

1 dissuading a witness or victim from reporting a crime or
2 commencing prosecution.

3 I looked into those matters further. Reviewed case
4 law. I will be candid I also reviewed anything I could
5 get my hands on, which was inclusive of some unpublished
6 decision. Again, we know that counsel is under direction
7 from our Supreme Court not to cite to or rely on
8 unpublished decisions. And this court as well takes that
9 admonishment seriously.

10 However, to the extent we can gather some guidance
11 from review of everything that has gone before on these
12 matters that could be informative, I'll be candid, I
13 looked at everything.

14 As far as the issue with regard to the removal of the
15 life support, I cannot find cases that specifically
16 address whether that is considered exculpatory evidence
17 that required disclosure. But I do have cases that
18 indicate the removal of life support itself does not
19 relieve the criminal defendant of the causal liability for
20 the alleged murder.

21 In these circumstances, if that is not going relieve
22 the Defendant of the causal liability for the murder, even
23 if it was favorable, I do not believe that it falls into
24 the category of the probability -- reasonable probability
25 of the results being different if this information had

1 been disclosed. It does not explain away the charges.

2 And it does appear though -- the fact she was on life
3 support in order for her organs to be harvested made to
4 the grand jury, it wouldn't seem to make the difference
5 that the State did not give the grand jury that
6 information. Specifically in the language the defense was
7 asking for it. So the Court is not persuaded that this is
8 a basis upon which relief should be granted.

9 The Court does believe that the Defendant has been on
10 notice, and that the language was necessary to the State's
11 case.

12 And with regard to the vacuum, the circumstances of
13 the weakness of the chain of custody, again, I do not find
14 that there is that weakness in the chain of custody.

15 The only other argument -- I do find also that the
16 State did present at least slight or marginal evidence for
17 probable cause determination to be made.

18 I think the only issue where the Court has a concern
19 was the introduction of the evidence of the alleged prior
20 bad acts, or what would be constituting prior bad acts.
21 There is some case law that gives us guidance that in
22 those circumstances, even if the State had introduced what
23 could be admissible bad acts evidence, as long as there
24 was sufficient evidence to support the grand jury's
25 finding of probable cause, it would be likely to still

1 have the same outcome. And I believe that that is the
2 appropriate circumstance to find here. That the slight or
3 marginal evidence was shown, even without the alleged
4 improper bad act evidence, that it's sufficient to support
5 the grand jury's finding of probable cause.

6 So I'm not persuaded ultimately by the arguments made
7 in the original petition that those were sufficient to
8 warrant relief, and on those bases I am denying the
9 petition.

10 Obviously, the much more difficult determination to
11 make was with regard to the addendum and whether or not
12 the existence of this Moyamoya disease would explain away
13 the charges and then ultimately whether the relief was
14 appropriate to be granted.

15 I do find that the fact that the victim may have
16 suffered from the Moyamoya disease would tend to explain
17 away the charges. And it could account for why the
18 alleged victim had brain hemorrhaging, that was
19 essentially reported by the doctors to be apparently 2 to
20 5 days old when the incident occurred prior to that time
21 frame.

22 However, if you look at the statute, the statute
23 clearly indicates that the State needed to provide
24 evidence of which it is aware, that is exculpatory. And
25 they are required to present that to the grand jury.

1 In this particular case the medical records showing
2 the potential of the suffering of the victim of the
3 Moyamoya disease, the State has provided what I believe to
4 be -- and the facts and circumstances of this case I
5 believe to be shown that the State did not have knowledge
6 that the Moyamoya disease existed, or that it withheld
7 that evidence. In fact, the representations made by
8 counsel were that it did inquire of the doctor and the
9 doctor believed Moyamoya disease had nothing to do with
10 the brain hemorrhage.

11 At the end of the day it is telling to this Court
12 that it wasn't even necessarily clear to the defense,
13 until much later in the process, that this is something
14 that could or would potentially explain away the
15 circumstances.

16 So based on how I believe the statute is intended to
17 apply, the State needed to be aware of the exculpatory
18 evidence and had to have made a determination to not
19 disclose it. I believe simply in these circumstances that
20 those facts are not in existence.

21 I don't have to make a determination that's been
22 pointed out before, that the Moyamoya disease actually
23 existed, or the victim actually succumbed to it in order
24 to grant petition. That is true. But I do need to find
25 that the district attorney was aware of the evidence and

1 that it chose to not submit it to the grand jury.

2 The medical records, as I said, indicated that this
3 may have existed, but it does not appear the district
4 attorney was aware that there was exculpatory value in
5 those medical records. They relied on the opinion of the
6 expert who had reviewed all the medical records, who had
7 indicated there was no other explanation for the alleged
8 victim's death.

9 The circumstances are such that I believe that
10 denying the petition is the appropriate course of conduct
11 here. Certainly the Defendant is going to be able to
12 potentially provide this in his defense. But I do not
13 find that it supports or justifies the dismissal of the
14 charges on the statute that is cited.

15 MR. SILVERSTEIN: May I.

16 THE COURT: Please, Mr Silverstein.

17 MR. SILVERSTEIN: Your Honor, the court's
18 reading of the statute of NRS 172.145 and the reasons the
19 Court has just put on the record, quite frankly, is wrong.
20 It encourages the State to put its head in the sand and
21 intentionally not look at medical records, intentionally
22 not look at evidence that could contain exculpatory
23 evidence.

24 What this Court's ruling does is it encourages
25 willful ignorance on the part of the State. The statute

1 certainly does not say how the Court has read it. That's
2 not what the statute says. If there is evidence that the
3 district attorney is aware of, it must be presented to the
4 grand jury. The Court has already ruled that the evidence
5 had exculpatory value. That, quite frankly, at the end of
6 the analysis.

7 The fact that Mr. Stephens or his expert didn't read
8 these records closely enough to understand the value is
9 not a defense to the statutory obligation.

10 The fact that the records had this evidence, the fact
11 that Mr. Stephens had those records prior to the grand
12 jury presentment, and in fact said they were critical and
13 necessary to the prosecution, I mean, what -- basically
14 what the Court's ruling does is it encourages the
15 prosecutor to come in and say, well, we didn't read our
16 evidence. We didn't know. And that's somehow a defense
17 and gets them out of their statutory obligation. It's
18 quite frankly -- it is a ruling that encourages ignorance
19 on the part of the State. It is a ruling that does not
20 put forth -- does not support the reasoning behind this
21 obligation. It's a ruling that, quite frankly, really
22 does a disservice to the rights of Mr. Mayo and two other
23 defendants.

24 THE COURT: And I absolutely appreciate, Mr.
25 Silverstein, your position on that. Again, I did not take

1 this review lightly, and I did not make this decision
2 lightly.

3 I will tell you that I've had argued, obviously, in
4 this case both ways. I've had it argued by the State,
5 we're walking down a slippery slope here if we do this
6 thing because where do we stop and where do we term that
7 some condition that a victim may have had is something
8 that the State is obligated to raise and bring to the
9 attention of the grand jury. And I've had sort of --
10 maybe not the mirror -- but somewhat of the reverse argued
11 here today that by making this ruling, the Court is now
12 discouraging the State from actually looking at and
13 understanding this information.

14 I think what we have to look at -- and I absolutely
15 will respect it if the Supreme Court agree with you and
16 doesn't agree with me on how to interpret this. But I
17 think what we have here is a circumstance where I don't
18 believe the State ignored the facts that weren't present
19 before it. I don't believe the fact that it's potentially
20 an explanation for what occurred to this victim is the end
21 of the inquiry.

22 I think if the requirement is that the inquiry has to
23 be that the State indicated to us that it absolutely spoke
24 with the doctor, it spoke with its expert witness and that
25 expert witness fully assessed the records. And I know

1 that the argument was made previously that was kind of
2 compounding the problem when you have a doctor saying to a
3 grand jury I looked at everything and really this is all
4 there is.

5 But the reality is is when you look at the dust
6 settling on all of that, when you have the State taking
7 the time prior to grand jury to have a talk with the
8 doctor, have undertaken the review of those records, and
9 the doctor says, absolutely an explanation. That is the
10 one. That is what the cause of death is. And it's not
11 this other matter.

12 Again, I am taking into account that both sides had
13 these medical records prior to the grand jury and neither
14 side cottoned to or glean to the fact that this is
15 something that could potentially have had this exculpatory
16 nature and the matter proceeded.

17 I don't perceive that it ends the inquiry to
18 determine that this is potentially exculpatory in nature.
19 I believe the inquiry requires me to look further to the
20 facts and circumstances of what the State did in fact know
21 and what the totality of the circumstances are.

22 So, with all due respect, it's possible that the
23 State could look at this and say, gee, now I never have to
24 look anymore at whatever else is there and put it up
25 because this Court found in this case that they were, sort

1 of, not -- I'm trying to think of the right word, so I'm
2 not going to say anything -- the State did something wrong
3 in this particular case.

4 But I think the State will continue to look for and
5 provide whatever exculpatory explanation there is. I
6 think that this set of facts and circumstances in this
7 case are unique to this case. And that ultimately both
8 sides have argued slippery slope, the Court has to come
9 down on the sides that it feels is warranted.

10 And while it could be a path to say that anytime
11 something like this is found to exist, it's somewhere in
12 the course of examination of the records and to look back
13 in hindsight and say the State could have and should have
14 done something, that that is certainly an option. It is a
15 path the Court could proceed to go down. And maybe in the
16 abundance of caution it is the way the Court should go.
17 But I have reviewed the cases. I have reviewed the
18 circumstances. And I've reviewed the statute. I very
19 well may be misinterpreting the statute, but my
20 interpretation of the statute, in all honesty, is what
21 occurred at the time of the grand jury was appropriate in
22 these circumstances, based on the State's discussion with
23 its medical expert, and the facts and circumstances of the
24 case. I do not have a basis to grant the petition.

25 I absolutely hear you. I anticipate and would

1 include in whatever order is issued any language that
2 would be necessary to allow the Supreme Court to have a
3 look at this issue sooner rather than later. I'm open to
4 that. But I'm making the best judgment call I can make in
5 the circumstances.

6 MS. FELICIANO: Your Honor, may I just further
7 question the court.

8 Regarding the probable cause determination on the
9 battery DV strangulation, the issue with that was whether
10 the officer could testify as a medical expert when the
11 actual medical expert found no evidence of strangulation.
12 And just so that the record is clear, has the court
13 found -- there is case law directly on point that says the
14 officer cannot testify as a medical expert.

15 I just wanted to get the Court's finding so that the
16 order is clear, that the Court is finding the officer's
17 presentation of his medical opinion regarding
18 strangulation, which contradicted the medical expert
19 carried the day.

20 THE COURT: Does the State want to respond to
21 that before the Court clarifies. I looked at my notes at
22 the same time to make sure I did not shortcut any of my
23 notes. It's very possible. I have a lot of notes here.
24 It's very difficult to do chapter and verse, issuing a
25 written decision, which typically I would put the burden

1 of the State to do, as they are the prevailing party here,
2 I may still do that. But to the extent we need to ensure
3 that we've provided further clarification, we may end up
4 directing that order.

5 Go ahead. State have anything it wishes to
6 address.

7 MR. STEPHENS: I'll be brief on that, your
8 Honor.

9 Regarding the strangulation, you can give expert
10 testimony based upon your training and/or experience. The
11 officer that did testify as to strangulation discussed
12 his -- I believe it was his post-certification training
13 along with other training he attended. I believe there
14 were a couple at the attorney general's office that he
15 attended. Along with the fact he has the experience with
16 law enforcement. I can't recall exactly how long he has
17 been working as an officer at this point. I believe it
18 was more than 6 years. I think he said it was 7. I'm not
19 confident off the top of my head.

20 So with that experience, your Honor, he is allowed to
21 testify as an expert under the training and experience
22 that he has. Received both classroom training and also
23 the experience he's experienced in the field.

24 THE COURT: The Court -- I guess, as you said,
25 Ms. Feliciano, the Court's outcome does certainly indicate

1 that it found there was sufficient evidence -- slight or
2 marginal evidence that was presented. And then pinpointed
3 saying that that slight or marginal evidence could have
4 included, and did in fact include, the testimony from the
5 officer who was giving his opinion as to the
6 circumstances. That is what the Court has found.

7 I didn't think of it in that terminology. In
8 fairness, the Court needed and sort of articulated it that
9 way. I don't believe that in the circumstances it is
10 countervailing to the case law, but I respect that you
11 believe the case law would point us in a different
12 direction. But ultimately that is the Court's
13 determination.

14 MS. FELICIANO: Thank you.

15 THE COURT: Any other clarifications.

16 MR. STEPHENS: Not from the State.

17 MS. FELICIANO: Not from defense, your Honor.

18 THE COURT: I'll ask the State to prepare the
19 order. The Court will review it and interlineate anything
20 that feels necessary to interlineate.

21 I obviously found persuasive the State's arguments in
22 these matters, but certainly the Court articulated today
23 those specific findings that was basing its determination
24 on in that way. So not necessarily looking for your staff
25 member to go take your entire motion and cut -- or your

1 opposition, I should say, and cut and paste it to an
2 order. I would like the order to track to what the Court
3 indicated today, then those reasonable -- the reasonable
4 connection to the arguments the State made in support of
5 those findings, as opposed to chapter and verse, cut and
6 paste from the opposition.

7 MR. SILVERSTEIN: Will you also order defense
8 have a chance to look at the order before it's submitted
9 to the Court.

10 THE COURT: Absolutely.

11 As I indicated, the Court will be open to any
12 language that would enable this matter to be reviewed. I
13 can't ask my colleagues up at the Supreme Court to just
14 take a look at it. It has to go in through whatever fashion
15 is going to be requested. But oftentimes, there's an
16 impediment if we've not already done something at this
17 level to indicate we welcome that review. So whatever
18 language can be provided, I'd be open to that.

19 MR. STEPHENS: I attempted to take as good a
20 notes as possible. Could I have the transcript ordered
21 today, and we'll submit an order to you this afternoon.

22 THE COURT: I don't know how quickly, you'll get
23 those.

24 MR. STEPHENS: As soon as get them -- we'll
25 prepare the order as soon as possible.

1 MS. FELICIANO: Defense would ask that if the
2 State orders the transcript that they also provide us a
3 transcript from the hearing.

4 THE COURT: At the State's expense, we'll order
5 that a transcript be provided to both parties. Let's then
6 ensure that the order on the decision on the petition
7 tracks to what has been stated. Again, those arguments
8 that were made by the State that would support those
9 findings may be included. But we don't want the
10 determination to overreach and we want the determination
11 to be sufficiently positioned to be reviewed.

12 The motion for OR release, which was also filed, I
13 certainly wasn't necessarily and isn't dependant from or
14 dependant on what the outcome of the determination was,
15 but in light of the Court's determination and
16 circumstances, the Court doesn't know -- do you prefer to
17 have that heard a little down the road or do you want to
18 have that determination made now.

19 MS. FELICIANO: I'd like to have the
20 determination made now, your Honor.

21 THE COURT: All right.

22 Do you want to make further argument with regard to
23 what is before the Court. The Court has reviewed the
24 motion. Obviously the facts were incorporated by
25 reference from the petition. There is the connection that

1 the Defendant has to the community for -- I believe there
2 was a reference for a 10 year period. That he had been
3 working and that he potentially could return to that work.
4 That he has a strong support system.

5 The opposition pointed out, and what the Court does
6 tend to weigh as heavily as anything, is analysis of
7 release are the mysteriousness of the charges and the
8 history of the Defendant, if any.

9 With regard to circumstance of potential flight risk,
10 there was reference to the Defendant having prior violent
11 history, as well as attempt to flee. I'm not making a
12 finding in those regards. There are ten factors that the
13 Court reviews when it looks at one of these requests, and
14 I did review all of those and was giving some insights as
15 to how I'd weigh them.

16 In light of that, Ms. Feliciano, anything you'd like
17 to add.

18 MS. FELICIANO: No, your Honor. I'll submit on
19 the written record. I think we sufficiently outlined our
20 position.

21 THE COURT: Mr. Stephens.

22 MR. STEPHENS: I'd just ask that bail remain at
23 the \$1,050,000.00.

24 THE COURT: At this point, in light of the
25 Court's determination to deny the petition, the bail will

1 not be reduced. And the motion for OR release will be
2 denied.

3 Again, the nature of the charges, as well as the
4 history of the Defendant, he's not a candidate at this
5 time, I believe, for release from custody.

6 As there's been a change in the charges, the Court is
7 disinclined to grant the motion at this time. The motion
8 is denied.

9 MS. FELICIANO: Thank you, your Honor.

10 Would your Honor like --

11 THE COURT: I'd ask the State to prepare that as
12 well. As long as you are giving the defense the
13 opportunity to see the other order, you can show them both
14 orders.

15 MR. STEPHENS: I will.

16 THE COURT: Thank you all.

17 MS. FELICIANO: Thank you.

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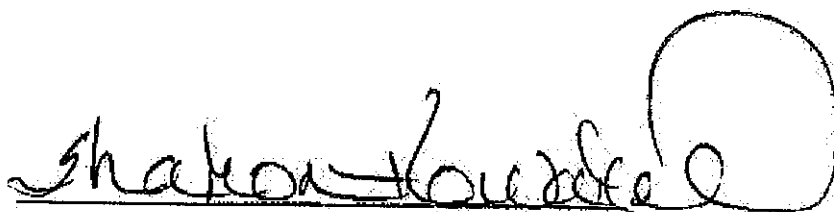
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CERTIFICATE
OF
CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.

A handwritten signature in cursive script, reading "Sharon Howard", is written over a horizontal line. The signature is fluid and includes a large, circular flourish at the end.

Sharon Howard
C.C.R. #745

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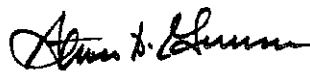
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CLERK OF THE COURT

1 **ORDR**
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3 Clark County District Attorney
4 Nevada Bar #001565
5 ROBERT STEPHENS
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7 Nevada Bar #011286
8 200 Lewis Avenue
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10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,
11
12 Plaintiff,

-vs-

13 ANTHONY TYRON MAYO,
14 #2581304,

Defendant.

CASE NO: C-14-295313-1

DEPT NO: XXV

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: March 30, 2015

TIME OF HEARING: 10:30 A.M.

19 THIS MATTER having come on for hearing before the above entitled Court on the
20 30th day of March, 2015, the Defendant being present, represented by AMY FELICIANO,
21 Deputy Public Defender, the Plaintiff being represented by STEVEN B. WOLFSON, District
22 Attorney, through ROBERT STEPHENS, Chief Deputy District Attorney, and the Court
23 having heard the arguments of counsel and good cause appearing therefor,

24 IT IS HEREBY ORDERED that both the Defendant's Petition for Writ of Habeas
25 Corpus and the Defendant's Addendum to Petition for Writ of Habeas Corpus shall be and
26 are DENIED.

27 THE COURT FINDS that Defendant's Addendum to Petition for Writ of Habeas
28 Corpus was not untimely.

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1 THE COURT FINDS that presenting evidence that Beverly McFarlane (Victim) was
2 removed from life support would not have changed the determination of the Grand Jury.
3 Medical personnel removing Beverly McFarlane from life support does not relieve Defendant
4 of the causal liability for murder.

5 THE COURT FINDS that the word "vacuum" is properly in the Indictment to provide
6 Defendant notice.

7 THE COURT FINDS that the chain of custody of the brain was not broken. The State
8 presented a sufficient chain of custody of the brain.

9 THE COURT FINDS that even if the bad acts were inappropriately admitted before
10 the grand jury, there is still sufficient evidence to support the Grand Jury's finding of probable
11 cause. Slight or marginal evidence was presented even without the alleged bad acts being
12 presented.

13 THE COURT FINDS that the officer's training and experience qualified him to testify
14 as an expert in strangulation.

15 THE COURT FINDS that the State presented slight or marginal evidence to support
16 all the charges alleged against Defendant in the Indictment.

17 THE COURT FINDS that pursuant to NRS 172.145, the State has a duty when
18 appearing before the Grand Jury to present all evidence of which the State is aware of at that
19 time that would explain away the charge.

20 THE COURT FINDS that evidence that Beverly McFarlane possibly had moya moya
21 disease was contained in the medical records which the State obtained prior to the Grand Jury
22 hearing.

23 THE COURT FINDS that if Beverly McFarlane suffered from moya moya disease it
24 could explain away the count of murder. Furthermore, there is a possibility that moya moya
25 may have caused the brain hemorrhaging.

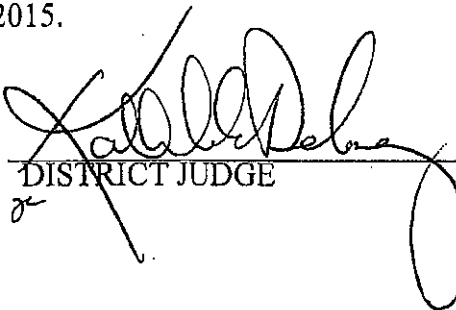
26 HOWEVER, THE COURT FINDS that the State is only required to present to the
27 Grand Jury exculpatory evidence of which the State is aware of at that time. At the
28 presentation of the Grand Jury, although the State had possession of documents that contained

1 reference to the possible existence of moya moya disease, the State was not aware of the
2 exculpatory value of such evidence. In fact, prior to the Grand Jury presentation the State
3 spoke with medical experts who reviewed the medical records. The medical experts believed
4 there was no other explanation for Beverly McFarlane's death other than blunt force trauma.

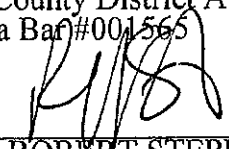
5 MOREOVER, THE COURT FINDS that the exculpatory value of the possible
6 existence of moya moya disease did not become apparent to the defense or the State until
7 much later after the Grand Jury presentation. The Court also finds that the State did not
8 purposefully choose to not disclose the possible existence of moya moya disease, but instead
9 the State was simply unaware of the potential of moya moya disease or its exculpatory value.
10 Because the State was unaware of the possible exculpatory value of the reference in the
11 medical records to moya moya disease the State was not required to present such evidence to
12 the Grand Jury.

13 THE COURT made no determination that Beverly McFarlane actually had moya moya
14 disease or that Beverly McFarlane succumbed to moya moya disease.

15 DATED this 1st day of July 2015.

16
17 
18 DISTRICT JUDGE

19 STEVEN B. WOLFSON
20 Clark County District Attorney
Nevada Bar #001565

21 BY 
22 ROBERT STEPHENS
23 Chief Deputy District Attorney
24 Nevada Bar #011286
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CERTIFICATE OF SERVICE

I certify that service of the above and foregoing Order Denying Defendant's Petition for Writ of Habeas Corpus was made this 29th day of June, 2015, to:

AMY FELICIANO, Deputy Public Defender
johnsoaa@clarkcountynv.gov

DAN SILVERSTEIN, Deputy Public Defender
SilverDA@clarkcountynv.gov

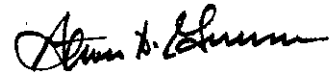
BY:


Theresa Dodson
Secretary for the District Attorney's Office

td/dvu

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06/29/2015 10:43:43 AM


CLERK OF THE COURT

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,
11 v.
12 ANTHONY TYRON MAYO,
13 Defendant.

CASE NO. C-14-295313-1
DEPT. NO. XXV
DATE: July 13, 2015
TIME: 9:00 a.m.

14
15 DEFENDANT'S MOTION TO RECONSIDER DENIAL OF
16 PETITION FOR WRIT OF HABEAS CORPUS

17 COMES NOW, the Defendant, ANTHONY TYRON MAYO, by and through DAN
18 A. SILVERSTEIN, Deputy Public Defender, and hereby requests that this Court reconsider its
19 prior denial of the Defendant's Petition for Writ of Habeas Corpus.

20 This Motion is made and based upon all the papers and pleadings on file herein and
21 oral argument at the time set for hearing this Motion.

22 DATED this 29th day of June, 2015.

23 PHILIP J. KOHN
24 CLARK COUNTY PUBLIC DEFENDER

25 By: Dan A. Silverstein
26 DAN A. SILVERSTEIN, #7518
27 Deputy Public Defender
28

1 "If evidence highly probative of innocence is in [the prosecutor's] file, he should
2 be presumed to recognize its significance even if he has actually overlooked it."

3 United States v. Agurs, 427 U.S. 97, 110 (1976)

4
5 **STATEMENT OF FACTS**

6 On September 24, 2013, Justice of the Peace Chris Lee signed an order submitted by the
7 Clark County District Attorney's Office releasing the medical records of the alleged victim in this
8 case, Beverly McFarlane. These medical records were received by the District Attorney's Office
9 on October 7, 2013, over three months prior to the grand jury presentment in this case.

10 In those medical records, a report from radiologist Rajneesh Agrawal, M.D., dated August
11 17, 2012, makes clear that the findings in McFarlane's CT scans "...are suggestive of a slow,
12 progressive vasculopathy that can be seen with moyamoya disease." A physician's order sheet
13 from the same date also suggests a diagnosis of moyamoya disease.

14 Moyamoya disease is a rare condition that causes progressive occlusion of the carotid
15 arteries in the brain, consistent with the findings of Clark County Coroner Alane Olson that the
16 alleged victim suffered "complete occlusion of the left internal carotid artery and narrowing of the
17 right internal carotid artery." Sufferers of moyamoya disease tend to experience a gradual
18 deterioration of cognitive function, and if left untreated, the steady occlusion of the arteries in the
19 brain can be fatal. Death from moyamoya disease is typically caused by brain hemorrhage. This
20 is consistent with the findings of Clark County Coroner Alane Olson that the alleged victim died as
21 a result of brain hemorrhage. It is also consistent with the findings of the State's
22 neuropathological expert, Dr. Claudia M. Greco, M.D., who concluded that the hemorrhages found
23 in McFarlane's brain were between two and five days old. The injuries which Anthony Mayo is
24 alleged to have inflicted on McFarlane occurred on August 10, 2012, **fifteen days** prior to her
25 death.

26 On February 2, 2015, the Defendant filed an addendum to a previously filed Petition for
27 Writ of Habeas Corpus, arguing that the State had violated NRS 172.145(2) by withholding
28 evidence of this alternate theory of McFarlane's death from the grand jury's consideration. The

1 State filed an opposition on March 5, 2015. Oral argument commenced on March 23, 2015. The
2 Court issued its decision on March 30, 2015. The Court agreed that the evidence of moyamoya
3 disease tended to explain away the charges against the Defendant, and as such, constituted
4 exculpatory evidence that the State was obligated to present to the grand jury. The Court denied
5 the petition, however, concluding that NRS 172.145(2) did not apply because even though this
6 evidence was in the State's file, the prosecutor was not personally aware of its significance.

7 This motion to reconsider the Court's interpretation of NRS 172.145(2) follows.

8 ARGUMENT

9 This Court has interpreted NRS 172.145(2) to absolve the prosecutor of its duty to present
10 evidence of obvious exculpatory value, unquestionably in the prosecutor's actual possession prior
11 to the grand jury hearing, where the prosecutor claims to have been unaware of the significance of
12 the evidence. Because this interpretation violates the purpose and spirit of the enactment, leads to
13 absurd and unreasonable results, and renders the obligation conferred by the statute meaningless, it
14 is respectfully requested that this interpretation be reconsidered.

15 1. *The Court's interpretation of NRS 172.145(2) violates the policy and spirit of the law.*

16 "A statute should be construed in light of the policy and the spirit of the law." Hunt v.
17 Warden, 111 Nev. 1284, 1285 (1995). The policy and spirit of the statutory obligation to present
18 exculpatory evidence to the grand jury are utterly subverted where the Court requires some
19 showing more than the State's actual possession of exculpatory evidence in order to occasion
20 relief.
21

22 The grand jury's mission "...is to clear the innocent, no less than to bring to trial those who
23 may be guilty." Sheriff v. Frank, 103 Nev. 160, 165 (1987), quoting United States v. Dionisio,
24 410 U.S. 1, 16-17 (1973). Where "...a prosecutor refuses to present exculpatory evidence, he, in
25 effect, destroys the existence of an independent and informed grand jury." Sheriff v. Frank, 103
26 Nev. 160, 165 (1987), quoting United States v. Gold, 470 F.Supp. 1336, 1353 (N.D.Ill. 1979). The
27 withholding of exculpatory evidence "...casts the prosecutor in the role of an architect of a
28 proceeding that does not comport with standards of justice." Brady v. Maryland, 373 U.S. 83, 88

1 (1963). Clearly, the policy and spirit of NRS 172.145(2) is to ensure that the factfinder in the
2 criminal justice process be informed of any evidence that has a tendency to show that the accused
3 is innocent.

4 In this sense, the policy of NRS 172.145(2) can be compared with the policy of the United
5 States Supreme Court's landmark decision in Brady v. Maryland, 373 U.S.83 (1963), imposing a
6 constitutional obligation on the government to disclose exculpatory evidence to the defense.
7 Importantly, Brady imposes a constitutional obligation on the prosecution to disclose exculpatory
8 evidence "...regardless whether the prosecutor was personally aware of the existence of the
9 evidence." People v. Whalen, 294 P.3d 915, 966 (Cal. 2013); Kyles v. Whitley, 514 U.S. 419,
10 437 (1995).

11 The obligation to present exculpatory evidence derives from the character of the evidence,
12 not the character of the prosecutor. The purpose of the rule mandating disclosure of exculpatory
13 evidence is to protect the fairness of the proceedings, not to punish an individual prosecutor for
14 misdeeds. As a result, "[i]f evidence highly probative of innocence is in his file, he should be
15 presumed to recognize its significance even if he has actually overlooked it." United States v.
16 Agurs, 427 U.S. 97, 110 (1976) (emphasis added). "It is now axiomatic that the prosecutor has an
17 affirmative duty to volunteer evidence that arguably falls within the scope of Brady, and, in fact, is
18 presumed to have knowledge of the contents of his files, such that claims that exculpatory
19 evidence was overlooked will not be tolerated." United States v. Kipp, 990 F.Supp. 102
20 (N.D.N.Y. 1998).

21 Because the purpose of NRS 172.145(2) is to ensure that evidence tending to demonstrate
22 the defendant's innocence is considered by the grand jury, it is irrelevant whether the prosecutor
23 withholds the evidence through inadvertence or intent. The damage to the rights of the accused is
24 the same. This Court's interpretation of NRS 172.145(2) deprives the defendant of a remedy,
25 despite the existence of material exculpatory evidence in the prosecutor's file, as long as the
26 prosecutor makes the claim that he failed to read it. This interpretation thwarts the policy and
27 spirit of the statute.
28

1 In United States v. Agurs, 427 U.S. 97 (1976), the United States Supreme Court concluded
2 that the State's obligation to disclose exculpatory evidence was not contingent on the prosecutor's
3 attention to detail. Agurs stands for the proposition that exculpatory evidence is just as important
4 to the factfinder's judgment whether the prosecution has overlooked it or not. If the evidence
5 exists in the State's file, the prosecutor is presumed to have knowledge of it. The rule cannot
6 reasonably be interpreted any other way. The prosecutor's duty would be effectively nullified if it
7 could be evaded merely by claiming ignorance. The Agurs reasoning applies with equal force to
8 the obligation to present exculpatory evidence to the grand jury set forth in NRS 172.145(2). Any
9 unfairness the Court attributes to presuming the prosecutor has knowledge of the contents of his
10 own file is substantially outweighed by the unfairness of visiting the consequences of the State's
11 lack of diligence upon the accused. The prosecutor "...is presumed to have knowledge of the
12 contents of his files, such that claims that exculpatory evidence was overlooked will not be
13 tolerated." United States v. Kipp, 990 F.Supp. 102 (N.D.N.Y. 1998).

14 Courts have routinely held that a prosecutor is presumed to possess knowledge of the
15 exculpatory information in his files. "Brady does require that the information requested be known
16 to the prosecution. That knowledge may be presumed, as when the information is in the
17 prosecutor's files." Parker v. State, 587 So.2d 1072, 1086 (Ala.Cr.App. 1991). Where
18 exculpatory evidence is in the State's file, "...knowledge of the existence of evidence will be
19 imputed to the prosecution even when the prosecution is without actual knowledge of the existence
20 of the evidence." Hill v. State, 651 So.2d 1128, 1132 (Ala.Cr.App. 1994). This rationale makes
21 perfect sense. After all, a prosecutor willing to withhold exculpatory evidence from the grand jury
22 would likely have no compunction about disclaiming knowledge of the existence of the evidence
23 to uphold the indictment. This Court's interpretation of the rule binds only the angelic prosecutor,
24 and any rule that only applies to those who are most likely to follow it is no rule at all.

25 It is neither unfair nor unreasonable to presume that a prosecutor has knowledge of the
26 contents of his file, and in fact, the United States Supreme Court has done so for almost forty
27 years. United States v. Agurs, 427 U.S. 97 (1976). There is no reason why knowledge of the
28 contents of the file should be presumed in the Brady context, but not in the context of grand jury.

1 proceedings. The policy behind the requirement that exculpatory evidence be presented to the
2 grand jury is ill-served by an interpretation of NRS 172.145(2) that allows prosecutors to avoid it
3 by not reading their own file. This Court's interpretation contradicts the spirit of the law, and
4 should be reconsidered.

5
6 *2. The Court's interpretation of NRS 172.145(2) creates absurd and unreasonable results.*

7 "Statutory language should be construed to avoid absurd or unreasonable results." Speer v.
8 State, 116 Nev. 677, 679 (2000); Wilson v. State, 121 Nev. 345, 357 (2005). "When interpreting
9 a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against
10 what is unreasonable." Oakley v. State, 105 Nev. 700, 702 (1989); Desert Valley Water Co. v.
11 State Engineer, 104 Nev. 718, 720 (1988), citing Cragun v. Nevada Pub. Employees' Ret. Bd., 92
12 Nev. 202 (1976).

13 In reading NRS 172.145(2) to excuse the State from responsibility for presenting
14 exculpatory evidence clearly present in the State's file at the time of the grand jury hearing, this
15 Court encourages prosecutors to read and comprehend the minimum possible amount of evidence
16 prior to the grand jury presentment. In fact, in light of the Court's ruling, it would make more
17 sense for the prosecutor to read nothing but the police report summarizing probable cause and
18 ignore every other document or report in its file, assuring that the State knew sufficient facts to
19 obtain an indictment without needing to worry about being held accountable later for withholding
20 anything exculpatory. As a result of the Court's interpretation, the prosecutor is encouraged to
21 remain ignorant; he has a greater incentive to keep himself in the dark than to carefully review all
22 aspects of the case against the accused. The Court's reading puts the enlightened prosecutor at a
23 disadvantage as opposed to the willfully ignorant one; the enlightened prosecutor must similarly
24 enlighten the grand jury, risking an adverse result, while the ignorant one can keep the grand jury
25 ignorant as well, and suffer no consequence. By the Court's logic, the grand jury is only entitled
26 to learn the exculpatory evidence that the prosecutor has taken the time to learn himself; the clever
27 prosecutor would do everything possible to avoid reading too deep into the case file, for fear of
28 accidentally learning the evidence that would unravel his case.

1 To truly understand the depth of the absurdity, imagine the situation were reversed, and the
2 defense attorney could keep inculpatory evidence away from the grand jury by simply ignoring its
3 existence. Not only would the defense lawyer have no incentive to read the file, arguably, he
4 would be providing ineffective assistance to his client if he were to do so. Yet this is the very sort
5 of regime created by this Court's reading of NRS 172.145(2). By determining that the State is
6 only responsible for presenting unfavorable evidence to the grand jury if the prosecutor personally
7 comprehends its significance, the Court has created a system that rewards prosecutors for not
8 reading their files, and imposes more onerous obligations on those that do.

9 It is patently absurd and unreasonable for the State's obligation to present exculpatory
10 evidence to the grand jury to be nullified by the prosecutor's ignorance of the facts contained in his
11 own file. The State must be charged with presumptive knowledge of the information in its actual
12 possession, otherwise the accused pays the price for the prosecutor's lack of diligence.

13 *3. The Court's interpretation of NRS 172.145(2) renders its existence nugatory.*

14 "Statutes should be given their plain meaning and 'must be construed as a whole and not be
15 read in a way that would render words or phrases superfluous or make a provision nugatory.'" *Mangarella v. State*, 117 Nev. 130, 133 (2001), quoting *Charlie Brown Constr. Co. v. Boulder*
16 *City*, 106 Nev. 497, 502 (1990). This Court's interpretation of NRS 172.145(2), that the
17 unquestioned existence of exculpatory evidence in the State's file prior to the grand jury hearing
18 does not confer "knowledge" upon the prosecutor, renders the obligation inherent in the statute a
19 nullity. Because this interpretation of the statute essentially invalidates the entire provision, this
20 interpretation ought to be reconsidered.

21
22 The Court's interpretation of NRS 172.145(2) enables the State to disregard its obligation
23 to present exculpatory evidence by simply refusing to study its own file. According to this Court's
24 ruling, exculpatory evidence need not be presented to the grand jury until the prosecutor personally
25 reads it. So, for example, the State would not be compelled to present a DNA report exonerating
26 the defendant in a sexual assault case, even if the DNA report was sitting in the State's file, as long
27 as the prosecutor thumbed past it while reviewing the case. Given this interpretation of the statute,
28 for what possible reason would a prosecutor ever thoroughly investigate his own file before a

1 grand jury hearing? Since the Court's reading of the State's obligation is essentially "out of sight,
2 out of mind," the prosecutor would be better served ignoring any evidence in the file beyond the
3 absolute minimum necessary to establish probable cause for indictment. Where the State can
4 control the introduction of exculpatory evidence by simply turning a blind eye to it, there is no
5 obligation to introduce exculpatory evidence at all. This Court's interpretation of NRS 172.145(2)
6 negates the very obligation the statute intends to confer, and abridges the rights of the accused to
7 an informed, independent grand jury. This interpretation ought to be reconsidered.

8 CONCLUSION

9 This Court has determined that evidence of moyamoya disease, a reasonable alternate
10 explanation for the death of Beverly McFarlane, constituted exculpatory evidence. As such, NRS
11 172.145(2) requires that the State present this evidence to the grand jury. It is also undisputed that
12 this evidence was in the State's actual possession prior to the grand jury hearing; in fact, the State
13 obtained this evidence through a court order with the contention that the medical records were
14 essential to the prosecution of this case.

15 Yet the Court denied the petition anyway, ruling that even though the exculpatory evidence
16 was in the State's file, the prosecutor was excused from his obligation to present it because he had
17 overlooked its true significance. The Court's interpretation of NRS 172.145(2) dismantles
18 important protections for the rights of the accused. With respect to the production of exculpatory
19 evidence, the State is presumed to have knowledge of the content of its files, United States v.
20 Agurs, 427 U.S. 97 (1976), and this Court's adoption of the contrary position should be
21 reconsidered.

22 DATED this 29th day of June, 2015.

23 PHILIP J. KOHN
24 CLARK COUNTY PUBLIC DEFENDER

25 By: /s/ Dan A. Silverstein
26 DAN A. SILVERSTEIN, #7518
27 Deputy Public Defender
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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 13th day of July, 2015, at 9:00 a.m., in District Court, Department XXV.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC SERVICE

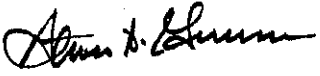
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
Motions@clarkcountyda.com

By: /s/ Sara Ruano
Secretary for the Public Defender's Office

1 **OPPS**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ROBERT STEPHENS
6 Deputy District Attorney
7 Nevada Bar #011286
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11 State of Nevada

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-14-295313-1

12 ANTHONY TYRON MAYO,
13 #2581304,

DEPT NO: XXV

14 Defendant.

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER DENIAL**
16 **OF PETITION FOR WRIT OF HABEAS CORPUS**

17 DATE OF HEARING: July 13, 2015

18 TIME OF HEARING: 9:00 A.M.

19 COMES NOW, DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada,
20 Respondent, through his counsel, STEVEN B. WOLFSON, District Attorney, through
21 ROBERT STEPHENS, Chief Deputy District Attorney, files this Opposition to Defendant's
22 Motion to Reconsider Denial of Petition for Writ of Habeas Corpus, currently set for hearing
23 on July 13, 2015 at 9:00 A.M.

24 This Opposition is made based upon all papers and pleadings filed herein and oral
25 arguments at the time set for hearing these matters.

26 ///

27 ///

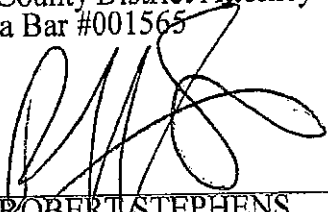
28 ///

1 Wherefore, Respondent prays that the Writ of Habeas Corpus, along with the
2 Addendum to the Writ, be discharged and the Petition be dismissed.

3 DATED this 9th day of July, 2015.

4 Respectfully submitted,
5 STEVEN B. WOLFSON
6 Clark County District Attorney
7 Nevada Bar #001565

8 BY


9 ROBERT STEPHENS
10 Chief Deputy District Attorney
11 Nevada Bar #0011286

12 **POINTS AND AUTHORITIES**

13 **PROCEDURAL SUMMARY**

14 On January 17, 2014, an Indictment was filed against Anthony Mayo (Defendant)
15 charging him with Murder, Battery Constituting Domestic Violence – Strangulation, Coercion
16 and Dissuading a Witness. The Grand Jury Transcripts were prepared on January 30, 2014.
17 Defendant requested more time to file the writ beyond the 21 days. Both parties requested
18 additional time to file the Return and Reply. On February 28, 2014, Defendant filed a Petition
19 for Writ of Habeas Corpus. The State's Return was filed on April 4, 2014. On April 18, 2014,
20 Defendant filed his Reply. The Court heard arguments on April 21, 2014. The Court passed
the case to May 7, 2014 for decision. On said date, no decision was made.

