

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,

v.

NATASHA JACKSON,
Respondent.

Electronically Filed
Feb 24 2015 03:08 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 67071

APPELLANT'S SUPPLEMENTAL APPENDIX

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

DAN SILVERSTEIN
Deputy Public Defender
Nevada Bar #007518
CHRISTY CRAIG
Deputy Public Defender
Nevada Bar #006262
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar # 012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

INDEX

<u>Document</u>	<u>Page No.</u>
Recorder's Transcripts of 11/10/14 (Hearing Re: Petition for Writ of Habeas Corpus), filed 01/21/15	1-19

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 24, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

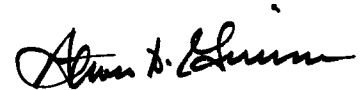
CATHERINE CORTEZ MASTO
Nevada Attorney General

DAN SILVERSTEIN
CHRISTY CRAIG
Deputy Public Defenders

RYAN J. MACDONALD
Deputy District Attorney

BY /s/j. garcia
Employee,
Clark County District Attorney's Office

RJM/Steven Rose/jg



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

NATASHA GALENN JACKSON,

Defendant.

CASE NO. C-300032

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

NOVEMBER 10, 2014

ROUGH DRAFT

RECORDER'S TRANSCRIPT OF HEARING RE

PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State:

PAMELA WECKERLY, ESQ.
Deputy District Attorney

For the Defendant:

DAN A. SILVERSTEIN, ESQ.
CHRISTY CRAIG, ESQ.
Deputy Public Defenders

RECORDED BY: VICTORIA BOYD, COURT RECORDER

1 MONDAY, NOVEMBER 10, 2014 AT 9:52:21 A.M.

2
3 THE MARSHAL: Page twenty-six, Natasha Jackson.

4 THE COURT: Case number C300032. Okay. Could we have appearances
5 for the record, please?

6 MS. WECKERLY: Good morning, Your Honor. Pamela Weckerly on behalf of
7 the state.

8 THE COURT: Thank you.

9 MR. SILVERSTEIN: Dan Silverstein and Cristy Craig on behalf of Ms.
10 Jackson who is present in custody.

11 THE COURT: Thank you. Good morning. So, this is on calendar as the
12 Petition for Habeas Corpus pre-trial.

13 MR. SILVERSTEIN: Yes, Your Honor.

14 THE COURT: Mr. Silverstein.

15 MR. SILVERSTEIN: Your Honor, I'm gonna take the arguments in turn, I'm
16 gonna start out with the Counts 1 and Count 8. The argument that we've made is
17 that there was insufficient evidence to support those counts. And no based on the
18 fact that no crimes were committed but based on the fact that the evidence that was
19 presented was insufficient to meet the standard of the crimes that they've charged.
20 In other words, they've charged Ms. Jackson with Burglary 1 and Possession of a
21 Deadly – of a Firearm.

22 Now there are some other charges that are – involve a use of a deadly
23 weapon and has – we did not challenge those charges, we didn't file a writ on those
24 charges because I think those charges were properly brought, but when you talk
25 about possession of a firearm that is a different standard than the use of a deadly

1 weapon. And the case that Ms. Weckerly cited, Brooks versus State, actually points
2 out that difference between the use and the possession. And the Court has said
3 that you can have use without possession but they've never said that you can have
4 possession without ever touching the weapon and that's what happened in this
5 case. Ms. Jackson while she was present with the co-defendant who clearly
6 committed a burglary while in possession of a firearm based on the evidence, Ms.
7 Jackson never touched the weapon, never entered the home with the weapon,
8 never gained possession of the weapon while in the home. At no point did she
9 touch the weapon. The evidence that was presented to the Grand Jury was that the
10 weapon was struggled over by one of the victims and Mr. Winters who was – who
11 was shot and killed by the police after this incident, but at no time did any witness
12 testify that Ms. Jackson had possession of the firearm. And so while the use
13 enhancements I believe are properly charged because she can be on the hook for
14 the use that Mr. Winters perpetrated, I don't believe she can be on the hook for
15 burglary while in possession having never touched the weapon and there's no case
16 law that says otherwise. So, I'd ask the Court to dismiss Count 1 and Count 8,
17 those are the burglary while in possession charged.

