

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

2
3 MAURICE MANUEL SIMS,

4 Petitioner,

5
6 vs.

7 THE HONORABLE JUDGE DOUGLAS
8 W. HERNDON, EIGHTH JUDICIAL
9 DISTRICT COURT OF THE STATE OF
10 NEVADA

11 Respondent.

Supreme Court Electronically Filed
District Court Case No. C28744-11
Nov 07 2013 08:36 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPENDIX TO PETITION FOR
WRIT OF MANDAMUS OR
WRIT OF PROHIBITION
VOLUME V
(PA 706- PA 777)

12 ANTHONY P. SGRO, ESQ.
13 Nevada Bar No. 3811
14 PATTI, SGRO, LEWIS & ROGER
15 720 S. 7th Street, 3rd Floor
16 Las Vegas, NV 89101
17 TEL: (702) 385-9595
18 FAX: (702) 386-2737

19 IVETTE A. MANINGO, ESQ.
20 Nevada Bar No.: 7076
21 LAW OFFICES OF IVETTE A.
22 MANINGO
23 720 S. 7th Street, 3rd Floor
24 Las Vegas, NV 89101
25 TEL: (702) 385-9595
26 FAX: (702) 386-2737

27 ATTORNEYS FOR THE
28 PETITIONER

THE HONORABLE JUDGE
DOUGLAS W. HERNDON
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 16TH FLR
LAS VEGAS, NEVADA 89155
TEL: (702) 671-0591
FAX: (702) 671-0598

STEVEN B. WOLFSON
Clark County District Attorney
Attn: Appellate Division
200 Lewis Avenue 3rd Floor
Las Vegas, NV 89101

CATHERINE CORTEZ-MASTO
Attorney General
100 North Carson Street
Carson City, NV 89701-4717

ATTORNEYS FOR THE STATE

Index

Volume I

Indictment,

February 13, 2013.....PA 1-PA 9

Notice of Intent to Seek Death Penalty,

March 8, 2013.....PA 10- PA 18

Motion to Strike the State's Notice of Intent to Seek the Death Penalty,

July 19, 2013.....PA 19- PA 36

Exhibit 1: Minutes Assembly Committee on Legislative Operations,

May 2, 2013.....PA 37- PA67

Exhibit 2: The Death Penalty in New York,

April 3, 2005.....PA 68- PA 152

Exhibit 3: Legislative History of S171.....PA 153- PA 155

Exhibit 4: P.L. 2005, c.321.PA 156- PA 158

Volume II

Exhibit 5: New Jersey Death Penalty Commission Report

January 2007,.....PA159-PA 292

Exhibit 6: Legislative Fiscal Estimate for Senate Bills 171 and 2471,

November 21, 2007.....PA 293- PA 312

Exhibit 7: P.L 1983, C.245,PA 313- PA 319

Exhibit 8: News Release Jon S. Corzine,

December 17, 2007.....PA 320- PA 322

Exhibit 9: House Bill 285,.....PA 323- PA 332

Exhibit 10: Statement of Governor Bill Richardson,

March 18, 2009.....PA 333- PA 336

Exhibit 11: New Mexico legislature votes to repeal the death penalty

March 13, 2009.....PA 337- PA 339

Exhibit 12: Fiscal Impact Report titled “Abolish Death Penalty” January 31, 2009.....	PA 340- PA 344
Exhibit 13: Estimates of Time Spent in Capital and Non-Capital Murder Cases, February 21, 2012.....	PA 345- PA 356
Exhibit 14: Fixing the Death Penalty, Chicago Tribune December 29, 2000.....	PA 357- PA 362

Volume III

Exhibit 15: Illinois Governor Ryan’s Press Release January 31, 2000.....	PA 363- PA 364
Exhibit 16: SB 3539,	PA 365- PA 367
Exhibit 17: Senate Bill 280,.....	PA 368- PA 383
Exhibit 18: “Death Penalty Repeal Goes to Connecticut Governor” April 11, 2012.....	PA 384- PA388
Exhibit 19: In Death Penalty Repeal, reason over revenge at long last March 16, 2013.....	PA 389- PA 392
Exhibit 20: Senate Bill 276,	PA 393- PA 419
Exhibit 21: Report- The Cost of Death Penalty in Maryland...PA 420-PA489	
Exhibit 22: LVRJ Article May 22, 2013.....	PA 490- PA 492
Exhibit 23: Zillow Report,.....	PA 493-PA 495
Exhibit 24: Nevada’s Triple Economic Whammy, CNN Money February 4, 2012,.....	PA 496-PA 498
Exhibit 25: Nevada Leads in Underwater Homes as Market Improves March 20, 2013.....	PA 499- PA500
Exhibit 26: LA Times Article March 19, 2013.....	PA 501- PA 503
Exhibit 27: BSL Report.....	PA 504- PA 508
Exhibit 28: Assembly Bill 444.....	PA 509- PA 518

1 State's Opposition to Defendant's Motion to Strike

2 July 25, 2013.....PA 519- PA 526

3 Reply to State's Opposition to Motion to Strike

4 October 26, 2013.....PA 527- PA 530

5 Supplemental Exhibits in Support to Motion to Strike

6 September 11, 2013.....PA 531- PA 533

7 Exhibit 29: Executions by Year.....PA 534- PA 535

8 Exhibit 30: Is Death Penalty a deterrent?.....PA 536- PA 537

9 Exhibit 31: Deterrence,.....PA 538- PA 541

10 Exhibit 32: Family sues over botched Ohio execution

11 September 9, 2013,.....PA 542- PA 544

12 Exhibit 33: Citing Cost, States Consider End to Death Penalty

13 February 25, 2009,..... PA 545- PA 548

14 Exhibit 34: What killed Illinois' death penalty

15 March 10, 2011,..... PA 549- PA 552

16 Exhibit 35: Death Penalty Repeal Goes to Connecticut Governor

17 April 11, 2012,.....PA 553- PA 557

18 Exhibit 36: Nevada, Illinois among states that can't pay their bills

19 January 18, 2012,.....PA 558- PA561

20 Exhibit 37: WNC Chief resigns over Nevada budget cuts

21 July 10, 2013,.....PA 562- PA 563

22 Exhibit 38: Broken mental health system overwhelms Nevada

23 April 14, 2013,.....PA 564- PA 569

24 Exhibit 39: Executions in Nevada 1997-Present.....PA 570- PA 571

25 Exhibit 40: Las Vegas Sun News.....PA 572- PA 577

26 Exhibit 41: Statesman.com Article

27 September 24, 2010,.....PA 578- PA 581

28 Exhibit 42: Las Vegas Review Journal

May 22, 2013,.....	PA 582- PA 584
Exhibit 43: Langon v. Matamoros, 121 Nev. 142 (2005).....	PA 585- PA 588
Exhibit 44: Lockett v. Ohio, 438 U.S. 586 (1978).....	PA 589- PA 609
Exhibit 45: State v. Catanio, 120 Nev. 1030 (2004).....	PA 610- PA 615
Exhibit 46: New York Times Article July 1, 2011,.....	PA 616- PA 618
Exhibit 47: New York Times Article August 18, 2013,.....	PA 619- PA 623
Exhibit 48: Las Vegas Sun Article May 14, 2011,.....	PA 624- PA 626

Volume IV

Reporter's Transcript of Petition for Writ, Motion for Severance September 10, 2013,.....	PA 627- PA 705
--	----------------

Volume V

Reporter's Transcript of Petition for Writ, Motion for Severance (Continued) September 10, 2013,.....	PA 706- PA 777
--	----------------

Volume VI

Reporter's Transcripts of Petition for Writ, Motion for Severance (Continued) September 10, 2013.....	PA 778- PA 824
The Price of the Death Penalty, Power Point Presentation.....	PA 825- PA 873

Volume VII

Sign-On Letter for Victims' Families.....	PA 874- PA 880
Assembly Committee on Ways and Means May 22, 2013,.....	PA 881
Minutes of the Senate Committee on Judiciary February 5, 2013,.....	PA 882- PA 904
Las Vegas Sun Article: Why Nevada needs a new appellate court March 22, 2013,.....	PA 905- PA 906

1 shots were being fired in there about the 3 individuals
2 that are in there.

3 I'm not prepared to say that it has to be dismissed
4 because there's a failure to expressly address that.
5 Again, we're talking about a very fluid thing going on in
6 the scene where ultimately these guys are shot multiple
7 times and killed. So again, you could say a very
8 reasonable inference can be drawn that they didn't want to
9 leave any witnesses there. This guy got lucky that he was
10 able to get out the back door, only to be shot once before
11 everything got more egregious as to the two gentleman that
12 died.

13 I think that from a totality standpoint there is
14 sufficient evidence to justify the conspiracy murder and
15 attempt murder charges maintaining as part of the
16 indictment.

17 In terms of the other things that are raised, the
18 co-conspirator liability, statements by co-conspirators.
19 Again, those kind of fall into the legal instructions
20 argument that was made. I don't think that the legal
21 instructions were incomplete or improper in any way to
22 justify the dismissal of the indictment.

23 The bad act type evidence, I mean, I think this kind
24 of falls -- some of it I understand why it would have come
25 in any way. The others I think are really, in my mind,

1 harmless, if you are going to engage in a harmless error
2 kind of thing.

3 The statement by Mr. Matsky (ph) about the gang
4 related stuff, it seems to be a natural response to what
5 he was trying to describe. Nonetheless, when you get to
6 trial it's probably a situation where he's going to be
7 admonished about certain things that shouldn't be said as
8 he's trying to explain what happened on January 4th. But
9 I don't think there was prejudice by that coming in to
10 justify a dismissal of the indictment.

11 The stalking, harassment incident that's talked about
12 as occurred earlier in the day, that's part of this link
13 between the 4 days that are at issue -- January 4; early
14 on January 8th, and then later on in the evening on
15 January 8th. Maybe it isn't referred to as a stalking
16 type of thing, but it's kind of it is what it is, in terms
17 of Mr. Scott and what's occurring between individuals and
18 he and her in his apartment.

19 Then the thing about the selling marijuana. I agree
20 that that wasn't relevant to anything being decided. I
21 don't think though that that's something that can be said
22 to be so overly prejudicial as to say, well, the grand
23 jury probably wouldn't have indicted him but for the
24 comment being shot out there about him being a bad guy
25 because he was selling marijuana. So subject to a

1 harmless error analysis, it's not sufficient to justify a
2 dismissal on the indictment.

3 Nor is the other issue that was discussed between Mr.
4 Scott and Mr. Sims about the alleged larceny that
5 occurred.

6 The joinder argument, we've kind of discussed in the
7 context of the motion to sever. The cumulative error type
8 arguments, there's a difference between prosecutors
9 vouching for people as opposed to something that comes out
10 of a witness that's their responsible to a certain kind of
11 question. Should it happen, no. Is it the same kind of
12 standard as the impropriety of the prosecutor making that
13 statement or intentionally soliciting something that's
14 improper. Yeah, I think it is a different distinction.

