

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICE MANUEL SIMS,

Petitioner,

vs.

THE HONORABLE JUDGE DOUGLAS
W. HERNDON, EIGHTH JUDICIAL
DISTRICT COURT OF THE STATE OF
NEVADA

Respondent;

THE STATE OF NEVADA,

Real Party in Interest.

Supreme Court Case No.

District Court Case No. 2017-00001
Electronically Filed
Jan 24 2017 09:10 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR WRIT OF
MANDAMUS OR WRIT OF
PROHIBITION

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

IVETTE AMELBURU MANINGO,
ESQ.
Nevada Bar No.: 7076
LAW OFFICES OF IVETTE
AMELBURU MANINGO
720 S. 7th Street, 3rd Floor
Las Vegas, NV 89101
TEL: (702) 384-9800
FAX: (702) 386-2737

ATTORNEYS FOR PETITIONER

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

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

ADAM PAUL LAXALT, ESQ.
Attorney General
100 North Carson Street
Carson City, NV 89701-4717

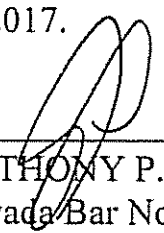
ATTORNEYS FOR THE STATE

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to the rule. These representations are made so that the Justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorneys of Record for Petitioner: Anthony P. Sgro, Esq. of Patti, Sgro & Roger; Ivette Amelburu Maningo, Esq. of the Law Offices of Ivette Amelburu Maningo.
2. Publicly held companies associated: None.
3. Law Firm(s) Appearing in Court(s) Below: Anthony P. Sgro, Esq. and Ivette Amelburu Maningo, Esq. have appeared in district court case number C-13-287414-1 for Petitioner; Deputy District Attorneys Marc DiGiacomo, Esq. and Pamela Weckerly, Esq. have appeared in district court case number C-13-287414-1 for Real Party in Interest; Adam Paul Laxalt, Esq. is the Nevada Attorney General.

DATED this 19 day of January, 2017.



ANTHONY P. SGRO, ESQ.

Nevada Bar No. 3811

IVETTE AMELBURU MANINGO, ESQ.

Nevada Bar No. 7076

720 S. 7th Street, 3rd Floor

Las Vegas, NV 89101

TABLE OF CONTENTS

Table Of Authorities	iv
I. Relief Sought.....	1
II. Issues Presented For Review	1
III. Statement Of The Case.....	1
IV. Statement Of Facts	4
V. Jurisdictional Statement	9
VI. Argument.....	10
A. The DA's Own Memo States The DA's Office Will Hand All Inculpatory Evidence Over To The Defense	10
B. Petitioner's Co-Defendants Are Now Testifying Against Him And Their Testimony Will Be Inculpatory As To Petitioner	12
C. Petitioner's Case Is Distinguishable From <i>State v.</i> <i>Eighth Judicial District Court of Nevada</i>	14
D. Petitioner Is Also Entitled To The Proffer Content As Impeachment Evidence.....	16
Vii. Conclusion.....	19
Certificate Of Compliance.....	20
NRAP 27(E) Certificate.....	21

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)	5,10,15
<i>Cheung v. Eighth Judicial Dist. Ct.</i> , 121 Nev. 867, 124 P.3d 550 (2005)	9,10
<i>Diaz v. Eighth Judicial Dist. Ct. ex rel County of Clark</i> , 116 Nev. 88, 993 P.2d 50 (2000)	10
<i>Giglio v. United States</i> , 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)	4,6,10,15-18
<i>Kyles v. Whitley</i> , 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)	5,16
<i>Mazzan v. Warden</i> , 116 Nev. 48, 993 P.2d 25 (2000)	16
<i>Napue v. Illinois</i> , 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217	16
<i>Quisano v. State</i> , 368 P.3d 415, 132 Nev. Adv. Op. 9 (2016).....	3,7,15
<i>Round Hill Gen. Imp. Dist. v. Newman</i> , 97 Nev. 601, 637 P.2d 534 (1981)	9
<i>State v. Eighth Judicial Dist. Ct. (Armstrong)</i> , 127 Nev. 927, 267 P.3d 777 (2011)	9
<i>State v. Eighth Judicial Dist. Ct. (Logan D.)</i> , 306 P.3d 369, 129 Nev. Adv. Op. 52 (2013).....	9,10
<i>State v. Eighth Judicial District Court of Nevada</i> 2013 Nev. Unpub LEXIS 126, 2013 WL 324283	7,8,14