18 There's an additional argument as to Count 8, and I believe Count 8 – I
19 don't think the state has even shown a criminal intent that would be sufficient to
20 make out a charge of regular burglary much less burglary while in possession. The
21 state – the evidence that came out at the Grand Jury was that while inside this
22 abandoned house – and I just want to clarify that Count 1 pertains to the house
23 where the victims resided, Count 8 pertains to the abandoned house that her and
24 Cody entered after what happened inside the residents' homes.

25 So, what happened in the abandoned house is that Ms. Jackson

1 entered with Mr. Winters and while they were inside the police claim that Ms.
2 Jackson was pretending to be a hostage and faking the fact that Mr. Winters was
3 terrorizing her and screaming out, "help, help, help." And the police make it sound
4 that this was sort of a subterfuge that Ms. Jackson was just pretending to be a
5 hostage. But even if that's the case and even if you take everything Ms. Weckerly
6 says as fact that she was just pretending to be a hostage, there is no crime
7 pretending to be a hostage. Entering the house with the intent to pretend to be a
8 hostage is not burglary. In order for there to be a burglary she has to enter that
9 home with the intent to commit some very specific enumerated crimes and none of
10 those were in her head – or facts established that she committed any of those
11 crimes while she was inside that abandoned home. So, I'm going to ask the Court
12 to dismiss Counts 1 and Count 8.

13 Now, I have some other arguments as to the indictment in its entirety.
14 I'm not sure if the Court wants to argue – wants me to argue everything at once or
15 go back and forth.

16 THE COURT: I'd prefer to you – to hear your entire argument and then I'll
17 hear Ms. Weckerly and any rebuttal from you.

18 MR. SILVERSTEIN: Okay. Thank you, Your Honor.

19 With respect to the argument that the state should have introduced Ms.
20 Jackson's entire statement, I think that there are two competing views of the best
21 evidence rule that are presented in the briefs. My view of the best evidence rule is
22 that the best evidence of what a statement says is the statement itself. In
23 otherwords the state can't put on a witness to give a summary version of that
24 statement to the Grand Jury without actually introducing the statement because the
25 Grand Jury should have the right to look at the statement and decide whether the

1 witness told them what actually happened or whether they were just spinning it. The
2 way that the Grand Jury went down in this case the lead detective testified to what
3 he thought the statement meant and his gut feelings about the statement and his
4 impressions about the statement. And he's – he's more than welcome to do that,
5 but the best evidence rule also requires that the Grand Jury have the opportunity to
6 see if the actual evidence he was describing matches what he said. Now, Ms.
7 Weckerly's version of the best evidence rule is that, well, as long as everybody
8 agrees that what was on the tape was Ms. Jackson talking we don't actually have to
9 introduce it. And I don't believe that that is a proper interpretation of the rule. I think
10 the rule is is that the state cannot put on a biased, subjective view of evidence that
11 exists without introducing that evidence. The tape of her statement, Ms. Weckerly
12 had it, she could have introduced it. She didn't have to play it for the Grand Jury,
13 just to introduce it and give the Grand Jury the opportunity to review the statement
14 to see if it matched what the police detective testified to. And I think not doing that is
15 a violation of the best evidence rule.

16 And if the Court disagrees with me as far as the best evidence rule I
17 would also point to NRS 47.120. And that statute says that the state – “Any time a
18 part of a writing or recorded statement is introduced by a party the party may be
19 required at that time to introduce any other part of it which is relevant to the part
20 introduced.” And the reason I think this statute is also implicated here is because
21 what the state did was they introduced everything Ms. Jackson said that supported
22 the idea that she was guilty and all of the things she said that suggested that Mr.
23 Winters was coercing her, forcing her, terrorizing her and she committed she crimes
24 under duress. Those statements were either not introduced at all or they were
25 introduced in such a manner as to make them valueless to the Grand Jury because

1 the detective minimized everything Ms. Jackson said when she would say that,
2 “Well, I couldn’t get away from Mr. Winters.” The police officer said, “Well, in my
3 opinion she was making that up.” I mean, that to me is not the best evidence of
4 anything.