15 Something like that occurs at trial may not mandate a
16 mistrial or anything, but a cautionary instruction given.
17 But I don't think what occurred here in terms of Detective
18 Wildamen's statement individually is sufficient to justify
19 a dismissal of the indictment.

20 Nor do I think the nature of some of the leading
21 questions that occur, especially some things are kind of
22 predicate type of questions, some things are not predicate
23 type questions and probably would be objectionable at
24 trial. But I don't think the nature of what was asked of
25 the grand jury justifies a dismissal.

1 The allegation that there was victim impact kind of
2 evidence that was provided. There is context that has to
3 be overlaid into what happens on the 4th, what happens
4 early on the 8th in regard to Mr. Scott in his apartment.
5 So to the extent there was testimony about him leaving
6 that apartment and not staying there and these individuals
7 impact up there, it's -- I don't think it's victim impact
8 evidence as much as they're just having him describe what
9 occurred after and on the 8th as well.

10 Which kind of leaves us with just the whole --
11 everything in a nut shell, does that justify the dismissal
12 of the indictment. Like most things, whether I'm
13 presiding over a trial or somebody is presiding over a
14 grand jury, or somebody else is presiding over a trial, it
15 seems rare that they're completely free, as much as you're
16 like them to be. People say things they're not intending,
17 questions you ask them, or any number of things that
18 occur. But I don't think that the totality of what
19 occurred here is such that I find it to be of such error
20 as warranting a dismissal of the indictment. For all
21 those reasons, I'll deny the petition for writ of habeas
22 corpus.

23 That brings us to Mr. Hendron's petition on behalf of
24 Mr. Williams.

25 MR. HENDRON: Your Honor, with regards to the

1 petition, we addressed the conspiracy to commit and the
2 attempt murder. We went over this somewhat with the two
3 prior attorneys speaking of it. I wanted to go and
4 address the fact that in this case there is no slight or
5 marginal in this given situation for Ms. Williams.

6 We cited factually from the grand jury transcript
7 that she was not one who went to go get the gun. She
8 never had a gun in her possession. There is nothing to
9 indicate anything that she somehow conspired to kill any
10 of these individuals.

11 I'll go back to the Peterson case I cited in my
12 brief. The fact that the mere association with a
13 co-defendant doesn't support a charge for conspiracy. So
14 when you look at it from that aspect and you also look at
15 it from the witness Laurice (ph), the guy that was shot in
16 the buttocks, he himself says, did the petitioner, Ms.
17 Williams say my boyfriend would come over and kill you.
18 He responded, no, rob us. There is nothing -- anything
19 I've been presented through the grand jury that indicates
20 she at any given time conspired to kill any of the
21 individuals.

22 Drawing your attention to the attempt murder As Mr.
23 Sgro pointed out the Charma case, which requires that the
24 aider and abetter must have knowingly aided the other
25 person with the intent that the other person committed the

1 crime charged. There was nothing presented in the grand
2 jury transcript, testimony that gives any indictment that
3 Ms. Williams had attempted to kill Mr. Brightmen at any
4 given time. There was nothing there as far as firearms.
5 She had no firearms. No slight or marginal evidence the
6 State was able to show.

7 So on those grounds, we'd ask that Count (9) and
8 Count (12) be dismissed.

9 THE COURT: All right.

10 Mr. DiGiacomo.

11 MR. DIGIACOMO: The only thing I would add is as
12 it relates to Ms. Williams, he read you a portion of what
13 Mr. Brightmen said.

14 THE COURT: That's what I was trying --

15 MR. DIGIACOMO: Ms. Williams said -- he
16 originally tells the police, she said my boyfriend is
17 crazy. He'll come over and kill you.

18 He said, rob. I confronted him with the prior
19 statement. He acknowledged he made the prior statement,
20 but said my recollection now is that it was rob.

21 Either way, it's not dispositive of the issue. When
22 you grab 4 people. You arm them all. You take them all
23 over to a house, with people who are going to be able to
24 identify you from the crime you're about to commit and the
25 3 victims wind up getting shot, there's some incriminating

1 evidence to allege that the entire plan all along was the
2 killing of the 3 victims. No matter what it is, her
3 statement specifically is to Mr. Brightmen, in the several
4 weeks prior.

5 I'll submit on that, Judge.

6 THE COURT: What page was his testimony. I'm
7 not finding that.

8 MR. DIGIACOMO: Mr. Sgro might have that.

9 THE COURT: That issue. That issue was in
10 regard to Ms. Williams' statement to Mr. Brightmen. It
11 kind of sets her apart from the others, in terms of the
12 piece of key evidence I think.

13 He said she said come over and rob us. Then he
14 says -- he admits he told the police he used the word
15 kill. Then says again, she said he'd come over and rob
16 us.

17 Okay. Mr. Hendron.

18 MR. HENDRON: Again, your Honor --

19 THE COURT: That's the big thing that separates
20 her from the others in terms of what evidence is with the
21 grand jury that inure to certain statements having been
22 made or certain -- state of mind, I guess.

23 MR. HENDRON: There's no slight or marginal
24 evidence that supports the conspiracy or the attempt.

25 THE COURT: Well, I mean, in terms of supporting

1 the conspiracy though, her presence, the nature and way
2 everything is unfolding there that's -- I mean, there is
3 the same kind of inference of that applied to everybody
4 that went there. So I don't think that in and of itself
5 is vastly different from her. Just because she's not the
6 one holding the gun at the time they all go over there.

7 MR. HENDRON: My argument was going to be that
8 they're the ones that have the firearm. The case law, the
9 mere association and fact she's present with them, doesn't
10 give rise for her conspiring with them to kill anybody.

11 THE COURT: You don't think that kind of makes a
12 reasonable inference that she is part of whatever the
13 conspiracy is.

14 I understand your argument is it was conspiracy at
15 best to rob, not to kill. But you're not suggesting that
16 there wasn't slight or marginal evidence that she was
17 involved in the conspiracy. You're just saying the
18 conspiracy to kill anybody.

19 MR. HENDRON: Correct. On what's in the grand
20 jury testimony. Slight or marginal, you can infer. It's
21 an issue for the jury to determine with the robbery, but
22 not with respect to the conspiracy to commit murder.

23 THE COURT: Well, I struggle with her more. But
24 I'll tell you. At the end of the day I'm going to deny
25 the petition as well.

1 The full nature of what her knowledge is and what her
2 intent is being involved in whatever was agreed upon or
3 decided upon in terms of the course of conduct among these
4 individuals is, as I've said with everybody, a question
5 for the jury to decide.

6 The nature of what occurred, the nature of how it
7 occurred, the approach to this place, the firing of the
8 shot originally when the door closes, the continuation of
9 everybody and the involvement of that, I think is
10 important when you're talking about what a reasonable
11 jury -- grand jurors inure in terms of what people's
12 intent was. As opposed to if they're just going over
13 there to rob them. Gee, what happens when they start
14 firing those guns. Nobody is stepping away from this
15 thing.

16 I also think it's important --- Mr. Brightmen, I
17 don't know what the truth is in terms of the statements he
18 made. Was any statement made, to begin with. And if the
19 statement was made by Ms. Williams, was it a statement
20 that my boyfriend is going to come over here and rob
21 everybody if you don't make this right. Or was it a
22 statement that he's going to come over and kill everybody
23 if you don't make it right. At the time close to when
24 this occurred, he said she said -- and he says this to the
25 police -- she made the statement that her boyfriend would

1 come over and kill everybody. We're not dealing with two
2 words that sounds similar in a transcript. They're a very
3 kind of separate and distinct word. He later on says, I
4 didn't say kill, I said rob.

5 Again, I think there is enough evidence for the
6 indictment to stand. The jury will have to come up and
7 decide what they think about the evidence and the
8 credibility of the statements and figure out what
9 liability they all have, if any.

10 All right. That leaves us with the motion to strike
11 the death penalty. So let's take a short break before we
12 get started on that.

13 (Brief recess taken.)

14 THE COURT: Back on the record, again, in
15 C-287414, State vs. Sims, Williams, Range and Morris.

16 Did Mr. Hendron, take off as well.

17 The Defendants are all present. The attorneys are
18 present, except for Mr. Arnold, who had the last motion on
19 today.

20 We'll move over now to the last motion, Defendant
21 Sims' motion to strike notice of attempt to seek the death
22 penalty, or in the alternative motion to stay the capital
23 proceeding.

24 Mr. Sgro.

25 MR. SGRO: Thank you, your Honor.

1 I prepared a power point presentation, your Honor,
2 and I provided a copy to the court, to co-counsel, and to
3 the State. And just for purposes of the record, we had an
4 occasion this morning to discuss off the record that in an
5 abundance of caution, I invited potential witnesses. I
6 didn't know -- although this is a motion hearing, the
7 motion we filed is -- asked for atypical relief. I didn't
8 know where the court was going to go. Off the record, you
9 indicated if there were need, and you weren't suggesting
10 there was or was not, but if there is a need for witnesses
11 down the road, those witnesses could be excused. And as
12 result, some people left.

13 With that having been said, your Honor, what we are
14 here today to talk about is the price of the death
15 penalty. The price has been defined now by our
16 legislators. There's going to be an actual fiscal
17 accountability, fiscal number they're going put on the
18 price of the death penalty, independent of the price of
19 the socio, moral factors that sometimes get debated
20 amongst opponents and proponents of the death penalty.

21 I think the best thing we can do to see where we're
22 going is look where we've been. So by way of brief
23 background, we hear the phrase all the time, death is
24 different. We use that phrase capital case that we do,
25 and it comes from the Gardner vs. Florida case, amongst

1 others.

2 In the United States in 1967, we had -- up until 1967
3 we had allowed for different states to legislate their own
4 version of whatever capital punishment laws they saw fit
5 to pass. By 1967, 41 states had some sort of level of
6 acceptance in their state system of capital punishment.

7 Between 1967 and 1972 there was a moratorium on the
8 death penalty in the United States. The United States
9 Supreme Court debated the merits or non-merits of the
10 death penalty.

11 What we have essentially, up until Ferman vs. Georgia
12 or approximately 10 years time in our country, no one had
13 the death penalty. Ferman comes down, and they say,
14 listen, we're going to take a look at death penalty
15 schemes so long as they're not arbitrary and capricious.
16 Then we have the seminal case of Greg vs. Georgia where
17 the United States Supreme Court in 1976 upheld a
18 bifurcated death penalty procedure. The bifurcation being
19 the difference between the guilt phase and the penalty
20 phase.

21 So what happens after those Supreme Court decisions
22 get handed down. We see capital punishment begins at a
23 somewhat slower rate. And this chart, by the way, which
24 comes from the death penalty info website, does -- says
25 something very compelling. It's part of what brings us

1 here to the cost issue.

2 If you look in the year -- I believe it's 1998,
3 there's almost a hundred executions in the United States.
4 At that time in 1998, the economy in the United States is
5 rolling. People are making money. And most importantly,
6 it's predated by about a decade, 2008. And if you go to
7 2008, your Honor, you see that there are a total in the
8 United States of 37 executions.