<u>Statute</u>	<u>Page</u>
Nevada Revised Statute 34.160	9
Nevada Revised Statute 174.235	11,15

<u>Miscellaneous</u>	<u>Page</u>
<i>Black's Law Dictionary</i> , (9 th ed. 2009).....	9

I.
RELIEF SOUGHT

The Petitioner respectfully requests this Court direct the district court order the State to turn over evidence pertaining to the oral or written proffers related to the plea agreements signed by two of Petitioner's Co-Defendants.

II.
ISSUES PRESENTED FOR REVIEW

Whether the State has a duty to disclose the content of proffers made by Co-Defendants who have signed plea agreements where the State represents that it will provide the Defense all inculpatory evidence intended to be used at trial in its case-in-chief.

III.
STATEMENT OF THE CASE

The Petitioner, Maurice Manuel Sims ("Sims"), was charged via Indictment, dated February 12, 2013, with the following: Count 1 – CONSPIRACY TO COMMIT ROBBERY; Count 2 – BATTERY WITH A DEADLY WEAPON; Count 3 – CONSPIRACY TO COMMIT BURGLARY; Count 4 – BURGLARY WHILE IN POSSESSION OF A FIREARM; Count 5 – CONSPIRACY TO COMMIT ROBBERY; Count 6 – ROBBERY WITH USE OF A DEADLY

WEAPON; Count 7 – ROBBERY WITH USE OF A DEADLY WEAPON; Count 8 – ROBBERY WITH USE OF A DEADLY WEAPON; Count 9 – CONSPIRACY TO COMMIT MURDER; Count 10 – MURDER WITH USE OF A DEADLY WEAPON; Count 11 – MURDER WITH USE OF A DEADLY WEAPON; Count 12 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON; Count 13 – POSSESSION OF FIREARM BY EX-FELON; and Count 14 – POSSESSION OF FIREARM BY EX-FELON. (Petitioner’s Appendix Volume I “PA I”1-9).

The State alleges that on January 8, 2013, Sims and his Co-Defendants, Daron Morris (hereinafter “Morris”), Brandon Range (hereinafter “Range”), and Sasha Williams (hereinafter “Williams”) went to the home of Laurice Brightman, Anthony Anderson, and Evin Russell with the intent to commit a robbery. (PA I:3). The State alleges this came about after Williams accused the occupants of owing her \$200.00 and they refused to give her the money. (PA I:13). According to the State, after this attempt to receive the money did not go as planned, Anthony Anderson and Evin Russell were shot and killed, and Laurice Brightman received a non-fatal bullet. (PA I:10-17).

On March 8, 2013, the State filed a Notice of Intent to Seek Death Penalty against Sims and Morris. (PA I:10-18; I:22). The State never sought the death penalty against Williams or Range. On April 13, 2016, Williams and Range both

agreed to generous plea offers in exchange for their testimony against Defendant Sims. (PA I:22). Either before or after the pleas were taken of both Co-Defendants, the State received proffers from both of them. Sims's counsel was advised by counsel for the Co-Defendants that the Co-Defendants would not submit to being interviewed by Sims's counsel. (PA I:101).

Sims had filed his *Motion to Compel Discovery Based on District Attorney Open File Policy* on June 27, 2016 after learning of these extremely favorable plea agreements. (PA I:19-39). The State filed an Opposition (PA I:40-56) and Sims filed a Reply (PA I:57-75). The district court, originally granting Sims's motion, stated that, based on the district attorney's memorandum sent to Judges and the Defense Bar in April of 2016, the district attorney's office agreed to disclose all inculpatory evidence to the defense. As such, the district attorney, assuming they would only call the Co-Defendants to provide inculpatory information against Sims, would have to provide a summary of the proffers to Sims. (PA I:200-201).

The State, at the initial hearing, raised concerns in light of the holding in *Quisano v. State*, 368 P.3d 415, 132 Nev. Adv. Op. 9 (2016) (unpublished disposition). They subsequently filed their *Motion to Reconsider Court's Ruling on Defendant's Motion to Compel Discovery Based on District Attorney Open File Policy*. (PA I:202-208), which Sims opposed (PA I:209-215). The reconsideration was based primarily on the case of *Quisano*. The State's motion for reconsideration

was granted by the district court on October 6, 2016. (PA II:216-269). This writ follows.