5 As far as my next argument, the state violated the statute requires them
6 to present exculpatory evidence to the Grand Jury. And this – this argument is – I’ll
7 concede it’s really kind of wrapped up in the previous argument because it’s the
8 failure to introduce Ms. Jackson’s statement in its entirety that in my opinion is a
9 violation of NRS 172.145 subsection 2. I will admit that Ms. Weckerly did introduce
10 certain aspects of that statement and I’m sure she’s going to say that she fulfilled
11 her obligation because the detective did testify that Ms. Jackson said certain things
12 that suggested duress, but the statement itself had a – there were facts in her actual
13 statement that were not presented to the Grand Jury. In addition, her statement
14 would have presented her story in a manner that was not shaded and biased the
15 way that the lead detective in this case shaded it to the Grand Jury.

16 And finally, Your Honor, my last argument is that the state failed to
17 properly instruct the Grand Jurors on the felony murder rule. There is – there’s no
18 question that the state told the Grand Jury about the felony murder rule. I mean,
19 they wanted to tell them about the felony murder rule because that was one of their
20 theories. So, obviously they wanted the Grand Jurors to know that is you commit
21 murder in the course of a felony that you can be on the hook for first degree murder,
22 but the problem is that the state only gave them half of the law. There’s another part
23 of the felony murder rule that that Grand Jury was not told about which is that the
24 intent to commit that felony must exist before or at the time of the killing. If you kill
25 someone and then an hour later you decide, hey, I’m gonna take their car that is not

1 felony murder; that is not murder in the course of a robbery. It's a killing followed by
2 an act of robbery. The Grand Jury was not told about that and that is sort of a new
3 aspect of Nevada law. That's from the Nay versus State case which is not – it's a
4 fairly recent case but it is the law and it is something the Grand Jury should have
5 been told about.

6 And I'm well aware of Hylar versus State, I'm well aware that the state
7 has no obligation to present any instructions and I understand that. And my position
8 is if the state didn't want to present any instructions to the Grand Jury they didn't
9 have to, but my position is what you can't do is present half of the instructions. You
10 can't tell the Grand Jury about everything that points towards guilt and not tell them
11 about anything that points towards a potential defense. It would be like in a case
12 where the state is a little weak on the deliberation aspect of first degree murder. It
13 would be like telling the Grand Jury first degree murder is a willful and premeditated
14 killing and leaving out the part that includes deliberation because that's where you
15 know that you're weak. That is not something that Hylar has ever suggested is
16 allowed and that is what happened here. If they didn't want to instruct at all they
17 don't have to, I agree with that. But you can't tell the Grand Jury half the law in a
18 way that misleads them into believing that there was no defense. And so those are
19 my arguments to the Court. And if the Court has any questions after Ms. Weckerly's
20 argument I'll be happy to answer them.

21 THE COURT: Okay. Ms. Weckerly.

22 MS. WECKERLY: Your Honor, on July the 29th of this year this Defendant
23 along with Cody Winters were stranded on the side of the freeway in a vehicle that
24 would later prove to be stolen but was not charged in this indictment. They had a
25 Nevada Department of Transportation worker ask them if they needed help. They

1 both told that worker the same lie that they had lost a car key. Eventually Ms.
2 Jackson and Mr. Winters go back and forth speaking with the Nevada Department of
3 Transportation worker, eventually Mr. Winters pulls a gun on the worker and Ms.
4 Jackson unloads the property in the stolen car into the NDOT vehicle and she gets
5 what the victim later describes it looks like a machete in a sheath and they both get
6 inside the vehicle of the transportation worker and essentially carjack him to an area
7 just off the freeway. During that time period Ms. Jackson never asked for help, she
8 participates and coordinated actions with Mr. Winters and she of course has her
9 own weapon and she also unloads all the stuff.

