

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

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3       DAVID BURNS,

4                               Petitioner,

5  
6       vs.

7       THE HONORABLE JUDGE JEROME T.  
8       TAO, EIGHTH JUDICIAL DISTRICT  
9       COURT OF THE STATE OF NEVADA

10                              Respondent.

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**PETITION FOR WRIT OF**  
**MANDAMUS OR WRIT OF**  
**PROHIBITION**

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I.

**RELIEF SOUGHT**

The Petitioner respectfully requests this Court to direct the District Court to strike the Notice of Intent to Seek the Death Penalty in the instant case. Alternatively, the Petitioner requests that this Court direct the District Court to stay capital proceedings against the Petitioner until the conclusion of the legislative session in 2015, which is the anticipated time for the resolution of the fiscal audit of the death penalty legislated in the recently passed Assembly Bill 444.<sup>1</sup>

II.

**ISSUES PRESENTED FOR REVIEW**

1. Whether Assembly Bill 444 calls for an effective moratorium on the death penalty that requires either:
  - a) dismissal of the instant Notice of Intent to Seek the Death Penalty
  - b) a stay of capital proceedings pending the outcome of the fiscal audit of the death penalty in Nevada, or
  - c) the continuation of the instant proceedings on a non-capital basis.
2. Whether the District Court has the authority to grant the relief sought in the Petitioner's *Motion to Strike the State's Notice of Intent to Seek the Death Penalty Based on the Cost of Capital Punishment and Attendant Policy Considerations, or in the Alternative, Motion to Stay Capital Proceedings Pending the Outcome of the Audit Related to Assembly Bill 444.*

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<sup>1</sup> The undersigned counsel is cognizant that this issue was previously decided in Nevada Supreme Court Case No. 64357 and files the instant Writ to protect the record on appeal.

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**III.**

**STATEMENT OF THE CASE**

The Petitioner, David James Burns (“Burns”), was charged via Superceding Indictment, dated October 13, 2010, with Count 1: CONSPIRACY TO COMMIT ROBBERY, Count 2: CONSPIRACY TO COMMIT MURDER, Count 3: BURGLARY WHILE IN POSSESSION OF A FIREARM, County 4: ROBBERY WITH USE OF A DEADLY WEAPON, Count 5: MURDER WITH USE OF A DEADLY WEAPON, and Count 6: ROBBERY WITH USE OF A DEADLY WEAPON, Count 7: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, and Count 8: BATTERY WITH A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM. (PA 1-8). On October 28, 2010, the State filed a Notice of Intent to Seek Death Penalty against Petitioner. (PA 9-11). On May 22, 2013, the Legislature passed Assembly Bill 444. (PA 502-511).

On July 19, 2013, Petitioner filed his *Motion to Strike the State’s Notice of Intent to Seek the Death Penalty Based on the Cost of Capital Punishment and Attendant Policy Considerations, or in the Alternative, Motion to Stay Capital Proceedings Pending the Outcome of the Audit Related to Assembly Bill 44*. (PA 12-29).

In that Motion, Petitioner requested the stated relief based upon the recently passed Assembly Bill 444 (AB 444), which calls for a fiscal audit of capital punishment in the State of Nevada. (PA 502-511).

1 The State filed its objection to the Motion on July 25, 2013, stating that the  
2 recently passed AB 444 was not a recognized ground to strike a Notice of Intent to  
3 Seek the Death Penalty, and that there was neither good cause nor relevant authority  
4 to authorize a stay of proceedings. (PA 512-519). The Petitioner replied to the State  
5 on August 26, 2013. (PA 520-523). On September 11, 2013, the Petitioner filed his  
6 first Supplemental Exhibits in support of his Motion. (PA 524-632).  
7

8  
9 The matter was heard on September 12, 2013 before the Honorable Jerome  
10 Tao. (PA 633-690). During the proceedings, counsel for the Petitioner gave a  
11 PowerPoint presentation to the Court in support of the Motion. (PA 691-741).  
12

13 At the close of the proceedings, the Court noted that “..when the study comes  
14 back, it’s probably going to say the death penalty costs, I don’t know what the dollar  
15 figures are, but substantially more than any other type of murder prosecution. I mean,  
16 that’s just what the reality is.” (PA 673, ll. 14-18). However, the Court maintained  
17 that it did not have the authority to grant the Motion on legal grounds. (PA 679, ll.3-  
18 18). The District Court further noted:  
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20

21 ..you know, I understand why you brought the motion, you know, as I  
22 hope you can tell, I gave it some pretty serious thought, I read the whole  
23 binder, it took me days, but—because it’s an important issue, but it’s,  
24 you know, a lot of what you’re asking for is not within—you’re in the  
25 wrong branch of government for it in my view. But, you know, if you  
26 want to appeal this and take it up to the Supreme Court and take a shot  
27 there, you’re welcome to, that’s totally up to you. (PA 679, ll. 12-18).  
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29 Ultimately, the Court denied the Motion.



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IV.

**STATEMENT OF FACTS**

The Nevada legislature passed Assembly Bill 444, which calls for an audit of the fiscal costs of the death penalty. (PA 502-511). This Act calls for the Legislative Auditor to conduct an audit of the costs of legal counsel involved in the prosecution and defense for all capital pre-trial, trial, and post-conviction proceedings. (PA 502-511). Further, the audit must include the disparate costs for investigators, experts, mitigation specialists, court costs, jury costs, as well as the costs of incarceration and the actual execution. (PA 502-511). The final report of the legislative audit is due no later than January 31, 2015. (PA 502-511). Assembly Bill 444 was prompted by the legislature's concern over the cost of the death penalty in Nevada and its fiscal viability in the future.

