

1 time of the opposition --

2 THE COURT: Right.

3 MS. MANINGO: -- they said they no had intent to bring any bad acts in.

4 MS. WECKERLY: That's correct.

5 THE COURT: Right.

6 MR. DIGIACOMO: For the record, I went through this yesterday because
7 Ms. Maningo was looking for something that she thought she didn't have, all of
8 the documents we used to create the notice that's going to be filed today was
9 discovered in January of 2014, I think is about when it was. It's all the --

10 THE COURT: Okay.

11 MR. DIGIACOMO: -- bindover information and judgments of convictions
12 for all those prior things. So you do not -- we don't have anything we haven't
13 previously turned over.

14 THE COURT: All right. So just for the record, I'll grant the motion for
15 disclosure of uncharged evidence regarding the trial, understanding the
16 representation being that there isn't anything that's being produced during the
17 case-in-chief that hasn't been discussed.

18 And as far as the potential penalty hearing, I'm just granting the
19 motion in conformance with the rules and the statute about when you need to
20 provide those things. If there's something that comes up in what you provided
21 today that gives rise to some other issue, then we will put it back on calendar.

22 MS. MANINGO: Okay. Thank you, Your Honor.

23 THE COURT: All right. Then let's do one more then take a short -- short
24 break because I want to read this case and let everybody stretch and use the
25 restroom.

1 Motion to federalize all motions, objections, and requests.

2 MS. MANINGO: Yes. And, Your Honor, I think the State, let me start
3 with they said this motion is without meaning. And I think -- what -- I guess
4 the State's frustration and sometimes the defense frustrations, and they point
5 out that, you know --

6 THE COURT: Right.

7 MS. MANINGO: -- a lot of times federal attorneys are trying to impose
8 certain standards or make judgments on us people that are trying cases in the
9 State court and to some extent that's true. But it's still our obligation to make
10 sure that they've made a record, we've preserved it, and the reason we filed
11 this motion is to make sure that we're not waiving any federal basis for an
12 objection, as you know, once we're in the heat of trial.

13 THE COURT: Right.

14 MS. MANINGO: It's easy when we're filing a brief to make sure that we
15 cite to the State and Federal constitution and all that. But when we're in the
16 heat of trial, it's very difficult to every time there's an objection made, to go
17 into what turns into a speaking objection with a, you know, pursuant to, you
18 know, the next five amendments that I'm about to talk about. That's not what
19 generally happens in the flow of trial, but we want to make sure that the
20 record's clear that we're not waiving any Federal objections. And so --

21 THE COURT: Okay.

22 MS. MANINGO: -- that's the basis for the motion.

23 THE COURT: Well, I think the way I've responded to this before is to
24 say, look, I have no problem with the issue that you're raising. You still have
25 the obligation to make the objection. You've still got the obligation to state a

1 basis for the objection. I just don't expect there to be a five minute recitation
2 on every objection as to all the Federal case law and everything that -- that --
3 that's the underpinnings of what you're doing.

4 So even if I say, you know, I'm going to grant your motion on
5 federalizing the objections and stuff that you raise at trial, it does still mean
6 you've still got to make those objections and you've got to cite the basis for
7 those, you know, what the legal basis is for your objections.

8 Ms. Weckerly, you have anything?

9 MS. WECKERLY: No. I have yet to understand this motion.

10 THE COURT: Yeah, I know. I know.

11 So anyway, I'll leave it, I'll leave it at that. I'll grant it as I said.

12 MR. SGRO: Your Honor, may I ask a quick question?

13 THE COURT: Sure.

14 MR. SGRO: I know you want to take a break but this is quick, when we
15 do objections, do you do the thing, like, at the end of the day we make our
16 record on everything or do you do them one by one and we come up?

17 THE COURT: So, well, what do you mean, like, going outside the
18 presence of the jury to talk about them?

19 MR. SGRO: We have an -- this just reminds me to ask, we have an
20 objection, right?

21 THE COURT: Okay.

22 MR. SGRO: Objection. Whatever it is. Hearsay. We didn't get it in
23 discovery. Whatever it is.

24 THE COURT: Well, so here's what'll happen, let's say you raise an
25 objection, if to me it's an incredibly obvious and meritorious objection, then I'm

1 probably just going to say sustained.

2 MR. SGRO: Which most of ours will be, just so you know.

3 THE COURT: Right. If -- if you raise an objection and on occasion I might
4 say, State, you know, i.e., respond to that objection and then maybe I'll say
5 approach the bench or whatever it may be and then I'll rule on it.

6 It may be that you raise an objection and I get the sense right away
7 that it's kind of lengthy what your objection's going to be, in which case I'm
8 going to say approach the bench. Now, all our bench conferences are recorded.
9 But when we take a break, then you can, you know, revisit and make a more
10 lengthy record if you want to so you know the white noise isn't going on,
11 things like that.

12 But, no, I generally don't say let's send the jury out, get them back
13 in, ten minutes of testimony, oh, we've got another objection, send the jury
14 out, go back in.

15 MR. SGRO: No. I've actually had the experience where we do the
16 predicate quick objection --

17 THE COURT: Right.

18 MR. SGRO: -- respond. Hearsay. Not offered for the truth.

19 THE COURT: Right.

20 MR. SGRO: Let's just say.

21 THE COURT: Right.

22 MR. SGRO: Then the judge let's everyone go at 4:45.

23 THE COURT: And you make a more full record?

24 MR. SGRO: And now -- right.

25 THE COURT: Sure.

1 MR. SGRO: And some judges do what you just explained, approach,
2 quick conference at the bench.

3 THE COURT: Right.

4 MR. SGRO: With the white noise and I just -- your habit, I guess, was
5 what I was looking for.

6 THE COURT: Yeah. The habit, I guess, if you had to characterize it,
7 would be more of doing what you just said which is you make the more lengthy
8 record when we take a natural break in the proceedings.

9 Okay. Do you still need -- are you still getting out of here to catch
10 a plane?

11 MR. DIGIACOMO: No. I have a doctor's appointment, sir.

12 MR. SGRO: I am.

13 MR. DIGIACOMO: At 3:00. But I have a three-week murder trial starting
14 on Monday.

15 THE COURT: Okay.

16 MS. WECKERLY: And Judge Scotti just told me that I can't get out of
17 the paper case with the out-of-custody defendants the week after. So I've got
18 a lot things going on. But apparently, if we're going to be here all day, we're
19 going to be here all day. I think I have the last ten motions. I don't know if
20 we'll get to those today.

21 THE COURT: No, we're going to get to everything today. It's just
22 whether you wanted to -- I had told you, you know what, get prepared, we'll
23 just go through lunch and get it all done so everybody can be on their way.
24 You had talked about bringing lunch in for --

25 MR. SGRO: Which I would prefer. During this break, I'll make a call and

1 bring some food in.

2 THE COURT: That's fine with me, look, I don't need to eat. I don't know
3 that --

4 You're not going to let him or would you let him eat if they bring in
5 food?

6 MS. MANINGO: He hasn't -- well, he's not there, so he hasn't eaten.

7 THE CORRECTIONS OFFICER: I'll let him eat.

8 THE COURT: You're going to let him eat? Okay. Yeah, so if you want
9 to order --

10 MR. DIGIACOMO: Judge, I need at least some time.

11 THE COURT: You've got to order something for DiGiacomo.

12 MR. DIGIACOMO: We have -- we have to do a final edit on the
13 15-day-notice.

14 THE COURT: Okay.

15 MR. DIGIACOMO: And I think I can read the jury questionnaire. But I've
16 also got to get my motion to continue because Scotti wants it on an O.S.T. for
17 Tuesday.

18 THE COURT: Okay.

19 MR. DIGIACOMO: Filed in that other case, so I at least need a half hour.
20 Can we at least take a half-hour-break?

21 THE COURT: Yeah.

22 MR. DIGIACOMO: If Tony wants to order the food, whatever he wants to
23 do.

24 MS. MANINGO: Yeah, by the time -- by the time you guys get back, the
25 food will be here. Right? Is that what you want to do?

1 THE COURT: How many more motions does Pam have?
2 MS. WECKERLY: I think, Your Honor, I have three.
3 THE COURT: Okay.
4 MS. WECKERLY: But I'm sure they're going to be quick.
5 THE COURT: They're going to be quick? Okay. We're going to be in
6 recess.
7 MS. WECKERLY: Marc's are faster.
8 THE COURT: We'll be in recess for 30 minutes.
9 MR. DIGIACOMO: Mine are going to be really fast. I'm submitting them
10 on the pleadings. Mine are all that kind of stuff.
11 THE COURT: All right. Then we'll be in -- we'll be break for 30 minutes
12 then.
13 MS. WECKERLY: Thank you.
14 [Recess at 12:43 p.m.; proceedings resumed at 1:28 p.m.]
15 THE COURT: All right. We're going to be back on the record in 287414.
16 Mr. Sims is present with his attorneys. State's attorneys are present as well.
17 Where did we leave off, guys?
18 MR. SGRO: We have -- it's number 16. It's motion to preclude the State
19 from conducting background checks on potential --
20 THE COURT: Correct.
21 MR. SGRO: Is the Court there?
22 THE COURT: Yep.
23 MR. SGRO: May we proceed, Your Honor?
24 THE COURT: Yes.
25 MR. SGRO: So the long and short of this motion is this, Your Honor, in

1 the last couple of years there has been a significant amount of conversation in
2 the Nevada Supreme Court relative to jury selection. There is a case that came
3 down called Conner, a case called -- I never remember this name -- Artiga --

4 THE COURT: A civil case.

5 MR. SGRO: Artiga-Morales.

6 THE COURT: Right. Oh, no, I'm thinking of Sears-Page. But go ahead.

7 MR. SGRO: State versus Jermaine Brass has come down the last two
8 years. I'm actually doing the retrial of that case. That was an issue where
9 there was a race-neutral reason that was proffered without an evidentiary
10 hearing. And most recently, just a few months ago, was a case called McCarty
11 that actually Mr. DiGiacomo and I were two of the counsel in that case. And
12 parenthetically, Your Honor, we cited to McCarty in our pleadings. The State's
13 opposition does not address McCarty whatsoever.

14 And so here's -- here's the situation, Mr. Sims is Hispanic and he's
15 African-American. He's entitled to, as you know, a jury of his peers, a
16 cross-section of the community, all those beautiful phrases we see in the case
17 law.

18 THE COURT: Okay.

19 MR. SGRO: And we have the right and the mandate, obviously, to
20 challenge any peremptory challenge that seeks the exclusion of persons who
21 represent a cross-section of the community, specifically, persons of Mr. Sims'
22 same race, gender, creed, *et cetera*. And so I want to back into this argument
23 based on what happens in McCarty. Okay? McCarty is a capital murder case,
24 right? We're doing jury selection and an African-American juror responds in
25 such a way as to give some pause to the State.

1 SCOPE -- SCOPE is done, background check is done on that juror.
2 The race-neutral reason proffered in the McCarty case, and just to make sure I
3 have it correct, they had a valid work card at a strip club. Okay? So in that
4 trial the State proffers to our trial judge, who's Judge Villani, hey, here's the
5 race-neutral reason, this particular prospective juror happens to be
6 African-American; however, our race-neutral reason is that this
7 African-American juror has a valid work card at a strip club.

8 Now, the Nevada Supreme Court simply reduced it to the following:
9 How many other jurors did you run background checks on such that you
10 could determine if that if this is your policy that you exclude all persons that
11 have valid work cards at strip clubs, how many other jurors were subject to
12 your search to determine consistency; and the answer was zero. So the only
13 person they did a background check on in that particular case was this one
14 African-American. And then, obviously, there was conversation about whether
15 or not that proffered reason was pretextually. Right? And McCarty was
16 reversed, Your Honor, trial and penalty, just some months ago.

17 So -- so now we back into some of the opinions that have begun to
18 come down relative to the enforcement on our part to traverse a peremptory
19 challenge when it looks like it's -- it's not neutral, but it's, in fact, race-related.
20 So it strikes me, Your Honor, two things, one is the combination and cumulative
21 impact of the cases that I have suggested to the Court need to be viewed hand
22 in glove, one with the other, because each case deals with a different
23 component of what is involved in selecting a jury. And for, call it coincidence,
24 call it this is something now that they're shining a flashlight on, we have four or
25 five published decisions that have reversed cases all relative to jury selection.

1 So there is a -- there is a footnote in one of the decisions that we
2 referenced where Justice Cherry, this is not in the majority opinion, it's a
3 footnote, and this is the first one that comes down, this Artiga-Morales versus
4 Nevada case.

5 THE COURT: Okay.

6 MR. SGRO: And he suggests that at some point there has to be the
7 leveling of a playing field such that defendants who make the request, right,
8 and that was the predicate to his comment in the footnote.

9 THE COURT: Right.

10 MR. SGRO: The defendants that make the request should receive what it
11 is that they're asking for to make it a level playing field. And I read
12 Artiga-Morales to be sort of the blueprint of what Justice Cherry is telling us
13 down here at the trial level to do. Now, when you look at -- you look at
14 McCarty, there is the one, I can't remember if it was Judge Silver before she
15 went to the Appellate Court or Judge Cadish, one of the two of them, I think it
16 was Judge Cadish and I can't remember the name of the case, but she had said
17 she was going to grant an evidentiary hearing on a race-neutral --

18 THE COURT: That was Judge Silver.

19 MR. SGRO: Silver. Okay. She came --

20 THE COURT: And then she decided the panel was fine, she went
21 forward, and she got reversed.

22 MR. SGRO: Yes, sir, exactly.

23 And, again, you can, you know, reasonable minds can agree to
24 disagree as to the reason but, man, it seems highly likely the Nevada Supreme
25 Court has finally shined a flashlight on this issue of how to deal with

1 peremptory challenges particularly when the race of the defendant is an issue in
2 terms of the cross-section of the community. So here's what I -- so I -- that's
3 the big picture.

4 THE COURT: Okay.

5 MR. SGRO: So backing into this motion, we have asked that to the
6 extent --

7 THE COURT: Let me interrupt for you minute and just ask a quick
8 question. Is the State, and I don't really know, well, is the State opposed to
9 them having this information or that you have to be the person that gives them
10 this information under the current state of the law?

11 MR. DIGIACOMO: And, I'm sorry, since he decided to bring up McCarty I
12 figured I should be the one that responds to this since I was there.

13 THE COURT: But just that one question for right now. Are you guys just
14 taking the position, hey, we don't care what they get, it's just not our
15 obligation to provide this to them?

16 MR. DIGIACOMO: Our position is that the District Court can do whatever
17 they want to provide them whatever information you feel appropriate to provide
18 them. We'd ask that any information you provide them, you provide to us.

19 THE COURT: Okay.

20 MR. DIGIACOMO: But you cannot order us --

21 THE COURT: To turn it over to them?

22 MR. DIGIACOMO: -- to turn over what we do or to conduct the search
23 itself.

24 THE COURT: And just so nobody's in the dark about it, when the motion
25 was first filed, because I'm aware of Artiga-Morales and I'm on the criminal

1 procedure commission, one of the 55 commissions the Supreme Court has
2 going on that I'm involved in, my first thought was has anybody ever asked to
3 get those for jury selection just like the defense asks to get them on cases since
4 you guys aren't public defenders. Public defenders can SCOPE people just like
5 the State can.

6 And I didn't -- and Molly told me nobody's ever asked her to provide
7 that information. And I don't know if there was some particular rule that we
8 have within the court that I was unaware of about providing that information.

9 MR. SGRO: You know, on --

10 THE COURT: But, I just -- my guess was you guys, from the State's
11 perspective are probably like I don't care what they have, but we're not going
12 to provide them things that we're not -- that there is no obligation for us to
13 provide them. But we sure want to get what they're getting if the Court's
14 going to get involved in it at all. So am I encapsulating that correctly?

15 MR. SGRO: That -- that may alleviate all of this. Because to the extent
16 that there is a disparity in what we can get and what they can get, that's an
17 issue, right? And that's what Justice Cherry spoke to. However, if the Court is
18 inclined, when it receives the filled-out jury questionnaire to run SCOPE and put
19 it on the front page of each of the questionnaires before -- because my
20 experience has been they go from the Jury Commissioner back to the
21 department that -- that sought them out.

22 THE COURT: Right.

23 MR. SGRO: If we can get the SCOPE put as the face sheet of page 1 and
24 that's the sum total of the investigation, and I use that term loosely, the
25 background investigation that's -- that's completed, I think that quells a lot -- a

1 lot of the issues.

2 The difficulty has been, and Mr. DiGiacomo and I and actually Ms.
3 Weckerly, we had a different case in front of Judge Tao who actually ordered
4 the SCOPES and then reversed the order after the trial got continued. In other
5 words, we thought we were going to trial, there was a lot of stuff going on,
6 and in the heat of that battle, he ordered the disclosure. The trial would get
7 postponed, things calmed down, it was re-raised, and Judge Tao then reversed
8 his prior decision. So what I'll tell you --

9 THE COURT: Who's got that one now?

10 MR. SGRO: Judge Thompson tried the case.

11 MR. DIGIACOMO: Well, we've since tried it.

12 MR. SGRO: The case is done.

13 THE COURT: Okay.

14 MR. SGRO: What I'm suggesting to Your Honor is that I don't know that
15 there is a roadmap yet for this stuff. The easiest thing, if you're willing to have
16 Molly do it and attach it as a face sheet, then I have nothing more to say and I
17 think it's -- we can resolve it that way.

18 THE COURT: But just to be clear that doesn't, I mean, if I was inclined to
19 that, I can do that. But if there is something else they're doing to look into
20 jurors, just like you guys could go out and hire a private investigator or
21 something to look into people, that's separate from SCOPE.

22 MR. SGRO: I understand that and --

23 THE COURT: Okay.

24 MR. SGRO: -- that brings up the next -- the next tier down of the
25 argument. So here's the thing, Your Honor, prosecutors and defense attorneys

1 are not similarly situated in many different respects. Jury selection, they have
2 obligations that we do not have. I would suggest to the Court that one of the --
3 there are two -- there are two broad-stroke analysis that occur relative to the
4 striking of a minority juror and comparing that to the race-neutral reason.

5 Okay?

6 THE COURT: Okay.

7 MR. SGRO: One -- one analysis is this, I struck Minority Juror X because
8 they're a truck driver, right? Now, turns out Minority Juror X is a truck driver;
9 however, Nonminority Jurors A, B, and C are also truck drivers.

10 THE COURT: Okay.

11 MR. SGRO: Right? So that's why I say if you give us all the SCOPES,
12 right, that alleviates that analysis.

13 THE COURT: Right.

14 MR. SGRO: The other area of inquiry was similar to McCarty which is I
15 struck Minority Juror X because they are fill-in-the-blank, a student at UNLV,
16 former law enforcement, whatever it is. Right? How many others did you seek
17 out to determine if they possessed that same characteristic such that you
18 would be consistent in your presented policy?

19 THE COURT: Right.

20 MR. SGRO: Right? So there is the top down and then the bottom up.
21 Right? So the SCOPE cures the top down issue. Right? If there's a motion,
22 peremptory challenge on a minority juror because they're truck driver, we can
23 quickly see who else is there.

24 THE COURT: Well, I don't know that SCOPE's going to tell you whether
25 they're a truck driver.

1 MR. SGRO: And I'm -- I'm, you know, I'm just pulling out of the air. It
2 could be --

3 THE COURT: I get it. I get it.

4 MR. SGRO: -- work card, let's use the work card. Let's get a little more
5 realistic. The work card in a gaming, the work card at a topless club, those are
6 things that are objectively seen on a SCOPE.

7 THE COURT: Right.

8 MR. SGRO: Okay? And if we have all the SCOPES, and there is a work
9 card applicant or a work card that's been given to someone and the State says
10 we never let anyone that has this work card sit as a juror for our own personal
11 reasons, great. Now, let's look at everyone else that has a work card and see if
12 the peremptories are used the same way.

13 THE COURT: Okay.

14 MR. SGRO: So the -- so the SCOPES, to us, quell top down.

15 THE COURT: Okay.

16 MR. SGRO: No issue. The difficulty becomes the extent to which there
17 is additional investigation, and I use at that term loosely, investigation done as
18 to a single individual who may be of a minority background or descent as
19 opposed to the entirety of the panel. That was the holding in the McCarty
20 decision and -- not the holding, one of the factual predicates under which the
21 McCarty decision turned such that the case was reversed was a discussion in
22 the case that of all the prospective jurors, the only person sought for the
23 determination of a work card was this one African-American person.

24 THE COURT: Okay.

25 MR. SGRO: So to the extent there is additional investigation that is done,

1 the motion does seek that information. Because, again, they have obligations
2 pursuant to constitutional and statutory standards that we do not. They -- we
3 don't have to -- we don't have to give a race-neutral reason. Right? We can
4 we can strike whoever we want.