IV.

STATEMENT OF FACTS

On April 13, 2016, the Clark County District Attorney's Office ("DA") issued a Discovery Memo (hereinafter "Memo") seeking to "clarify" how it would, from that point on, conduct discovery. (PA I:35). The Memo states all deputy district attorneys would comply with *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and also that deputy district attorneys would turn all inculpatory evidence intended to be used at trial during the State's case-in-chief over to the defense. (PA I:35-36).

Sims filed a *Motion to Compel Discovery Based on District Attorney Open File Policy* on June 27, 2016, arguing, amongst other things, that he was entitled to the contents of the proffer of both Co-Defendants, who had since accepted plea bargains and agreed to testify. (PA I:19-39). This agreement came *after* each Co-Defendant made exculpatory statements to the police immediately after arrest. The State opposed the motion, arguing "no law requires the state to maintain an open file policy" (PA I:41) and, while the State has the responsibility to discover information from "others acting on the government's behalf," this responsibility extends only to information "that the defense could not obtain through its own

effort.” (PA I:43). Sims tried to schedule interviews with the Co-Defendants through their attorneys and was told the Co-Defendants would not speak to Sims’s counsel. The State opposed turning over any of the contents of the proffers.

As set forth in Sims’s Reply, *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) specifically mentions a duty to both learn and disclose any favorable evidence known to others acting on the government’s behalf (PA I:60), and under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State “must first disclose its exculpatory evidence to the defense before a due diligence requirement is triggered.” (PA I:64).

Sims’s motion was heard September 9, 2016. At the hearing, Sims’s counsel argued that in the instant case, the Co-Defendants would definitely give different testimony at trial than was initially given to law enforcement, and after the Defense cross-examines as to the inconsistent statements, the State re-directs and implies that the witness had given consistent testimony to the State at a pre-trial interview with the State. (PA I:80-81). Sims’s counsel pointed out that, in such a situation, “we have absolutely no way to challenge it ... whether it happened or didn’t happen, we have no idea.” (PA I: 81).

The thrust of Sims’s request for proffer content was summarized by counsel as follows:

Sasha Williams and Brandon Range have made deals with the State.
Their statements to the police were mildly incriminating, at best. [...]

But they were not confessions in the sense of here's exactly what when down, here's what everybody did, here's what everyone's role was, *et cetera*. And I expect the State's going to argue and the police are going to say that Sasha Williams minimized Mr. Sims' involvement because at the time they were romantically involved. [...] At trial I expect she's going to come in, because she's made a deal, and I expect she's going to come in and say, This is exactly what happened, Mr. Sims did this, this, this, and this. Right? I will have no idea of that version of facts if the State is not obligated to make some memorialization of that event.

(PA I:81-82). Under *Giglio*, Sims has a right to know all impeachment material.

(PA I:85). In response, the State argued it had no legal obligation to turn over proffer content, and that the Defense had the option of interviewing witnesses (PA I:88-89) (Sims's counsel pointed out later at the hearing that Williams would not agree to be interviewed by him (PA I:101)¹). The district court stated:

I think that that's at least appropriate that you let them know what it was that was stated in the proffer. And I think, and we're probably going to come back to this several times in regards to the discovery issues, I know, and I very much respect the discovery statute, but I also know that in the memo that Steve [Wolfson] prepared, I mean, one of the things that was very clear in there is that all inculpatory evidence that's intended to be used at trial is going to be provided. So even though there's things in the discovery statute that, well, you know, a defendant's oral statement may not fall within that statute, if a guy gives an oral statement inculcating himself, you're going to use it at trial. And I know your office is going to let the defense know that. A proffer that is potentially, and I can see where Tony [Sgro] would be worried, is potentially going to be somewhat different than the original statements were or maybe more, you know, expansive of what my involvement was and what everybody else's involvement was, I think we all get that, that if somebody's trying to, you know,

¹ Counsel was also advised that Range refused an interview with Sims's counsel as well.

not get arrested they may say one thing and later on when they finally see the light, they may say a little more about everybody.