**A. Can Nevada Afford the Cost of the Death Penalty?**

It is a well-founded principle that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). While the moral and sociological debates over the death penalty have not resulted in a comprehensive ban of capital punishment, the American discourse on the subject has dramatically shaped the means and methods by which the death penalty is carried out. Due to concerns regarding not only the finality of capital punishment, but the real possibility of innocent people being sentenced to die, the United States Supreme Court has reinforced the need for more rigorous procedural requirements

1 relative to imposition of the death penalty. See, *Woodson v. North Carolina*, 428 U.S.  
2 280, 305 (1976) (plurality opinion). The Supreme Court has gone so far as to suggest  
3 that the process due to an offender faced with prison does not necessarily satisfy the  
4 process due to capital offenders. *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J.  
5 concurring). See also, *Williams v. Georgia*, 349 U.S. 375, 391 (1955) (distinguishing  
6 capital and non-capital offenses).  
7  
8

9 The debate over the process due to capital offenders came to a head in 1972  
10 with the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238  
11 (1972). In *Furman*, the High Court granted certiorari to determine whether imposition  
12 of the death penalty under Georgia's capital sentencing scheme constituted cruel and  
13 unusual punishment in violation of the Eighth and Fourteenth Amendments to the  
14 U.S. Constitution. *Id.* at 239. In a per curium opinion consisting of one paragraph,  
15 the Court held that it did. *Id.* at 240. The plurality decision rendered in *Furman* has  
16 since been construed as requiring that, at a minimum, "where discretion is afforded a  
17 sentencing body on a matter so grave as the determination of whether a human life  
18 should be taken or spared, that discretion must be suitably directed and limited so as  
19 to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*,  
20 428 U.S. 153, 189 (1976) (plurality op.).  
21  
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25 Following the decision in *Furman*, states that still impose the death penalty  
26 have been required to enact procedural safeguards for capital proceedings in order to  
27 comport with the Supreme Court's rigorous standards.  
28

1 In Nevada, the special rules governing a capital proceeding can be found in  
2 Nevada Supreme Court Rule 250, as well as NRS 175.552 and 175.554. Rule 250  
3 requires the appointment of two attorneys to try each capital case, as well as  
4 mandatory appointment of counsel for direct appeal and post conviction habeas  
5 corpus proceedings. NRS 175.552 mandates a penalty phase in which mitigating and  
6 aggravating factors are presented to the jury. Further, case law has required additional  
7 safeguards for the imposition of the death penalty, such as the requirement of trial  
8 counsel to prepare for mitigation. See *Jones v. State*, 124 Nev. 1483, 238 P.3d 827  
9 (2008).

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13 Each of these factors has contributed to the overall cost of the pursuit of, and  
14 the defense against, the imposition of the death penalty. As such, many jurisdictions,  
15 including Nevada, have questioned the benefit that they are receiving from the costs  
16 expended. Of the eighteen (18) States that do not have capital punishment, six (6) of  
17 those States have abolished the death penalty within the last decade, the most recent  
18 being Maryland.

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21 **B. The Passage of Assembly Bill 444 and the Effective Moratorium on the**  
22 **Death Penalty Reveals the Legislative Intent of the Bill.**

23 On May 2, 2013, Assembly Bill 444 was introduced before the Assembly. The  
24 bill called for a comprehensive fiscal audit of the costs of the death penalty in the  
25 State of Nevada. (PA 30-60). At the introduction of the Bill, James Ohrenschall,  
26  
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28

1 Assembly District No. 12, stated that “[T]he study outlined in Assembly Bill 444 is  
2 meant to be dispassionate, rational, and logical.” (PA 49).

3 Senator Tick Segerblom, Senatorial District No. 3, testified before the  
4 Assembly that the death penalty does not “work.” (PA 39). Senator Segerblom stated  
5 that:  
6

7 We prosecute too many people, and a study of the current system, to  
8 determine why there are so many death penalty charges, is needed. Did  
9 you know the cost to prosecute a death penalty case is double that of a  
10 case involving life without the possibility of parole? If there is a way to  
11 reduce the number of people that are charged and reduce that cost, it  
12 would be a great savings for our state. That is why I think we have to  
do this audit. It will be done by staff so there is no additional cost to the  
state. *Id.*

13  
14 Nancy E. Hart, from the Nevada Coalition Against the Death Penalty, who introduced  
15 the Bill, testified that while there have been few executions in Nevada, there are  
16 eighty (80) people currently on death row that are creating a “backlog.” (PA 40). If  
17 the death penalty remains in Nevada, there will eventually come a time when all of the  
18 people comprising this “backlog” will have to be executed, resulting in accrued costs.  
19 (PA 40).  
20  
21

22 Michael Pescetta, of the Federal Public Defender’s Office, testified that in the  
23 thirty-six (36) years since the death penalty was reinstated in Nevada, 151 death  
24 sentences were imposed in Nevada. (PA 42). Of those 151 death row inmates, only  
25 twelve (12) have been executed. (PA 42). Of those twelve, eleven (11) were  
26 voluntary executions. (PA 42). As such, only one (1) person has been involuntarily  
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1 executed in the State of Nevada since the death penalty was reinstated, out of 151  
2 costly convictions, and attendant appeals.

3  
4 On May 17, 2013, following the above-referenced testimony on this matter, the  
5 Assembly passed Bill 444 with vote of thirty-eight (38) to one (1). The Senate passed  
6 the Bill on May 30, 2013 by a vote of eleven (11) to ten (10). Finally, on June 10,  
7 2013, the Bill was approved by Governor Sandoval and codified as Chapter 469 of the  
8 Laws of the State of Nevada, 2013.  
9

10 Subsequently, during a May 22, 2013 joint legislative subcommittee on  
11 Finance, the legislature voted not to fund the building of a new execution chamber to  
12 replace the sole, non-functioning chamber at the now-closed Nevada State Prison. (PA  
13 621). In doing so, the committee noted that the recently enacted Assembly Bill 444,  
14 “required that a legislative audit be conducted on the death penalty in the state, which  
15 would include a review of facilities to carry out a death sentence.” (PA 621)<sup>2</sup>. In  
16 doing so, the legislature effectively assured that no executions can be conducted  
17 during the pendency of the AB 444 audit.  
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21 V.

22 **JURISDICTION**  
23

24 A writ of mandamus is available to compel the performance of an act that the  
25 law requires as a duty resulting from an office, trust, or station or to control an  
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27 <sup>2</sup> This portion of the legislative history is provided in the Appendix for the Court’s  
28 convenience.