5 MR. DIGIACOMO: Actually, that applies to both of us.

6 THE COURT: I actually think Batson applies across the board.

7 MR. SGRO: Yeah, but I tell you --

8 THE COURT: Batson or J.E.B.

9 MR. SGRO: Yeah, but if I tell you just I have far more liberty, far more
10 liberty, we can -- we're going to disagree on this motion.

11 THE COURT: Okay.

12 MR. SGRO: But let's just suggest that in my experience we have far
13 more liberty, and, in fact, if there ever comes a time when the defense strikes a
14 minority we hear lots of accolades because they say, well, see this is what can
15 happen and they're use, you know, we go down this very, very different road
16 than a prosecutor does.

17 THE COURT: Okay.

18 MR. SGRO: I think it's fair to suggest we find ourselves --

19 THE COURT: I think that the fair way to characterize it is that you all are
20 situated differently in many respects and leave it at that.

21 MR. SGRO: Hundred percent.

22 THE COURT: But I think constitutional prohibitions against deliberately
23 excluding minorities from a jury applies both ways actually.

24 MR. SGRO: I agree with that general principle for sure. So I guess I'm
25 suggesting this, there are two components of this motion, the SCOPE cures 50

1 percent of our relief --

2 THE COURT: Okay.

3 MR. SGRO: -- requested. The other relief we seek is to the extent that
4 the State does any additional investigation beyond the SCOPE, that we be
5 provided with that investigation. And, Your Honor, understand if for no other
6 reason to simply know who the person was that this was investigated. Right?
7 And I will -- I will be even making another point here that I have been in cases
8 with these prosecutors where they pull information because an individual has a
9 criminal conviction. Right? And they may have misstated whether it's a
10 misdemeanor or a felony, whatever it is. And that person's not always of a
11 minority.

12 So I'm suggesting that this is for contemplation of the protection of
13 the record relative to the peremptory challenges based on these recent, I say
14 recent because McCarty's just a few months ago, Conner was two or three
15 summers ago.

16 THE COURT: Right.

17 MR. SGRO: And Buchanan is the other one, Your Honor, and these four
18 or five cases have all come down the last four or five years. So I would ask the
19 Court to consider as a remedy the inclusion of the SCOPEs, attach them to the
20 questionnaires, and then secondarily, to the extent the State does conduct any
21 background investigation beyond that, that we be provided that information.
22 And I'll submit it, Your Honor.

23 THE COURT: Mr. DiGiacomo.

24 MR. DIGIACOMO: Yes, Judge. And I told you before I was going to
25 submit everything, this one I won't be. Just briefly, because I was kind of

1 joking with Mr. Sgro that he didn't actually lie to the Court this morning, but
2 today he's certainly misrepresented or misconstrued or whatever it is we want
3 to call him, because I know Mr. Sgro really remembers Mr. McCarty because
4 Mr. McCarty there was actually two SCOPEs run, two -- both of them on young
5 females. One of which was a young Caucasian female, one of which was an
6 African-American female.

7 Ms. Decaire, the Caucasian woman, did not have any SCOPE.

8 THE COURT: Right.

9 MR. DIGIACOMO: And the other woman had a SCOPE and it was a work
10 card for an adult, a nightclub. And the argument that was made to the District
11 Court was an equal protection argument, they should have access to SCOPE
12 and we shouldn't. And the Court has rejected that consistently. What actually
13 happens, and I take a lot of solace in Justice Pickering's dissent about how
14 intellectually dishonest the -- the majority opinion is, is essentially they were
15 saying I'm a racist because I thought perhaps Stripper Crazy shouldn't be on a
16 jury.

17 And that's -- be that as it may, McCarty stands for the idea that
18 you have to leave strippers on your jury because God knows if not, you're a
19 racist. That's the only thing you can take from that McCarty. There is
20 absolutely nothing else you can take from it.

21 In that vein, I think the Court sort of understands the position of the
22 litigants, as a member of the -- of the Clark District Attorney's Office, I got no
23 beef, no issue, and no dog in between what the Court decides they're going to
24 do for the defense.

25 THE COURT: Right.

1 MR. DIGIACOMO: I would note, though, that the footnote Artiga-Morales
2 seems to suggest it would be improper for the Court to do that. And it says
3 specifically in there that such a formal rulemaking procedure is implicitly
4 authorized and better suited to the job of assessing the scope of the disparity,
5 the impact on juror privacy interests, the need to protect work product,
6 practicality, and fundamental fairness than this case, with its limited record and
7 arguments. And that was exactly what, in McCarty, is essentially what they
8 came back with as it relates to idea this -- that they have some equal protection
9 issue with the government is, look, at the end of the day, there is a lot more
10 interest here than just a criminal defendant in a trial and the access to juror
11 information. There is privacy interests and everything else. And, thus, we
12 think it should be part of a rule and not something that's done on an *ad hoc*
13 basis.

14 So whatever the Court decides, we're fine with as a litigant, just I
15 think it should be noted for the record that that footnote seems to suggest it
16 would be improper and we'll submit it to the Court.

17 THE COURT: Just so I understand, is that, from a general proposition, do
18 you -- when you guys have done it, is it just individuals or you just run the
19 panel? Because McCarty obviously was just individuals.

20 MR. DIGIACOMO: I have never -- I -- yeah.

21 THE COURT: But I realize that was a while ago.

22 MR. DIGIACOMO: Yeah, in fact, what had happened in McCarty is that
23 the juror had actually said she had a brother who had some sort of criminal
24 history, but she couldn't remember what his criminal history was. And she was
25 very vague about a number of other things. It wasn't the only race-neutral

1 reason that we struck her, even though if you read the opinion it is. And, thus,
2 we went on SCOPE to find for her and, in fact, the reason we had run
3 Ms. Decaire was actually to determine whether or not she was a stripper.

4 THE COURT: Okay.

5 MR. DIGIACOMO: And then for this witness, we had gone on for a
6 totally different reason and that came up during the course of running her,
7 trying to identify what her -- what her maiden name was so that we could
8 identify her brother.

9 THE COURT: So you all aren't going into trials automatically running
10 people on SCOPE?

11 MR. DIGIACOMO: No. I mean, it has happened before in some cases.
12 But we don't normally have the time to do so.

13 THE COURT: Well, yeah, I mean, look, in my reality, absent a jury
14 questionnaire case, you get the list of jurors when we walk into court and I'm
15 not going to have a hundred people sitting outside the door and say now I'm
16 going to stop and have Molly go back and run SCOPE on everybody. That's
17 kind of silly.

18 MR. DIGIACOMO: I used to -- we used to have access to SCOPE in the
19 courtroom. That's why in McCarty we had access in the courtroom when the
20 old Wi-Fi was up. Now, because of the Wi-Fi and the NCIC rules, you can no
21 longer have SCOPE access on a standalone computer in the courtroom. Thus,
22 we no longer have that access. So the McCarty situation won't come back up.
23 It will be back in the office, if it happened.

24 THE COURT: Okay. So what would be your position on alerting the
25 Court if you're going to SCOPE somebody?

1 MR. DIGIACOMO: I don't think anybody's entitled to know that I did any
2 sort of background information. And I notice, and the defense loves this,
3 whenever we strike somebody, we get to make a Batson challenge. It's like we
4 skip past step number one.

5 THE COURT: Right. Well, I don't skip past step number one.

6 MR. DIGIACOMO: Well, that's -- but that's what he's suggesting. He's
7 suggesting that, you know, I want to know who it is you ran background
8 information on so that when I decide that the first African-American you strike,
9 I can find out what you've done so I can do some sort of analysis as to whether
10 or not I can make some pretextual argument. What I do in my background
11 investigation is my work product. Nobody has the right to ask me about it.
12 And we will not disclose it absent, obviously, if the Court orders me to, I will.

13 THE COURT: No, no, no.

14 MR. DIGIACOMO: But I can't imagine a legal basis to require me to
15 disclose it. We voluntarily disclosed it in McCarty.

16 THE COURT: I wasn't ordering it. I was just asking.

17 All right, so here's the thing, I -- Artiga-Morales is obviously still
18 good law. And I get what the Supreme Court is saying. I don't think that I
19 have the ability to order them to give you copies of SCOPes or any other
20 investigation that they do on anybody. In terms of whether I have Molly do it,
21 it's something that -- and Barker and I just haven't had a chance to chat about
22 it yet -- but when the issue, when I saw the motion and I started having the
23 thoughts I did, I wanted to make sure I wasn't missing anything in terms of
24 how we've kind of come up with the idea of providing SCOPE to private
25 defense counsel. Since the D.A.s have it and the Public Defenders have it and

1 that was the only organization that didn't get it. And I want to ask him again
2 about whether we've done it on trials or anything when people have asked to,
3 you know, SCOPE individuals or what have you.

4 MR. SGRO: We've gotten -- so I will tell you, we've gotten them from
5 courts. However --

6 THE COURT: On jurors?

7 MR. SGRO: On jurors. But never wholesale. I don't recall a case where
8 here's the entire panel.

9 THE COURT: Right.

10 MR. SGRO: Here's all the SCOPES. But to be fair, those were -- the
11 recollections that I'm having predated the case that we're talking about.

12 THE COURT: Well --

13 MR. SGRO: But it was not unusual for a judge to come out and say to
14 both of us, Here's the SCOPE on this person or that person.

15 THE COURT: Okay.

16 MR. SGRO: For whatever the reason of the day was.

17 THE COURT: And I've done that during trial, I mean, the people -- you all
18 are questioning a juror and they're giving us something where a guy says I think
19 I have a felony, but I'm not sure, you know, that type of thing. And so we're
20 trying to figure out if they're even eligible to stay in the panel and I've run
21 SCOPE.

22 My -- my inclination as I sit here now is to think that it would be
23 more of an individualized thing, if you all want -- you get the questionnaires,
24 you're reading the questionnaires, and it's just like any other discovery issue,
25 there's something in there that gives you rise to say, hey, I want to run SCOPE

1 on this person and figure out what it is that they're talking about or I've got a
2 sense that they're, from what I'm reading, that they've got some kind of
3 criminal history or something that I'd like to know about so that I can
4 effectively chat with them when I get them into the courtroom. As opposed to
5 just printing out a 150 SCOPES.

6 MR. SGRO: So let me ask this question, Your Honor, does that not go
7 right to the imbalance that is created because I am a private attorney?

8 THE COURT: Right.

9 MR. SGRO: If I was at the Public Defender's Office, I would just run
10 them all myself, if that's the order of the Court, right?

11 THE COURT: Right.

12 MR. SGRO: So, and if I'm at the D.A.'s office --

13 THE COURT: Does the Public Defender's office have some -- some policy
14 that you're aware of that they don't cooperate with you all?

15 MR. DIGIACOMO: I don't think they have SCOPE, Judge. They have
16 C-Track, but they don't have SCOPE, and now that there's Odyssey.

17 THE COURT: I thought they had SCOPE?

18 MR. DIGIACOMO: Stu gave it to them, David took it away from them.
19 They no longer have SCOPE.

20 MR. SGRO: I guess at the end of the day, Your Honor, we don't have
21 anything. We don't have a C-Track, a SCOPE, a nothing.

22 MR. DIGIACOMO: That's Mr. Sgro's partner.

23 MR. SGRO: Pardon me?

24 MR. DIGIACOMO: Took SCOPE away from him, away from his office.

25 MR. SGRO: That will be another conversation we have.

1 But at the end of the day, Your Honor, the point is this, the equal
2 protection part comes in that Mr. Sims, only because of his bad luck, has
3 attorneys that can't get access to the records that another attorney can't.

4 THE COURT: I wouldn't call it bad luck. But, look, I -- I -- I'm trying to
5 do what I think is right here.

6 MR. SGRO: Then don't -- isn't the right thing to put him in the position of
7 if he had an attorney that could get the access to that information? And if you
8 only give us individual requests, doesn't that create the very non-level playing
9 field that was discussed in the Artiga case? Because the D.A.s can, if they
10 want to, they can run SCOPE on everyone, if they want to. Right? We -- we
11 don't have that option. That option is eliminated from us.

12 THE COURT: Well, I'm going to -- like I said, I am going to talk to Barker
13 and figure out what I think about it and then I'll get back to you on this issue.
14 But I'm not ordering the State to provide you with anything because I don't
15 think that --

16 MR. SGRO: Okay.

17 THE COURT: -- I have the ability to do that. Regardless of whether I
18 think you should be entitled to look at things and whether it's in wholesale or
19 with regard to particular people, I'll decide that issue and I'll let you know. But
20 I'm not ordering them to provide any kind of investigative background that they
21 do on jurors.

22 MR. SGRO: Will the Court have enough time to get back to us when
23 we're back on Wednesday?

24 THE COURT: Oh, yeah. Yeah.

25 MR. SGRO: Okay.

1 THE COURT: Yeah.

2 All right. Let's see, commenting on defense opening or using the
3 defense demonstrative materials.

4 MR. SGRO: Your Honor, this is also very simple. And, you know, I learn
5 a lot of lessons after we do these cases and the litigation reflects those lessons
6 learned.

7 Here's -- here's -- here's exactly the purpose of this motion. As you
8 know, Your Honor, we have no burden of proof, we don't have to give an
9 opening statement at all. Right?

10 THE COURT: Right.

11 MR. SGRO: Sometimes we do give opening statements and sometimes
12 within the rubric of the opening statement there is a PowerPoint presentation
13 that's used where we comment on what the evidence will show. Now, one of
14 the first jury instructions the jurors get is opening statements and closing
15 arguments of the attorneys are not evidence. Right? So what both parties say
16 are a preview and then later an interpretation of what actually is to be
17 considered. Right? So that's number one.

18 Number two is we have no burden of proof. So I've had a case
19 where I did such a PowerPoint presentation and as you know, Your Honor,
20 everything here is recorded on JAVS. Right?

21 THE COURT: Right.

22 MR. SGRO: So what -- what was done was the copying of the TV screen
23 as the PowerPoint was -- was -- was being presented. Then in rebuttal, not in
24 the State's initial closing, we make our presentation. Now in rebuttal for the
25 first time, I see slides from my opening statement and the interpretation of why

1 what I said didn't come to fruition. Right? Burden shifting at a minimum.
2 Taken away, you know, I have no burden of proof, those matters are not
3 evidence. How it is he has my slide up on the TV, which was not something
4 presented in evidence is beyond me.

5 So in that case it was very interesting because the way -- that case
6 would end up being negotiated midway through trial. And what we did in that
7 case was we crafted -- crafted a resolution such that that issue would not be
8 vetted on appeal.

9 THE COURT: Okay.

10 MR. SGRO: Okay? So the case gets resolved. And so I -- no one wants
11 to be in a case like this that's going to last weeks and weeks and just chalk it
12 up to batting practice. Right? We want to make sure that the integrity of
13 whatever occurs here has some -- some scent of finality. And so what I'm
14 suggesting to the Court, Your Honor, is because it's in opening statement and
15 it's not evidence and because the mechanics of this are such that we have no
16 burden of proof, it is grossly improper to take what I said in opening and argue
17 that what I said in opening didn't come to fruition when they do rebuttal.

18 And so I wanted to give you the context from where this comes
19 from so that the Court had some idea. My -- I would suggest, Your Honor, this
20 may be one that could be deferred until the time just prior to closing because
21 we don't have our opening statement completed yet. We don't know even if
22 we're going to use a PowerPoint. But my suggestion would be potentially,
23 unless the Court has some solid ground that it intended to follow today, this
24 may be one we can defer 'til the time we get to closing to determine whether or
25 not there is any appropriateness and comment on what we say in opening.

1 THE COURT: All right. State.

2 MS. WECKERLY: So what the -- what the situation was in the prior trial
3 is in his opening statement in that trial, Mr. Sgro represented that certain words
4 were said on a 9-1-1 call. Okay? We obviously disagreed with what words
5 were said. So he had a slide in his opening statement saying, Witness calls into
6 9-1-1 and is saying I shot my daughter, essentially.

7 THE COURT: Okay.

8 MS. WECKERLY: In closing, not in rebuttal, I had that slide up and I
9 played the audio and said, It's been suggested to you that Mr. Witness said this
10 over the 9-1-1 call, this is not what is in the recording and then I played the
11 recording.

12 THE COURT: Okay.

13 MS. WECKERLY: I fail to see how that is at all improper. We aren't
14 shifting the burden. We are merely confronting what the defense is
15 representing the evidence is. They, obviously, have no burden. Using what --
16 what we would say is a misrepresentation of the evidence in opening statement
17 and precluding us from addressing that at all in any form or by, you know,
18 referencing, Here's how it was used because it was typed out like it was a
19 transcript, Witness said blah, blah, blah. I didn't hear that on the recording.
20 But the jury saw that in opening statements.

21 There is nothing -- that's not burden shifting, that's just arguing the
22 evidence. And, obviously, when I argued it and told the jury, you know, it's
23 your interpretation, you listen to it. If you hear that, you hear. If you don't,
24 you know, you don't. But nothing in that is improper.

25 And it also is -- I guess I don't get where the case law is that they --

1 they cited, because it doesn't burden shift either. So I don't see where the
2 legal justification is to grant this motion. We know we can't make improper
3 arguments. We know we can't burden shift. If we do that in argument, then
4 certainly the defense can object and the, you know, the Court can stop our
5 argument or give an instruction to the jury or, you know, some other remedy.

6 But as far as saying, well, you're not allowed to bring up what they
7 already told the jury, why? I mean, like the trial's supposed to be a search for
8 the truth. I mean, we're allowed to comment on what the evidence is and what
9 it isn't. And when they're representing what something is or what something
10 shows, it's proper argument and a proper use of demonstrative tools to remind
11 the jury, like, this was the context of how they described this evidence. That's
12 not reality, that's not what you saw, that's not what was produced in trial.
13 And so I would ask the Court to deny the motion.

14 MR. SGRO: And, Your Honor, just to be clear, I don't quarrel with the
15 argument as to what the evidence showed. And Ms. Weckerly was the one
16 that made the argument, so if she remembers doing the closing and not the
17 rebuttal, then I misspoke.

18 The bottom line though is this, putting what we put up in opening
19 which was something that was not evidence and then commenting on it such
20 that the suggestion was made that we didn't prove that what was not evidence
21 manifested in the trial is improper on two different levels. It's argument on
22 something that was not evidence because it was my opening statement; and,
23 two, it was burden shifting. I don't have any quarrel with her saying, This is
24 what the evidence showed, listen to it yourself, see what you think. But they
25 crossed the line -- they cross -- if they make that argument and they say, well,

1 Mr. Sims didn't testify about that, okay, obviously they've crossed the line.

2 So it's not the quarrel with the argument, it's the mechanism
3 through which the argument is supported. Just like they can't comment on Mr.
4 Sims not taking the stand, they can't comment to where I have the burden of
5 prove something.

6 THE COURT: Well, here's what I'll say, oftentimes, and you guys know
7 this, I mean, people kind of the first things you're hearing about a case are from
8 the attorneys and the danger is always do the jurors kind of think of that as
9 what the evidence is. So I don't think it's improper during closing arguments to
10 refer back to things that -- that may have been stated in opening statement and
11 say, You gotta remember the evidence is what you get from the juror -- I mean,
12 from witnesses during the trial. It's not what people have said.

13 So there is a part of me that thinks this isn't improper, but it
14 depends upon how -- what the context of it is and how it's stated. I could very
15 easily see where somebody would state it in a way that is burden shifting. I
16 can see where it can be argued in ways it wasn't burden shifting. So I don't
17 think just making comment about something that was presented during an
18 opening statement is misconduct. I don't think that just on its face it's
19 misconduct.

20 I don't know that I've ever seen the State use a defense slide, to be
21 honest. I've seen the defense use State slides and say, hey, you know what,
22 you guys were -- this was represented to you and this witness totally turned
23 that around didn't say any of those things.

24 And I get, again, you guys are different situations, I mean, you're
25 situated different in what your obligations are. But so long as it's argued in a

1 legal fashion, I don't think it's burden shifting.

2 MR. SGRO: And then --

3 THE COURT: To basically be reminding people what we said, both -- all
4 of us, what we say in opening statement isn't evidence. What you see that
5 people present in opening statement isn't evidence. It's what you're hearing
6 from witnesses and this is what I think you heard from witness during the trial.

7 MR. SGRO: Yeah. And that would be totally fine. My suggestion then,
8 to -- not to belabor it too much, but if we could defer this one then, Your
9 Honor?

10 THE COURT: Yeah, look, if something -- generally, on motions in limine,
11 if something changes during the course of a trial or somebody gets a sense that
12 something's occurring that they thought was ruled upon or something's
13 changed the way a ruling should occur, then by all means, you can raise it
14 again.

15 So if you get some belief that, gee, they're going to argue
16 something and they're going to do so in a way that burden shifts and is going
17 to be objectionable and I want to talk about it beforehand, we can certainly do
18 that. But if I get where you're going, there is no obligation for them to say let
19 me show you all my PowerPoint stuff before my closing argument and show
20 you what I'm going to do.