9 Which, although obviously from my standpoint, it's 37
10 too many, the death penalty can be seen as a reflection on
11 economic times. In 2008 -- the end of October of 2007 is
12 where Lehman Brothers collapse, Bear Stearns collapse
13 occurs, and that's typically the time frame attributed to
14 what is the beginning of the financial collapse in the US
15 credit markets, et cetera.

16 That spills over state by state, with Nevada
17 obviously suffering its fair share of that economic
18 consequence. But it is telling that there are only 1/8th
19 (ph) the executions in 2008 as there are in 1998.

20 We break it down. Who does and who doesn't have the
21 death penalty right now. This is going to be relevant
22 from a cost perspective. Because as we'll see, many of
23 the states abandon the death penalty simply because they
24 deemed it a luxury they didn't have the money to pay
25 for.

1 Pre-Ferman, remember we started this presentation
2 with 41 states having some version of capital punishment.
3 The 9 states that did not are listed on the slide --
4 Michigan, Wisconsin, Maine, Minnesota, Hawaii, Alaska,
5 Vermont, West Virginia, and Iowa. And the attendant year
6 that they abandoned the death penalty is listed next to
7 it.

8 After Ferman comes down, 3 additional states elect to
9 abandon the death penalty. North Dakota, which abandoned
10 it in 1973 was a death penalty state only for treason and
11 some other crime, which escapes me right now. But they
12 only have two possibilities as to why they would ever
13 consider the imposition of capital punishment. Right
14 after Ferman came down, they abandoned it. Rhode Island
15 and Massachusetts follow suit.

16 Now the next group of states is very important for
17 purposes of our motion. Because it's in the last decade,
18 from 2004 to 2013, six additional states in our country
19 elected to abandon the death penalty. And interestingly,
20 your Honor, they all started, and I mean they all started
21 the way we started here in Nevada. Which is, let's do a
22 study. Because we need to determine whether or not we can
23 continue to afford this. We need to see also if we are
24 getting the right bang for our buck.

25 The monies we are expending for the pursuit of

1 capital punishment is it garnering a sufficient enough
2 benefit to our state, such that it's still financially
3 worth it to pursue.

4 We have then our version of the initiation of this
5 quest to determine whether or not financially we have the
6 ability in this state to continue to be taxed with the
7 monies to pursue capital prosecution. That manifests,
8 your Honor, in what we have today is Assembly Bill 444.
9 It was proffered on March 25th --

10 THE COURT: Can I ask you a question.

11 Recent states, Maryland, Connecticut, Kentucky,
12 Illinois and the like that have abolished the death
13 penalty, what have the legislature -- the pronouncements
14 spoken to in terms of ongoing litigation.

15 MR. SGRO: They did a study, and they abandoned
16 it. It is unclear -- so, for example, let's take New
17 York. Which is in this presentation, but just because you
18 asked the question. Here's what happens in New York.

19 There's a case called People vs. Lavallo. In People
20 vs. Lavallo the Defendant in that case got the death
21 penalty. Now what the defense attorney did in that case
22 is they challenged the constitutionality as to how capital
23 litigation proceeded. In New York they have a structure
24 whereby jurors would determine a sentence of either death
25 or life without parole. The jurors were instructed that

1 if they did not choose unanimously between life without
2 parole and death, the judge would have to. Because of the
3 statutory scheme, they would have to impose life with the
4 possibility of parole.

5 So the defense argued in that case successfully, we
6 can't pressure jurors to give in to death when they want
7 life without parole for fear this guy or girl may be on
8 the street again. So the New York Supreme Court strikes
9 down the statutory scheme as unconstitutional. So in the
10 Lavallo decision, there are no death cases. Because it
11 happened in court. And they remanded them for
12 reconstruction of their statutory scheme.

13 In lieu of reconstruction of the statutory scheme,
14 what they do in New York is they do a study. So New York
15 is an example where the pending cases were not an issue.
16 Simply because a court had made a determination and then
17 it came down such that they never went back to the death
18 penalty again. So every state is different. I'm happy to
19 go through them.

20 THE COURT: For instance, let's take Maryland.
21 Maryland abolishes the death penalty in 2013. There is
22 obviously a lot of cases across the State of Maryland I'm
23 sure in which murder charges had been filed, case are
24 pending trial, that type of thing. Maybe some of those
25 involved notice of intent to seek death.

1 Were those statutes retroactively eliminating those
2 penalties, or just prospectively saying death is no longer
3 an option.

4 MR SGRO: No -- well, in Illinois for example,
5 they not only abolished the death penalty, they
6 pardoned -- commuted sentences of everyone on death row.
7 So I think there was a retroactive application. I'm
8 unaware of a state that actually only eliminated the death
9 penalty --

10 THE COURT: Illinois had a whole lot of other
11 problems, separate and apart from just their --

12 MR. SGRO: There's no doubt. But it was the
13 governor in Illinois who made a big deal about the cost.

14 They definitely had other issues. There was someone
15 that was factually innocent that have come within 50 hours
16 of being executed. There was a lot of things going on in
17 Illinois.

18 But if the court will indulge me, I'm going to go
19 through this stay by state.

20 THE COURT: Fine.

21 MR. SGRO: Upon Assembly Bill 444 being
22 submitted and passes May 13, which is only a few months
23 ago, which is the timeliness of the motion, why it's ripe
24 in front of you for the first time, your Honor. We
25 initially filed the motion sometime in the end of June.

1 So within about a month or so, we had something that we
2 thought was sufficient to get in front of a court to make
3 a determination on what happened with the pending cases.
4 Interestingly, it was passed 38 to 1.

5 The scope of the bill is to examine the cost,
6 relative to pretrial trial, trial counsel, appellate
7 counsel, post-conviction relief. You uttered today in
8 these proceedings concerns for post-conviction relief,
9 which is a signal to me you have a sense of the bigger
10 picture.

11 You pointed out earlier, because no one -- I have
12 said this myself in other cases. No one wants to do
13 things twice. It's a very costly ordeal we evolve into
14 when we start doing these cases.

15 Then they are also going to look at the procedural
16 costs, the investigations that are being done not only by
17 the defense but also by the state. How much do the expert
18 witnesses cost, how much are the psychologists costing us,
19 and the difference between what we have to do in a capital
20 case versus a non-capital case in terms of assuring a
21 certain threshold of level of preparedness.

22 When we look at the cost of the death penalty,
23 they're going to be controlled by a couple of things. We
24 have increased safeguards in the post-Ferman United States
25 case law. So for example, the two lawyer rule is

1 something that manifested out of the post-Ferman era. In
2 Supreme Court Rule 250, which we have in our state, et
3 cetera.

4 Interestingly, another cost that many other states
5 looked at is the cost of wrongful convictions. This is
6 important. Because it's not the emotional outpour that
7 may exist for someone put to death. But it's actually a
8 very frank dispassionate look at, well, now that we've
9 killed someone innocent, now we, as a state, have to pay
10 that man's family settlement money. And the settlements
11 relative to wrongful convictions were factored into how
12 much it costs to keep the death penalty.

13 There is also a cost associated with what is known in
14 the studies I submitted to, your Honor, as botched
15 executions. And those are examples of persons who are to
16 be executed within a certain amount of minutes. It's a
17 timing thing. This drug goes in in so many minutes.
18 There are stories of actually defendants helping, nurses
19 finding veins, which is part of the literature we gave
20 you, your Honor.

21 The cost of the law suits that were settled as a
22 result of botched executions, which fell under the rubric
23 of the cruel and unusual punishment standards are also to
24 be factored in.

25 So what we did, your Honor, is we looked at just the

1 Greg vs. Georgia, in terms of the Ferman protections,
2 mandatory review of all the death sentences, all the way
3 to the United States Supreme Court. Doesn't exist
4 anywhere in our legislation.

5 We have a Locket case, which is the mitigating
6 factors. Which as you know post 250, we now have a
7 mandatory mitigation specialist. That's something that's
8 sort of like the cellphone. We have them now. We're used
9 to it. But when I first started, I didn't know what a
10 mitigating specialist was. And now we're told we have to
11 have one.

12 Now the cost in this study are going to be weighed
13 against the benefits that citizens in a state are able to
14 glean from the imposition of capital punishment. One of
15 the benefits always asserted, relative to the imposition
16 of the death penalty, is whether or not the death penalty
17 is a deterrent. I have a chart. This is the court of
18 public opinion that shows that over the last 10 years less
19 than half of those polled believe that the death penalty
20 was a deterrent. The numbers shrink from 12 percent to
21 5.

22 Interestingly enough, that number as to whether or
23 not it's deterrent is borne out in the next slide. The
24 next slide is very telling relative to the deterrent
25 issue. It's something that's going to be studied by the

1 legislature. If you look, your Honor, at the per capita
2 homicide rate of the states in dark green, which are the
3 death penalty states, every year, every year since 1990 to
4 2009, almost a 20-year span, exceeds the per capita
5 homicide rate in non-death penalty states. Which is an
6 interesting undertone when they look at this cost
7 perspective analysis.

8 We spoke of the assessment of cost. And I brought up
9 wrongful executions. This is an example, your Honor. And
10 the examples are only limited to how much time you want to
11 spend on the internet. This is an example. This is a
12 very famous case in Texas of a man who was factually
13 innocent who ended up being executed. And the family of
14 this man filed a 62-page lawsuit as a result of that
15 wrongful execution. This is an example, which was
16 mentioned in the literature we provided to your Honor, as
17 a result of someone that's going to be infused in this
18 assessments in the State of Nevada.

19 The botched execution, this is an example of a family
20 in Ohio where the execution instead of going by that
21 minute-by-minute tracking, it lasted 62 minutes too long.
22 And they also filed suit in Ohio. The cost of the
23 settlement is also attended to the cost of legal fees.
24 The state has to pay attorneys to defend it, et cetera.

25 So now we get to one of the inquiries the courts

1 have, which is tell me about these other states that have
2 abolished the death penalty in the last 10 years. So I'm
3 going to go through them briefly.

4 We start with New York. And remember I mentioned
5 early this case People vs. Lavallo. This is the one that
6 had that unconstitutional scheme. So what happens is the
7 court sends it back to the legislature, figure it out.
8 And the legislature then, amongst other things, is going
9 to look at the cost involved in the imposition of capital
10 punishment.

11 So I submitted to your Honor the study that was done
12 in New York. And this is Exhibit 2, in our brief. They
13 found in New York that since 1995 to the time of the
14 study -- so about 10 years -- \$200,000,000.00 had been
15 spent to pursue capital litigation. I want -- I pull this
16 out, because this is also undercurrent that exists right
17 now. The last sentence of what is pulled out on your
18 screen now, your Honor, says a DA -- a DA testified and
19 said many criminal justice initiatives that are affective
20 in reducing crime, could be enhanced for a fraction of
21 this money.

22 So one of the undercurrents that's happening at this
23 time and that will continue -- would continue to happen
24 for 10 years is could we use the money somewhere else. In
25 other words, additional prisons, victim impact situations,

1 et cetera. And that was -- this was testimony from the DA
2 in New York. So we had \$200,000,000.00 in the prior 10
3 years spent on capital litigation punishment.