10 When they get to the neighborhood where the Ramos's live Mr. Winters
11 gets out of the state vehicle and Ms. Jackson gets out as well, she's unloading stuff
12 never asking for help, never saying she doesn't want to do anything and also she
13 has her weapon at that point. Eventually the two make it to the Ramos residence
14 which is a totally random selection at that point. They have no connection to this
15 residence whatsoever. The teenage or nineteen year old son of the victim in the
16 case, Mr. Ramos, eventually wakes up that morning and hears his mother
17 screaming, "Dominic, come help us, Dominic, come help us." This nineteen year old
18 comes out to the living room and sees Mr. Winters and his father engaging in a
19 struggle over a gun and he observes this Defendant, Ms. Jackson, stabbing his
20 mother in the back with a screwdriver and pulling her hair. Dominic has to pull Ms.
21 Jackson off of his mother in order to stop Ms. Jackson from attacking her. And the
22 struggle over the gun occurs, Dominic hears a shot go off and his father doesn't
23 move after that. Inside the house was also Dominic's seven year old brother
24 Michael and his teenage sister Jasmine.

25 When the gun finally went off he's asked for car keys because that's

1 what these two were seeking in order to get out of there. Dominic can't find the
2 keys, he gets his sister and they climb out a window and run around in the
3 neighborhood and hide under an RV in a neighbor's lot. He eventually comes out to
4 see if he can find his mom and brother and figure out what's going on and he sees
5 this Defendant looking around for Mr. Winters because she wants to hook back up
6 with him. The two are eventually – by this time the police have come because 9-1-1
7 has been called to the area and Ms. Jackson somehow hooks up with Mr. Winters
8 again, is in yet another residence that's adjacent to – where the RV was and it turns
9 out to be an abandoned residence. They're in that residence for several minutes
10 and they're engaged with the police the whole time. At one point there's an officer
11 who is in the next door house looking over a wall and he can see into the window
12 where Ms. Jackson is with Mr. Winters. At one point Mr. Winters is indeed holding a
13 gun to Ms. Jackson's head and she's saying, "Please help me, help me." But then
14 that stops. He puts – he doesn't hold the gun, he goes upstairs and Ms. Jackson is
15 left downstairs. They move place back and forth, they're separated at various times
16 inside the residence. Finally the officer tells Ms. Jackson to come to him and they
17 will rescue her. She comes – she can't get over the wall, the officers assist her to
18 pull her over the wall and at that point when they're close, when they're dealing with
19 her is when Ms. Jackson shouts out to Mr. Winters, "Shoot them, Cody, shoot them."
20 And she yells that several times to the officers who are stunned because they
21 believed they have just rescued a hostage.

22 Count 1 in this case is charged under the regular burglary statute which
23 is 205.060. That's just a straight burglary. Subsection four of the statute enhances
24 the sentence if you use or possess a firearm – sorry, possess a firearm in
25 connection with the burglary. Now certainly from the facts we know that there are

1 slighter marginal evidence that Ms. Jackson certainly without question committed a
2 burglary. She doesn't know the Ramos's, she was on the inside of the house, she
3 knew they were asking for car keys because they wanted to get out of the place.
4 We certainly know from her prior conduct with the state worker that the two were
5 seeking a car, they were seeking a vehicle. She goes into the residence with Mr.
6 Winters; she has committed a burglary at that point because they're seeking car
7 keys. They later ask Dominic for the keys when they can't find them and they can't
8 get them from the ultimate murder victim in this case, Mr. Ramos. So, there is
9 certainly slight or marginal evidence at least of the burglary count.