21 MR. SGRO: Understood. And perhaps this is cured easily with a simple
22 question before -- I don't want to see everything, but if they're going to make a
23 comment about what was said in the opening statement, that could be
24 something we could vet, that -- that point of minutiae, so that we don't have --
25 again, with an eye towards --

1 THE COURT: Well, look, the easy answer is I'm not foreclosing you from
2 raising anything you want to. How we deal with it, I'll deal with it at that point
3 in time. But I, like I said, I think it's really, this is more a situation in which I
4 have to react to the way something gets phrased at trial as opposed to trying
5 to, you know, kind of, tell them the way they have to phrase it at trial. All
6 right.

7 MR. SGRO: The State -- the State and I have agreed, Your Honor, as to
8 number 20. That one becomes ripe when we see what panel shows up for our
9 jury selection.

10 THE COURT: Well, I'll tell you, there's -- I want to you refer you to two
11 things. One of them is you -- you know what, let me -- I may have them on
12 here. There's two recent, and I believe they're both unpublished opinions. One
13 of them was in my case and it came out about a month ago, Battle is the name.
14 And in the Battle trial the defense raised an objection to the venire and asked
15 for a hearing. I provided both sides with copies of transcripts from a hearing
16 that Judge Villani had done in which we brought the Jury Commissioner in and
17 examined her about the methodology for how we draw people in. And the
18 attorneys still objected, you know what, we still want to have our own hearing,
19 *et cetera*. The Supreme Court affirmed the conviction and in their opinion
20 approved of, by the way they worded things, the fact that the attorneys had
21 been given that transcript and the transcript revealed an appropriate way to
22 draw in jurors.

23 So my sense is that, and Villani's not the only one that had a
24 hearing with the Jury Commissioner, it's happened on several occasions. But I
25 believe the Supreme Court has approved of our methodology for bring jurors in.

1 And, I'll tell you, in Battle I think they reaffirmed in their language that there's
2 no entitlement to a single minority in a panel that comes into a courtroom. You
3 don't have an entitlement to have an African-American on your panel or 6 or 7
4 or 2 or 20 or anything like that. It's just what you have the right to have is a
5 venire drawn in from the community that doesn't -- doesn't inappropriately
6 exclude anybody. Do you understand what I'm saying?

7 MR. SGRO: So -- so -- I do.

8 THE COURT: So they -- and I'll tell you what the language specifically
9 was in Battle. Hold on a second. Because I had sent this out to all the judges
10 after these came in because we, kind of, try and share unpublished opinions
11 when they come in.

12 All right. Here it is. It's Battle v. State and the Supreme Court case
13 number is 68744, filed August 10th, 2016. And it's probably on file in the
14 District Court case under Odyssey as well, if you guys want, which is
15 C305414. And one of the holdings that I was just referring to was, quote,
16 "Regardless of whether distinctive groups were underrepresented on the jury,
17 Battle must also demonstrate a systematic exclusion. As long as the jury
18 selection process is designed to select jurors from a fair cross-section of the
19 community, then random variations that produce venires without a specific
20 class of persons or with an abundance of that class are permissible. The
21 District Court provided the parties with a transcript from a hearing in different
22 case where the Jury Commissioner testified about the jury selection process
23 used in Clark County. We conclude that the process explained by the Jury
24 Commissioner provides no opportunity for systematic exclusion of specific
25 races. Accordingly, because Battle failed to provide any competing evidence in

1 the record, he has failed to make a showing under the third prong of Williams."

2 So not only do I think the Supreme Court approved of our process
3 of contacting and trying to bring people in, but I think they also reaffirmed their
4 belief that once you get them in, it's randomized as to how you come up with
5 the 40 people that are going to go into a courtroom. So even if one particular
6 courtroom gets a group of people that have no particular, you know, minority
7 representation on them, so long as there's no systematic exclusion of people in
8 the overall process, that's -- that's just kind of random variations.

9 And I only say that because this is an argument that I get over and
10 over again now, which is we're entitled to 13 percent of our panel to be, you
11 know, Asian because our client is Asian, or whatever it may be. And I -- and I
12 keep -- not you all obviously -- but I keep telling, and it's generally younger
13 Public Defenders, there is no right to that. You don't have a right to have 13
14 percent of this group and 12 percent of that group and 42 percent Caucasian
15 and blah, blah, blah. I mean, you're focusing on the wrong thing.

16 So and, again, take a look at these things. I'm not foreclosing that
17 we get our panel in here and you want to make some objections and request
18 certain things, we'll deal with it at that time. It's just I know you guys don't
19 always know about the unpublished opinions that come in. So, and those are
20 ones that we circulate amongst the court. So I just want you to have them.

21 MR. SGRO: Would it be okay for the Court to disseminate the transcript
22 to us as well?

23 THE COURT: Yeah. Yeah.

24 MR. SGRO: The trans -- whatever you gave --

25 THE COURT: I think I have that digitally or electronically as well. I'll

1 e-mail it to all of you.

2 MR. SGRO: Thank you, Your Honor.

3 THE COURT: As well as this opinion that I was talking about. The other
4 opinion I believe made some reference to our methodology but was more geared
5 towards a challenge that was made to our Grand Jury selection process of
6 grand jurors. That I think was Buchanan, if I recall. But I'll send you all of
7 them. I've got to find them. No, Afzali, A-F-Z-A-L-I, was the other case.

8 MR. SGRO: A, what?

9 THE COURT: Yeah, I know, A-F-Z-A-L-I, that's the one that challenged
10 the Grand Jury selection process but also spoke about the overall methodology
11 and the sources from which we draw jurors. Because there's also always been
12 this argument that we have to draw jurors from at least three sources, which is
13 incorrect as well. There was a jury -- some work-up on jury selections that
14 suggested that, hey, it would be good to draw from at least three sources, but
15 that's never been any legal requirement of that. And so I know that the Afzali
16 court spoke about that as well. That one, Afzali is Supreme Court case number
17 54019, July 22nd, 2016. I do not have a District Court case number on that
18 one. But, yes, I will forward all that stuff to you guys. Let me write this stuff
19 down.

20 MR. SGRO: Thank you, Your Honor.

21 THE COURT: Yeah.

22 All right. The next one we have is argue last in penalty phase.

23 MS. MANINGO: Yes, Your Honor, that's mine. Your Honor, I guess I will
24 start by saying, really, what could be the opening sentence for various motions
25 that we filed in that as Your Honor's very aware death is different. And so,

1 yes, we make requests that aren't usually made in other cases. And in other
2 cases we have -- we get things that you may not be -- that may not be
3 requested and definitely are not given. And, for example, we are often allowed
4 for both attorneys to argue in a penalty phase.

5 THE COURT: Right.

6 MS. MANINGO: Which is not something that commonly happens. And
7 the reason that is is because there's a higher standard of scrutiny, and most
8 judges in this jurisdiction realize that. We are, in this type of case, literally, by
9 the time we get to the penalty phase, begging for someone's life. And so, of
10 course, we believe it's our position that it's only fair in that circumstances, not
11 in a circumstance where we're talking about a regular murder trial and the State
12 has the burden of proof and in that circumstance it may not be, you know,
13 necessary.

14 But when we've reached a stage where it's a life-or-death situation,
15 we believe that due process requires that we get to appeal to the jury last.
16 There is argument, obviously, by the State and I realize the case law that's
17 been cited is that there is -- the burden, it doesn't shift to the defense, so they
18 should continue to argue last. But -- and technically that might be true, but
19 practically speaking, that really is not true.

20 In this case, for example, there are ten aggravators in this case.
21 They all come and arise from the facts of the case themselves not from outside
22 things. Once we get to the penalty phase, the conviction itself, if there is a
23 conviction, really has proved the aggravators. And we're at the point where
24 now we have to prove -- we have to present mitigation and we have the
25 burden. And I realize it may not be a specific legal burden, but we do have the

1 burden to present mitigation to the jury and to hopefully convince a jury that
2 mitigation outweighs aggravation.

3 In that circumstance, I mean, while I said it's not a legal burden,
4 there is no higher burden than that, we're basically asking for a jury not to kill
5 our client. And this is -- this issue is something that is raised in another motion
6 that we'll talk about in a minute, but this is particularly the case when there is
7 no bifurcation of the hearings. Because in the system of a nonbifurcated
8 penalty hearing, you're having the two sections, the two parts of the penalty
9 hearing that are being heard together in one proceeding.

10 THE COURT: Correct.

11 MS. MANINGO: So you have the eligibility phase and the selection
12 phase. In that type of proceeding, once -- because it's all together, by the time
13 we get to our closing arguments, we're already in a situation where the State
14 has -- in other words, if we -- if we can make an argument -- if you let us
15 bifurcate the hearing and at the end of that hearing we can argue that the
16 mitigation -- sorry, Judge, I lost my train of thought.

17 THE COURT: I know what you -- I know what you're getting at.

18 MS. MANINGO: Yeah. So what I'm saying, Judge, is that practically
19 speaking, by the end of the time we get to the penalty hearing we do have not
20 a legal burden but a practical burden and because we are trying to beg for Mr.
21 Sims' life, it's only appropriate that we be able to talk to the jury last.

22 THE COURT: Okay. Mr. DiGiacomo.

23 MR. DIGIACOMO: Death may be different, but it doesn't change statutes
24 and it doesn't change case law. And the State shall open and close the
25 arguments and, thus, the motion has to be denied. I'll submit it on the

1 pleadings, Judge.

2 THE COURT: All right. Well, look, this is -- I respect the position, and I
3 get exactly why the argument is made about penalty phases that are made and
4 I don't think it's just in death cases that the people raise the issue, obviously. I
5 mean, when they're talking about life in prison without the possibility of parole,
6 that's an incredibly, you know, cumbersome penalty as well.

7 But I agree with the State that, you know, the state of the law right
8 now is what it is and I don't think that the penalty phase is carved out in any
9 fashion to say we're going to, you know, flip that around and have arguments
10 end after the defense makes their argument. Regardless of the bifurcation
11 issue, I still think it's State's burden and they're the ones that argue last.
12 Okay?

13 All right. Motion to preclude victim impact regarding statements
14 and opinions about the crime, defendant, or sentence, and to bar duplicative
15 testimony.

16 MS. MANINGO: And, Your Honor, I don't think -- I believe the State
17 conceded to some, or at least in part, to our argument.

18 THE COURT: Okay.

19 MS. MANINGO: We don't want to find ourselves, obviously, in a
20 situation where we're in the middle of doing a penalty phase, they're calling
21 victim's family to the stand and we are, you know, standing up and objecting to
22 cumulative evidence. That obviously is not the situation we want to find
23 ourselves in.

24 THE COURT: Okay.

25 MS. MANINGO: So we filed this motion and, again, I recognize that the

1 State has said that they understand what their obligations are. But there was
2 some media in this case where, of course, the victim's family had some very
3 vocal about it and we anticipate there may be some need for them to go outside
4 of what's -- what's allowed by Payne and speak more. And so we would like to
5 make sure that that's limited at this time rather than waiting for a time when
6 we were actually in front of a jury.

7 THE COURT: Okay. The only -- well, actually, let me, do you guys have
8 anything?

9 MR. DIGIACOMO: No. I mean, obviously, at some point if you believe
10 that it's going to be cumulative, obviously, there's more here than in a single
11 homicide, this is a double. So, you know, had there been less people killed then
12 you would have had less penalty witnesses. But, you know, I have yet to see a
13 lawyer in case that myself or Ms. Weckerly has done, suggest that we've put
14 up too many family members or that there is a specific number that you can
15 limit it to.

16 I mean, ultimately, if the Court decides that, you know, we're going
17 to be cumulative by calling our next witness, we don't get to call the next
18 witness. I mean, but --

19 THE COURT: Well, it's --

20 MR. DIGIACOMO: -- it's hard to know it now, what that's going to be.

21 THE COURT: It's kind of hard because to me it's not always, kind of,
22 numbers thing, it's what is it that people have to offer. Right? Sometimes you
23 may have four or five people, but there's specific, you know, have a child, you
24 have a parent, you have a wife, I mean, there's different aspects of life that
25 people kind of fit into. But you don't want to have, you know, four

1 grandparents and six kids or three nieces and nephews that are saying the same
2 thing. This was really horrible, now, you know, you want to put on ten people
3 or something.

4 It's one of those things where I think we all know it when we see
5 it. But you all, just like your gatekeeper role that I give credit to run over in
6 terms of discovery, I mean, you've got to kind of know when you're talking to
7 these people, we've got to tell some of these they're not going to be able to
8 testify because they're all kind of what to express the same thing and it's going
9 to be duplicitous. It shouldn't be us waiting for them to hit the stand and then
10 I've got to tell them in front of jury, you know what, hold on, we're going to
11 cut you off and you need to get off the stand. Okay?

12 MR. DIGIACOMO: Of course, but, I mean, if they at some point think
13 that this is getting to be duplicative, they can obviously object to it. I don't
14 think I've ever seen in capital cases --

15 THE COURT: Well, they don't want to object in front of the jury.

16 MR. DIGIACOMO: -- where we've called like 12.

17 THE COURT: Look like they're, you know, trying to prohibit family
18 members from testifying because then that makes them look -- that's really
19 prejudicial on them. That's why I'm saying, I just want you all to be very
20 careful when you're talking to people about your deliberations as to who you're
21 going to put up there so we're not going --

22 MS. MANINGO: Our main focus, obviously, Judge, is at the penalty
23 phase the focus is on Mr. Sims and the victim's obviously entitled -- the juries
24 entitled to hear a glimpse of the victim's life, but we just want to make sure
25 that it's limited.

1 THE COURT: No, I --

2 MS. MANINGO: And not only -- it's not a numbers game as Your Honor
3 said, it's also the content of what is being said and we would ask that they
4 instruct the victim's family on what it is that they can talk about and they are
5 not to have opinions --

6 THE COURT: The only time I've really ever had people go outside of that
7 are people that I could tell immediately were fairly uncontrollable, right, that you
8 can tell them 'til you're blue in the face what's appropriate and but they get up
9 there and they're just going to start spouting off, you know, whatever it may
10 be. So I agree with counsel, I mean, you guys need to make sure you're talking
11 to people about what their -- what the intent of their testimony is and what
12 really is things they shouldn't be going into.

13 The only thing that I have any exception to in the motion is the
14 reference to not talking about details of the crime. Because a lot of times, how
15 a crime occurred is greatly relevant to the impact that it has on somebody.
16 Right? It's not just that somebody died, but the circumstances of when they're
17 told what it was that what happened to their son or their husband or whatever
18 it may be. You know, whether it's just somebody got shot or somebody got
19 tortured, those are two different things in terms of how it impacts somebody.
20 So I would say there's some leeway in that area. But I agree at that them
21 coming in and all wanting to testify that this guy needs to die and, I mean, you
22 know where I'm going.

23 MR. DIGIACOMO: Yeah, I assume no witness, either from the State or
24 the defense is going to suggest what the punishment should be in the case
25 because that's what the case law is, nobody gets to say. It's inadmissible and

1 it's irrelevant. I would believe that they would instruct their witnesses that
2 they can't say I want my kid to live. And, you know, we can't have our
3 witnesses say we want that defendant to die. I mean, that's the state of the
4 law and we're all aware of what it is. I don't think we need to have a motion
5 for it.

6 MS. MANINGO: Well, again, Judge, we file the motion because it's
7 easier to talk about this now.

8 THE COURT: No, I know.

9 MS. MANINGO: Than at the time.

10 THE COURT: I know.

11 MS. MANINGO: And it has, and I'm not suggesting that I've been in a
12 case with these two where -- but it tends to happen and sometimes it does get
13 a little bit out of control only because, maybe they haven't had the opportunity
14 to really sit down and say, hey, the defense has filed a motion on this, in other
15 words, it's -- it's putting a light on this so they realize that we are concerned
16 with this issue and that they instruct their victim's families that there are limits,
17 legally, of what they can testify to on the stand and, you know, how many
18 people can testify with regards to victim impact.

19 THE COURT: All right. Anything further?

20 MR. DIGIACOMO: No.

21 THE COURT: All right. As I said, I agree with the motion that to the
22 extent that duplicative testimony is unnecessary and improper. So, I mean, it's
23 kind of a I'm deferring ruling on this until we get to the penalty phase and we're
24 evaluating what's going on. But as I've, kind of, explained here, I want to make
25 sure that there's good conversations that take place with witnesses prior to

1 their testimony so that we can kind of get a feel for whether there's an
2 anticipation that it's going to be duplicitous at all, and that they're going to
3 make sure that they confine themselves to appropriate testimony.

4 MR. SGRO: Your Honor, may I interrupt briefly?

5 THE COURT: Yep.

6 MR. SGRO: May we approach?

7 [Bench conference -- not transcribed]

8 THE COURT: All right. We're going to take a -- we're going to be at
9 ease, take a recess for a few minutes so some folks can grab some lunch.

10 [Recess at 2:27 p.m.; proceedings resumed at 2:45 p.m.]

11 THE COURT: And you're going from here, Tony, right? You're going
12 from here?

13 MR. SGRO: My clothes are in my -- my bag's in my car. Yeah.

14 THE COURT: All right.

15 MR. SGRO: I just have to the valet across the street the street and go.

16 THE COURT: Okay.

17 [Colloquy among counsel]

18 THE COURT: All right. So in the interest of time, why don't we try and
19 get through the ones that we can do quicker and then hold off on the ones that
20 are going to take more time.

21 MS. MANINGO: Your Honor, we are just going over the jury
22 questionnaire real quick.

23 THE COURT: Okay.

24 MR. DIGIACOMO: How about we do the first phase is the guilt phase,
25 since we agree to call it the trial phase?

1 THE COURT: That's going to be a quick one.

2 MR. SGRO: Trial -- yeah.

3 THE COURT: Yeah, look, I --

4 MR. SGRO: We agree to call it trial.

5 THE COURT: -- always tell people, you know, I'm not going to jump up
6 and declare a mistrial if somebody slips up and says guilt phase, but I always
7 ask everybody to try and refer to it as trial phase. So, technically, that's
8 granted.

9 MR. SGRO: There's only two. There's only two issues on the
10 questionnaire, Your Honor, if you want to knock that one out.

11 THE COURT: Okay. You want to -- you want to give me a copy of it and
12 I'll take a look at it?

13 MR. DIGIACOMO: There is two and a half.

14 MS. MANINGO: Should we just go ahead --

15 MR. DIGIACOMO: There's two nos and the question mark. The question
16 mark's more a --

17 MS. MANINGO: Okay. Let me, Judge, let me give you a copy and I'll
18 highlight what the problems are.

19 THE COURT: Okay.

20 All right. How about, and if I call one of these and it's yours,
21 Ivette, just tell me and we'll do a different one.

22 Motion to invoke heightened standard of review.

23 MS. MANINGO: It is, Your Honor.

24 MR. SGRO: Your Honor, we can probably agree --

25 MS. MANINGO: That one -- go ahead.

1 MR. SGRO: Sorry.

2 MS. MANINGO: No, go ahead.

3 MR. SGRO: The motion to prohibit the prosecutor from arguing mitigators
4 not raised by the defense, I think we agree on that one. Don't we, Marc?

5 MR. DIGIACOMO: Yeah, I believe we agree. You know, as long as it's
6 not we're not going to instruct on the mitigators and we're not going to call
7 them mitigators, but we have the right to argue whatever we want to argue.

8 MR. SGRO: In other words, they -- they can't make the argument, listen,
9 in the state of Nevada there is eight articulated mitigators.

10 THE COURT: Right.

11 MR. SGRO: So the defense only --

12 THE COURT: So they can -- if they want to argue if a submitted, if you
13 do not submit a mitigator, for instance, that says the person's really young and
14 didn't know what they were doing. They can still argue, hey, this guy's middle
15 age, he's wise, he's been around, that kind of stuff. He's not some young kid.

16 MR. SGRO: Of course. Of course.

17 THE COURT: Just as long as they're not calling it a mitigator under the
18 statute.

19 MR. DIGIACOMO: Correct.

20 MR. SGRO: Correct. So we can agree to that one.

21 THE COURT: With that understanding then I will -- I guess, I'll just say
22 that's a kind of grant half grant half deny type thing.

23 MR. DIGIACOMO: How about the unconstitutionality of our death penalty
24 scheme, can't we submit that on the pleadings?

25 MR. SGRO: What's that?

1 MS. MANINGO: What? I didn't hear.

2 MR. SGRO: The constitutionality of the death penalty scheme.

3 THE COURT: Yeah. I don't -- I don't want to rush you, though. So you
4 tell me, if there's any others that you were just going to basically submit, then
5 we'll do those now. If not, we'll hold them over until Wednesday.

6 MR. SGRO: Okay. Yeah, we'll submit the -- the Nevada death penalty
7 scheme unconstitutionality based on the pleadings, Your Honor.

8 THE COURT: Okay. Mr. DiGiacomo.

9 MR. DIGIACOMO: I'll submit it on the pleadings, Judge.

10 THE COURT: All right. I'll deny that motion. I think under the current
11 state of the law in Nevada our death penalty scheme has been repeatedly
12 upheld to be constitutional.