4 Another individual testified that they spent
5 \$170,000,000.00 in the past decade, and they were able to
6 glean 7 death sentences. That math means each death
7 sentence -- remember, your Honor, we're not talking about
8 execution -- each death sentence costs the citizens in New
9 York \$24,000,000.00.

10 So they said, okay, that's the past. Now we're going
11 forward. Well, going forward we're going to look at
12 investigations, whether or not they are more money, what
13 it costs to represent these folks. Are the procedural
14 phases longer. How long does it take to pick a jury in a
15 non-death case versus a death case. All those sorts of
16 things.

17 Here's what they came up with in New York. They
18 predicted that over the next 20 years, if New York would
19 have reinstituted capital litigation, would have cost them
20 \$500,000,000.00. They predicated that they would have 2
21 to 3 executions during that time. That means each
22 execution is \$200,000,000.00.

23 In New Jersey they also did a study report, and this
24 one, your Honor, you asked me a question earlier. What
25 did the states do. New Jersey did a moratorium pending

1 the outcome of this study. This study, your Honor, is
2 found at Exhibit 5 in our brief.

3 And really the silent thing -- I provided a lot of
4 information to the court. I didn't want to be
5 duplicative. New York and New Jersey sort of followed the
6 same path as you can see in the record. The findings, the
7 cost of death penalties are greater than the cost of life
8 in prison without parole. No big shock there.

9 Then of course December 17, 2007, New Jersey Governor
10 Corzine signed the bill abolishing the death penalty ---
11 post-moratorium.

12 We turn to New Mexico, where again the legislators
13 there and the governor there cited costs. And he -- there
14 is a quote in here from Governor Richardson, and basically
15 the frustration experienced by the legislators in the
16 State of New Mexico had to do with, quote, "We have --
17 cost was a factor in shifting views away from the death
18 penalty." "And this was a, quote, 'valid' reason in this
19 era of austerity and tight budgets."

20 As we were preparing this motion, your Honor, we
21 couldn't help but see the parallels that existed in these
22 other states in our country versus what's going on here in
23 Nevada.

24 In Illinois, which admittedly had other problems
25 going on, as the court pointed out, and as I will readily

1 concede. Illinois had a situation where an individual, 50
2 hours prior to execution walked out a free man. And so
3 that was an issue for sure. But when it got down to it,
4 the legislators found that they were frustrated because
5 sufficient reform had not been enacted, and they were
6 struck by the cost of trials and appeals.

7 We go to Connecticut, which is also in the last
8 decade. The legislators there said for decades we have
9 not had a workable death penalty. In 52 years we have
10 executed one person. We -- they talk about the money.
11 And they say, you know what, let's throw away the key on
12 these individuals and lock them up for life. It's going
13 to be cheaper.

14 Maryland, which the court talked about earlier, found
15 that it was an additional \$186,000,000.00 more to have
16 capital punishment on a full sampling of death cases they
17 had in their state. The cost was more than \$1,000,000.00
18 per death notice. And the result of death sentence
19 litigation was an additional 70.9 million dollars.

20 Here is -- remember when I spoke earlier about the DA
21 in New York that said we can have programs that address
22 criminal system issues, crime and punishment issues for a
23 fraction of the cost.

24 Another trend that we see, your Honor, is where
25 Maryland sort of followed suit in that. They appropriate

1 money differently, which is also what we're going to get
2 into what we're doing in Nevada. Maryland specifically
3 included in their statute that repealed the death penalty
4 a provision that they are going to recommend that savings
5 from repealing the death penalty be used to increase the
6 services and resources already provided to families of
7 victims.

8 Now, I'm told, your Honor, Mr. Orenshall is here
9 today. He's been present throughout most of the day. Mr.
10 Orenshall was a chair of the committee that authored this
11 bill and got it passed. I'm told by persons who worked on
12 this bill that sometimes the victim witness assistance
13 that is offered to homicide victim families, can be
14 expended in the clean up of the residence where the
15 homicide occurred.

16 I point that out as an example, because this would be
17 the second time now in a different state where states are
18 saying, you know what, let's back up for a minute and look
19 at these hundreds of millions of dollars we are spending
20 for one execution in 52 years, for no executions at all,
21 or for something that we think is broken, and see if can't
22 better allocate our resources.

23 In Nevada then we turn to what the study most likely
24 will bear out from the legislative standpoint. In
25 Nevada -- and people will tell you, whether we want to see

1 the glass half full or whatever it is, people will tell
2 you in our State, we're starting to rebound. We're
3 starting to come back. But we're still 50 percent higher
4 in our unemployment rate. We are still 1 in 16 homes
5 being foreclosed versus 169 nationwide. We have 58
6 percent of our homes are still underwater in our State
7 compared to 20 percent nationally. We're at 3 times the
8 levels of other states. There is no mystery that Nevada
9 citizens were hardest hit. More than anyone else.

10 There are some people in Phoenix that might disagree,
11 but Nevada took a serious hit in late 2007, 2008. I beg
12 to differ with those that say we've already recovered.

13 If we look at what's happened in the last few years,
14 we are -- the subject matter of national news, that we
15 can't pay our bills. We have had recent budget cuts in
16 our state. This one most resent. The Western Nevada
17 College in Carson City, people are quitting because they
18 can't afford the payment anymore. They cut the college
19 budget by 11 percent. In the next two years -- they've
20 cutting continuously for the last few years. They're
21 losing people.

22 We have what has been described as a broken mental
23 health system in Nevada because of budget cuts. This
24 photograph, your Honor, is pretty ironic and compelling.
25 If you see the bottom half of the legs of these folks.

1 They look like they're dressed in prison attire or jail
2 attire. These are mental health individuals which some
3 might say may not have been in the system but for a lack
4 of funding for the appropriate counseling.

5 But again, not because it's some emotional outcry,
6 not because we want to engage in a philosophical debate.
7 What is cutting the budget of mental health do to the cost
8 of the overall death penalty system. We have a quote here
9 from Judge Norheim.

10 He's heard cases for 17 years in Clark County. He
11 sees the same people dozens of times. He blames the lack
12 of funding, housing, case managers, treatment facility and
13 intense supervisors for the repeats.

14 In our schools in Clark County I have personally
15 seen -- my kids don't have music programs anymore in their
16 schools. The foreign language programs have been cut or
17 limited. This is a much more overall picture that shows
18 that in 2012, we had a \$64,000,000.00 deficit for our
19 school district.

20 Here the blowup shows in this same argument that the
21 school district budget cut 2,000 jobs, 2,000 teacher jobs
22 as a result of that deficit shortfall. And these things,
23 your Honor, are only offered -- I don't know what they're
24 going to do in the legislature. I can tell you as a
25 citizen in the State of Nevada I keep turning on the news

1 and looking at what we can't afford to pay for anymore.

2 In -- again, in Clark County, not only did we lose
3 funding for schools, and we had a layoff of lot of
4 teachers, but what's the natural consequence of that
5 result. Larger class sizes. We have cash-strapped school
6 districts that are forced to increase class sizes during
7 the recession to balance their budgets.

8 This is stuff -- I know that you're looking at a Las
9 Vegas Sun article now, but these are things that make
10 national new that call Nevada's education system into
11 question. Because we don't have enough teachers for all
12 of the kids in our classrooms.

13 Now, let's look at Rule 250. We have to eventually
14 get to the cost of what it takes in Nevada to prosecute a
15 death penalty case appropriately. We have 250, as we
16 talked about earlier. We have 2 attorneys in Rule 250
17 cases. We have mandatory appellate and post-conviction
18 review. The experts, the investigators, the mandatory
19 transcripts that get produced daily. And through case law
20 we have this mandatory mitigation expert.

21 Individuals in our university were commissioned to do
22 studies relative to a 3 year time frame. I believe it was
23 2009 to 2011. The difference between what attorneys were
24 spending in capital versus non-capital cases, they found
25 disparities of approximately 12,000 hours per increment of

1 time they were looking at. They found an actual cost
2 differential between \$230,000.00 for defense attorneys in
3 the public defender's office. Almost \$300,000.00 for
4 private defense attorneys. You got down to a non-capital
5 case, the same people were between 60 - and \$75,000.00.
6 Four times the money, your Honor, to do a death case.

7 This is just attorney time, not the mitigation
8 experts, not the transcripts, not the court time, not the
9 cases that have to sit because capital cases get priority,
10 not because capital cases take 6 weeks and non-capital
11 takes 2. This is just flat out attorney time.

12 And so now we have to look at where we sent all the
13 money. What did we get. Well, out of 35 cases reported
14 in that 2009 to 2011 time frame, 5 resulted with a death
15 sentence. So it's a 1 in 7 number, which I don't know if
16 the court flipped through that section or not. There's
17 this standing 1 in 7 number that was talked about in the
18 legislative session when this bill was passed.

19 They have spent all the money on all 7 cases and to
20 come away with one benefit. Again, not that the death
21 penalty is good, bad, or indifferent, just what's the
22 cost. It costs us 7 tries to get one death sentence.

23 Now, if you look, this is where the 1 in 7, 35 total
24 cases, 5 received the death penalty in those 3 years. Now
25 here's another interesting thing where Nevada is somewhat

1 of an anomaly. You have the 1 in 7 number, okay.

2 Now, of those 5 convictions, we have amazingly 36
3 percent of the cases in our state that involve imposition
4 of the death penalty are reversed. So not only do you
5 have 1 in 7, which is about 14 percent. Then you have to
6 take 36 percent of that 14 percent to get to the true
7 number.

8 Since 1978, your Honor, we have only executed one
9 person that wasn't what we call a volunteer. Obviously a
10 volunteer being someone who wants to be executed and
11 waives everything, et cetera. I believe that was Mr.
12 Moren (ph) listed on the chart.

13 Now that's 1978. Now, do you remember the
14 legislators in Connecticut said our system is broken.
15 We've had one execution in 52 years. We've had one
16 execution, your Honor. I know it's not 52. It's about
17 35. One execution in 35 years. Can you imagine what the
18 audit is going to reveal as to how much money we've spent
19 in 35 years to obtain that one execution.

20 Eighty-three inmates are currently awaiting execution
21 in our death row in our State. With no mention of
22 anything happening any time soon.

23 Why. Because the facility that had the death
24 chamber, as it is known, closed down. And it closed down
25 I think in May 18, 2012. So what happens when that

1 facility closes down. The death chamber gets relocated.
2 It gets relocated to a prison that does not have an
3 operational death chamber.

4 And among other things, Greg Cox has -- and we
5 provided some materials beyond what's here in the power
6 point -- relative to the inability to even affect an
7 execution. So understand the dynamics here. One
8 execution in 35 years. Let's set that number aside.

9 Now let's go prospectively. The litigation we're in
10 here today. Let's assume they're benefit is the obtaining
11 of a death in this case and get it tomorrow. Okay. So
12 what. Where is he going. Because we don't have a place
13 where we can ever do anything with it. At least that's
14 the current state of our government, your Honor.