10 Now, what the defense is quibbling with or arguing against is whether or
11 not the enhancement of with a deadly – or in possession of a deadly weapon can
12 apply. I could not find any case law that dealt with that specific section of the
13 statute. Mr. Silverstein is correct that the only interpretation of that is sort of a
14 related interpretation when it's with use of a deadly weapon, but in this instance
15 she's at least in constructive possession of the weapon. She and Mr. Winters are
16 working together. They don't know the Ramos's; they have no reason to be in that
17 house. And she knows by seeing it, at least with the state worker, that they have a
18 gun as they're going into that Ramos residence and I'd say that substantiates with
19 use of a deadly weapon. Essentially the argument of the defense seems to be that
20 you cannot enhance on that defense if there's only one gun between the two
21 perpetrators of the crime and that doesn't seem like a proper interpretation of the
22 law to me.

23 If the Court finds some issue with how it's pled I don't see her as a true
24 aidor and abettor on the burglar because she doesn't unlock a door, she doesn't
25 provide a ruse on the outside. She's not sitting in a getaway car, she's in there,

1 she's in there stabbing Julie Ramos. I mean, she's in on this, you know, up to her
2 ears. While she may not be the person that holds a gun she definitely knows they
3 have a gun going in there. However, if the Court wants us to add pleading language
4 for aiding and abetting that she was aware that her co-conspirator had a gun, you
5 know, that's certainly permissible under the law and under statute because all that's
6 required for us to amend is notice and certainly adequate evidence has been
7 presented to the Grand Jury to substantiate that she knew a gun was in play when
8 they committed this burglary. That same argument would apply to the abandoned
9 residence as well.

10 Mr. Silverstein's secondary argument on the abandoned residence is
11 that there was no evidence elicited that showed her intent to commit a crime once
12 she went into the abandoned residence. The state views that differently. First we
13 know they carjacked Mr. Euford who is the state worker, so they wanted
14 transportation which suggests a robbery. They certainly went into the Ramos house
15 seeking transportation which suggests they're going into this house too. They don't
16 know it's abandoned of course when they get in there which suggests that they're
17 entering to commit another robbery, find a car to get out of there. But secondarily at
18 this point when they go into that abandoned residence they know police are in the
19 area and she engages and Mr. Winters engages in a ruse to lure the police closer in
20 so Mr. Winters can shoot at them. So, she enters that residence with the intent to
21 commit murder. And certainly at this stage of the proceedings where we only have
22 to satisfy a burden of slight or marginal evidence the state has met its burden as to
23 burglary for both of those two counts.

24 Mr. Silverstein – excuse me, is correct that we have a different
25 interpretation of the best evidence rule. When the contents of a writing or when the

1 contents of a reporting – or a reporting are at issue that is when the best evidence
2 rule applies in contract situations or whether something or not – something was
3 recorded or not. But as the Nevada Supreme Court, Ninth Circuit, and U.S.
4 Supreme Court have recognized what is on a recording is not at issue in the criminal
5 case. In a criminal case what is at issue is literally, what did she say? Whether it's
6 contained in the recording or not the best evidence rule has no application in that
7 sense. And curiously the writ and the reply there is no citation to this Court
8 whatsoever of any case where the best evidence rule has been used to dismiss a
9 portion or a part of an indictment or even at trial let alone an indictment or a
10 preliminary hearing transcript when the state elicits testimony about a statement
11 from an officer without playing their recording or putting in a transcript. We do this
12 all the time. I mean, where is the case law? There isn't a single case that the
13 defense has cited where it says this was a violation of the best evidence rule. By
14 contrast in the state's return, we did cite this Court to Carter and the Ninth Circuit
15 and the U.S. Supreme Court case where those courts all found that there's no
16 application of the best evidence rule in this context in a criminal case.