13 And then that's okay. We'll set all the others aside for right now
14 and just focus on taking a look at the jury questionnaire.

15 [Colloquy among counsel]

16 MS. MANINGO: May I approach, Your Honor?

17 THE COURT: You may.

18 MS. MANINGO: So, Your Honor, to give you an indication of what we
19 did, the State sent us a proposed questionnaire.

20 THE COURT: Okay.

21 MS. MANINGO: We added, we made proposed changes and the addition
22 that we would like are in red.

23 THE COURT: Okay.

24 MS. MANINGO: And then we struck some things as well. So they had a
25 chance to review it and they agreed to most of our revisions.

1 THE COURT: Okay.

2 MS. MANINGO: With the exception of the three things. I've highlighted
3 those in yellow.

4 THE COURT: Okay. Let me go print out something real quick, a front
5 page, because I usually have more information on there than you guys even
6 have on the front page. So let me give you a copy of that. Hopefully you can
7 look at it real quick.

8 [Pause in proceedings]

9 THE COURT: I think that front page is the same thing from Michael
10 Rodriguez.

11 MS. WECKERLY: Okay.

12 THE COURT: I believe it encompasses all the stuff that you guys are
13 mentioning here about making sure they understand they have to answer under
14 penalty of perjury, that their questionnaires are part of the public record, that
15 they have more opportunity to expand on answers on the last page if they need
16 to, that -- and it's just a much broader here's all the things that you cannot do
17 from this date forward about don't go on social media, don't go on search
18 engines, don't read anything blah, blah, blah, blah, blah.

19 MS. WECKERLY: So the -- this is fine. What I'm thinking is once you
20 make a ruling on the issues that we still have the questionnaire, do you want
21 me to send a, like, a Word version and then your cover sheet can be the cover
22 or your cover sheet can be --

23 THE COURT: Yeah, you can send -- if you're both okay with that, I'll just
24 slap that on to the version you send to me.

25 MS. WECKERLY: Okay. The State's okay with that.

1 MS. MANINGO: And, yes, I think -- I think yours is -- is fine, Your Honor.

2 THE COURT: Okay. So in our synopsis of the case, I can't remember,
3 what's in the reasonable doubt statute. Is it unless or until?

4 MR. SGRO: The stock --

5 MS. WECKERLY: The stock --

6 MR. SGRO: The stock says --

7 THE COURT: Not the instructions, the statute.

8 MS. WECKERLY: Yeah, the stock says -- oh, the statute says until.

9 THE COURT: Okay.

10 MS. WECKERLY: Our objection on the synopsis, it's fine, it's supposed
11 to be alerting people, like, if they've read media.

12 THE COURT: Right.

13 MS. WECKERLY: I don't think the charges there add anything in terms
14 of, like, alerting to someone if they've, you know, heard about the case or
15 maybe read about the case a few years ago. So we want, you know, that out
16 and then, I mean, to the extent that we want to track the statute, that -- that's
17 fine.

18 MS. MANINGO: And, Your Honor, just to be clear the only objections, I
19 had put what we wanted to add in red and we struck things. They don't have
20 any other objections to this other than the three things that I've highlighted in
21 yellow.

22 THE COURT: Oh, okay.

23 MS. MANINGO: That's it.

24 THE COURT: Oh, all right. I'm sorry.

25 MS. MANINGO: So the only part about the synopsis is the charges

1 which --

2 THE COURT: All right.

3 MS. MANINGO: -- I guess the argument is doesn't add anything. I would
4 disagree. I think it does add what they're here for and they are about answer
5 to a questionnaire with regards to a capital case. So I think the charges are
6 relevant.

7 THE COURT: Sorry, I'm just reading through the factual part of it before
8 that. I've never put the charges in, so I'm trying to see if I see that I think there
9 is some separate reason to do so here.

10 MR. SGRO: It does make a little sense, Your Honor, in terms of the death
11 penalty questions at the end of the questionnaire because not every prospective
12 juror understands that the penalties we're talking about are specifically
13 applicable to charges that look like these as opposed to something else.

14 MS. WECKERLY: Well --

15 THE COURT: What do you mean?

16 MR. SGRO: What I mean is that they need to understand that the
17 consequences -- they only need to the death penalty because they're involved in
18 a case that charges murder. We have to spend a lot of time sometimes in
19 *voir dire*, Your Honor, distinguishing the difference between the death penalty
20 for a first degree murder.

21 THE COURT: Right.

22 MR. SGRO: As opposed to, you know, this isn't an accident, this is not
23 self-defense. In other words if they understand the charges from the inception
24 of the questionnaire, it makes more sense when they answer the questions at
25 the end of the questionnaire that deal with appropriate forms of punishment.

1 We inevitably see questions being answered in the end of the questionnaire can
2 you -- can you think of imposing a sentence less than death; answer, yes, in a
3 case of self-defense.

4 THE COURT: Yeah.

5 MR. SGRO: Okay? We get that all the time.

6 THE COURT: Right. Right. What about this? What about if we just say,
7 Ultimately, the four defendants were arrested for various crimes including
8 conspiracy, burglary, robbery, and murder. Because if we're going to make
9 some reference to the crimes, I don't know that it needs to be two counts of
10 this, three counts of that, a conspiracy to this, a conspiracy to that. It's really
11 just what's the nature of the crimes they're charged with.

12 MS. WECKERLY: I mean, that -- that's fine. That's preferable to the
13 State because they don't -- they don't know what counts are, they don't know,
14 like, what the definitions of the crimes are. I mean, the idea is this is the kind
15 of case you're going to be sitting on, this is the kind of punishment, you know,
16 have you heard of it, and --

17 THE COURT: Right.

18 MS. WECKERLY: -- this is the kind of punishment that you may have to
19 consider in this case and I think if they have an idea of it, that's fine. This way
20 the addition as written is confusing to me.

21 THE COURT: Well, I just think putting in more than just including murder,
22 which is what's in here right now, so putting in conspiracy, burglary, robbery,
23 murder, in my mind kind of solves part of the issue of them understanding when
24 they're answering penalty questions that there's a lot of charges here that
25 might have some people give you a different answer than if they just thought it

1 was a murder.

2 MS. WECKERLY: Uh-huh.

3 THE COURT: And also it kind of supplements the factual scenario,
4 because there's not really, and I would agree that it would be inappropriate to
5 try and go and explaining this that the nature of the entry being without
6 consent and does that, you know, so it's kind of a they'll understand that there
7 is an alleged conspiracy, a wrongful entry, forcible taking, and a murder. So do
8 that, Various crimes, comma, including conspiracy, burglary, robbery, and
9 murder.

10 All right. And then what's our next page; do you remember?

11 MR. SGRO: Six.

12 THE COURT: Six. Thank you. All right. And what's the objection to
13 that?

14 MS. WECKERLY: So, Your Honor, only objection on that is it's the very
15 bottom of six into seven, we don't have an objection to the question --

16 THE COURT: Okay.

17 MS. WECKERLY: -- the part where it says, The defendant, Maurice Sims,
18 is an African-American male.

19 THE COURT: Okay.

20 MS. WECKERLY: I think that's an appropriate question. The two, kind
21 of, questions prior to that, I don't think touch on -- reasonably touch on the
22 ability of someone to be fair and impartial. I do think they are entitled to that
23 last question. But the two prior to that, I think are kind of, I don't -- I don't
24 know what those go to exactly.

25 THE COURT: Well, the first one, the one at the bottom of page 6, I don't

1 have a problem with. Do you have any relatives or close friends of a different
2 racial background than your own? I think that that can be informative. The
3 when the last time you hosted someone of a different racial background, I think
4 that's kind of an incredibly vague, like, what you mean "hosted," like, invited
5 them over to their house? Or went on vacation? Or, you know, had a foster
6 child? I mean, there are so many things that are kind of connoted in that.

7 MR. SGRO: Interacted.

8 THE COURT: Interacted. Well, isn't that just kind of a natural follow-up
9 question for you all to ask, if somebody says, yeah, I've got a lot of close
10 friends that are African-American or Hispanic or Asian, then you're going to ask
11 them how often do you socialize with them?

12 MR. SGRO: What if they don't put it -- so, I think part of the
13 questionnaire is to take away from the attorneys questions that might put them
14 in a confrontational situation with the juror and let the Court ask them.

15 THE COURT: Right.

16 MR. SGRO: Because it's, you know, you're the vanilla ice cream in the
17 room.

18 THE COURT: Right.

19 MR. SGRO: Right? So if we ask when was the last time you hosted
20 someone that could definitely be taken as adversarial. In other words, if they
21 haven't, it's like you're being judgmental of the fact that they have not.
22 Because some jurors will have hosted persons of different racial background and
23 some will not have. And so we put that question in the questionnaire because
24 it's the path of least resistance for all the lawyers so that no one has to ask
25 that question.

1 THE COURT: All right. I'll allow it. But let's change it to something
2 along the lines of how often do you socialize with people of a different racial
3 background, because that can encompass, you know, people may say, well, at
4 work we have parties or friends in my neighborhood, whatever it may be. I
5 think that would allow for a more distinct answer.

6 And -- and if you want it this way, I'm not trying to be disrespectful
7 in any way, but is it appropriate to have Mexican descent or Hispanic descent?

8 MS. MANINGO: I'd like to keep Mexican.

9 THE COURT: Okay.

10 MS. MANINGO: It does hone in on the fact some people may have a
11 specific opinion with regards to --

12 THE COURT: Okay.

13 MS. MANINGO: He's Hispanic because he's Mexican.

14 THE COURT: Okay.

15 MS. MANINGO: But if he's just Hispanic, it doesn't narrow it down.

16 THE COURT: Yeah, no worries. Okay.

17 All right. What's the next page?

18 MS. WECKERLY: I think that's it.

19 MR. DIGIACOMO: That's it.

20 THE COURT: Oh, I thought there was three.

21 MS. WECKERLY: So I'll just --

22 THE COURT: No?

23 MS. WECKERLY: -- make the first one of the --

24 MR. DIGIACOMO: We counted those two questions as --

25 MS. WECKERLY: We're going to number them as questions; is that

1 okay?

2 MS. MANINGO: Yeah. I didn't put numbers just because I didn't want
3 to -- yeah, yes.

4 MS. WECKERLY: Okay. And then they'll just, everything else will move
5 up.

6 THE COURT: Yeah. And then send it to me and what I routinely try and
7 do is have a have the last page be a full page of blanks, so I might space your
8 things out a little differently or add a couple of lines.

9 MS. WECKERLY: Okay.

10 THE COURT: Sometimes I'll look at a question and think, you know
11 what, in my experience that's usually one that has longer answers, so I may
12 add a couple of lines to that.

13 MS. WECKERLY: Okay.

14 THE COURT: I mean, I'll keep it such that it flows and we're not breaking
15 things up. But it may be that it becomes, you know, 13 pages instead of 12
16 pages or something. Okay?

17 MS. WECKERLY: Sure.

18 THE COURT: All right. And then I'll have that for you on Wednesday, if
19 you can get it to me before then, so I can take a look at it.

20 MS. WECKERLY: Sure.

21 THE COURT: And then we will chat about the other motions when we
22 come back then as well.

23 Do we, from the standpoint of when I want my trial attorneys here
24 on Wednesday, can we finish that all up on the morning on Wednesday before
25 lunch hour if we're starting at 10:00ish?

1 MR. SGRO: I'm sorry, I missed the first part of the question.
2 THE COURT: Well, we're coming back Wednesday at 10:00.
3 MR. SGRO: Yes, sir.
4 THE COURT: Which I thought was really just going to be more of a
5 status check on this.
6 MR. SGRO: Yes.
7 THE COURT: And would be quickly, be done quickly. But since we have
8 about eight or nine more motions to do, can we finish those up so that I can tell
9 my trial people we can start at 1:00 o'clock with trial?
10 MR. SGRO: I'm sure we'll get a long way.
11 THE COURT: Notice that I'm looking at you and not Ivette.
12 MR. SGRO: That hurts.
13 THE COURT: Yes, you.
14 MR. SGRO: You know, I think two hours gets us a lot of the way there
15 for sure.
16 THE COURT: Wow, is that an incredibly nonspecific answer.
17 MS. MANINGO: We can do it.
18 MR. SGRO: We can do it, Judge.
19 MR. DIGIACOMO: Did you expect anything less?
20 MR. SGRO: I'm fully, fully confident.
21 THE COURT: All right. So, yeah, just kind of know that I'm planning on
22 being done in time to start my trial at 1:00, okay?
23 MR. SGRO: Yes, sir.
24 THE COURT: All right. I'll see you on Wednesday, guys. Thank you.
25 MR. SGRO: Thank you.

1 [Recess at 3:05 p.m.; matter recalled at 3:06 p.m.]

2 THE COURT: -- this case, I'm going to leave my order the way it is for
3 this case because it's not just, and I agree with you wholeheartedly that this
4 opinion would say you don't have to turn over a proffer, regardless of whatever
5 I think about that. But I think within the context of how I view what you've
6 tried to communicate to people in the memo, I think that would fall into what I
7 would consider inculpatory evidence that would be used at trial and that would
8 be something that you would disclose to people.

9 MS. WECKERLY: And I understand the order, I just, I guess if you could
10 just maybe give us some clarification on, like, how specific, you know, I mean,
11 we didn't record that proffer.

12 THE COURT: Right.

13 MS. WECKERLY: You know, or how detailed -- I'm a little bit, I want to
14 comply, I'm just --

15 THE COURT: Well, yeah, I'm not -- like in Jessica Austin's case, I think
16 this were some notes.

17 MS. WECKERLY: There were.

18 THE COURT: I thought Michelle Fleck said, yeah, we have some notes,
19 so I'll give them the notes from the investigator.

20 MS. WECKERLY: Yeah, I am --

21 THE COURT: But the notes were very, kind of, all over the place. So I
22 don't know that that was really even that helpful.

23 MS. WECKERLY: Right.

24 THE COURT: To be quite honest. Look, as I said earlier, I'm not so much
25 worried that you leave out some particular details when you're trying to say this

1 is basically what the proffer was. If it's not recorded, then I can't expect you
2 to remember verbatim everything that was said. So, I mean, I guess I'm just
3 saying you need to give them the flavor of what was provided to you.

4 MS. WECKERLY: Okay.

5 THE COURT: I'm not going to say it has to be a page long or a paragraph
6 or whatever, just the substance of what was related to you and that you plan
7 on using as part of your presentation at trial, you need to tell them.

8 MS. WECKERLY: Okay.

9 THE COURT: I'll see you Wednesday.

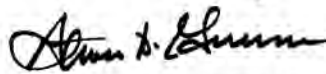
10 PROCEEDING CONCLUDED AT 3:08 P.M.

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20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio-video recording of this proceeding in the above-entitled case.

22 

23 SARA RICHARDSON
24 Court Recorder/Transcriber
25



CLERK OF THE COURT

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10 **(702) 671-2500**
11 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

12 **MAURICE MANUEL SIMS,**
13 **#2684920**
14 **Defendant.**

CASE NO: C-13-287414-1

DEPT NO: III

15 **STATE'S MOTION TO RECONSIDER COURT'S RULING ON**
16 **DEFENDANT'S MOTION TO COMPEL DISCOVERY BASED**
17 **ON DISTRICT ATTORNEY OPEN FILE POLICY**

18 **DATE OF HEARING: 9/20/16**
19 **TIME OF HEARING: 9:00 AM**



20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and
22 hereby submits the attached Motion to Reconsider Court's Ruling on Defendant's Motion to
23 Compel Discovery Based on District Attorney Open File Policy.

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

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1 is acknowledgement that the defense has the opportunity to inspect evidence pursuant to NRS
2 174.235, the discovery statute—meaning physical evidence like photos, recordings, objects,
3 or pre-existing statements to be used in the State’s case-in-chief. It is not a pledge to create
4 evidence or summaries of oral statements.

5 Beyond that, the State asks this Court to review Quisano v. State, 2016 Nev. App. LEXIS 11
6 (2016). In Quisano v. State, Quisano raised a Brady claim regarding an affidavit used by the
7 State to cross-examine a witness at a sentencing hearing. The affidavit was used to impeach
8 a witness testifying favorably for Quisano at sentencing. 2016 Nev. App. LEXIS 11. p. 18.
9 The Nevada Appellate Court summarily dismissed the Brady claim as the affidavit was in no
10 way exculpatory. Referencing language in the State’s Receipt of Copy form, the appellate
11 court noted the form guaranteed “the State’s intent to provide access to ‘all discovery’ in its
12 possession to Quisano.” Id. at 19. From that language and the State’s invitation to the defense
13 to view the LVMPD case file and physical evidence, the court concluded the “State’s
14 discovery policy constituted an ‘open-file’ policy.” In essence, the appellate court
15 extrapolated that an “open-file” local convention was tantamount to a legal undertaking or
16 Open File pledge. Id.

17 From there, the appellate court then interpreted what “Open File” meant as a legal term of art.
18 To make this determination, the Nevada Appellate Court referenced not the standards and
19 practices in Clark County, but cited to a case from Humboldt County, McKee v. State, 112
20 Nev. 642, 647-8, 917 P.2d. 940, 943-44 (1996). In McKee, a prosecutor allowed defense
21 counsel to review his file, but excluded an inculpatory photo the prosecutor intended to use
22 only if the defendant testified. Finding error, the Nevada Supreme Court noted that although
23 “the boundaries of that [open] file policy do not appear to be defined, the record shows that
24 McKee’s counsel believed that the open file policy meant that the District Attorney’s Office
25 would make available all relevant inculpatory, as well as, exculpatory evidence.” Id. at 647.

26 Relying on McKee, the Nevada Appellate Court held that it was error for the State in Quisano
27 not to have disclosed the affidavit used to impeach the sentencing witness. The court stated,
28 “Quisano could reasonably rely on the State’s promise under the open-file policy to provide

1 discovery as it became available, just like the defendant in McKee who reasonably relied on
2 the State's open file policy." Quisano, 2016 U.S. Dist. LEXIS at 27.

3 On June 24, 2016, the Nevada Supreme Court ordered the appellate court's Quisano
4 opinion withdrawn from publication. 2016 Nev. LEXIS 618 (2016).

5 In premising a discovery ruling on the 2016 Memo describing the policy of the District
6 Attorney, this Court does the exact thing the appellate court did in Quisano. It takes a policy
7 of the Office of the District Attorney and interprets it as though it is a statute entitling a party
8 to discovery. A policy of a government agency is not a statute; it is not a regulation; it is not
9 a contract with defense counsel. In the dissent of Quisano, Judge Tao noted this distinction
10 and discussed, at length, why it is not within a court's discretion to interpret an agency policy
11 and apply that interpretation in litigation.

12 In the Quisano dissent, Judge Tao notes that the appellate court "judicially interprets"
13 the prosecutor's open file policy so that it applied to more than what the prosecutor had
14 intended. Quisano v. State, 2016 Nev. App. LEXIS 11 (2016). Judge Tao explained that in
15 reaching this conclusion, the majority of the appellate court "proffers this interpretation as a
16 matter of law, not based upon factual findings (as the district court heard no sworn testimony
17 or evidence and entered no factual findings), and furthermore it does so on appeal de novo
18 without deference to the district court or to the prosecutor who wrote the policy." Id. at 40.
19 The dissenting opinion further commented:

20 So the court's holding today does not originate in any statute. Instead, to reach
21 its conclusion, the majority interprets the meaning of the prosecutor's open file
22 policy as a question of law in the same way that the Nevada Supreme Court has
23 interpreted the meaning of criminal discovery statutes. But prosecutorial
24 policies are not legislative statutes, and the two things cannot be interpreted
25 using the same methods.

24 Id. at 42.

26 Judge Tao also recognized that the court's power does not extend to announcing its
27 own interpretation of an agency's policy and then applying it as though it's a statutory
28 requirement. He noted, "[u]nlike my colleagues, I do not think that we have any such power,

1 and therefore, I do not think we can legitimately make the prosecutor's open-file policy mean
2 what the majority does." *Id.* at 42. Judge Tao recognized the separation of powers. He stated:

3 It seems to be that deciding what a prosecutor's open file policy should say, and
4 what prosecutors are required to do under it, is an exercise of a fundamentally
5 prosecutorial (executive) function, and I wonder whether we have any (judicial)
6 power to make it mean what the majority does when we have no evidence
(literally none, as the district court did not conduct an evidentiary hearing) that
the district attorney who wrote it intended to give it that meaning.

7 *Id.* at 46.

8 Further, by issuing such an order, as Judge Tao noted, the court usurps the authority of the
9 prosecutor, or executive branch. He stated:

10 Consequently, the open-file policy at issue here is not a public statute or
11 administrative regulation; it is a unilaterally revocable office policy voluntarily
12 adopted by the Clark County District Attorney to govern how its staff
13 prosecutors handle criminal prosecutions. The decision to adopt an open file
14 policy belongs to the district attorney; it's an exercise of executive branch
prosecutorial power that courts generally have limited power to second-guess.
A court cannot force a prosecutor to adopt a policy if he does not want one; that
decision is his alone to make in the exercise of his judgment as an elected
official.