I think it's important that they know what was in the proffer. And so I understand completely why they're not recorded or reported in any fashion. But I do think you need to let them know.

(PA I:89-90). The State continued to argue the lack of statutory authority to compel it to turn over proffer content, and the district court's response pointed to the Memo, which "says [] very explicitly, All inculpatory information that is intended to be used at trial will be provided." (PA I:96).

Though the district court denied Sims's request for a recording of the proffer to be provided, the district court did order the State to "give them the flavor of what was provided to you [...] just the substance of what was related to you and that you plan on using as part of your presentation at trial, you need to tell them." (PA I:201).

The State filed its *Motion to Reconsider Court's Ruling on Defendant's Motion to Compel Discovery based on District Attorney Open File Policy*, relying heavily upon the dissent in *Quisano*, 368 P.3d at 415, 132 Nev. Adv. Op. at 9. (PA 80-85). The State also relied on *State v. Eighth Judicial District Court of Nevada*, 2013 Nev. Unpub. LEXIS 126, 2013 WL 324283 (2013), in which this Court found "there is no controlling legal authority" to support a district court ordering the State to disclose the content of an oral proffer. *Id.* at *2. In his Opposition, Sims argued the State was relying "upon the most narrow interpretation of the

Court's ruling relative to oral proffers in an attempt to sidestep obligations" under the Constitution. (PA 88).

The State's Motion to Reconsider and Sims's Opposition thereto were heard on October 6, 2016. The district court granted the State's motion and reversed its decision, stating:

I think I also made an error in that regard to the memo, because the memo was disseminated to everybody with this idea of judges, defense bar, private defense bar, you know, whomever it is, here's what our policy's going to be and there's a statement in there. I think I, kind of, looked at it in exactly the way you were talking about it a moment ago, Tony [Sgro]. And I think in reviewing it, again, I was wrong in having looked at it that way, that you should be basically judicially estopped from doing anything different.

But judicial estoppel doesn't really apply to some situation where you've sent out an interoffice memo or even outside the office to people saying, hey, here's a policy we're going to have on discovery. I think judicial estoppel applies to promises that are made in the context of the case. Like if the State, within a plea agreement, promises somebody a certain thing, they're judicially estopped from turning around and saying, oh, no, no we're not going to do that now.

[...]

Nobody ever came in in this case and said, we promise that we're going to provide proffers, or we promise that we're going to provide any and all pieces of exculpatory evidence no matter what it is if we intend in using in in our trial.

(PA II:254-255). The district court reversed its decision so that the decision would not conflict with *State v. Eighth Judicial District Court of Nevada*, stating that if the district court ordered the State to disclose the proffer content:

it would render *State v. Eighth Judicial* meaningless if I said, well, you got to turn over the proffers so they can decide whether or not

they want to challenge its admissibility or not. They have to be the gatekeeper on that.

(PA II: 260). Sims therefore files the instant Petition for Writ of Mandamus.

V.

JURISDICTIONAL STATEMENT

A party may file a writ of mandamus “to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station,” per NRS 34.160, or “to control a manifest abuse or arbitrary or capricious exercise of discretion.” *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). An arbitrary exercise of discretion is one “founded on prejudice or preference rather than on reason,” while a capricious exercise of discretion is one “contrary to the evidence or established rules of law[.]” *State v. Eighth Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (quoting *Black’s Law Dictionary* 119 (9th ed. 2009); *Black’s Law Dictionary* 239 (9th ed. 2009)) (internal quotations omitted).

Extraordinary relief is available where the petitioner has “no plain, speedy, and adequate remedy in the ordinary course of the law” or there are either “urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration.” *State v. Eighth Judicial Dist. Ct. (Logan D.)*, 306 P.3d 369, 373, 129 Nev. Adv. Op. 52 (2013) (citing *Cheung v. Eighth*

Judicial Dist. Ct., 121 Nev. 867, 869, 124 P.3d 550, 552 (2005)). Further, consideration of a petition for extraordinary relief may be justified where an important issue of law needs clarification and public policy is served by the Supreme Court's invocation of its original jurisdiction. *Diaz v. Eighth Judicial Dist. Ct. ex rel. County of Clark*, 116 Nev. 88, 993 P.2d 50 (2000).