17 Where I think their argument is a legitimate argument in a writ is when
18 they say there was no – there wasn't a fair presentment of what was contained in
19 her statement which is essentially her claims of duress. That could be an issue
20 raised in a writ and certainly statements made by a defendant that could explain
21 away the charges are – it is our obligation to present those at Grand Jury, but the
22 duress defense is a little bit different than the case cited in the habeas petition. The
23 case cited in the petition concerns a sexual assault and they talk about not
24 introducing a statement of the defendant where he claimed consent, and consent or
25 non-consent is an actual element of a crime in a sexual assault. By contrast duress

1 is, yes, I committed all those elements, all those elements were met but I really – I
2 didn't mean to do that, I was forced to do it or I didn't want to do it. That doesn't
3 explain away the charge. Those questions are left of course to the trial jury because
4 Grand Jury presentments, preliminary hearings and such aren't supposed to be an
5 entire recitation of every fact. Those types of statements duress and even self-
6 defense are not things that are to be introduced at the preliminary hearing stage or
7 at the Grand Jury stage. However, even the statements that are pointed to in this
8 instance by the defense concern, well, how much of the duress was – you know,
9 how much of it was presented? They certainly concede that some statements
10 regarding her claims of duress were presented but they don't say how that would
11 have changed the outcome. I mean, the Grand Jury was instructed on duress at the
12 request of defense counsel once he received the Marcum notice, we did instruct on
13 that. They heard her claims of duress. Maybe not the certain instances that
14 defense counsel wanted. But given that we didn't even have an obligation to
15 present it at all there's no possible reason an indictment could be dismissed based
16 on that. Finally, it doesn't apply to Count 4 which is murder. Duress is never a
17 defense to murder.

18 But overarching all of that of course is the Lay [sic] case which is 110
19 Nev. 1189 which says that in order for there to be sufficient prejudice to dismiss an
20 indictment the Court has to question whether or not the outcome – and in this case a
21 true bill would have been different if whatever was improper wasn't presented. And
22 that certainly is an easy answer, right? I mean, we had the testimony of Euford, we
23 had the testimony of Dominic both of whom identified Ms. Jackson and described
24 vividly her interactions and what her actions were in committing all of these crimes.
25 There's no question at all that an indictment would have been returned regardless if

1 we had added in a few more statements about her claims of duress.

2 Lastly, in terms of the Lay [sic] case and the felony murder argument. I
3 believe that's the last argument. The Nay case – sorry, Lay. The Nay case is a
4 valid jury instruction but that's a trial instruction. That case has been around since
5 2007, that's the citation on the case so we're – you know, we're coming up on seven
6 years old. And that case has never been a reason – or failure to instruct, as to Nay
7 has never been used to dismiss any portion of an indictment. I'd also reference this
8 Court to the Cortinas case which says that even if there's a faulty theory within your
9 murder – within your murder charge, if there's sufficient evidence on one of the
10 theories of liability a conviction can be sustained. Lastly, they cannot cite to this
11 Court a single case where failure to instruct according to Nay was – was an
12 indictment properly dismissed.

13 Finally, there's no question that when Ms. Jackson entered that
14 residence an ultimately the murder of Mr. Ramos occurred that they were there to
15 commit a robbery. There were there to do that when they showed up on the
16 doorstep. They don't know the Ramos's; they don't have any reason to be in that
17 house. The police hadn't been called by that point; they asked Dominic for the keys
18 because they want to get out of there. Their whole point was they needed
19 transportation. Their first car broke down, the other car could have been tracked
20 according to the state worker and they go to the Ramos house seeking another –
21 another means of travel. So clearly, even if you applied Nay, their intent to commit a
22 robbery was formed prior to the murder and based on all of that the defense or the
23 Petitioner has not presented this Court with any legally proper basis to dismiss the
24 indictment.