21 At calendar call on February 2, 2015, the Court indicated that it needed to decide the
22 writ. Before allowing the Court to decide the writ, Defendant filed an Addendum to the
23 pending writ more than one year after the Grand Jury transcripts were prepared and nearly ten
24 months since arguments on the Writ occurred. The State filed a Return to Defendant's
25 Addendum to Petition for Writ of Habeas Corpus. On April 20, 2015, this Court Denied
26 Defendant's Initial Petition and Defendant's Addendum to Petition for Writ of Habeas Corpus.
27 As of the writing of this Opposition, the Order Denying Defendant's Petition has not yet been
28 filed. On June 29, 2015, Defendant filed the instant Motion to Reconsider Denial of Petition

1 for Writ of Habeas Corpus. The State's Opposition follows.

2 **FACTUAL SUMMARY**

3 On or about August 8, 2012, Beverly McFarlane (Beverly) was living with her husband,
4 Anthony Mayo (Defendant) and their two children, Ashanti and Ashley. Grand Jury
5 Transcript (GJT) 41. Defendant became upset when Beverly accidentally called Defendant
6 while at work. GJT 54. Defendant was irritated and annoyed by the phone call. GJT 54.
7 When Beverly arrived home from work, Defendant was playing with a beach ball with the
8 kids. GJT 56. Beverly asked that they stop playing while she began cooking dinner. GJT 56.
9 This caused a verbal argument between Beverly and Defendant. GJT 56. Once dinner was
10 finished they all went upstairs to the master bedroom. GJT 58.

11 Another argument arose about the cooking. GJT 59. Defendant ordered Ashanti and
12 Ashley to their room. GJT 59. Defendant was so mad that his eyes were "popping out of his
13 head" and his vein was popping out of his forehead. GJT 66. Beverly tried to call 911 but
14 Defendant slapped the phone out of Beverly's hand. GJT 59. The phone slid under the fridge
15 in the room. GJT 72. Ashanti tried to retrieve the phone, but Defendant stopped her. GJT 72.

16 Defendant then mounted Beverly and began choking her. GJT 59. Out of fear, Ashanti
17 and Ashley went to their room which is directly across from the master bedroom. GJT 60.
18 Defendant punched Beverly numerous times in the face and body. GJT 63. Beverly kept
19 screaming for help. GJT 63. Defendant then began to choke her. GJT 63. Ashanti saw
20 Defendant pushing Beverly down into the bed. GJT 63. She knew Beverly was being choked
21 because she could hear it in Beverly's voice. GJT 64. Beverly would scream and then she
22 would just stop. GJT 64.

23 Ashanti eventually turned away from the beating in an attempt to find her mom's phone
24 in her purse. GJT 60. Ashanti was unable to find the phone in the purse. GJT 61. Defendant
25 observed Ashanti searching for the phone. GJT 72. He told Ashanti that if she called the
26 police, he would knock Beverly out. GJT 73. He also threatened to "whoop" Ashanti. GJT
27 73. Ashanti then hid behind the door so she could not see what Defendant was doing to her
28 mother. GJT 61.

1 At some point, Defendant rhetorically asked where his bat was. GJT 61. Defendant
2 then went into the garage to look for his bat. GJT 61. Knowing where the bat was located,
3 Ashanti rushed downstairs and hid the metal bat from Defendant. GJT 61. Ashanti then
4 returned to her room. GJT 62. Unable to find the bat, Defendant returned to the master
5 bedroom this time grabbing a vacuum. GJT 62. Defendant closed the door behind him. GJT
6 64. Ashanti could hear her mother screaming to "stop" and "not to do that." GJT 64. She
7 then heard a loud bang. GJT 65.

8 Some time passed and Beverly exited the bedroom with a limp. GJT 65. She was
9 severely beaten, with scratches on her face. GJT 70. Dust was in her hair and on her person.
10 GJT 65. There was also dust on one side of the bed. GJT 65. The vacuum was broken. GJT
11 68. Beverly was having a hard time speaking. GJT 71. Beverly took a bath and then tried to
12 sleep in Ashanti's room, however, Defendant demanded that she sleep in the master bedroom
13 with him. GJT 71.

14 The next morning, August 9, 2012, Ashanti heard Defendant apologizing to Beverly.
15 GJT 74. Beverly slept almost all day. GJT 74. Beverly woke up at around dinner time. GJT
16 74. She could only whisper. GJT 75. Ashanti brought some food to Beverly. GJT 75. It
17 appeared to Ashanti that her mom was "very sick." GJT 76. Beverly's eyes were red and her
18 skin was peeled off on one side of her face. GJT 76-77.

19 On August 10, 2012, Ashanti was woken up by Defendant yelling and cursing at
20 Beverly to go to work. GJT 44, 46. After Beverly informed Defendant that she would not be
21 going to work, the Defendant left the residence. GJT 44. At this time, Beverly got out of bed
22 and tried to call the police. GJT 42-44. Beverly limped to the stairs. GJT 47. Beverly could
23 only whisper, even though she was trying to talk louder. GJT 48. Initially Beverly called 411.
24 GJT 49. Then she called 311. GJT 44-45. Because Beverly was having a difficult time
25 talking, Ashanti eventually took over the 911 call. GJT 43, 45.

26 Officer Vital and other police officers eventually arrived at the residence and tried to
27 speak to Beverly; however, again Beverly had difficulty communicating with them. GJT 43,
28 86. Initially Officer Vital spoke to Ashanti who pointed him towards Beverly. GJT 87.

1 Officer Vital described Beverly as "a little lethargic, disoriented, kind of displaying sort of
2 intoxicated type of person clues, but I could not smell any odor of alcohol coming from her."
3 GJT 87. She had slurred speech and muffled sentences. GJT 87. She would get lost in the
4 conversation. GJT 87. Beverly was unable to give her date of birth, name the President or
5 identify the day of the week. GJT 87-88. Officer Vital also noticed that she had abrasions on
6 the side of her face and her face was swollen. GJT 88-89. Beverly had petechia and
7 scratching on her neck. GJT 89. Ashanti testified that Beverly did not have a limp or difficulty
8 communicating until after Defendant beat Beverly. GJT 52. Beverly was taken to the hospital.
9 GJT 91.

10 Officer Aker followed Beverly to the hospital. GJT 93. Officer Aker has taken almost
11 240 hours in domestic violence training courses and is permitted to teach other cadets about
12 domestic violence and strangulation. GJT 94. Specific to strangulation, Officer Aker attended
13 a course on strangulation. GJT 94. This training has assisted other officers in the field on
14 numerous occasions. GJT 95.

15 Officer Aker testified that Beverly was very scared and upset. GJT 97. He noticed a
16 black eye and an abrasion and bruising to her face. GJT 97. Beverly hesitated to move her
17 neck. GJT 97. She continued to sooth her neck. GJT 97. Her voice was very hoarse. GJT
18 97. At the hospital, Officer Aker noticed petechial hemorrhaging under her eyelids. GJT 98.
19 Beverly still had great difficulty in communicating due to her cognitive abilities being
20 diminished. GJT 102-03.

21 On August 11, 2012, Officer Aker again returned to the hospital to check up on Beverly.
22 GJT 106. His interaction with Beverly was somewhat limited due to the several medical
23 procedures that were being performed. GJT 106. However, Officer Aker noticed that her
24 cognitive abilities had worsened. GJT 107. Beverly had virtually no ability to communicate.
25 GJT 107. Her answers were just gibberish. GJT 107.

26 While in the hospital, many exams were performed on Beverly. Radiologist Dr.
27 Rajneesh Agrawal noted the following impression: "Findings are suggestive of a slow
28 progressive vasculopathy that can be seen with moyamoya disease. Although the

1 hypertrophied vessels are not well developed. Other etiologies such as sickle cell disease or
2 other chronic vasculopathies would have to be also considered." Defendant's Exhibit C
3 attached to Addendum. Further a physician notated, "possible moya moya." Defendant's
4 Exhibit D attached to Addendum.

5 While at the hospital, Beverly eventually died and her body was examined by Dr.
6 Olson. GJT 125. Dr. Olson assigned the autopsy case a unique case number. GJT 125-26.
7 An external review of her body showed that Beverly had intravenous lines on her body. GJT
8 128. Prior to the autopsy, Dr. Olson noted that Beverly's organs were donated. GJT 128. In
9 fact, there was a significant cut down the middle of her body which Dr. Olson said was from
10 the organ procurement procedure. GJT 129. Dr. Olson also identified other "small injuries"
11 on the surface. GJT 128.

12 The internal examination showed that Beverly sustained "considerable amount of
13 swelling in her brain." GJT 129. Dr. Olson preserved the brain and sent it to Dr. Greco. GJT
14 129, 133. She testified that the bleeding on the brain would be indicative of trauma to the
15 head. GJT 130. Dr. Olson noticed the stark contrast in the coloration of the brain, which is
16 indicative of one side sustaining more injury than the other. GJT 131. She concluded that her
17 brain suffered trauma which "ultimately" led to her death. GJT 133-34. Other contributing
18 factors included the blockage of arteries which interfered with the blood flow to the brain.
19 GJT 134. This case was determined to be a homicide. GJT 15.

20 Dr. Claudia Greco has examined 400-500 brains for various reasons in her medical
21 practice. Grand Jury Transcripts (GJT) 12. The Clark County Coroner's Officer contacted
22 her to examine Beverly's brain. GJT 13. In December 2012, Dr. Greco received the brain
23 from FedEx and kept it in a locked area. GJT 13. From that point forward she was the only
24 person who handled the brain. GJT 13. She personally assigned a number to the brain which
25 correlated with the unique number assigned by the Clark County Coroner's Office. GJT 14.
26 In her review of the brain, she noted significant injuries to the left side of the brain. GJT 18.
27 Specifically she noted a hemorrhage on the underside of the brain. GJT 18. There was massive
28 swelling on the brain which would have "gotten to the point where her life was irretrievable."

1 GJT 18. The brain began to herniate or go down the spinal cord. GJT 22. Dr. Greco explained
2 that this injury is fatal because it will pinch the spinal cord and "destroy the cardiac breathing
3 mechanisms." GJT 23. She testified that the brain tissue toward the spinal cord is "very
4 swollen." GJT 25. In fact it was so swollen that there was no opening for the cerebrospinal
5 fluid to transmit to the brain. GJT 26-27. This fluid is important because it brings nutrients
6 and oxygen to the brain. GJT 27-28. The swelling was so severe that Beverly's brain would
7 not have allowed for cerebrospinal fluid to transmit. GJT 28. Additionally, the swelling
8 prevented blood from transmitting to the brain. GJT 32. The left side of the brain was
9 noticeably more swollen. GJT 21. She also noted other hemorrhages in the brain. GJT 24.

10 Dr. Greco testified that the types of injuries Beverly sustained were absolutely the result
11 of trauma. GJT 28. The hemorrhage was large and caused the death of Beverly. GJT 29. Dr.
12 Greco concluded Beverly "suffered cerebral trauma, brain trauma, and it was aggravated by
13 the fact that she already had high blood pressure and it was very, very hard to control." GJT
14 29. Beverly's brain was so significantly damaged that medical intervention could not have
15 saved her life. GJT 30.

16 Dr. Greco believed these injuries were three to four days old. GJT 31. She further
17 explained that three to four days after Beverly sustained this trauma to the head, the brain had
18 swelled to the point where the necessary nutrients, including oxygen and blood would not have
19 been transmitting to the brain. GJT 33.

20 Since Defendant filed the instant Addendum to Petition for Writ of Habeas Corpus, Dr.
21 Greco has re-examined the brain. It is her conclusion and opinion that Beverly did not suffer
22 from moya moya. "There is no pathology present that would lead to a diagnosis of Moyamoya
23 disease." State's Exhibit 1 attached. "No evidence of Moyamoya disease." State's Exhibit
24 1.

25 Detectives Owens and Bodnar investigated the case once it was determined that
26 Beverly died. GJT 111. In March 2013, Detectives Owens and Bodnar met with Defendant
27 in Los Angeles, California. GJT 111-12. After reading Defendant his Miranda rights,
28 Defendant admitted that a verbal argument escalated into a physical altercation. GJT 113. He

1 admitted to shoving her with both hands, slapping her in the face, punching her repeatedly,
2 and striking her with a vacuum. GJT 113. Initially Defendant said that he swung the vacuum
3 at her, but missed. GJT 117. When he missed the vacuum struck the bedpost and the vacuum
4 broke. GJT 117. Later, Defendant said that the vacuum hit Beverly in the hand as she tried
5 to block the vacuum from hitting her. GJT 114. Defendant claimed that Beverly pushed and
6 slapped him as he was trying to leave the residence. GJT 115-16. Defendant said he and
7 Beverly had intercourse and then the next morning he left the residence. GJT 114. When he
8 left he told Beverly that he was going to Los Angeles. GJT 117.

9 Defendant said he gave her some treatment for her black eye to make it appear that she
10 was not beat up. GJT 118. Defendant asserted that he asked Beverly if she wanted to go to
11 the hospital, but she refused and just asked for a Tylenol. GJT 119.

12 ARGUMENT

13 Defendant's Motion to Reconsider Denial of Petition for Writ of Habeas Corpus should
14 be denied for three of reasons.

15 **I. A MOTION TO RECONSIDER IS NOT RECOGNIZED**

16 First, Defendant fails to cite any authority permitting Defendant to file a motion to
17 reconsider a denial of a petition. In reviewing the Eighth Judicial District Court Rules
18 (EJDCR), the State noted that Rule 2.24 permits parties in a civil action to file a motion to
19 reconsider within ten days after the filing of the court's order. However, Part 3 of the EJDCR,
20 governing procedure in criminal cases, is silent about motions to reconsider. Obviously those
21 who drafted and ratified these rules could have included a provision for motions to reconsider
22 in criminal cases had they so desired.

23 It should further be noted that NRS 34, governing petitions, mentions nothing about
24 reconsideration of petitions. NRS 34 does discuss when it is appropriate to appeal a decision
25 on a writ or file an extraordinary writ. Criminal courts could come to a grinding halt if parties
26 in a criminal case could file motions to reconsider every time a court ruled against them. Thus,
27
28

1 motions to reconsider within the Eighth Judicial District are not permitted in criminal cases.¹

2 **II. DEFENDANT FAILS TO PRESENT ANY NEW EVIDENCE**

3 Second, Defendant has not presented any additional evidence that was not presented
4 before this court at the time of the hearing of the Petitions. There are no new facts for this
5 court to reconsider. Defendant's desire to persuade the court to rule in its favor is not a basis
6 for a motion to reconsider. Because nothing new is presented in this motion to reconsider, the
7 State requests that Defendant's Motion to Reconsider be denied.

8 The first and second points made herein are sufficient to deny Defendant's instant
9 Motion to Reconsider Denial of Petition for Writ of Habeas Corpus. However, to be thorough
10 the State will also address Defendant's motion on the merits.

11 **III. DEFENDANT'S MOTION HAS NO MERIT**

12 The merits of the instant motion were previously considered by this court when it
13 denied Defendant's multiple petitions for writ of habeas corpus. The State incorporates all of
14 its prior Responses herein. With that, the State will address a few points raised by Defendant.

15 **A. The Court's Interpretation of 174.145(2) Comports with the Plain Meaning of**
16 **the Statute**

17 NRS 174.145(2) reads, "If the district attorney is aware of any evidence which will
18 explain away the charge, the district attorney shall submit it to the grand jury." (Emphasis
19 added). "When interpreting a statute, legislative intent 'is the controlling factor.' The starting
20 point for determining legislative intent is the statute's plain meaning; when a statute 'is clear
21 on its face, a court can not go beyond the statute in determining legislative intent.'
22 State v. Lucero, 249 P.3d 1226, 1228 (Nev. 2011) (citing Robert E. v. Justice Court, 99 Nev.
23 443, 445, 664 P.2d 957, 959 (1983)). The clear meaning of NRS 174.145(2) is plain on its
24 face. The plain language requires the State to present exculpatory evidence of which it is
25 aware to the grand jury. That is precisely what this Court found when deciding this issue.

26
27 ¹ The State notes that the Order Denying Defendant's Petitions for Writ of Habeas Corpus has not yet been filed and thus
28 the Motion to reconsider is technically premature. However, the State understands that the instant motion filed by
Defendant, even if dismissed now, will eventually be filed once the Order is filed. Thus, the State does not request that
Defendant's Motion be dismissed as being premature.

1 Defendant asserts that this Court's interpretation of NRS 174.145(2) deprives
2 defendants of a remedy because the State can hide behind a shield by saying they were unaware
3 of the exculpatory nature of the evidence. That is not true and is an overly broad statement.
4 In the vast majority of cases, the exculpatory nature of evidence is clear, (i.e. an alternative
5 suspect admitting to the crime, a witness asserting that they lied, an alibi, etc.)

6 This is one of maybe only a few cases where the potentially exculpatory nature of the
7 evidence is not readily apparent. Very few attorneys are trained in the medical field. Hence,
8 attorneys rely upon experts to explain medical records and injuries in cases. In this specific
9 case, the State relied upon experts to assist in understanding the medical records. Two medical
10 experts, after having reviewed the medical reports, explained that the only cause of death was
11 blunt force trauma. The State relied upon those representations.

12 It must further be noted that moya moya is a rare disease. This is not a common disease
13 and there is still absolutely no evidence that Beverly actually suffered from this disease. Thus,
14 the exculpatory nature of the evidence is even less apparent. In fact, there is no exculpatory
15 value to this evidence without some evidence that she had moya moya. No such evidence has
16 been presented to the State.

17 As discussed above, many times the exculpatory nature of the evidence will be clear.
18 Thus the State will be aware of such and be required to present such evidence to the grand
19 jury.

20 1. Brady does not apply to grand jury proceedings

21 Defendant cites numerous cases referencing Brady and its progeny, especially Agurs v.
22 State, 427 U.S. 97 (1976). However, Brady is actually a post-conviction trial remedy. It has
23 no application to the grand jury process in the federal system. See Williams v. State, 504 U.S.
24 36, 49-55, 112 S.Ct. 1735, 1743-46 (1992). "Given the grand jury's operational separateness
25 from its constituting court, it should come as no surprise that we have been reluctant to invoke
26 the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over
27 the years, we have received many requests to exercise supervision over the grand jury's
28 evidence-taking process, but we have refused them all, including some more appealing than

1 the one presented today.” *Id.* at 49-50. **“[R]equiring the prosecutor to present exculpatory**
2 **as well as inculpatory evidence would alter the grand jury's historical role, transforming**
3 **it from an accusatory to an adjudicatory body. It is axiomatic that the grand jury sits**
4 **not to determine guilt or innocence, but to assess whether there is adequate basis for**
5 **bringing a criminal charge.”** *Id.* at 51 (Emphasis added). “[T]hree years before the Fifth
6 Amendment was ratified, it is the grand jury's function not ‘to enquire . . . upon what
7 foundation [the charge may be] denied,’ or otherwise to try the suspect's defenses, but only to
8 examine ‘upon what foundation [the charge] is made’ by the prosecutor. As a consequence,
9 neither in this country nor in England has the suspect under investigation by the grand jury
10 ever been thought to have a right to testify or to have exculpatory evidence presented.
11 Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his
12 possession would be incompatible with this system.” *Id.* at 52 (citing *Respublica v. Shaffer*,
13 1 U.S. 236 (1788)).

14 The *Williams* Court continued to discuss whether a prosecutor should be required to
15 present exculpatory evidence before the grand jury. It held, that requiring the “modern
16 prosecutor to alert the grand jury to the nature and extent of the available exculpatory
17 evidence” is not necessary. *Id.* at 53. “A complaint about the quality or adequacy of the
18 evidence can always be recast as a complaint that the prosecutor's presentation was
19 ‘incomplete’ or ‘misleading.’ Our words in *Costello* bear repeating: ‘Review of facially valid
20 indictments on such grounds “would run counter to the whole history of the grand jury
21 institution[,] [and] neither justice nor the concept of a fair trial requires [it].” ’ ” *Id.* at 54-55
22 (citing *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406 (1956)). This Court can see that
23 in the federal system, there is no obligation to present exculpatory evidence except which the
24 defendant supplies to the prosecution. Thus, *Brady* and *Agurs* has no application to grand
25 jury.

26 The State understands that 174.145(2) requires the State to present exculpatory
27 evidence of which it is aware. However, Defendant’s instant motion cites so many cases
28 referencing *Brady* and its progeny that the State wants to clarify that *Brady* and its progeny

1 does not apply to the grand jury. That is true for several reasons, but primarily because the
2 function of a trial is different than the function of a grand jury. "A grand jury proceeding is
3 not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather,
4 it is an *ex parte* investigation to determine whether a crime has been committed and whether
5 criminal proceedings should be instituted against any person." United States v. Calandra, 414
6 U.S. 338, 343-44, 94 S.Ct. 613, 618 (1974). The Brady doctrine is meant to protect criminal
7 defendants from unreliable convictions arising from unfair trials (or plea proceedings), and
8 not from any other type of harm. Ambrose v. City of N.Y., 623 F. Supp. 2d 454, 471-72
9 (S.D.N.Y. 2009)

10 Defendant seeks to expand the obligation of the State proscribed by NRS 174.145(2)
11 than what the Legislature intended by the clear and plain meaning of the statute itself.
12 Defendant's attempts to expand Brady and its progeny to grand jury proceedings is unfounded
13 and unnecessary given its distinct purpose from trial. A defendant is never convicted based
14 upon an Indictment alone. At trial, when a defendant's guilt will be determined, the defendant
15 will be able to present the relevant evidence on his behalf. For the purposes of grand jury the
16 State is only obligated to present exculpatory evidence of which it is aware.

17 Here, Defendant is unhappy with the court's interpretation. Defendant believes that
18 this court's interpretation will allow the State to hide behind the statute to assert that he was
19 not aware of the exculpatory nature of the evidence. While the State disagrees with
20 Defendant's position due to reasons previously addressed, the State can similarly State that
21 defendants will unnecessarily benefit from a decision that would require the State to present
22 any possible explanation of death. For example, in every murder case where the State obtains
23 medical records, Defendant could scour the medical records for nearly a year to find some
24 miniscule possibility other than the Defendant's action that caused her death. They would be
25 able to argue that a victim who was shot in the head died of high blood pressure, old age, heart
26 attack, diabetes, the flu or internal bleeding. The possibilities are endless. If any of those
27 symptoms exist in any of the records the State obtains, the defendant could argue that such
28 evidence should have been presented to the grand jury. This would defeat the purpose of a

1 probable cause determination. The grand jury is not a determination to prove guilt, but a
2 determination of whether the defendant should stand trial for the alleged criminal acts. As an
3 investigative body, the grand jury need not hear every piece of evidence that may be presented
4 at trial.

5 **2. Moya moya was not apparent and the State exercised due diligence**

6 In this case, the allegedly exculpatory evidence is not even slightly apparent on its face.
7 Moya moya is a rare disease. There is no evidence that Beverly actually had moya moya let
8 alone that she died from it. Defendant is speculating that she had moya moya. This is not a
9 smoking gun in the State's file, but a theory of defense that Defendant discovered a year after
10 the grand jury indicted Defendant. Defendant may present such a defense at trial if deemed
11 appropriate. The State was unaware of the possibly exculpatory nature of the evidence and
12 thus there was no obligation to present it. Defendant may present such evidence to the trial
13 jury.

14 Moreover, in this case the State exercised due diligence by asking the doctors, who
15 reviewed the medical records, if there was any other possible cause of death besides blunt
16 force trauma. The doctors said the only cause of death was blunt force trauma. Defendant is
17 upset with their opinion. That is something to flesh out at trial as to what the various doctors
18 believe is the cause of death. However, at the time, the State was unaware of any other possible
19 cause of death. Thus, there was no obligation to present it.

20 **B. THE COURT PROPERLY INTERPRETTED NRS 172.045(2)**

21 Defendant is attempting to expand Brady into the realm of grand juries. However, such
22 a push would venture beyond the plain meaning of NRS 172.045(2). The State cannot
23 overemphasize the distinct differences between trial and the grand jury. Brady has obvious
24 and inherent value as it relates to trials to ensure that the innocent are not convicted. However,
25 the purpose of the grand jury is to present probable cause. Should this court expand the
26 purpose of NRS 172.045(2) beyond the plain meaning of the statute, it would give Defendants
27 virtually an unfettered ability to challenge probable cause and find fault with every
28 presentation to the grand jury. Defendant wants the State to investigate and understand every

1 iota of medical records before presenting to the grand jury. This could grind the wheels of
2 justice to a virtual halt.

3 In this case alone, prior to presenting to the grand jury, the State received several
4 hundreds of pages of medical records. It also received a report from the State's brain expert.
5 Virtually every page in those reports have medical terminology that is unfamiliar to the
6 prosecutor. Many murder cases have even more medical records. If this Court were to adopt
7 Defendant's interpretation of NRS 172.045(2), the State would be obligated to go through
8 each page with a medical expert to learn whether it is exculpatory evidence. The State would
9 be required to ask the expert about all the unfamiliar words, then understand how those words
10 relate to the body's functions, and then understand whether that word could cause or lead to
11 death based upon the facts of this case. Even after that, after the State understood sufficiently
12 how the numerous medical terms are relevant, if at all, the State would be obligated to educate
13 the grand jurors on these numerous medical terms so they could properly deliberate. This
14 would take numerous hours, if not days or even weeks for the more complicated cases. This
15 is the purpose of trial not a grand jury. Essentially Defendant is asking the State to present the
16 entire trial to the grand jury. That defeats the purpose and intent of the grand jury system.

17 Moreover, a Defendant could argue that the medical experts misinterpreted data or
18 symptoms that led them to the improper conclusion. Defendant could then argue that the State
19 had evidence in their file that disease X caused the death of the victim because all of the
20 symptoms in the medical records are consistent with disease X even though the term "disease
21 X" never actually appears in the reports.

22 The Court's ruling is not encouraging prosecutors to be ignorant of the facts of the case.
23 The vast majority of the times the exculpatory nature of the evidence is apparent. It will be
24 rare, as it is in this case, where the State is simply unaware of the possibly exculpatory nature
25 of the disputed evidence. In this case, the State was unaware of moya moya and its possible
26 relevance to the case. The State exercised due diligence in determining whether anything other
27 than blunt force trauma could have caused death in this case by asking its experts if there was
28 any other possible cause of death. The experts, who reviewed the records, indicated that there

1 was no other possibility. Should the Court adopt Defendant's interpretation, this would not
2 be enough. Defendant wants the State prosecutor, trained in the law and not in medicine and
3 anatomy, to understand the significance of a possible moya moya diagnosis even though the
4 doctors themselves did not find any evidence that it caused death. This is preposterous and
5 defeats the purpose of a grand jury.

6 **C. The Court's Interpretation of NRS 174.045(2) Does Not Invalidate the Statute**

7 Defendant argues that the Court's interpretation of NRS 174.045(2), puts the State in a
8 better position to present a case to the grand jury without ever having read the file because the
9 State could then assert that he was unaware of exculpatory evidence in his file. This is again
10 a very extreme example. The State is unaware of any such cases being treated as described
11 above. In the vast majority of cases being presented to the grand jury, the defendant is aware
12 of the grand jury presentation. Often times, as in this case, the defense attorney will present a
13 list of evidence and witnesses to call before the grand jury in defense of the defendant. Thus,
14 the State will be aware of such exculpatory evidence.

15 Moreover, the State only has a limited amount of time to present a case to the grand
16 jury. It behooves the State to be as prepared as possible. It serves no purpose for the State to
17 wander through a presentation of the grand jury without knowing anything about the case. It
18 will confuse the grand jurors and could result in charges missing from the Indictment. The
19 benefit of reading and preparing the file greatly outweighs the minimal benefit of being able
20 to inform the Court that he was unaware of certain exculpatory evidence.

21 Lastly, the State is not asserting that it should receive any benefit by not preparing the
22 file and presentation to the grand jury. The State is asserting that the Court's interpretation,
23 as it relates to this case, is accurate. Inherent with the Legislature's purpose in enacting this
24 statute is that the State will exercise due diligence by investigating, preparing for and
25 presenting to the grand jury. As discussed above, in the vast majority of cases presented to
26 the grand jury, the exculpatory nature of the evidence is obvious and it gets presented.
27 However, in this case, the State was unaware of the exculpatory nature of the disputed
28 evidence, even after discussing the case with medical experts for several hours. Even after

1 that, the prosecutor was unaware of the possibly exculpatory nature of the victim possibly
2 having moya moya.² The Court's decision comports with the plain meaning of the statute.
3 The Court should not reconsider its decision in this case.

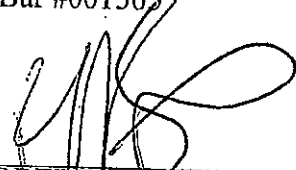
4 **CONCLUSION**

5 Wherefore, based upon the foregoing, this Honorable Court should DENY Defendant's
6 Motion to Reconsider Denial of Petition for Writ of Habeas Corpus.

7 DATED this 9th day of July, 2015.

8 Respectfully submitted,
9 STEVEN B. WOLFSON
10 Clark County District Attorney
11 Nevada Bar #001565

12 BY

13 
14 ROBERT STEPHENS
15 Deputy District Attorney
16 Nevada Bar #011286

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27 ² Since Defendant filed the instant Addendum claiming that Beverly died of moya moya disease, Dr. Greco has conducted
28 additional analysis on the brain. She has concluded that there is no pathology present leading to a diagnosis of moya moya
disease. Beverly did not have moya moya disease. Thus, the evidence Defendant claims to be exculpatory, was in fact
not exculpatory. There was no violation of the State's duty to present the possibility of Beverly dying from moya moya
disease because she did not have moya moya.

1 CERTIFICATE OF SERVICE

2 I hereby certify that service of State's Opposition to Defendant's Motion to Reconsider
3 Denial of Petition for Writ of Habeas Corpus, was made this 10th day of July, 2015, by
4 facsimile transmission to:

5 DAN SILVERSTEIN, Deputy Public Defender
6 SilverDA@clarkcountynv.gov

7 BY: Theresa Dodson
8 Theresa Dodson
9 Secretary for the District Attorney's Office
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RS/td/dvu


CLERK OF THE COURT

RPLY
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C-14-295313-1
)	
v.)	DEPT. NO. XXV
)	
ANTHONY TYRON MAYO,)	DATE: July 29, 2015
)	TIME: 9:00 a.m.
Defendant.)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO RECONSIDER
DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Defendant, ANTHONY TYRON MAYO, by and through DAN
A. SILVERSTEIN, Deputy Public Defender, and ARLENE HESHMATI, Deputy Public
Defender, and hereby files this reply in support of his previously filed Motion to Reconsider
Denial of Petition for Writ of Habeas Corpus.

This Reply is made and based upon all the papers and pleadings on file herein and
oral argument at the time set for hearing this Motion.

DATED this 21st day of July, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Dan A. Silverstein
DAN A. SILVERSTEIN, #7518
Deputy Public Defender

By: /s/ Arlene Heshmati
ARLENE HESHMATI, #11076
Deputy Public Defender

ARGUMENT

I. MOTIONS TO RECONSIDER ARE RECOGNIZED BY NEVADA LAW.

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced *or the decision is clearly erroneous.*" Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741 (1997). Additionally, Nevada's criminal statutes afford a defendant wide latitude in motion filing, authorizing the accused to file "...any defense or objection which is capable of determination without the trial of the general issue" in a pretrial motion. NRS 174.095. The absence of a specific type of motion from the purview of the Eighth Judicial District Court Rules does not abridge the right to file a motion to reconsider recognized by the Nevada Supreme Court and the general latitude afforded defendants to file pretrial motions.

The State also theorizes in a footnote that this motion is premature because the final order denying the Defendant's petition had not yet been filed. State's Opposition, p.9 fn.1. In Tener v. Babcock, 97 Nev. 369 (1981), the district court granted a pretrial petition for writ of habeas corpus and the State sought rehearing. The prevailing party in Tener argued, as the State does here, that Nevada law does not authorize rehearing in a habeas corpus proceeding. The Nevada Supreme Court disagreed, holding that "...the judge retains the power to reconsider his decision" until the filing of a written order discharging the habeas petitioner. Tener at 370. Thus, not only is the Defendant's motion to reconsider authorized under Nevada law, arguably, under Tener, such a motion must be filed before the written order. Because the motion to reconsider was filed on June 29, 2015, a week before the written order of denial, this motion to reconsider is timely and not barred by Nevada law.

II. DEFENDANT IS NOT REQUIRED TO PRESENT NEW EVIDENCE.

As explained above, "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced *or the decision is clearly erroneous.*" Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741 (1997). While introducing substantially different evidence is one acceptable way to trigger

1 reconsideration, it is not the exclusive avenue to do so. Reconsideration is also appropriate where
2 the initial district court decision is clearly erroneous, and based on the arguments presented in the
3 Motion to Reconsider, this Court's interpretation of NRS 172.145(2) is clearly erroneous. For this
4 reason, the Court's ruling is ripe for reconsideration. There is simply no requirement that a
5 defendant present new evidence to obtain reconsideration where the underlying basis for the
6 decision is based on a clearly erroneous interpretation of the relevant law.

7
8 **III. DEFENDANT'S MOTION SHOULD BE GRANTED.**

9 *A. The Court's reading of NRS 172.145(2) conflicts with the purpose and spirit of the law.*

10 The State is adamant that it should not be presumed to have knowledge of exculpatory
11 information contained within its files, but ignored or neglected by the prosecutor. While the State
12 is correct that NRS 172.145(2) requires the presentation of exculpatory evidence of which the
13 district attorney is aware, State's Opp. p.9 ll.17-21, the prosecutor in this case was aware of the
14 potential alternate explanations for Beverly McFarlane's death in every meaningful sense of the
15 word "aware." As pointed out in the Defendant's original petition, notes suspecting moyamoya
16 disease were a part of the medical records the State ordered prior to the grand jury presentment.
17 The State does not dispute that this information was present in its file at the time of the proceeding.
18 Consequently, the State was made aware of this information upon receipt of McFarlane's medical
19 records on October 7, 2013, more than three months before the grand jury was convened. The
20 State urges this Court to reaffirm its original determination that the prosecutor's ignorance of the
21 contents of his own file renders the State "unaware" of the information for purposes of NRS
22 172.145(2). However, in the context of exculpatory evidence, courts have routinely held that the
23 State is presumed to be aware of the information contained in its files. Much like an accused who
24 claims innocence because he did not know his conduct was illegal, ignorance is not a defense to
25 the requirement that the State present exculpatory evidence to the grand jury.

26 As pointed out in the Defendant's Motion to Reconsider, "[i]f evidence highly probative of
27 innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if
28 he has actually overlooked it." United States v. Agurs, 427 U.S. 97, 110 (1976). The logic behind

1 this presumption is abundantly clear. The rule requiring the presentation of exculpatory evidence
2 would be rendered a nullity if it could be avoided by the prosecutor simply asserting that he did not
3 read or understand his own file. Agurs encourages the State to thoroughly examine its file before
4 initiating a prosecution by ensuring that the State, not the Defendant, will be held accountable
5 when important exculpatory evidence is kept from the factfinder. The Defendant need only
6 demonstrate that the evidence was in the State's file at the time of the proceeding. To require the
7 Defendant to shoulder the burden of proving that the prosecutor actually read and understood the
8 contents of the file in order to establish a violation of NRS 172.145(2) is far too onerous, and it is a
9 burden that no prior court has ever imposed upon an accused seeking to invoke this statutory
10 provision. The State has not pointed to a single court opinion that suggests the Defendant has any
11 greater burden than establishing that the exculpatory evidence in question was present in the
12 State's file. Once it has been shown that the evidence was in the State's possession, as was shown
13 here, the prosecutor "... should be presumed to recognize its significance even if he has actually
14 overlooked it." Agurs at 110. This is the fair and correct reading of the statute.

15 The State downplays the fundamental miscarriage of justice created by this Court's
16 erroneous interpretation of NRS 172.145(2) by suggesting that "[t]his is one of maybe only a few
17 cases where the potentially exculpatory nature of the evidence is not readily apparent." State's
18 Opp., p.10 ll.6-7. The State claims that "[i]n the vast majority of cases, the exculpatory nature of
19 evidence is clear (i.e. an alternative suspect admitting to the crime, a witness asserting that they
20 lied, an alibi, etc.)." State's Opp., p.10 ll.4-5. The State implies that where the exculpatory value of
21 evidence is "clear," it would be fair to charge the State with presumed knowledge of the evidence,
22 but because the exculpatory value of an alternate explanation for McFarlane's death was not
23 "readily apparent," it is perfectly appropriate to relieve the State of its obligation to present it.

24 Yet the distinction drawn by the State illustrates exactly why the Court's interpretation is
25 clearly erroneous. The State seems to agree that a prosecutor should not be allowed to claim
26 ignorance of evidence with an exculpatory value that is readily apparent. ("[M]any times the
27 exculpatory nature of the evidence will be clear. Thus the State will be aware of such and be
28 required to present such evidence to the grand jury." State's Opp., p.10 ll.17-19.) But if the State

1 can be presumed to be "aware" of the "clear" exculpatory information in its file, there is no
2 difference between an alibi, for example, and the potential alternate cause of death documented in
3 the medical records in this case. In both instances, information in the State's file is consistent with
4 the defendant's innocence, and if the State can be presumed to be "aware" of an alibi even if the
5 prosecutor overlooked it in the file, the State can just as rightfully be presumed "aware" of the
6 medical records in this case. The State's concession that a prosecutor can be considered "aware"
7 of facts in the file that he negligently overlooked illustrates why this Court's interpretation of NRS
8 172.145(2) was incorrect and why reconsideration is appropriate. As set forth in the Defendant's
9 original Motion to Reconsider, courts have refused to entertain the State's arguments that
10 exculpatory evidence need not be presented because its significance was overlooked. There is no
11 logical reason why the outcome of this motion should be any different if the exculpatory evidence
12 at issue was an alibi as opposed to an alternate cause of death. If the State can be presumed to be
13 aware of the former, it can be presumed to be aware of the latter.

14 **1. Brady is not implicated by this motion.**

15 It is important to note that Agurs and the related cases cited by the Defendant's motion are
16 not intended to imply that Brady v. Maryland governs this issue. Agurs is cited for the proposition
17 that the State cannot avoid its obligation to produce exculpatory evidence by claiming ignorance of
18 the contents of its own files. The parameters of that obligation extend to exculpatory evidence in
19 the State's file, and the obligation is in no way diminished by the State's claims that it did not
20 grasp the significance of the evidence. The State's obligation to present exculpatory evidence
21 derives not from Brady v. Maryland but from NRS 172.145(2). Brady has nothing to do with this
22 issue.

23 The State cites to Williams v. State, 504 U.S. 36 (1992), which holds that the United States
24 Constitution does not mandate that prosecutors be required to present exculpatory evidence to the
25 grand jury. However, Nevada is free to provide greater protections to its citizens than the bare
26 minimums set forth in the Constitution. Nevada law obligates the State to introduce exculpatory
27 evidence to the grand jury, despite Williams' holding that such an obligation is not mandatory.
28 Clearly, the State would prefer to see NRS 172.145(2) repealed, and its citation to Williams may

1 be persuasive to the Nevada legislature during its next session. Under current Nevada law,
2 however, the State was required to present the exculpatory evidence contained in Beverly
3 McFarlane's medical records to the grand jury.

4 The State worries that "...defendants will unnecessarily benefit from a decision that would
5 require the State to present any possible explanation of death." State's Opp., p.12 ll.20-22. This
6 "unnecessary benefit" the State identifies is an inherent feature of a criminal justice system that
7 honors the presumption of innocence and is premised on the notion that it is better for ten guilty
8 men to go free than for one innocent man to be wrongfully imprisoned. It is true that where the
9 grand jury is fully informed, and provided all of the evidence that points to innocence as well as
10 guilt, they may not automatically return an indictment. This is not an "unnecessary benefit" to the
11 accused. This is the exact manner in which our system is supposed to work. While the State
12 clearly prefers a system that would force the defendant to suffer the consequences of the State's
13 failure to grasp the significance of the facts in its own file, this is not the system envisioned by
14 NRS 172.145(2).

15 The State complains that if it were required to advise the grand jury of the potential
16 alternate causes of McFarlane's death in this case, then it will be required to present, for example,
17 evidence of "high blood pressure, old age, heart attack, diabetes, the flu, or internal bleeding" in a
18 case where the victim was shot in the head. State's Opp., p.12 ll.24-26. This hypothetical parade
19 of horrors is a smokescreen to draw attention away from the egregious facts of this case.
20 Obviously, there is no connection between a gunshot wound to the head and a diagnosis of the flu
21 or diabetes. Here, however, the diagnosis of moyamoya disease provides an explanation for every
22 fatal injury documented by the medical examiner. Moyamoya disease causes blockages of the
23 arteries in the brain, and would cause damage that mirrored abusive head trauma. Moyamoya
24 disease is not just a contributing factor to the victim's death in this case, it would explain away
25 every one of the coroner's findings and absolutely negate the conclusion that McFarlane died as a
26 result of homicide. Moyamoya disease thus explains away the charges in a way that diabetes, the
27 flu, or high blood pressure would not in a case where death was occasioned by a gunshot wound or
28 a stabbing. The State tried this same argument in opposition to the Defendant's Petition for Writ

1 of Habeas Corpus and it was squarely rejected. The Court does not dispute that the evidence of
2 moyamoya disease is exculpatory; the Court held that the evidence was exculpatory, but that the
3 State's obligation to present it was excused because the State did not understand its significance.