15 *Id.* at 47 (citations omitted).

16 In his dissent, Judge Tao the limited legal significance of an agency policy externally.
17 He explained the "United States Court of Appeals for the District of Columbia has described
18 a federal executive agency policy as follows:

19 An agency policy statement does not seek to impose or elaborate or interpret a
20 legal norm. It merely represents an agency position with respect to how it will
21 treat—typically enforce—the governing legal norm. By issuing a policy
22 statement, an agency simply lets the public know its current enforcement or
23 adjudicatory approach. The agency retains the discretion and the authority to
24 change its position— even abruptly—in any specific case because a change in
its policy does not affect the legal norm. We thus have said that policy statements
are binding on neither the public nor the agency. *Syncor Int'l Corp. v. Shalala*,
127 F.3d 90, 94, 326 U.S. App. D.C. 422 (D.C. Cir. 1997) (internal citations
omitted).

25 *Id.* at 50.

26 Certainly, as noted by Judge Tao, it cannot be said "that courts never have any power
27 whatsoever over executive branch policies."

28 Numerous other examples of this overlap exist; most relevant here is that where
an executive branch policy affects the way a criminal case is prosecuted in court

1 (and open-file discovery policies clearly do that), it overlaps with the province
2 of the judiciary, and courts possess some constitutional power to ensure that the
3 policy does not harm the integrity of a judicial proceeding or result in
4 fundamental unfairness. See United States v. Armstrong, 517 U.S. 456, 464, 116
5 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) (providing that if prosecutor's policy
6 constitutes improper race-based "selective prosecution," resulting charges can
7 be dismissed and conviction can be reversed); Salaiscooper v. Eighth Judicial
8 Dist. Court, 117 Nev. 892, 902-03, 34 P.3d 509, 516-17 (2001) ("selective
9 prosecution" may violate the equal protection clause).

10 Id. at 52.

11 However, in the case of "overlapping" power, the Court's range of remedies is
12 somewhat limited. The court can sanction a prosecutor, dismiss a case, exclude evidence, or
13 invalidate a conviction. But, generally, a court cannot force an agency to adopt a particular
14 policy or interpretation of an internal policy. See id. at 56. An agency policy is different than
15 a statute. Statutes are enacted after debate in a legislative setting. There is some history
16 regarding what it means or what it is intended to mean. A policy has no such history and is
17 made without debate. Without question, if the 2016 Memo prescribed a policy that fell short
18 of Brady or Giglio obligations, the Court could intervene in some manner. In that case, it
19 would be a constitutional issue. However, in terms of the content of a proffer, the Nevada
20 Supreme Court has already found that there is no right to the contents pursuant to statute. If
21 the 2016 Memo, as interpreted by the Office of the District Attorney, rather than the courts,
22 does not offend the constitution or a statute, there is no mechanism by which a court can
23 intervene and impose its own interpretation of it.

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1 CONCLUSION

2 Based on the foregoing, the State respectfully asks the Court to reconsider its order.

3 DATED this 14th day of September, 2016.

4 Respectfully submitted,

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

8 BY Pamela Weckerly
9 PAMELA WECKERLY
10 Chief Deputy District Attorney
11 Nevada Bar #006163

12 CERTIFICATE OF SERVICE

13 I certify that on the 15 day of September, 2016, I e-mailed a copy of the above and
14 foregoing, to:

15 IVETTE MANINGO, ESQ. (for Maurice Sims)
16 iamaningo@iamlawnv.com
17 ANTHONY P. SGRO, ESQ. (for Maurice Sims)
18 tsgro@pattisgrolewis.com

19 LANCE HENDRON, ESQ. (for Sasha Williams)
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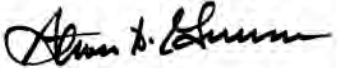
21 ALZORA JACKSON, SPD (for Brandon Range)
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28 BY T. Driver
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CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

MAURICE MANUEL SIMS,
#2684920

Defendant.

CASE NO. C287414
DEPT. III

**OPPOSITION TO STATE'S MOTION TO RECONSIDER COURT'S RULING ON
DEFENDANTS MOTION TO COMPEL DISCOVERY BASED ON DISTRICT
ATTORNEY OPEN FILE POLICY**

COMES NOW the Defendant, MAURICE MANUEL SIMS ("Defendant"), by and through his counsel of record, IVETTE AMELBURU MANINGO, ESQ. of the Law Offices of Ivette Amelburu Maningo, and ANTHONY P. SGRO, ESQ., of Patti, Sgro, Lewis & Roger, and hereby files his Opposition to the State's Motion to Reconsider the Court's ruling on Defendant's Motion to Compel Discovery Based on District Attorney Open File Policy.

1 This Opposition is based on the following points and authorities and any oral argument at
2 the time set for hearing on the Motion.

3
4 DATED this 19 day of September, 2016.

PATTI, SGRO, LEWIS & ROGER

5
6
7 ANTHONY P. SGRO, ESQ.
8 Nevada Bar No.: 3811
9 720 S. 7th Street, Suite 300
10 Las Vegas, NV 89101
11 *Attorney for Defendant*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 This Court's ruling on Defendant's Motion to Compel Discovery Based On The District
15 Attorney Open File Policy is sound, and rooted in the basic notions of of fundamental due process.
16 There is no justification for reconsidering the Courts prior ruling, nor any controlling authority which
17 provides a safe haven for the State to avoid its constitutional obligations. The State issued a memo,
18 detailing its legal obligations relative to discovery, and now seeks to retreat from the mandates of
19 that memo, in violation of the law. As demonstrated below, the State relies upon the most narrow
20 interpretation of the Court's ruling relative to oral proffers in an attempt to sidestep obligations
21 founded upon very straightforward Constitutional principles of fairness and justice.

22 **II. LEGAL ARGUMENT**

23 EDCR 2.34 provides the procedure to seek reconsideration and states, "...no motions once
24 heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced
25 be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to
26 the adverse parties. The Courts prior ruling should not be disturbed unless substantially different
27
28

1 facts or law are presented, or the decision is clearly erroneous. *Masonry v Jolley, Urga & Worth,*
2 *Inc.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

3 Given that it was the impetus for the filing of Defendants Motion to Compel, the April 13,
4 2016 Memorandum must be given consideration relative to this Motion. But we must proceed
5 cautiously so as not to lose sight of the controlling underlying legal principles. A criminal
6 defendant's right to evidence is not based upon an internal memo issued by the District Attorney nor
7 based on an individual state's statutory scheme. Government disclosure of material evidence is part
8 of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v.*
9 *U.S.*, 405 U.S. 150, 154 (1972). A criminal defendant's right to access to certain items of discovery
10 is founded upon the fundamental notions of Constitutional Due Process, specifically articulated in
11 *Brady* and its progeny.

12 In *United States v Bagley*, the court explained, "The *Brady* rule is based on the requirement
13 of due process. Its purpose is not to displace the adversary system as the primary means by which
14 truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor
15 is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable
16 to the accused that, if suppressed, would deprive the defendant of a fair trial.

17 The State relies on two cases to support its request for reconsideration, cases that existed at
18 the time the original motion was heard, and previously available for consideration. Neither of these
19 cases provides a basis to alter the Court's prior ruling. First, the State offers *State v Eight Judicial*
20 *District Court of Nevada*, 2013 Nev. Unpub. LEXIS 126 (2013), and provides a very limited
21 summary to support its request for reconsideration, which is misleading. Closer examination reveals
22 that this decision is an unpublished decision resulting from an Emergency Writ of Mandamus. The
23 decision was rendered just two days after the answering brief was filed. The opinion existed for
24 more than three years prior to the issuance of the District Attorney's Memorandum to the Eight

1 Judicial District Court and the Defense bar which was specifically drafted "... in an effort to clarify
2 the Clark County District Attorney's Office discovery practice ...". This memorandum, intent of
3 which was to un-complicate discovery issues, specifically included the unequivocal directive to all
4 prosecutors to produce "All inculpatory evidence that the deputy district attorney intends to use at
5 trial during his/her case-in-chief ..." This statement, coupled with the assertion that "All deputy
6 district attorneys are to...comply with the controlling opinions of the Nevada Supreme Court, the
7 Ninth Circuit Court of Appeals, and the United States Supreme Court with regards to *Brady v*
8 *Maryland*, 373 U.S. 83 (1963), *Giglio v United States*, 405 U.S. 10 (1972), and their progenies."
9 establishes the legal foundation necessary to support this Court's Order with regards to Defendants
10 Motion to Compel.
11

12
13 Second, the State asks this Court to review the Appellate court's decision in *Quisano v State*,
14 132 Nev. Adv. Op. 9, (February 18, 2016). In *Quisano*, the Appellate court held, in pertinent part,
15 that Prosecutors have a strict duty to disclose both inculpatory and exculpatory evidence in its
16 possession, pursuant to its own open-file policy. *Id.* The State used an affidavit to impeach the
17 testimony of a witness favorable to Quisano at the time of trial. Quisano argued that the State's
18 open-file policy subjected the State to a duty to disclose all evidence in its possession; and that
19 the State's failure to comply to the duty unfairly surprised and prejudiced him such that he was
20 entitled to a new sentencing hearing. *Id.* The Appellate court agreed, and concluded the State's
21 discovery policy on each Receipt of Copy constituted an open- file policy under ordinary
22 contract principles pursuant to *McKee v. State*, 112 Nev. 642, 917 P.2d 940 (1996). (a
23 prosecutor's open-file policy created a duty to disclose all inculpatory or exculpatory evidence
24 when the defendant reasonably relied on the that policy).
25
26

27 The State accurately points out that the *Quisano* opinion was withdrawn from publication
28 on June 24, 2016. However, this withdraw from publication did not reverse the Appellate Court's

1 decision, but effectively converted the published opinion to an “unpublished opinion”. The Petition
2 for Review of the Appellate Court’s decision was denied, and the matter is now closed. So the
3 *Quisano* opinion stands as unpublished opinion, but instructive nonetheless.

4 The State relies heavily on the *Quisano* dissent by Judge Tao to make its case. However,
5 Judge Tao largely concurred with the majority. His narrow dissent centered on criticizing the
6 majority’s judicial interpretation of the “open file” policy to the extent he believed expanded the
7 prosecutor’s obligation to produce evidence beyond what it intended to use in its case-in-chief (as
8 required by NRS174.235(1)(a)) to now require the prosecutor to produce evidence beyond the
9 determination of guilt until the entry of the judgment of conviction. Judge Tao disagreed with the
10 majority’s decision to proffer this interpretation as a matter of law, in the absence of any sworn
11 testimony or evidence of the intent of the District Attorney’s policymakers.

12 Why have the policy only to ignore it? Why disseminate the April 13, 2016 memorandum,
13 only to retreat from its instruction when the interpretation of its content becomes an inconvenience
14 to the State. The State is attempting to self-servingly interpret its open file policy memorandum to
15 serve as the proverbial sword and shield. It wants to strictly interpret the memorandum to limit its
16 obligations to produce evidence to the defense, but loosely interpret those portions of the
17 memorandum that require the production of inculpatory evidence, which logically includes the
18 content or basis of a potential proffer of a cooperating witness. As of the date of this Motion, and
19 to defendant’s knowledge, the policy remains in place. There have been no efforts from the District
20 Attorney’s office to retract the memorandum, or to issue a new memorandum clarifying its own
21 interpretation of its policy. As such, the State should be held to its own policy as instructed by this
22 court.

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CONCLUSION

No justification exists to reconsider this Courts prior ruling. The Courts ruling was the product of a seasoned jurist who has witnessed the derailing of multiple trials at the hands of both prosecutors and defense attorneys alike who were more concerned with gamesmanship and deception than the full disclosure of evidence. For the foregoing reasons, Defendant request the court deny the State's Motion to Reconsider the Courts ruling on Defendant's Motion to Compel Discovery based on the District Attorney's open file policy.

DATED this 19 day of September, 2016.

PATRICK SGRO, LEWIS & ROGER


ANTHONY P. SGRO, ESQ.
Nevada Bar No.: 3811
720 S. 7th Street, Suite 300
Las Vegas, NV 89101
Attorneys for Defendant

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 19th day of September, 2016, I served a true and correct
3 copy of the foregoing document entitled: **OPPOSITION TO STATE'S MOTION TO**
4 **RECONSIDER COURT'S RULING ON DEFENDANTS MOTION TO COMPEL**
5 **DISCOVERY BASED ON DISTRICT ATTORNEY OPEN FILE POLICY**
6

7 as indicated below:

8 ☐ sending a copy via facsimile to the parties herein, as follows; and/or

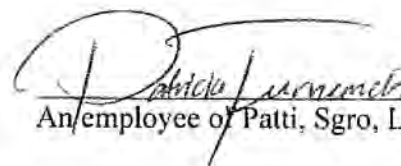
9 ☒ sending a copy via electronic mail, and/or

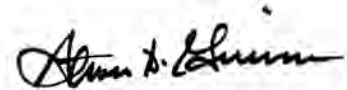
10 ☐ placing the original copy in a sealed envelope, first-class, postage fully pre-paid
11 thereon, and depositing the envelope in the U.S. mail as Las Vegas, Nevada addressed as
12 follows, and/or

13 ☒ the document was submitted electronically for filing and/or service within the Eighth
14 Judicial District Court, pursuant to Administrative Order 14-02, for e-service to the following
15 e-service list:
16

17 PAM WECKERLY, ESQ.
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25 
26 An employee of Patti, Sgro, Lewis & Roger
27
28


CLERK OF THE COURT

1 RTRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 THE STATE OF NEVADA,

6 Plaintiff(s),

7 vs.

8 MAURICE MANUEL SIMS,

9 Defendant(s).

CASE NO.: C-13-287414-1

DEPT. NO.: III

10
11
12 BEFORE THE HONORABLE DOUGLAS HERNDON, DISTRICT COURT JUDGE

13
14 FRIDAY, SEPTEMBER 9, 2016

15 **RECORDER'S TRANSCRIPT OF ALL PENDING MOTIONS**

16
17
18
19 APPEARANCES:

20 For the State:

21 PAMELA WECKERLY
22 MARC DIGIACOMO
Chief Deputies District Attorney

23 For Defendant Sims:

24 IVETTE A. MANINGO, ESQ.
ANTHONY P. SGRO, ESQ.

25 RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, FRIDAY, SEPTEMBER 9, 2016, 10:47 A.M.

2 * * * * *

3 THE COURT: And you guys want Mr. Sims to sit with you at the table
4 or --

5 MS. MANINGO: Yeah.

6 THE COURT: Yeah? Mr. Sims, you can come on down to their table, if
7 you would.

8 MR. DIGIACOMO: You wouldn't happen to have an extra copy of the
9 calendar would you, Judge?

10 THE COURT: What's that?

11 MR. DIGIACOMO: Do you have an extra copy of the calendar?

12 THE COURT: We may. Here you can just have this one.

13 MR. DIGIACOMO: Thank you.

14 MS. WECKERLY: Thank you.

15 THE COURT: Are you just trying to keep track of all of the motions?

16 MR. DIGIACOMO: Yes, sir.

17 MS. WECKERLY: Yes, sir. Yeah, the rulings. It's easier with the list.
18 Thanks.

19 THE COURT: Okay. You know what, I have our old calendar that's got
20 'em all on it anyway, that's where my notes are, so that's okay.

21 Before we get rolling into the motions, what, if anything, did you
22 guys figure out on your jury questionnaire?

23 MS. WECKERLY: We -- we exchanged questionnaire, they -- they gave us
24 some additions they would like this morning. I'm looking at them right now.

25 THE COURT: Okay.

1 MS. WECKERLY: I think we may be down to maybe one or two things
2 that you'd have to make a ruling on. I'd just like a little bit more time to look at
3 it. But --

4 THE COURT: Okay.

5 MS. WECKERLY: -- I mean, we could even resolve it today if you want to
6 or show you what the issue. But, I mean, I think we're pretty close.

7 THE COURT: All right. Well, I mean, I don't have any problem giving you
8 a little more time to look at it if you want. Can we just come back maybe on
9 Tuesday or something?

10 MS. WECKERLY: Sure.

11 THE COURT: If we're still -- I mean, that's just a if we still need to have
12 a conversation.

13 MS. WECKERLY: Sure.

14 THE COURT: If you agree to things, then all I need you to do is send it
15 over to me in electronic form and I'll sign off on it and get the copies made and
16 get it out.

17 MS. WECKERLY: Okay.

18 THE COURT: If there is anything that you're in disagreement over, then
19 we can discuss it on Tuesday and finalize it.

20 MS. WECKERLY: Okay.

21 THE COURT: Is that good?

22 MS. WECKERLY: Sure.

23 THE COURT: Okay. All right. So we'll set this issue over to Tuesday the
24 13th, at 9:00 a.m., with the understanding that if you communicate to me that
25 we don't need the hearing we'll go ahead and vacate it.

1 Okay. And then as far as our motions go, Mr. Sgro.

2 MR. SGRO: May we approach very briefly, Your Honor?

3 THE COURT: Yeah.

4 [Bench conference -- not transcribed]

5 THE COURT: All right. So actually rather than doing the jury
6 questionnaire issue, if need be, on Tuesday, we're going to do it on
7 Wednesday. And we will do it at 10:00 o'clock on Wednesday the 14th. And
8 we'll vacate what I just said about Tuesday the 13th at 9:00 o'clock. All right.
9 You got that, officer?

10 THE CORRECTIONS OFFICER: You going to need him for that?

11 THE COURT: Pardon?

12 THE CORRECTIONS OFFICER: Are you going to need him for that?

13 THE COURT: Yeah, I need Mr. Sims for that. Thank you.

14 MR. SGRO: And with that, Your Honor, we're ready to proceed.

15 THE COURT: And then I just, Tony, planned that we would just start the
16 way they are on the calendar. That's the order I have them. If you have them
17 some other order, I'm fine. I can find it.

18 MR. SGRO: I just want to make sure we're on the same page. The first
19 one I have is motion to compel the recording of witness interviews?

20 THE COURT: Yep.

21 MR. SGRO: Okay.

22 THE COURT: Okay. You can go ahead.

23 MR. SGRO: So, Your Honor, essentially here's the situation and we have
24 it in this particular case. We have a number of defendants that are originally
25 charged, now we find ourselves being severed from the other defendant that

1 remains in the case, two of the defendants have -- have now flipped.

2 THE MARSHAL: Ma'am, you have to go wait outside.

3 UNIDENTIFIED SPEAKER: Huh?

4 THE MARSHAL: To wait outside.

5 MR. SGRO: Essentially, here's what the motion seeks, the motion seeks
6 the opportunity for the defense to be apprised of witness statements as they
7 occur generally and then specifically. So, for example, we have cases often
8 times where the victim in a case, we just had a trial about a year or so ago,
9 same -- same prosecutors were on the other side, and the victim in the case
10 had modified an identification that she'd made of an assailant. Okay?

11 Now, those -- the statements that she was making to the State
12 were different than the ones that she was making to us. And at the end of the
13 day, Your Honor, here's -- here's the practical reality of what happens,
14 Witness X takes the witness stand, and Witness X comes with a different
15 rendition of facts. Right?

16 THE COURT: Right.

17 MR. SGRO: So I say to the witness on cross-examination, You said this
18 to the police, you said this today, and so now we're hearing for the first time,
19 three years after the fact, this new version of events. Okay?

20 THE COURT: Okay.

21 MR. SGRO: And you've seen that I'm sure a thousand times.

22 THE COURT: Okay.

23 MR. SGRO: State gets up on redirect and says, Well, now wait a second,
24 Witness X, didn't you just tell me in my office a month ago this exact same
25 thing that you told the jury on direct examination? And now I'm put in a

1 position where, forget about the fact that it now borders on vouching because
2 the State is now testifying on behalf of the witness, refreshing the recollection
3 of the witness as to what, you know, the witness did not create for the first
4 time on the stand but in fact told the State some time ago.

5 And more importantly in the thrust of this motion, Your Honor, is
6 we have absolutely no way to challenge it. Right? So whether it happened or
7 didn't happen, we have no idea. Now, that's -- that's the general nature of
8 what the motion seeks to discover is that we should know, as witness's
9 testimony evolves, if it does, when it evolved, who was present, all that sort of
10 thing so we're not sandbagged at trial.

11 Now, take in this case a very specific example, Your Honor. Sasha
12 Williams and Brandon Range have made deals with the State. Their statements
13 to the police were mildly incriminating, at best. Okay, and reasonable minds
14 can agree to disagree as to how you characterize their statements.