15 The next slide shows that the legislators rejected
16 the funds necessary to construct the new execution
17 chamber. And this particular moment in time is very
18 critical, because it is very reflective of legislative
19 intent. I will tell you, your Honor, in preparation for
20 these proceedings, I have had numerous conversations with
21 a lot of different people. I saw minutes just this
22 morning that showed the timing of the request for the
23 funding and the reason that the funding was tabled was
24 because we have this bill now that's going to examine
25 capital punishment. Why spend the money now and put this

1 thing back in operation, when we don't know what's going
2 to happen with the death penalty.

3 And the whole point of it is this. Your job will be
4 in this hearing to determine legislative intent, because
5 as we pointed out in our brief, that statute -- the bill
6 is silent as to what happens next.

7 Now among -- I want to sort of put a pin in this one,
8 and I'll come back to it when we talk about the
9 legislative intent. But amongst other things, your
10 Honor -- this is Exhibit 42 in our brief. One of the
11 other things that's happened in Nevada is we get our
12 cocktail for the injection from Denmark. Denmark does not
13 have the death penalty. Denmark believes that they were
14 sending this drug over here, that was part of a cocktail
15 to the states that had the death penalty, for medicinal
16 purposes. The representative from the drug company said,
17 we were shocked and outraged to learn this drug was being
18 used for executions. States and prisons never asked. We
19 only found out about it from the media. They asked, we
20 would have said no.

21 Now, in the literature that we presented to your
22 Honor, there are a number of states that have outwardly
23 stated they are running out of the drug. In Nevada we are
24 also running out. I don't know what running out means,
25 but I'm suggesting to the court that we don't even have

1 appropriated what the mechanism is going to be of the
2 death chamber, but we don't have funding to rebuild.

3 When we talk about where the money can go, and this
4 is all part of a dispassionate analysis. I found -- and
5 your Honor, I know you're a former prosecutor. You may
6 know better than I do where victim family members can draw
7 money from. I've never been in the position where that
8 has occurred to me. But we found two. There's something
9 statewide call the Nevada Victims of Crime Compensation
10 that gives families up to \$35,000.00.

11 There's something called Clark County Victim
12 Assistance, which is the other. This one I've heard of
13 before. They're here in court often. I will submit to
14 the court, these are the numbers when you look at, for
15 example, medical expense, counseling bills. I have a case
16 right now where the surviving witnesses -- at the time the
17 mother was raped and the kid -- the daughter was raped.
18 They killed the father. You know what they get, Judge,
19 \$5,500.00, for all their counseling.

20 Now, I don't know what counseling costs if you get it
21 through the State. From the psych stuff we --

22 THE COURT: More than \$5,500.00.

23 MR. SGRO: So my point is, your Honor, from a
24 dispassionate analysis, it appears to me that not only the
25 slides we looked at earlier are more esoteric, global

1 education, class size, et cetera, if you want to just do
2 what the DA in New York recommended, which is infuse it
3 back into the system, but a different way that makes more
4 sense. Maybe this is a way that makes more sense.

5 THE COURT: Look, I mean, I was on the
6 Administration of Justice Commission -- you are still on
7 it, right.

8 If you gave us the keys to the Ferrari of hundreds of
9 millions of dollars, it wouldn't take long to figure out
10 many programs that you can institute, not just specific to
11 this individual case, to hopefully address a lot of ills
12 that plague the criminal justice system.

13 MR. SGRO: That's the thing. I was discussing
14 it with the State this morning. If you -- I don't know
15 what the budget number is off the top of my head. Whatever
16 that number is it's \$100,000,000.00, \$500,000,000.00 there
17 out there, one years worth of money to deal with capital
18 litigation. Give it to people in the private sector.

19 THE COURT: You are talking about what's
20 budgeted through the DA's office, prosecution or
21 through --

22 MR. SGRO: I'm talking about all of it.

23 THE COURT: The County looks at it. That's what
24 you're talking about.

25 MR. SGRO: You give it to individuals that are

1 in the private sector, and you say, you know what, I'm
2 going to give you 20 percent of everything you keep,
3 that's left over after the budget. You know what's going
4 to happen. They are going to look at this as a business.
5 They're going to see what they can and cannot afford.
6 They are going to cut things. The death penalty in the
7 private sector, 1 every 35 years, for a cost of a couple
8 hundred million dollars, and the continued pursuit of
9 death penalty litigation when we can't even do anything to
10 affect a remedy being sought, for God knows how many
11 hundred million dollars. Hit the pause button and say
12 let's circle back here when we're back on our feet and
13 let's revisit some of the undercurrent issues we may be
14 able to address more effectively.

15 The -- I simply included this slide, your Honor. I
16 don't know whether there's any dispute you have the right
17 to decide legislative intent when the statute is silent.
18 These are the cases that are in the brief, your Honor. I
19 just throw that out there because in the very brief
20 response that we got from the State to this motion, one of
21 the assertions was you didn't have the discretion. So I
22 offered these in support of our position.

23 Here it is at the end of the day, your Honor. The
24 study outlined in 444 is dispassionate, rational, and
25 logical. Now that comes from a United States Supreme

1 Court case that was decided in 1979, when they were
2 evaluating the cost versus benefit analysis of the death
3 penalty.

4 Here's my point. Similar to my view that if this was
5 a private sector issue, difficult decisions would be made
6 and things would be cut. In our humble view, it does not
7 make any sense. Because we're here as advocates. We
8 happen to have someone facing capital punishment. But as
9 a citizen of this State, I can't wrap my brain around
10 why we want to continue to spend money in a situation
11 where we know they are looking at the money we're
12 spending. I will tell you one of the things -- I know you
13 didn't want witness testimony and all that stuff. I will
14 represent to you, your Honor, one of the things that
15 Assemblyman Orenshall told me is this is a sign. This is
16 a sign. We've never done this before. But you know what,
17 tough economic times call upon our leadership to make
18 tough economic choices. And it is easy when you're not
19 spending your own money and it's just a blind checkbook to
20 say you don't have the authority.

21 The response in the case is a demonstration of how
22 flippant the State can be with respect to something that
23 even affects them personally as citizens.

24 All they see is the tunnel vision. We have the death
25 penalty. The response was, well, we filed the notice of

1 aggravation timely. Well, we did the notice timely.
2 We're complying with the law. So let's go. I want to
3 make it clear for the record where our position is.

4 To the extent that the State wants to proceed on any
5 case, including this one, because I have this issue in
6 front of other jurists, as your Honor is aware.

7 To the extent, if the State said --

8 THE COURT: Just so we're clear. I'm assuming
9 that they, for whatever reason, Judges Tao and Walsh
10 decided that they -- I didn't have any problem if they
11 wanted to come down to listen to the presentation. I
12 question the propriety of having me have a panel judicial
13 discussion on it. I think that's individual to each of us
14 in our cases. But I just assumed, because I never heard
15 from them --

16 MR. SGRO: We didn't hear back. I knew it was
17 an unusual thing to ask for. I thought I'd throw it out
18 there in the spirit of doing this once. And -- but I
19 totally get it.

20 At the end of the day what we're suggesting is this.
21 I will happily withdraw from this case today if this case
22 proceeds as a non-capital case. I just had a situation
23 with Ms. Weckerly where over some period of time a
24 decision was made to abandon the imposition of the death
25 penalty, as to a client I had. I withdrew immediately, or

1 as quick as I could get the motion to withdraw on
2 calendar.

3 So my position is this. We are in the midst of a
4 change, I think, in our State. That change may be
5 abolition of the death penalty. I don't know. Mr.
6 Orenshall will tell you he doesn't know. No one has a
7 crystal ball. But one thing that could happen too, if
8 it's not the extreme remedy of abolition. It may be as
9 the State of Nevada, DA, we'll allow you 3 death cases a
10 year. I'm just pulling the number 3 out of the air.
11 We'll allow you 3. You know what that will force them to
12 do. Really focus on the worst of the worst offenders, as
13 deemed appropriate by the DA. Because every case I have I
14 always draw the worst of the worst guy, when it's a death
15 case.

16 But maybe they's limit it.

17 THE COURT: Do you do that on purpose.

18 MR. SGRO: Maybe they'd limit it to 3
19 prosecutions a year. Maybe they say instead of 8
20 aggravators -- which has been consistently attacked for
21 years as being overbroad, and any case qualifies, et
22 cetera. Maybe instead of 8, they'll reduce it to 2. I
23 don't know.

24 The point is something will change. Do we
25 really -- again, I don't want to continue to harp on one

1 innocuous comment you made. But you did bring up
2 post-conviction relief. Imagine the record now. Sims has
3 his aggravators. He has his particular capital case. If
4 in 2 years from now, because the legislature will next
5 meet in 2015, where this study is supposed to be completed
6 by. They are going to figure it what they are going to
7 do.

8 They change something and lo and behold they change
9 something relative to the aggravator they had. Maybe the
10 death penalty is abolished. In the meantime we have gone
11 through trial. We have spent all the money. We've hired
12 the psychologists, the psychiatrists. We've hired any
13 experts relative to mental health. We've done the
14 mitigation expert. That money is gone forever. And if
15 there is a conviction, and if there is a sentence of
16 death, all we are going to do is do it all over again.

17 In the meantime, we're going to take up 4, 5, 6 weeks
18 of your time between picking a jury, getting the ones
19 excused for cause, the Jehovah's witnesses who can't
20 impose judgment. We'll go through all of that rigamarole
21 and it's just taking a big bucket of money, that we don't
22 have in this State, and flushing it right down the
23 toilet.

24 What's the point. There's no prejudice to wait to
25 see what they do.

1 On the other hand --

2 THE COURT: Along those lines. How long do you
3 reasonably wait before something becomes unfair. The
4 process becomes -- generally speaking from your side of
5 the aisle the argument is they don't want to sit around in
6 custody waiting for my trial. I want to go to trial.
7 When you're dealing with capital litigation, I understand
8 that people want to avoid being sentenced to death.

9 But on the other side, how long are they supposed to
10 wait before they become prejudiced by keeping track of
11 witnesses, you know, things like that.

12 You're kind of talking about a very dicey proposition
13 of let's just wait to see what happens.

14 MR. SGRO: There is no doubt --

15 THE COURT: And just so you know, and I'm sorry
16 to interrupt. I say that being in agreement with a great
17 deal of what you said today. But still having that
18 concern.

19 MR. SGRO: I think, to be fair, it's not every
20 day that a State contemplates changing the way it does
21 everything, relative to capital punishment. So this is
22 different then the State standing up and saying, Judge,
23 they've had 6 months to get him psyched. They haven't
24 done it. The victims need closure. That's not this
25 argument. We've been on both sides of that argument in

1 the past on other cases.

2 What I'm suggesting to you is today is a different
3 day. Today there's finally been a recognition that Nevada
4 went through a financial crises. That's not a shock to
5 anyone. And I know it probably was a little overkill, but
6 don't really need Drew Christensen from the office of
7 appointed counsel to come in here and testify that it cost
8 more to do a capital case then a non-capital case. Does
9 anyone believe that.