Here, Sims has no “plain, speedy, and adequate remedy in the ordinary course of the law” as this matter concerns the production of materials needed by Sims to prepare for trial. Further, this matter concerns an important issue of law that needs clarification. Thus, jurisdiction is proper and this Court may consider this issue.

VI.

ARGUMENT

A. THE DA’S OWN MEMO STATES THE DA’S OFFICE WILL HAND ALL INCULPATORY EVIDENCE OVER TO THE DEFENSE

As stated, the Clark County District Attorney’s Office issued its Memo in April 2016. The Memo states, in pertinent part:

All deputy district attorneys are expected to be familiar – and comply – with the controlling opinions of the Nevada Supreme Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court with regard to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 10 (1972), and their progenies.

[...]

All inculpatory evidence that the deputy district attorney intends to use at trial during his/her case-in-chief will be provided. Inculpatory

evidence that the deputy district attorney does not intend to use during his/her case-in-chief, but may use in cross-examination or in rebuttal, is not discoverable pursuant to this policy. Irrelevant material will not be provided.

(PA I:35-36). The State's response, however, to Sims's request for proffer content was as follows:

Acknowledging the unpublished case regarding disclosure of proffer content, this Court reasoned that the 2016 Discovery Memo issued by the Clark County District Attorney mandated the disclosure. The Court referenced a particular section of the Memo – under the heading “Statutory Requirements,” the paragraph which states, “All inculpatory evidence that the deputy district attorney intends to use at trial during his/her case in chief will be provided.” The Court stated although no statute or case law mandated disclosure of the proffer content, the sentence in the 2016 Memo obligated the State to provide it as the proffers represent inculpatory evidence.

[...]

The State respectfully asks the Court to reconsider its order. In context, the sentence appears under the heading “Statutory Requirements.” The reference to “inculpatory evidence” is acknowledgement that the defense has the opportunity to inspect evidence pursuant to NRS 174.235, the discovery statute – meaning physical evidence like photos, recordings, objects, or pre-existing statements to be used in the State's case-in-chief. It is not a pledge to create evidence or summaries of oral statements.

(PA I:203-204). The State argues that the provision in its own Memo does not mean what it plainly states, but that “inculpatory evidence” means only what the State decides it means.

The State's Memo, however, does not state only inculpatory evidence that is written, or only inculpatory evidence physically located within the Deputy District Attorney's case file would be turned over – the State's Memo promises that *all*

inculpatory evidence the State intends to use in its case-in-chief will be provided. The State should be held to the standard of its voluntarily promulgated policy.

B. PETITIONER'S CO-DEFENDANTS ARE NOW TESTIFYING AGAINST HIM AND THEIR TESTIMONY WILL BE INCULPATORY AS TO PETITIONER

As stated, the Memo assures the Defense will receive “[a]ll inculpatory evidence that the deputy district attorney intends to use at trial during his/her case-in-chief will be provided.” (PA I:26).

As pointed out by Sims’s counsel at the September 9, 2016 hearing, Sims’s Co-Defendants’ statements to police dramatically downplayed their own involvement in the crime charged. For example, Williams “minimized Mr. Sims’ involvement” in the alleged activity (PA I:81) and “barely [got] ... to the point where Mr. Sims even has a weapon at the scene, let alone whether or not he was the shooter.” (PA I:100).

At the October 6, 2016 hearing, Sims’s counsel continued to give examples of why he believed the Co-Defendants’ testimony would be inculpatory. Both Co-Defendants gave “partial admissions” of criminal activity with “significant minimization.” (PA II:258). Williams, in particular, was “interviewed [] over and over and over” by detectives who believed Williams was “protecting” Sims, and Williams did not say anything to the police implicating Sims other than that he had a gun. (PA II:258). Sims’s counsel iterated that Williams testimony would

inculcate Sims because, in exchange for her testimony, “she’s pled to a couple of robberies and she was previously facing first degree murder.” (PA II:258-259).

Similarly Range “minimized” his involvement during his police interview and was also “accused of protecting Sasha [Williams] in his statement.” (PA II:263). In fact, Range told police he did not even have a gun and that he and Sasha were merely caught in the crossfire of the alleged conflict. Like Williams, Range has also received an extremely favorable plea agreement. Neither Sasha Williams nor Brandon Range will agree to be interviewed by Sims’s counsel (PA I:101); therefore, the only way for Sims to know for sure whether Williams and Range will provide testimony consistent with or different from their statements to the police and at trial is through the proffer content.