1 arbitrary or capricious exercise of discretion.” *Morrow v. Dist. Ct.*, 294 P.3d 411, 413  
2 (Nev. 2013); citing *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179  
3 P.3d 556, 558 (2008).  
4

5 Extraordinary relief is available where the petitioner has no plain, speedy, and  
6 adequate remedy in the ordinary course of the law or there are either urgent  
7 circumstances or important legal issues that need clarification in order to promote  
8 judicial economy and administration.” *State v. Eighth Jud. Dist. Ct. (Logan D.)*, 306  
9 P.3d 369, 373 (Nev. 2013); citing *Cheung v. Eighth Judicial Dist. Court*, 121 Nev.  
10 867, 869, 124 P.3d 550, 552 (2005). Further, consideration of a petition for  
11 extraordinary relief may be justified where an important issue of law needs  
12 clarification and public policy is served by the Supreme Court's invocation of its  
13 original jurisdiction. *Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116  
14 Nev. 88 (2000).  
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## 18 VI.

### 19 ARGUMENT

20 **A. The legislative history, in conjunction with the passage of Assembly Bill**  
21 **444, has created an effective moratorium on the death penalty.**

#### 22 1. Legal Standard

23  
24 This Court reviews questions of statutory interpretation de novo.” *Clay v. Eight*  
25 *Jud. Dist. Ct.*, 305 P.3d 898, 902 (Nev. 2013); citing *Bigpond v. State*, 270 P.3d 1244,  
26 1248 (2012). When interpreting a statutory provision, this Court first looks first to the  
27 plain language of the statute. *Id.* The Court shall avoid statutory interpretation that  
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1 renders language meaningless or superfluous and if the statute's language is clear and  
2 unambiguous, this Court will enforce the statute as written. *Id.* Citing *In re George J.*,  
3 279 P.3d 187, 190 (2012). Likewise, this Court will interpret a rule or statute in  
4 harmony with other rules and statutes.” *Id.*

6 When two statutory provisions conflict, this Court employs the rules of  
7 statutory construction, *State v. Eighth Jud. Dist. Ct. (Logan D.)*, 306 P.3d 369, 380-81  
8 (Nev. 2013); citing *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 484, 50 P.3d  
9 536, 543 (2002), and attempts to harmonize conflicting provisions so that the act as a  
10 whole is given effect. *Id.* Citing *In re Eric L.*, 123 Nev. 26, 31, 153 P.3d 32, 35  
11 (2007). Statutes are interpreted so that each part has meaning. *Id.*; citing *Leven v.*  
12 *Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). Therefore, when a scheme  
13 contains a general prohibition contradicted by a specific permission, “the specific  
14 provision is construed as an exception to the general one.” *Id.* citing *RadLAX Gateway*  
15 *Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. —, —, 132 S.Ct. 2065, 2071, 182  
16 L.Ed.2d 967 (2012).

21 Finally, this Court has long recognized that when interpreting a statute, this  
22 Court must examine the statute as a whole. *Clark County v. Southern Nevada Health*  
23 *District*, 289 P.3d 212, 216 (2012).

25 In this case, the jurisdictional trends toward abolishment of the death penalty  
26 on fiscal grounds, the current economic climate, the exorbitant cost of the death  
27 penalty, the passage of Assembly Bill 444, and the effective moratorium on  
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1 executions in Nevada demonstrate that the legislature intended to make a dramatic  
2 change to the scope of the death penalty in Nevada.

## 3           **2.     There is a Jurisdictional Trend Towards Abolishment of the Death** 4           **Penalty**

5           Since 2007, six (6) states, namely Maryland, Connecticut, Illinois, New  
6 Mexico, New York, and New Jersey, have joined an already increasing number of  
7 states which have repealed or abolished capital punishment. Almost all six states  
8 referenced above have cited the increasing cost of litigating capital cases as  
9 motivation for the abolishment of the death penalty.  
10

11           Studies performed in Nevada have echoed the concerns of these jurisdictions,  
12 noting the increasing cost of both prosecuting and defending capital cases, as well as  
13 the costs presented by a lengthy appellate process. (PA 345-356). These factors  
14 indicate that the cost of the death penalty in Nevada has become too great a burden on  
15 the State, for little reward. As such, Nevada should follow the trend of American  
16 states that have abolished the antiquated, unworkable, and costly relic of old world  
17 punishment embodied by the death penalty.  
18

### 19           **a. New York**

20           After reinstating the death penalty in 1995, New York's high court, the Court of  
21 Appeals, entertained a constitutional challenge to the death penalty scheme in *People*  
22 *v. LaValle*, 3 N.Y. 3d 88 (2004). In *La Valle*, the Court of Appeals found that New  
23 York's death penalty scheme was unconstitutional based upon a provision that  
24 mandated the judge to impose a sentence of life with the possibility of parole when  
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1 the jury was deadlocked on the issue of whether to impose death or life without the  
2 possibility of parole. *Id.* In essence, a defendant in a capital case would be given a  
3 lesser sentence than either of the sentences being adjudicated by the deadlocked jury.  
4 *Id.* The Court of Appeals found that such a system was coercive and tainted jurors  
5 who feared that if they did not vote for capital punishment the defendant would  
6 receive the possibility of parole. *Id.* As such, the Court effectively abolished the death  
7 penalty in New York, pending any legislative change to the death penalty scheme.  
8

9  
10 After the high court's ruling, death sentences which had previously been  
11 imposed were overturned. See *People v. Taylor*, 9 N.Y.3d 129, 137, 878 N.E.2d 969,  
12 971 (2007). In 2005, the New York Assembly considered the issue of reinstating the  
13 death penalty and held five public hearings on capital punishment between December  
14 15, 2004 and February 11, 2005, resulting in a report based upon these hearings. (PA  
15 61-145). Among the factors considered by the Assembly were the costs of reinstating  
16 capital punishment. (PA 91-94).  
17

18  
19 At those hearings James Liebman, a Columbia University Law Professor,  
20 predicted that reinstatement of the death penalty, over a period of twenty (20) years,  
21 would cost the State approximately \$500 million dollars. (PA 93). Jonathan Gradess  
22 of the New York State Defenders Association testified that conservative estimates  
23 were that \$170 million dollars were spent since 1995 on capital prosecutions and  
24 defense. (PA 94). Gradess further stated that with seven death sentences imposed,  
25 taxpayers paid approximately \$24 million dollars per execution. (PA 94).  
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1 No action to reinstate the death penalty was ever taken by the New York  
2 legislature.