4 **2. The State did not exercise due diligence in reviewing its file.**

5 The State repeatedly argues to this Court that it "exercised due diligence" in reviewing its
6 file for exculpatory information before the grand jury hearing, State's Opp., p.13 II.5-19, p.14
7 II.26-28. Reading between the lines of the State's brief, however, it becomes apparent that the
8 State did no such thing. In fact, it is not even clear from the State's opposition that the prosecutor
9 ever bothered to review Beverly McFarlane's medical records at all.

10 The State writes that "...the State exercised due diligence by asking the doctors, who
11 reviewed the medical records, if there was any other possible cause of death besides blunt force
12 trauma." State's Opp., p.13 II.14-16. Noticeably absent from the State's account is the claim that
13 the prosecutor himself examined the medical records prior to the grand jury hearing. According to
14 the State, it relied upon the assessments of its experts, a Clark County medical examiner and a
15 private neuropathologist, to determine whether any exculpatory information existed. How can the
16 State claim that it exercised due diligence without having personally read the medical records?
17 The possibility that McFarlane suffered from moyamoya disease is plainly set forth at multiple
18 points throughout the UMC records. Had the State personally reviewed these records, it could
19 have specifically addressed these notations with its experts. Instead, it appears the State posed a
20 much more general question to its experts, without mentioning the specific disease identified by
21 independent UMC employees. This is not due diligence. The State has not given any indication
22 that the prosecutors personally analyzed the medical records for exculpatory evidence, instead
23 shifting that responsibility to its experts.

24 It seems quite suspicious that the State would argue a lack of awareness of an alternate
25 cause of McFarlane's death, yet freely admit that it posed questions about an alternate cause of
26 death to its experts before the grand jury proceeding. It certainly appears that the State had at least
27 some understanding that the medical records could expose an alternative diagnosis. In any event,
28 by raising the possibility of an alternate cause of death with its experts, but refusing to present the

1 same issue to the grand jury, the State violated its statutory obligation to introduce exculpatory
2 evidence.

3 **B. THE COURT'S INTERPRETATION OF NRS 172.145(2) IS CLEARLY**
4 **ERRONEOUS.**

5 The State incorrectly asserts that "Defendant is attempting to expand Brady into the realm
6 of grand juries." State's Opp., p.13 l.21. This is a false statement. As explained above, the cases
7 cited by the Defendant in his Motion to Reconsider are not intended to suggest that Brady v.
8 Maryland governs this issue. These cases are cited to highlight the uncontroversial proposition
9 that the State is presumed to be aware of exculpatory evidence in its file. This presumption first
10 arose in the Brady context, but is equally applicable to Nevada's statutory obligation to present
11 exculpatory evidence to the grand jury. And the logic behind this proposition is clear: the State
12 cannot escape its obligations by ignoring documents in its possession. Crafting an "ignorance"
13 exception to the obligation to present exculpatory evidence would punish the accused for the
14 State's negligence and discourage prosecutors from fully reviewing their own files. Furthermore,
15 since there would be no reliable way to determine whether the prosecutor truly overlooked the
16 significance of the evidence in its own file or whether he simply *claimed* to have done so in order
17 to avoid the adverse consequences of a pretrial writ petition, courts have come to the conclusion
18 that the fairest way to handle the issue is to charge the prosecutor with presumptive awareness of
19 everything in his possession. Proving that the prosecutor was aware of exculpatory evidence
20 before he withheld it is just as impossible as proving that a defendant was aware of a statutory
21 provision before he violated it. As Agurs makes clear, ignorance is not a defense to producing
22 exculpatory evidence any more than it would be a defense to the commission of a crime.

23 The State fears that requiring it to actually read its file before presenting a case to the grand
24 jury "...could grind the wheels of justice to a virtual halt." State's Opp., p.14 ll.1-2. The State
25 need not worry about the speed of the wheels of justice in this particular proceeding, however,
26 because the withholding of critical evidence tending to explain away the charge of murder ensured
27 no justice at all would be had for Anthony Mayo before the grand jury. "Justice" in this case
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1 required that the grand jury be informed that Beverly McFarlane could have died from causes
2 other than blunt force trauma.

3 The State expresses concern that "Defendant wants the State to investigate and understand
4 every iota of medical records before presenting to the grand jury." State's Opp., p.13 IL28 -- p.14
5 1.1. The State insinuates that it would be wrong to expect the prosecutor seeking to imprison a
6 man for the rest of his life to "investigate and understand" the medical records of the victim before
7 presenting the case to a grand jury. To the extent that NRS 172.145(2) obligates the prosecutor to
8 present exculpatory evidence, Nevada law *does* expect the State to investigate and understand the
9 evidence in the case, especially where the State obtains the medical records prior to the hearing
10 with the argument that the records are necessary for the prosecution. It was the State that initially
11 signaled the importance of these records, and now the State contends that it is perfectly fair to
12 secure an indictment by hiding an innocent explanation for McFarlane's death from the factfinder.
13 The State must be joking when it frets that reconsideration will grind the wheels of justice to a
14 halt. When it comes to this case, the State flattened the fires on the wheels of justice long ago.

15 The State then has the audacity to suggest that it is simply too burdensome for the State to
16 understand and convey to the grand jurors the significance of the exculpatory medical evidence in
17 this case. State's Opp., p.14 IL3-16. The State complains that it would have had to "ask the expert
18 about all the unfamiliar words" in the medical records and "educate the grand jurors on these
19 numerous medical terms so they could properly deliberate." State's Opp., p.14 IL6-13. These
20 complaints about the burdens of ensuring fairness in the grand jury proceedings are not sufficient
21 excuses for violating the plain mandate of NRS 172.145(2). The State cannot hide exculpatory
22 evidence from the grand jury because presenting it would be too time-consuming or too difficult.
23 Indictments may be secured more efficiently without the necessity of presenting exculpatory
24 evidence, in the same way that convictions may be secured more efficiently by disallowing the
25 defense attorney from asking questions. And jury deliberations would surely proceed more
26 quickly if that controversial "Not Guilty" option were removed from the verdict form. Our
27 criminal justice system frequently sacrifices efficiency in favor of fairness to the accused.

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CONCLUSION

The Court's interpretation of NRS 172.145(2), holding that the State need not present exculpatory evidence in its possession to the grand jury as long as it does not understand the significance of the evidence, is clearly erroneous and ought to be reconsidered. This interpretation ignores the principle set forth in Agurs that the State is presumed to be aware of the exculpatory evidence in its possession, rewards prosecutors for laziness, and deals a crippling blow to the purpose and spirit of the statutory obligation. This interpretation should be reconsidered, and the Defendant's Petition for Writ of Habeas Corpus should be granted.

DATED this 21st day of July, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Dan A. Silverstein
DAN A. SILVERSTEIN, #7518
Deputy Public Defender

By: /s/ Arlene Heshmati
ARLENE HESHMATI, #11076
Deputy Public Defender

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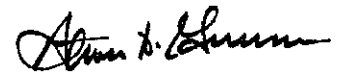
CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of DEFENDANT'S REPLY IN SUPPORT OF
MOTION TO RECONSIDER DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS, was
made this 21ST day of July, 2015, by Electronic Filing to:

CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
Motions@clarkcountyda.com

ROBERT STEPHENS, Deputy District Attorney
E-Mail: robert.stephens@clarkcountyda.com

By: /s/ Sara Ruano
Secretary for the Public Defender's Office



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,)
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Plaintiff,) Case No. C-14-295313-1
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vs.) Dept No. XXV
)
ANTHONY TYRON MAYO,)
)
Defendant.)
)
_____)

BEFORE THE HONORABLE KATHLEEN DELANEY

JULY 29, 2015, 9:00 A.M.

REPORTER'S TRANSCRIPT
OF
DEFENDANT'S MOTION TO
RECONSIDER DENIAL OF PETITION
FOR WRIT OF HABEAS CORPUS

APPEARANCES:
(See separate page)

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

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1 LAS VEGAS, CLARK COUNTY, NEVADA

2 WEDNESDAY, JULY 29, 2015, 9:00 A.M.

3 PROCEEDINGS

4 * * *

5 THE COURT: State of Nevada versus Anthony Mayo.

6 MR. STEPHENS: Rob Stephens for the State.

7 MR. SILVERSTEIN: Dan Silverstein and Arlene
8 Heshmati on behalf of Mr. Mayo who is present in custody.

9 THE COURT: Yes. I do see Mr. Mayo present with
10 us in custody. This is on for Defendant's Motion to
11 Reconsider Denial of Petition for Writ of Habeas Corpus.

12 There has been extensive briefing here, but with
13 any matter where -- I don't know that I would necessarily
14 call it unique because there are some very special
15 aspects I think to this argument and this circumstance
16 and I do want to make sure that not only for our written
17 record but for our oral record that we have full
18 argument.

19 So, Mr. Silverstein, is there anything you want
20 to highlight or add? I do want to point out that there
21 was an issue raised about is there even a mechanism to
22 reconsider something in criminal cases.

23 I certainly feel that especially in criminal
24 cases that whether there's a rule that would give you
25 parameters for how to reconsider that anything that might

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1 precludes a reconsideration motion and there have been
2 Nevada Supreme Court cases where they have considered
3 motions to reconsider as valid motions in the State of
4 Nevada.

5 MR. STEPHENS: Your Honor, on that point, I'm
6 just going to submit it to your discretion.

7 THE COURT: And as I said, I don't perceive
8 there to be a procedural bar. I appreciate you
9 addressing that. And certainly there are circumstances
10 in which the supreme court has made it clear that simply
11 ruling in court and having minutes does not in itself
12 turn it into a final order, and absent that final order
13 it can be subject to review and changed.

14 Of course, there still has to be a standard met
15 to warrant that review and change and typically what
16 you're looking for in those circumstances would be that
17 there has either been a misapplication of the law or a
18 misapprehension of the facts pertaining to the case.

19 I think in this particular circumstance your
20 arguments are more focused on that the law has been
21 misapplied. But I'm open to hearing, again, any
22 arguments that you want to highlight. I have of course
23 reviewed the briefings but I want to make sure our record
24 is complete.

25 MR. SILVERSTEIN: And the Court is correct; it's

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1 be subject to review that could create a manifest
2 injustice is not addressed, et cetera, should be the
3 subject of the ability for counsel to come to court. So
4 I don't have any heartburn over the procedural issue.
5 But to the extent that that becomes an issue anywhere
6 along the way or could become an issue then I would want
7 to see if you had any opinion on that, otherwise, of
8 course, the substantive issues are what we are looking
9 for today.

10 MR. SILVERSTEIN: Well, with respect to the
11 first issue as to whether or not a motion to reconsider
12 is a proper motion to be heard there are cases from the
13 Nevada Supreme Court, as cited in my reply, that suggest
14 that unless the written order has been filed until that
15 written order is signed and filed by the Court that the
16 Court is free to reconsider its ruling. And this motion
17 was filed about a week before the written order was filed
18 in court.

19 THE COURT: Was actually entered, yes.

20 MR. SILVERSTEIN: So I don't believe that there
21 is any procedural bar to reconsideration. I believe the
22 Court agrees with that, that there is no procedural bar
23 here that while there is no specific rule, there's no
24 specific Eighth Judicial District Court rule that allows
25 for a reconsideration motion. There is also no rule that

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1 misapplication of the law that I am focused on. I don't
2 think that there is really any dispute as to the major
3 relevant facts to this issue. I mean the Court has found
4 that the evidence we are speaking of is the reference to
5 Moyamoya disease in the medical records. The Court has
6 found that that evidence was exculpatory. That's part of
7 the order that that evidence is exculpatory.

8 So I don't think that there is any dispute at
9 this point as to whether or not that evidence is
10 exculpatory within the meaning of the statute. The
11 dispute is whether or not the State can be considered
12 aware of that evidence within the meaning of that
13 statute.

14 And as I have laid out in the motions and as I
15 will lay out here again orally, Your Honor, I believe
16 that the Court's interpretation of this statute that
17 obligates the State to present exculpatory evidence, it's
18 NRS 172.145(2), and I believe that the Court's
19 interpretation of that statute was clearly erroneous. I
20 think the Court's reading of that statute negates the
21 obligation that is in the statute itself.

22 If the Court's ruling were to be applied
23 generally in the Regional Justice Center it would
24 prejudice not just Mr. Mayo it would prejudice anyone who
25 comes before the court, this court or any other court,

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<p>1 with an argument that there was exculpatory evidence that 2 should have been presented to the grand jury.</p> <p>3 Here's the problem in the case. We all agree 4 that the evidence was exculpatory. That's part of the 5 Court's order. We all agree that that evidence was in 6 the State's file at the time that he went to the grand 7 jury. It was there about a month prior to going to the 8 grand jury.</p> <p>9 He had subpoenaed these medical records with the 10 argument that the evidence in the medical records was 11 important and necessary to the prosecution, so 12 Mr. Stephens definitely had these records in his 13 possession.</p> <p>14 And the question is whether or not it's fair to 15 Mr. Mayo to exonerate Mr. Stephens from the necessity of 16 presenting that evidence because he claims to the Court 17 that he was not aware of what it meant.</p> <p>18 And I'm going to cite several cases. The most 19 important is <i>United States v. Agurs</i>. And this is from 20 the U.S. Supreme Court 1976.</p> <p>21 "If evidence highly probative of 22 innocence is in the State's file he -- meaning the 23 prosecutor -- should be presumed to recognize its 24 significance even if he has actually overlooked 25 it."</p> <p style="text-align: right;">7</p>	<p>1 would like to go back and revisit just the case law 2 holdings themselves. And <i>Agurs</i> is one, obviously, that 3 you focused on and the Court looked at as well.</p> <p>4 I guess I want to have a little discussion here 5 because a couple things that haven't been discussed yet 6 in this oral argument is I don't think it's disputed that 7 not only did the State have this information but so did 8 the defense. And if that is in dispute prior to the 9 grand jury that the defendant and the State both had the 10 evidence let me know.</p> <p>11 But, regardless, just focusing on the State 12 having it when you look at <i>Agurs</i> and these other cases 13 these holdings are in the context of a bigger picture. 14 And the context of the bigger picture is <i>Agurs</i> and these 15 other cases is these were cases, as I read them, where 16 because of the alleged or even if it was determined to be 17 actual <i>Brady</i> violation, failure to disclose evidence, is 18 because this was prior to trial and the defendant then 19 was unable to get a fair trial because they didn't have 20 the information.</p> <p>21 And the statute requires awareness and requires 22 that this information be given so that the defense has 23 the opportunity to know what is there and to present it 24 to him to work with it. And I think the missing piece of 25 this argument here, and it is something that is</p> <p style="text-align: right;">9</p>
<p>1 "It is now axiomatic that the prosecutor 2 has an affirmative duty to volunteer evidence and 3 in fact has presumed to have knowledge of the 4 contents of his files such that claims that 5 exculpatory evidence was overlooked will not be 6 tolerated."</p> <p>7 That is <i>United States v. Kipp</i>, 990 F. Supp. 102. 8 From <i>Hill v. State</i>, this is an Alabama case, 651 9 South Southern 2nd 1128.</p> <p>10 "Knowledge of the existence of evidence 11 will be imputed to the prosecution even when the 12 prosecution is without actual knowledge of the 13 existence of the evidence."</p> <p>14 <i>Parker v. State</i>, another Alabama case.</p> <p>15 "Knowledge of exculpatory evidence may 16 be presumed as when the information is in the 17 prosecutor's files."</p> <p>18 Mr. Stephens in his opposition to the Court 19 tried to draw a distinction between the medical evidence 20 that we are talking about here and, for example, an alibi 21 witness or a statement from someone else confessing to 22 the crime.</p> <p>23 THE COURT: Mr. Silverstein, before we move over 24 to sort of perhaps examples or hypotheticals of how this 25 might play out in this circumstance, how that fits in, I</p> <p style="text-align: right;">8</p>	<p>1 persuasive to this Court is that this information was 2 available to both sides and that this information, not 3 the fact that I -- sorry, I'm being long-winded here -- 4 but I am trying to avoid the we're still looking at a 5 certain result that we say that the State doesn't have to 6 look at something just because the defense happens to 7 come into possession of it. That's not what I'm getting 8 at.</p> <p>9 What I'm getting at is the application of the 10 <i>Agurs</i> case where something never came to the defense's 11 attention, the State had it or knew they had it or should 12 have known they had it and didn't get it over and we had 13 an unfair trial. We just simply don't have those facts 14 here.</p> <p>15 And the circumstance that concerns me is at the 16 same time the State has this the defense has it. And at 17 some point awareness is an issue and so I want to bring 18 it back to your specific argument and the concerns you 19 have about the specific issues in this case. But I do 20 need to address the distinction that I see from <i>Agurs</i> and 21 <i>Kipp</i> versus this case.</p> <p>22 MR. SILVERSTEIN: Certainly, Your Honor. And I 23 agree with the Court that I cannot make a claim here that 24 Mr. Mayo received an unfair trial. I just can't make 25 that claim. I can make the claim that Mr. Mayo received</p> <p style="text-align: right;">10</p>

<p>1 an unfair grand jury proceeding. He absolutely received 2 an unfair grand jury. 3 And the way that the law is written, because 4 Mr. Mayo has just as much right for his grand jurors to 5 hear the exculpatory evidence as he has a right for his 6 trial jury to hear that evidence. 7 And the State has the same obligation to present 8 that evidence to the grand jury prior to that proceeding 9 as they do to provide it to me prior to the trial. 10 Had they taken this case to the preliminary 11 hearing as opposed to the grand jury where I am not 12 allowed to be present at the grand jury, I'm not there, I 13 don't have the capability to explain to the grand jury 14 what this Moyamoya disease means and the significance of 15 why this is important and why this is an alternate 16 explanation to this woman's death. I wasn't there. 17 Had they gone to the preliminary hearing then I 18 could understand the argument that, Well, the defense had 19 it too. They could have cross-examined, they could have 20 brought this up and that's why that argument wouldn't fly 21 at preliminary but the grand jury is very different. 22 Mr. Stephens is the only representative there. He is the 23 only one making the argument to the grand jury as to why 24 Mr. Mayo should be indicted and that's why he has this 25 obligation.</p> <p style="text-align: right;">11</p>	<p>1 what it is you just said a minute ago. 2 MR. SILVERSTEIN: Sure. 3 THE COURT: Well, I have no disagreement with 4 you that the Court has determined that this information 5 could have been exculpatory or would be exculpatory, I 6 don't recall making a finding and tying it into that. I 7 want to make sure I understood what you just said about 8 cause of death. 9 MR. SILVERSTEIN: The reason that this evidence 10 is exculpatory is because it would provide an alternate 11 explanation for the death. 12 THE COURT: I just wanted to make sure I didn't 13 miss something. 14 Go ahead. 15 MR. SILVERSTEIN: It is not whether or not it 16 would be proven before the grand jury that this man is 17 innocent of the crime but the grand jury had the right to 18 consider that information in deciding whether or not he 19 should be indicted on a count of murder. 20 The grand jury had the right and Mr. Stephens 21 had the obligation to inform them that, Hey, there may be 22 another explanation here. There may be another reason 23 that this woman died as opposed to what the expert 24 testified to which is, Oh, the only possible explanation 25 here is Mr. Mayo's conduct. And that is simply not the</p> <p style="text-align: right;">13</p>
<p>1 Whether or not the defense had the information, 2 with all due respect, I do not believe that that's 3 relevant to this issue as to whether or not -- 4 THE COURT: Of course the grand jury's purpose 5 is to simply determine probable cause from the totality 6 of the circumstances, so there is a different analysis 7 would you agree based on information that could have or 8 would have been provided to determine whether the grand 9 jury would have met the much lower standard of probable 10 cause versus ultimately guilt beyond a reasonable doubt. 11 MR. SILVERSTEIN: But, Your Honor, the mission 12 of the grand jury -- this is from <i>Sheriff v. Frank</i> -- the 13 mission of the grand jury is to clear the innocent no 14 less than to bring the trial to those who may be guilty. 15 There was evidence that was withheld from the 16 grand jury that would suggest not just that Mr. Mayo 17 wasn't there at the time that this happened, but that no 18 crime was committed, that this woman's death was the 19 result of a preexisting medical condition. That is 20 absolutely exculpatory evidence. 21 And the courts agreed with the fact that that 22 evidence is exculpatory. Now we are just arguing about 23 whether or not Ms. Stephens should have been obligated to 24 provide it. I think that these cases; <i>Agurs</i>, <i>Kipp</i> -- 25 THE COURT: I'm sorry. Can you back up and say</p> <p style="text-align: right;">12</p>	<p>1 case and the medical records bear that out. 2 That testimony from that expert was at best 3 highly misleading to the grand jury. At worst it 4 destroyed the grand jury's function in this case to clear 5 the innocent no less than bring the trial to those who 6 may be guilty. 7 Where a prosecutor refuses to present 8 exculpatory evidence he in effect destroys the existence 9 of an independent and informed grand jury. That's also 10 from <i>Sheriff v. Frank</i>. 11 The problem here, Your Honor, is that the grand 12 jury was not told about critically important information 13 that may have influenced their judgment that may have 14 avoided an indictment on a murder charge from Mr. Mayo. 15 Now, I want to talk about the distinction that 16 Mr. Stephens attempts to draw between this medical 17 evidence here and, for example, an alibi witness or some 18 other type of evidence that in Mr. Stephen's view where 19 the exculpatory value would be clear. And the argument 20 being that here it wasn't clear. 21 There is nothing to prevent a prosecutor in the 22 next case down the line when, let's say, that there's a 23 statement from an alibi witness. What would prevent the 24 prosecutor from coming before this court and saying, 25 Well, Your Honor, I was out late the night before that I</p> <p style="text-align: right;">14</p>

1 went to the grand jury; I didn't have a chance to read
 2 the entire file and that particular folder with that
 3 particular alibi witness statement, I just didn't get to
 4 that. I'm sorry. I'm meant to but I just didn't.
 5 Now under this Court's reading of the statute
 6 that would not be a violation of the obligation to
 7 present exculpatory evidence because the prosecutor
 8 wasn't aware. That is the point.
 9 THE COURT: How would that be due diligence? I
 10 appreciate your argument maybe if the Court has due
 11 diligence out of the requirement.
 12 MR. SILVERSTEIN: Absolutely. That is exactly
 13 what your reading of this statute has done because
 14 Mr. Stephens could come before the court whatever the
 15 evidence, whatever it is no matter how exculpatory it is,
 16 no matter how clear, if Mr. Stephens were to say, Well,
 17 I'm sorry, I just missed it, that's the defense's
 18 obligation under this court's reading of the statute.
 19 THE COURT: This Court's ruling specific to the
 20 fact that we have an obscure reference to an obscure
 21 disease buried in hundreds and hundreds of pieces of
 22 paper and medical records and ultimately making the
 23 determination that with due diligence this wasn't found,
 24 it wasn't aware. That's the Court's understanding of
 25 what happened here. Not, Oh, I just didn't get to it but

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1 it's there.
 2 I understand your argument saying, Hey, whether
 3 they are aware of it or not then it should still be
 4 considered exculpatory and it should still have the same
 5 net effect. But I do believe the statute requires due
 6 diligence and awareness and I could not find that there
 7 was a lack of due diligence here. So I don't see where
 8 this ruling would obviate the need for that requirement.
 9 MR. SILVERSTEIN: Well, with all due respect,
 10 again, Your Honor, the statute does not mention due
 11 diligence. That, again, is something that has been read
 12 into the statute. It's just not there.
 13 THE COURT: Well, I believe the case law has
 14 read that into the statute.
 15 MR. SILVERSTEIN: Actually, Your Honor, the case
 16 law says that when there is evidence highly probative of
 17 innocence in the file the prosecutor should be presumed
 18 to recognize its significance. If we are going to go by
 19 the case law, the case law is very clear that you cannot
 20 get out of your obligation to present exculpatory
 21 evidence by saying that you overlooked the evidence.
 22 Over and over again the rulings that I have
 23 pointed out in my motion over and over again say the
 24 courts will not tolerate this argument that, Well, it's
 25 in my file but I overlooked it. The only thing that I

16

1 needed to produce to show a violation of this statute is
 2 that there was exculpatory evidence present in this file
 3 when it went to the grand jury and I have shown those
 4 things.
 5 And to interpret the statute, to add this
 6 additional requirement that now not only do I have to
 7 show that he had it but I have to show that he understood
 8 it, that's impossible. That's a showing that can never
 9 be made. The prosecutor could always come to the court
 10 and say, Well, I didn't understand why that alibi witness
 11 was important. I didn't understand that that statement
 12 would put the client somewhere else at the time of the
 13 crime. I just didn't get it.
 14 And how do we disprove that? Do we put
 15 Mr. Stephens on the stand, give him a polygraph. The
 16 only prosecutor that is bound by this obligation under
 17 the Court's ruling, the only prosecutor that is bound is
 18 one that is angelic; that is not only going to follow all
 19 the rules but is going to come into court and admit, Yes,
 20 I did know about that and I didn't present it even
 21 knowing that it was exculpatory.
 22 Because if a prosecutor comes in and says I
 23 didn't understand that that was exculpatory under this
 24 Court's ruling the obligation to present it doesn't
 25 apply. And that is the problem. That's why the courts

17

1 in *Brady* said over and over, It's not a defense to say I
 2 didn't understand the significance of the evidence.
 3 Because the courts have recognized it would be impossible
 4 for a defendant to ever prove a violation of this statute
 5 if I also had to show his level of knowledge or his
 6 degree of understanding.
 7 It is not fair to Mr. Mayo to require this
 8 additional hurdle for the defense to jump. His rights
 9 were violated and it happened because this man
 10 (indicating) had evidence in his file that he didn't
 11 produce to the grand jury.
 12 Now, if the ruling is going to turn on whether
 13 or not due diligence was performed then I'm going to ask
 14 for a brief evidentiary hearing to ask Ms. Greco exactly
 15 what this conversation was that they had. There was at
 16 least some conversation based on Mr. Stephens' responses.
 17 There was some conversation between Mr. Stephens and his
 18 experts about alternate causes. And I'm assuming that
 19 that just didn't come out of the blue. I mean that
 20 conversation, that question had to be sparked by
 21 something. So perhaps there was something in the medical
 22 records that gave him some clue that there might be
 23 something else. I mean why ask the expert, Is there an
 24 alternate cause?
 25 So I think there was some degree of awareness

18

1 just based on --
2 THE COURT: Well, I can see a basis to ask that
3 question just to eliminate that issue without there
4 actually being some belief that there was. But that
5 aside, one of the things I want to sort of make sure our
6 record is clear here, I don't disagree with you that due
7 diligence is in the statute. I don't want to misspeak
8 here or make it sound like I'm adding yet another layer
9 of what the concern is here.

10 I guess my point is on the facts and
11 circumstances as the Court found it in this case, the
12 Court found that, again, first and foremost, that these
13 medical records were in the possession of both sides
14 prior to the grand jury.

15 Secondly, that a -- and I'll use these terms
16 again -- obscure reference to a disease which no one
17 knows what it is buried within a large volume of medical
18 records does not -- how do I phrase this without
19 stumbling upon the arguments that we are making here.
20 That it does not stand out to be something that would be
21 known at some point.

22 Doctors reviewed these records. Were asked if
23 there were alternate causes and testified that there were
24 not. It's hard for this Court to determine at this point
25 in time that there was an unfair grand jury presentation

19

1 from the prosecutor's perspective or from the prosecutor
2 in this case under those facts and circumstances.

3 And I understand your argument that we now have
4 gone through the records. We now have seen and
5 determined what is this disease. The Court has now found
6 that this disease could be an alternative explanation for
7 the circumstances of the death such that it would be
8 exculpatory and now we are going in hindsight and saying,
9 Okay, that in and of itself means we're done. That in
10 and of itself means that there was a constitutional
11 violation because it exists. I get that's your argument.

12 But I wanted to be clear of what the findings
13 were and the Court's point in the due diligence
14 discussion was that there doesn't seem to be any
15 indication here of those other scenarios of I just didn't
16 get to it; I wasn't looking at it; I wasn't paying
17 attention; we gave it to doctors; they looked at it; we
18 asked them if there were alternate causes and they said
19 no.

20 Both the State and the defense had it and nobody
21 knew what Moyamoya disease was. Now we go and through
22 the defense's due diligence looked it up and see what it
23 is and find that there's something here that very well
24 may be an explanation, that's why the Court determined
25 that it was potentially exculpatory.

20

1 But I think the whole thing here just rests on,
2 okay, in hindsight going back something is in there that
3 nobody would including the defense seen, perceived or
4 known it was exculpatory, but now that we determine that
5 it is we go back and undo everything.

6 Again, I just wanted to put it in context. The
7 due diligence comment for me was that I don't perceive
8 any lack of due diligence on the part of the prosecutor
9 here in these circumstances, for what that's worth in the
10 analysis, so unique to these facts and circumstances
11 because you were drawing analogies to the net effect of
12 this case being, Well, somebody didn't even bother to
13 look or somebody neglected to look at a file or somebody
14 just missed it and that somehow this ruling would give
15 them a pass.

16 I am not trying to disagree with you. I am just
17 trying to put it into context of what I meant by the due
18 diligence and how it pertains to these facts.

19 MR. SILVERSTEIN: Your Honor, obviously, I'm
20 much more concerned about the situation where a
21 prosecutor intentionally does that.

22 THE COURT: Of course.

23 MR. SILVERSTEIN: But the effect to Mr. Mayo is
24 the same. I mean the effect on my client is the same
25 whether he intentionally withheld it or negligently

21

1 withheld it. The effects of Mr. Mayo's rights are the
2 same. And there's been a violation of the statute either
3 way whether it was intentional or not.

4 In many respects it is not relevant. What's
5 relevant here is that information contained in his file
6 was exculpatory. That finding has been made. Once that
7 finding has been made that that evidence is exculpatory
8 and we know that it was in his file the analysis, in my
9 opinion, is done.

10 Because any other ruling is going to open the
11 door for a prosecutor to come in and say, Well, I didn't
12 read it; I just missed it; you know my co-counsel took
13 that file home; my dog ate that alibi statement.
14 Whatever reason a prosecutor can come up with as to why
15 it was not presented and now a defense to his obligation
16 and that's why I say that if this ruling stands and if
17 this interpretation stands this obligation no longer
18 exists.

19 The interpretation that the Court has made of
20 this obligation negates the obligation. Because if a
21 prosecutor comes in and says, I didn't present it because
22 I didn't know about it there is no more obligation, Your
23 Honor. It might as well not be in the statute. And if
24 Mr. Stephens wants to have that statute repealed then he
25 should go to the legislature and make those arguments to

22

<p>1 the legislature.</p> <p>2 Knowing that this obligation is on the books it</p> <p>3 has to be interpreted in a way that gives it rights. It</p> <p>4 has to be interpreted in a way that is consistent with</p> <p>5 the purpose and the spirit of why we have this rule. And</p> <p>6 we have this rule to protect people like Anthony Mayo</p> <p>7 where there's exculpatory evidence that may persuade a</p> <p>8 grand jury not to indict.</p> <p>9 The reason we have the statute is so that people</p> <p>10 in Mr. Mayo's shoes get a fair hearing and the grand jury</p> <p>11 hears everything not just the facts that Mr. Stephens</p> <p>12 thinks points towards guilt. They should be allowed to</p> <p>13 hear everything.</p> <p>14 And the Court has said multiple times, Well,</p> <p>15 this is a note that is buried in hundreds of pages of</p> <p>16 medical records. Well, that may be true, Your Honor. I</p> <p>17 have no control over what percentage of the records are</p> <p>18 exculpatory. But I know that even if it's one percent,</p> <p>19 he has a right to that one percent to be presented.</p> <p>20 It's not about how many records or how many</p> <p>21 pages of records were there; it's about the significance</p> <p>22 of what was there. And there was evidence that the grand</p> <p>23 jury was entitled to hear. There was evidence in his</p> <p>24 possession that he failed to present. That is a</p> <p>25 violation of this statute, Your Honor.</p> <p style="text-align: right;">23</p>	<p>1 highly probative of innocence or is in the State's file</p> <p>2 he should be presumed to recognize its significance even</p> <p>3 if he's actually overlooked it.</p> <p>4 The important words here are highly probative of</p> <p>5 innocence. It's not highly probative of innocence. And</p> <p>6 in fact let me go further to say back to a case</p> <p>7 discussing <i>Brady</i> and its obligations. <i>Brady</i> is for</p> <p>8 trial. Grand jury has a separate purpose, and therefore,</p> <p>9 has a separate standard when we are doing what evidence</p> <p>10 was or was not presented to the grand jury.</p> <p>11 <i>Brady</i> specifically says that all exculpatory</p> <p>12 evidence within the State's possession or that the State</p> <p>13 should have been aware of needs to be disclosed to the</p> <p>14 defense.</p> <p>15 Whereas, the grand jury statutes specifically</p> <p>16 uses different language. It says:</p> <p>17 "All exculpatory evidence of which</p> <p>18 the State is aware must be disclosed."</p> <p>19 I think this word "aware" provided the Court the</p> <p>20 discretion to determine whether or not the State was</p> <p>21 aware. And if they weren't aware whether it was because</p> <p>22 the dog ate the paperwork or whatever it is, then the</p> <p>23 Court can issue some sort of appropriate remedy based</p> <p>24 upon that.</p> <p>25 But I think in this specific case where the</p> <p style="text-align: right;">25</p>
<p>1 THE COURT: Okay. Let me hear from</p> <p>2 Mr. Stephens.</p> <p>3 MR. STEPHENS: Thank you, Your Honor. I think</p> <p>4 you've hit upon a point that I want to address with you,</p> <p>5 so I will try to be brief on a lot of this.</p> <p>6 As far as whether or not defense counsel had the</p> <p>7 evidence, I do believe that that is relevant because I</p> <p>8 think it shows whether or not the prosecutor was aware of</p> <p>9 that evidence.</p> <p>10 We received a letter from the defense in this</p> <p>11 case prior to grand jury explaining the evidence that</p> <p>12 they wanted to present. That evidence was presented to</p> <p>13 the grand jury. When a medical record in two pages</p> <p>14 mentioned she "may" or "it could be consistent with</p> <p>15 Moyamoya" or a variety of other causes. When I asked my</p> <p>16 experts to explain these things to me or asked them, Hey,</p> <p>17 are there any other causes of death to be explained --</p> <p>18 that could cause this death and they say, no, I don't</p> <p>19 know what else I can do without sitting here and</p> <p>20 literally taking hours and hours, potentially weeks and</p> <p>21 months to understand the medical records. I am not</p> <p>22 trained in medicine; I rely upon these experts to explain</p> <p>23 these things to me.</p> <p>24 As far as the <i>Agurs</i> statement that is repeated</p> <p>25 often through the defense's motion is that if evidence is</p> <p style="text-align: right;">24</p>	<p>1 State relies upon two doctors; a brain expert and a</p> <p>2 coroner and they both say there is no other cause of</p> <p>3 death, I don't see, in my personal opinion, how this</p> <p>4 potentially could be exculpatory.</p> <p>5 You have already decided that issue so I will</p> <p>6 not address that any further.</p> <p>7 But the grand jury has a separate purpose than</p> <p>8 trial. And grand jury is to determine whether or not</p> <p>9 there is evidence for which the defendant should stand</p> <p>10 charge.</p> <p>11 Lastly, Your Honor, what I will just say in</p> <p>12 closing here, Your Honor, is the Court has, I believe,</p> <p>13 appropriately tried to draw that line of balance with</p> <p>14 this statute. <i>Brady</i> has a very strong position because</p> <p>15 the consequences are significant. It's a conviction,</p> <p>16 it's potential prison and those types of things. That is</p> <p>17 absolutely significant.</p> <p>18 Grand jury also has an important role in the</p> <p>19 process but the consequences aren't nearly as significant</p> <p>20 because he is not being adjudicated of anything. The</p> <p>21 defense will be able to present the Moyamoya defense at</p> <p>22 trial. They will be able to explain to the jurors how</p> <p>23 this would be relevant, whether it is relevant and we'll</p> <p>24 be able to put on a rebuttal case.</p> <p>25 The State exercised its due diligence in asking</p> <p style="text-align: right;">26</p>

<p>1 the experts. And I will state for the record because I 2 think there were implications that the State did not 3 prepare the case, what I will say is I spent probably 4 close to an hour with Dr. Greco in my office going over 5 the brain, going over pictures, going over some of the 6 records with her.</p> <p>7 I would also state that I spent time with 8 Coroner Elaine Olsen at her office. I can't remember the 9 exact time I spent there. And in addition to that I went 10 through the medical records. I don't understand the 11 relevance of Moyamoya when I was presenting it at that 12 time to the grand jury. It is a rare disease and we 13 don't even know if she had the disease. In fact there 14 has now been a report saying that there is no 15 pathological findings that she actually had it.</p> <p>16 Your Honor, what I would ask is that you deny 17 the defendant's motion for reconsideration.</p> <p>18 THE COURT: Mr. Silverstein, any final rebuttal?</p> <p>19 MR. SILVERSTEIN: Just briefly. Tell Mr. Mayo 20 that the consequences of the grand jury indicting him for 21 murder are not significant. Tell a man who has been 22 incarcerated because the grand jury indicted him on a 23 murder charge who has been sitting in jail with an 24 indescribably high bail because of that indictment. Tell 25 this man that the consequences of a grand jury proceeding</p> <p style="text-align: right;">27</p>	<p>1 MR. SILVERSTEIN: Yes, Your Honor. I mean 2 knowing this obligation exists, if there was language in 3 those records that Mr. Stephens didn't understand -- he 4 told the Court that he did look at the medical records 5 but he can't be expected to understand them because 6 there's big words and he's not a doctor he's a lawyer. 7 And I understand those arguments. But when you are 8 responsible for charging someone with a crime that could 9 land them in prison for the rest of his life I do not 10 believe it is too much to ask the State of Nevada to make 11 sure that they do understand the significance of those 12 records.</p> <p>13 Knowing full well that there's an obligation 14 that if there is something exculpatory in these records 15 it has to be presented, knowing that obligation exists 16 how do you not take the time to educate yourself and 17 determine whether or not there's something to be 18 presented to make sure that this man's rights are 19 protected.</p> <p>20 THE COURT: Mr. Silverstein, this is where I 21 think the argument gets weaker is if you go down a path 22 of no matter what happened they absolutely should have 23 figured out what this was and they should have known what 24 this was, i.e., more due diligence than they exercised 25 and that they didn't do did it and that's why I think</p> <p style="text-align: right;">29</p>
<p>1 are not significant. That's outrageous to say, Well, 2 because it's only the grand jury we shouldn't really care 3 too much about the statute here. It's only the grand 4 jury; it's not the trial.</p> <p>5 THE COURT: The actual argument that I heard, 6 Mr. Silverstein, in all honesty, and I understand your 7 passion for the circumstance. I don't think anybody 8 disputes there have been severe consequences to Mr. Mayo 9 already in this case. I think the distinction of what we 10 heard though was that the statute that is applicable here 11 to grand jury does have language that is different and 12 does say something about awareness. And we are being 13 asked to apply case law which talks about a trial which 14 has different requirements.</p> <p>15 But coming back to your point, your point as I 16 understand it is that the underpinnings of the 17 constitutional rights should apply if it's exculpatory 18 regardless of whether they are aware, it should be 19 applicable here and it should have the results that it 20 should have. And it really doesn't matter what they do 21 or when they do it or how the statute is worded, the 22 clear issue is once we determine that there was something 23 exculpatory in those records regardless of who had it and 24 who was aware of it, at the end of the day it now needs 25 to have relief to Mr. Mayo.</p> <p style="text-align: right;">28</p>	<p>1 that's a weaker argument than the argument that I heard 2 you making at the beginning, which is it doesn't matter 3 what efforts they made to try to figure it out. If it is 4 exculpatory, it's in there and we're done.</p> <p>5 If you go down the road of somehow in these 6 unique facts and circumstances that they should be 7 determined to be lacking because they didn't figure this 8 out that is a much weaker argument to me than saying, 9 Look, we now know that it's in there. It's exculpatory. 10 End of story.</p> <p>11 MR. SILVERSTEIN: To the extent that I'm 12 suggesting that he could have fixed it by reading for an 13 extra hour, that is not what I am suggesting. The only 14 fix here is that the grand jury needed to be informed of 15 this information. That is really the only thing. I am 16 not suggesting that if he had spent more time with the 17 file it would have been different.</p> <p>18 What needed to be different is the grand jury 19 needed to be told that there is an alternate explanation 20 this woman actually could have died from a preexisting 21 medical condition. That information is what the grand 22 jury needed to have for this man to have a fair 23 proceeding in front of that grand jury. And if they 24 still indict him in light of that evidence there can be 25 no complaint.</p> <p style="text-align: right;">30</p>

1 But the fact is that this statute was on the
2 books. It requires that if the State is going to indict
3 somebody -- and remember this is a choice that the State
4 made. They made the choice to go to the grand jury where
5 I am not there as opposed to taking it to a preliminary
6 hearing where I am there.