15 THE COURT: Okay.

16 MR. SGRO: But they were not confessions in the sense of here's exactly
17 what when down, here's what everybody did, here's what everyone's role was,
18 *et cetera*. And I expect the State's going to argue and the police are going to
19 say that Sasha Williams minimized Mr. Sims' involvement because at the time
20 they were romantically involved. Okay? The police pressed Sasha Williams
21 extensively throughout her statement to give up more information as to what
22 Mr. Sims. She does not. And the explanation's going to be, well, because he's
23 the boyfriend. Right?

24 THE COURT: Okay.

25 MR. SGRO: At trial I expect she's going to come in, because she's made

1 a deal, and I expect she's going to come in and say, This is exactly what
2 happened, Mr. Sims did this, this, this, and this. Right? I will have no idea of
3 that version of facts if the State is not obligated to make some memorialization
4 of that event. Even in the federal system where the discovery rules are far
5 more strict in terms of what United States attorneys have to turn over to
6 defense attorneys, even in the federal system, there's an agent there given the
7 job task of recording the interview. And when I say recording the interview, I
8 don't mean a tape recorder.

9 THE COURT: Right.

10 MR. SGRO: I mean taking notes, memorializing --

11 THE COURT: Notes.

12 MR. SGRO: -- it as it -- as it goes down. Remarkably, in our State
13 system there is no such mandate, subject to the mandate statutorily under
14 N.R.S. 174, to provide -- you know, we have a discovery statute that says that
15 they have to provide all the recorded statements of witnesses they intend to
16 use at trial. Right? That should not be taken as a license to subvert a
17 discovery obligation by simply electing to not record.

18 So I guess the point is this, we are in a capital murder case. They
19 will -- they, the State, will seek to persuade a jury that Maurice Sims should be
20 executed. They should not be allowed to do so without following the
21 underpinnings of what we're entitled to. Impeachment material, Your Honor,
22 is -- falls under Giglio. They made a deal with these people. There are potential
23 ramifications under Brady. Some of the progeny of Brady, and this is in the
24 brief, it speaks to not the exoneration of the defendant but evidence which
25 tends to negate the guilt of the defendant. There are Supreme Court cases that

1 have that language which are cited in the brief.

2 At the end of the day, Your Honor, we are entitled to the
3 information. And in the absence of some memorialization of what was
4 discussed by a D.A. investigator, the homicide detective assigned to the scene,
5 we are absolutely handcuffed and unable to adequately cross-examine the two
6 most important witnesses in the case. So this thing was filed, you know, as
7 you know with scheduling and conflicts that we have had and the State from
8 time to time has had, we just haven't gotten to the point of arguing this motion.

9 THE COURT: Right.

10 MR. SGRO: The motion was filed at a time when we were concerned
11 about witnesses coming forward like the Laurice Brightmans, the victim in the
12 case.

13 THE COURT: Right.

14 MR. SGRO: And I'll tell you, we had a file review yesterday. We have
15 been provided discovery along the way. There are e-mails from
16 Laurice Brightman, who is the surviving victim who was shot in the butt as he
17 exited out of a window, right, e-mails memorializing that he wanted to speak to
18 the police. Now, we went through two very significant binders yesterday.

19 THE COURT: He wanted to speak to police, like, when? What do you
20 mean?

21 MR. SGRO: There, it's just an e-mail to Detective Jensen who's one of
22 the leads on this. It's him and Wildemann, as you might recall.

23 THE COURT: Right.

24 MR. SGRO: And so it's an e-mail, Hey, Laurice Brightman called today,
25 wants to talk to you about the case.

1 THE COURT: Okay.

2 MR. SGRO: Okay? Very generic, just give him a call.

3 THE COURT: Gotcha.

4 MR. SGRO: And that -- and that, of course, happens all the time. The
5 difficulty is is what if Laurice Brightman remembered a significant detail that's
6 not memorialized anywhere. So in other words, the thrust of this motion came
7 at a time prior to the two defendants in this case flipping, right?

8 THE COURT: Right.

9 MR. SGRO: Now that they have flipped, it becomes even more
10 important, not that it was less important then, but it's more important now.
11 And I expect, Your Honor, the argument to be, you know, we don't have a
12 statutory obligation. And as you -- if you see these pleadings in their totality,
13 there are a lot of discovery issues in this case.

14 THE COURT: True.

15 MR. SGRO: We have filed, I'm ball parking, ten different ways to seek
16 specific discovery.

17 THE COURT: Okay.

18 MR. SGRO: The totality of the arguments, though, seems to be
19 inconsistent with a straight-line argument, if you look at the State's briefs. For
20 example, we're not talking about it now, but the open-file policy situation and
21 what discovery they have to produce, *et cetera*, in that brief the State responds
22 only by citing federal case law which is governed by Rule 16 of the Federal
23 Rules of Criminal Procedure. It has nothing to do with the Nevada statutory
24 scheme.

25 In this particular case, they argue they're simply not statutorily

1 required. In another discovery motion, they say that they're going to follow the
2 mandates of Brady and Giglio and their progeny. That's in the discovery memo
3 portion. So what I'm suggesting to Your Honor is I want to definitely do these
4 issues one at a time.

5 THE COURT: Okay.

6 MR. SGRO: But I want to understand -- the Court to understand our
7 position that you cannot segregate and differentiate holdings by U.S. Supreme
8 Courts and discovery statutes based on the specific argument that's being
9 presented at the time. Under Giglio, under Giglio we have an absolute right to
10 know all impeachment material of these folks. Giglio does not stand for the
11 proposition that a prosecutor has the election to determine when they and will
12 not exercise their discretion as to when to memorialize materials that may yield
13 impeachment information. So therein lies the rub.

14 And I actually had one case, and I think it was with --

15 THE COURT: Well, I don't expect that the prosecutors are going to say,
16 We have the discretion of whether to turn over Giglio evidence. Their exception
17 is probably going to be, We don't have any obligation to video or audiotape our
18 interviews and then if we discover Giglio evidence, turn it over in that fashion.
19 We can turn it over to you by telling you that somebody made this statement
20 that falls under Giglio and we need to inform you of it.

21 MR. SGRO: The unfettered, unbridled, unilateral discretion of a
22 prosecutor seeking to persuade a jury to impose capital punishment is going to
23 determine on his or her own what's Giglio.

24 THE COURT: Right.

25 MR. SGRO: That seems patently --

1 THE COURT: But --

2 MR. SGRO: -- against the spirit of what the --

3 THE COURT: I know. And I get that argument all the time. I got as an
4 attorney. You shouldn't be the one that decides that. But that's basically how
5 the law is set up. I mean, they -- they -- they aren't going to turn over
6 something that to them is blatantly, obviously, not relevant to the case, not
7 exculpatory, not Giglio, not Brady, anything like that.

8 Now, if later on, you know, it's discovered that that was and it was
9 potentially, you know, exculpatory or whatever, then the case gets reversed,
10 whatever.

11 MR. SGRO: Right. But without the memorialization of it, Your Honor,
12 with all due respect, how do we ever know? In other words, our request seeks
13 the very thing you just said.

14 THE COURT: Right.

15 MR. SGRO: Right? Sometime later on, you're right, sometimes later on
16 down the road cases get reversed based on something that's discovered.
17 However, what the invitation is with the denial of this motion, if I'm -- if I'm a
18 D.A., you know, lightning may strike here.

19 THE COURT: Right.

20 MR. SGRO: But if I'm a D.A., I don't think I ever --

21 THE COURT: DiGiacomo just fainted, just so you know, when you said
22 you were a D.A.

23 MR. SGRO: -- I never record anything, I never tell an investigator to write
24 anything down. Right? Why would I? And then I have the complete advantage
25 of several things, complete surprise at trial, I get to come up on redirect and

1 vouch for the witness because now I am leading the witness and I'm saying, Do
2 you remember when you told me last week and do you remember when you
3 said, yeah, you told me that this, this, and this happened; do you remember
4 that? And I have nothing I can do about it. And so what I'm suggesting to
5 Your Honor is this, there is not a statute.

6 THE COURT: Right.

7 MR. SGRO: Admittedly, right? I can't go and say, hey, N.R.S. 174 has a
8 special subsection which compels a prosecutor to record interviews. I get that.
9 What I'm suggesting to the Court is that under Giglio, particularly in this case, I
10 think our motion got stronger because in this case, Your Honor, two of the
11 defendants have flipped. They are the two most important witnesses in the
12 case.

13 And I'll tell you, Your Honor, this is not a case of science, this is
14 not where, as to Mr. Sims there's a compelling fingerprint that's located or
15 there is a saliva, fingernail clippings, it's not that case. Okay? This is -- this is
16 testimonial in nature and the two most important testifiers are the subject of
17 what we are discussing here today.

18 And so unless the Court has further inquiry, I think the Court gets
19 where I'm coming from and I'll submit it.

20 THE COURT: Okay. Ms. Weckerly.

21 MS. WECKERLY: Your Honor, I think Mr. Sgro kind of made my argument
22 for me. I don't know of any case, Giglio progeny, that would have require this.
23 So it's outside the discovery statutes. We're well aware we have constitutional
24 obligations.

25 And I -- I take issue with the idea that, well, we just hear it in a

1 pretrial and, you know, we're not going to turn it over even if it's exculpatory or
2 impeachment. I mean, we take those obligations seriously. If we disregard
3 them, we do that at our peril for the, you know, validity of the conviction, but
4 also our own ethical peril as well.

5 And we -- when we have exculpatory material, either in the form of
6 impeachment or straight Brady material, we do turn that over. And if we don't,
7 there are mechanisms that address that. And neither one of those
8 constitutional principles stand for a discovery proposition. And they certainly,
9 Giglio doesn't stand for any proposition that we would have to record,
10 memorialize, I mean, there's simply not a case on that.

11 The only case I found that was close to this topic, actually found
12 the, you know, the opposite that even if a prosecutor does record a pretrial that
13 is not discoverable. I don't think our office actually takes that position if we
14 record a pretrial, we do turn it over.

15 THE COURT: Right.

16 MS. WECKERLY: But it's really rare, as this Court knows, that -- that we
17 do record pretrials.

18 Secondarily, I would also say, we are not the only party with access
19 to witnesses. The defense can certainly -- these two witnesses, they know
20 they're represented, they know who their lawyers are. They can certainly
21 inquire as to Ms. Williams or Mr. Range's attorney. If they can talk to the
22 attorney about what to expect in court or if they are allowed to talk to their
23 client. I mean, every witness who is in this case can interview with the
24 defense if the defense wants to. I certainly haven't received a lot of defense
25 recordings of interview witness, as a side note.

1 But there is just no mechanism legally that requires us to do that.
2 Obviously, the Court has broad discretion with regard to discovery. But I simply
3 know of no case and no requirement of Brady, Giglio, or statute that would
4 require this motion to be granted.

5 THE COURT: With regard to the two people we're talking about, I mean,
6 are there statements beyond what was originally given to the police?

7 MS. WECKERLY: They -- they proffered with us.

8 THE COURT: Okay.

9 MS. WECKERLY: And those were not recorded. But I had, I mean, one
10 of them is represented by the Special Public Defender.

11 THE COURT: Okay.

12 MS. WECKERLY: I've flipped their defendants before in cases and I have
13 known that office to give some access or at least the lawyer, explaining here's
14 what you might expect.

15 THE COURT: Right.

16 MS. WECKERLY: I don't know --

17 THE COURT: Did you all inform them of what was brought up in the
18 proffer even though it wasn't recorded?

19 MS. WECKERLY: No.

20 THE COURT: Okay. And why not?

21 MS. WECKERLY: We just haven't that done. I mean, we can tell them
22 generally if they want to, you know, have a discussion about that, generally,
23 what the proffers were.

24 THE COURT: Well, I think it's, in these situations, I think that that's at
25 least appropriate that you let them know what it was that was stated in the

1 proffer. And I think, and we're probably going to come back to this several
2 times in regards to discovery issues, I know, and I very much respect the
3 discovery statute, but I also know that in the memo that Steve prepared, I
4 mean, one of the things that was very clear in there is that all inculpatory
5 evidence that's intended to be used at trial is going to be provided.

6 So even though there's things in the discovery statute that, well,
7 you know, a defendant's oral statement may not fall within that statute, if a
8 guy gives an oral statement inculcating himself, you're going to use it at trial.
9 And I know your office is going to let the defense know that.

10 A proffer that is potentially, and I can see where Tony would be
11 worried, is potentially going to be somewhat different than the original
12 statements were or maybe more, you know, expansive of what my involvement
13 was and what everybody else's involvement was, I think we all get that, that if
14 somebody's trying to, you know, not get arrested they may say one thing and
15 later on when they finally see the light, they may say a little more about
16 everybody.

17 I think it's important that they know what was in the proffer. And
18 so I understand completely why they're not recorded or reported in any fashion.
19 But I do think you need to let them know. Because, look, the reality is, you
20 know, Alzora may say, absolutely, you can talk to my client, but the client may
21 say, absolutely, I ain't talking to you. So I think it is fair for them to know what
22 was stated in the proffer.

23 MS. WECKERLY: And their -- obviously, I'm sure the Court's aware, their
24 attorneys were present at the proffers.

25 THE COURT: Sure.

1 MS. WECKERLY: So they can --

2 THE COURT: Sure. I mean, but -- and I just throw this out there, the
3 other, you know, you know what other case I'm going to talk about with regard
4 to the proffer, the other quadruple defendant homicide case that we had the
5 proffer of Ms. Austin apparently included something that was completely
6 unexpected, supposedly, from the defense of the one defendant which was a
7 statement that that was the guy that actually the fired the shots that killed the
8 gentleman in question which had never been stated before.

9 So, you know, I think it was an over-exaggeration for them to say
10 we never prepared for that and that's why, in part, I, you know, dealt with
11 things the way I did.

12 MS. WECKERLY: Yeah.

13 THE COURT: But nonetheless, I mean, I -- that's kind of an example of
14 why I think it's important that those things be disclosed.

15 MS. WECKERLY: I mean, certainly, I mean, in that case I would say that
16 witness had a really good idea what she might testify to.

17 THE COURT: I know. I know. Look, that's why I kept telling them it's
18 the worst secret in Clark County --

19 MS. WECKERLY: Exactly.

20 THE COURT: -- what she's going to do. But in any event.

21 MS. WECKERLY: And, I mean, and certainly I would actually say the
22 same thing with regard to Mr. Sims.

23 THE COURT: Okay.

24 MS. WECKERLY: I mean, he was present, what does he think
25 Ms. Williams is going to describe or Mr. Range?

1 THE COURT: Yeah, I know. I know.

2 Well, here's the thing, I'm going to deny the request to record the
3 interviews. I don't think there is a mechanism under the law to do that. I think
4 that if you're dealing with a situation where a witness comes -- and, you know,
5 let me back off for a second before I say that because I want to say this first.

6 I often get the very same argument that you gave, Tony, about, you
7 know, I have to trust them to be the ones that utilize discretion and I get
8 prosecutors that have that same thing where they say we know they have alibi
9 witnesses or whatever or experts and they never prepare reports and I've got to
10 rely on them to tell me what supposedly was said. And I get, and I probably
11 had that same, you know, gut reaction when I was an attorney. As a judge, it
12 is very, very rare in my mind that I think that it would be appropriate not to
13 trust somebody to uphold their obligations as an officer of the court.

14 And I tend, maybe I'm naive, but I tend, particularly with you all
15 that I've known for years, to trust that you're going to abide by the things that
16 tough abide by. So even though they may not record an interview with a
17 witness, if the witness comes in and makes changes to a statement that would
18 give you impeachment evidence, I trust that they're going to tell you that. If
19 they make new inculpatory statements that they intend on using at trial against
20 your client, then I trust that they're going to tell you that as well.

21 But I think the wisdom as to why it would be a bad idea to compel
22 recordings, I mean, they're going to interview witnesses sometimes in a way
23 that kind of divulges what their theories are and how they want to present a
24 case. And you can't really excise that out of recordings and stuff. I think that
25 would be giving you certain things that you're not entitled to. Just like making

1 you turn over things of that nature would be violative of your rights as well.

2 MR. SGRO: So if I understand correctly, Your Honor, and again the Court
3 hit the nail right on the head relative to the discovery memo which does
4 suggest, you know, that inculpatory evidence is going to be provided.

5 THE COURT: Right.

6 MR. SGRO: Clearly, they negotiated the case with an eye towards their
7 testimony.

8 Is the ruling, when you say that the State has to tell us, can we do
9 it via e-mail so there's a written record of the representation made relative to
10 the nuts and bolts factually of what occurred? I don't --

11 THE COURT: In terms of if they're notifying you about a witness's
12 statement in some fashion?

13 MR. SGRO: As to the proffer, Your Honor, the proffer.

14 THE COURT: Oh, oh, oh, oh.

15 MR. SGRO: The proffer -- the proffer has inculpatory information that
16 they intend to use at trial.

17 THE COURT: Okay.

18 MR. SGRO: Per their own office policy, they have an obligation to
19 produce that to us.

20 THE COURT: Okay.

21 MR. SGRO: Through some mechanism. The Court has now ruled that
22 it's not going to compel the State to record, either with a tape recording device
23 or memorializing, handwritten contemporaneous.

24 THE COURT: Right.

25 MR. SGRO: If I understand the ruling, right?

1 THE COURT: Right.

2 MR. SGRO: So, but what the Court is suggesting is that, per, at least the
3 memo, that there be some representation made to a factual predicate of what
4 was articulated insofar as inculpatory information is concerned. And they can
5 sterilize it in terms of how they ask questions.

6 THE COURT: Well, just to be clear, my discussion about the proffer was
7 kind of separate from the memo issue. I think that with a proffer when you've
8 got represented defendants who have been advised by their attorneys all along,
9 Don't be talking to people, don't talk to people in the jail, don't, you know, talk
10 on the phone, don't do all these things, and now they've pled guilty and they've
11 given a proffer, sometimes it's much more difficult for you to talk to them than
12 your ability to talk to a normal witness.

13 So the extent they've given proffers to the State, I'm just saying I
14 want them to let you know what those proffers were about.

15 MR. SGRO: I understand.

16 THE COURT: Separate and apart from that. And I can guess they're
17 probably somewhat inculpatory if they're planning on using them to testify.

18 MR. SGRO: Of course. Of course.

19 THE COURT: But separate and apart from that, just under the idea that
20 they have an obligation, you know, the way their memo says we'll turn over
21 any exculpatory evidence that we intend to use at trial, if somebody gives a
22 statement that now they're saying certain things that weren't in their statement
23 to the police and they know where the gun was or they saw the gun in your
24 hand or whatever it is, then I'm saying their policy says they're going to tell you
25 about that.

1 MR. SGRO: Right.

2 THE COURT: So on the proffer, going back to that proffer issue, are you
3 just saying you would like them by e-mail to let you know what was in the
4 proffer?

5 MR. SGRO: Yes.

6 THE COURT: Okay. All right.

7 MR. SGRO: Yes. Just an e-mail of, obviously, each of the two
8 defendants, I'm going to tell you as an officer of the court, their statements are
9 going to be --

10 THE COURT: All right. Pam.

11 MR. SGRO: -- a lot different.

12 MS. WECKERLY: So, I mean, now we're sort of shifting, right. Like, the
13 argument initially is they've got to record the proffer because there's, you
14 know, impeachment information in there, there's exculpatory information; and,
15 obviously, we have a constitutional duty to provide that.

16 THE COURT: Right.

17 MS. WECKERLY: If we're shifting now to what's inculpatory, there's
18 actually another motion they filed on that. I would say --

19 THE COURT: That's why I said this is probably going to come up a few
20 times.

21 MS. WECKERLY: Correct. There is no statutory authority for that, that's
22 written and recorded statements. If we reduce something to an e-mail, that's
23 our version, like me the lawyer's version --

24 THE COURT: Right.

25 MS. WECKERLY: -- of what they said, which they can't cross, you know,

1 a witness on because --

2 THE COURT: Right.

3 MS. WECKERLY: -- that's not their words, those -- that's my description
4 of what I think they'll testify to at trial. And now we're talking about
5 inculpatory information where there is no statutory authority for producing that
6 and no constitutional authority for producing that and I --

7 THE COURT: Producing inculpatory information?

8 MS. WECKERLY: Correct.

9 THE COURT: Well, but here's the problem, I mean, but, you know, these
10 discovery wars have been going on for forever and so the D.A. produced this
11 memo and asked us to kind of rely upon that.

12 MS. WECKERLY: Right.

13 THE COURT: And, look, I sent it to every judge and said this is their
14 policies on discovery, please, utilize this, read it, understand it before you're
15 ruling on discovery issues in court. And what that says is, very explicitly, All
16 inculpatory information that is intended to be used at trial will be provided. And
17 that's separate from the reference to the statutes about things.

18 MS. WECKERLY: Well -- yeah.

19 THE COURT: And when it says inculpatory information that's only to be
20 used in cross-examination or rebuttal is not discoverable. So there is that
21 caveat to it. But other than that, anything you want to use in your case-in-chief
22 that you believe inculcates a defendant, you want to use to convict him, seem
23 to be an acknowledgment that we're going to -- we're going to provide that,
24 we're going to let you know about that.