3  
4 **b. New Jersey**

5 On January 10, 2006, the Senate introduced Bills S171 and S2471, calling for  
6 the elimination of the death penalty. (PA 146-148). On January 12, 2006, the  
7 legislature approved an Act, codified as P.L.2005, c.321 imposing a moratorium on  
8 the death penalty and creating a study commission to evaluate the fiscal and social  
9 impact of the death penalty. (PA 149-151).  
10

11 In 2007, the newly created Death Penalty Study Commission generated its  
12 report on the social and fiscal impact of the death penalty in the New Jersey. (PA  
13 152-285). In this report, the Committee acknowledged that it was unable to precisely  
14 pinpoint the costs of the death penalty. It was, however, able to gather data from  
15 government entities with a projection of the estimated savings. (PA 189). The office  
16 of the Public Defender noted that elimination of capital cases would result in an  
17 annual savings of \$1.46 million per year. (PA 189). The Department of Corrections  
18 noted that it would save \$974,430 to \$1,229,240 per death row inmate over each  
19 inmate's lifetime. (PA 190). While the Administrative Office of the Courts (AOC)  
20 stated that elimination of the death penalty cannot be absolutely fiscally quantified,  
21 the AOC did state that the repeal of capital punishment would generate savings in trial  
22 court costs and proportionality review costs. (PA 191).  
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1 In November 21, 2007, the New Jersey Senate published its legislative fiscal  
2 estimate for Senate Bill 171, citing, in part, the report of the Death Penalty  
3 Commission. (PA 286-305). In that report, the Senate Subcommittee found that the  
4 State of New Jersey would save the following per death penalty trial: \$79, 926 in  
5 Public Defender costs, \$148,185 in judicial trial costs, and \$93,018 in proportionality  
6 review costs. (PA 290-292). On December 13, 2007, the Assembly passed Senate  
7 Bill 171 and it was signed by the governor on December 17, 2007, eliminating the  
8 Death Penalty in New Jersey. (PA 306-311); (PA 313-315).

### 11 **c. New Mexico**

12  
13 In 2009, the New Mexico legislature passed House Bill 285, which removed the  
14 penalty of death from the sentencing authority for capital felonies and effectively  
15 abolished the death penalty in the state of New Mexico. (PA 316-325). In a statement  
16 after passage of the law, Governor Richardson cited the 130 inmates freed from New  
17 Mexico's death row since 1973 and added, "The sad truth is the wrong person can still  
18 be convicted in this day and age, and in cases where that conviction carries with it the  
19 ultimate sanction, we must have ultimate confidence, I would say certitude, that the  
20 system is without flaw or prejudice. Unfortunately, this is demonstrably not the case."  
21 (PA 326-329). The repeal brought with it great support. "As beautiful as our justice  
22 system is ... it is still a justice system of human beings, and human beings make  
23 mistakes," Sen. Cisco McSorley, an Albuquerque Democrat, said during nearly three  
24 hours of debate. (PA 330-332).

1 Before a vote was taken on the Bill, the Legislative Finance Committee  
2 prepared its Fiscal Impact Report. (PA 333-337). Although the author of the report  
3 acknowledges that New Mexico has never performed a study of costs of the death  
4 penalty to the State, the report outlines the additional costs required in the litigation of  
5 capital cases:  
6

7 The State Bar Task Force on the Administration of the Death Penalty,  
8 completed in 2004, outlines exactly why death penalty cases are so  
9 costly: These cases require heightened standards for defense counsel  
10 and at least two highly qualified defense attorneys at each stage of the  
11 proceedings. They require extensive trial level litigation as well as  
12 constitutionally and statutorily mandated appeal. Unlike any other  
13 criminal trial, these cases demand that a certified court reporter  
14 transcribe all proceedings. The survivors of the victim should be  
15 accorded particular respect. Jury selection is a long and arduous process  
16 that potentially touches on the constitutional and religious rights of New  
17 Mexicans and costs at least four times as much as a non-death first-  
18 degree murder case. Due to changes in federal habeas corpus law, these  
19 cases must be long and thoroughly litigated in state court habeas  
20 proceedings as well. The Task Force ultimately recognized and  
21 recommended substantial changes to the way death penalty cases are  
22 prosecuted and defended in New Mexico, which may increase further  
23 costs. (PA 335).

24 Many, if not all, of the factors that the Fiscal Impact Report cites, echo the  
25 requirements of capital prosecutions in the State of Nevada. See *Nev. Sup. Ct. R. 250*.  
26 Like New Mexico, Nevada requires at least two (2) specially qualified and  
27 experienced defense counsel on capital cases. (PA 333-337). Further, Nevada and  
28 New Mexico both mandate the appeal of any capital conviction, mandatory  
transcription of all proceedings, as well as a bifurcated penalty phase. (PA 333-337).

Moreover, like New Mexico, capital prosecutions in Nevada can cost in excess of twice the amount for defense counsel at trial alone. (PA 338-349).

#### **d. Illinois**

Since 1977, Illinois has exonerated 13 death row inmates, which is one more than the State has successfully executed. Innocent defendant Anthony Porter came within 48 hours of being executed. (PA 350-355). See also Leigh B. Bienen, *The Quality of Justice in Capital Cases; Illinois as a Case Study*, 61 Law and Contemp. Probs. 193 at 213 (1993). In light of Porter's case, Illinois Governor Ryan was noted as saying: "I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row." He remarked that he could not support a system that has come "so close to the ultimate nightmare, the state's taking of innocent life." (PA 356-357).