10 It's so implicit. But even today, there are DAs that
11 will tell you, I don't know if it costs that much more.
12 And they'll argue all sorts of, well, maybe it's not even
13 relevant. It's easy to say it's not relevant, because
14 they're not the ones spending the money.

15 I guess what I'm suggesting to your Honor is
16 something has to give. And if the State really wants to
17 move forward on these cases, they can proceed
18 non-capitally, there's nothing stopping them. To proceed
19 capitally is absolutely unbridled throwing money away. We
20 can't afford to spend the money we're spending. Let alone
21 the potential of doing this twice. Why would we do that.
22 Why would you let all of these appointed counsel here
23 continue to bill and inflate their time and inflate their
24 hours and get to a point where maybe there is a moratorium
25 in 2015.

1 THE COURT: But that's a separate issue, then
2 worrying about doing something twice because of a
3 post-conviction issue.

4 MR. SGRO: I understand.

5 THE COURT: Or some error I create or anybody
6 else creates. You try to do things, all of us, as cleanly
7 as possible so you are not doing it twice because of an
8 error.

9 MR. SGRO: I think we run that risk right now.
10 I think if in 2015 they change anything relative to
11 capital litigation, whether it's decrease in aggravators,
12 whether it's limitation on the number of cases they can
13 do, whether it's an increase in mitigators, whether
14 it's -- they have to do something. Because the study is
15 going to find, yes, this is really expensive. They
16 wouldn't take the time to do the study to learn that this
17 is really expensive to then only say, yeah, but we're not
18 going to do anything about it. That doesn't make any
19 sense at all.

20 THE COURT: I agree.

21 MR. SGRO: They're going to do something about
22 it, so why are you going to cause us to be in a position
23 where we have to do everything we have to do under the
24 mandates of the post-Ferman years, under the mandates of
25 Rule 250, under all the Strickland factors we have to

1 comply with, the 2 counsel. Why are we going to do all
2 that and waste all that money. Because, why. Because the
3 cost isn't relevant to justice.

4 I mean, that's great fodder for bar room conversation
5 and pounding your chest in front of a jury, but this is a
6 dispassionate, rational, logical exercise. So to be
7 dispassionate, there is not a single dispassionate reason
8 why we should go forward as a capital case. It doesn't
9 make any sense.

10 You, Judge, as a jurist have the ability to actually
11 save all of us a whole ton of money. It's somewhat of an
12 anomaly because you have the ability to do that right
13 now.

14 THE COURT: You have to agree that it's
15 different to be in the position of having the authority to
16 address legislative intent, as opposed to legislating from
17 the bench.

18 It's one thing to say, look, I look at AB 444. I'm
19 thinking, you know what, I agree with Mr. Sgro completely
20 that there is great concern about the cost of this and the
21 imputes of the bill to go in and study all of this. They
22 wouldn't do that if they didn't have a mind that once we
23 get the results of that, we're going to take a long hard
24 look at revamping the statutory scheme and eventually
25 abolish the death penalty. I don't think that's wild

1 conjecture or speculation. I think that's an absolute
2 reality.

3 But, as a judge, I can't say that prospectively I'm
4 guessing they are going to do all of this, so I'll kind of
5 legislate it now and say you can't seek death anymore.
6 When the statutory scheme is in place and has been found
7 to be constitutional.

8 MR. SGRO: I would like to refer to -- because
9 of something you just said on funding. Remember I said I
10 was shown minutes earlier. Thankfully I have people that
11 are good with this technology. I want to read from the
12 minutes.

13 Senator Dennis (ph) asked members if they had
14 questions or concerns regarding any of the 6 projects that
15 required separate action by sub-committees. Hearing calls
16 for a vote on the first item. Remodel Project 13-C02.
17 Remodel administration building to accommodate execution
18 chamber -- Illinois State Prison.

19 This is underlined -- Assembly Bill 444, requires
20 that a legislative audit be conducted on the death penalty
21 in this State. Which would include a review of facilities
22 to carry out a death sentence.

23 Next entry -- Senator Smith then moved to not approve
24 capital improvement project.

25 Next sentence -- Assembly woman Carlton seconded the

1 motion.

2 The reason we're here for you to decide legislative
3 intent, your Honor, is because it's silent in the statute.
4 What I just read to you is absolutely the guidance you
5 need to understand what the legislative intent was. They
6 are moving away from the direction of the imposition of
7 capital punishment. You have the ability as a jurist to
8 interpret -- you have a bill in front of you, right. We
9 didn't create that. You have it in front of you.

10 We're all going to agree it doesn't say -- here's
11 what it doesn't say. All cases currently under the rubric
12 of being pursued as a capital litigation must continue
13 until this audit is completed. Doesn't say that.

14 Similarly, it doesn't say no cases shall go forward
15 as capital litigation. Therein lies the rub. We have to
16 turn to you, again, Senator Orenshall will tell you, there
17 is a separation of powers issue. We have to now turn to
18 you, so you can tell us how you interpreter that bill.
19 How you interpret the bill, your Honor, depends on what
20 you glean as the legislative intent. You just told me
21 that it is not going to be conjuncture to suggest that
22 these people, the legislators, moving away, possibly from
23 capital punishment. I just read to you the reason the
24 funding wasn't approved for the death chamber because
25 we're going to see if we'll have the death penalty

1 anymore.

2 THE COURT: Right.

3 But I can't fathom that the legislature would intend
4 in any fashion to say we want you to just grind to a halt,
5 the criminal justice system, for a couple of years until
6 we can finish this audit and get into session and figure
7 out what we want to do.

8 I mean, it's one thing to say we can glean from this
9 their intent is to get the study done and probably make
10 substantial changes, if not abolish the entirety of it.
11 But it's another thing to say because that's probably
12 their intent, it must also have been their intent to stop
13 murder litigation right now.

14 MR. SGRO: No, no, no, your Honor. With all due
15 respect. They're stopping capital murder litigation.
16 Again, again my position --

17 THE COURT: I understand. You're right.

18 MR. SGRO: They want to prosecute Morris, Sims
19 as a non-capital case. I'm out, right. Because I'm
20 second counsel on this case. And Morris/Sims case goes
21 through however it goes through. We have a trial date.
22 That trial date will come and go. The case will be tried
23 and that case will be over.

24 I will tell you what will happen is the State will be
25 called upon to really finally, again, you know, from my

1 eyes, finally be called upon to make the decision what
2 they really do want to wait for.

3 And by the way, by the way, your Honor, I would say
4 two things. Number one, is two years really a long time.
5 I don't mean to be flippant here, but is that really a
6 long time in a capital murder case from arraignment to
7 trial. Is that really a long time.

8 I was -- Chris Owens isn't here. He's retired now.
9 But Chris Owens had been complaining in another case him
10 and I had. He had a static that the average case in Clark
11 County, death penalty case, was somewhere 3-and-a-half to
12 4 years from initial appearance to trial. I don't know
13 where he got that. He was making a point about something
14 that was occurring that he was frustrated with because of
15 delay.

16 So at the outset I would say that, number one, 2
17 years, I'm not seeing that as a practitioner in the
18 capital defense arena as being an inordinate stretch of
19 time.

20 Number two, I would say the worst thing you can do to
21 everybody, to the Defendants, to the parties, and to the
22 victims, by the way, who do -- I understand from doing
23 this for years, want closure. To have to redo it twice,
24 we're all on notice that change may be coming. Why would
25 we stick a square peg in a round hole to force down

1 everyone's throats this case just to get it done. Just to
2 get it done. When we know there is a high likelihood
3 we'll have to do over again. Because, as you say, your
4 Honor, change is probably coming. Some substantial
5 change.

6 THE COURT: What kind of slippery slope are you
7 getting on, however. If you start looking at things like
8 that and then broaden that analogy to, look, we have a lot
9 of traction in oral argument on this issue. I think the
10 Supreme Court may rule in a certain way, which is going to
11 affect future cases, so we need to stop those cases. Or
12 we have a lot of traction with lobbying the legislature
13 this session about changing the definition of burglary so
14 the State can't file a burglary every time a guy steals a
15 candy bar. Whatever it may be. You always kind of -- as
16 the court system you're looking and saying right now
17 things are constitutionally firm and in place. They have
18 been approved. So that's what I have to rely on in term
19 of allowing the cases to proceed.

20 MR. SGRO: I think there's two significant
21 differences. I don't think your judgment is going to be
22 called into question on a burglary case. Let's call it
23 what it is.

24 THE COURT: Judgment as me or as --

25 MR. SGRO: The parties, what the litigation is.

1 I would be hard pressed to imagine a burglary type of
2 offence garnering this kind of traction. Burglary cases
3 don't have the same level of cost.

4 THE COURT: I know, but I'm talking about the
5 applicability of a process where we kind of decide to stop
6 litigation from moving forward while we wait for something
7 prospectively to happen. That's what we'd be doing,
8 protectively saying that -- and some things are more a
9 guess, and it may be a likelihood. But essentially you
10 are saying I'm going to assume that that audit turns out
11 in a certain way that weighs favorable to capital
12 defendants. And I'll assume thereafter the legislature
13 takes that audit and starts to create change that's
14 favorable to capital defendants. And I'm going to assume
15 they don't do it in a way that parcels it all out to 3
16 times a year you can do it or not, I'll just assume they
17 are going to abolish it. And I'll assume that they make
18 the retroactive on -- that's what I'm getting at. It's a
19 very attenuated process. So what does that stand for in
20 terms of other similar situations moving forward. That's
21 a bad precedent.

22 MR. SGRO: I would say two things. I'm not sure
23 that it's a precedent to the extent that the court does,
24 for a couple reasons.

25 Number one, we're not guessing at the future relative

1 to what changes may be affected. We know the future. We
2 know the future because we have Assembly Bill 444. We
3 know that in 2015, they're going to preset what the audit
4 results are. And they're going to make decisions. So
5 we're not speculating that change is coming. We know that
6 change is coming. Because we know as reasonably bright
7 people in this room, they're not going to put all of this
8 manpower and energy into finding that this is really
9 expensive and then say good job guys, we'll see next week.
10 They're going to do something about it.

11 The second thing I want to point out to your Honor is
12 right now do we not effectively have relative to at least
13 the inmates who are currently sitting on death row and an
14 inmate who got the death penalty a week ago, a day ago, a
15 year ago, a moratorium. We don't even have a functioning
16 death chamber.

17 So what I see is an absolute black hole when you get
18 to what reason do we have to move forward, relative to
19 death cases. I get it. I think what is presented to you
20 are two equally unpalatable decisions. I think you have
21 the one --

22 THE COURT: Lucky me.

23 MR. SGRO: Lucky you.

24 I think you have the one unpalatable decision where
25 you may think -- and I know judges in our district and

1 delay, those two concepts clash.

2 THE COURT: Not just our district. You travel
3 the country and it's probably going to be similar. There
4 are certainly a heightened sense of that in jurisdictions
5 like ours that have such high case loads.