7 And by making that choice he is accepting the
8 obligation that if there is something exculpatory in the
9 file he's got to present it. He accepted that obligation
10 and now Mr. Mayo pays the consequences for its violation.
11 It's simply not fair.

12 The statute was violated because there was
13 exculpatory evidence in his possession that wasn't
14 presented. That's all I need to show. That's all I can
15 show. I cannot get inside of his head and explain to you
16 exactly why despite reading the records --

17 THE COURT: I just wanted to clarify that
18 argument. All right. The Court will take this under
19 advisement and we will issue a determination as soon as
20 possible.

21 MR. SILVERSTEIN: Thank you, Your Honor.

22 MR. STEPHENS: Thank you, Your Honor.

23 (Proceedings were concluded.)
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1 REPORTER'S CERTIFICATE

2
3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss.
5)

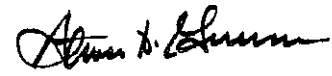
6 I, BRENDA SCHROEDER, a certified court reporter
7 in and for the State of Nevada, do hereby certify that
8 the foregoing and attached pages 1-32, inclusive,
9 comprise a true, and accurate transcript of the
10 proceedings reported by me in the matter of THE STATE OF
11 NEVADA, Plaintiff, versus ANTHONY MAYO, Defendant, Case
12 No. C295313, on July 29, 2015.
13
14
15

16 Dated this 6th day of August, 2015.
17

18 /s/ Brenda Schroeder
19 BRENDA SCHROEDER, CCR NO. 867
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PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

ANTHONY MAYO,

Defendant.

CASE NO. C295313

DEPT. NO. XXV

DATE: January 4, 2016

TIME: 9:00 A.M.

DEFENDANT'S MOTION TO STAY PROCEEDINGS

COMES NOW, the Defendant, ANTHONY MAYO, by and through his counsel, DAN A. SILVERSTEIN, Deputy Public Defender, and ARLENE HESUMATI, Deputy Public Defender, and hereby requests that this Court enter an order staying all District Court proceedings pursuant to NRAP 8(a), in order for the Defendant to seek a Writ of Mandamus from the Nevada Supreme Court.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 8th day of December, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: 
DAN A. SILVERSTEIN, #7518
Deputy Public Defender

By: 
ARLENE HESUMATI, #11076
Deputy Public Defender

DECLARATION

DAN A. SILVERSTEIN makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant in the instant matter, and the Defendant has represented the following facts and circumstances of this case.

2. That on February 28, 2014, the Defendant filed a Petition for Writ of Habeas Corpus, alleging, among other contentions, that the State had failed to present exculpatory evidence to the grand jury in violation of NRS 172.145(2). On February 2, 2015, before the Court had issued a ruling on his Petition, the Defendant filed an Addendum to the Petition further fleshing out the State's violation of NRS 172.145(2). Specifically, in this Addendum, the Defendant explained that the State failed to present evidence in the alleged victim's medical records that she had died as the result of a pre-existing medical condition, rather than blunt force trauma. The Defendant established that this exculpatory evidence was in the State's possession at the time of the grand jury presentment; in fact, the State had sought a court order for the medical records that contained the exculpatory information.

3. On July 6, 2015, the Court entered an order denying the Defendant's Petition for Writ of Habeas Corpus. The Court concluded that evidence that McFarlane suffered from moyamoya disease, a condition that could account for the injuries that caused her death, "...could explain away the count of murder." The Court also concluded "...the State had possession of documents that contained reference to the possible existence of moyamoya disease." Despite these findings, however, the Court denied the Defendant's claim that the State had violated NRS 172.145(2). The Court came to this conclusion by interpreting NRS 172.145(2) to determine that the State was unaware of the exculpatory information, even though such information was unquestionably present in the State's file at the time of the grand jury presentment.

4. On June 29, 2015, one week before the Court filed its order formally denying the Defendant's Petition, the Defendant filed a Motion to Reconsider. The Defendant argued that the Court's interpretation of NRS 172.145(2), allowing the State to disclaim awareness of evidence present in its file, contradicted the language, spirit, and purpose of the enactment. The

1 Defendant cited numerous cases for the proposition that "[i]f evidence highly probative of
2 innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if
3 he has actually overlooked it." United States v. Agurs, 427 U.S. 97, 110 (1976). The Defendant
4 pointed out that by allowing the State to evade its obligation to present exculpatory evidence with
5 the claim that it did not read or understand the contents of its own file, the Court had effectively
6 precluded all relief under the statute. On November 5, 2015, the Court entered a minute order
7 summarily denying the Defendant's Motion to Reconsider.

8 5. That the Defendant believes the Court's interpretation of NRS 172.145(2)
9 was clearly erroneous, and the denial of his Petition alleging a violation of this statute was an
10 abuse of discretion. The Defendant has exhausted all known avenues to have the State's violation
11 of NRS 172.145(2) remedied by this Court, and that extraordinary relief from the Nevada Supreme
12 Court is necessary to assure that the Defendant's rights under Nevada law and the United States
13 Constitution are adequately protected.

14 6. That the Defendant will seek a Writ of Mandamus from the Nevada
15 Supreme Court ordering that this Court grant the Defendant's Petition, or, in the alternative,
16 reconsider the Defendant's Petition under the correct interpretation of NRS 172.145(2). At oral
17 argument on this issue on March 30, 2015, this Court acknowledged that it "...very well may be
18 misinterpreting the statute," and graciously offered to "...include in whatever order is issued any
19 language that would be necessary to allow the Supreme Court to have a look at this issue sooner
20 rather than later." Transcript, March 30, 2015, p.14 ll.18-19, p.15 ll.1-3. The Defendant intends to
21 seek this review. One of the prerequisites for seeking this relief is that the Defendant must first
22 request a stay of the proceedings in District Court. Therefore, the Defendant respectfully requests
23 a stay of these proceedings in order to raise these issues with the Nevada Supreme Court.

24 I declare under penalty of perjury that the foregoing is true and correct. (NRS
25 53.015)

26 EXECUTED this 8th day of December, 2015.

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DAN A. SILVERSTEIN

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff.

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 4th day of January, 2015, at 9:00 A.M. in District Court, Department XXV.

DATED this 8th day of December, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Dan A. Silverstein
DAN A. SILVERSTEIN, #7518
Deputy Public Defender

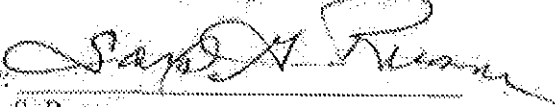
By: /s/ Arlene Heshmati
ARLENE HESHMATI, #11076
Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of DEFENDANT'S MOTION TO STAY PROCEEDINGS, was made this 8TH day of December, 2015, by Electronic Filing to:

CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
Motions@clarkcountydca.com

ROBERT STEPHEN, Deputy District Attorney
E-Mail: robert.stephen@clarkcountydca.com

By: 
S. Ruano
Secretary for the Public Defender's Office


CLERK OF THE COURT

1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ROBERT STEPHENS
6 Chief Deputy District Attorney
7 Nevada Bar #011286
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,
11
12 Plaintiff,

13 -vs-

14 ANTHONY MAYO,
15 #2581304

16 Defendant.

CASE NO: C-14-295313-1

DEPT NO: XXV

17 **STATE'S OPPOSITION TO DEFENDANT'S**

18 **MOTION TO STAY PROCEEDINGS**

19 DATE OF HEARING: JANUARY 4, 2016
20 TIME OF HEARING: 9:00 AM

21 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
22 District Attorney, through ROBERT STEPHENS, Chief Deputy District Attorney, and hereby
23 submits the attached Points and Authorities in Opposition to Defendant's Motion To Stay
24 Proceedings.

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

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1 **POINTS AND AUTHORITIES**

2 **PROCEDURAL SUMMARY**

3 On January 17, 2014, an Indictment was filed against Anthony Mayo (Defendant)
4 charging him with Murder, Battery Constituting Domestic Violence – Strangulation, Coercion
5 and Dissuading a Witness. The Grand Jury Transcripts were prepared on January 30, 2014.
6 Defendant requested more time to file the writ beyond the 21 days. Both parties requested
7 additional time to file the Return and Reply. On February 28, 2014, Defendant filed a Petition
8 for Writ of Habeas Corpus. The State's Return was filed on April 4, 2014. On April 18, 2014,
9 Defendant filed his Reply. The Court heard arguments on April 21, 2014. The Court passed
10 the case to May 7, 2014 for decision. On said date, the Court did not issue its decision.

11 At calendar call on February 2, 2015, the Court indicated that it needed to decide the
12 writ. Before allowing the Court to decide the writ, Defendant filed an Addendum to the
13 pending writ. This Addendum was filed more than one year after the Grand Jury transcripts
14 were prepared and nearly ten months since arguments on the initial Writ occurred. This
15 "Addendum" to the writ raised new issues, unrelated to the initial writ. The State filed a Return
16 to Defendant's Addendum to Petition for Writ of Habeas Corpus. On April 20, 2015, this
17 Court Denied Defendant's Initial Petition and Defendant's Addendum to Petition for Writ of
18 Habeas Corpus. On June 29, 2015, Defendant filed a Motion to Reconsider Denial of Petition
19 for Writ of Habeas Corpus. The Court denied Defendant's Motion to Reconsider Denial of
20 Petition for Writ of Habeas Corpus on November 5, 2015.

21 Trial is set for February 22, 2016.

22 On December 8, 2015, Defendant filed the instant Motion to Stay Proceedings. The
23 State's Opposition follows.

24 **FACTUAL SUMMARY**

25 On or about August 8, 2012, Beverly McFarlane (Beverly) was living with her husband,
26 Anthony Mayo (Defendant) and their two children, Ashanti and Ashley. Grand Jury
27 Transcript (GJT) 41. Defendant became upset when Beverly accidentally called Defendant
28 while at work. GJT 54. Defendant was irritated and annoyed by the phone call. GJT 54.

1 When Beverly arrived home from work, Defendant was playing with a beach ball with the
2 kids. GJT 56. Beverly asked that they stop playing while she began cooking dinner. GJT 56.
3 This caused a verbal argument between Beverly and Defendant. GJT 56. Once dinner was
4 finished they all went upstairs to the master bedroom. GJT 58.

5 Another argument arose about the cooking. GJT 59. Defendant ordered Ashanti and
6 Ashley to their room. GJT 59. Defendant was so mad that his eyes were "popping out of his
7 head" and his vein was popping out of his forehead. GJT 66. Beverly tried to call 911 but
8 Defendant slapped the phone out of Beverly's hand. GJT 59. The phone slid under the fridge
9 in the room. GJT 72. Ashanti tried to retrieve the phone, but Defendant stopped her. GJT 72.

10 Defendant then mounted Beverly and began choking her. GJT 59. Out of fear, Ashanti
11 and Ashley went to their room which is directly across from the master bedroom. GJT 60.
12 Defendant punched Beverly numerous times in the face and body. GJT 63. Beverly kept
13 screaming for help. GJT 63. Defendant then began to choke her. GJT 63. Ashanti saw
14 Defendant pushing Beverly down into the bed. GJT 63. She knew Beverly was being choked
15 because she could hear it in Beverly's voice. GJT 64. Beverly would scream and then she
16 would just stop. GJT 64.

17 Ashanti eventually turned away from the beating in an attempt to find her mom's phone
18 in her purse. GJT 60. Ashanti was unable to find the phone in the purse. GJT 61. Defendant
19 observed Ashanti searching for the phone. GJT 72. He told Ashanti that if she called the
20 police, he would knock Beverly out. GJT 73. He also threatened to "whoop" Ashanti. GJT
21 73. Ashanti then hid behind the door so she could not see what Defendant was doing to her
22 mother. GJT 61.

23 At some point, Defendant rhetorically asked where his bat was. GJT 61. Defendant
24 then went into the garage to look for his bat. GJT 61. Knowing where the bat was located,
25 Ashanti rushed downstairs and hid the metal bat from Defendant. GJT 61. Ashanti then
26 returned to her room. GJT 62. Unable to find the bat, Defendant returned to the master
27 bedroom this time grabbing a vacuum. GJT 62. Defendant closed the door behind him. GJT
28 64. Ashanti could hear her mother screaming to "stop" and "not to do that." GJT 64. She

1 then heard a loud bang. GJT 65.

2 Some time passed and Beverly exited the bedroom with a limp. GJT 65. She was
3 severely beaten, with scratches on her face. GJT 70. Dust was in her hair and on her person.
4 GJT 65. There was also dust on one side of the bed. GJT 65. The vacuum was broken. GJT
5 68. Beverly was having a hard time speaking. GJT 71. Beverly took a bath and then tried to
6 sleep in Ashanti's room, however, Defendant demanded that she sleep in the master bedroom
7 with him. GJT 71.

8 The next morning, August 9, 2012, Ashanti heard Defendant apologizing to Beverly.
9 GJT 74. Beverly slept almost all day. GJT 74. Beverly woke up at around dinner time. GJT
10 74. She could only whisper. GJT 75. Ashanti brought some food to Beverly. GJT 75. It
11 appeared to Ashanti that her mom was "very sick." GJT 76. Beverly's eyes were red and her
12 skin was peeled off on one side of her face. GJT 76-77.

13 On August 10, 2012, Ashanti was woken up by Defendant yelling and cursing at
14 Beverly to go to work. GJT 44, 46. After Beverly informed Defendant that she would not be
15 going to work, the Defendant left the residence. GJT 44. At this time, Beverly got out of bed
16 and tried to call the police. GJT 42-44. Beverly limped to the stairs. GJT 47. Beverly could
17 only whisper, even though she was trying to talk louder. GJT 48. Initially Beverly called 411.
18 GJT 49. Then she called 311. GJT 44-45. Because Beverly was having a difficult time
19 talking, Ashanti eventually took over the 911 call. GJT 43, 45.

20 Officer Vital and other police officers eventually arrived at the residence and tried to
21 speak to Beverly; however, again Beverly had difficulty communicating with them. GJT 43,
22 86. Initially Officer Vital spoke to Ashanti who pointed him towards Beverly. GJT 87.
23 Officer Vital described Beverly as "a little lethargic, disoriented, kind of displaying sort of
24 intoxicated type of person clues, but I could not smell any odor of alcohol coming from her."
25 GJT 87. She had slurred speech and muffled sentences. GJT 87. She would get lost in the
26 conversation. GJT 87. Beverly was unable to give her date of birth, name the President or
27 identify the day of the week. GJT 87-88. Officer Vital also noticed that she had abrasions on
28 the side of her face and her face was swollen. GJT 88-89. Beverly had pettechia and

1 scratching on her neck. GJT 89. Ashanti testified that Beverly did not have a limp or difficulty
2 communicating until after Defendant beat Beverly. GJT 52. Beverly was taken to the hospital.
3 GJT 91.

4 Officer Aker followed Beverly to the hospital. GJT 93. Officer Aker has taken almost
5 240 hours in domestic violence training courses and is permitted to teach other cadets about
6 domestic violence and strangulation. GJT 94. Officer Aker also attended a specific course on
7 strangulation. GJT 94. This training has assisted other officers in the field on numerous
8 occasions. GJT 95.

9 Officer Aker testified that Beverly was very scared and upset. GJT 97. He noticed a
10 black eye and an abrasion and bruising to her face. GJT 97. Beverly hesitated to move her
11 neck. GJT 97. She continued to sooth her neck. GJT 97. Her voice was very hoarse. GJT
12 97. At the hospital, Officer Aker noticed petechial hemorrhaging under her eyelids. GJT 98.
13 Beverly still had great difficulty in communicating due to her diminished cognitive abilities.
14 GJT 102-03.

15 On August 11, 2012, Officer Aker again returned to the hospital to check up on Beverly.
16 GJT 106. His interaction with Beverly was somewhat limited due to the several medical
17 procedures that were being performed. GJT 106. However, Officer Aker noticed that her
18 cognitive abilities had worsened. GJT 107. Beverly had virtually no ability to communicate.
19 GJT 107. Her answers were just gibberish. GJT 107.

20 While in the hospital, many exams were performed on Beverly. Radiologist Dr.
21 Rajneesh Agrawal noted the following impression: "Findings are suggestive of a slow
22 progressive vasculopathy that can be seen with moyamoya disease. Although the
23 hypertrophied vessels are not well developed. Other etiologies such as sickle cell disease or
24 other chronic vasculopathies would have to be also considered." Beverly eventually
25 succumbed to her injuries on August 23, 2012.

26 Beverly indicated on various documents that she intended to be an organ donor. On
27 August 25, 2012, it appears that Beverly's family was contacted regarding the donation of
28 Beverly's organs. The necessary paperwork was executed and the heart, spleen, kidneys and

1 adrenal glands were removed.

2 On August 26, 2012, Dr. Olson, a Coroner, performed the autopsy on Beverly. GJT
3 125. Dr. Olson assigned the autopsy case a unique case number. GJT 125-26. Prior to the
4 autopsy, Dr. Olson noted that Beverly's organs were donated. GJT 128. In fact, there was a
5 significant cut down the middle of her body which Dr. Olson said was from the organ
6 procurement procedure. GJT 129. Dr. Olson also identified other "small injuries" on the
7 surface. GJT 128.

8 The internal examination showed that Beverly sustained "considerable amount of
9 swelling in her brain." GJT 129. Dr. Olson preserved the brain and sent it to Dr. Greco. GJT
10 129, 133. She testified that the bleeding on the brain would be indicative of trauma to the
11 head. GJT 130. Dr. Olson noticed the stark contrast in the coloration of the brain, which is
12 indicative of one side sustaining more injury than the other. GJT 131. She concluded that her
13 brain suffered trauma which "ultimately" led to her death. GJT 133-34. Other contributing
14 factors included the blockage of arteries which interfered with the blood flow to the brain.
15 GJT 134. This case was determined to be a homicide. GJT 15.

16 Dr. Claudia Greco has examined 400-500 brains for various reasons in her medical
17 practice. Grand Jury Transcripts (GJT) 12. The Clark County Coroner's Officer contacted
18 her to examine Beverly's brain. GJT 13. In December 2012, Dr. Greco received the brain
19 from FedEx and kept it in a locked area. GJT 13. From that point forward she was the only
20 person who handled the brain. GJT 13. She personally assigned a number to the brain which
21 correlated with the unique number assigned by the Clark County Coroner's Office. GJT 14.
22 In her review of the brain, she noted significant injuries to the left side of the brain. GJT 18.
23 Specifically she noted a hemorrhage on the underside of the brain. GJT 18. There was massive
24 swelling on the brain which would have "gotten to the point where her life was irretrievable."
25 GJT 18. The brain began to herniate or go down the spinal cord. GJT 22. Dr. Greco explained
26 that this injury is fatal because it will pinch the spinal cord and "destroy the cardiac breathing
27 mechanisms." GJT 23. She testified that the brain tissue toward the spinal cord is "very
28 swollen." GJT 25. In fact it was so swollen that there was no opening for the cerebrospinal

1 fluid to transmit to the brain. GJT 26-27. This fluid is important because it brings nutrients
2 and oxygen to the brain. GJT 27-28. The swelling was so severe that Beverly's brain would
3 not have allowed for cerebrospinal fluid to transmit. GJT 28. Additionally, the swelling
4 prevented blood from transmitting to the brain. GJT 32. The left side of the brain was
5 noticeably more swollen. GJT 21. She also noted other hemorrhages in the brain. GJT 24.

6 Dr. Greco testified that the types of injuries Beverly sustained were absolutely the result
7 of trauma. GJT 28. The hemorrhage was large and caused the death of Beverly. GJT 29. Dr.
8 Greco concluded Beverly "suffered cerebral trauma, brain trauma, and it was aggravated by
9 the fact that she already had high blood pressure and it was very, very hard to control." GJT
10 29. Beverly's brain was so significantly damaged that medical intervention could not have
11 saved her life. GJT 30.

12 Dr. Greco believed these injuries were three to four days old. GJT 31. She further
13 explained that three to four days after Beverly sustained this trauma to the head, the brain had
14 swelled to the point where the necessary nutrients, including oxygen and blood would not have
15 been transmitting to the brain. GJT 33.

16 Since then, Dr. Greco has again re-examined the brain. It is her conclusion and opinion
17 that Beverly did not suffer from moya moyo. "There is no pathology present that would lead
18 to a diagnosis of Moyamoya disease." State's Exhibit 1 attached. "No evidence of Moyamoya
19 disease."

20 Detectives Owens and Bodnar investigated the case once it was determined that
21 Beverly died. GJT 111. In March 2013, Detectives Owens and Bodnar met with Defendant
22 in Los Angeles, California. GJT 111-12. After reading Defendant his Miranda rights,
23 Defendant admitted that a verbal argument escalated into a physical altercation. GJT 113. He
24 admitted to shoving her with both hands, slapping her in the face, punching her repeatedly,
25 and striking her with a vacuum. GJT 113. Initially Defendant said that he swung the vacuum
26 at her, but missed. GJT 117. When he missed the vacuum struck the bedpost and the vacuum
27 broke. GJT 117. Later, Defendant said that the vacuum hit Beverly in the hand as she tried
28 to block the vacuum from hitting her. GJT 114. Defendant claimed that Beverly pushed and

1 slapped him as he was trying to leave the residence. GJT 115-16. Defendant said he and
2 Beverly had intercourse and then the next morning he left the residence. GJT 114. When he
3 left he told Beverly that he was going to Los Angeles. GJT 117.

4 Defendant said he gave her some treatment for her black eye to make it appear that she
5 was not beat up. GJT 118. Defendant asserted that he asked Beverly if she wanted to go to
6 the hospital, but she refused and just asked for a Tylenol. GJT 119.

7 ARGUMENT

8 **I. GRANTING THE STAY WILL CONTINUE TRIAL**

9 Defendant's Motion to Stay Proceedings complies with Nevada Rules of Appellate
10 Procedure (NRAP) 8. The State understands that generally this type of motion should be filed
11 in the district court before seeking relief in a higher court. NRAP 8(a)(1)(A).

12 The concern of the State is that this crime occurred in August 2012. Defendant initially
13 delayed the proceedings when he ran from the police. He avoided apprehension for nearly a
14 year. He was returned to Las Vegas through extradition on September 19, 2013. Once
15 Defendant was indicted, the court set a trial date more than one year out at the request of
16 defense counsel; February 2, 2015. Defense counsel requested another continuance at the next
17 calendar call of November 9, 2015 because defense counsel was recently made lead counsel.
18 Trial was then continued to February 22, 2016. The State is concerned that should this stay
19 be granted, the trial date will again be continued causing further prejudice to the State.
20 Memories fade over time. If trial is continued on February 22, 2016, the trial will again be
21 delayed. This case will be well over four years old without any resolution. When trial actually
22 commences, memories will be more than four years old. This will make it much more difficult
23 on the State to prove Defendant's guilt beyond a reasonable doubt.

24 If in Defendant's instant motion he is suggesting that this Court again reconsider the
25 matter, the State opposes. This Court has carefully read the pleadings of the parties on this
26 issue. The Court has made its decision. It has even studiously reconsidered the matter once
27 previous. Reconsideration is not appropriate by this Court at this time.

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CONCLUSION

WHEREFORE, based upon the foregoing, the State respectfully requests that this Honorable Court DENY Defendant's Motion to Stay Proceedings.

DATED this 23rd day of December, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ ROBERT STEPHENS
ROBERT STEPHENS
Chief Deputy District Attorney
Nevada Bar #011286

CERTIFICATE OF SERVICE

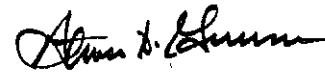
I hereby certify that service of the above and foregoing was made this 3rd day of DECEMBER 2015, to:

DAN SILVERSTEIN, DPD
silverda@ClarkCountyNV.gov
ARLENE HESHMATI, DPD
Arlene.Casillas@ClarkCountyNV.gov

BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

1 PHILIP J. KOHN, PUBLIC DEFENDER
2 NEVADA BAR NO. 0536
3 309 South Third Street, Suite 226
4 Las Vegas, Nevada 89155
5 (702) 455-4685
6 Attorney for Defendant



CLERK OF THE COURT

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 v.

12 ANTHONY TYRON MAYO,

13 Defendant.

CASE NO. C295313

DEPT. NO. XXV

DATE: January 4, 2016

TIME: 9:00 a.m.

14 DEFENDANT'S REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

15 COMES NOW, the Defendant, ANTHONY TYRON MAYO, by and through DAN
16 A. SILVERSTEIN, Deputy Public Defender, and ARLENE HESHMATI, Deputy Public
17 Defender, and hereby files this Reply brief in support of his previously filed request for a stay of
18 proceedings to seek extraordinary relief with the Nevada Supreme Court.

19 This Motion is made and based upon all the papers and pleadings on file herein and
20 oral argument at the time set for hearing this Motion.

21 DATED this 28th day of December, 2015.

22 PHILIP J. KOHN
23 CLARK COUNTY PUBLIC DEFENDER

24 By: 

DAN A. SILVERSTEIN, #7518
Deputy Public Defender

25 By: 

26 ARLENE HESHMATI, #11076
27 Deputy Public Defender
28

ARGUMENT

The State does not contest that the Defendant's Motion to Stay Proceedings is a prerequisite to seeking extraordinary relief from the Nevada Supreme Court, pursuant to Nevada Rules of Appellate Procedure (NRAP) 8(a)(1). State's Opposition, p.8 ll.9-10. Surely, the State also understands that filing an opposition to the motion for stay is a futile effort, since the resolution of the stay motion in District Court is immaterial to whether the Nevada Supreme Court will consider the Defendant's petition for extraordinary relief. The State's opposition is particularly curious under the facts of this case, where this Court explicitly invited the defense to seek the review at issue. In denying Mayo's motion to dismiss due to a plain violation of NRS 172.145(2), this Court acknowledged the necessity "...to allow the Supreme Court to have a look at this issue sooner rather than later." Transcript, March 30, 2015, p.15 ll.1-3. Because no appeal can be taken from an acquittal, and because a conviction at trial will render the State's violation of NRS 172.145(2) moot, see Dettloff v. State, 120 Nev. 588 (2004), a petition for extraordinary relief is the only mechanism by which the defense can seek review of the Court's interpretation of NRS 172.145(2). By opposing Mayo's motion for a stay to seek this review, the State is not only opposing the Defendant's request, it is also apparently opposing the request of the Court.

Still, the State's alleged concerns about the fading memories of its witnesses may convince the Court that a stay of the proceedings is inappropriate at this time. Consequently, it is necessary that the defense address those concerns.

Unlike many other jurisdictions, Nevada law specifically provides the State with the right to a speedy trial within sixty (60) days of arraignment, a right parallel to the speedy trial right afforded to an accused, NRS 174.511. At Mayo's arraignment on January 27, 2014, neither Mayo nor the State invoked their right to a speedy trial. The State never expressed concerns about the memories of its witnesses at that time, and failed to invoke its right to a speedy trial despite having that right under Nevada law. The State's concerns for its witness' fading recollections did not surface until, coincidentally, it learned of the defense's intention to litigate its violation of NRS 172.145(2) in the Nevada Supreme Court. As the Court will recall, Mayo had a calendar call less than two months ago, on November 9, 2015. The defense sought a continuance of the November

1 trial date with no opposition from the State. No concerns about fading witness memories were
2 raised with the Court during the hearing on that motion to continue. The State's sudden anxiety
3 over the consequences of a continuance should be viewed with suspicion, considering the State's
4 acquiescence to the Defendant's continuance request less than two months ago.

5 According to its opposition, the State believes that the prejudice it will suffer if the trial is
6 continued outweighs the prejudice that will be suffered by Anthony Mayo if the State's blatant
7 violation of NRS 172.145(2) is allowed to stand. This contention is wholly illegitimate. The State
8 is in a dilemma entirely of its own making, first by withholding critical exculpatory evidence from
9 the grand jury that it knew or should have known was in its file, and then by advocating and
10 defending an interpretation of NRS 172.145(2) that it knows or should know is patently
11 unreasonable. Opposing a stay of the proceedings at this point is akin to setting a fire and then
12 complaining that the firemen are taking too long to extinguish the blaze.

13 Even the State's statutory right to a speedy trial recognizes that the State's thirst for a quick
14 conviction must give way to the defense's legitimate needs to prepare the case for trial. NRS
15 174.511(1) (court may postpone trial over State's speedy trial objection where it finds that the
16 defendant needs additional time to prepare a defense). Preparation of Mayo's defense has met
17 with extraordinary obstacles, as a direct result of the fact that the initial attorney appointed to
18 represent Mr. Mayo, Amy Feliciano, has since resigned from the Clark County Public Defender's
19 Office and has no contact whatsoever with current defense counsel. Due to this unfortunate and
20 unforeseeable circumstance, the preparation of Mr. Mayo's defense essentially started over from
21 scratch when current counsel was assigned as the lead attorney in May 2015. Thus, while the
22 incident that gives rise to these charges may well be "over four years old" when it proceeds to trial,
23 State's Opposition, p.8 L21, for all intents and purposes, current counsel has only been in charge of
24 Mr. Mayo's case for less than *eight months*.

25 With recent advances in DNA analysis and other scientific testing, the State is now able to
26 solve "cold case" murders that occurred many years, even decades, before criminal charges are
27 filed. For example, in August 2012, right around the time that Beverly McFarlane passed away,
28 the Clark County District Attorney's Office filed murder charges against Nathan Burkett for two

1 homicides that had taken place in 1978 and 1994. See "Suspect Charged in Las Vegas Cold
2 Cases," *Las Vegas Review-Journal*, August 7, 2012, attached as Exhibit A. In fact, according to
3 this article, the Las Vegas Metropolitan Police Department received a \$500,000 grant from the
4 U.S. Department of Justice specifically to help solve cold-case slayings. Ex. A. Where is the
5 State's concern for the fading memories of its witnesses when charging defendants with murders
6 from the 1970s and 1980s? In fact, where was the State's concern for the fading memories of its
7 witnesses in this very case, less than *two months ago*, when Mayo requested a continuance with no
8 opposition whatsoever from the State?

9 On November 20, 2015, the Defendant filed a Motion to Dismiss due to the State's
10 destruction of several organs of the deceased prior to the autopsy. The Defendant's motion
11 included a request for an evidentiary hearing. With the very same February trial date looming,
12 how did the State react to this motion? Did the State, apparently so nervous about the fading
13 memories of its witnesses, file a timely opposition brief so that the motion could be heard and
14 resolved as soon as possible? No. Instead, the State sent an electronic mail to defense counsel on
15 November 24 requesting permission to file a late brief, and eventually persuaded the Court to
16 extend its deadline to December 9.

17 This is not to suggest that it was inappropriate for the State to request additional time to file
18 its brief. There are a number of important, complex legal issues surrounding this prosecution, and
19 neither side should be precluded from fully and fairly litigating them. However, it certainly *does*
20 suggest that the State's sudden concern over the memories of its witnesses is not genuine, and is
21 being falsely invoked to try and thwart the Defendant's legitimate efforts to obtain a remedy for
22 the State's clear violation of NRS 172.145(2). If the State was sincere, it could have invoked its
23 statutory right to a speedy trial at arraignment, or opposed the defense's November continuance
24 request, or at the very least, filed a timely opposition to the Defendant's recent motion to dismiss
25 and request for an evidentiary hearing. The State's newfound urgency to proceed to trial is
26 inconsistent with its prior conduct, and certainly gives rise to the appearance that it is borne not out
27 of legitimate concern, but naked opportunism.
28

1 The State also suggests that the defendant's Motion to Stay Proceedings may be a Motion
2 to Reconsider in disguise. State's Opposition, p.8 ll.24-27. While nothing in the defendant's
3 Motion to Stay implies a second request for reconsideration, in case there is any confusion, the
4 defendant is definitely not asking this Court to reconsider its ruling. The defendant is simply
5 seeking recourse from a higher court, as authorized by the Nevada Rules of Appellate Procedure,
6 and as he was encouraged to do by this Court when his pretrial habeas petition was denied.

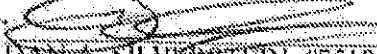
7 8 CONCLUSION

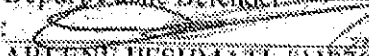
9 Even the State's valid concern for the fading memories of its witnesses, expressed by an
10 invocation of its statutory right to a speedy trial, must give way to a criminal defendant's right to
11 prepare a defense. NRS 174.511(1). Clearly, the petition for extraordinary relief that Mayo
12 intends to file is not frivolous, for the Court directly encouraged Mayo to seek that review. Filing
13 this petition is absolutely essential to preparing Mayo's defense. In fact, if Mayo's counsel failed
14 to file such a petition after the Court's explicit invitation, that alone could provide Mayo a
15 compelling argument that he received ineffective assistance of counsel. Thus, even if the State had
16 invoked its right to a speedy trial, a continuance of the trial date to pursue a petition for
17 extraordinary relief would be plainly justified under Nevada law.

18 But the concerns noted in the State's opposition are not legitimate. This can be seen by the
19 State's conduct, outlined above. It was not until the defense indicated that it would be seeking
20 review from the Nevada Supreme Court that the State decided it needed to rush the case to trial as
21 soon as possible. And while it certainly benefits the State to try the case before its obvious
22 violation of NRS 172.145(2) can be corrected, this is not an acceptable reason to oppose a stay.

23 DATED this 28th day of December, 2015.

24 PHILIP J. KOHN
25 CLARK COUNTY PUBLIC DEFENDER

26 By: 
27 DAN A. SILVERSTEIN, #7518
Deputy Public Defender

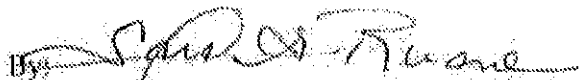
28 By: 
ARLENE HESHMATI, #11076
Deputy Public Defender

1
2 CERTIFICATE OF ELECTRONIC SERVICE

3 I hereby certify that service of Defendant's Reply in Support of Motion To Stay
4 Proceedings, was made this 28TH day of December, 2015, by Electronic Filing to:

5
6 CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
Motions@clarkcountydac.com

7
8 ROBERT STEPHEN, Deputy District Attorney
E-Mail: robert.stephen@clarkcountydac.com

9
10 By: 

11 Sara Roano

12 Secretary for the Public Defender's Office
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EXHIBIT "A"

Suspect charged in Las Vegas cold cases

By Antonio Planas AND Lawrence Mower LAS VEGAS REVIEW-JOURNAL

August 7, 2012 - 3:20pm

A 65-year-old man suspected in a series of strangulation killings was booked Tuesday into the Clark County Detention Center on two cold-case slayings, the first in 1978.

Metropolitan Police Department Homicide Lt. Ray Steiber announced during an afternoon news conference Tuesday that Nathan Burkett was extradited from Picayune, Miss., and faces two counts of murder and one count of sexual assault.

Steiber said Burkett is a "serial killer" who has been tied to the slayings of three women in the Las Vegas Valley over the course of more than two decades.

"He hasn't (just) committed one homicide in Las Vegas, not two, but we know he's at least committed three," Steiber said.

Burkett is also being looked at in connection with other cold-case slayings, but police wouldn't release details about those investigations.

Police recently recommended charging Burkett in the death of 22-year-old Barbara Ann Cox on April 22, 1978, and the slaying of 27-year-old Tina Gayle Mitchell on Feb. 20, 1994. Steiber said forensic evidence linked Burkett to the slayings.

Las Vegas police arrested Burkett in October 2003 for the slaying and kidnapping of Valetter Jean Bousley, 41. Bousley was found strangled on Sept. 4, 2002. Burkett was convicted of voluntary manslaughter in Bousley's death and served six years in prison.

Police also are investigating him in the death of a 32-year-old woman three months after Mitchell was found slain in 1994.

Tod Burke, associate dean of the College of Humanities and Behavioral Sciences at Radford University in Radford, Va., said if Burkett is guilty of the crimes he has been charged with, he qualifies as a serial killer.

Burke, who was formerly a criminal justice professor at Radford and a police officer in Maryland, said he has been studying the behavior of serial killers for more than a quarter century.

He said it is not atypical for serial killers to have long lapses between slayings.

"Sometimes serial killers may kill a matter of weeks apart, and sometimes it could be years apart," Burke said.

He added Burkett also fits the mode of a serial killer because he is accused in a series of strangulations where the victims' bodies were discovered in a specific area, West Las Vegas, generally bordered by Carey Avenue on the north, Bonanza Road on the south, Interstate 15 on the east and Rancho Drive on the west.

"Serial killers tend to pick out areas they will feel comfortable with," he said.

In at least four of the five cases, the victims were strangled.

1978 SLAYING

Police think the killing spree might have started in 1978, when Cox was found dead in a parking lot outside apartments at 211 W. Bonanza Road.

She was found nude, raped and with strangulation marks on her neck, according to Burkett's arrest report, which cites the notes from the original homicide investigators.

Police interviewed the woman who found Cox, who was in the area because she was driving Burkett home from the Aladdin hotel-casino, where he worked then.

She told detectives that she and Burkett discussed reporting the death. But Burkett got out of the car and walked into his upstairs apartment at 211 W. Bonanza. The woman chose to flag down an officer.

When detectives interviewed Burkett, he was staggering around nearby, "grossly intoxicated" and "belligerent," detectives said. He first told officers he wouldn't help them, then said that he once saw Cox go into an apartment across the street. He added that he was with his friend when Cox's body was found.

"This subject was in no condition to be interrogated, and he was escorted to his apartment by uniformed officers, where he promptly passed out," the report said.

There is no indication that detectives believed Burkett was a suspect, according to the reports. Investigators took vaginal samples of Cox, and the case was suspended when no new leads surfaced; DNA would not begin to be used in forensics until the late 1980s.

Five years after her death, however, Burkett was sentenced to 20 years in prison for manslaughter in Mississippi. Details of the case weren't available Tuesday, but records show he was scheduled to be released in 1992.

Police think his move back to Las Vegas is connected to the slaying of Mitchell in February 1994.

Mitchell's body was found behind a home on H Street near Washington Avenue, lying facedown and covered with towels. Medical examiners ruled she had been strangled.

Burkett's name didn't surface in the investigation into Mitchell's death, according to his arrest report. Detectives focused on another man, obtaining an arrest warrant for a Louis Donald Moore.

But prosecutors dismissed the case. Moore's connection to Mitchell is unclear, and the reports don't state why the case was dismissed. Detectives obtained samples from Mitchell that would eventually yield DNA, but the case went cold.

Two months after Mitchell was found, the body of Los Angeles woman Alethea Maria Williams was discovered in the same location. Williams, too, was strangled, authorities ruled.

Although Burkett has not been named as a suspect in her death, his arrest report reveals that detectives recently have questioned him about the case.

Burkett would serve time a decade later after pleading guilty to voluntary manslaughter in the death of local hotel maid Bousley. She was found strangled in September 2002, outside a church on F Street near Monroe Avenue.

The case was unsolved until March 2003, when a jail inmate said he saw Bousley go around the church with Burkett. Ten minutes later, the inmate saw Burkett walking away from the church, alone.

DNA SAMPLE

Police charged Burkett with murder, but he pleaded guilty to voluntary manslaughter. When he started his six-year prison stint, officials took a sample of DNA.

That sample would be registered with a national database and link him to the deaths of Cox and Mitchell when cold-case detectives submitted evidence from their deaths into the system in 2010.

When officers went to Mississippi to question him about the deaths on July 18, he denied knowing the victims or having sexual relations with them.

Police said Burkett was no stranger to local law enforcement. He has been arrested more than a dozen times in Southern Nevada since 1975 for charges including battery, kidnapping, rape, sexual assault, robbery and domestic violence.

Burke said now that Burkett is in custody, police have to take a deeper look at all of his moves in Southern Nevada. Burke said serial killers sometimes evade police.

"Even their first time doing something may not have been their first time," Burke said. "It might have been the first time they got caught."

Police said they will focus on Burkett's local history in Southern Nevada from 1978 to 2007.

FEDERAL GRANT

Burkett's arrest was aided by a federal grant Las Vegas police received in September 2009.

Steiber said his agency emphasized solving cold-case slayings after the department was awarded a nearly \$500,000 grant from the Department of Justice.

Since then, cold-case detectives have investigated 275 unsolved slayings, and were able to solve 20 cases. Steiber said without the grant, and without flourishing forensic technology: "Those cases might have never been solved."

Steiber added his department still has 1,015 unsolved homicide cases.

"Every unsolved homicide deserves to be solved," Steiber said. "For the victim. For the family. For the community."

Contact reporter Antonio Planas at aplanas@reviewjournal.com or 702-383-4638. Contact reporter Lawrence Mower at lmower@reviewjournal.com or 702-383-0440.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY MAYO,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, COUNTY OF
CLARK, THE HONORABLE KATHLEEN
DELANEY, DISTRICT COURT JUDGE,

Respondent,

THE STATE OF NEVADA,

Real Party In Interest.

No.

(District Ct. No. C295313)

Vol. II

APPENDIX TO PETITION FOR WRIT OF PROHIBITION MANDAMUS

PHILIP J. KOHN
Clark County Public Defender
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(702) 687-3538

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of January, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

DAN A. SILVERSTEIN
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to: Honorable Judge Kathleen Delaney, District Court, Department XXV, 200 Lewis Avenue, Las Vegas, NV 89101.