Not least among the concerns about the Illinois death penalty, was the cost of these botched capital convictions. Leigh B. Bienen, a senior lecturer at Northwestern University School of Law, noted that the State of Illinois wasted millions of dollars prosecuting a capital murder case against an alleged murder named Brian Dugan. Bienen stated:

...the state of Illinois wasted millions imposing a death sentence on Brian Dugan, who was already serving life in prison without possibility of parole for another murder. This is not a wise or sober use of public monies. It is no solace to the public, to the thousands of other murder victims' families, or to the professionals committed to a principled criminal justice system. To make matters worse, this prosecution came

1 only after two other people were wrongfully convicted, retried, and  
2 convicted again for the crime Dugan admitted to having committed. The  
3 state spent millions of dollars prosecuting these capital cases, and then  
4 paid out millions more to the men it had wrongfully sentenced to death.  
5 Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the  
Ryan Commutations: Reforms, Economic Realities, and A New Saliency  
for Issues of Cost*, 100 J. Crim. L. & Criminology 1301, 1389-90 (2010).

6 Bienen's reflection on the Dugan case reflects the prevailing notion that the costs of  
7 the death penalty simply do not produce sufficient benefit to make the system  
8 workable. Not only is there a real and present possibility of a wrongful conviction  
9 that could result in the execution of an innocent person, but even rectifying a wrongful  
10 conviction can cost millions of dollars to the State.  
11

12  
13 In response to knowledge of potential wrongful convictions such as Porter's,  
14 Governor Ryan declared a moratorium on the death penalty which continued until  
15 Illinois Governor Pat Quinn signed a bill abolishing the practice. Senate Bill 3539  
16 abolished the death penalty in Illinois, and barred executions after the effective date of  
17 the Act. (PA 365-367). In addition, anyone who received a sentence of death was to  
18 have such sentence commuted to life imprisonment. (PA 358-360).  
19  
20

21  
22 On March 9, 2011, Illinois Governor Pat Quinn signed into law Senate Bill  
23 3539, which effectively abolished the death penalty in Illinois.  
24

25 **e. Connecticut.**

26 In 2012, Connecticut Gov. Dannel Malloy signed Senate Bill 280 into law  
27 which abolished the death penalty, replacing the practice with life in prison without  
28

1 the possibility of parole as the state's highest form of punishment. (PA 361-376). The  
2 governor noted that the "unworkability" of Connecticut's prior death penalty law was  
3 a contributing factor in his decision to repeal. (PA 377-381). Proposed amendments  
4 from supporters of the death penalty were defeated during debates to pass the bill,  
5 mainly because lawmakers were swayed by other national cases in which states had  
6 exonerated people sentenced to death and by arguments that the practice was carried  
7 out in an arbitrary manner and served only to drain states of financial resources. (PA  
8 377-381).

11 **f. Maryland**

12  
13 In the past decade Maryland joined a growing trend of states leaning toward the  
14 abolishment of the death penalty because of the potential likelihood of sentencing the  
15 innocent. For years, Maryland protesters called on lawmakers to repeal the death  
16 penalty. Calls for the practice's repeal grew louder following a 2002 study that found  
17 racial disparity in the implementation of the death penalty, in conjunction with  
18 wrongful convictions. (PA 382-385).

19  
20  
21 In May 2013, Maryland became the eighteenth and most recent U.S. state to  
22 abolish the death penalty when Governor Martin O'Malley signed Senate Bill 276  
23 outlawing the practice. (PA 386-412). Among dozens present for SB 276's signing,  
24 was Kirk Bloodsworth, who spent years campaigning for its repeal. He was released  
25 from Maryland's death row in 1993, after DNA evidence proved he was wrongfully  
26 convicted. (PA 384).

1 While a myriad of reasons were cited by Maryland, including reliability of  
2 verdict, actual innocence, and racial disparity, Maryland also cited the cost of the  
3 death penalty as a factor in repealing capital punishment.  
4

5 In March 2008, the Urban Institute Justice Policy Center published a report on  
6 the cost of the death penalty in Maryland. (PA 413-482). The report found that in the  
7 162 cases where a “death notice” was filed by the State, taxpayers paid an additional  
8 186 million dollars, or over one million dollars per notice. (PA 445). Such concerns  
9 about the fiscal cost of the death penalty in conjunction with moral and social factors  
10 were reflected in the final Act. The Act repealing the death penalty in Maryland  
11 specifically cited that the savings from the repeal of the death penalty would result in  
12 a savings to the general fund. The Act further noted that this increase to the general  
13 fund would benefit the Victims of Crime Fund, which was funded by the same  
14 source. (PA 389, ll. 25-31). As such, the repeal of the death penalty in Maryland not  
15 only saved lives, but it also redirected funds to help the victims of crime rebuild their  
16 lives.  
17  
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20

### 21 **3. Nevada – Can We Afford to Keep Capital Punishment on the Books?**

22 A recent study in Nevada has shown that there is great interest in the cost of  
23 capital cases versus non-capital cases, and that Nevada is leaning towards the  
24 preclusion of the practice based on its economic effects. Dr. Terrance Miethe of the  
25 Department of Criminal Justice at the University of Nevada, Las Vegas, analyzed the  
26 time and costs incurred by defense attorneys working on capital and non-capital cases.  
27  
28



(PA 338-349). The study concluded that defense attorneys in Clark County spend an average of 2,298 hours on capital cases, whereas they spend an average of 1,087 hours on non-capital cases. (PA 34.).

Table 4: Average Court Processing Outcomes in 127 Murder Cases Resulting in Conviction by Type of Sentence (Clark County, 2009-2011)					
<b>Case Outcome</b>	<b>Years*</b>	<b>Life With</b>	<b>Life W/O</b>	<b>Death</b>	<b>All Cases</b>
% Convicted by Trial versus Guilty Plea:	5.9 %	22.7 %	47.6 %	100 %	21.0 %
# of Days between Initial Filing and Sentencing:	387 days	732 days	887 days	1,107 days	599 days
# of Separate Court Appearances/Meetings:	9.3	20.9	27.9	35.2	16.8
# of Separate Orders Filed to the Court:	3.6	10.1	12.6	20.0	7.6
# of Separate Motion Filed to the Court:	5.4	16.6	24.4	30.0	12.8
Total # of Cases with this Sentence:	68	44	21	5	138
<i>Note: * Years include any sentence in which a specific maximum number of years of imprisonment was pronounced (excluding life and death sentences).</i>					

(PA 348).