6 MR. SGRO: So I get it. I get it. I
7 understanding this notion of delay don't typically go hand
8 in hand.

9 On the other hand though, what has to be more
10 non-palatable is the likelihood of reversal because a
11 record was made a year before a trial in a capital case to
12 not let it proceed under the current statutory framework,
13 with the knowledge of that framework was probably going to
14 get modified in some way -- a substantial way down the
15 road. We did it anyway, despite this record, despite the
16 knowledge, all to only do it again.

17 THE COURT: Let me ask you this. Let's assume
18 for the moment, sometimes people hate when I do this.
19 Let's talk philosophically here a bit.

20 Let's assume that the kind of process I just talked
21 about occurred. The audit occurred. It's favorable to a
22 capital defendant. The legislature then acts in way
23 favorable to capital defendants and creates a new
24 legislative scheme in some fashion.

25 That legislative scheme either -- and let's assume it

1 abolishes the death penalty. It either says it's
2 retroactive to everything that's occurred. So you go in
3 and pardon everybody, commute those sentencings, or it's
4 not.

5 Correct.

6 MR. SGRO: Well, funding is not going to get
7 done for example. The practical impact under your theory
8 has to be computation of everyone sentenced to life
9 without parole. It's what they've done in every other
10 state.

11 THE COURT: Once the legislature acts and does
12 something, it either is retroactive or it's not. If it's
13 retroactive, it doesn't matter if we went through trial
14 here and somebody was sentenced to death. It's going to
15 be wiped out by the actions of the legislature.

16 If we go to trial and they're sentenced to death and
17 the legislature acts and changes the scheme and says, but
18 it's not retroactive at all, it's not affecting our case
19 either.

20 What's going to affect it is a lot of money.

21 MR. SGRO: The money.

22 Again, the dispassionate analysis. This is a lot of
23 money. At the end of the day, we get to cut through all
24 the BS. We get to cut through -- it sure deters the guys
25 who's dead. I get to cut through, what about the -- none

1 of that matters. The only thing that matters is the
2 bottom financial line.

3 THE COURT: Is that a basis for me to make a
4 decision.

5 MR. SGRO: Absolutely.

6 THE COURT: I'm sure the taxpayers and Steve
7 Sisolack love that. This is going to cost too much. I'm
8 not going to let it happen.

9 MR. SGRO: But, your Honor, it's a sign of
10 what's to come. There is no precedent in our country for
11 the proposition that the death penalty is abolished, yet,
12 the ones on death row are going to be executed. There's
13 no precedent for that.

14 In our state we have no mechanism by which to execute
15 anybody. They're not going to abolish the death penalty,
16 then appropriate funds for the chamber to execute the 83
17 guys there right now. So that can't be an argument.

18 So at the end of the day, we're not just spending
19 money because of the hypothetical that the court posed
20 probably cannot exist, simply because of where we find
21 ourselves today.

22 If they had a functioning death chamber and there was
23 an individual that got executed a week ago, perhaps the
24 argument is different. But we're not there. We have no
25 mechanism by which to enforce the remedy sought by the

1 state, which is capital punishment.

2 So it makes sense that if anything changes, they are
3 not going to do anything other than commute the sentences.
4 What we have in the meantime is a completely wasteful
5 expenditure of funds. I think, your Honor, my prediction
6 would be if we got an order from your Honor to proceed
7 non-capital, we got our trial date, let's go forward, or
8 you have a choice, State, to see the outcome of this
9 audit. You know what's going to happen as a result of
10 that, my prediction. They're going to go upstairs and
11 sharpen their pencils and figure out which ones they
12 really think are death cases. And isn't that after all
13 what we wanted in the first place.

14 It cannot be -- I don't mean to be flip, because
15 we're talking about the most serious case, but it cannot
16 be such that every time a defendant is a death defendant,
17 he's the worst of the worst. It can't be an inaccurate
18 statement.

19 THE COURT: You are the incredibly unlucky
20 person.

21 The position that you are really asking me to take is
22 almost purely political. It's a stop it, because it's
23 costing so much money. Until we decide whether to keep it
24 or not. Isn't that really something -- maybe the governor
25 signs a moratorium and says death penalties can't be

1 sought until all this is done. If counties want to pursue
2 murder cases as non-capital, you can do that. Otherwise,
3 you can't go to trial.

4 MR. SGRO: I believe your Honor, I'm asking you
5 to take a very judicial approach to this. I think -- I'm
6 not asking to say -- I'm not saying -- let me start this
7 was.

8 In February of 2013, before this bill came out, I
9 didn't go to any judges in the capital cases I had and
10 say, the death penalty is too expensive. We can't proceed.
11 That would have been political.

12 After May of 2013, when this bill passed and the
13 legislature does not tell me whether there is a stay or
14 not a stay on these cases, my only remedy is to come to
15 court and say, Judge, interpret the statute. We do that
16 all the time.

17 You get asked all the time to determine whether
18 things are constitutional, non-constitutional. What you
19 do often times is go to the legislative history.
20 Sometimes you see how it's applied, you know, all those
21 sorts of issues are before you every day. But you, as
22 part of your job, I imagine every day, get presented a
23 statute, say, interpret it. Every statute doesn't have
24 every possibility crafted within the statute. You are
25 called upon every day.

1 What we have is the most serious of all cases being
2 silent. I will tell you that the easy thing that they
3 could have done is put in there language, the current
4 cases need to go forward. That wouldn't have made any
5 sense from my view. It's not in there because it wouldn't
6 make sense.

7 We're about to change everything, so we're going to
8 affirmatively recommend everything go forward, and we're
9 going to redo a bunch of stuff in a couple years. That
10 wouldn't make sense.

11 So they are silent. I'm asking you, as a judge, to
12 do what I have seen you do a million times, and what I
13 know you do every day, interpret a statute. The only way
14 to do it is to go to legislative intent. The strongest
15 evidence of legislative intent happen to be senators who
16 move for the denial of funding for a death chamber,
17 because the study is in play and we're not going to spend
18 money right now until we see what we figure out.

19 They did do it politically, your Honor. They made a
20 decision not to spend any more money in the State, to the
21 extent they could control it, until they find out what the
22 study is. They're not going to make a death chamber
23 operational, only to repeal the death penalty.

24 I'm asking you today to do same thing. I'm asking
25 you as a judge to define what legislative intent is and

1 not make us spend money we can never get back.

2 I get it it's one case here today in front of you.
3 The repercussions are going to have a significant impact.
4 We're not looking to save the economy by doing this. But
5 \$200,000,000.00 thrown out by other states, crazy
6 numbers.

7 Hundreds of millions of dollars, where we got
8 \$5,500.00 allocated for counseling for a family. It's
9 just -- all of which goes to a remedy that can't be had.

10 So I think I'm asking you as a jurist to determine
11 legislative intent of a statute which does not give us
12 guidance as to that fact.

13 MS. WECKERLY: Briefly, your Honor.

14 My recollection as to the legislature is 2 years
15 before AB 444 was approved, that the legislature
16 considered a bill that was going to study the cost of the
17 death penalty and impose a moratorium on it. And that
18 didn't pass. Then we moved on to two years later and have
19 the study.

20 What's interesting to me is the assembly bill, or
21 what was told to us by our representatives is that the
22 study is going to be dispassionate, rational, and logical.
23 Well, everything I heard today is, this is a forgone
24 conclusion. It's already too expensive. And we're going
25 to ask the court to forecast that it will be abolished.

1 So our victims of crime should have to wait around
2 and see when the legislature does -- and assume that it's
3 going to be a total abolishment of the death penalty.

4 So according to Mr. Sgro, on the 3 death cases I know
5 that he's on, a mother who is raped and murdered; a
6 10-year-old daughter was raped and murdered; the two
7 little brothers who survived, and the father who was
8 almost killed, he survived, they should wait around and
9 see, not only the outcome of the study, which I guess we
10 already know it's too expensive in that case to go after the
11 death penalty for rape and murder of a 10 year old and her
12 mother, but we'll hope that 2 years later in the future
13 the legislature does something that limits the currently
14 constitutional ability of the state to seek the death
15 penalty in a particular case.

16 In the other case that I know of that Mr. Sgro
17 represents a capital defendant, a mother is killed. Her
18 12-year-old daughter is shot by the defendant in the
19 abdomen. She's transported from the scene. This all
20 occurs while her 3 remaining children, all under 10, are
21 present inside the home.

22 So I guess we tell those victims, those children,
23 look, you know maybe by the time you are an adult, some
24 decision will be made in the legislature that may some how
25 limit our ability to seek the death penalty in your case.

1 And, you know, just wait around and see how it turns out.

2 And of course the case before this court, 2 men were
3 shot. One man is luck to be alive. And I guess we're
4 supposed to tell --

5 THE COURT: 3 people were shot.

6 MS. WECKERLY: Sorry -- 3 men were shot. One is
7 lucky to be alive.

8 We'll see. We know the outcome of the study,
9 according to Mr. Sgro. But if the legislature is truly
10 studying this and truly going to study it fairly and
11 dispassionately, I think we should wait and see what the
12 outcome of the study is. We all know that capital
13 litigation is expensive. But how much more expensive is
14 it versus a traditional murder case. I think it's
15 honestly up in the air. I don't see defense attorneys in
16 murder cases that are not capital foregoing psychologists
17 and psychiatrists. I see the office of independent
18 counsel routinely appointing two lawyers on non-capital
19 cases.

20 I don't see motions being skipped because a case is
21 non-capital. I don't see investigations by defense
22 counsel being short circuited because a case is
23 non-capital.

24 So I realize that it is more expensive, but how much
25 more I think is something that the legislature will

1 hopefully take a fair look at and make an assessment.

2 But the motion before the court is respectfully
3 asking a judge with a single case before it, to substitute
4 the judgment of the Nevada voters, to substitute the
5 judgment of their representatives, and to extend its
6 authority outside of this branch of government into a
7 purely legislative arena.

8 And from the State's perspective, there is no
9 authority for the court to do that. In fact, in all of
10 the cases -- or all of states cited by the defense, New
11 York, New Jersey, New Mexico, Illinois, Connecticut, ad
12 Maryland, those changes were all brought about by assembly
13 or state senates, all occurring in the legislative
14 arena.

15 There is no legislative intent for this court to
16 interpret. This is a bill that is going to
17 dispassionately, rationally, and logically study the cost
18 of the death penalty. It's silent. It doesn't say there
19 is a moratorium on the death penalty.

20 There may be changes. There may not be changes. But
21 right now it's a constitutional punishment. It's a
22 punishment that's been upheld repeatedly by the Supreme
23 Court of Nevada. And this court simply does not have a
24 legal mechanism available that's legitimate to grant the
25 motion.

1 MR. SGRO: First of all, your Honor, when the
2 State stands up and talks about rapes and murders and all
3 those things, they have rape and murder in every state
4 that abolished the death penalty. The point of it is,
5 those comments or made to inflame passions. And that is
6 completely contrary to what the purpose of the bill you
7 have in front of you is designed to do. It is a
8 dispassionate analysis.