Based upon the fact that both Williams and Range received extremely favorable plea agreements while Sims faces the death penalty leads to the conclusion that their testimony is going to be more helpful to the State than their statements to the police. As Sims and Morris are the only two Defendants facing a capital murder conviction, the testimony of the Co-Defendants will likely inculcate Sims.

As was pointed out by Sims in his *Opposition to State’s Motion to Reconsider Court’s Ruling on Defendant’s Motion to Compel Discovery Based on District Attorney Open File Policy*:

The State is attempting to self-servingly interpret its [Memo] to serve as the proverbial sword and shield. It wants to strictly interpret the memorandum to limit its obligations to produce evidence to the defense, but loosely interpret those portions of the memorandum that require the production of inculpatory evidence, which logically includes the content or basis of a potential proffer of a cooperating witness.

(PA I: 213). The District Attorney's own promise to the Defense is to provide all inculpatory evidence, and the State should be held to this promise.

C. PETITIONER'S CASE IS DISTINGUISHABLE FROM *STATE V. EIGHTH JUDICIAL DISTRICT COURT OF NEVADA*.

In requesting reconsideration, the State relied upon *State v. Eighth Judicial District Court of Nevada*, 2013 Nev. Unpub LEXIS 126, 2013 WL 324283 (2013) (unpublished disposition), and it was clear the district court relied upon it as well. (PA II:260).

In *State*, a Defendant, Price, was awaiting trial for the alleged beating and robbery in a motel room. *Id.* Edelman was a Co-Defendant who negotiated with the State for a more favorable plea agreement. *Id.* The district court ordered the State to disclose a summary of Edelman's unrecorded oral proffer made during negotiations. *Id.* Upon writ petition, the Nevada Supreme Court found that, at the time, there was "no controlling legal authority" that would compel the State to turn over the oral proffer content. *Id.* The Court did, however, mention it "appreciate[d]" the district court's concerns about Price facing trial without knowing the precise substance of Edelman's oral proffer." *Id.*

This case is distinguishable from Sims's case. When the *State* decision came down in 2013, the Discovery Memo had not yet been written and disseminated; in fact, it was not disseminated to Judges and the Defense Bar until 2016. When *State* was decided, the DA had not made a plain and unambiguous promise to the Defense Bar that *all* inculpatory evidence intended to be used at trial would be provided to the Defense.

Additionally, in 2016, the Nevada Supreme Court decided *Quisano v. State*, 368 P.3d 415, 132 Nev. Adv. Op. 9 (2016) (unpublished disposition). Quisano was charged with murder and, prior to trial, he entered a guilty plea agreement. *Id.* at 418-19. At sentencing, Quisano called the victim's mother, who testified Quisano should receive a light sentence with no prison time, and the State cross-examined her using an affidavit not previously disclosed to Quisano. *Id.* at 419-20.

As in this case, the State argued in *Quisano* it was "only committed to disclosed evidence under NRS 174.235, *Brady*, and *Giglio*[".]” *Id.* at 423. However, the Nevada Supreme Court, in examining the DA's "discovery policy" furnished to the defense (which, except for the affirmation that the DA does not have an open-file policy, is substantially similar to the Memo), found that Quisano reasonably relied upon the State's policy to provide discovery, and that the withholding of the affidavit constituted misconduct. *Id.* at 425.

Based upon the Memo that was disseminated to the Defense and explicitly promised the State would turn over all inculpatory evidence intended to be used in the State's case-in-chief, Sims's case is distinguishable from *State*, which was decided three years before the Memo was distributed to Judges and the Defense Bar.

D. PETITIONER IS ALSO ENTITLED TO THE PROFFER CONTENT AS IMPEACHMENT EVIDENCE.

“When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility” is improper. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)) (internal quotations omitted). The Nevada Supreme Court has held any evidence that “provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense against prosecutorial attacks” must also be disclosed. *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (citing *Kyles v. Whitley*, 514 U.S. 419, 442 n.13, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

Regardless of how one interprets the Memo or the District Attorney's promise to turn over all inculpatory evidence, Sims is still entitled to the proffer

content as impeachment evidence under *Giglio*, as was argued by his counsel at the September 9, 2016 hearing:

But I want ... the Court to understand our position that you cannot segregate and differentiate holdings by the U.S. Supreme Court[] and discovery statutes based on the specific argument that's being presented at the time. Under *Giglio* ... we have an absolute right to know all impeachment material of these folks. *Giglio* does not stand for the proposition that a prosecution has the election to determine when they [will] and will not exercise their discretion as to when to memorialize materials that may yield impeachment information.