BY /s/ Carrie M. Connolly
Employee, Clark County Public Defender's Office

1 IN THE SUPREME COURT OF THE STATE OF NEVADA
2

3 ANTHONY MAYO,)
4)

5 Petitioner,)
6)

7 vs.)
8)

9 THE EIGHTH JUDICIAL DISTRICT COURT)
10 OF THE STATE OF NEVADA, COUNTY OF)
11 CLARK, THE HONORABLE KATHLEEN)
12 DELANEY, DISTRICT COURT JUDGE,)
13)

14 Respondent.)
15)

No.

(District Ct. No. C295313)

Electronically Filed
Jan 13 2016 09:15 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Vol. II

16 APPENDIX TO PETITION FOR WRIT OF PROHIBITION MANDAMUS

17 PHILIP J. KOHN
18 Clark County Public Defender
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Counsel for Respondent

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ANTHONY TYRON MAYO

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FILED IN OPEN COURT

STEVEN D. GRIERSON

CLERK OF THE COURT

FEB 02 2015

BY

KRISTEN BROWN, DEPUTY

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

ANTHONY TYRON MAYO,

Defendant.

CASE NO. C295313

DEPT. NO. XXV

DATE: February 2, 2015

TIME: 9:30 a.m.

DEFENDANT'S ADDENDUM TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Defendant, ANTHONY TYRON MAYO, by and through AMY A. FELICIANO, Deputy Public Defender, and DAN SILVERSTEIN, Deputy Public Defender, and hereby files this addendum to his previously filed Petition for Writ of Habeas Corpus.

This Addendum is made and based upon all the papers and pleadings on file herein, and oral argument at the time set for hearing this Petition.

DATED this 2nd day of February, 2015.

PHILIP J. KOHN

CLARK COUNTY PUBLIC DEFENDER

By:

AMY A. FELICIANO, #9596
Deputy Public Defender

By:

DAN A. SILVERSTEIN, #7518
Deputy Public Defender

STATEMENT OF RELEVANT FACTS

The Defendant hereby incorporates by reference the Statement of Facts as previously set forth in his Petition for Writ of Habeas Corpus, filed on February 28, 2014.

On February 28, 2014, the Defendant filed a Petition for Writ of Habeas Corpus alleging, among other issues, that the State had failed to present exculpatory evidence to the grand jury in violation of NRS 172.145(2). That Petition is still pending before this Court. The Defendant submits this addendum to his previously filed Petition, alleging new, compelling evidence that the State violated its obligation to present known exculpatory evidence to the grand jury.

On September 24, 2013, Justice of the Peace Chris Lee signed an order submitted by the Clark County District Attorney's Office releasing the medical records of the alleged victim in this case, Beverly McFarlane. Ex. A. These medical records were received by the District Attorney's Office on October 7, 2013, over three months prior to the grand jury presentment. Ex. B.

In those medical records, a report from radiologist Rajneesh Agrawal, M.D., dated August 17, 2012, makes clear that the findings in McFarlane's CT scans "...are suggestive of a slow, progressive vasculopathy that can be seen with moyamoya disease." Ex. C. A physician's order sheet from the same date also suggests a diagnosis of moyamoya disease. Ex. D.

Moyamoya disease¹ is a rare condition that causes progressive occlusion of the carotid arteries in the brain, consistent with the findings of Clark County Coroner Alane Olson that the alleged victim suffered "complete occlusion of the left internal carotid artery and narrowing of the right internal carotid artery." Ex. F. Sufferers of moyamoya disease tend to experience a gradual deterioration of cognitive function, and if left untreated, the steady occlusion of the arteries in the brain can be fatal. Death from moyamoya disease is typically caused by brain hemorrhage. This

¹ Medical articles describing moyamoya disease, its symptoms, diagnosis, and effects are attached hereto as Exhibit E for the Court's edification.

1 is consistent with the findings of Clark County Coroner Alane Olson that the alleged victim died as
2 a result of brain hemorrhage. Ex. F. It is also consistent with the findings of the State's
3 neuropathological expert, Dr. Claudia M. Greco, M.D., who concluded that the hemorrhages found
4 in McFarlane's brain were between two and five days old. Ex. G. The injuries which Anthony
5 Mayo is alleged to have inflicted on McFarlane occurred on August 10, 2012, **fifteen days** prior to
6 her death.

7
8 Moyamoya disease would account for the findings of the Clark County Coroner in this
9 case, and provide a reasonable alternative explanation for the death of Beverly McFarlane. In
10 other words, UMC's opinion that McFarlane suffered from moyamoya disease is the very
11 definition of exculpatory evidence.

12 13 14 ARGUMENT

15 As pointed out in the Defendant's original Petition, pursuant to NRS 172.145(2), "[i]f the
16 district attorney is aware of any evidence which will explain away the charge, the district attorney
17 shall submit it to the grand jury." Petition, 2/28/14, p.12 ll.14-16. "The grand jury's 'mission is to
18 clear the innocent, no less than to bring to trial those who may be guilty.'" Sheriff v. Frank, 103
19 Nev. 160, 165 (1987), quoting United States v. Dionisio, 410 U.S. 1, 16-17 (1973). When "...a
20 prosecutor refuses to present exculpatory evidence, he, in effect, destroys the existence of an
21 independent and informed grand jury." United States v. Gold, 470 F.Supp. 1336, 1353 (N.D. Ill.
22 1979); Johnson v. Superior Court, 539 P.2d 792 (Cal. 1975). Under Nevada law, the State has an
23 absolute duty to present to the grand jury any evidence which tends to explain away the charges.
24 Failure to do so renders the resulting indictment invalid and denies the defendant due process,
25 requiring dismissal. Sheriff v. Frank, 103 Nev. 160 (1987), Ostman v. District Court, 107 Nev.
26 563 (1991).

1 There can be no legitimate debate that the evidence of moyamoya disease seen by multiple
2 physicians at UMC is evidence that tends to explain away the charge of murder against Anthony
3 Mayo. This disease provides an innocent explanation for all of the findings upon which Alane
4 Olson based her opinion that Beverly McFarlane died as a result of homicide. In fact, the
5 occlusion of McFarlane's carotid arteries is the defining characteristic of moyamoya disease, a
6 disease which could have caused the very brain hemorrhages which the State has blamed on
7 Anthony Mayo. Moyamoya disease would also explain why, despite the fact that Mayo is charged
8 with having assaulted McFarlane on August 10, 2012 -- **fifteen days** before her death -- the State's
9 neuropathologist concluded that the brain hemorrhages were, at most, five days old. Evidence that
10 Beverly McFarlane suffered from this rare condition has a tendency to explain away the murder
11 charge in a manner that hardly any other evidence could. It is the very definition of exculpatory
12 evidence, and NRS 172.145(2) exists to ensure that this type of evidence is presented to the grand
13 jury determining a defendant's fate. The grand jury had a right to consider this alternate
14 explanation, and the prosecutor had a statutory obligation to present it.
15

16
17 It is also beyond debate that the exculpatory evidence in question was known to the Clark
18 County District Attorney's Office well in advance of the grand jury presentment. In fact, in their
19 September 24, 2013 order requesting these medical records, the prosecutors assert that possession
20 of these medical records was necessary for prosecution of this case. Ex. A, ll.18-19. The District
21 Attorney's Office confirmed receipt of these medical records on October 7, 2013, more than three
22 months before the grand jury presentment on January 16, 2014. Ex. B.
23

24 The prosecuting attorneys called both their neuropathologist, Claudio Greco, M.D., and the
25 coroner, Alane Olson, as witnesses at the grand jury presentment, yet never admitted a shred of
26 evidence that Beverly McFarlane suffered from a progressive disease that could have caused her
27 death. The failure to present this evidence is particularly appalling given the fact that Dr. Greco
28

1 gave the impression that she had thoroughly reviewed all of the available medical records when
2 she testified:

3 "Q: Prior to doing any examination of the brain, were you given any
4 documents to review?

5 A: Yes, I had a small number of, a small amount of paperwork that came
6 with the case in the same box.

7 Q: Do you recall what types of documents those would have been?

8 A: There was a small amount of clinical history on the case. Basically the
9 events of the trauma that the lady suffered in her home. And I had a
10 preliminary report of what the general forensic pathologist had found.
11 *And subsequently I asked for more records because as Mr. Stephens
12 knows I really study these cases and I like to be very sure of the whole
13 thing."*

Grand Jury Transcript, p.16 l.16 – p.17 l.5.


14 As can be seen from this exchange, not only did the State fail to present the critical
15 exculpatory evidence of McFarlane's pre-existing condition, it actively encouraged the grand jury
16 to believe that its expert performed a thorough review of all available medical information prior to
17 her testimony and was unable to find any alternate explanation for her death. It is no surprise that
18 the grand jury returned an Indictment charging Anthony Mayo with murder; the very facts in the
19 district attorney's possession that would tend to provide an alternate reasonable explanation were
20 withheld from the presentment. This was as blatant a violation of NRS 172.145(2) as this Court is
21 ever likely to see.

CONCLUSION

1
2 "The grand jury's 'mission is to clear the innocent, no less than to bring to trial those who
3 may be guilty.'" Sheriff v. Frank, 103 Nev. 160, 165 (1987), quoting United States v. Dionisio,
4 410 U.S. 1, 16-17 (1973). This mission was completely subverted in this case. The State obtained
5 possession of Beverly McFarlane's medical records with the assertion that they were necessary for
6 their prosecution, and then proceeded to withhold evidence contained within those records that
7 tended to explain away Anthony Mayo's guilt. The State then compounded the violation of its
8 statutory obligation by allowing Dr. Greco to paint the false impression that she had thoroughly
9 reviewed all of the available medical information with her comment to the grand jury that "...as
10 Mr. Stephens knows, I really study these cases and I like to be very sure of the whole thing." GJT,
11 p.17 ll.3-5. Beverly McFarlane's medical records revealed a reasonable alternate explanation for
12 her death that exonerated Anthony Mayo, and the grand jury had a right to consider that
13 explanation. By withholding evidence of the alleged victim's pre-existing medical condition, a
14 rare, progressive disease that is known to cause death by brain hemorrhage, the State destroyed the
15 existence of the independent and informed grand jury upon which our system of criminal justice
16 relies. The pending Indictment against Anthony Mayo is the product of an unfair process, a
17 process that not only tipped the scales in favor of indictment but purposely removed any
18 counterweight. For this reason, and for the reasons previously presented in the Defendant's
19 original Petition filed February 28, 2014, this Indictment should be dismissed.
20
21
22

23 DATED this 2nd day of February, 2015.

24 PHILIP J. KOHN
25 CLARK COUNTY PUBLIC DEFENDER

26 By: 
27 DAN A. SILVERSTEIN, #7518
28 Deputy Public Defender

By: 
AMY A. FELICIANO, #9596
Deputy Public Defender

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RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Defendant's Addendum to Petition
for Writ of Habeas Corpus is hereby acknowledged this _____ day of February, 2015.

CLARK COUNTY DISTRICT ATTORNEY

By: _____

Exhibit A
September 24, 2013 Order Releasing Medical Records

1. **ORDER**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 COLLEEN R. BROWN
6 Deputy District Attorney
7 Nevada Bar #011777
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED

2013 SEP 24 PM 12 37

JUSTICE COURT
NORTH LAS VEGAS, NV
BY WHA CLERK

7 JUSTICE COURT, NORTH LAS VEGAS TOWNSHIP
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 ANTHONY TRYON MAYO,
13 #2581304,

14 Defendant.

CASE NO: 12PN1733X

DEPT NO: 3

15 **ORDER RELEASING MEDICAL RECORDS**

16 Upon the ex parte application and representation of STEVEN B. WOLFSON, Clark
17 County District Attorney, by and through COLLEEN R. BROWN, Deputy District Attorney,
18 that certain records containing protected health information are necessary for the prosecution
19 of the above-captioned criminal case are being held in the custody of University Medical
20 Center; that said information is relevant and material to a legitimate law enforcement
21 inquiry; that the application was specific and limited in scope to the extent reasonably
22 practicable in light of the purpose for which the information is sought; and that de-identified
23 information could not reasonably be used;

24 ///

25 ///

26 ///

27 ///

28 ///

CERTIFIED COPY

The document to which this certificate is
attached is a full, true and correct copy of
original on file with North Las Vegas
Justice Court, Clark County, State of Nevada
By: WHA Date: 9-26-13

245

Exhibit B

October 7, 2013 Proof of Receipt of Medical Records



47544986

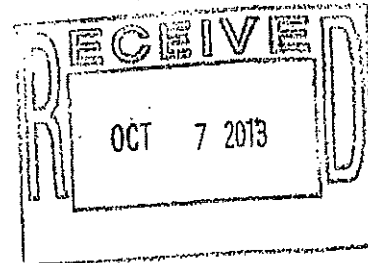
OFFICE OF THE DISTRICT ATTORNEY
SPECIAL VICTIMS UNIT

STEVEN B. WOLFSON
District Attorney

CHRISTOPHER LALLI
Assistant District Attorney

ROBERT W. TEUTON
Assistant District Attorney

MARY-ANNE MILLER
County Counsel



FACSIMILE TRANSMISSION

Fax Number (702) 384-0146
Telephone number (702) 671-2805

To: UMC Records

From: Debbie Marriott, Investigator

Fax: ~~382-2012~~ 383-6275

Date: 10/1/13 10:413

002-008-156

8-23-12 inp.

(Sorry!)

Number of pages including cover sheet: _____
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(702) 671-2782 • Fax: (702) 382-1062 • TDD: (702) 385-7486

Exhibit C
August 17, 2012 UMC Documentation of Moyamoya Disease

UNIVERSITY MEDICAL CENTER OF SOUTHERN NEVADA

DEPARTMENT OF RADIOLOGY

1800 W. CHARLESTON BLVD, LAS VEGAS, NV. 89102

(702) 383-2241

Name: MCFARLANE, BEVERLY E

Sex: F Age: 40Y

Location: ICU NSCU-0901

Date of Birth: 11/01/1971

Medical Record Number: 002-008-158

Ordering Physician: ROBBY ANN QUINTOS M.D.

Order Number: 00016

Order Date: 08/17/2012

Intracranially, there is complete occlusion of the supraclinoid segment of the left internal carotid artery before the carotid terminus. No antegrade flow into the left internal and middle cerebral arteries. There is faint hypertrophied lenticulostriate branches. The left posterior communicating artery is patent. There is collateral reconstitution of extremely diseased left anterior cerebral artery. No aneurysms are present.

Left vertebral artery catheterization injection demonstrates the left vertebral artery vertebral basilar system to be patent. There is extensive left meningeal collateralization noted. However, the perfusion portion is extremely limited.

Catheter sheaths were removed, hemostasis was achieved using a StarClose vascular closure device. There were no procedural complications.

IMPRESSION:

1. Complete distal occlusion of the left internal carotid artery with extremely poor circulation to the left cerebral hemisphere.
2. Diffuse narrowing of the right internal carotid artery intracranially.
3. Findings are suggestive of a slow progressive vasculopathy that can be seen with moyamoya disease. Although the hypertrophied vessels are not well developed. Other etiologies such as sickle cell disease or other chronic vasculopathies would have to be also considered.
4. The patient was transferred from the department in good clinical condition. Total fluoroscopy time was 3 minutes.

dhc

Interpreting Radiologist: RAJNEESH AGRAWAL M.D.

Dictated at: Aug 20 2012 8:53A

Signed and Finalized by: RAJNEESH AGRAWAL M.D. Aug 20 2012 8:50A

Patient: MCFARLANE, BEVERLY E

DOB: 11/01/1971 Account Number: 000047544886 Seq#: 183

Order Number: 00016 SP ANGIO CAROTID CEREBRL BIL SI

Medical Record Number: 002-008-158

Exam Charge Date: Aug 19 2012 4:07PM

The information contained in this document is privileged and confidential. If you are not the intended recipient, reproduction, dissemination, or distribution of this document is prohibited. If you have received this document by fax in error, please notify the UMC Radiology Department at (702) 383-2241.

Exhibit D

August 17, 2012 UMC Documentation of Moyamoya Disease

UNIVERSITY MEDICAL CENTER
OF SOUTHERN NEVADA
CHILDREN'S HOSPITAL OF NEVADA
PHYSICIAN'S ORDER SHEET

ACCT: 00047544986 DOB: 11/01/1971
MCFARLANE
BEVERLY F 40 Y
MR# 002-008-156 ADM: 08/10/2012

Mark X in box for priority order
PROMOTE PATIENT SAFETY - 1) indicate REASONS FOR USE for all PRN orders 2) do NOT use these dangerous abbreviations:

A FORMULARY EQUIVALENT WILL BE DISPENSED UNLESS NON-FORMULARY DRUG REQUEST COMPLETED.

- 4 vessel cerebral arteriogram: DX, shaker, possible
Moxa Moxa

- Aspirin 31mg orally daily

- Aspirin subcutaneous 5,000 units q 8hrs

- Hemoglobin electrophoresis, Hemoglobin A.C.
160 161

T.O. Dr. _____ RN/RP/RT Orders Read Back/Verified Date _____ Time _____

Physician's Signature: _____ Date: 8/17/12 Time: 12:15p

Print Name / License #: _____

Waleed Moxa 8/17/12

SCANNED Date: 8/17/12 Time: 1320

AD
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trailing-zero

PROMOTE PATIENT SAFETY - 1) indicate REASONS FOR USE for all PRN orders 2) do NOT use these dangerous abbreviations:

A FORMULARY EQUIVALENT WILL BE DISPENSED UNLESS NON-FORMULARY DRUG REQUEST COMPLETED

T.O. Dr. _____ RN/RP/RT Orders Read Back/Verified Date _____ Time _____

Physician's Signature: _____ Date: _____ Time: _____

Print Name / License #: _____

SCANNED Date: _____ Time: _____

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MSGO
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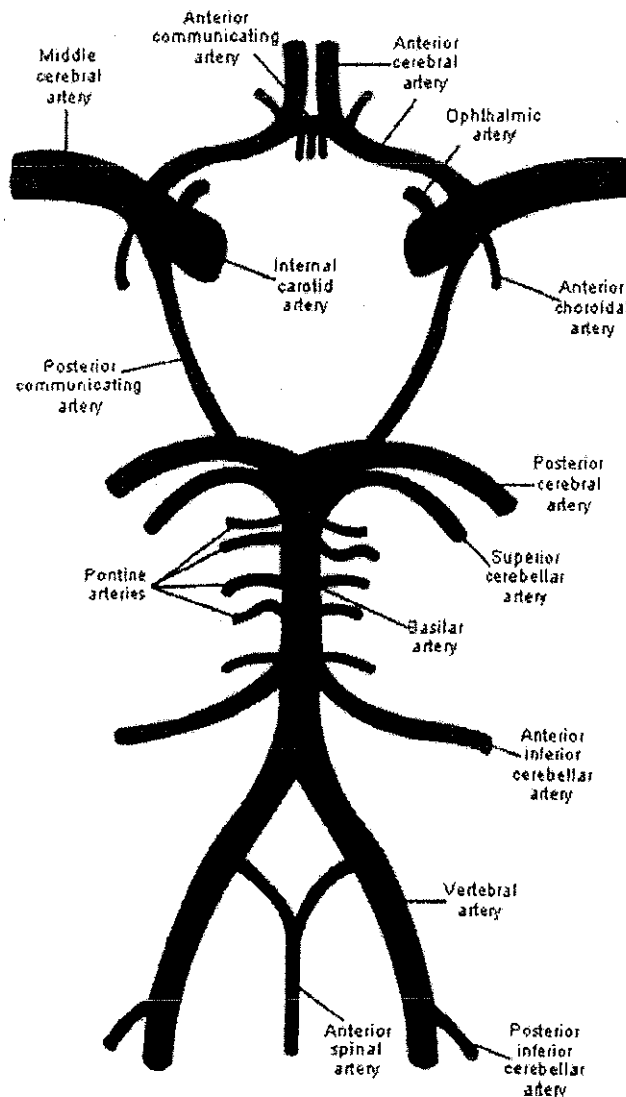
Exhibit E
Medical Articles: Moyamoya Disease

Moyamoya Disease

• Author: Roy Sucholeiki, MD; Chief Editor: Amy Kao, MD Updated: Jan 7, 2015

Background

Moyamoya disease is a progressive, occlusive disease of the cerebral vasculature with particular involvement of the circle of Willis and the arteries that feed it.^[1] The image below is a schematic representation of the circle of Willis, the arteries of the brain, and the brainstem. (See Etiology.)



Schematic representation of the circle of Willis, arteries of the brain, and brain stem.

Medscape

The term moyamoya (Japanese for "puff of smoke") refers to the appearance on angiography of abnormal vascular collateral networks that develop adjacent to the stenotic vessels. The steno-occlusive areas are usually bilateral, but unilateral involvement does not exclude the diagnosis. (See Workup.)

Pathologically, moyamoya disease is characterized by intimal thickening in the walls of the terminal portions of the internal carotid vessels bilaterally. The proliferating intima may contain lipid deposits. The anterior, middle, and posterior cerebral arteries that emanate from the circle of Willis may show varying degrees of stenosis or occlusion. This is associated with fibrocellular thickening of the intima, waving of the internal elastic lamina, and thinning of the media. (See Etiology, Workup, Treatment, and Medication.)

Numerous small vascular channels can be seen around the circle of Willis. These are perforators and anastomotic branches. The pia mater may also have reticular conglomerates of small vessels.

Etiology

The cause of moyamoya disease is not known. The disease is believed to be hereditary. Fukui reported a family history in 10% of patients with the disorder. Moreover, Mineharu suggested that familial moyamoya disease is autosomal dominant with incomplete penetrance that depends on age and genomic imprinting factors.^[2] Genetically, susceptibility loci have been found on 3p, 6p, 17q, and band 8q23. Mineharu et al have found a specific gene locus, q25.3, on chromosome 17.^[3] A genome-wide association study identified RNF213 as the first gene associated with moyamoya.^[4] One meta-analysis demonstrated that there are strong associations between p.R4859K and p.R4810K polymorphisms of the RNF213 gene and moyamoya disease.^[5]

People with moyamoya disease have been found to have a higher incidence of elevated thyroid antibodies.^[6] While this is an association in some individuals, the significance is not clear. However, it suggests that immune abnormalities may play some role in moyamoya disease.

Associated diseases

Although moyamoya disease may occur by itself in a previously healthy individual, many disease states have been reported in association with moyamoya disease, including the following:

- Immunologic - Graves disease/thyrotoxicosis^[7]
- Infections - Leptospirosis and tuberculosis
- Hematologic disorders - Aplastic anemia, Fanconi anemia, sickle cell anemia, and lupus anticoagulant
- Congenital syndromes - Apert syndrome, Down syndrome, Marfan syndrome, tuberous sclerosis, Turner syndrome, von Recklinghausen disease (Neurofibromatosis Type 1), and Hirschsprung disease
- Vascular diseases - Atherosclerotic disease, coarctation of the aorta and fibromuscular dysplasia, cranial trauma, radiation injury, parasellar tumors, and hypertension

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These associated conditions may not be causative, but they do warrant consideration due to their impact on treatment. In the presence of these risk factors, the condition is referred to as moyamoya *syndrome*.

Epidemiology

A study indicated that the prevalence of moyamoya disease in California and Washington was 0.086 case per 100,000 population.¹⁸¹ In this study, the breakdown based on ethnicity as ratio to whites was 4.6 for Asian Americans, 2.2 for African Americans, and 0.5 for Hispanics.

The incidence of moyamoya disease is highest in Japan. The prevalence and incidence of the disorder there has been reported to be 3.16 cases and 0.35 case per 100,000 people, respectively.

Race-, sex-, and age-related demographics

Moyamoya disease occurs primarily in Asians but can also occur (with varying degrees of severity) in whites, blacks, Haitians, and Hispanics.

The female-to-male ratio of moyamoya disease is 1.8:1. Ages for patients with moyamoya disease range from 6 months to 67 years, with the highest peak in the first decade and smaller peaks in the third and fourth decades.

Prognosis

Death from with moyamoya disease is usually from hemorrhage. The outcome of the disease depends on the severity and nature of the hemorrhage; the prognosis depends on recurrent attacks.

Mortality rates from moyamoya disease are approximately 10% in adults and 4.3% in children. About 50-60% of affected individuals experience a gradual deterioration of cognitive function, presumably from recurrent strokes.

Patients with moyamoya disease who present for treatment while symptoms are evolving have a better prognosis than do those who present with static symptoms (which probably indicate a completed stroke).

History and Physical Examination

History

Children and adults with moyamoya disease may have different clinical presentations. The symptoms and clinical course vary widely, with the disease ranging from being asymptomatic to manifesting as transient events to causing severe neurologic deficits. Adults experience hemorrhage more commonly; cerebral ischemic events are more common in children.

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Children may have hemiparesis, monoparesis, sensory impairment, involuntary movements, headaches, dizziness, or seizures. Mental retardation or persistent neurologic deficits may be present.

Adults may have symptoms and signs similar to those in children, but intraventricular, subarachnoid, or intracerebral hemorrhage of sudden onset is more common in adults.

Physical examination

Physical examination findings depend on the location and severity of the hemorrhage or ischemic insult.

Diagnostic Considerations

Conditions to consider in the differential diagnosis of causes of or associations with moyamoya syndrome include the following:

- Homocystinuria/homocysteinemia
- Hyperglycemia/hypoglycemia
- Syndrome of mitochondrial encephalomyopathy, lactic acidosis, and strokelike episodes (MELAS)
- Methylmalonic acidemia
- Propionic acidemia
- Neurofibromatosis, type 1
- Neurofibromatosis, type 2
- Pituitary tumors
- Polyarteritis nodosa
- Posterior cerebral artery stroke
- Subarachnoid hemorrhage
- Temporal/giant cell arteritis
- Tolosa-Hunt syndrome
- Apert syndrome
- Aplastic anemia
- Brainstem syndromes
- Cranial trauma
- Coarctation of the aorta
- Fanconi anemia
- Irradiation injury
- Leptospirosis
- Marfan syndrome
- Mitochondrial cytopathies
- Parasellar tumors
- Sickle cell disease
- Tuberculosis
- Turner syndrome

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- Vasculitis
- Carotid disease and stroke

Differential Diagnoses

- Anterior Circulation Stroke
- Basilar Artery Thrombosis
- Blood Dyscrasias and Stroke
- Cavernous Sinus Syndromes
- Cerebral Aneurysms
- Craniopharyngioma
- Dissection Syndromes
- Fabry Disease
- Fibromuscular Dysplasia
- Intracranial Hemorrhage

Approach Considerations

Misdiagnosis and delayed diagnosis of moyamoya disease are particular pitfalls in the treatment of patients with this disorder. Misdiagnosis can occur easily if the physician does not incorporate moyamoya disease into the differential diagnosis of any patient presenting with stroke. How high moyamoya disease is ranked in the differential depends on presence of atypical features such as young age and absence of obvious risk factors for stroke.

If moyamoya disease is not considered seriously, then appropriate diagnostic tests may not be performed and a delay in diagnosis could result. Because definitive treatment may be surgery, any delay could allow unnecessary progression of disease.

If an ischemic stroke that is being treated with antiplatelet agents or anticoagulants does not respond to therapy, then moyamoya disease should be considered as a possible etiology. This is especially true if results of a hypercoagulability profile are unremarkable.

Physicians practicing in the community who encounter atypical stroke presentations should not hesitate to seek consultation with a stroke specialist or even to transfer a patient to a facility equipped to care for complex cases.

Laboratory Studies

Several studies may be indicated in patients with moyamoya disease. In a patient with stroke of unclear etiology, a hypercoagulability profile may be helpful. Significant abnormality in any of the following is a risk factor for ischemic stroke:

- Protein C
- Protein S
- Antithrombin III

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- Homocysteine
- Factor V Leiden

The erythrocyte sedimentation rate (ESR) can be obtained as part of the initial workup of possible vasculitis. However, a normal ESR does not rule out vasculitis.

Thyroid function and thyroid autoantibody levels have been shown to be elevated in a significant percentage of pediatric patients with moyamoya disease.^[9] Therefore, monitoring these studies is indicated.

Angiography

Cerebral angiography is the criterion standard for the diagnosis of moyamoya disease. The following findings support the diagnosis:

- Stenosis or occlusion at the terminal portion of the internal carotid artery or the proximal portion of the anterior or middle cerebral arteries
- Abnormal vascular networks in the vicinity of the occlusive or stenotic areas
- Bilaterality of the described findings (although some patients may present with unilateral involvement and then progress)

Magnetic resonance angiography (MRA) can be performed. Any of the above findings on MRA may preclude the need for conventional angiography.

Approach Considerations

Pharmacologic therapy for moyamoya disease is disappointing. Therapy is primarily directed at complications of the disease. If intracerebral hemorrhage has occurred, then management of hypertension (if present) is imperative. In cases of severe stroke, intensive care unit (ICU) monitoring is indicated until the patient's condition stabilizes. If the patient has had an ischemic stroke, consider anticoagulation or antiplatelet agents.

Activity

Rehabilitation with physical therapy, occupational therapy, and speech therapy should be considered, depending on the neurologic impairment. The extent of therapy can range from bedside treatment to full, comprehensive inpatient rehabilitation. The latter would include physical, occupational, speech, and cognitive therapy. The condition of the patient, including active comorbidities, dictates his or her involvement in rehabilitation therapy.

Anticoagulation and Antiplatelet Therapy

The rationale behind the administration of anticoagulation and antiplatelet agents is the prevention of further strokes, especially in stenotic vessels (where further infarction can occur if occlusion progresses).

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These medications are not approved by the US Food and Drug Administration (FDA) specifically for use in moyamoya disease. Therefore, the decision to treat patients with anticoagulants such as heparin (and, in some cases, warfarin, for long-term anticoagulation) or antiplatelet agents such as aspirin rests on the following: angiogram findings, severity of stroke, and risk/benefit analysis by physicians who are experienced in stroke treatment.

Direct and Indirect Anastomosis

As previously stated, patients with moyamoya disease who present for treatment while symptoms are evolving have a better prognosis than do those who present with static symptoms (which probably indicate a completed stroke).

Various surgical procedures have been used in the treatment of moyamoya disease, with the goal of revascularizing the ischemic hemisphere, including the following:

- Superficial temporal artery–middle cerebral artery (STA-MCA) anastomosis
- Encephaloduroarteriosynangiosis (EDAS)^[10]
- Encephaloduroarteriomyosynangiosis (EDAMS)
- Pial synangiosis
- Omental transplantation

These procedures can be divided into 2 groups depending on whether they involve direct or indirect anastomosis. Which of these procedures is most effective remains controversial. Sufficient evidence suggests that surgical revascularization procedures result in some symptomatic benefits along with demonstration of improved blood flow. Direct and/or combined procedures provide improved vascularization. However, data proving sustained or improved long-term outcomes are insufficient.^[11,12]

STA-MCA anastomosis is very difficult in children younger than 2 years because of the small diameter of the STA. In these cases, EDAS may be more suitable. This procedure sometimes has failed because of poor revascularization. Hoffman suggested that this is due to the presence of atrophy and a layer of spinal fluid between the pia and the arachnoid tissue.^[13] Division of the arachnoid membrane and placement of the STA directly on the pial membrane help to avoid the problem. In cases of EDAS failure, EDAMS can be considered.

Consultations

Initial neurologic consultation is imperative. A neurologist can document neurologic deficits, consider the differential diagnosis, conduct testing to validate suspected etiologies, and commence medical management as indicated.

Neuroradiology consultation is needed to help determine the extent of radiologic testing needed (ie, MRA vs conventional angiography). Based on the results of these tests, a neurosurgeon can decide if surgical intervention will be helpful.

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Medication Summary

Drug therapy for moyamoya disease depends on the particular manifestations of the disease. For hemorrhage, therapy revolves around the management of hypertension (if present).

For ischemic stroke, anticoagulation with heparin or warfarin may be considered. Safety and efficacy have not been fully established for these drugs, and careful analysis of risk and benefits is needed. These drugs could be useful if thrombosis of vessels is present, but they do not alter the natural history of the disease and they considerably increase the risk of hemorrhage with large strokes.

The same considerations are true for aspirin and other antiplatelet agents. Treatment with anticoagulation or antiplatelet agents should be pursued only after consultation with a neurologist who is experienced in stroke management.

Anticoagulants, Hematologic

Class Summary

These agents are given for the prevention of further thrombosis and potential infarction of the brain. Caution: Anticoagulation is of unproven benefit in ischemic stroke associated with moyamoya disease. This therapy is therefore considered to be empirical.

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Heparin

Heparin is administered intravenously; it is frequently given with initial bolus in cardiac situations. In stroke, bolus not recommended. The target dose is aimed at maintaining an activated partial thromboplastin time (aPTT) of 1.5-2 times control. A computed tomography (CT) scan of the brain must be done prior to any anticoagulant use to rule out preexisting intracranial hemorrhage.

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Warfarin (Coumadin, Jantoven)

Warfarin, which is administered orally, is used if long-term anticoagulation is needed. The international normalized ratio (INR) is followed, with a target range of 2-3. A CT scan of the brain must be done prior to any anticoagulant use to rule out preexisting intracranial hemorrhage.

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Antiplatelet agents

Class Summary

These agents can be considered to help prevent future ischemic strokes. As with anticoagulation, aspirin is of unproven benefit in moyamoya disease; its use is considered empirical.

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Aspirin (Ecotrin, Ascriptin Maximum Strength, Ascriptin, Bayer Aspirin)

Aspirin's efficacy in preventing stroke relies on the inhibitory effect of aspirin on platelet function. This presumably helps to prevent thrombus formation and propagation.

Moyamoya Disease Medication

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Moyamoya Disease

1

Moyamoya disease is a rare, progressive cerebrovascular disorder caused by blocked arteries at the base of the brain in an area called the basal ganglia. The name "moyamoya" means "puff of smoke" in Japanese and describes the look of the tangle of tiny vessels formed to compensate for the blockage. Moyamoya disease was first described in Japan in the 1960's and it has since been found in individuals in the United States, Europe, Australia, and Africa. The disease primarily affects children, but it can also occur in adults. In children, the first symptom of Moyamoya disease is often stroke, or recurrent transient ischemic attacks (TIA, commonly referred to as "mini-strokes"), frequently accompanied by muscular weakness or paralysis affecting one side of the body, or seizures. Adults most often experience a hemorrhagic stroke due to recurring blood clots in the affected brain vessels. Individuals with this disorder may have disturbed consciousness, speech deficits (usually aphasia), sensory and cognitive impairments, involuntary movements, and vision problems. Because it tends to run in families, researchers think that Moyamoya disease is the result of inherited genetic abnormalities. Studies that look for the abnormal gene(s) may help reveal the biomechanisms that cause the disorder.

Treatment

There are several types of revascularization surgery that can restore blood flow to the brain by opening narrowed blood vessels or by bypassing blocked arteries. Children usually respond better to revascularization surgery than adults, but the majority of individuals have no further strokes or related problems after surgery.

Prognosis

Without surgery, the majority of individuals with Moyamoya disease will experience mental decline and multiple strokes because of the progressive narrowing of arteries. Without treatment, Moyamoya disease can be fatal as the result of intracerebral hemorrhage.

Research

The NINDS conducts neurological research in laboratories at the NIH and also supports additional research through grants to major medical institutions across the country. These studies, which range from clinical trials to investigations of basic biological mechanisms, are aimed at discovering how and why diseases develop in the brain, and focus on finding ways to prevent, treat, or cure them.

View research ([http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?CMD=search&term=moyamoya+disease+AND+human[mh]+AND+english[la]&db=PubMed&orig_db=PubMed)

[CMD=search&term=moyamoya+disease+AND+human\[mh\]+AND+english\[la\]&db=PubMed&orig_db=PubMed](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?CMD=search&term=moyamoya+disease+AND+human[mh]+AND+english[la]&db=PubMed&orig_db=PubMed) on this topic.

View studies ([http://clinicaltrials.gov/ct2/results?term=Moyamoya Disease](http://clinicaltrials.gov/ct2/results?term=Moyamoya+Disease)) being conducted about this condition.

View NINDS publications (http://www.ninds.nih.gov/disorders/moyamoya/pubs_moyamoya.htm) on this topic.

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National Organization for Rare Disorders (NORD)

Federation of voluntary health organizations dedicated to helping people with rare "orphan" diseases and assisting the organizations that serve them. Committed to the identification, treatment, and cure of rare disorders through programs of education, advocacy, research, and service.

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National Stroke Association

National non-profit organization that offers education, services and community-based activities in prevention, treatment, rehabilitation and recovery. Serves the public and professional communities, people at risk, patients and their health care providers, stroke survivors, and their families and caregivers.

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Children's Hemiplegia and Stroke Assocn. (CHASA)

CHASA is a 501(c)(3) nonprofit organization dedicated to improving the lives of children and families affected by pediatric stroke and other causes of hemiplegia. Offers national family retreat, local family events and seminars, online support group, websites, fact sheets, clinical study information, and pediatric stroke awareness campaigns.

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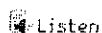
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What is Moyamoya Disease?

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Is there any treatment?

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What is the prognosis?

Without surgery, the majority of individuals with Moyamoya disease will experience mental decline and multiple strokes because of the progressive narrowing of arteries.

Without treatment, Moyamoya disease can be fatal as the result of intracerebral hemorrhage.

What research is being done?

The NINDS conducts neurological research in laboratories at the NIH and also supports additional research through grants to major medical institutions across the country. These studies, which range from clinical trials to investigations of basic biological mechanisms, are aimed at discovering how and why diseases develop in the brain, and focus on finding ways to prevent, treat, or cure them.

NIH Patient Recruitment for Moyamoya Disease Clinical Trials

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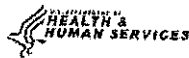
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August 26, 2012 Excerpt from Alane Olson Autopsy Report

Clark County Coroner
1704 Pinto Lane
Las Vegas, NV 89106
(702) 455-3210



AUTOPSY REPORT

Case Number: 12-07691

August 26, 2012

A rectangular stamp with the word "COPY" in a bold, sans-serif font. The stamp is slightly tilted and has a thin border.

AUTOPSY REPORT

PATHOLOGIC EXAMINATION ON THE BODY OF

BEVERLY ESTELLA MCFARLANE

FINAL PATHOLOGIC FINDINGS

- I. Brain injuries.
 - A. Scant right-sided galeal and temporalis muscle hemorrhage.
 - B. Left-sided subdural hematoma, with cerebral softening.
 - C. Per neuropathology report:
 - 1. Diffuse acute cerebral ischemic damage
 - 2. Cerebral edema with herniation.
 - 3. Sub-acute left temporal lobe hemorrhage.
 - 4. Pontine microinfarct.
- II. Clinically documented complete occlusion of the left internal carotid artery and narrowing of the right internal carotid artery.
- III. Acute bronchopneumonia.
- IV. Status post organ donation (heart valves, kidneys, spleen, left adrenal gland).

OPINION

CAUSE OF DEATH: It is my opinion that this 40-year-old woman, Beverly Estella McFarlane, died as a result of brain injuries due to assault. Other significant conditions include ischemic encephalopathy due to occlusion of the left internal carotid artery, hypertension, and diabetes mellitus.

MANNER OF DEATH: HOMICIDE.

A handwritten signature in cursive script, reading "Alane M. Olson".

Alane M. Olson, M.D.
Pathologist

AMO/jph/amu

Dissemination is restricted.
Secondary dissemination of this document is prohibited.

Exhibit G

December 19, 2012 Neuropathology Report, Dr. Claudia Greco

UNIVERSITY OF CALIFORNIA DAVIS

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SANTA BARBARA • SANTA CRUZ

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December 19, 2012

Clark County Medical Examiner/Coroner's Office
 1704 Pinto Lane
 Las Vegas, NV 89106

RE: Clark County Case # 12-7691
 UCDCM Department of Pathology Case #12:OS1468

NEUROPATHOLOGY REPORT

Received wrapped in a moistened towel in a container labeled "12-07691,"
 "McFarlane, Beverly E," and "8-26-12" is a formalin-fixed, whole brain and fragmented dura.

Gross Examination: Fixed brain weight= 1098 gm. External examination of the brain shows diffuse swelling of the cortical gyri. As the corpus callosum appears artifactually disrupted, assessment of subfalcine herniation is not possible. The surface of the left hemisphere is grey-brown in color, and corresponds to the left subdural hemorrhage. Examination of the inferior surface of the brain shows a large left uncus notch of approximately 5 mm depth. The Circle of Willis is free of atherosclerotic changes. Externally, the brainstem and cerebellum show effacement of external structures, and there is prominent tonsillar herniation. Removal of the brainstem and cerebellum shows the left uncus notch to measure 4.5 cm x 1.8 cm x 5 mm. The brain is cut in the coronal plane, and shows the ventricles to be slit-like. There is a circular red-brown lesion in the right frontal pole white matter that measures 0.3 x 0.3 cm and traverses the right corpus callosum. The left temporal lobe contains a large red-brown hemorrhage that measures 2.5 x 3.5 x 2 cm in greatest dimensions. There is marked compression of the left hippocampus. Horizontal sections of the brainstem and cerebellum show effacement of anatomic markings, compression of the left cerebral peduncle, and multiple small punctate hemorrhages that show in the right midbrain and rostral pons. Less than 1cc of blood is present in the 4th ventricle. There is prominent bilateral cerebellar tonsillar herniation. The small fragments of dura show dusky gray discoloration. On the inner aspect of the left dural cap, there is a collection of easily removable red-brown material that is no greater than 5mm in thickness. The subdural collection measures 15 cm x 10 cm in greatest dimensions. The sagittal sinus is free of thrombus.