This disparate workload is reflected in the costs incurred by the State in funding capital defense attorneys. The difference in attorneys' fees between a non-capital murder case and a capital case is \$169,700 for the public defender's office, and \$212,125 for private assigned counsel. (PA 346). This figure only encompasses attorneys' fees and does not include the additional costs of a mitigation expert, additional investigator fees, or hard costs associated with the increased scrutiny of a death penalty case.

Not only do capital cases in Nevada result in significant increases in costs for the state, but the time spent defending capital cases is increased tremendously when

1 compared to cases in which the disposition is life without the possibility of parole.  
2 (PA 348). Of the cases in Clark County between 2009 and 2011 that resulted in a  
3 death sentence penalty, the time spent trying these cases was approximately 1,107  
4 days from the time of the initial filing through sentencing, whereas cases which  
5 resulted in life sentences took an average of 887 days. (PA 348).

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A. Lead Attorney Estimates:			
Stage	Capital Cases	Non-Capital Cases	Difference
Pretrial	1,075	461	+ 614
Trial	168	110	+ 58
Penalty	56	12	+ 44
Post-Conviction	48	18	+ 30
<b>TOTAL:</b>	<b>1,347 hours</b>	<b>601 hours</b>	<b>+ 746 hours</b>
B. Second Chair Attorney Estimates:			
Stage	Capital Cases	Non-Capital Cases	Difference
Pretrial	685	351	+ 334
Trial	180	110	+ 70
Penalty	58	12	+ 46
Post-Conviction	28	13	+ 15
<b>TOTAL:</b>	<b>951 hours</b>	<b>486 hours</b>	<b>+ 465 hours</b>
C. Both Lead Attorney and Second Chair Attorney Estimates Combined:			
Stage	Capital Cases	Non-Capital Cases	Difference
Pretrial	1,760	812	+ 948
Trial	348	220	+ 128
Penalty	114	24	+ 90
Post-Conviction	76	31	+ 45
<b>TOTAL:</b>	<b>2,298 hours</b>	<b>1,087 hours</b>	<b>+ 1,211 hours</b>

(PA 342).

20 However, there is little gain justified by these results. Of the thirty-five (35)  
21 capital cases in Clark County brought between 2009 and 2011, only five (5) resulted  
22 in the death penalty. (PA 349). This results in a 14.3% death penalty imposition rate,  
23 with nearly 85% of the defendants being given a life sentence or less. *Id.* However,  
24 the 85% of death penalty cases that did not result in death still cost the tax payers  
25 more than double the amount of a non-capital trial.

**Table 5: Final Disposition of Murder Cases in which a "Notice of Intent to Seek the Death Penalty" was Filed (Clark County, 2009-2011)**

<i>Case Outcome</i>	<i>Number of Cases</i>	<i>Percent Distribution</i>
Charges Dismissed	1	2.8 %
Specific Number of Years Given*	5	14.3 %
Life <u>With</u> Possibility of Parole	7	20.0 %
Life <u>Without</u> Possibility of Parole	17	48.6 %
Death Sentence	5	14.3 %
Total	35	100.0 %

*Note: \* Years include any sentence in which a specific number or range of years of imprisonment was pronounced (excluding life and death sentences).*

(PA 349).

**4. Nevada cannot continue to channel financial resources for the empty “success” of the Death Penalty.**

The fiscal impact of the death penalty can not be analyzed in a vacuum. These costs must be considered in tandem with the current economic climate in both the nation, as well as Nevada. For example, the median home value in Nevada is \$152,000, compared with \$356,000 in California. (PA 486-488). One in sixteen (1 in 16) Nevada homes are in foreclosure, compared to one in sixty-nine (1 in 69) nationally. (PA 489-491). Further, the percentage of homes that are financially “underwater” is a staggering 52.4% compared to 21.5% nationwide. (PA 492-493); (PA 494-496). The United States Bureau of Labor Statistics reports that Nevada has the highest unemployment rate in the nation at 9.6%. (PA 497-501). Further, Nevada’s unemployment rate is significantly higher than the 7.6% unemployment rate

1 nationally. Currently, the median income for Nevadans is \$44,581, compared to  
2 \$45,790 nationally. (PA 496-498). Nearly 7.5% of two parent households, and  
3 20.5% of single family households live under the poverty line. (PA 489-491).  
4

5 Nevada has been entrenched in an economic crisis, even more so than the  
6 overall crisis that swept the country. Nevada has suffered more economic harm than  
7 the jurisdictions that have already abolished the death penalty for fiscal reasons.  
8

## 9 **5. Where the Money Could be Better Spent.**

### 10 **a) An Intermediate Appellate Court.**

11 Nevada's economic crisis is not just reflected in the community as a whole, but  
12 is equally evident in the administration of justice. While, the State spends  
13 approximately \$260,000 per capital case just on defense counsel for trial, numerous  
14 services are suffering due to a lack of funds (PA 347).  
15  
16

17 For instance, the Justices of this Court have long advocated for an intermediate  
18 appellate court, which has been rejected on several ballot initiatives. This is despite  
19 that the Nevada Supreme Court has one of the heaviest caseloads in the Nation and  
20 has the highest number of incoming cases of all states that lack an intermediate  
21 appellate court (PA 744-745).<sup>3</sup> An intermediate appellate court, which would aid this  
22  
23

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24  
25 <sup>3</sup> The article referenced was not submitted to the District Court at the time for hearing  
26 on the matter. However, this article was cited by defense counsel in identical  
27 motions submitted in two additional death penalty cases and is provided in the  
28 Petitioner's Appendix for the convenience of the Court.