25 THE COURT: Okay. Thank you. Mr. Silverstein.

1 MR. SILVERSTEIN: Your Honor, I'll be brief. I just want to focus on the first
2 argument again as far as the burglary charges. And even Ms. Weckerly kind of
3 blurred the distinction between use versus possession when she was making her
4 argument to the Court and I think it's an important distinction. The reason that we
5 didn't challenge Counts 2, 3, 4 and the other counts that have the use enhancement
6 is because we understood that they can charge use even though she didn't touch
7 the gun. However, there is no case law that suggests they can charge her with
8 possession without touching the gun. And when Ms. Weckerly argues to the Court
9 that "Ms. Jackson was not a true aider and abettor" -- those were her words to the
10 Court. "Ms. Jackson was not a true aider and abettor at least with respect to the
11 burglary charge." So, how then can she be held to be in constructive possession of
12 the weapon? That she wasn't an aider and abettor in those counts? Then how can
13 she be responsible for Mr. Winters' actions? That doesn't make much sense to me
14 either.

15 They have charged Ms. Jackson in those -- in Counts 1 and Count 8
16 directly with the crime. They haven't charged her with any conspiracy, they haven't
17 charged her with any aiding and abetting, they charge her directly with doing these
18 things. Apart from what Mr. Winters did -- there's no question that Mr. Winters
19 committed that crime and if he was alive to stand trial I'm sure that those counts
20 would stand against him, but this woman did not possess a firearm inside the house,
21 she didn't possess a firearm before she entered the house, she didn't possess a
22 firearm while she was in the house. She was never in possession of a firearm and
23 to say that she's responsible for that possession I think runs contrary to what -- the
24 case that was cited in Ms. Weckerly's own return I think it's contrary to the Brooks
25 case. The Brooks case says that possession is not an element of use. You can use

1 a weapon without possessing it but that's suggested you – in order to be on the
2 hook for possession of the weapon you actually have to possess it because
3 otherwise it would make – their ruling would make no sense. I don't believe the
4 Brooks decision can be read any other way then to say that if you use a – you can
5 use a weapon without holding it but you can't possess a weapon without holding it.
6 And so that's – that is the argument that I would make to the Court on those counts.

7 THE COURT: Okay. So, the Court is inclined to grant the petition in part and
8 deny in part. With respect to Count 1 and Count 8 Defendant's petition is granted as
9 the state has failed to present slight or marginal evidence that the Defendant
10 possessed a firearm or a deadly weapon during the commission of the burglaries of
11 the Ramos residence or the vacant house. And the Court notes NRS 205.0560
12 subsection 4 specifically states: "A person convicted of a burglary who has in his or
13 her possession or gains possession of any firearm or deadly weapon at any time
14 during the commission of the crime, at any time before leaving the structure or upon
15 leaving the structure is guilty of a Category B Felony. Defendant must present slight
16 or marginal evidence that Defendant possessed – I'm sorry. Plaintiff must present
17 slight or marginal evidence that Defendant possessed a firearm or deadly weapon
18 as opposed to just using the weapon as set out in NRS 1 – NRS 193.165." Because
19 the statutes are separate and require the state to prove different facts Brooks v.
20 State is inapplicable here and the state's argument that it presented slight or
21 marginal evidence to support Counts 1 and 8 by providing evidence that Defendant
22 was aware that Cody David Winters has a firearm during the burglaries fails.

23 With respect to the Defendant's argument with respect to Count 8
24 burglary while in possession of a deadly weapon should be dismissed because the
25 state failed to presents slight or marginal evidence that the Defendant intended to

1 commit a felony inside the vacant house. Defendant's petition is denied. The
2 indictment shows that the state asserts that the Defendant entered the vacant
3 property with the intent to commit murder therein which fulfills the intent requirement
4 for burglary. The state did provide slight or marginal evidence to support a finding of
5 probable cause that the Defendant entered the vacant house with the intent to
6 commit murder. The state presented testimony from Officer William Moore that the
7 Defendant called for help at the vacant house as if she were Winters' hostage but
8 that once she was pulled to safety by officers the Defendant began screaming for
9 Winters to shoot the officers. Officer Moore further testified that the Defendant told
10 him Winters wanted to commit suicide by cop. Further, the state presented
11 testimony from Detective McCarthy that the Defendant told him she has called out
12 for Winters to shoot the officers because she knew it was Winters intention to get
13 into a shootout with the police and be killed in the process. Intent to commit
14 burglary maybe inferred based on the Defendant's conduct and other facts in this
15 case.