(PA I:85). Sims's counsel also pointed out this case does not hinge on science or forensics, but on the testimony of the individuals who were present at the time of the alleged crime; therefore, the most important witnesses will be the testifying Co-Defendants. (PA I:87).

Similarly, at the October 6, 2016 hearing, Sims's counsel pointed out:

Mr. Sgro: Because we're talking about the proffer, how could there, under *Giglio*, when someone makes a statement to the police –

The Court: Okay.

Mr. Sgro: – that is exculpatory, let's just say, I had nothing to do with this crime.

The Court: Right.

Mr. Sgro: Right? Then they make a deal with the State to be a cooperating witness.

The Court: Right.

Mr. Sgro: Right? Now they had everything to do with the crime, right? And not only did they, but the persons against whom their testimony will be offered –

The Court: Right.

Mr. Sgro: – was also a principal actor, right? Everything that they say in the proffer is an inconsistent statement, right?

[...]

Mr. Sgro ... Because I'll tell you in our case, it's not that extreme. There are partial, partial, to be fair to the State, there are partial admissions. However, there is significant minimization, okay. Sasha Williams, who's one of the cooperating codefendants in our case was beaten up, not physically but verbally, beaten up by the two detectives that interviewed her over and over and over because their position during the entire interview was she was protecting Maurice Sims because at that time they were romantically involved [...] She doesn't say Maurice did anything in this case ...

The Court: Okay.

Mr. Sgro: Now she's going to come in and say he did all sorts of things. And how do I know that? I know that because she's pled to a couple of robberies and she was previously facing first degree murder. I'm assuming the proffer went very well. So how then, notwithstanding what you just ruled on, how then do I not get the proffer anyway because other than calling her to testify as to an inculpatory fact that he possessed a weapon, everything that she says relative to the ongoings inside the residences where these victims were killed is inconsistent.

(PA II:257-258). Thus, it stands to reason that Williams and Range were given plea agreements because they agreed to testify as to a different set of facts than were initially given to law enforcement. Their proffer content, therefore, is impeachment evidence and, under *Giglio*, should be turned over to Sims.

///

///

///

///


///

///

VII.
CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests this Court to grant a Writ of Mandamus or Prohibition instructing the district court to order the State to turn over to Petitioner evidence of the proffer content of testifying Co-Defendants Williams and Range.

DATED this 19 day of January, 2017.

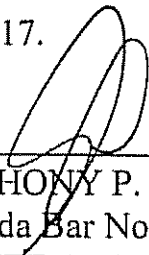


ANTHONY P. SGRO, ESQ.
Nevada Bar No. 3811
IVETTE AMELBURU MANINGO, ESQ.
Nevada Bar No. 7076
720 S. 7th Street, 3rd Floor
Las Vegas, NV 89101

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition for Writ of Mandamus, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19 day of January, 2017.



ANTHONY P. SGRO, ESQ.

Nevada Bar No. 3811

IVETTE AMELBURU MANINGO, ESQ.

Nevada Bar No. 7076

720 S. 7th Street, 3rd Floor

Las Vegas, NV 89101

NRAP 27(e) CERTIFICATE

I HEREBY CERTIFY that service of the foregoing PETITION FOR WRIT OF MANDAUMUS made this 20th day of January, 2017, by hand delivering a true and correct copy of the same to the offices of:

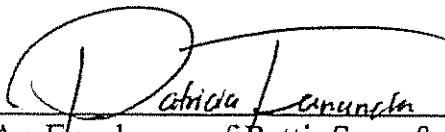
THE HONORABLE JUDGE DOUGLAS W. HERNDON
REGIONAL JUSTICE CENTER, 16TH FLR
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89155
TEL: (702) 671-0591
FAX: (702) 671-0598

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

And by mailing a correct copy to:

ADAM PAUL LAXALT
Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Dated this 20th day of January, 2017.


An Employee of Patti, Sgro & Roger