Gross photographs are taken and are included with this report.

Case 12-7691, cont.

Sections are taken as follows:

- B1 Shunt tract, right frontal lobe
- B2 Left temporal lobe hemorrhage
- B3 Left hippocampus
- B4 Right hippocampus
- B5 Midbrain
- B6 Right cerebellar cortex
- B7 Left dura
- B8 Left frontal pole
- B9 Right frontal pole
- B10 Right anterior corpus callosum
- B11 Right posterior corpus callosum
- B12 Left thalamus, posterior internal capsule
- B13 Right thalamus, posterior internal capsule
- B14 Left cerebellar peduncle
- B15 Right cerebellar peduncle
- B16 Upper pons
- B17 Right anterior corona radiata
- B18 Left posterior corona radiata
- B19 Right anterior coronal radiata
- B20 Left posterior corona radiata

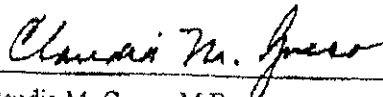
Microscopic Description: All cortical sections show diffusely pyknotic neurons, as do both hippocampi. There is homogenization of red cells in the shunt tract. Sections of the left temporal lobe hemorrhage shows homogenization of red cells, focal lines of Zahn, and surrounding infiltration by lymphocytes and macrophages. Hemorrhages in the midbrain and pons show primarily homogenized red cells. There is a single microinfarct in the pons that shows macrophage infiltration and is surrounded by a small number of swollen axons. Sections of dura show intact as well as homogenized red cells, early formation of lines of Zahn, and scattered patches of fibroblastic proliferation (3-5 cells thick) and neovascular invasion of the clot. Homogenized red cells are seen in midbrain hemorrhages. Purkinje cells are rounded and have pyknotic nuclei. H&E stain shows no swollen axons in any section, save for a small number of them surrounding the pontine microinfarct.

FINAL DIAGNOSIS:

Case 12-7691, cont.

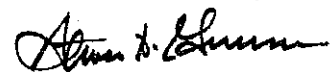
- A. SUBACUTE LEFT-SIDED SUBDURAL HEMORRHAGE (APPROXIMATELY 3-4 DAYS DURATION).
- B. DIFFUSE ACUTE CEREBRAL ISCHEMIC DAMAGE.
- C. CEREBRAL EDEMA WITH HERNIATION INJURY (GROSS EXAMINATION).
 - 1. DURET HEMORRHAGES OF MIDBRAIN, UPPER PONS.
- D. S/P RIGHT FRONTAL LOBE VENTRICULAR SHUNT PLACEMENT.
- E. SUBACUTE LEFT TEMPORAL LOBE HEMORRHAGE (APPROXIMATELY 2-4 DAYS).
- F. PONTINE MICROINFARCT (APPROXIMATELY 5 DAYS DURATION), WITH SURROUNDING AXONAL SWELLINGS.

Note: An addendum report will be issued with the results of B-APP staining that will aid in the detection of swollen axons.



Claudia M. Greco, M.D.
HSCP Professor of Pathology
Neuropathology

12/19/12


CLERK OF THE COURT

1 **RET**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ROBERT STEPHENS
6 Deputy District Attorney
7 Nevada Bar #011286
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 State of Nevada

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 In the Matter of Application,
11 of
12 ANTHONY TYRON MAYO,
13 #2581304
14 for a Writ of Habeas Corpus.

Case No. C-14-295313-1
Dept No. XXV

16
17 **RETURN TO DEFENDANT'S ADDENDUM TO PETITION FOR WRIT OF**
18 **HABEAS CORPUS**

19 DATE OF HEARING: March 16, 2015

20 TIME OF HEARING: 9:00 A.M.

21 COMES NOW, DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada,
22 Respondent, through his counsel, STEVEN B. WOLFSON, District Attorney, through
23 ROBERT STEPHENS, Chief Deputy District Attorney, files this Return to Defendant's
24 Addendum to Petition for Writ of Habeas Corpus, currently set for hearing on March 16, 2015
25 at 9:00 A.M.

26 This Return is made based upon all papers and pleadings filed herein and oral
27 arguments at the time set for hearing these matters.
28

1 while at work. GJT 54. Defendant was so irritated and annoyed by the phone call that he
2 ordered Ashanti and Ashley to their room. GJT 54. When Beverly arrived home from work,
3 Defendant was playing with a beach ball with the kids. GJT 56. Beverly asked that they stop
4 playing while she began cooking dinner. GJT 56. This caused a verbal argument between
5 Beverly and Defendant. GJT 56. Once dinner was finished they all went upstairs to the master
6 bedroom. GJT 58.

7 Another argument arose about the cooking. GJT 59. Defendant ordered Ashanti and
8 Ashley to their room. GJT 59. Defendant was so mad that his eyes were "popping out of his
9 head" and his vein was popping out of his forehead. GJT 66. Beverly tried to call 911 but
10 Defendant slapped the phone out of Beverly's hand. GJT 59. The phone slid under the fridge
11 in the room. GJT 72. Ashanti tried to retrieve the phone, but Defendant stopped her. GJT 72.

12 Defendant then mounted Beverly and began choking her. GJT 59. Out of fear, Ashanti
13 and Ashley went to their room which is directly across from the master bedroom. GJT 60.
14 Defendant punched Beverly numerous times in the face and body. GJT 63. Beverly kept
15 screaming for help. GJT 63. Defendant then began to choke her. GJT 63. Ashanti saw
16 Defendant pushing Beverly down into the bed. GJT 63. She knew Beverly was being choked
17 because she could hear it in Beverly's voice. GJT 64. Beverly would scream and then she
18 would just stop. GJT 64.

19 Ashanti eventually turned away from the beating in an attempt to find her mom's phone
20 in her purse. GJT 60. Ashanti was unable to find the phone in the purse. GJT 61. Defendant
21 observed Ashanti searching for the phone. GJT 72. He told Ashanti that if she called the
22 police, he would knock Beverly out. GJT 73. He also threatened to "whoop" Ashanti. GJT
23 73. Ashanti then hid behind the door so she could not see what Defendant was doing to her
24 mother. GJT 61.

25 At some point, Defendant rhetorically asked where his bat was. GJT 61. Defendant
26 then went into the garage to look for his bat. GJT 61. Knowing where the bat was located,
27 Ashanti rushed downstairs and hid the metal bat. GJT 61. Ashanti then returned to her room.
28 GJT 62. Still upset, Defendant returned to the master bedroom, this time grabbing a vacuum.

1 GJT 62. Defendant closed the door behind him. GJT 64. Ashanti could hear her mother
2 screaming to "stop" and "not do that." GJT 64. She then heard a loud bang. GJT 65.

3 Some time passed and Beverly exited the bedroom with a limp. GJT 65. She was
4 severely beaten, with scratches on her face. GJT 70. Dust was in her hair and on her person.
5 GJT 65. There was also dust on one side of the bed. GJT 65. The vacuum was broken. GJT
6 68. Beverly was having a hard time speaking. GJT 71. Beverly took a bath and then tried to
7 sleep in Ashanti's room, however, Defendant demanded that she sleep in the master bedroom
8 with him. GJT 71.

9 The next morning, August 9, 2012, Ashanti heard Defendant apologizing to Beverly.
10 GJT 74. Beverly slept almost all day. GJT 74. Beverly woke up at around dinner time. GJT
11 74. She could only whisper. GJT 75. Ashanti brought some food to Beverly. GJT 75. It
12 appeared to Ashanti that her mom was "very sick." GJT 76. Beverly's eyes were red and her
13 skin was peeled off on one side of her face. GJT 76-77.

14 On August 10, 2012, Ashanti was woken up by Defendant yelling and cursing at
15 Beverly to go to work. GJT 44, 46. After Beverly informed Defendant that she would not be
16 going to work, the Defendant left the residence. GJT 44. At this time, Beverly got out of bed
17 and tried to call the police. GJT 42-44. Beverly limped to the stairs. GJT 47. Beverly could
18 only whisper, even though she was trying to talk louder. GJT 48. Initially Beverly called 411.
19 GJT 49. Then she called 311. GJT 44-45. Because Beverly was having a difficult time
20 talking, Ashanti eventually took over the 911 call. GJT 43, 45.

21 Officer Vital and other police officers eventually arrived at the residence and tried to
22 speak to Beverly; however, again Beverly had difficulty communicating with them. GJT 43,
23 86. Initially Officer Vital spoke to Ashanti who pointed him towards Beverly. GJT 87.
24 Officer Vital described Beverly as "a little lethargic, disoriented, kind of displaying sort of
25 intoxicated type of person clues, but I could not smell any odor of alcohol coming from her."
26 GJT 87. She had slurred speech and muffled sentences. GJT 87. She would get lost in the
27 conversation. GJT 87. Beverly was unable to give her date of birth, name the President or
28 identify the day of the week. GJT 87-88. Officer Vital also noticed that she had abrasions on

1 the side of her face and her face was swollen. GJT 88-89. Beverly had pettechia and
2 scratching on her neck. GJT 89. Ashanti testified that Beverly did not have a limp or difficulty
3 communicating until after Defendant beat Beverly. GJT 52. Beverly was taken to the hospital.
4 GJT 91.

5 Officer Aker followed Beverly to the hospital. GJT 93. Officer Aker has taken almost
6 240 hours in domestic violence training courses and is permitted to teach other cadets about
7 domestic violence and strangulation. GJT 94. Specific to strangulation, Officer Aker attended
8 a course on strangulation. GJT 94. This training has assisted other officers in the field on
9 numerous occasions. GJT 95.

10 Officer Aker testified that Beverly was very scared and upset. GJT 97. He noticed a
11 black eye and an abrasion and bruising to her face. GJT 97. Beverly hesitated to move her
12 neck. GJT 97. She continued to sooth her neck. GJT 97. Her voice was very hoarse. GJT
13 97. At the hospital, Officer Aker noticed petechial hemorrhaging under her eyelids. GJT 98.
14 Beverly still had great difficulty in communicating due to her cognitive abilities being
15 diminished. GJT 102-03.

16 On August 11, 2012, Officer Aker again returned to the hospital to check up on Beverly.
17 GJT 106. His interaction with Beverly was somewhat limited due to the several medical
18 procedures that were being performed. GJT 106. However, Officer Aker noticed that her
19 cognitive abilities had worsened. GJT 107. Beverly had virtually no ability to communicate.
20 GJT 107. Her answers were just gibberish. GJT 107.

21 While in the hospital, many exams were performed on Beverly. Radiologist Dr.
22 Rajneesh Agrawal noted the following impression: "Findings are suggestive of a slow
23 progressive vasculopathy that can be seen with moyamoya disease. Although the
24 hypertrophied vessels are not well developed. Other etiologies such as sickle cell disease or
25 other chronic vasculopathies would have to be also considered." Defendant's Exhibit C
26 attached to Addendum. Further a physician notated, "possible moya moya." Defendant's
27 Exhibit D attached to Addendum.

28 While at the hospital, Beverly eventually died and her body was examined by Dr.

1 Olson. GJT 125. Dr. Olson assigned the autopsy case a unique case number. GJT 125-26.
2 An external review of her body showed that Beverly had intravenous lines on her body. GJT
3 128. Prior to the autopsy, Dr. Olson noted that Beverly's organs were donated. GJT 128. In
4 fact, there was a significant cut down the middle of her body which Dr. Olson said was from
5 the organ procurement procedure. GJT 129. Dr. Olson also identified other "small injuries"
6 on the surface. GJT 128.

7 The internal examination showed that Beverly sustained "considerable amount of
8 swelling in her brain." GJT 129. Dr. Olson preserved the brain and sent it to Dr. Greco. GJT
9 129, 133. She testified that the bleeding on the brain would be indicative of trauma to the
10 head. GJT 130. Dr. Olson noticed the stark contrast in the coloration of the brain, which is
11 indicative of one side sustaining more injury than the other. GJT 131. She concluded that her
12 brain suffered trauma which "ultimately" led to her death. GJT 133-34. Other contributing
13 factors included the blockage of arteries which interfered with the blood flow to the brain.
14 GJT 134. This case was determined to be a homicide. GJT 15.

15 Dr. Claudia Greco has examined 400-500 brains for various reasons in her medical
16 practice. Grand Jury Transcripts (GJT) 12. The Clark County Coroner's Officer contacted
17 her to examine Beverly's brain. GJT 13. In December 2012, Dr. Greco received the brain
18 from FedEx and kept it in a locked area. GJT 13. From that point forward she was the only
19 person who handled the brain. GJT 13. She personally assigned a number to the brain which
20 correlated with the unique number assigned by the Clark County Coroner's Office. GJT 14.
21 In her review of the brain, she noted significant injuries to the left side of the brain. GJT 18.
22 Specifically she noted a hemorrhage on the underside of the brain. GJT 18. There was massive
23 swelling on the brain which would have "gotten to the point where her life was irretrievable."
24 GJT 18. The brain began to herniate or go down the spinal cord. GJT 22. Dr. Greco explained
25 that this injury is fatal because it will pinch the spinal cord and "destroy the cardiac breathing
26 mechanisms." GJT 23. She testified that the brain tissue toward the spinal cord is "very
27 swollen." GJT 25. In fact it was so swollen that there was no opening for the cerebrospinal
28 fluid to transmit to the brain. GJT 26-27. This fluid is important because it brings nutrients

1 and oxygen to the brain. GJT 27-28. The swelling was so severe that Beverly's brain would
2 not have allowed for cerebrospinal fluid to transmit. GJT 28. Additionally, the swelling
3 prevented blood from transmitting to the brain. GJT 32. The left side of the brain was
4 noticeably more swollen. GJT 21. She also noted other hemorrhages in the brain. GJT 24.

5 Dr. Greco testified that the types of injuries Beverly sustained were absolutely the result
6 of trauma. GJT 28. The hemorrhage was large and caused the death of Beverly. GJT 29. Dr.
7 Greco concluded Beverly "suffered cerebral trauma, brain trauma, and it was aggravated by
8 the fact that she already had high blood pressure and it was very, very hard to control." GJT
9 29. Beverly's brain was so significantly damaged that medical intervention could not have
10 saved her life. GJT 30.

11 Dr. Greco believed these injuries were three to four days old. GJT 31. She further
12 explained that three to four days after Beverly sustained this trauma to the head, the brain had
13 swelled to the point where the necessary nutrients, including oxygen and blood would not have
14 been transmitting to the brain. GJT 33.

15 Since Defendant filed the instant Addendum to Petition for Writ of Habeas Corpus, Dr.
16 Greco has re-examined the brain. It is her conclusion and opinion that Beverly did not suffer
17 from moya moya. "There is no pathology present that would lead to a diagnosis of Moyamoya
18 disease." State's Exhibit 1 attached. "No evidence of Moyamoya disease." State's Exhibit
19 1.

20 Detectives Owens and Bodnar investigated the case once it was determined that
21 Beverly died. GJT 111. In March 2013, Detectives Owens and Bodnar met with Defendant
22 in Los Angeles, California. GJT 111-12. After reading Defendant his Miranda rights,
23 Defendant admitted that a verbal argument escalated into a physical altercation. GJT 113. He
24 admitted to shoving her with both hands, slapping her in the face, punching her repeatedly,
25 and striking her with a vacuum. GJT 113. Initially Defendant said that he swung the vacuum
26 at her, but missed. GJT 117. When he missed the vacuum struck the bedpost and the vacuum
27 broke. GJT 117. Later, Defendant said that the vacuum hit Beverly in the hand as she tried
28 to block the vacuum from hitting her. GJT 114. Defendant claimed that Beverly pushed and

1 slapped him as he was trying to leave the residence. GJT 115-16. Defendant said he and
2 Beverly had intercourse and then the next morning he left the residence. GJT 114. When he
3 left he told Beverly that he was going to Los Angeles. GJT 117.

4 Defendant said he gave her some treatment for her black eye to make it appear that she
5 was not beat up. GJT 118. Defendant asserted that he asked Beverly if she wanted to go to
6 the hospital, but she refused and just asked for a Tylenol. GJT 119.

7 ARGUMENT

8 Defendant's Addendum to Petition for Writ of Habeas Corpus should be denied on
9 three grounds. First, it is untimely. Second, Beverly did not suffer from moyamoya disease.
10 Third, the State presented all the necessary and proper evidence before the Grand Jury. The
11 State will discuss each below.

12 I. DEFENDANT'S ADDENDUM IS UNTIMELY

13 NRS 34.700 governs the filing of writs. It reads in relevant part:

14 1. Except as provided in subsection 3, a pretrial petition for a
15 writ of habeas corpus based on alleged lack of probable cause or
16 otherwise challenging the court's right or jurisdiction to proceed
to the trial of a criminal charge may not be considered unless:

17 (a) The petition and all supporting documents are filed within
18 21 days after the first appearance of the accused in the district
court; and

19 (b) The petition contains a statement that the accused:

20 (1) Waives the 60-day limitation for bringing an
accused to trial; or

21 (2) If the petition is not decided within 15 days before
22 the date set for trial, consents that the court may, without
notice or hearing, continue the trial indefinitely or to a
date designated by the court.

23 2. The arraignment and entry of a plea by the accused must not be
24 continued to avoid the requirement that a pretrial petition be filed
within the period specified in subsection 1.

25 3. The court may extend, for good cause, the time to file a petition.
26 Good cause shall be deemed to exist if the transcript of the preliminary
27 hearing or of the proceedings before the grand jury is not available
28 within 14 days after the accused's initial appearance and the court
shall grant an ex parte application to extend the time for filing a

petition. All other applications may be made only after appropriate notice has been given to the prosecuting attorney. (Emphasis added).

Here, Defendant's initial appearance was on January 27, 2014. Thus, Defendant's Petition was due on or about February 17, 2014. Defendant filed his original Petition on February 28, 2014. For reasons that do not need be discussed in this Return, the State did not oppose Defendant filing the Petition on February 28, 2014.

However, the Addendum was ambushed upon the State nearly one year past the deadline to file the writ when it was filed at calendar call on February 2, 2015. The State did not agree to the untimely filing of the addendum, nor does there appear to be good cause permitting such an untimely filing. By statute, NRS 34.700, the Addendum must be dismissed.

Defendant may argue in its Reply that it may supplement any filing prior to decision by the court, but such a stance lacks any persuasion or authority in this case. Petition filings are governed by statute. This is likely due to many reasons, one of which is to prevent unending delays in cases. In fact, the Nevada Legislature specifically passed a statute preventing additional pretrial petition filings. NRS 34.710(1) reads:

1. A district court shall not consider any pretrial petition for habeas corpus:
 - (a) Based on alleged lack of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge unless a petition is filed in accordance with NRS 34.700.
 - (b) Based on a ground which the petitioner could have included as a ground for relief in any prior petition for habeas corpus or other petition for extraordinary relief. (Emphasis added)**

A defendant may not file additional writs presenting grounds of relief that could have previously been raised.

Here, Defendant essentially filed a Second Petition cloaked as an "Addendum" in an attempt to subvert NRS 34.710. Addendums and supplements are filed to provide additional information on issues previously submitted to the court. Defendant is not supplementing additional information on the issues previously presented to the court. He is alleging a new issue that could have and should have been raised in the initial petition. If Defendant was presenting information in its "Addendum" related to issues previously raised in its Petition,

1 then possibly the instant filing could be considered an addendum. Such is not the case here.

2 Defendant's initial Petition never once addressed a concern that Beverly may have had
3 moya moya disease. Defendant is presenting additional theories for relief. Such filings should
4 not be permitted as it would open a loophole into filing additional petitions in perpetuity by
5 carefully crafting the filing as an "Addendum." Clearly, the Legislature never intended
6 additional filings as NRS 34.710 states that the "district court shall not" consider issues that
7 should have been raised in a previous petition.

8 Lastly, Defendant asserts in its Addendum that he is "alleging new, compelling
9 evidence." Defendant's Addendum, p.2 l.8. The "new and compelling" evidence is that
10 Beverly may have had moya moya disease. (Emphasis added). This is not new evidence.
11 Defendant was sent the medical records on December 12, 2013, a month before the grand jury
12 and more than a year before the instant filing of Defendant's Addendum. This is not "new"
13 evidence. Nor does it rise to the level of good cause. Defendant was aware of this information
14 when he filed his initial petition. Had it been so compelling, as alleged, it should have been
15 raised in the initial petition, not nearly a year later.

16 Defendant's instant Addendum is statutorily barred from consideration by this Court.
17 This Court should Dismiss Defendant's Addendum to Petition for Writ of Habeas Corpus
18 pursuant to NRS 34.700 and 34.710.

19 **II. BEVERLY DID NOT HAVE MOYA MOYA DISEASE**

20 Should this Court nonetheless decide to address the merits of Defendant's Addendum,
21 the State submits that Beverly never had moya moya disease. See attached Exhibit 1. Since
22 Defendant filed the instant Addendum claiming that Beverly died of moya moya disease, Dr.
23 Greco has conducted additional analysis on the brain. She has concluded that there is no
24 pathology present leading to a diagnosis of moya moya disease. Beverly did not have moya
25 moya disease. Thus, the evidence Defendant claims to be exculpatory, was in fact not
26 exculpatory. There was no violation of the State's duty to present the possibility of Beverly
27 dying from moya moya disease because she did not have moya moya.

28 ///

1 III. THE STATE PRESENTED THE PROPER AND NECESSARY 2 EVIDENCE

3 In the event this Court decides not to rely upon Dr. Greco's further analysis on the
4 brain, the State submits that the possibility of Defendant suffering from moya moyo disease is
5 not exculpatory in nature. NRS 172.145 requires the State to present evidence that "will
6 explain away the charge." Possibly exculpatory evidence should not be examined piece by
7 piece but as a whole in context of all the facts. Mazzan v. Warden, Ely State Prison, 116 Nev.
8 48, 71, 993 P.2d 25, 39 (2000). "Undisclosed evidence must be considered collectively, not
9 item by item." Id. In other words, the evidence cannot be considered in a vacuum. The
10 determination of whether particular evidence is exculpatory is generally left to the discretion
11 of the district court. Ostman v. Eighth Judicial District Court, 107 Nev. 563, 564, 816 P.2d
12 458, 459 (1991). In exercising its discretion, the court must review the allegedly exculpatory
13 evidence in context with the other facts of the case. See King v. State, 116 Nev. 349, 358-59,
14 998 P.2d 1172, 1178 (2000).

15 In King, the State failed to present the testimony of four witnesses inside the residence
16 when the police executed the search warrant. Id. at 358, at 1172. These four witnesses would
17 have allegedly testified that the police did not knock and announce their presence prior to
18 entering the residence. Id. King asserted that this evidence would have shown that he was in
19 reasonable fear for his life when he, along with his other comrades, shot at the police when
20 the police entered the residence. Id. The Nevada Supreme Court held, "Assuming that the
21 provisions of NRS 172.145(2) were violated by the State's failure to present the testimony of
22 the four individuals to the grand jury, in light of the overwhelming evidence against King, we
23 conclude that violation does not compel reversal." Id. at 359, at 1172. Thus it appears that
24 courts must weigh the exculpatory nature of the evidence in context of all the facts.

25 Here, Defendant urges this Court to determine that the radiologist's statement is
26 exculpatory. This Court must consider the entire statement in context of the other facts of the
27 case before concluding that it is exculpatory. Dr. Agrawal stated, "Findings are suggestive of
28 a slow progressive vasculopathy that can be seen with moyamoya disease. Although

1 hypertrophied vessels are not well developed. Other etiologies such as sickle cell disease or
2 other chronic vasculopathies would have to be considered.” A physician’s note identified the
3 “possibility” of moya moya disease. This note could have been solely based upon Dr.
4 Agrawal’s findings. There is no evidence that this physician conducted his own analysis in
5 identifying a possibility of moya moya disease. Neither of these doctors actually diagnosed
6 Beverly with moya moya disease. In fact, no doctor has diagnosed her with this disease. The
7 doctors were merely speculating at the time. Dr. Agrawal said there were findings
8 “suggestive” of moya moya. In the very next comment he states that it was difficult for him
9 to make a determination because the “hypertrophied vessels are not well developed.” Dr.
10 Agrawal did not have sufficient evidence to come to any real conclusion. He then continues
11 by listing other various possibilities to explain his findings. These comments, buried in a
12 mound of medical records, do not exculpate Defendant. A possibility of having a rare disease
13 does not exculpate Defendant in this case when considered in conjunction with the other
14 evidence.

15 If Defendant just wants to speculate, then in the spirit of speculation, it is also possible
16 that Beverly simply died of old age. Defendant is requesting this court to venture down a very
17 slippery slope of speculation. Should this Court determine that this evidence is exculpatory
18 and should have been presented to the grand jury, then in every single murder case ever
19 presented before the grand jury, the State will be obligated to present every possible
20 explanation of death regardless of how implausible it is. For example, a victim with diabetes
21 is shot in the head; the State would be obligated to present evidence that she had diabetes. A
22 victim, who has cancer, is hit by a train; the State would be obligated to present evidence that
23 he had cancer. The possible causes of death could be endless, including the most absurd of
24 which could include alien intervention.

25 Furthermore, in this specific case, Defendant is asking this Court to take another
26 speculative step down the slippery slope. Defendant is not simply asking this Court to
27 determine that Beverly had moya moya, of which no doctor has ever diagnosed her, but to also
28 conclude that moya moya was the actual cause of death. That is the only way the evidence

1 would be exculpatory because that is the only way it would "explain away the charge."
2 However as previously stated, Dr. Greco has already determined that Beverly did not suffer
3 from moya moya. It should be noted that Dr. Greco and Dr. Olson both reviewed the medical
4 records prior to coming to any conclusion on the cause and manner of death. Even with the
5 review of the medical records that suggest there may be a possibility of moya moya disease,
6 both doctors concluded that Beverly died of blunt force trauma to the head. Defendant desires
7 this Court to rely upon speculation of moya moya as the cause of death. The evidence does
8 not even support that she had moya moya disease, let alone that she actually died of moya
9 moya. Beverly died of blunt force trauma to the head.¹

10 Moreover, prior to the grand jury presentation, defense counsel submitted a letter to the
11 State requesting that certain evidence be presented to the grand jury. In sum, this was evidence
12 defense counsel believed would exculpate Defendant. Nowhere in that letter does defense
13 counsel request that the State present the possibility of Beverly having moya moya disease or
14 that Beverly actually died of moya moya. If this evidence was so glaringly exculpatory, the
15 State finds it interesting that the first time Defendant ever mentioned it is more than one year
16 after the grand jury deliberated.

17 The mere possibility that Beverly had moya moya and the speculation that she actually
18 died of moya moya is not exculpatory when evaluated in context of all the evidence. It is
19 highly unlikely and very improbable that she died of moya moya. Ashanti testified that
20 immediately after Defendant severely beat Beverly, Beverly began to have cognitive issues.
21 Her speech was slurred, she could not remember the number for 911 and did not cogently
22 respond to basic questions. The evidence that she may have had moya moya is not exculpatory
23 and thus the State had no obligation to present it to the grand jury

24 CONCLUSION

25 This Court should DISMISS Defendant's Addendum to Petition for Writ of Habeas
26 Corpus as it is extremely untimely. Additionally, Beverly did not have moya moya disease

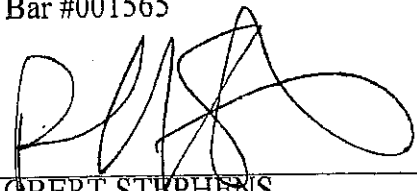
27
28 ¹ The State encourages the court to review the photos admitted to the Grand Jury to see the significant trauma caused from blunt force, not moya moya. The photos show clear traumatic injury to one side of her head.

1 and thus the exculpatory nature of the speculation of doctors is eliminated. Even without the
2 further analysis by Dr. Greco on the brain, the evidence is not exculpatory as it is based purely
3 upon speculation. The State respectfully requests that this Court DISMISS and/or DENY
4 Defendant's Addendum to Petition for Writ of Habeas Corpus.

5 DATED this 5th day of March, 2015.

6 Respectfully submitted,
7 STEVEN B. WOLFSON
8 Clark County District Attorney
9 Nevada Bar #001565

10 BY

11 
12 ROBERT STEPHENS
13 Deputy District Attorney
14 Nevada Bar #011286


15 CERTIFICATE OF SERVICE

16 I hereby certify that service of the above and foregoing Return to Defendant's
17 Addendum to Petition for Writ of Habeas Corpus, was made this 5th day of March, 2015
18 to:

19 AMY FELICIANO, Deputy Public Defender
20 johnsoaa@clarkcountynv.gov

21 DAN SILVERSTEIN, Deputy Public Defender
22 SilverDA@clarkcountynv.gov

23 BY:

24 
25 Theresa Dodson
26 Secretary for the District Attorney's Office
27
28

RS/td/dvu

EXHIBIT 1

RUN DATE: 02/25/15
RUN TIME: 1729
RUN USER: 07485

LABORATORY REPORT
UC DAVIS MEDICAL CENTER CLINICAL LABORATORY
Lydia P. Howell, M.D. Director

PAGE 1

Specimen Inquiry

PATIENT: MCFARLANE, BEVERLY	DOB: 11/01/71	UNIT#: N/A	LOC: REF
	AGE/SX: 43/F	ACCT#: RC0000453953	

SPEC #: 12:OS1468	COLL: 08/23/12-2300	PT ID: 12-7691	
	RECD: 11/09/12-1354	CLIENT: CLARK CO. NV. CORONER/MED EXM	
	STATUS: SOUT	CLARK CO. NV. CORONER/MED EXM	

SUPPLEMENTARY REPORT

Addendum #1 Entered: 02/25/15-1728

REASON FOR ADDENDUM: NEUROPATHOLOGY ADDENDUM.

ADDENDUM TO NEUROPATHOLOGY REPORT:

Replacement blocks taken (original blocks lost):

B17 Right anterior corona radiata
B18 Right posterior corona radiata
B19 Left anterior corona radiata
B20 Left posterior corona radiata

Additional blocks taken:

B21 Anterior cerebral arteries
B22 Various basal arteries
B23 Right internal carotid artery, intracranial portion
B24 Left internal carotid artery, intracranial portion
B25 cortex
B26 Lenticular nuclei
B27 Additional section, left temporal lobe hemorrhage

Microscopic examination for above: There are no abnormalities seen in sections of the corona radiata (B17-B20). The anterior cerebral arteries show focal atherosclerotic depositions that compromise the vascular lumen by 15-20%. The right internal carotid artery shows patchy atherosclerosis with compromise of 50-60%. The left internal carotid artery shows severe atherosclerotic changes amounting to focal, complete occlusion of the vessel. The section of cortex (B25) shows normal vessel structuring throughout. The lenticular nuclei show no increase in the number of vessels, nor is there abnormal structuring on the vessels present. The hemorrhage within the left temporal hemorrhage contains distinguishable red blood cells without organization. Elastic stains on vessels of the Circle of Willis show no abnormalities of the elastic membranes (B21-B24).

Comment: Occlusive changes in the Circle of Willis are those of atherosclerosis. There is no pathology present that would lead to a diagnosis of Moyamoya disease.

Addendum to Final Diagnosis, following 2nd examination of the post-mortem brain:

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Sacramento CA 95817

** CONTINUED ON NEXT PAGE **

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LABORATORY REPORT
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Lydia P. Howell, M.D. Director

PAGE 2

Specimen Inquiry

PATIENT: MCFARLANE, BEVERLY ACCT#: RC0000453953 (Continued)

Specimen: 12:OS1468 Received: 11/09/12-1354 (Continued)

SUPPLEMENTARY REPORT (Continued)

F. Patchy severe cerebrovascular atherosclerosis, Circle of Willis. No evidence of Moyamoya disease.

Addendum Signed (electronically signed) CLAUDIA GRECO, MD 02/25/15 1729

DIAGNOSIS

FINAL DIAGNOSIS:

- A. SUBACUTE LEFT-SIDED SUBDURAL HEMORRHAGE (APPROXIMATELY 3- 4 DAYS DURATION).
- B. DIFFUSE ACUTE CEREBRAL ISCHEMIC DAMAGE.
- C. CEREBRAL EDEMA WITH HERNIATION INJURY (GROSS EXAMINATION).
 - 1. DURET HEMORRHAGES OF MIDBRAIN, UPPER PONS.
- D. S/P RIGHT FRONTAL LOBE VENTRICULAR SHUNT PLACEMENT.
- E. SUBACUTE LEFT TEMPORAL LOBE HEMORRHAGE (APPROXIMATELY 2- 4 DAYS).
- F. PONTINE MICROINFARCT (APPROXIMATELY 5 DAYS DURATION), WITH SURROUNDING AXONAL SWELLINGS.

Note: An addendum report will be issued with the results of B-APP staining that will aid in the detection of swollen axons.

CLINICAL INFORMATION

Suspected Diagnosis: Autopsy, Limited, Single Brain
Clinical Information: Brain
Collected by: Clark County Coroners Office
1704 Pinto Lane
Las Vegas, NV 89106
(702) 455-3210 Telephone
(702) 387-0092 Fax
Contact Person: Rebecca Drummond

2315 Stockton Blvd.
Sacramento CA 95817

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LABORATORY REPORT
UC DAVIS MEDICAL CENTER CLINICAL LABORATORY
Lydia P. Howell, M.D. Director

PAGE 3

Specimen Inquiry

PATIENT: MCFARLANE, BEVERLY ACCT#: RC0000453953 (Continued)

Specimen: 12:OS1468 Received: 11/09/12-1354 (Continued)

CLINICAL INFORMATION (Continued)

Other/Special Requests: Stains as needed by Neuropathologist

1 brain collected on 08/23/12

Referring M.D.: Alane Olson, M.D.

Assigned M.D.: Claudia Greco, M.D.

MICROSCOPIC DESCRIPTION

Received wrapped in a moistened towel in a container labeled "12-07691," "McFarlane, Beverly E," and "8-26-12" is a formalin-fixed, whole brain and fragmented dura.

Gross Examination: Fixed brain weight= 1098 gm. External examination of the brain shows diffuse swelling of the cortical gyri. As the corpus callosum appears artifactually disrupted, assessment of subfalcine herniation is not possible. The surface of the left hemisphere is grey-brown in color, and corresponds to the left subdural hemorrhage. Examination of the inferior surface of the brain shows a large left uncus notch of approximately 5 mm depth. The Circle of Willis is free of atherosclerotic changes. Externally, the brainstem and cerebellum show effacement of external structures, and there is prominent tonsillar herniation. Removal of the brainstem and cerebellum shows the left uncus notch to measure 4.5 cm x 1.8 cm x 5 mm. The brain is cut in the coronal plane, and shows the ventricles to be slit-like. There is a circular red-brown lesion in the right frontal pole white matter that measures 0.3 x 0.3 cm and traverses the right corpus callosum. The left temporal lobe contains a large red-brown hemorrhage that measures 2.5 x 3.5 x 2 cm in greatest dimensions. There is marked compression of the left hippocampus. Horizontal sections of the brainstem and cerebellum show effacement of anatomic markings, compression of the left cerebral peduncle, and multiple small punctate hemorrhages that show in the right midbrain and rostral pons. Less than 1cc of blood is present in the 4th ventricle. There is prominent bilateral cerebellar tonsillar herniation. The small fragments of dura show dusky gray discoloration. On the inner aspect of the left dural cap, there is a collection of easily removable red-brown material that is no greater than 5mm in thickness. The subdural collection measures 15 cm x 10 cm in greatest dimensions. The sagittal sinus is free of thrombus.

Gross photographs are taken and are included with this report.

Sections are taken as follows:

B1 Shunt tract, right frontal lobe

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LABORATORY REPORT
UC DAVIS MEDICAL CENTER CLINICAL LABORATORY
Lydia P. Howell, M.D. Director

PAGE 4

Specimen Inquiry

PATIENT: MCFARLANE, BEVERLY ACCT#: RC0000453953 (Continued)

Specimen: 12:OS1468 Received: 11/09/12-1354 (Continued)

MICROSCOPIC DESCRIPTION (Continued)

- B2 Left temporal lobe hemorrhage
- B3 Left hippocampus
- B4 Right hippocampus
- B5 Midbrain
- B6 Right cerebellar cortex
- B7 Left dura
- B8 Left frontal pole
- B9 Right frontal pole
- B10 Right anterior corpus callosum
- B11 Right posterior corpus callosum
- B12 Left thalamus, posterior internal capsule
- B13 Right thalamus, posterior internal capsule
- B14 Left cerebellar peduncle
- B15 Right cerebellar peduncle
- B16 Upper pons
- B17 Right anterior corona radiata
- B18 Left posterior corona radiata
- B19 Right anterior coronal radiata
- B20 Left posterior corona radiata

Microscopic Description: All cortical sections show diffusely pyknotic neurons, as do both hippocampi. There is homogenization of red cells in the shunt tract. Sections of the left temporal lobe hemorrhage shows homogenization of red cells, focal lines of Zahn, and surrounding infiltration by lymphocytes and macrophages. Hemorrhages in the midbrain and pons show primarily homogenized red cells. There is a single microinfarct in the pons that shows macrophage infiltration and is surrounded by a small number of swollen axons. Sections of dura show intact as well as homogenized red cells, early formation of lines of Zahn, and scattered patches of fibroblastic proliferation (3-5 cells thick) and neovascular invasion of the clot. Homogenized red cells are seen in midbrain hemorrhages. Purkinje cells are rounded and have pyknotic nuclei. H&E stain shows no swollen axons in any section, save for a small number of them surrounding the pontine microinfarct.

My electronic signature below is attestation that I have personally reviewed the submitted specimen(s) and the description and diagnosis on this report reflects this evaluation.

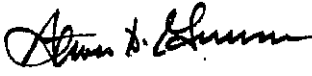
Signed (electronically signed) CLAUDIA GRECO, MD 12/19/12 1853

2315 Stockton Blvd.
Sacramento CA 95817

** END OF REPORT **

Phone (916) 734-0500
Fax (916) 734-5665

1 PHILIP J. KOHN, PUBLIC DEFENDER
2 NEVADA BAR NO. 0556
3 309 South Third Street, Suite 226
4 Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant


CLERK OF THE COURT

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,)

8 Plaintiff,)

9 v.)

10 ANTHONY TYRON MAYO,)

11 Defendant.)

CASE NO. C295313

DEPT. NO. XXV

DATE: March 16, 2015

TIME: 9:00 a.m.

12
13 **DEFENDANT'S REPLY IN SUPPORT OF ADDENDUM TO**
14 **PETITION FOR WRIT OF HABEAS CORPUS**

15 COMES NOW, the Defendant, ANTHONY TYRON MAYO, by and through
16 AMY A. FELICIANO, Deputy Public Defender, and DAN A. SILVERSTEIN, Deputy Public
17 Defender, and hereby files this reply in support of his previously filed Addendum to his Petition
18 for Writ of Habeas Corpus.

19 This Reply is made and based upon all the papers and pleadings on file herein and
20 oral argument at the time set for hearing this Motion.

21 DATED this 12 day of March, 2015.

22 PHILIP J. KOHN
23 CLARK COUNTY PUBLIC DEFENDER

24 By: 
25 AMY A. FELICIANO, #9596
26 Deputy Public Defender

27 By: 
28 DAN A. SILVERSTEIN, #7518
Deputy Public Defender

ARGUMENT

The Defendant's Addendum presents a very basic question: does evidence of a medical condition that represents a reasonable alternate explanation of the alleged victim's death consistent with the defendant's innocence constitute exculpatory evidence that the State should have presented to the grand jury pursuant to NRS 172.145(2)? Because this question must be answered in the affirmative, the Defendant's Petition should be granted and the pending Indictment dismissed. This medical evidence possesses an exculpatory value of a character and quality unlike any other; it transcends beyond merely supporting a defense for the charge but directly challenges whether a criminal offense was committed at all. The State was commanded by statute to present it and has no excuse for its failure to do so.

The State's Return offers three equally specious arguments why the Defendant's Petition should be denied. These arguments will be addressed in turn.

I. DEFENDANT'S ADDENDUM IS NOT TIME-BARRED BY NRS 34.700.

A. The State was not "ambushed" by the Defendant's Addendum.

The State is not being truthful with the Court when it complains that it was "ambushed" with the instant Addendum on February 2, 2015. State's Return, p.9 ll.6-7. On January 31, 2015, the defense sent an electronic mail to Deputy District Attorney Rob Stephens notifying him of their intent to file an addendum to the previously filed petition. In this electronic mail, the defense told the prosecutor that the addendum was going to raise the issue that the State had failed to inform the grand jury of evidence that Beverly McFarlane died as a result of moyamoya disease. Additionally, in the weeks prior to the February 2 calendar call, the defense had revealed this evidence of moyamoya disease to the prosecutor. The undersigned counsel personally met with Deputy District Attorney Stephens in his office in January 2015 to bring this issue to Mr. Stephens' attention. In fact, the report from Dr. Greco attached to the State's Return was prepared in response to this revelation by the defense. The defense had no obligation to provide this advance notification to the State regarding its intent to file the instant Addendum, but provided that notice anyway. Under these circumstances, the State's suggestion that the Petition was addended by ambush is blatantly false.