25 MS. WECKERLY: And, I mean, I don't -- you know, I'm not trying to

1 quibble with the Court, I read the memo as saying, We'll adhere to the
2 constitutional and statutory requirements. I understand what you're saying.

3 THE COURT: Do you have the memo?

4 MS. WECKERLY: But the other -- the other thing I would add, although it
5 obviously isn't binding on this Court, is we had had -- we have in the past had
6 an order by a judge to record a proffer.

7 THE COURT: Okay.

8 MS. WECKERLY: And we did writ that and we were successful.

9 THE COURT: I'm not -- I didn't, you know, let's be clear, I didn't say
10 that.

11 MS. WECKERLY: Okay.

12 THE COURT: I wasn't telling you to record a proffer. In fact, I denied the
13 motion that you have to record anything. I don't think you have to record
14 pretrial conferences. I don't think there's an obligation that Metro has to record
15 every time they talk to a witness. I mean, sometimes they do, sometimes they
16 don't. So I'm not saying you have any obligation to do that.

17 As far as the proffer is concerned, all I said was I think a proffer is
18 pretty distinct animal and I think they're entitled to know what was the proffer
19 that was given. And if it was all they did was tell us the same things that are
20 in the police statement, there you go. If they -- if these are things that were
21 added to it or that changed it or inculcates themselves or other people, they
22 kind of want to be able to prepare for that as well.

23 MR. SGRO: And it's on page 2, Judge, All --

24 THE COURT: I know. I remember.

25 MR. SGRO: -- all inculpatory evidence that the deputy district attorney

1 intends to use at trial during his, her case-in-chief will be provided.

2 THE COURT: I know.

3 MR. SGRO: I just read that verbatim.

4 THE COURT: So, look, we'll discuss that again when it comes up again, I
5 guess. But I don't have a problem with asking you all to, by e-mail, say, Here's
6 what was proffered to us.

7 Now, I think what you're actually getting at, prophylactically is,
8 well, how would this be used at trial. So can they use that information to
9 cross-examine the witness by saying did, in your proffer to the State, did you
10 tell them, da, da, da, da. You know, showing a jury an e-mail like that
11 somehow is evidence of something I would say would be inappropriate. I
12 mean, it's the information that you're entitled to know about under my ruling.

13 MR. SGRO: Well, she's got --

14 THE COURT: Not to implicitly try and say this is a memorialization of it
15 from a witness, so if you change now you've violated her statement because
16 that's, I agree, that's just the prosecutor's characterization of what they were
17 told.

18 MR. SGRO: Well, I guess you could go two ways with that, Your Honor.
19 One way is let's cross that bridge when we get there. But off the top of my
20 head I will tell you it's extremely analogous because in the federal system, they
21 never record anything.

22 THE COURT: Right.

23 MR. SGRO: Right? And so everything that every witness says is a
24 special agent's interpretation, including what a defendant says. Right? So if
25 the defendant's interpretation by the agent is, Yes, I committed -- I was

1 involved in the drug deal, they just write that down, they don't tape it and then
2 the defendant is free to challenge the interpretation of the agent.

3 So off the top of my head, it seems somewhat analogous, and I'm
4 not sure I would agree, instinctively, that it's not appropriate. But I think what
5 we have to do is play it out and see how it comes. Because, understand too,
6 Mr. Range and Ms. Williams both have an obligation to be truthful, right,
7 pursuant to their cooperation --

8 THE COURT: Sure.

9 MR. SGRO: -- agreement which you went over with them during the
10 canvass.

11 THE COURT: Right.

12 MR. SGRO: Arguably then, if they varied significantly, not, you know, I
13 was there 10 minutes and now they said 15.

14 THE COURT: Right.

15 MR. SGRO: But something of some consequence, there's probably room
16 for the argument that the State would, on its own, be compelled to elicit that
17 variance consistent with the cooperation agreement because as these witnesses
18 are testifying, you're given the job task of assessing credibility. Right?

19 THE COURT: Well, I don't know -- I don't know what the State's
20 obligation to bring out something related to what could potentially happen after
21 trial if I find that they violated the agreement.

22 MR. SGRO: Well --

23 THE COURT: I mean, that's really an issue for after the trial. If the State
24 says, you know what, you screwed us, you lied on the stand, and you turned
25 us around, and we're going to ask the judge now to find that your agreement is

1 void and you're going to prison or whatever it may be. I mean, that's really an
2 issue to be decided after trial.

3 MR. SGRO: Let's do -- let's do something very simple. I don't know
4 what the proffer is.

5 THE COURT: Okay.

6 MR. SGRO: Okay? The statement barely gets to Sasha Williams to the
7 point where Mr. Sims even has a weapon at the scene, let alone whether or not
8 he was the shooter.

9 THE COURT: Okay.

10 MR. SGRO: Okay? If the proffer is basically a felony murder factual
11 predicate, right, hypothetically because I haven't seen it yet.

12 THE COURT: Okay.

13 MR. SGRO: And at trial Ms. Williams were to testify that, you know,
14 they had conversations about this homicide for weeks and Mr. Sims went
15 locked and loaded, ready to fire upon entry, that's probably something that we
16 need to -- we need to talk about.

17 THE COURT: Okay.

18 MR. SGRO: Right? Because that's a significant variation. And I
19 flippantly said the scene 10 minutes versus 15 minutes, I'm trying to draw a
20 distinction here between something of substance. But I think the best thing to
21 do, Your Honor, is to allow the -- the memorialization of the proffer to occur. In
22 other words, have Ms. Weckerly shoot us an e-mail as to what B Rich or
23 Brandon Range said and what Sasha Williams said.

24 THE COURT: Okay.

25 MR. SGRO: To the extent anything comes up at trial, the context will be

1 such more greatly defined that we'll all be in a better position to figure out if
2 the e-mail's appropriate, not appropriate, what I can and can't get into, what
3 Ms. Maningo can and can't get into, *et cetera*. So --

4 THE COURT: Just out of curiosity, have you talked to their attorneys
5 about talking to them?

6 MR. SGRO: The first sentence of Mr. Guymon's e-mail was Sasha
7 Williams has already said she does not want to be interviewed again. And --
8 and -- and actually that reminds me of a point I wanted to make is that many of
9 the cases that talk about discovery obligations-slash-violation in one category
10 and ineffective assistance of counsel in another, in terms of what a defense
11 attorney's obligations are.

12 THE COURT: Right.

13 MR. SGRO: Many of them have as the predicate the ability of the
14 defense attorney to get the same information exercising due diligence, and
15 that's going to come up in the discovery memo motion which we haven't
16 addressed yet.

17 THE COURT: Right.

18 MR. SGRO: But to the Court's -- to the Court's point, many witnesses, I
19 don't think it would make much imagination on your part, Your Honor, to
20 assume that the surviving victim who was shot in the butt as he dove out a
21 window in fear of his life is going to have a whole lot of love for me saying,
22 hey, I represent the defendant in that case. Right? I mean, that's just the
23 practical reality of it.

24 THE COURT: Right.

25 MR. SGRO: These very capable prosecutors have correctly advised

1 witnesses in many, many cases that we've had against each other, You don't
2 have an obligation to speak to the defense attorney, you can if want to, but you
3 don't have to. Okay. So, and that correct statement of the law, right, has an
4 extremely chilling effect on our abilities. So we haven't got to this notion that,
5 oh, they can do whatever, you know, whatever they want to do. They can do
6 that. It's incredibly transparent because we can't do that. And there is an
7 affinity that exists between victims and the D.A.'s office and probably rightfully
8 so, right? The D.A.'s the one going to the bat for that particular victim. We're
9 not welcomed and received the same way given our business card.

10 So that that's the practical reality of it. And I didn't want to get
11 there just yet, but there is a definitely a recognition of the disparate nature of
12 the work that we do and the treatment that we receive from witnesses such
13 that we do not have the same access oftentimes as the State dose.

14 THE COURT: Okay.

15 MR. SGRO: So.

16 MS. WECKERLY: That, I mean, obviously, that's always been the case.
17 And there's no change in the law in that.

18 With regard to how this Court's going to actually order the
19 production of the content of the proffer, I would just ask the Court,
20 respectfully, if you could reserve ruling so we can show you that opinion and,
21 obviously, the defense too, of the case we writted on that actual proffer topic.

22 THE COURT: Okay.

23 MS. WECKERLY: Because --

24 THE COURT: Well, so tell me real quickly, I mean, was that a situation
25 where somebody ordered you to go back and record the proffer?

1 MS. WECKERLY: Yes, record and disclose -- and describe it.

2 THE COURT: Okay.

3 MS. WECKERLY: And we writted that and we were successful broadly
4 as to the content of the proffer. I understand this Court can make its own
5 ruling, I just ask you to reserve until we can show you that opinion, and
6 obviously the defense would comment on it too.

7 THE COURT: Okay.

8 MS. WECKERLY: We can -- or we can decide it now, but I'm sure they
9 want time to look at it.

10 THE COURT: Yeah. But, obviously, it sounds like we're going to be here
11 for a long time. Not DiGiacomo he's going to be on a flight.

12 MS. WECKERLY: He'll do it.

13 MR. DIGIACOMO: It's unpublished. I'll pull it -- I can pull it up. It's
14 unpublished, but it is --

15 THE COURT: I tell you what --

16 MR. DIGIACOMO: -- even the lawyers telling the other lawyers what
17 happened, all of that was --

18 THE COURT: Tell you what, Katherine, write this down, what's the cite?

19 MR. DIGIACOMO: Well, I've got to pull it up, so.

20 MS. WECKERLY: If we could just hold that on pause.

21 MR. DIGIACOMO: I will -- I will find it.

22 THE COURT: All right. When you find it, Marc, give it to Katherine, if
23 you would please.

24 MR. SGRO: And if he would give it to us too.

25 THE COURT: And I'll have her make some copies for us and at some

1 point we'll take a break and we'll look at it and we'll talk about it again. Okay?

2 Okay. So that's one that we're almost done with.

3 MR. SGRO: We're flying through, Your Honor.

4 THE COURT: Number 2 regarding the open-file policy.

5 MR. SGRO: So, Your Honor, I guess what we need to understand is
6 relative to the discovery that is being received, the ability of us to be able to go
7 to trial. Okay? So the Court in this case, and I guess to be completely fair, the
8 Court did offer an accommodation of an extra week, but, generally speaking,
9 the Court wants this case to go in the next few weeks, right?

10 THE COURT: Right.

11 MR. SGRO: And the Court is going to expect, based on that mandate
12 from the bench when we were last here, that when we come to calendar call
13 that the defense attorneys in this case announce ready. Right? And so the
14 difficulty comes in being able to appropriately announce ready because of the
15 newness of this policy and how it's being vetted. And I know we've only been
16 here on one motion, but we can already see Ms. Weckerly, whom I trust, just
17 made a representation to the Court that she didn't read the sentence that I read
18 to you about inculpatory evidence the same way that I saw it.

19 Now, I attribute that to the newness and the infusion of this policy
20 going throughout a policy -- an office of hundreds and hundreds of attorneys.

21 THE COURT: Okay.

22 MR. SGRO: The difficulty comes then, Your Honor, is when the
23 subjective reading of a number of district attorneys in the office and their
24 individual assessment as to what they do and don't need to comply with. So
25 we start with, you know, All inculpatory evidence that the district attorney

1 needs to or intends to use at trial will be provided. And then it just states in the
2 memo, now this memo is a memo, but it's not case law.

3 And while on the one hand one can appreciate the policy, there are
4 statements in the memo such as, Irrelevant material will not be provided. Who
5 decides then relevancy? In other words, it doesn't say material, which
6 according to the individual prosecutor prosecuting his or her case, will be
7 provided to the court for an in camera review. In other words, anything that we
8 do, Your Honor, always -- you're the gatekeeper of what's relevant and what's
9 not.

10 Attorneys, in my experience, aren't the providers of authority
11 relative to what's going to be relative evidence. They can guess what our
12 theory of the case is going to be in any given case. But they don't know until
13 we -- we argue what our theory is. So it's unsettling that they are the
14 determiners of what's relevant without being subject to any review.

15 It's interesting to me, Your Honor, relative to this memo, it says,
16 The Clark County D.A.'s Office does not, underline not, have an open-file policy
17 as that phrase has been interpreted by courts. Now understand, some of your
18 colleagues that you worked in the D.A.'s office with years ago are the ones
19 making the decisions that they now castigate and criticize, right?

20 THE COURT: Okay.

21 MR. SGRO: It's unusual, at best, colleagues of the prosecutors to my left
22 who have had the good fortune of advancing through the ranks in their judicial
23 careers are now in various appellate courts mandating and giving rulings
24 through the eyes of an open-file policy. The D.A., for whatever -- inexplicably
25 in my view, just said we don't have one. Well, that's not the state of the law.

1 But if you have district attorneys operating functionally under this
2 rubric that they don't have an open-file policy, how do I know if I'm prepared to
3 go to trial because I can never be assured that I have the discovery requisite to
4 my announcing I'm prepared. They go on to state, As that phrase has been
5 interpreted by courts to relieve defense counsel of its obligation to exercise due
6 diligence in discovering impeachment, they talk about a case file review, does
7 not relieve defense counsel of its obligation to discover material which is
8 available to the defense. Right?

9 So we have been told for years, and this is the new twist, for years
10 how many times have you heard prosecutors say, Judge, they have everything
11 we have, they came and did a file review at our office; everything we have,
12 they have. Okay. You've probably heard that, again, a thousand times. But
13 now because we don't know what a file review means, I mean, Ivette and I did
14 a file review yesterday for -- I left after a couple hours, she was there longer
15 than I was. I don't know what we reviewed. Did we see 50 percent of the
16 material? Did we see 80? I have no idea.

17 And the -- the interesting thing is is that for years they have
18 castigated defense attorneys for not being ready because, Judge, they can
19 come over and look at our file any time they want to. They want discovery,
20 they don't have to file this motion. They can come over to our office and they
21 can look at whatever we have. Right?

22 THE COURT: Right.

23 MR. SGRO: That's been the thing forever. So all of a sudden, six months
24 ago or so, whenever the memo was drafted, apparently that has now changed.
25 They instruct how to serve subpoenas and they -- and here's -- here's what's

1 great, the memo comes out, right, and so now we're supposed to have a
2 change and you'll recall this, Your Honor, do you remember all the banter back
3 and forth about those statements that Wildemann had taken when the -- there
4 was an issue whether or not Wildemann was purposely trouncing over Miranda
5 rights.

6 THE COURT: Right.

7 MR. SGRO: My words, not anyone else's words.

8 THE COURT: Right.

9 MR. SGRO: But the subject matter was statements that that detective
10 had taken post- and pre-Sims' interview. Right?

11 THE COURT: Okay.

12 MR. SGRO: I send the subpoena to Metro and I got, Your subpoena for
13 records in an open criminal case does not comply with N.R.S. 174.315, is not a
14 lawful subpoena for the discovery of records. Discovery is properly obtained
15 from the District Attorney pursuant to N.R.S. 171.1965, October 9th, 2014.
16 And this would be the letter that led to --

17 THE COURT: Right.

18 MR. SGRO: -- God knows how many court appearances and briefs we
19 had. Right? Interestingly, the memo comes out. I had sent -- and if I may
20 approach, Your Honor?

21 THE COURT: Sure.

22 MR. SGRO: I had sent another subpoena after the memo comes out for
23 phone records, jail phone records. And the subpoena's attached. And June of
24 '16, after the memo's come out and now I'm trying to do my due diligence,
25 right, I'm trying to be competent, I'm trying to get the material that's out there.

1 And, Your Honor, how many cases have you had where jail records or, I'm
2 sorry, jail telephone calls are played in front of a jury, right? Many.

3 THE COURT: Right.

4 MR. SGRO: Unfortunately, as a seasoned practitioner, we're also aware,
5 jail phone calls sometimes come into evidence. Right? So I subpoena the jail
6 phone calls. And look at what it says in the middle of the letter, June 29th,
7 2016, after the memo comes out, Pursuant to N.R.S. 174.235, discovery is
8 properly obtained from the District Attorney on an open criminal case unless the
9 court orders specific discovery pursuant to N.R.S. 174 with the subsection.
10 You should request the phone records from the deputy district attorney
11 assigned to your case prior to the court hearing.

12 Now, Judge, where in the memo does it say they're going to give
13 me phone records from the jail? And these, by the way, I did request other
14 defendants' phone records. I got two defendants in my case that flipped.

15 And, now, understand, to be completely transparent, the outcome
16 of this letter would be the machinations of me ultimately getting an order to this
17 Court --

18 THE COURT: Right.

19 MR. SGRO: -- and getting jail records provided. But this was on June
20 29th, I'm getting the records, literally, as we speak, three weeks before trial.
21 So they successfully burned through, you know, three-- two, three months of
22 trial prep time I could have had with those jail records. And the long and short
23 of it is, I bring this to your attention, Your Honor, because the D.A. doesn't give
24 us jail phone records unless, unless they are going to use a phone call, five
25 phone calls, and then they send over that one call or those five calls on a disk

1 and say here you go.

2 In this case we haven't gotten that. But that doesn't mean that
3 there's not relevant information on those phone calls. Who knows what Sasha
4 Williams or Brandon Range said to one of their colleagues or family members
5 about taking the deal, about really what their level of criminality was in the
6 case. Right?

7 THE COURT: Right.

8 MR. SGRO: You know that those sometimes are treasure troves for
9 defense attorneys. I look at the memo and it tells me to send a subpoena. I
10 did. I get a letter back saying going go to the D.A. And you can see the circle
11 jerk that happens here --

12 THE COURT: Right.

13 MR. SGRO: -- on a case you have in front of you right now.

14 THE COURT: Circle jerk.

15 MR. SGRO: I'm sorry to use that term, Your Honor.

16 THE COURT: Look, I get it. This has been an issue for a long time with
17 regards to where our discovery comes from.

18 MR. SGRO: Okay. So -- yes, sir. And there are claims in the discovery
19 memo, Las Vegas Metropolitan Police Department will not comply, not comply,
20 with the subpoena which requests investigative records related to someone
21 other than the client of the defense attorney issuing the subpoena. Who are
22 they, through the D.A.'s office, to simply say we're not going to comply?
23 Where is that statutory authority anywhere?

24 And by the way, this has no carve-out for codefendants. Right? So
25 if the Metropolitan Police Department's going to take a position where they're

1 simply not going to comply with a subpoena, how in the world would it not
2 apply or would there not be a carve-out to codefendants? In our case, Your
3 Honor, we have codefendants who have flipped. What more fertile ground for
4 cross-examination would there be? Every, I mean, defense attorney 101, you
5 go to their rap sheet, prior records, law enforcement interactions, right?

6 THE COURT: Right.

7 MR. SGRO: Do they have -- do they have a gang file? Have they
8 associated with other criminals? Whatever. Again, that's basics. And they're
9 telling me they're not going to comply.

10 THE COURT: Well, but, just to be clear, the section of the memo you're
11 talking about, if I remember everything I read in that, is the D.A. saying, look, in
12 terms of Metro, this is kind what we understand their policies to be. We don't
13 represent them, we're not advocating for or against them, but this is what we
14 understand how they're going to do business. So we're giving you this
15 information and, you know, to the extent that we're being told that Metro will
16 do certain things, we're going to rely on that as well. But not that this is the
17 D.A. policy to have Metro not do something.

18 MR. SGRO: Okay. I understand all that.

19 THE COURT: That's a little -- that's a little different.

20 MR. SGRO: Then how can the D.A. recognize on the one hand the
21 Metropolitan Police Department is not going to assist you relative to certain
22 issues.

23 THE COURT: Right.

24 MR. SGRO: And on the other hand, in the same document, go get
25 whatever you need from Metro because when we show you open file, we're

1 not doing your job for you. How many times have you heard and seen written,
2 It is not the obligation of the prosecutor to do the work for the defense
3 attorney.

4 THE COURT: I get you.

5 MR. SGRO: You, at a hearing in this case, related to this very issue,
6 chastised, to put it mildly, the notion that every time a defense attorney tries to
7 get something here comes the motions to quash, here comes, you know, and
8 we have to go through this litigation when, at the end of the day --

9 THE COURT: But you think -- you're saying that I chastised you all?

10 MR. SGRO: No. No. The attorney --

11 THE COURT: I chased Metro.

12 MR. SGRO: Correct.

13 THE COURT: Right.

14 MR. SGRO: Correct. So I guess what I'm saying is I'm doing this all
15 under the big picture of you want me -- you want us to announce ready at
16 calendar call.

17 THE COURT: Right.

18 MR. SGRO: And what I'm telling you, Your Honor, is that I am unsettled,
19 relative to announcing ready, because I don't know if I have what's out there
20 because I can't rely on the assurance that it's in the file, in the D.A. file. Right?
21 And they're not going -- they self -- self-announce they're not responsible for
22 anything else outside of their office. That violates Bagley it violates Kyles. I
23 mean, these are, you know, law school U.S. Supreme Court cases.