16 As to the defense argument that the state erred by presenting the
17 testimony from Detective McCarthy as opposed to Defendant's recorded statement,
18 the Court is not persuaded by that argument. Defendant's argument that the state
19 violated NRS 172.135 subsection 2 fails. The Court must consider whether the
20 evidence which was not presented to the Grand Jury would serve to explain away
21 the charges. The evidence does not explain the charges – does not explain away
22 the charges or where it supports a finding other than Defendant's innocence. Here
23 there was no violation of NRS 172.145 as the statements Defendant references in
24 the petition would not serve to explain away the charges. These statements
25 Defendant cites certainly support an argument that the Defendant acted under

1 duress but they do not only support a finding of innocence.

2 The Defendant's argument that the state violated NRS 47.120
3 subsection 1 fails. The best evidence rule requires the production of an original
4 document or recording where the actual contents of the document or recording are
5 at issue and sought to be proved. Here the best evidence rule is inapplicable.
6 Detective McCarthy's testimony was not to prove the contents of the Defendant's
7 recorded statement but to testify regarding his interview with the Defendant. The
8 best evidence rule is not implicated in an instance where a recording of the interview
9 is not played for the jury.

10 The Defendant's argument that the state improperly instructed the jury
11 – Grand Jury on the felony murder rule the Court is not persuaded by that argument.
12 In order for a robbery to serve as an underlying felony for a charge of a felony
13 murder rule the state must present evidence that the Defendant intended to commit
14 the robbery before killing the victim. What intent the Defendant had and when that
15 intent was formed may be inferred from Defendant's actions during the –
16 immediately after the killing. The Nevada Supreme Court has held that it is not
17 mandatory for the prosecuting attorney to instruct the Grand Jury on the law, instead
18 the Nevada Supreme Court limited the state's responsibility to informing the Grand
19 Jury of the specific elements of any public offense which they may consider as the
20 basis of the indictment.

21 The state provided the following instruction to the Grand Jury on felony
22 murder. A murder which is perpetrated or which is committed during a perpetration
23 or attempted perpetration of a robbery or a burglary, or a home invasion is murder of
24 a first degree whether the killing was intentional, unintentional or accidental. The
25 state did properly instruct the Grand Jury on felony murder as the instruction calls

1 for the murder being perpetrated during the perpetration of or attempt to commit the
2 robbery, burglary, or home invasion. While the jury – while the Grand Jury
3 instructions does not provide the emphasis on when intent is formed to commit a
4 felony or a killing to constitute felony murder the state did provide that element as
5 required by Clay.

6 I'll ask the defense to draft an order for the Court's signature. Please
7 run the proposed order passed Ms. Weckerly before you submit it to me.

8 MR. SILVERSTEIN: Thank you, Your Honor. So, Counts 1 and 8 are
9 dismissed?

10 THE COURT: Yes.

11 MR. SILVERSTEIN: Thank you, Your Honor.

12 MS. WECKERLY: Could I just ask for a clarification as to Counts 1 and 8? Is
13 the Court striking while in possession of a deadly weapon or are you striking the
14 burglary as well?

15 THE COURT: As the matter was briefed the entire counts have been stricken.

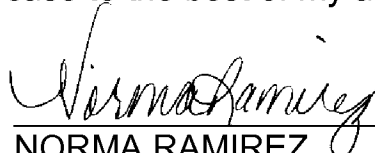
16 MR. SILVERSTEIN: Thank you, Your Honor.

17 MS. WECKERLY: Okay.

18 [Proceedings concluded at 10:25:09 a.m.]

19 * * * * *

20
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to the best of my ability.

23 

24 NORMA RAMIREZ
25 Court Recorder
District Court Dept. XXII
702 671-0572