1 *B. The State did not object to the filing of the Addendum.*

2 Despite being notified well before calendar call that the defense intended to file the instant
3 addendum, the State acquiesced to the filing in open court on February 2, 2015. Had the State
4 believed that the addendum was not properly filed, it had every opportunity to lodge an objection
5 at the time it was filed. When the State writes in its Return that "...[t]he State did not agree to the
6 untimely filing of the addendum," State's Return, p.9 ll.7-8, again, the claim is at best a half-truth.
7 The State knew in advance the addendum was going to be filed and also knew in advance the issue
8 that was being raised therein. To the extent the State affirmatively argues in its Return that it "did
9 not agree to the untimely filing," State's Return, p.9 ll.7-8, it must be pointed out that the State did
10 not object to the untimely filing either, despite having ample opportunity to do so.

11 *C. The Defendant's Addendum does not raise a new ground for relief.*

12 The State attempts to invoke NRS 34.710(1)(b) as a reason to bar the filing of Defendant's
13 Addendum. State's Return, p.9 ll.14-20. This argument must fail, as this statute has no
14 applicability to the instant situation. NRS 34.710(1)(b) bars consideration of a pretrial petition
15 "...based on a ground which the petitioner could have included as a ground for relief in any prior
16 petition for habeas corpus or other petition for extraordinary relief." The claim set forth in the
17 Addendum is not a ground which could have been raised in a prior petition because, in fact, there
18 is no prior petition. It is simply a supplement to the initial petition, which the State concedes was
19 timely filed. State's Return, p.9 ll.2-5. The Defendant's pretrial petition had not been decided at
20 the time this addendum was filed, and there is no force to the State's argument that there was some
21 "prior" petition which would invoke the provisions of NRS 34.710. Had the Defendant's petition
22 been ruled upon, the State would be correct that a subsequent petition would be precluded by NRS
23 34.710(1)(b). Because the initial petition was timely filed, there is no statutory bar to a
24 supplement to the grounds raised in that initial petition.

25 The State clearly understands this. The State concedes that "...addendums and
26 supplements are filed to provide additional information on issues previously submitted to the
27 Court." State's Return, p.9 ll.23-24. The State even concedes that "...[i]f Defendant was
28 presenting information in its 'addendum' related to issues previously raised in its Petition, then

1 possibly the instant filing could be considered an addendum.” State’s Return, p.9 l.26 – p.10 l.1.
2 The State’s own logic supports the Defendant’s position.

3 As pointed out in the Defendant’s Addendum at page 2, lines 5-7, the Defendant’s initial
4 Petition raised the issue that the State failed to present exculpatory evidence to the grand jury in
5 violation of NRS 172.145(2). As the Defendant argued in the initial Petition, “[t]he Indictment
6 must be dismissed because the State failed to comply with its obligation to present exculpatory
7 evidence to the grand jury.” Initial Petition, p.12 ll.13-14. The Defendant pointed out in the initial
8 Petition that “[u]nder Nevada law, the State has an absolute duty to present to the grand jury any
9 evidence which tends to explain away the charges.” Initial Petition, p.12 ll.26-27. The Addendum
10 filed on February 2, 2015, does not raise a new and independent ground for relief; it simply offers,
11 in the State’s own words, “...additional information on issues previously submitted to the Court.”
12 State’s Return, p.9 ll.23-24. *Even by the State’s own definition*, the Defendant’s filing is clearly
13 acceptable as an addendum to the previously filed Petition. It is not, as the State hopes to
14 characterize it, a “Second Petition cloaked as an ‘Addendum.’” State’s Return, p.9 ll.22-23. It
15 raises no new ground for relief. It plainly offers additional information to consider with respect to
16 the Defendant’s initial argument that the State violated NRS 172.145(2) by failing to present all
17 known exculpatory evidence to the grand jury. There is no procedural bar to preclude this Court
18 from considering the important information contained in the Addendum. This argument is just the
19 State’s desperate effort to prevent the Court from ruling on a clearly egregious violation of NRS
20 172.145(2).

21 The State’s procedural Hail Mary continues a disturbing trend becoming apparent
22 throughout this prosecution. The State first withholds compelling evidence of the alleged victim’s
23 serious pre-existing medical condition from the factfinder in order to obtain an indictment, and
24 now attempts to dodge a ruling on the merits of its violation with a tortured interpretation of the
25 statutory time limits. The State clearly does not want this Court to decide on the merits of this
26 Petition any more than it wanted the grand jury to decide on the merits of its case. There can be
27 little confidence in the final outcome of a prosecution where it has been reached through such
28 gamesmanship.

1 II. IT IS FOR THE GRAND JURY, NOT THE STATE, TO DETERMINE THE CREDIBILITY
2 OF EXCULPATORY EVIDENCE.

3 A. *The opinion of the State's paid expert is not a substitute for the grand jury's judgment.*

4 The State next argues that its own expert's opinion of McFarlane's medical condition is a
5 worthy substitute for the independent judgment of the grand jury. Taking the State's argument to
6 its logical conclusion, there should also be no need for a jury trial, since the prosecutor is of the
7 opinion that the Defendant is guilty. Because our criminal justice system relies on the judgment of
8 neutral factfinders, not the opinions of the advocates charged with prosecuting the accused, the
9 report from the State's paid expert is entirely irrelevant to the question of whether the State
10 violated NRS 172.145(2) by failing to present known exculpatory evidence to the grand jury. The
11 State would have been free to present Dr. Greco's opinion to the grand jury along with the
12 evidence that the alleged victim suffered from moyamoya disease. What it is not free to do is
13 withhold any mention of the evidence because the State does not find it credible.

14 B. *The prosecutor cannot withhold exculpatory evidence by personally disputing its
15 credibility.*

16 It is important to note at the outset that Nevada law defines exculpatory evidence as
17 evidence which "tends to explain away the charge," and is not limited to evidence which
18 conclusively convinces the prosecutor of the defendant's innocence. In Ostman v. Eighth Judicial
19 District Court, 107 Nev. 563 (1991), the Nevada Supreme Court concluded the State had violated
20 NRS 172.145(2) where it withheld from the grand jury a defendant's statement that the alleged
21 victim had consented to the sexual assault with which he had been charged. The Court held that
22 the defendant's statement "had a tendency to explain away the charge[s]... [t]he prosecutor was
23 therefore obligated... to present it to the grand jury." Ostman at 564-565. Whether or not the
24 prosecuting attorney in Ostman believed the defendant's statement was credible was of no moment
25 to the question of whether NRS 172.145(2) had been violated. Nor should it have been. If the
26 prosecutor's obligation to present exculpatory evidence was limited to evidence that definitively
27 convinced the prosecutor of the defendant's innocence, the statute may as well not exist at all.¹

28 ¹ This is partly a result of Nevada Rule of Professional Conduct 3.8(a), which instructs that a prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." If a prosecutor's duty to

1 Sheriff v. Frank, 103 Nev. 160 (1987), further illustrates this point. In Frank, the defendant
2 was charged with one count of lewdness with a minor and one count of sexual assault on a child
3 under the age of fourteen. The victim had recanted similar allegations she had made against her
4 thirteen-year-old brother and an adult male neighbor. Frank at 161. The prosecutor failed to
5 introduce these recanted allegations at the grand jury, and cut off questions from the grand jurors
6 to the lead detective about prior false accusations. The Frank Court concluded that the State had
7 violated its duty to present exculpatory evidence under NRS 172.145(2) by failing to present
8 evidence that the alleged victim had recanted prior sexual abuse accusations against other persons.
9 It was irrelevant whether or not the prosecutor in Frank believed the alleged victim's recantations,
10 or whether he had reason to doubt her credibility when she recanted. It was up to the grand jury
11 charged with deliberating the indictment to weigh the recantations against the inculpatory
12 evidence. By withholding the evidence that would tend to explain away the criminal charges
13 against the defendant, the prosecutor "destroy[ed] the existence of an independent and informed
14 grand jury." Frank at 165, quoting United States v. Gold, 470 F.Supp. 1336, 1353 (N.D.Ill.1979).

15 *C. The State usurped the critical function of the grand jury by withholding evidence.*

16 By suggesting that evidence of McFarlane's pre-existing medical condition was rightfully
17 withheld from the Defendant's grand jury proceeding because the State possesses contrary
18 evidence from its paid expert, the State usurped the critical function of the grand jury's mission
19 "...to clear the innocent, no less than to bring to trial those who may be guilty." Frank at 165,
20 quoting United States v. Dionisio, 410 U.S. 1, 16-17 (1973). The State is simply not entitled to
21 hide exculpatory evidence from the factfinder because, in the State's independent judgment, that
22 evidence is not credible or contradicted by other evidence. It is up to the grand jury to determine
23 whether evidence of McFarlane's pre-existing medical condition was important in its probable
24 cause finding.

25 The State's logic would render its obligation under NRS 172.145(2) obsolete. Rather than
26 present exculpatory evidence to the grand jury, the State would simply need to concoct a reason

27
28 present exculpatory evidence was limited to evidence which conclusively established the defendant's innocence in the
mind of the prosecutor, NRS 172.145(2) would never come into play, because a prosecutor could not ethically present
such a case to a grand jury in the first place.

1 that the exculpatory evidence was unworthy of belief. For example, in a case where three
2 eyewitnesses identified someone other than the accused, the State could merely withhold the three
3 unhelpful identifications and later tell a district court that, in its judgment, those three eyewitnesses
4 did not have an adequate opportunity to see the suspect. Or, in Ostman, the State could have
5 simply said that it did not believe the defendant's story. Or, in Frank, the State could have simply
6 said that it did not believe the alleged victim's recantations. The State presents an absurd and
7 unworkable reading of NRS 172.145(2). It was up to the grand jury to determine whether
8 evidence that McFarlane suffered from moyamoya disease impacted their finding of probable
9 cause, not the prosecutor months after the fact. The contention that the present Petition should be
10 denied because a State expert contradicts the defense theory must be rejected.

11
12 III. THE STATE WAS OBLIGATED TO PRESENT THE EXCULPATORY EVIDENCE OF
13 BEVERLY MCFARLANE'S PRE-EXISTING MEDICAL CONDITION.

14 A. Mazzan and King do not negate the State's obligation under NRS 172.145(2).

15 Finally, the State argues that even if its other two arguments fail – which they must – it was
16 somehow not required to present the exculpatory evidence that McFarlane's death was caused by a
17 disease, not any injury inflicted by the Defendant two weeks prior to her death. It is an outrageous
18 suggestion to claim that an alternate cause of death independent of the Defendant's actions in a
19 prosecution for first-degree murder is somehow not important. The State's citation to Mazzan v.
20 Warden, 116 Nev. 48 (2000), State's Return, p.11 ll.7-8, demonstrates how far afield the State's
21 opposition strays. The quote cited by the State that "[u]ndisclosed evidence must be considered
22 collectively, not item by item," State's Return, p.11 ll.8-9, was written with the *exact opposite*
23 meaning to which the State now ascribes. In Mazzan, the State argued that specific items of
24 evidence were not Brady material. The Mazzan Court found fault with the district court's
25 piecemeal consideration of each individual item of potentially exculpatory evidence, as made clear
26 by the lines immediately preceding the line quoted by the State:

27 "The district court also did not apply the proper standard in assessing the
28 materiality of this [exculpatory] evidence in question. It considered the

1 evidence in isolated bits and found that many of those bits were not
2 exculpatory. The proper question is whether evidence is 'favorable,' and
3 this 'will often turn on the context of the existing or potential evidentiary
4 record." Mazzan v. Warden, 116 Nev. 48, 71 (2000).

5 The Mazzan Court was not saying, as the State implies in its opposition, that exculpatory
6 evidence can somehow become less exculpatory in the presence of other inculpatory evidence.
7 The Mazzan Court actually said the exact opposite; that the exculpatory nature of certain evidence
8 sometimes depends on the context of the entire record, and that individual pieces of exculpatory
9 evidence that may seem innocuous when considered in a vacuum can take on clearly exculpatory
10 value when combined with the totality of evidence in the record.

11 The State's reliance on King v. State, 116 Nev. 349 (2000), is misplaced for two reasons.
12 First, the defendant in King had been convicted on proof beyond a reasonable doubt at trial when
13 he raised the issue on appeal that the State had failed to present exculpatory evidence to the grand
14 jury. The evidence that the Defendant argued could have thwarted his Indictment had been
15 presented at trial and failed to sway a jury under a much heavier burden of proof. King at 359.
16 This situation cannot reasonably be analogized to the procedural posture of this case, where it is
17 unknown what effect the exculpatory evidence of McFarlane's medical condition would have on a
18 trial jury. The King Court could reliably surmise the exculpatory evidence would not have had an
19 effect on the probable cause determination because the defendant was convicted of proof beyond a
20 reasonable doubt even when the trial jury had considered the evidence.

21 More importantly, the exculpatory evidence in King did not directly impact the substance
22 of the allegations as it does here. In King, police officers were shot at while executing a search
23 warrant. The defendant was charged with three counts of attempted murder with use of a deadly
24 weapon for firing at the entering officers. The exculpatory evidence in King did not go to the
25 substantive question as to whether the defendant had actually committed the offense. Rather, the
26 exculpatory evidence there dealt with witnesses who claimed the police had failed to "knock and
27 announce" their presence, King at 358, and thus whether the defendant was in reasonable fear at
28 the time he fired the weapon. The exculpatory evidence withheld from the grand jury in this case
is of a very different character. The exculpatory evidence here, if believed by the grand jury,

1 would establish that McFarlane died as a result of the progression of a medical condition, not as
2 the result of Mayo's actions two weeks prior. In other words, the exculpatory evidence in King
3 went to whether the defendant had a reasonable defense to the charges; the exculpatory evidence
4 here goes directly to whether a criminal offense was committed at all. King does not control the
5 outcome of this petition, and even if King were applicable, the State does not have sufficient
6 evidence of Mayo's guilt to argue that it was absolved of its statutory duty to present exculpatory
7 evidence.

8 *B. Evidence does not lose exculpatory value based on the amount of documents.*

9 The State takes great pains to downplay the importance of the conclusion that McFarlane's
10 injuries appeared consistent with moyamoya disease. State's Return, p.11. l.25 – p.12 l.14. The
11 State laments that the exculpatory evidence was "...buried in a mound of medical records," State's
12 Return, p.11-12, as though the number of pages in the discovery provides an exception to its
13 statutory obligation. As previously pointed out, the State acquired these records by insisting that
14 they were essential to its prosecution, Addendum, p.p ll.19-21, yet now implies to the Court that
15 they were simply too voluminous to expect them to have been read prior to the grand jury
16 presentment. This is a wholly inappropriate argument to be made in a prosecution for first-degree
17 murder. Through these proceedings, the State seeks to imprison Anthony Mayo for the remainder
18 of his natural life. That the State now expects this Court to allow them to shirk their duty because
19 the medical records were lengthy is quite appalling. The State writes that, "...[a] possibility of
20 having a rare disease does not exculpate Defendant in this case when considered in conjunction
21 with the other evidence," State's Return, p.12 ll.12-14, but this statement reflects a fundamental
22 misunderstanding of the grand jury process. The possibility that McFarlane died as the result of
23 the progression of a rare disease, as opposed to the relatively minor injuries she suffered two
24 weeks prior to her death, absolutely works to exculpate the Defendant, and it does so in a manner
25 that very little other evidence could. For if McFarlane died because of a medical condition, and
26 not because of Mayo's actions, then Anthony Mayo is innocent of murder. This evidence is as
27 exculpatory as it gets.
28

1 C. *The State's duty under NRS 172.145(2) is not negated by other inculpatory evidence.*

2 The State repeatedly refers to "other evidence" in the case, as though there is some
3 smoking gun here that negates its obligation to fully inform the grand jury. Even assuming for a
4 moment that the State's obligation under NRS 172.145(2) was dependent on the amount of
5 inculpatory evidence – which it is assuredly not – this is certainly not the type of case where the
6 State can rightfully argue that overwhelming evidence supports its theory of guilt. There were no
7 witnesses to the abuse Mayo allegedly inflicted upon McFarlane. Two young children heard what
8 sounded like a fight, but no one ever witnessed Mayo inflict fatal injury. The photos taken of
9 McFarlane in the hospital also do not reflect the type of injury that it would be reasonable to
10 assume caused her death. While Mayo admitted to striking McFarlane, there is no evidence that he
11 used a vacuum or any other foreign object, and the fact that McFarlane did not die until two weeks
12 later casts substantial doubt on the State's argument that his actions were the only possible cause
13 of her death. This is exactly the type of case where evidence of the alleged victim's pre-existing
14 medical condition was so important for the grand jury to consider, and why the withholding of this
15 evidence is so particularly insidious. The error was greatly compounded when the State elicited
16 testimony from its expert suggesting that she "really stud[ies] these cases" and "like[s] to be very
17 sure of the whole thing." GJT, p.17 ll4-5. When considered in conjunction with the highly
18 tenuous nature of the evidence against Mayo, the State's failure to present exculpatory evidence
19 pointing to an alternate cause of death is *more* deserving of a remedy, not less.

20 D. *The exculpatory evidence the State withheld is not "mere speculation."*

21 The State's flippant discussion characterizing this exculpatory evidence as mere
22 "speculation," State's Return, p.12 ll.15-24, is out of line. By casually labelling the evidence of
23 moyamoya disease as "speculation," the State implies that the defense threw a dart into the
24 Physician's Desk Reference and stumbled upon this disease by chance. The evidence that
25 McFarlane suffered from moyamoya disease did not manifest out of thin air. It was offered by
26 independent, unbiased personnel at the University Medical Center who, unlike the paid expert who
27 penned the report attached to the State's Return, have no financial incentive to please either
28 advocate in this proceeding. Unlike the outlandish examples proposed by the State, moyamoya

1 disease not only is known to cause death if left untreated, but is known to cause the exact injuries
2 to McFarlane's brain that the State ascribes to homicide. If diabetes were known to cause gunshot
3 wounds, or if cancer was known to cause injuries that mimic a train accident, then evidence of
4 those medical conditions would absolutely be exculpatory evidence that the State would be
5 obligated to present to a grand jury. The State is setting up the most far-fetched possible straw
6 men arguments in order to hide its clear violation of NRS 172.145(2), in much the same way that it
7 hid relevant exculpatory evidence from the grand jury in the first place. To compare a known fatal
8 disease that causes brain injury by progressive arterial occlusion – the precise findings made by the
9 coroner here – with “alien intervention,” State's Return, p.12 l.24, makes a mockery of this issue
10 and is just as ridiculous as the rest of the State's arguments. This portion of the State's brief is
11 designed to be laughed at, as well it should, and not to be seriously entertained by a court entrusted
12 to protect this defendant's substantial rights.

13 *E. The Court is not being asked to determine the truth or falsity of the exculpatory*
14 *evidence, but to provide a remedy for the State's decision to hide it from the factfinder.*

15 The State argues that the defense is “...not simply asking this Court to determine that
16 Beverly had moyamoya... but to also conclude that moyamoya was the actual cause of death.”
17 State's Return, p.12 ll.26-28. This is also flatly untrue. This petition is not asking the Court to
18 render a final determination on McFarlane's cause of death, any more than it is asking the Court to
19 declare Mayo innocent or guilty of the charged crimes. The defendant had a right to have the
20 evidence of this alternate theory of death presented to the grand jury, and it was up to the grand
21 jury to determine what, if any, significance to attach to it. NRS 172.145(2) clearly imposes an
22 obligation to the State to present this evidence, and granting this Petition does not conclusively
23 establish McFarlane's cause of death any more than denying it conclusively establishes his guilt.
24 There are rules that the State must follow in grand jury proceedings, and those rules were violated
25 in this case. This Petition does not ask the Court to render any opinion on the truth or falsity of the
26 charges. It simply asks the Court to remind the State that the grand jury's function is substantially
27 impaired when evidence consistent with the defendant's innocence is purposely withheld from
28 their consideration.

1 *F. McFarlane's medical history enhances the value of the exculpatory evidence.*

2 The State's Return repeatedly proposes the idea that "...[i]t is highly unlikely and very
3 improbable that [McFarlane] died of moyamoya." State's Return, p.13 ll.18-19. This
4 pronouncement ignores significant evidence of McFarlane's poor health in the months prior to her
5 death. The State was made aware of this evidence prior to the filing of its Return, and is painting
6 an intentionally false impression for this Court. As the State well knows, on April 8, 2011,
7 McFarlane was examined at University Medical Center on suspicion of having some unknown
8 infectious disease. Ex. A. While the doctors at that time suspected tuberculosis, they were
9 ultimately unsure of the diagnosis. Ex. A. The hospital noted a number of symptoms, including a
10 history of hypertension and transient ischemic attack (essentially, a series of mini-strokes). Ex. A.
11 The hospital notes that their tests for known causes had all come back negative, and they were
12 unable to make a final confirmed diagnosis. Ex. A. Most notably, in April 2011, McFarlane was
13 informed by doctors that her failure to seek further treatment entailed "*the chance of getting into*
14 *respiratory failure, or sepsis, or septic shock, including death.*" Ex. A. Despite this dire warning
15 in early 2011, McFarlane opted to leave the hospital *against medical advice*. Ex. A. Contrary to
16 the State's suggestions that she was the picture of health before Mayo's actions, doctors had told
17 McFarlane that she was facing the risk of death by failing to seek further treatment.

18 The State's claim that McFarlane did not have moyamoya disease because she had not been
19 diagnosed with it represents a fundamental misunderstanding of the nature of this disease. As
20 pointed out in the description of moyamoya disease attached to the Addendum, "Misdiagnosis and
21 delayed diagnosis of moyamoya disease are particular pitfalls in the treatment of patients with this
22 disorder. Misdiagnosis can occur easily if the physician does not incorporate moyamoya disease
23 into the differential diagnosis of any patient presenting with stroke." In March 2011, University
24 Medical Center noted that Beverly McFarlane had a history of transient ischemic attack – the
25 medical terminology for a stroke. Ex. B. As the evidence shows, McFarlane had a history of
26 suffering strokes, doctors were unable to make a final diagnosis in April 2011, and she was warned
27 that failure to seek additional treatment could lead to her death. The State was well aware of this
28

1 information prior to filing its Return, yet still argues to this Court that moyamoya disease is as
2 likely as "alien intervention." State's Return, p.12 ll.24.

3 The State attributes some significance to the fact that McFarlane was never formally
4 diagnosed with moyamoya; however, the very reason this disease is so dangerous is because it is
5 difficult to diagnose. The "cognitive issues" the State mentions in its Return, p.13 ll.20, are all
6 symptoms of the progression of moyamoya disease as it occludes the vital arteries in the brain. In
7 any event, it was the province of the grand jury to decide whether this evidence was important to
8 the probable cause determination. The State's disregard for the clear exculpatory value of UMC's
9 findings of moyamoya disease is nothing less than shocking.

10 The State wants this Court to believe that Beverly McFarlane was in perfect health before
11 Anthony Mayo struck her on August 8, 2012, and that the defense is merely speculating about
12 some random medical condition that is no more likely in this case than diabetes or cancer. This
13 portrayal of the underlying facts of this case is a blatant falsehood. McFarlane knew something
14 was wrong with her over a year before she died. She suffered from multiple transient ischemic
15 attacks and sought medical treatment to explain her ill health. Doctors were unable to render a
16 definitive diagnosis, warned her that she could die if she failed to seek further treatment, and she
17 left the hospital against medical advice. When she died, two weeks after any injury she suffered at
18 Mayo's hand, an independent, unbiased radiologist at UMC noted that her brain appeared to be a
19 textbook case of moyamoya disease. Her history of symptoms, as well as the arterial occlusion
20 chronicled by the coroner, all match up with this disease, a disease known to be notoriously
21 difficult to diagnose. The State is correct that "...evidence cannot be considered in a vacuum."
22 State's Return, p.11 ll.9. Given the entire context of the evidence in this case, moyamoya disease is
23 a perfectly reasonable alternate theory to explain McFarlane's death, a theory that exonerates
24 Anthony Mayo of murder and that the State was absolutely compelled by statute to introduce at the
25 grand jury presentment.

1 *G. The State cannot ignore NRS 172.145(2) by blaming the defense.*

2 Finally, the State offers one more red herring to divert attention from its blatant violation of
3 NRS 172.145(2). The State blames defense counsel for its conduct, arguing that the defense failed
4 to request that evidence of moyamoya disease be introduced to the grand jury. State's Return, p.13
5 ll.10-16. This argument is entirely irrelevant. The State's obligation pursuant to NRS 172.145(2)
6 persists even if defense counsel makes no request at all. The State cannot evade its statutory duty
7 by pointing a finger at defense counsel and saying, "They didn't tell me what to present." The
8 State possesses awesome powers in our criminal justice system – the power to charge or not to
9 charge, the power to negotiate or not to negotiate, and ultimate the power to imprison citizens for
10 years, in this case, potentially for the remainder of the defendant's natural life. Those great powers
11 come with great responsibilities. One of those responsibilities is clearly set forth in NRS
12 172.145(2), and it imposes the obligation on the State to present any known exculpatory evidence
13 to the grand jury. This obligation exists regardless of whether the defense brings this evidence to
14 the State's attention or not. When the State opts to proceed by way of Indictment rather than
15 present the case to a neutral magistrate and offer the defense an opportunity to cross-examine
16 witnesses, it consciously accepts the statutory obligation to read through the evidence and present
17 anything that has a tendency to explain away the charge. The defense is not to blame for this
18 violation. That fault lies entirely with the State, and this violation merits a remedy.

19 This Petition should be granted, and the present Indictment against Anthony Mayo should
20 be dismissed.

21
22 DATED this 12 day of March, 2015.

23 PHILIP J. KOHN
24 CLARK COUNTY PUBLIC DEFENDER

25 By: 
26 AMY A. FELICIANO, #9596
27 Deputy Public Defender

28 By: 
29 DAN A. SILVERSTEIN, #7518
30 Deputy Public Defender

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CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
Motions@clarkcountysda.com

ROBERT STEPHENS, Deputy District Attorney
E-Mail: robert.stephens@clarkcountyda.com

By: Sara A. Ruano
Sara Ruano
Secretary for the Public Defender's Office

Exhibit A

Medical Records of Beverly McFarlane, April 8, 2011

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

ADMITTED: 03/28/2011

DATE OF LEAVING AMA: 04/08/2011

DISPOSITION: The patient is leaving AMA, against medical advice, even after explaining all the complications of the medical implications, including death.

ADMISSION DIAGNOSES:

1. Miliary infiltrates on CAT scan, possible etiologies include tuberculosis versus fungal versus granulomatous disease.
2. Hypertensive urgency.
3. Diabetes mellitus.
4. History of transient ischemic attack.
5. Hyponatremia.

PROCEDURES AND IMAGING: Done on this patient:

1. The patient had a CT-guided biopsy of the liver, and the biopsy results showed caseating granulomas.
2. CT of the abdomen and pelvis with contrast which showed innumerable nodules throughout the liver and spleen with multiple upper abdominal nodes.
3. The patient had a CT of chest which showed miliary pattern of the nodules in the bilateral lungs.
4. The patient had echocardiography which showed left ventricular systolic function is normal, moderate concentric left ventricular hypertrophy, left atrium is mildly dilated, severe mitral valve insufficiency, trivial tricuspid regurgitation.

CONSULTATIONS: Done on this patient was an infectious disease consult. Infectious disease consult was done basically because of miliary nodular pattern on the visceral organs, including liver, spleen and lungs, with a high suspicion of tuberculosis, and they recommended to get a fungal panel and QuantiFERON-TB test to rule out any tuberculosis and AFB x3. The patient had a QuantiFERON-TB test which was negative, AFB x3 which was negative, and a fungal panel which was essentially normal, and ID said they are not sure about the diagnosis at this point, and because the liver biopsy showed caseating granuloma-type of pattern, it is reasonable to start the empiric antituberculosis medications, including 4-drug therapy, for 2 months and see if there is any improvement in 4-6 weeks. But the patient actually denied antituberculosis medications and she wants to get a second opinion from another doctor in California.

HOSPITAL COURSE:

1. Basically, this is a 39-year-old female who was originally from Belize with a history of hypertension, diabetes mellitus, and questionable transient ischemic attack who came with a 2-month history of nonproductive cough, with a 40-pound weight loss unintentionally, and some right upper quadrant pain for the past few months. An initial CT of the chest and abdomen showed a miliary nodular pattern in the visceral organs and with high suspicion of tuberculosis in the patient. We have done all the investigations, including QuantiFERON-TB test, a fungal panel, and an autoimmune panel. So far everything came back negative; Rheumatoid factor, ANCA levels are pending. however, the liver biopsy showed a caseating granulomatous pattern without any confirming diagnosis, and as was said, her hospital course even though went without any complications, we were unable to get the final diagnosis done, and based

PATIENT: MCFARLANE, BEVERLY E ACCOUNT#: 00045960523
MR#: 002-008-156
JOB #: 133070
ADM. DATE: 03/28/2011

DICTATED BY: Kasaliah Nakam, M.D.
ATTENDING: Teena Tandon, M.D.
DISCHARGE SUMMARY

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

on ID recommendations, we were recommended to start her on antituberculosis medications, and we started on antituberculosis medications after she was agreeable initially, but she refused the antituberculosis medications later and she said she wanted to get another opinion from another doctor in California, and after that she does not want to take any medications because she does not have the confirming diagnosis of tuberculosis, even though we explained that her miliary nodular pattern along with the caseating granulomas, with the weight loss and dry cough probably is associated with tuberculosis, even though we do not have the confirmatory diagnosis. But still, she does not want to take any antituberculous medications, and at this point we explained to her the risks and benefits of not taking any antituberculosis medications and we explained to her all the scenarios, including the chance of getting into respiratory failure or sepsis or septic shock, including death, and she wants to leave against medical advice, and she does not want to get medical care at this point from our facility with antituberculosis medications. The patient is leaving against medical advice.

2. The other problem she had is high blood pressure without any symptoms. She qualifies for hypertensive urgency, and initially we treated her with p.r.n. medications along with lisinopril and Coreg, and we had to increase the lisinopril to 40 and she was already started on Norvasc 10 milligrams. Initially she was started on 5 milligrams p.o. daily and we later increased it to 10 milligrams p.o. daily, and we maximized out on the dose of Coreg to 25 b.i.d. and lisinopril to 40 milligrams p.o. daily. After starting all these medications to the maximum dosages, her blood pressure was pretty much controlled but still in the range of 150s and 140s, and on the day of her leaving against medical advice, we gave her prescriptions along with hydralazine 25 milligrams p.o. t.i.d., with lisinopril, Coreg and Norvasc, and we advised her to follow up as an outpatient with her primary care physician.

3. Diabetes mellitus. She was started on Lantus 12 units subcutaneously at bedtime and Lispro 5 units t.i.d. before meals, and her blood glucose levels were pretty much controlled all the time.

4. She also had normocytic anemia with a high RDW (red blood cell distribution width) and we did iron studies which showed a pattern of iron-deficiency anemia, so we started her on iron supplementation with iron sulfate p.o. t.i.d. 325 milligrams.

DISCHARGE DIAGNOSES: Include:

1. Miliary nodular pattern in the bilateral lungs, the liver and spleen, with a liver biopsy showing positive caseating granulomas, but without any confirmatory diagnosis at this point of time.
2. History of diabetes mellitus.
3. History of hypertension.
4. Iron-deficiency anemia.

DISCHARGE MEDICATIONS: While she is leaving AMA include: Lantus 12 units subcutaneously at bedtime, lispro 5 units subcutaneously t.i.d. before meals, lisinopril 40 milligrams 1

PATIENT: MCFARLANE, BEVERLY E
MR#: 002-008-156
JOB #: 133070
ADM. DATE: 03/28/2011

ACCOUNT#: 00045960523

DICTATED BY: Kasaiah Makam, M.D.
ATTENDING: Teena Tandon, M.D.
DISCHARGE SUMMARY

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

tablet p.o. every day, Coreg 25 milligrams 1 tablet p.o. b.i.d., iron sulfate 325 one
tablet p.o. t.i.d., Norvasc 10 milligrams p.o. daily, hydralazine 25 milligrams 1
tablet p.o. t.i.d., and we gave her blood glucose test strips, alcohol swabs and
lancets.

CC:

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DT: 04/08/2011 18:48:00

Electronically signed on 04/09/2011 7:32PM by Kasaiah Makam, M.D.
Kasaiah Makam, M.D.

Electronically signed on 04/19/2011 10:21AM by Teena Tandon, M.D.
Teena Tandon, M.D.

PATIENT: MCFARLANE, BEVERLY E
MR#: 002-008-156
JOB #: 133070
ADM. DATE: 03/28/2011

ACCOUNT#: 00045960523

DICTATED BY: Kasaiah Makam, M.D.
ATTENDING: Teena Tandon, M.D.
DISCHARGE SUMMARY

Exhibit B

Medical Records of Beverly McFarlane, March 28, 2011

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

Date of Service: 03/28/2011

TIME SEEN: 2135.

CHIEF COMPLAINT: Cough.

HISTORY OF PRESENT ILLNESS: This is a 39-year-old black female with history of hypertension and diabetes who comes in with a 2-month history of nonproductive cough. Patient states that she noticed a cough a few months ago and states that it has been nonproductive. No hemoptysis. She states she gets right upper quadrant pain associated with the cough. She has also noticed a 40-pound weight loss in the last 2-3 months. She has had subjective fevers at home, as well as night sweats. Patient denies shortness of breath. States her main complaint is cough. She describes her right upper quadrant pain as fullness and uncomfortable. Patient states that she works as a healthcare giver and was concerned that her former boss had tuberculosis, but states she has no known exposures. She is in a monogamous relationship for more than 10 years. She has never been tested for HIV. Patient had a PPD before coming to the ER that she states was secondary to her work. She needs an annual 2-stab and also reports that she has been off her blood pressure medications for a week. Her combination of cough and being off her blood pressure medications is what led her to come to the emergency department.

REVIEW OF SYSTEMS: As mentioned in the history of present illness, consistent with weight change, night sweats and fever. All other systems, except as mentioned in HPI, are negative.

PAST MEDICAL HISTORY: Hypertension, diabetes mellitus diagnosed in 2002, history of a TIA in 2006.

PAST SURGICAL HISTORY: Cesarean x2.

MEDICATIONS: Home medications include labetalol and regular insulin, but patient states she has been off these medications.

ALLERGIES: NO KNOWN DRUG ALLERGIES.

SOCIAL HISTORY: She is currently unemployed, formally worked as a caregiver. Nonsmoker, nondrinker. No drug use. Currently lives with her husband. She is originally from Belize.

FAMILY HISTORY: Hypertension, diabetes and stroke.

PHYSICAL EXAMINATION:

VITAL SIGNS: T max 98.3, pulse 115-121, respirations 16-24, BP 182-235/108-144, satting 99% on room air.

GENERAL: She is in no acute distress. She is alert and oriented to person, place and time.

HEENT: Normocephalic, atraumatic. Pupils equal, round and reactive to light and accommodation. Extraocular muscles intact. Dry mucus membranes

NECK: No JVD. No goiters or nodules.

CARDIOVASCULAR: Patient is tachycardic. She has a 2/6 holosystolic murmur without radiation. Distal pulses 2+.

PATIENT: MCFARLANE, BEVERLY E ACCOUNT#: 00045960523

MR#: 002-008-156

JOB #: 092837

ADM. DATE: 03/28/2011

4/8 mc
DICTATED BY: Nicole Davey-Ranasinghe, M.D.

ATTENDING: Sandhya Wahi Gururaj, MD

ROUTINE H&P

Medical Record

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RESPIRATIONS: She has coarse breath sounds in her bilateral upper lobes with good air movement diffusely with no wheezing, rales or rhonchi.
ABDOMEN: No hepatomegaly, soft, nontender, nondistended. Positive bowel sounds.
EXTREMITIES: No clubbing, cyanosis or edema.
SKIN: She has a left forearm tattoo. No rashes, ulcers or nodules.
NEURO EXAM: Cranial nerves II-XII intact. DTRs 2+. Muscle strength 5/5 and normal sensation.

DIAGNOSTIC STUDIES: Renal panel reveals sodium 130, potassium 3.3, chloride 94, CO2 21, BUN 16, creatinine 1.1, glucose 448. UA showed 2+ protein, 3+ glucose, 3-8 WBCs, rare bacteria and moderate squamous cells. Anion gap is 15 and calcium is 10.3. CBC white blood count 7, hemoglobin 12.7, hematocrit 38.6, platelets 427, granulocyte percent 65.2, MCV 85.2, RDW 17, THC positive, D-dimer 2.18.

EKG shows sinus tachycardia with left ventricular hypertrophy. CTA of the chest showed no central pulmonary embolism with innumerable pulmonary nodules consistent with miliary TB, as well as a miliary pattern of the liver with mediastinal adenopathy noted. Chest x-ray showed diffusely increased interstitial lung markings bilaterally.

EMERGENCY ROOM COURSE: In the ER, patient was given FEN, prednisone 60, insulin 10 units of regular and azithromycin 500 milligrams IV with Rocephin 1 gram and lisinopril 10 milligrams.

ASSESSMENT/PLAN: This is a 39-year-old black female with a history of hypertension and diabetes who comes in with cough and imaging studies suspicious for miliary tuberculosis. Patient's clinical exam does not have any GI or cutaneous manifestation. She has had a significant weight loss and night sweats, as well as fevers.

1. Miliary infiltrates on CAT scan. While CAT scan is concerning for TB, patient did have a PPD placed earlier this morning. At this time, there is no evidence of induration at the PPD site. The patient has not been tested for HIV. We will check this. In addition, differential diagnosis is broad including fungal versus malignancy versus tuberculosis versus sarcoidosis. We will evaluate patient's sputum and send for AFB x3. We will also check a liver panel, as well as a dedicated CT abdomen and pelvis, as patient did have a miliary pattern noted on her CT chest that involved the liver and spleen. Will also check a fungal panel with comment for allergies and blood cultures x2. Will also check HIV.
2. Hypertensive urgency. We will start patient on oral lisinopril and give p.r.n. antihypertensive medications as needed. Patient has a history of transient ischemic attack. Currently she is asymptomatic and no focal neurological deficits.
3. Diabetes. Blood sugar very high. Patient's anion gap is borderline at 15. Her bicarb is 21. Her glucose is 448. Will check a hemoglobin A1c. Will place patient on Accu-Cheks every 4 hours and monitor closely. Will also check an ABG.
4. History of transient ischemic attack. We will check a fasting lipid profile and continue blood pressure control and secondary prevention.
5. Hyponatremia. Patient has evidence of dehydration with dry mucous membranes on exam. Also, concern for syndrome of inappropriate secretion of antidiuretic hormone, given patient's lung pathology. We will continue to monitor and will check serum osmolality.
6. Deep venous thrombosis prophylaxis with dalteparin.

PATIENT: MCFARLANE, BEVERLY E ACCOUNT#: 00045960523
MR#: 002-008-156
JOB #: 092837
ADM. DATE: 03/28/2011

Dictated by: Nicole Davey-Ranasinghe, M.D.
Attending: Sandhya Wahi Gururaj, MD
ROUTINE H&P
Medical Record
Page 2 of 3

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

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DT: 03/29/2011 05:00:34

Electronically signed on 04/07/2011 11:40AM by Nicole Davey-Ranasinghe, M.D.

Nicole Davey-Ranasinghe, M.D.

Electronically signed on 05/22/2011 8:57PM by Sandhya Wahi Gururaj, MD

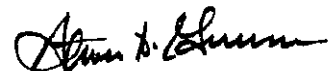
Sandhya Wahi Gururaj, MD

PATIENT: MCFARLANE, BEVERLY E
MR#: 002-008-156
JOB #: 092837
ADM. DATE: 03/28/2011

ACCOUNT#: 00045960523

Dictated by: Nicole Davey-Ranasinghe, M.D.
Attending: Sandhya Wahi Gururaj, MD

ROUTINE H&P
Medical Record
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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,)
)
Plaintiff,) Case No. C-14-295313-1
)
vs.) Dept No. XXV
)
ANTHONY TYRON MAYO,)
)
Defendant.)
)
_____)

BEFORE THE HONORABLE KATHLEEN DELANEY

MARCH 23, 2015, 9:00 A.M.