9 So I think the State goes to a potential victim and
10 says, victim family members, what would you rather do.
11 Would you rather (A) proceed on this case in a non-capital
12 fashion. The Defendant may never get the death penalty,
13 but as you may or may not know, there's something pending
14 in our state right now that may abolish the death penalty
15 anyway. We can go forward and push with vim and vigor
16 today and get this trial date and get you the penalty you
17 may or may not desire. However, be advised victim family
18 member, it may all be for not, and we might have to do
19 this twice.

20 Or alternative (B), we can proceed in a non-capital
21 fashion against this Defendant and you'll have closure.

22 I think it's absolutely disingenuous to stand up here
23 and parrot facts from other cases in a passionate manner
24 to suggest that all these various victim family members
25 are going to feel the same.

1 Judge, we've all had capital cases. You may have
2 seen it. Some family members don't want the death penalty
3 for religious or other reasons.

4 Now at the end of the day, I think a victim family
5 member is going to want one definitive moment to try and
6 relieve themselves of any further anxiety. So I don't
7 think the passionate remarks Ms. Weckerly made have
8 anything to do with practical application of what I'm
9 asking for.

10 I'm asking for a remedy that allows the State to
11 decide. They can go forward in every case in a
12 non-capital fashion. They don't have to wait for
13 anything. We have trial dates in all the cases that Ms.
14 Weckerly referenced. I have trial dates in all of them.
15 And if they are non-capital, assuming I'm the first chair
16 in them, I'm going to stay and we'll go forward. We'll do
17 them.

18 The alternative is if they want to wait to pursue
19 capital punishment, let's not waste the money. Again,
20 it's the difference between spending other people's money
21 and trying to take a dispassionate, logical approach to
22 see if the citizens in this State are getting the bang for
23 their buck. Ms. Weckerly is correct. They didn't say
24 moratorium. They didn't say proceed with full force
25 either. And the bill she spoke of was two sessions ago.

1 The last bill submitted didn't mention moratorium. It
2 only had to do with the message back to the legislators
3 what they wanted more specificity relative to the audit.

4 Do you know why, Judge, the last bill didn't have
5 moratorium language. Because he didn't need it. Because
6 they have established a de facto moratorium, because they
7 know they didn't fund the death chamber so there is a
8 moratorium now.

9 No one is getting executed between now and the next
10 session, for sure. That's why it's not in there. That
11 changed what -- the bill she's talking about happened a
12 couple sessions back.

13 The most recent bill, which is now Assembly Bill 444,
14 was a different numbered assembly bill. It was 5
15 something. I can't remember -- I think it was 555. It
16 came back and Governor Sandoval said you have to give me
17 more specificity in the numbers you're going to look at.
18 They provided the specificity. Sandoval signed it. With
19 knowledge, by the way, that the death chamber didn't get
20 funded.

21 THE COURT: I get that.

22 You also have to admit that there's a very important
23 difference in deciding the constitutionality of a statute
24 and legislate intent when you are talking about
25 potentially upholding portions of a statute or striking

1 other portions of a statute and allowing it to continue
2 without an excised portion. As opposed to what you're
3 doing here, which is saying read in a whole other clause,
4 or create another clause to this because that's what I
5 think the legislature intended was to put a moratorium on
6 this.

7 MR. SGRO: You have to read a clause in one way
8 or another.

9 THE COURT: No. You look at a statute on the
10 plan language of the statute. If it's silent, its silent.
11 That's not reading a clause in. That's viewing it for
12 what it is.

13 MR. SGRO: Again, you know, I respectfully
14 disagree. I think the statute being silent is what
15 compels a court to infuse into the statute a mechanism by
16 which you are going to proceed. And if it had to do with
17 some other issue that wasn't this highly charged in terms
18 of the death penalty, it would be easier for you to do it
19 as a matter of course in your day-to-day procedures as you
20 did cases.

21 The end of the day, Judge, you have to read something
22 into the statute. It doesn't say proceed forward. Okay.
23 So you have to read in those words. I'm going to proceed
24 forward. Or you have to read in the words, it doesn't
25 make sense to proceed forward.

1 Either way you're reading something into the statute.
2 You have to, because you have been as a jurist given no
3 guidance. You have been given a statute that's been
4 implicitly advised something is going to change. You have
5 been given no guidance with what to do with your capital
6 case load now. I imagine we're not the only case in front
7 of you where a capital defendant is involved.

8 THE COURT: No, probably we have 12 of them. I'm
9 guessing I'm not dissimilar from most departments in that
10 regard right now. This is a very interesting debate.

11 Here's the thing. I'm going to deny the motion.
12 I'll give you as much information as I can and I'll invite
13 you to take it up on appeal. The Supreme Court can deal
14 with it however they want. And maybe direct me if they
15 think I have more authority then I think I have here.

16 But there are, as I said earlier, a lot of things I
17 agree with. I don't know that Pam is disagreeing with you
18 that capital litigation is more expensive then non-capital
19 litigation. Whether it's disproportionately more
20 expensive is where she's raising some objection to.

21 It's not that I think you guys are really in great
22 disagreement on that. I bet if you just sat down over
23 coffee and have a discussion, as opposed to arguing
24 positions here in court, I think everybody can agree.

25 Anybody that thinks about the nature of what goes

1 into capital litigation vs. non-capital litigation knows
2 it's more expensive.

3 Obviously during a recession and economic downturns,
4 whatever you want to call it, that's essentially collapsed
5 our community for several years, all of these become
6 important to consider. As I said, it would be -- love to
7 have all that money to spend anywhere else. Whether
8 you're talking about infusing money into specialty court
9 programs, mental health programs, veteran's programs, open
10 programs, going home prepared programs to keep parolees
11 from going back to prison, whatever it is there's a myriad
12 of things that having an extra \$700,000,000.00, would be
13 put to great use.

14 But at the end of the day, as well, I think we're
15 really having a discussion about finances. I know a
16 purely financial reason is something that gives rise to me
17 in the jurisdiction to do what you are asking me to do.

18 You are not asking me to find the current statutory
19 scheme by which the State's filed a notice of intent to be
20 unconstitutional. I think you recognize that it's been
21 visited numerous times in front of the Nevada Supreme
22 Court. It's been found constitutional. So I don't think
23 there is a basis to strike their notice.

24 If you move to staying the proceedings and not
25 allowing the case to proceed, that's really just based on

1 it's very expensive and could be wasteful of money. So
2 you should order that we can't do it. I don't think, as a
3 judge, I can do that. If the law is in place, the law is
4 constitutional, I have to allow the law to continue to
5 move forward.

6 That being said, I agree and I think the study is
7 going to show -- even if it's done dispassionately and
8 logically -- that capital litigation is disproportionate
9 economically to non-capital. Why that is, however, is
10 where I think there is probably room for disagreement. Is
11 it solely because of the nature of our justice system
12 here, the lack of appellate court, whatever it may be that
13 creates so much more, or is it based solely on the fact
14 that it's the nature of capital litigation itself and how
15 much time and money is expended for that.

16 What happens if we eliminate the death penalty. Does
17 life without become the new death penalty and start
18 accruing large amounts of money. I don't think that's
19 going to be disproportionate.

20 But those are all things that the legislature is
21 going to look at as they're figuring out where all of the
22 money is going and why it's going there and what's the
23 appropriate thing is to do.

24 I also think, however, that when -- if the
25 legislature intends a moratorium, I think that would have

1 been express in what they enacted. AB 444, I don't know
2 that you're asking me to find that unconstitutional
3 either.

4 That just says there is going to be a study. There's
5 not anything unconstitutional about AB 444. Asking me to
6 address its intent in terms of what did it speak to the
7 rest of the criminal justice system, you have to read on
8 the plain language of what's there. And I know we
9 disagree, but you're really asking me to read in a new
10 clause, even though you say you have to read in something.
11 I don't think so. You read it for what it is, or you read
12 into it a new clause. It's silent. It doesn't enact
13 anything other than what's there, due to the study. And
14 the legislature or anybody in the legislative branch can
15 decide what to do thereafter.

16 So in terms of my ability, I'm saying, okay. There's
17 a study there. If that study gets done, when the
18 legislature starts acting, as I said earlier, they'll
19 either do nothing because of whatever the study
20 determines, which means whatever has happened with our
21 case it stays as is. Or they abolish the death penalty,
22 which whatever has happened in our case is retroactive, if
23 they abolish things then that sentence is getting
24 commuted. Or they make some changes and they modify
25 things. And I can't imagine modifying can be done

1 retroactively to wipe out everything done previously and
2 say go back and do it again with only 3 aggravators -- or
3 3 choices per year. I can't imagine that that would ever
4 be the intent of the legislature.

5 So if they are going to tinker or modify it, it would
6 have to be prospective only, so that what we have done
7 leading up to that would still stay in place.

8 So I don't think under any of those scenarios is our
9 case going to be affected by moving forward. I do think,
10 however, that you are -- you are right. Capital
11 litigation, 2 years depending on when the case came into
12 the district court, isn't that long. But the case has
13 been pending for awhile, now you're adding 2 plus years on
14 top of it while you're just waiting for the legislature to
15 do something. As I said earlier, I think you're creating
16 a slippery slope as to how that moves forward.

17 The efficiency of the justice system, the fairness to
18 both sides, the timing with regard to getting a case
19 through the system and the ability of everybody to have
20 some sense of, there's going to be some finality to this
21 moving forward, I think those are all important things as
22 well.

23 Like I said, if this goes up on appeal, I mean, part
24 of what I'm doing is that I don't think I have the ability
25 to impose what you're asking me to impose. If somebody

1 tells me I do have the ability, you can come back here and
2 we'll have another discussion and I'll tell you
3 specifically what the ruling would be, if I have the
4 ability to do it. I just don't think it exists.

5 So the second half of the motion to stay the
6 proceeding is denied as well.

7 MR. SGRO: Your Honor, for purposes of the
8 record I handed out the power point. Can we mark it as a
9 court exhibit and make it part of the record.

10 THE COURT: Absolutely.

11 So we're coming back on the 17th to talk about trial
12 dates in regard to the severance.

13 MS. MANINGO: If we can set a briefing for the
14 severance, which is one of the reasons we were here today.
15 We today withdrew the severance on counts -- based on our
16 preparation for the hearing, some issues with testing and
17 discovery that we still don't know. We decided that we
18 moved forward on that prematurely. So what I'd like to do
19 is reserve the right despite the briefing schedule to
20 bring that matter before the court again if we decide --

21 THE COURT: Tell you that when I first set the
22 briefing schedule, I really wasn't thinking about counts.
23 I was thinking about defenses.

24 MS. MANINGO: We discussed that and decided --
25 I understood that at the time, but we decided we'd better

1 do the counts, then when we discussed it, we realized it
2 was to early for that.

3 THE COURT: I won't hold it against you. You
4 can withdraw without prejudice to refile it, if you get to
5 a point in a reasonable amount of time. Then we'll
6 readdress it.

7 Thank you all.

8

9

10

11

12

* * * * *

13

14

15

16

17

18

19

20

21

22

23

24

25