1 State in effectively and efficiently adjudicating appellate claims would cost a mere  
2 \$1,746,583 a year in operating costs. (PA 760)<sup>4</sup>. Given the figures applied to the  
3 increased cost of capital cases, including, but not limited to: attorneys' fees for trial  
4 and post-conviction proceedings, mitigation, investigators, experts, prosecution costs,  
5 court costs, execution costs, and the like, the cost of the intermediate appellate court  
6 likely represents the cost of just one capital prosecution for the State of Nevada.  
7

### 8 **b) Victims of Crime**

9  
10 The State of Nevada recognizes that victims of crime often need extensive  
11 social services as a result of the crime perpetrated against them. As such, the Nevada  
12 Victims of Crime Compensation Program (NVCCP) was created to financially assist  
13 such persons. However, despite the evident impact that violent crime can have on a  
14 victim, the NVCCP caps each victim at a maximum of \$35,000 in benefits, despite the  
15 economic and physical damage that may have been caused to them by a defendant.<sup>5</sup>  
16  
17 Further, NVCCP only allows \$5,500 in counseling to victims, regardless of the  
18 substantial trauma or mental distress that a crime may have caused them.  
19  
20

21 In Maryland the reallocation of monies used for the death penalty to victims of  
22 crime proved extremely persuasive, as noted above. In Connecticut, the family  
23

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24  
25 <sup>4</sup> This portion of the legislative history is provided in the Appendix for the Court's  
26 convenience.

27 <sup>5</sup> See, current as of November 5, 2013:

28 <http://voc.nv.gov/uploadedFiles/vocnv.gov/content/Advocates/VOCP%20Policies.pdf>

1 members of victims noted that the death penalty “wastes millions of dollars that could  
2 go toward much needed victims’ services.” (PA 625-632)<sup>6</sup>. As such, other  
3 jurisdictions have realized the potential benefit in redirecting funds spent on the death  
4 penalty towards services that can aid the victims of crime. The system is in place in  
5 Clark County, all that is needed is the funds to expand the services.

7  
8 **c) Education**

9 Nevada School Districts are in a crisis. Most notably, Clark County has faced  
10 severe budget deficits that have resulted in program cuts and class sizes that are 25%  
11 percent larger than the national average. (PA 565-570). Further, the Clark County  
12 School District reflected a 64 million dollar deficit in the 2012-2013 school year. (PA  
13 570). In the collegiate system, educational funding has also caused difficulties. For  
14 example, in April of 2003, the President of Western Nevada College resigned, citing  
15 budget cuts. (PA 555-556).  
16  
17

18 As it stands, the State of Nevada desperately needs funding for the education of  
19 its youth. However, budget cuts to both primary and higher education have resulted  
20 in both the revocation of programs, as well as a decrease in the quality of education  
21  
22  
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25 <sup>6</sup> The letter referenced was not submitted to the District Court at the time for hearing  
26 on the matter. However, this letter was cited by defense counsel in identical motions  
27 submitted in two additional death penalty cases and is provided in the Petitioner’s  
28 Appendix for the convenience of the Court.

1 provided. Any amount of money that could be redirected to education would have a  
2 dramatic impact on the lives of Nevada students.

#### 3 **d) Mental Health**

4  
5 Services for mentally ill individuals are also facing a lack of funding, according  
6 to Jon Norheim, a Clark County judicial hearing master. In an April 14, 2013 article  
7 written in the *Las Vegas Review Journal*, Mr. Norheim noted that due to a lack of  
8 funding, housing, case managers, treatment facilities, and intense supervision  
9 programs, he has seen the same mentally ill individuals appear in front of him “dozens  
10 of times.” (PA 557-562).  
11  
12

13 As such, it appears that though these mentally ill individuals often encounter  
14 the criminal justice system as a result of their disorders, the money is not being spent  
15 to rehabilitate and assist these people. Instead, a significant amount of money is spent  
16 to prosecute a small minority of capital offenders. Money that is better spent to  
17 prevent violent crime from occurring in the first place.  
18  
19

20 Though a potential intermediate appellate court, NVCCP, education, and  
21 mental healthcare are just four (4) of many areas in which the money spent on capital  
22 punishment would be better directed, such reallocation of resources in these areas  
23 alone weigh strongly in favor of the abolition of the death penalty.  
24

#### 25 **6. The Effect of Assembly Bill 444**

26 The passage of Assembly Bill 444 demonstrates the growing awareness of the  
27 financial impracticability of capital punishment in the State of Nevada. The taxpayers  
28

1 are fronting increasing costs in order to prosecute capital cases, and seeing little if no  
2 return on their investment. However, the State continues to prosecute death penalty  
3 cases despite these diminishing returns. The undersigned has personally addressed  
4 these very issues with the District Attorney's Death Penalty Review committee on  
5 similar cases to argue the efficacy and fiscal cost of the death penalty, to no avail.

6  
7 Despite that these crucial issues have fallen on deaf ears to those that spend the  
8 money to prosecute these actions, it appears that these issues have gained traction with  
9 the Nevada legislature when evaluating the benefit of capital punishment in this State.  
10 Much like New Jersey and the other States that have recently abolished the death  
11 penalty following a substantive evaluation of the costs versus benefit, Nevada has  
12 begun the process of modernizing its legal system. The death penalty cannot be had  
13 without significant safeguards to prevent its abuse or misapplication. Such financial  
14 safeguards come at a price that is simply not viable in the modern economic climate.

## 15 16 17 18 **7. Effective Moratorium on Executions**

19 Nevada currently does not have the capacity to humanely execute those  
20 prisoners that are currently on death row. A May 22, 2013 article in the *Las Vegas*  
21 *Review Journal* quotes Corrections Department Director Greg Cox as stating that the  
22 current gas chamber at the now closed Nevada State Prison is not compliant with the  
23 Americans with Disabilities Act and the viewing area provides little room for official  
24 and unofficial witnesses. (PA 483-485). Director Cox goes on to state that he would  
25  
26  
27  
28



1 “expect litigation to be filed challenging the use of the chamber [at Nevada State  
2 Prison] if an execution was to go forward.” (PA 484).

3  
4 Further, attempts to build another facility have been stymied by the Nevada  
5 legislature. The joint Assembly Ways and Senate Finance subcommittee unanimously  
6 voted not to fund construction of a new \$700,000.00 facility at Ely State Prison. (PA  
7 620-624). In doing so, the committee noted that the recently enacted Assembly Bill  
8 444, “required that a legislative audit be conducted on the death penalty in the state,  
9 which would include a review of facilities to carry out a death sentence.” (PA 620-  
10 624). As it stands, there is no acceptable facility in Nevada to carry out an execution  
11  
12 which has created an effective moratorium on executions pending the audit.