REPORTER'S TRANSCRIPT
OF
DEFENDANT'S MOTION FOR
OWN RECOGNIZANCE RELEASE;
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

(See separate page)

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

1 APPEARANCES:

2 For the Plaintiff:

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<p>1 LAS VEGAS, CLARK COUNTY, NEVADA</p> <p>2 MONDAY, MARCH 23, 2015, 9:00 A.M.</p> <p>3 PROCEEDINGS</p> <p>4 * * *</p> <p>5 THE COURT: State of Nevada versus Anthony Mayo.</p> <p>6 I did anticipate that we were going to have some</p> <p>7 lengthy argument here. Obviously, it's counsels'</p> <p>8 prerogative; they can submit if they wish. But in these</p> <p>9 circumstances I would hope that there would be a bit of</p> <p>10 oral argument to complement the written record that we</p> <p>11 have.</p> <p>12 Obviously, we have a procedural issue that I</p> <p>13 think needs to be addressed first and foremost. My</p> <p>14 intent is to deal with the Petition first and then</p> <p>15 address the motion for the release.</p> <p>16 The procedural issue that is raised in the</p> <p>17 return indicates that it would be procedurally improper</p> <p>18 for what is styled as an Addendum to the Petition to be</p> <p>19 filed at this time.</p> <p>20 Obviously, the defense has argued that it is not</p> <p>21 improper in that the Court had not made a final</p> <p>22 determination, or at least had not issued a final</p> <p>23 determination on the prior Petition; and therefore, it is</p> <p>24 still okay to bring it forward.</p> <p>25 I think we need to address that procedural issue</p> <p style="text-align: right;">3</p>	<p>1 And so now we've got a moyamoya argument here,</p> <p>2 which is clearly a new issue. It was something that was</p> <p>3 never previously addressed. And so here we are now a</p> <p>4 year after the initial Petition arguing an issue on</p> <p>5 moyamoya disease.</p> <p>6 I would also note for the record, Your Honor,</p> <p>7 and I might not have remembered correctly, but I believe</p> <p>8 the last time at the calendar call it seems to me that</p> <p>9 you were prepared to rule upon the initial Petition,</p> <p>10 which I think would evidence also that this is a second</p> <p>11 filing of a petition.</p> <p>12 Lastly, Your Honor, what I would just note is I</p> <p>13 don't believe that under this scenario here that this</p> <p>14 could be deemed anything but a second petition.</p> <p>15 There was an issue raised as to whether or not</p> <p>16 the State objected to at the time of the filing. And the</p> <p>17 only thing I would note to that, Your Honor, is I had</p> <p>18 never read the Petition. It was handed to me that</p> <p>19 morning. And so I would just note that I did not make an</p> <p>20 objection that morning on the day it was filed; I wanted</p> <p>21 to read it and see what was actually being raised because</p> <p>22 potentially it could have fit under one of the other</p> <p>23 issues that were raised.</p> <p>24 And so with that, Your Honor, I would submit and</p> <p>25 I would ask you deny on the procedural grounds.</p> <p style="text-align: right;">5</p>
<p>1 first. Let me do it this way just to save a little bit</p> <p>2 of time. Let me have the State's position, if any, that</p> <p>3 they want to highlight.</p> <p>4 MR. STEPHENS: Your Honor, the State's argument</p> <p>5 that under NRS 34.700 and 34.710, both of those Petitions</p> <p>6 read together would require that the Addendum not be</p> <p>7 heard, and I would say so for the following facts and</p> <p>8 reasonings.</p> <p>9 Your Honor, the initial Petition in this case</p> <p>10 was filed, I believe, in March or April of last year. I</p> <p>11 don't remember the specific date. And we heard argument</p> <p>12 on it. Arguments were closed. We briefed the issues.</p> <p>13 The briefs were closed and we were waiting for the</p> <p>14 Court's decision on that matter.</p> <p>15 I believe there was an e-mail sent to your</p> <p>16 chambers in August of 2014, asking whether or not an</p> <p>17 order would be forthcoming, which would, I guess, show</p> <p>18 evidence, again, that the Petition had been closed, the</p> <p>19 filings of that.</p> <p>20 Furthermore, Your Honor, if we are to look at</p> <p>21 this Petition, Your Honor, this is clearly a new</p> <p>22 allegation that is being raised. I understand that they</p> <p>23 tried to work it in under the umbrella of exculpatory</p> <p>24 evidence. But, Your Honor, moyamoya was never mentioned</p> <p>25 in the initial Petition at all. Not once.</p> <p style="text-align: right;">4</p>	<p>1 THE COURT: Okay. Thank you.</p> <p>2 MR. SILVERSTEIN: Well, Your Honor, Mr. Stephens</p> <p>3 is going to concede that there was some way that this</p> <p>4 could have fit, fitting under one of the prior issues and</p> <p>5 saying that he wanted to read the Petition first to see</p> <p>6 if it fit in to one of the prior grounds that were</p> <p>7 raised, in which case I'm assuming were grounds he would</p> <p>8 not raise, made any objection.</p> <p>9 And this is clearly a situation where this is</p> <p>10 additional argument made on an issue that was previously</p> <p>11 raised. This is not a new ground for relief that we're</p> <p>12 raising. This is additional information that we would</p> <p>13 like to present to the Court relating to an issue that</p> <p>14 was already raised in the initial Petition, which has not</p> <p>15 yet been decided. The initial Petition was timely filed.</p> <p>16 In that Petition, we raised the argument that</p> <p>17 there was evidence that should have been presented</p> <p>18 pursuant to NRS 172.145(2) and this Addendum relates to</p> <p>19 that statute, relates to evidence that should have been</p> <p>20 presented to the grand jury. And it is just simply fully</p> <p>21 adding to the argument that we had previously made in the</p> <p>22 first Petition.</p> <p>23 If there was evidence that was exculpatory that</p> <p>24 should have been raised or should have been shown to the</p> <p>25 grand jury and that was not. This is absolutely</p> <p style="text-align: right;">6</p>

<p>1 something that relates to an issue that was previously 2 raised.</p> <p>3 Now, if the initial Petition hadn't mentioned 4 that statute, hadn't mentioned the raising of exculpatory 5 evidence, then I could understand Mr. Stephens' position. 6 But he draws a distinction in his return between a new 7 argument and additional evidence to an argument that had 8 already been raised and this is clearly a second 9 category.</p> <p>10 We cited NRS 172.145, and that is all of the 11 evidence raised in this Addendum goes to the argument 12 that exculpatory evidence was not given to the grand 13 jury.</p> <p>14 Mr. Stephens knew that this was coming. He knew 15 this issue was going to be raised. He was told in an 16 e-mail several days before the calendar call not only 17 that we were going to seek to make this filing, but in 18 fact what issue was presented in it.</p> <p>19 I went to his office and explained this issue 20 with the moyamoya disease about a week prior to this. 21 This is not a new issue to him. He knew exactly the 22 issue that was being raised.</p> <p>23 If there was an objection to the filing to the 24 Addendum, it should have been made at the calendar call 25 when we presented to the Court. He stood silent. He</p> <p style="text-align: right;">7</p>	<p>1 still has this matter open that it is simply adding 2 another example of how the State is argued to have failed 3 to present exculpatory evidence, and for that basis it is 4 not untimely and it is properly brought as an addendum or 5 a supplement.</p> <p>6 I kind of in my mind also thought in terms of 7 had we wrapped up the other argument would there still be 8 some avenue upon which something like this could and 9 should be brought to the Court's attention, and I trust 10 that there likely would have been a way for the Court to 11 have received and reviewed this despite the argument of 12 what the statute said.</p> <p>13 But in this particular circumstance, as the 14 Court has not issued its final determination on the 15 original Petition, and, again, the Petition does raise 16 the statute and raise arguments that the State failed to 17 present exculpatory evidence and this is an example of 18 that. I do find that the Petition and the Addendum to 19 not be untimely and to be appropriately brought.</p> <p>20 Now I would like to proceed then with that 21 substantive argument, if any, which you would like to 22 highlight today to complement your briefings. And I am 23 going to start with the defense in this circumstance. I 24 will certainly give an opportunity also for rebuttal. 25 But let's hear from the defense first.</p> <p style="text-align: right;">9</p>
<p>1 said nothing. He didn't raise any objection as to this 2 is not a proper filing at that time.</p> <p>3 The suggestion that he's been ambushed, which is 4 made in his return, is completely disingenuous. There is 5 no ambush here. He knew exactly what issues that were 6 being raised. And if he had any problem with the filing 7 as a successive Petition he could and should have said 8 something at the time that it was filed.</p> <p>9 This not a successive Petition. This is simply 10 evidence as it relates to an argument that was raised in 11 a prior Petition, which hasn't been ruled on. It's an 12 addendum even by the State's own definition that they 13 provide in their return. This is simply new evidence 14 relating to a prior issue that was raised.</p> <p>15 THE COURT: Well, I am going to wrap up this 16 piece of the argument this way. I think the State is 17 within its rights to raise a procedural issue at these 18 times whether they have been identified or known, told 19 beforehand that something was forthcoming, they still 20 have the opportunity to review it and they still have the 21 opportunity to raise it.</p> <p>22 And it is something that can be argued to be a 23 new ground that should fall outside of the prior 24 Petition; however, I don't find it that way. I do think 25 that the defense is correct in arguing that as the Court</p> <p style="text-align: right;">8</p>	<p>1 MS. FELICIANO: Your Honor, would you like to 2 start with the original Petition? We have already argued 3 that -- Mr. Silverstein is going to argue the Supplement. 4 I would just say for the record that under the original 5 Petition, and this further strengthens our ability to 6 file the Supplement, we raised medical issues in the way 7 that Ms. McFarlane died at UMC and that that was never 8 presented to the jury. That she was removed from life 9 support, her organs were harvested, et cetera.</p> <p>10 And so, again, I think that further supports our 11 argument that we can file this Supplement, which you have 12 already ruled on, but I don't know that you want to hear 13 anything further on this and we can just move to the 14 Supplement.</p> <p>15 THE COURT: Yes. I think that the argument 16 today would be related to the Supplement and the 17 Supplement only. We certainly, and I don't disagree with 18 the State, had not only full argument, but full briefing, 19 full presentation of evidence and it is just up to the 20 Court to prioritize the matter better than it has up to 21 this point to get it completed from the original Petition 22 standpoint. But additional argument would be unnecessary 23 for today's purposes.</p> <p>24 MS. FELICIANO: Okay. Thank you. 25 THE COURT: Supplemental, though, however</p> <p style="text-align: right;">10</p>

<p>1 related to the Addendum is what the Court is interested 2 in for today.</p> <p>3 MS. FELICIANO: I appreciate it. Thank you.</p> <p>4 MR. SILVERSTEIN: Thank you, Your Honor.</p> <p>5 Your Honor, the altercation the State charges 6 that occurred between Mr. Mayo and Ms. McFarlane 7 occurred on August 8th. Over two weeks after that time 8 Ms. McFarlane passed away. That in itself is something 9 that in my experience in these homicides cases is a 10 little strange. The fact that it would take two weeks 11 for what the State calls to be a fatal head injury to 12 actually occasion death. That is not something that 13 normally happens.</p> <p>14 So going through the medical records in this 15 case, medical records that were clearly in the State's 16 possession before they went to the grand jury, there is 17 notes from independent workers at UMC. These are people 18 who aren't paid by the State. They are not paid by the 19 defendant. They don't have any interest whatsoever in 20 the outcome of the proceedings other than to find the 21 truth and determine what happened.</p> <p>22 In looking at the CAT scans and the radiologist 23 who reviewed the pictures of Ms. McFarlane's brain noted 24 that it looked like she had this moyamoya disease. And 25 admittedly, this is a very rare condition. It's</p> <p style="text-align: right;">11</p>	<p>1 grand jury is entitled to consider anything that could 2 explain away the charge.</p> <p>3 The reason that the statute exists, NRS 4 172.145(2), the reason that that statute exists is 5 because in a grand jury proceeding there is no defense 6 lawyer there. There is no cross-examination there. 7 There is no other avenue for the grand jury to be able to 8 consider alternate explanation, to consider other 9 evidence that may point to the defendant's innocence.</p> <p>10 And that's why the obligation falls on the 11 prosecutor at that proceeding to not only tell the grand 12 jury all of the things that point towards guilt, but to 13 also point towards the things that might prove innocence, 14 otherwise, the grand jury their independence is destroyed 15 and it just becomes another argument of the State.</p> <p>16 And what the State did in this case was they 17 gave the grand jury all of the evidence to consider that 18 points to Mr. Mayo's guilt in this matter and all of the 19 evidence that they had in their possession that suggested 20 another way that this woman could have died was withheld 21 from them.</p> <p>22 Not only was the evidence withheld from them, 23 but a false picture was presented at the grand jury 24 through testimony of Dr. Claudia Greco, who specifically 25 said in front of the grand jury that she reviewed</p> <p style="text-align: right;">13</p>
<p>1 something I personally had never heard of. There's many 2 doctors who probably have never heard of it. But it is 3 an actual condition. It does exist. We have attached 4 some of the Internet entries on that disease to our 5 Addendum.</p> <p>6 It is a disease that causes the exact same type 7 of injuries that were found in Ms. McFarlane's brain that 8 the coroner said were caused by Mr. Mayo's actions; an 9 occlusion of the carotid artery.</p> <p>10 Basically, it's a progressive hardening or 11 filling up of the arteries in her brain that led to her 12 death. And these are injuries that absolutely look like 13 trauma. It's something that can mimic trauma and that 14 can be misdiagnosed as trauma after the patient has died.</p> <p>15 This is a disease that can cause death, is known 16 to cause death if it's not caught in time, if it's not 17 treated.</p> <p>18 And we are not here to decide whether or not 19 Ms. McFarlane actually died as a result of that disease. 20 But I know that Mr. Stephens wants us to turn this as I 21 am asking the Court to find that she actually died from 22 moyamoya disease. That's not what we're here for and 23 that's not what this is about.</p> <p>24 All we're saying is that this evidence 25 absolutely should have been given to the grand jury. The</p> <p style="text-align: right;">12</p>	<p>1 everything and she takes her time on these cases and 2 she's very thorough. And she painted this picture for 3 the grand jury that she has reviewed all of the available 4 evidence and found no other explanation for this woman's 5 death and that is simply not true.</p> <p>6 This moyamoya disease, granted, she has never 7 formally been diagnosed; it's a very difficult disease to 8 diagnose. However, it was something that at UMC an 9 independent radiologist said that this is something that 10 could be considered here. It's a reasonable alternate 11 explanation for this woman's death and it's something 12 that absolutely the grand jury should have been entitled 13 to consider.</p> <p>14 This is the very definition of exculpatory 15 evidence and it is unlikely to see any other evidence 16 that would be of a value and a character of this type of 17 evidence. It not only goes to a defense to the charge, 18 but goes to whether or not a crime was committed at all.</p> <p>19 Mr. Stephens argues that, Well, we're going to 20 open the floodgates here. This is a slippery slope. 21 What's next. Somebody has cancer and they have to tell 22 the grand jury. Or somebody has a hangnail and we have 23 to tell the grand jury about that.</p> <p>24 The point is the disease that we have identified 25 in this case, that UMC identified in this case is a</p> <p style="text-align: right;">14</p>

1 disease that could have caused the exact same injuries
2 that they are attributing to Mr. Mayo. This isn't a
3 situation where we want the Court to consider diabetes
4 when the cause of death is a gunshot wound. This is a
5 situation where the actual injuries that this woman died
6 from can be caused and directly attributed to this
7 disease that was found by an independent radiologist at
8 the hospital.

9 And if this evidence isn't exculpatory, I can't
10 imagine why the statute exists. How much more
11 exculpatory can evidence be in order to trigger the
12 requirements of that statute. I mean how much more
13 exculpatory can you get. This disease could have killed
14 this woman. It would have caused the exact same injuries
15 that the coroner found in this woman.

16 It was evidence that was in the State's
17 possession. It was in medical records that they actually
18 acquired on the argument that they were necessary for
19 their prosecution. They needed these medical records to
20 prosecute. And right there in those documents was
21 evidence that they were statutorily obligated to give to
22 the grand jury and that the grand jury had a right and a
23 duty to consider.

24 And by not considering that and by only
25 considering evidence that pointed to this man's guilt

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1 Indictment has to be fair. It has to be received where
2 the grand jury has at least been able to consider all of
3 the possible theories of death and not just the one that
4 favors the prosecution.

5 THE COURT: All right. Thank you,
6 Mr. Silverstein. As I said, I will give you the
7 opportunity for rebuttal.

8 MR. SILVERSTEIN: Thank you.

9 THE COURT: I didn't have questions in your
10 initial remarks. I may have some for the State and I may
11 have some as we come back in rebuttal.

12 But let me sort of set this up for the State.
13 One of the things that I don't think was addressed and
14 maybe it didn't need to be in your argument because you
15 made a lot of the arguments even beyond the procedural
16 argument that we've already addressed about how the Court
17 can and should consider even if there is something that
18 perhaps should have been brought to the grand jury's
19 attention, and maybe if it wasn't decided in some cases,
20 the *King* case and some others, where ultimately the
21 violation would call for a reversal.

22 But what is unclear to me is did the State just
23 not see this or did the State know that these things were
24 out there and intend not to show them. Because you have
25 made some argument that could make me believe that

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1 that grand jury proceeding was a nullity. Their
2 independent function as a neutral factfinder was
3 completely destroyed. They should have been entitled to
4 consider this evidence and weigh it and decide whether or
5 not it is something that may have affected a probable
6 cause finding.

7 The State doesn't get to decide after the fact
8 that, Well, she has never been formally diagnosed; we
9 don't think it was that important. They don't get to
10 make that call. The grand jury gets to make that call
11 and our system presupposes that the grand jury makes that
12 call.

13 The State can't come in later with an affidavit
14 from their paid expert and say, Well, we don't think she
15 had it anyway. The point is the grand jury had a right
16 to consider this at the time they were considering
17 whether there was probable cause to convict this man of
18 her death. And there is evidence that's clearly
19 exculpatory that was withheld from them. And I would ask
20 the Court to grant this Petition and dismiss the
21 Indictment.

22 This is not something that where Mr. Mayo -- if
23 he needs to be held to account he'll never be held to
24 account. The State is going to run right back to the
25 grand jury and seek a new Indictment. But that

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1 perhaps the State was aware that there were these other
2 things and just ultimately didn't put them forward
3 because you talk about whether or not it would explain
4 away the charges you again cite to the *King* case, you
5 also cite to the *Mazzan* case, you know, so there are some
6 things that aren't clear to me as to what you're actually
7 arguing.

8 MR. STEPHENS: Fair enough, Your Honor. And I
9 will try to be clear. And if I'm not please continue to
10 question me.

11 Your Honor, what I would say regarding that is
12 the first time I had ever heard of moyamoya disease was
13 probably a week or so prior, maybe two weeks prior to
14 Mr. Silverstein coming to my office where he presented
15 the moyamoya issue to me. And that was the first time I
16 had ever heard of the disease.

17 What I can represent, though, Your Honor, is we
18 did have conversations with the coroner, Ms. Olsen and
19 also Ms. Greco, and we asked them whether or not they had
20 reviewed the medical records. And they both clearly
21 stated that they did. And based upon that we asked them
22 whether or not there was any other possible result or
23 cause that could have caused this death.

24 And Ms. Greco was the most clear. She --

25 THE COURT: Just to be clear, these

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<p>1 conversations are all taking place more recently?</p> <p>2 MR. STEPHENS: Oh, no, no. This is prior to the</p> <p>3 grand jury.</p> <p>4 THE COURT: Okay. I misunderstood you then. I</p> <p>5 thought you said you had just heard about this disease</p> <p>6 recently. But you are talking now about your</p> <p>7 communications with them then --</p> <p>8 MR. STEPHENS: Prior to the grand jury.</p> <p>9 THE COURT: -- you didn't know about moyamoya,</p> <p>10 but you asked them had they reviewed everything.</p> <p>11 MR. STEPHENS: That's correct. I asked them if</p> <p>12 they had reviewed the medical records. And I asked them</p> <p>13 whether or not there was any other possibility of death.</p> <p>14 And Ms. Greco was the most conclusive to that where she</p> <p>15 said, This is a blunt force trauma injury.</p> <p>16 And that's because not only is there</p> <p>17 hemorrhaging, which I guess could be evidence of</p> <p>18 moyamoya, but it's not just the hemorrhage itself, you</p> <p>19 have to take that in comparison to the swelling of the</p> <p>20 brain. The fact that the brain actually swelled to the</p> <p>21 point of where it goes down her spinal column. That's</p> <p>22 evidence of trauma not some sort of disease causing some</p> <p>23 sort of carotid artery or some sort of harding of the</p> <p>24 arteries.</p> <p>25 I never spoke to her or Ms. Olsen directly about</p> <p style="text-align: right;">19</p>	<p>1 exculpatory, they have got to prove that she actually had</p> <p>2 moyamoya disease. Because if she never had it, it's</p> <p>3 clearly exculpatory because it would never explain away</p> <p>4 the charge. There has to be some sort of statement that</p> <p>5 she had moyamoya disease.</p> <p>6 If there's no statement that she had moyamoya</p> <p>7 disease, then it's clearly not exculpatory. It's based</p> <p>8 upon speculation, which is exactly what the grand jurors</p> <p>9 cannot rely upon.</p> <p>10 I would also note, Your Honor --</p> <p>11 THE COURT: But you are not telling me that you</p> <p>12 made a decision at the time of presenting to the grand</p> <p>13 jury that it was speculation and that is why you are not</p> <p>14 presenting it. You are telling me that basically you</p> <p>15 asked the doc is there any other cause. They said, no.</p> <p>16 They said it was trauma related and that's what you</p> <p>17 presented.</p> <p>18 MR. STEPHENS: And that's correct, Your Honor.</p> <p>19 That's an accurate statement. I honestly had no clue --</p> <p>20 I never even thought to ask them about moyamoya disease</p> <p>21 directly. I relied upon their representation that they</p> <p>22 had reviewed the medical records and I left it at that.</p> <p>23 Your Honor, what I would also say is there is</p> <p>24 now probably the most conclusive piece of evidence that</p> <p>25 there is and that is where Dr. Greco then again examined</p> <p style="text-align: right;">21</p>
<p>1 moyamoya disease. I happily state that on the record I</p> <p>2 never spoke to them about it. I never knew what it was.</p> <p>3 And what I would note, Your Honor, in moving on</p> <p>4 from that point and in addressing some of the other</p> <p>5 issues I would state, Your Honor, we have to address</p> <p>6 everything in context. And the primary point that the</p> <p>7 defense relies upon is a finding by the interpreting</p> <p>8 radiologist Dr. Agrawal. And this is what he actually</p> <p>9 found. This is point three of his report.</p> <p>10 It says:</p> <p>11 "Findings are suggestive of a slow</p> <p>12 progressive vasculopathy that can be seen with</p> <p>13 moyamoya disease."</p> <p>14 So it's suggestive. Not that she actually had</p> <p>15 it. Not that she didn't haven't. It's suggestive. But</p> <p>16 we can then see it says:</p> <p>17 "Although the hypertrophy vessels are</p> <p>18 not well developed."</p> <p>19 So he is not even looking at a clear radiology</p> <p>20 graph.</p> <p>21 And he says:</p> <p>22 "Other etiologies such as sickle</p> <p>23 cell disease or other chronic vasculopathies</p> <p>24 would have to also be considered."</p> <p>25 The defense's entire argument, if it's</p> <p style="text-align: right;">20</p>	<p>1 the brain and her findings are also relevant in</p> <p>2 determining whether she actually had moyamoya disease.</p> <p>3 And it was her conclusion there is no pathology</p> <p>4 consistent with moyamoya disease. That's more evidence</p> <p>5 that she did not have moyamoya disease. No one can state</p> <p>6 she had it or she did not have it.</p> <p>7 And what is also somewhat concerning to the</p> <p>8 State, Your Honor, is what we have to assume then is that</p> <p>9 by some pure dumb luck after she gets whacked in the head</p> <p>10 with a vacuum cleaner that she actually dies of moyamoya</p> <p>11 disease rather than of the blunt force trauma to the</p> <p>12 head. We have to assume that that's the case in order</p> <p>13 for this argument to have any relevance at all.</p> <p>14 We get on a slippery slope then because in every</p> <p>15 single case, Your Honor -- well, I can't say every single</p> <p>16 case, but in the majority of cases where someone dies</p> <p>17 there are other medical issues that they had. They have</p> <p>18 diabetes, they may have heart disease. They could have</p> <p>19 all sorts of different things that could contribute to</p> <p>20 their death.</p> <p>21 What we have here is no one has even indicated</p> <p>22 she actually has this disease, and so you have got to</p> <p>23 speculate or assume that she had it to find this evidence</p> <p>24 even remotely exculpatory. And even if she had it, then</p> <p>25 they still must prove that that was the actual cause of</p> <p style="text-align: right;">22</p>

<p>1 death or that it could have contributed to her death.</p> <p>2 THE COURT: Well, wouldn't you agree, Counsel,</p> <p>3 that, yes, there certainly could be any number of things</p> <p>4 that could cause a person to die. But we're talking</p> <p>5 about a circumstance here where something is being</p> <p>6 suggested. And I haven't been around radiologists enough</p> <p>7 and most simply haven't had my own circumstances enough</p> <p>8 to know is that the language that's typically used; "is</p> <p>9 suggestive of." Does that mean that they think they have</p> <p>10 it.</p> <p>11 But of course they are not going to make that</p> <p>12 final call. So I think that is fairly persuasive that</p> <p>13 they see something that indicates that's what it is.</p> <p>14 But what is compelling here is what moyamoya</p> <p>15 could cause to happen is what happened here. Although</p> <p>16 some of the examples may have been a little exaggerated,</p> <p>17 I think there are certainly more diseases where you are</p> <p>18 not necessarily going to automatically say that disease</p> <p>19 is going to cause that circumstance. But this disease</p> <p>20 would be manifest in a brain hemorrhage, arguably, which</p> <p>21 is what we have here.</p> <p>22 So is there some distinction in your mind there</p> <p>23 that the very consequences of this disease would be what</p> <p>24 happened here, if it existed, and that's different than</p> <p>25 other situations where somebody could have something that</p> <p style="text-align: right;">23</p>	<p>1 died. And you would get on this extreme slippery slope</p> <p>2 of any possible medical condition that could possibly</p> <p>3 cause death has to be presented to the grand jurors.</p> <p>4 And in this case the distinction, in my opinion,</p> <p>5 is we don't even know that she had moyamoya disease.</p> <p>6 It's all based 100 percent purely upon speculation.</p> <p>7 Admittedly, there are doctors that have found</p> <p>8 something suggestive of that. But I would lastly note,</p> <p>9 Your Honor, in my personal experience in attending</p> <p>10 doctors and having several knee surgeries, suggestive is</p> <p>11 a far different approach than this is what you have and</p> <p>12 this is how we fix it.</p> <p>13 Suggestive to me says evidence is clearly</p> <p>14 suggestive because he says there's other possible answers</p> <p>15 for why he's seeing what he's seeing in the radiology</p> <p>16 graph. This is a suggestive -- this is him saying based</p> <p>17 upon my experience, it is one of these potential things</p> <p>18 that I'm seeing. Possibly. And that's the best evidence</p> <p>19 they have that she actually had moyamoya disease.</p> <p>20 MS. FELICIANO: Judge, I am sorry to interrupt</p> <p>21 the State but I would remind the State that he is</p> <p>22 obligated to remain to what was testified to at the</p> <p>23 preliminary hearing instead of volunteering his own</p> <p>24 position regarding medical evidence.</p> <p>25 THE COURT: And I sort of may have invited that</p> <p style="text-align: right;">25</p>
<p>1 could cause them to pass away.</p> <p>2 MR. STEPHENS: Yes, Your Honor. I would note</p> <p>3 two different things, and one would be the doctors'</p> <p>4 testimony. I've already briefly addressed this, so I</p> <p>5 won't go into it in any greater detail. But the doctors</p> <p>6 both indicated, the coroner and the medical expert say</p> <p>7 that this is the cause of death; blunt force trauma. Not</p> <p>8 only just of the hemorrhage itself, which could be</p> <p>9 related to moyamoya disease, but it's the sepsis swelling</p> <p>10 of the brain to the point where it actually goes down the</p> <p>11 spinal column. That's one point.</p> <p>12 What I also note, Your Honor, is immediately</p> <p>13 after the defendant whacks her in the head with a vacuum,</p> <p>14 she begins to start having this unclucid conversation with</p> <p>15 people. She can't communicate clearly. I think that is</p> <p>16 great evidence; that they actually cause the brain injury</p> <p>17 cause is the defendant's actions. This isn't a moyamoya</p> <p>18 disease just happening.</p> <p>19 Because, again, then you gotta go to the point</p> <p>20 where, literally, if I'm sitting here arguing and my</p> <p>21 blood pressure might be rising, that might knock me dead.</p> <p>22 But if someone comes up here as I'm arguing and my blood</p> <p>23 pressure would be rising and someone shoots me in the</p> <p>24 head, that means we presented to the grand jury then that</p> <p>25 I have high blood pressure at that exact moment that I</p> <p style="text-align: right;">24</p>	<p>1 unintentionally in commenting on my own experiences and</p> <p>2 not being clear on -- and I would expect a radiologist to</p> <p>3 say something like suggestive. Or I would expect the</p> <p>4 primary care physician of whatever illness it is to be</p> <p>5 the ones who would diagnose.</p> <p>6 MR. STEPHENS: And there is no primary care</p> <p>7 physician who did that, Your Honor.</p> <p>8 THE COURT: But I agree that we are bound to</p> <p>9 what was presented and what we knew.</p> <p>10 Anything else from the State?</p> <p>11 MR. STEPHENS: Your Honor, I think I have</p> <p>12 addressed everything, unless there is anything</p> <p>13 specifically you would like me to address.</p> <p>14 THE COURT: I don't have any other questions at</p> <p>15 this time. Let me return for rebuttal.</p> <p>16 MR. SILVERSTEIN: Thank you. If we're going to</p> <p>17 go to evidence outside of the record, this isn't a</p> <p>18 situation where somebody just got -- that it was just</p> <p>19 dumb luck. Ms. McFarlane had preexisting medical</p> <p>20 problems. She had been to UMC in April of 2011. They</p> <p>21 could not make a final diagnosis. They knew there was</p> <p>22 something wrong with her and they told her, If you don't</p> <p>23 follow up on this and get further treatment you could</p> <p>24 die.</p> <p>25 I mean this isn't a situation where this woman</p> <p style="text-align: right;">26</p>

1 was in perfect health and only Anthony Mayo could have
2 caused her to die. She had preexisting medical
3 conditions that existed even before the altercation on
4 August 8th of 2012.

5 THE COURT: Well, we have a doctor who
6 specifically -- and I get your part of the argument is
7 that this sort of, I'll call it bolstering, of the
8 evidence by a doctor saying I thoroughly reviewed
9 everything and I didn't see anything else, could be
10 problematic if there was something obviously that was
11 another case.

12 But this doctor has testified in a way that
13 makes it sound as if they did look at all of that. They
14 saw the suggestion of moyamoya. They saw the other
15 thing, but felt that in the totality of the
16 circumstances, my words not necessarily theirs, but in
17 those circumstances that the only cause was the trauma.
18 So don't we have a doctor sort of eliminating there being
19 any other cause.

20 MR. SILVERSTEIN: Well, first of all, Dr. Greco
21 didn't eliminate anything. She eliminated moyamoya, but
22 what she says in her report is that it looks like
23 atherosclerosis. That's another medical condition that
24 could have caused death in the exact same manner that
25 this woman died.

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1 not present it.

2 And I would direct the Court's attention to the
3 *Ostman* case. That was a case where conviction was
4 reversed because the defendant's statement to the police,
5 which was exculpatory, was not presented to the grand
6 jury.

7 Now, certainly the State in that case said,
8 Well, Judge, we listened to the statement; didn't sound
9 credible to me, didn't sound credible to us, so we didn't
10 present it. That argument didn't hold in *Ostman*. That
11 argument didn't hold in *Sheriff versus Frank*. In *Sheriff*
12 *versus Frank* the same problem where the State decided
13 they weren't going to present evidence that the victims
14 had made false accusations against someone else.

15 Well, why not just come into court and say,
16 Well, we heard those accusations. They didn't sound
17 credible to us. We didn't believe them, so we didn't
18 tell the grand jury about them. That argument did not
19 fly in *Frank* either.

20 What the State is doing here is they are taking
21 the grand jury's function onto themselves, and he is
22 deciding for himself of what is worthy of presenting to
23 the grand jury and what's not. The statute directs him
24 otherwise. The statute tells him if you've got evidence
25 that would tend to explain away the charge, and that's

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1 Dr. Greco doesn't say that it had to have been
2 Anthony Mayo. She says, Well, it's not moyamoya, but it
3 looks like atherosclerosis to me. That is another
4 medical condition that could have caused these exact same
5 injuries that she died from.

6 But my point is, Your Honor, that it is up to
7 the grand jury to make the decision that Mr. Stephens
8 wants Dr. Greco to be able to make. It is up to the
9 grand jury to make that decision. He doesn't get to
10 decide and have the doctor come in and say, Well, she's
11 already screened all of these other possible theories and
12 she's decided that it was Anthony Mayo, and so the grand
13 jury doesn't get to hear all this other evidence.

14 The grand jury decides whether or not there is
15 any weight to be given to these other possible causes of
16 death. Dr. Greco, if she had reviewed these records and
17 if she had seen this statement from the radiologist that
18 decided it wasn't worth mentioning, that was improper.

19 It was up to her to tell the grand jury there's
20 an indication or a suggestion of this other disease and
21 explain to the grand jury what it is and give her opinion
22 why she doesn't think it's the case. But to completely
23 withhold it from the grand jury's purview is a violation
24 of the statute. They are not allowed to decide that
25 exculpatory evidence isn't exculpatory on their own and

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1 important; tendency to explain away the charge. That is
2 how exculpatory evidence is defined in Nevada law. A
3 tendency to explain away the charge.

4 Because it couldn't possibly be the case where
5 the only evidence that's exculpatory is evidence that I
6 can prove by some amorphous standard that is suddenly put
7 on the defense. I have to prove that that caused her
8 death in order for it to be exculpatory. That's not how
9 it works. If it was we wouldn't need the statute.

10 Because if there was evidence out there that conclusively
11 established this man's innocence, Mr. Stephens couldn't
12 take the case to the grand jury in the first place. He's
13 not allowed to prosecute a case where there's no proof
14 beyond a reasonable doubt.

15 Exculpatory evidence can't mean evidence that
16 definitively proves innocence. It can't mean that. It
17 means evidence that has a tendency to explain away the
18 charge.

19 And this suggestion made by the radiologist
20 suggesting a medical condition that is a reasonable
21 alternate theory of her death is absolutely evidence and
22 has a tendency to explain away the charge. He doesn't
23 get to withhold it because his doctor didn't think it was
24 worth presenting.

25 THE COURT: This is what the Court is going to

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1 do. I have a few additional cases, a few things that
2 have been cited here today that I want to look at. But I
3 am not going to just take this under advisement and then
4 have it go into the potential black hole and never coming
5 back. This Court has taken far too long again to
6 prioritize the other matter. And I had an inclination
7 coming in here today where I thought this might go but I
8 wanted to hear argument. I appreciate that I've heard
9 argument today and it has helped fine-tune the analysis,
10 and I have a few cases that I want to look at.

11 What I am going to do, I'm sorry to
12 inconvenience counsel, is to invite everybody back on
13 Wednesday for my final determination on all matters that
14 are pending before the Court with regard to Mr. Mayo.

15 It is my intention to make a full determination
16 at that time. It is not my inclination to take any
17 additional argument at that time. I think we have
18 covered everything that we need to between the briefings,
19 which were very thorough, again, always appreciate it,
20 and the arguments here today. But I will give a
21 definitive decision on that.

22 I don't know that Mr. Mayo needs to be present
23 unless he wishes to be. I don't want there to be an
24 issue of him having to be stuck down here and not getting
25 back or having to be brought back again or whatnot. So I

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1 guess I will leave that up to his determination. But
2 right now he would be scheduled to be.
3 MS. FELICIANO: I would ask that he be present
4 in court and I believe that he would like to be here for
5 it.

6 THE COURT: I think they would take him back and
7 then bring him back.

8 MS. FELICIANO: Maybe set a special setting for
9 this, Your Honor. That might be appropriate. I don't
10 know if you want to do this during your calendar or if we
11 can set a time.

12 My only issue is that I have an argument in
13 court of appeals that afternoon.

14 THE COURT: Oh, and I just realized something
15 else that would be very difficult for me to have that on
16 Wednesday's calendar this week.

17 MR. SILVERSTEIN: Maybe Friday, if that's
18 helpful.

19 THE COURT: I would have to make a special
20 setting to do it on Friday because we don't have calendar
21 otherwise on Friday. Anything is possible. Oh, we have
22 another hearing. Better option, honestly, would be
23 Monday. I could offset it at a certain time. Again, I
24 am not anticipating additional argument. I would lean
25 towards Monday and putting it at 10:30.

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1 MS. FELICIANO: Thank you.

2 MR. STEPHENS: I will try to make it, otherwise
3 I will leave it with the track deputy. I'll be assigned
4 to domestic violence court that day.

5 THE COURT: Would you rather have it be on a
6 Wednesday?

7 MR. STEPHENS: I'm okay with Monday. Someone
8 else can handle it. It's just the decision by the Court.

9 THE COURT: Right. It's just the decision by
10 the Court. So it will be on Monday at 10:30. We'll
11 create a special session; is that okay?

12 MS. FELICIANO: Yes, Your Honor, that's
13 perfectly fine. I appreciate the Court's accommodation.
14 The only one other issue is that I had filed a motion for
15 OR.

16 THE COURT: Yes.

17 MS. FELICIANO: May we trail that until Monday.
18 As I noted in the OR motion, it goes in conjunction with
19 Your Honor's decision regarding this issue.

20 THE COURT: My inclination was to wait until
21 this matter was resolved before we address that. So we
22 will also move the motion for OR release over to Monday
23 as well.

24 MS. FELICIANO: Thank you so much.

25 MR. STEPHENS: Thank you, Your Honor.

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1 THE CLERK: March 30th at 10:30 a.m.

2 MR. SILVERSTEIN: Thank you, Your Honor.
3 (Proceedings were concluded.)

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1 REPORTER'S CERTIFICATE

2
3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss.
5)

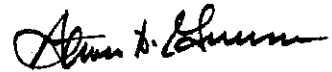
6 I, BRENDA SCHROEDER, a certified court reporter
7 in and for the State of Nevada, do hereby certify that
8 the foregoing and attached pages 1-35, inclusive,
9 comprise a true, and accurate transcript of the
10 proceedings reported by me in the matter of THE STATE OF
11 NEVADA, Plaintiff, versus ANTHONY TYRON MAYO, Defendant,
12 Case No. C295313, on March 23, 2015.
13
14
15

16 Dated this 6th day of April, 2015.
17

18 /s/ Brenda Schroeder
19 BRENDA SCHROEDER, CCR NO. 867
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TRAN
CASE NO. C-295313-1
DEPT. NO. 25



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
ANTHONY MAYO,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT
OF
DEFT'S MOTION FOR OR RELEASE
PETITION FOR WRIT OF
HABEAS CORPUS

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: MONDAY, MARCH 30, 2015

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

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APPEARANCES:

For the State:

ROBERT STEPHENS, ESQ.

For the Defendant:

DANNY SILVERSTEIN, ESQ.

AMY FELICIANO, ESQ.

* * * * *

1 LAS VEGAS, NEVADA; MONDAY, MARCH 30, 2015

2 P R O C E E D I N G S

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4
5 THE COURT: Page 13, State of Nevada vs. Anthony
6 Mayo.

7 MR. STEPHENS: Rob Stephens for the State.

8 MS. FELICIANO: Amy Feliciano and Dan
9 Silverstein for Mr. Mayo, who's present in custody.

10 THE COURT: I see that Mr. Mayo is present i
11 custody.

12 What was on the calendar, obviously, previously was
13 the petition for writ of habeas corpus, inclusive of the
14 addendum to that petition. The Court already took
15 argument with regard to the procedural aspect of whether
16 or not that should be considered untimely or not. We
17 dealt with that, indicating, no, we do not believe it was
18 untimely. We would take that addendum as being a
19 supplement to the original petition. We've heard argument
20 fully on all of those matters.

21 What is also on calendar today is the Defendant's
22 motion for OR release, which was filed on March 11th. And
23 we see that and no opposition.

24 Before I proceed with my determination that I
25 continued the matter over today so I could review all of

1 the case law, review all the pleadings again and really
2 try to digest it all and come up with what I think is the
3 appropriate decision, does either counsel have anything
4 they would like to add.

5 Ms. Feliciano or Mr Silverstein.

6 MS FELICIANO: We'd submit it on our written
7 documents and the arguments already presented before this
8 Court.

9 THE COURT: Thank you.

10 MR. STEPHENS: The State, similarly, your
11 Honor.

12 THE COURT: All right.

13 I'm going to address this sort of then in reverse
14 order. Obviously, I'm going to be -- address it and
15 argued last time, because we still have the outstanding
16 matter of the original petition, and then we have the
17 addendum.

18 I will tell you at this time it is the Court's
19 determination, after a great deal of thought and review,
20 to deny the petition in its entirety.

21 I'm going to go through and state my bases for why I
22 am denying the petition, and then we'll address the motion
23 for the OR release.

24 The original petition, obviously, spoke to a number
25 of issues. I want to make sure I get to my notes, so I

1 don't talk off the cuff and then miss or forget to address
2 something.

3 Before the addendum was filed, there was a number of
4 factors, a number of arguments that were made as to why
5 the Court should grant the petition for habeas corpus
6 pretrial. The arguments being the State did not provide
7 specific information requested by the Defendant regarding
8 the fact that the victim's sister had been taken off of
9 life support over the holidays and her organs were
10 donated.

11 Also the language with regard to vacuum there would
12 be -- not sufficient for the defense on the charges
13 against him.

14 Third argument being, according to the case law,
15 there was a weakness in the chain of custody with regard
16 to Brady (sic) of the alleged victim in this case. There
17 was some argument -- fourth argument with regard to prior
18 bad acts evidence which should have been admissible -- or
19 which would have been admissible to show the Defendant's
20 state of mind, but whether that should have been admitted
21 and whether that was inappropriate in the circumstances.

22 And finally, whether the State had provided, at
23 least, slight or marginal evidence for probable cause
24 determination as to the battery constituting domestic
25 violence, strangulation. Coercion, preventing or