#### 14 **8. The Legislature Intended a Moratorium.**

15  
16 Pursuant to *Clark County v. Southern Nevada Health District*, supra, this Court  
17 must examine the statute as a whole. *Clark County v. Southern Nevada Health*  
18 *District*, 289 P.3d 212, 216 (2012). In this case, the legislature nearly unanimously  
19 voted to assess the fiscal impact of the death penalty in Nevada. During the hearings  
20 on the matter, several Senators and Assemblymen noted the exorbitant cost of the  
21 death penalty to this State. These same concerns can be found in the legislative  
22 history of the six (6) most recent states to abolish the death penalty. And most  
23  
24 telling, the legislature declined to build a new death chamber pending the AB 444  
25 audit, creating an effective moratorium on the death penalty.  
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28

1 It is apparent from the record that the legislature did not intend for the capital  
2 sentencing scheme in Nevada to operate at status quo. The legislature's effective  
3 moratorium on executions, by declining to fund the death chamber, is incongruous  
4 with continuing to try and sentence capital defendants.  
5

6 As such, Petitioner Burns requests that this Court strike the Notice of Intent to  
7 Seek the Death Penalty against him. In the alternative, Mr. Burns requests that the  
8 capital proceedings against him be stayed until the completion of the legislative audit  
9 mandated by Assembly Bill 444. Studies in both this State and nearly every  
10 American jurisdiction have demonstrated the exorbitant cost of capital prosecutions.  
11 The outcome of this audit will reflect that the costs of death penalty can not be  
12 justified by the meager results.  
13  
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15

16 **B. The District Court has the Jurisdiction to Grant the Requested Relief.**

17 The District Court held that it did not have the authority to grant the relief  
18 requested in the Petitioner's motion. (PA 678, ll. 3-18). However, it is the province of  
19 the courts to interpret statutes. See generally *In re William S.*, 122 Nev. 432, 132 P.3d  
20 1015 (2006). Generally, the plain meaning of the words in a statute should be  
21 respected unless doing so violates the spirit of the act. *Id.* at 1018-1019. If more than  
22 one reasonable meaning can be understood from the statute's language, it is  
23 ambiguous, and the plain meaning rule does not apply. *Id.* at 1019. When such  
24 meaning is unclear, the District Court must then ascertain the Legislature's intent by  
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1 reviewing the statute's terms and context, along with reason and public policy. *Id.* at  
2 1019.

3       The legislature passed Assembly Bill 444 calling for an audit of the death  
4 penalty, with an eye toward whether the fiscal impact of capital punishment is worth  
5 the benefit received by the State. (PA 50-51). The results of the audit were not  
6 ordered for the pure edification of the legislature, but clearly represent that a  
7 reevaluation of the death penalty is imminently on the horizon. Whether such  
8 reevaluation results in the abolishment of the death penalty, or a reorganization of the  
9 capital sentencing structure, remains unclear at the moment. Yet, the legislature  
10 remained silent on whether the current capital sentencing structure would remain in  
11 place while the audit was being conducted.

12       The District Court held that the legislature's silence on the issue of a  
13 moratorium precludes the existence of such a moratorium. However, the context in  
14 which Assembly Bill 444 was passed, in tandem with the effective moratorium on  
15 executions pending the audit, demonstrate that the legislature's silence on the  
16 moratorium does not automatically legislate the absence of said moratorium.

17       The Nevada Supreme Court has repeatedly held that courts shall look to reason  
18 and public policy to discern legislative intent. *Langon v. Matamoros*, 121 Nev. 142,  
19 144, 111 P.3d 1077, 1078 (2005); See also *State v. Catanio*, 120 Nev. 1030, 1033, 102  
20 P.3d 588, 590 (2004). In this case, the District Court was provided with a

1 comprehensive view of both the context and the public policy considerations  
2 surrounding the passage of Assembly Bill 444. Armed with that information, the  
3 District Court has the ability to reconcile the incongruity and ambiguity of bills that  
4 call for an audit of the death penalty and the suspension of executions on one hand,  
5 and the continued existence of capital sentencing structure in Nevada on the other  
6 hand.  
7

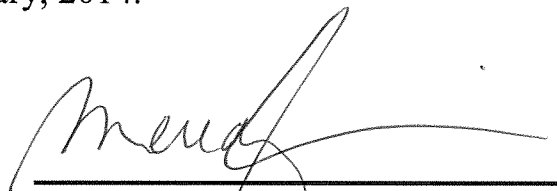
8  
9 The District Court determined that it did not have the ability to rule in the  
10 Petitioner's favor. However, the Petitioner was not calling for the District Court to  
11 legislate the institution of a moratorium, but to interpret Assembly Bill 444 consistent  
12 with the jurisdiction of the courts. As such, the District Court is vested with the  
13 authority to either strike or stay the Notice of Intent to Seek the Death Penalty, should  
14 it so find that the ambiguity of Assembly Bill 444 is resolved by the overwhelming  
15 evidence of legislative intent calling for such relief.  
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**VII.**  
**CONCLUSION**

Based upon the foregoing, the Petitioner respectfully requests this Court to direct the District Court to strike the Notice of Intent to Seek the Death Penalty in the instant case or direct the District Court to stay capital proceedings against the Petitioner until the resolution of the fiscal audit of the death penalty legislated in the recently passed Assembly Bill 444. Alternatively, Petitioner requests that this Court remand this decision to the District Court with the mandate that it has the authority to grant the instant relief.

Dated this 15 day of January, 2014.

  
\_\_\_\_\_  
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**NRAP 27(e) CERTIFICATE**

I HEREBY CERTIFY that service of the foregoing PETITION FOR WRIT OF  
MANDAUMUS OR WRIT OF PROHIBITION was made this 5<sup>th</sup> day of January,  
2014, by hand delivering a true and correct copy of the same to the offices of:

THE HONORABLE JUDGE JEROME TAO  
REGIONAL JUSTICE CENTER, 10<sup>TH</sup> FLR  
200 LEWIS AVENUE  
LAS VEGAS, NEVADA 89155  
TEL: (702) 671-4440  
FAX: (702) 671-4439

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


And by mailing a correct copy to:

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Dated this 5<sup>th</sup> day of January, 2014.

  
An Employee of Patti, Sgro, Lewis & Roger