24 THE COURT: But we're really, I mean, what we're talking about right
25 now is under that theory you could never, no matter how many times I set a

1 trial date, announce ready for fear --

2 MR. SGRO: No, that's --

3 THE COURT: -- for fear that you're just not getting everything.

4 MR. SGRO: Well, understand --

5 THE COURT: Right?

6 MR. SGRO: -- understand, Your Honor, I'm not shying away from our
7 responsibilities --

8 THE COURT: Right.

9 MR. SGRO: -- to do what we need to do to get ready, what I'm
10 suggesting to the Court is there appears to be, based on the memo, a parsing of
11 responsibilities to ensure that the left hand never knows exactly what the right
12 hand is doing. It provides an insulation so that the D.A. never has -- the D.A.
13 can always say --

14 THE COURT: Right.

15 MR. SGRO: If these guys get up and say they have everything in our file,
16 I -- I agree. Right? But it's the definition of what's in the file now that
17 apparently has changed. Right? And so when we now go seek to supplement
18 those items which are ostensibly no longer in their file based on the memo, we
19 receive obstacles, hurdles, and we don't know what we have and don't have.
20 Why would Metro, after the memo goes out and their position has been
21 articulated, send me right back to the D.A.'s office when I'm asking for my own
22 client's jail records?

23 THE COURT: Well, that I can't answer. I have never had the jail --

24 MR. SGRO: And I know --

25 THE COURT: -- the jail usually complies.

1 MR. SGRO: Right. Well, they had until the memo came out, Your Honor.

2 And, so, when it says, for example, you know, the different -- the
3 different things they put, first of all, in their brief, Your Honor, adhering to the
4 law, this is what we get all the time, the 2016 memo does not relief the
5 defense of investigating its case diligently.

6 THE COURT: Correct.

7 MR. SGRO: I agree. Hence my effort, look at what happened. Brady
8 does not require the State to conduct trial preparation and investigation on
9 behalf of the defense. I agree. That's not the issue here. The issue here is an
10 intentional parsing of responsibility such that I never know what I have.
11 Despite my effort to conduct due diligence.

12 And so I guess in order words to announce ready, Your Honor,
13 given the current state of affairs, I guess, in our district and I believe this is the
14 first criminal trial I'm trying since the memo came out, I would like the entry of
15 an order that says that the State has an obligation to obtain evidence known to
16 others acting on the State's behalf securing the fact that they have all of
17 Metro's information, securing the fact that they have the jail records. If we
18 have prison jackets, if we have visitation logs, all those items that for years
19 were part and parcel of an open-file policy because the D.A. would oftentimes
20 look at who was visiting which defendant, *et cetera*.

21 They have an obligation to cull that evidence because that's what
22 the U.S. Supreme Court has stated relative to their obligations. I want a
23 remedy that suggests that they have to provide to Mr. Sims, through us, all
24 evidence that's exculpatory or tends to negate guilt; and I want, once they have
25 all the evidence in their possession, another file review so we can make sure we

1 have everything, not, quote, unquote, that they have.

2 I do not take issue with the statement they have everything that we
3 have. What I take issue with now, given the memo, is the definition of what
4 constitutes now their complete file. And, Your Honor, you have in front of you
5 an example of us trying to be effective in our representation only to be met with
6 a letter, and I understand at the end of the day we got that, but there are tens
7 of thousands of calls, these defendants have been in custody for three and a
8 half years.

9 THE COURT: Right.

10 MR. SGRO: You can only imagine how many reams of telephone calls
11 that there are. They took away from me, because of that letter, about two
12 months' worth of time to appropriately digest all that information. Okay? So
13 what I'm suggesting to Your Honor is that the practical reality of what's playing
14 out here, ham -- hamstrings us. They talk, you know, in the memo they say it's
15 illegal to ask for a subpoena for documents unless it's an evidentiary hearing
16 or -- or trial, so Metro's just not going to comply. And then, you know,
17 N.R.S. 7 -- 174.335 states, A subpoena may command the person to whom it
18 is directed to produce books, papers, documents, or other objects designated
19 therein, to us not at a hearing.

20 So the troubling thing is you start with the case law, I think it's -- it
21 starts -- Quisano, you look at Rippo, these cases, Your Honor, where co --
22 former coworkers of yours who were D.A.s, and I think that's important
23 because they were the ones that had hands on the files at one time, are
24 suggesting in their rulings there's an open-file policy and the D.A. could I just
25 say, Your Honor, if -- can I write a memo and throw it out to the Defense Bar

1 and say, hey, in my opinion there's an open-file policy, here's what we're going
2 to do.

3 THE COURT: Well, I think one of things that's getting lost is that there's
4 probably a lot of us that would say at a point in time that the D.A.s had an
5 open-file policy, they just don't now. So to the extent there are -- there are
6 rulings that were premised on a belief that there was an open-file policy and
7 then talking about that, that's fine. But any agency has the right to change or
8 alter its policies. And so if they've decided we don't want to call this an
9 open-file policy anymore and we don't want to deal with discovery in the way
10 that it had been done in the past, they've got the right to do that as well.

11 MR. SGRO: Exactly, and so take, for example, an analogy from Federal
12 Court, the federal system has no discovery at all other than Rule 16, right? So
13 what did the prosecutors in our district do and in many others, they do what's
14 called a joint discovery statement. Right? And it's an agreement that's many
15 pages long that was hammered out years ago between representatives from the
16 U.S. Attorney's Office and various defense counsel. And there is a rule book
17 through which all parties know now how to operate. And if you want to issue
18 a subpoena to Metro or anyone else for that matter, you go under Rule 17, you
19 can submit it to a magistrate, they can issue it. There's some subpoenas that
20 get issued right from the clerk's office. We don't go through all this.

21 In other words, I don't care what the rules are, just tell me what
22 they are and let me do my thing, so long as I'm playing within the bounds of
23 the rules. Here they -- they want to change it to not open-file, great. Then
24 allow me to do my thing, let me subpoena Metro, let me subpoena the jail
25 records, let me subpoena various other law enforcement agencies that you are

1 now saying you're not going to provide any more.

2 But you can't have it both ways. You can't say here's the rules,
3 oh, and don't do anything even outside what we have said we're going to do,
4 that -- that's the difficulty that we have, Your Honor. And how do I get that
5 couple months back on the jail -- on the jail -- on the jail phone calls, by the
6 way, I can't. And at the same time that all this is going on, Your Honor, we're
7 operating under a rubric of judges that want finality in their cases. Right?

8 And it's us that have to do what we have to do to get ready and
9 we can do that if we're given, afforded the opportunity to understand what the
10 rules are. And so in the absence of consistency, because of this memo,
11 Your Honor, the only remedy we can fashion is -- is that the State, in this case,
12 and let's chalk it up to the newness of the memo, right? Maybe Metro didn't --
13 whoever wrote that letter didn't know, what the memo said, let's give them the
14 benefit of the doubt. But there has to be a way for us to be able to function
15 and be able to announce ready.

16 So if the State is mandated under a lot of U.S. Supreme case law to
17 collate the documents for us and say here is everything, we're in a different
18 situation. If not, there's an apparent disconnect which I have demonstrated
19 now in court relative to what we can and should do. And so in the spirit of
20 trying to announce ready, Your Honor, I'd ask the Court order the State to
21 gather the information from the various law enforcement agencies, give them a
22 time certain within which to produce it, and thereafter make copies for us of
23 whatever they get. That satisfies -- that satisfies our request, that's how we
24 announce ready, and that's the response to your question you posed some
25 minutes ago.

1 So I'll submit it unless the Court has inquiry, Your Honor.

2 THE COURT: Okay. Ms. Weckerly.

3 MS. WECKERLY: Your Honor, specifically, with -- I'll start with the
4 subpoena for the jail calls. It looks like Mr. Sgro's office filed it, it's dated the
5 28th of June. Metro's response is on June the 29th. So, at most, there was a
6 two-day delay. And the responsive letter is absolutely consistent with the
7 memo. It's saying if you want your own client's jail calls, we will produce them
8 for you.

9 The problem is his request was for people that he didn't represent.
10 In that event, way back in June or the very beginning of July, Mr. Sgro could
11 have come to the Court and said, hey, look, I want these jail calls of the other
12 two or the other three codefendants and I'm not getting them and then --

13 MR. SGRO: And I did. I did.

14 THE COURT: Well, just to, kind of, segue on that, the issue with the
15 order that that came over was asking for all jail records. And -- and I think
16 what I had more former law clerk communicate, or at least what I asked him to
17 was I'm concerned that you're asking for the release of medical records of
18 people that aren't your client and I don't know that that's appropriate. And so
19 this needs to be tailored down. I'm not understanding. And ultimately what I
20 got was what we want is the jail phone calls and then it was a -- it seemed to
21 be asking for an ongoing production every day of those things. And I was like,
22 well, I think that's going to be incredibly cumbersome. So we need to kind of
23 have some kind of narrow, specific thing that we're asking for and I have no
24 problem granting it.

25 MR. SGRO: Right.

1 THE COURT: So they did submit a court order, but it had to be modified.

2 MS. WECKERLY: But, I mean, that's the procedure.

3 THE COURT: Right.

4 MS. WECKERLY: I mean, I would think most people wouldn't want their
5 client's calls subject to a subpoena unbeknownst to them or without some
6 court authorization for the other defendants. For his own, obviously, he can get
7 those any time he wants. But those -- the subpoena he issued was for
8 represented people and requiring a court order for the release of those jail calls
9 is absolutely appropriate. And there was no delay on the part of Metro or the
10 State in letting him know you're not going to get these other peoples' jail calls.
11 So, I mean, this actually is the fault or, you know, the delay is because of the
12 additional requests for the other defendants.

13 Now, Mr. Sgro's characterization of what is required under Brady, I
14 sure haven't read in any case. Because the requirement of Brady is for us to
15 produce exculpatory information that isn't otherwise discoverable by the
16 defense. They can subpoena N.S.P. on certain inmates. They can subpoena
17 Metro even on other incidents with a court order, if they want particular
18 information. It is not the obligation of the State to search every single agency
19 about every possible thing.

20 We have an obligation to produce exculpatory material. But in
21 nowhere, in no case, or in no statutory description is there this broad, I guess,
22 order that he's seeking appropriate saying that, well, we have to check with
23 every agency, federal, state, whatever, which he can do himself, and then
24 come to court with it with copies for the defense. That's just not what's
25 required under the law. I mean, that would be really convenient for the

1 defense. But, I mean, what does that even mean? It's so broad and so vague.
2 Something specific like codefendant's jail calls, we get it, we're not going to
3 oppose that. We get in a codefendant case they're entitled to that. We would
4 never fight a subpoena like that. In fact, we have produced those in other
5 cases with codefendants without incident.

6 But the broad order he's seeking, I guess I'm just not even
7 understanding what that requires us to do and what case law underpins an
8 order like that. Now, the motion that they actually filed was to ask the Court to
9 order the State to adhere to a policy that doesn't exist in statutory case law
10 or -- or doesn't exist in terms of statute. When the Nevada Appellate Court
11 issued that Quisano opinion, which we have appealed, the -- the understanding
12 from the D.A.'s office was the Court is suggesting because we allow a file
13 review, we call it open file, but because we allow a file review typically in all
14 cases and certainly we've done that in this case, that that is now the legal
15 equivalent to an open-file policy as understood in case law where we're
16 representing that our file that we're letting you review is the totality of
17 information about the case.

18 THE COURT: Okay.

19 MS. WECKERLY: And that's just simply not the case, that's not what
20 we're representing. We allowed in this case a review of our file, a review of
21 Homicide's file. But we're not suggesting as -- to the defense that this is an
22 open-file as it's understood as a term of art. And, respectfully, I understand the
23 Court does have broad discovery discretion on what to order, but this motion, I
24 just simply don't understand how the Court legally can order us to have a policy
25 this isn't required by statute or the constitution.

1 THE COURT: Well, I don't think I can. Look, I'll tell you, just so
2 everybody knows, I never thought the D.A.'s office had an open-file policy even
3 when I was there. I mean, it wasn't like when you invited somebody over to
4 review the file you just gave 'em everything you had and said go through it and
5 tell me what you want. I mean, everybody was always going to say, well, this
6 is work product, this is something unrelated to this, you know, blah, blah, blah,
7 and was picking folders out of it and then said, Here's everything related to this
8 case that we're going to be using at trial, you know, tell me if you've got the
9 copies of it.

10 So, but, no, I can't create your policies and I don't think the
11 Appellate Court can create your policies either. An agency has a right to create
12 its policies. And a policy is just designed to govern the employees on how to
13 go about doing things, not necessarily to create some -- some legal requirement
14 on how you deal with opposing parties in your litigations. That's just my --

15 MR. SGRO: Your Honor, may I respond just very briefly to one point?

16 THE COURT: Yeah.

17 MR. SGRO: I have spoken about Brady, Bagley, Giglio --

18 THE COURT: Right.

19 MR. SGRO: -- these landmark decisions, I brought a copy of some of
20 them with me. Bagley, and this is about eight pages into the opinion, states,
21 this is headnote 11 and 12, The prosecution alone can know what is
22 undisclosed. It must be assigned the consequent responsibility to gauge the
23 likely net effect of all such evidence and make disclosure, when the point of,
24 quote, reasonable probability, end quote, is reached. This in turn means, and
25 here's -- I'm going to solve the mystery of where this language comes from,

1 right out of Bagley. This in turn means that the individual prosecutor has a duty
2 to learn of any favorable evidence known to the others acting on the
3 government's behalf in the case, including the police.

4 So right here in black and white. So my -- my -- my suggestion is
5 that there appears to be inconsistency with the mandate that the prosecutors in
6 any given case follow the constitutionality of what their obligations are versus
7 how the memo is drafted that suggests that they are not going to learn of
8 favorable evidence if others acting on their behalf in the case, including the
9 police, possess it. That runs afoul of the Bagley decision and that's -- that's
10 one of the core problems with the memo.

11 While I agree with the Court that they can advance a policy,
12 generally, that it's not open file any more, I disagree with a position that
13 violates a constitutionally interpreted mandate that comes from the United
14 States Supreme Court. So that's -- that's where the language comes from.
15 Bagley is 1995, 21 years ago. It's been --

16 THE COURT: Right.

17 MR. SGRO: -- cited a million times and many of the references in our
18 brief come from the sentences I just read to you. So that's -- that's our
19 position is that the memo as written runs contrary to constitutional principles as
20 articulated in landmark cases such as Bagley insofar as the prosecution has
21 made an effort to relieve itself of obligations for production of discovery that
22 are obligations that they do not have the constitutional right to relieve
23 themselves from.

24 That is, in essence, our problem. And before we can announce
25 ready, Your Honor, we seek a remedy that causes the constitutional mandate

1 articulated in these various Supreme Court decisions to be complied with. Once
2 we have the assurance that those mandates have been complied with, we'll
3 have everything and we can announce ready to go, just like we have for years
4 and years in this district.

5 THE COURT: Ms. Weckerly.

6 MS. WECKERLY: Your Honor, I too cited many cases about the extent of
7 the Brady violation. I would refer the court to our memo or our opposition at
8 page eight where the Ninth Circuit found there was no Brady duty to disclose
9 information in a Federal Public Defender's file regarding prior inconsistent
10 statements made by a government witness. That was United States v. Hankey,
11 203 F.3d 1169. In United States versus Lovitt, which is page 9 of our
12 opposition, the 4th Circuit found that there is no Brady violation when, through
13 reasonable efforts, the defense could have discovered the information.

14 In a footnote on page 10, it's an unpublished opinion, admittedly,
15 but it's a case by the Nevada Supreme Court where the defense wanted C.P.S.
16 records, the State did not get them for the defense, and the Nevada Supreme
17 Court said you could have gotten that yourself, there is no Brady violation.

18 On Page 11 there's a indented quotation citing several cases that
19 have found that essentially if the information is obtainable through diligent
20 effort by the defense, it is not the responsibility of the State to find it. And I
21 guess that's, I mean, the problem I see is when there is imprecision in what
22 they're requesting like codefendant's jail calls, we know what they want, we
23 can provide it. That's easy for us to comply with. Or that's easy for us to see,
24 you know, why they want something. But when their issue -- when they're
25 asking this Court for, well, we want everything in the, you know, the universe

1 whether we're able to get it or not, we have no way of ever meeting that
2 obligation because we have no idea what they want and we are not
3 constitutionally nor statutorily required to investigate the defense.

4 If we come upon exculpatory information, we have to provide it. If
5 we, through diligent effort in talking to our detectives, see something, we have
6 to pursue it to determine whether or not that it's exculpatory and, obviously,
7 disclose it if it is. If we find something about a witness we're using that's
8 impeachment, we have to disclose it. We have an obligation to look for stuff.

9 But separate and apart from the discrete part of the case, there is
10 no obligation unless they are part of the prosecution team, meaning part of that
11 investigation, we have no obligation, as I read the case law and the statutory
12 obligations, to conduct that type of discovery because they can seek that out
13 themselves.

14 THE COURT: Well, here's what I'm going to say, the -- I'm going to
15 decline to issue the order that the defense is asking for today in part because I
16 think what it's really just asking me to do is memorialize what legal obligations
17 are, which we all know what the legal obligations are, they're in the pleadings,
18 we've -- I've ordered, you know, compliance with discovery.

19 The other aspects of it saying that we want kind of you to go out
20 and grab everything that -- that reasonably should be grabbed, I agree that the
21 problem with that is neither you nor them would know if they've grabbed
22 everything or not. I mean, it's just hugely speculative to talk about, well, the
23 only way I'll know if I'm ready is if somebody looks and if they tell me there
24 isn't anything there, then I guess I've got to be ready. There's always that fear
25 that maybe there's something that I didn't know about. Every reasonable

1 attorney has that. And I think every reasonable attorney or good attorney
2 realizes that the minute you think, okay, now I know everything, then you've
3 probably -- you're not doing your job because you should always be worried if
4 there's anything else that's going to come up in something somebody says, a
5 document, whatever. You always want to be on your toes in that regard.

6 So the context of the conversation today about readiness is really
7 kind of speculative about things that potentially might be there that we don't
8 have as opposed to anything concrete that I think exists and I just never got.
9 The jail records, look, I don't know why, the jail letter here doesn't really refer
10 to why they weren't providing them. Other than making reference to discovery,
11 this initial letter didn't say, You're requesting things that aren't involving your
12 client. It just says, you know what, you need to get discovery through the
13 D.A.'s office. That's why I was kind of surprised about the letter.

14 But I agree that, you know what, the follow up to that is to get the
15 court order. They did seek the court order here, even though it took a little time
16 to -- to get it done. So, that's kind of finite issue. But you have the jail, all the
17 jail calls. I realize they're voluminous, but that's something that at least you
18 have possession of at this point.

19 In terms of worrying about other things, like I said, the state of the
20 law is always going to be, and logic dictates that the police are always going to
21 be the first gatekeeper of turning information over to the D.A.'s office. The
22 D.A.'s office has to be a gatekeeper of deciding what, if anything, is relevant
23 and discoverable under the various statutory and case mandates. And,
24 thereafter, you know, continuing their obligations to provide those things. And
25 I'm sure until the earth explodes, the defense is going to worry about things

1 that maybe are there that they didn't hear about because they didn't trust, you
2 know, this person or that person to turn them over. But I don't think that
3 anything that's occurring here requires any other kinds of discovery fashions
4 that aren't already in place.

5 All right. How about the motion to compel production of direct and
6 vicarious statements of the defendant?

7 MS. MANINGO: And, Your Honor, those are -- this motion is along the
8 same lines and, of course, I'm not going to rehash everything, but I want to
9 narrow in --

10 THE COURT: Thank you.

11 MS. MANINGO: -- on this specific issue.

12 THE COURT: Okay.

13 MS. MANINGO: You mentioned, of course, in the memo that the D.A.'s
14 policy is to turn over all inculpatory evidence that will be used at trial. And
15 even in discussing the first motion, I think Your Honor even said, you know, if
16 an oral statement is made by the defendant, of course, you know, I expect that
17 that'll be turned over. And the answer there is that's what we want.

18 THE COURT: Right.

19 MS. MANINGO: But the answer really in the opposition with that specific
20 issue is no, It's not being to be turned over. What we're asking for is that Mr.
21 Sims be granted, basically, equal access to his own words. So I think we are in
22 agreement that under N.R.S. 174.235, they're going to turn over things that are
23 recorded, right, the statements that -- which we have his two statements that
24 were recorded.

25 THE COURT: Written or recorded statements.

1 MS. MANINGO: That's right. What the rub is is vicarious statement --
2 well, statements made either directly or vicariously that are going to be
3 statements of the defendant. And as Your Honor knows, these direct
4 statements can either be made to a police officer, and I think what you just said
5 in the first motion is you expect those to be turned over. The opposition says,
6 no, they have no obligation to turn those over because they're not written or
7 recorded. So, again, contrary to the open -- or contrary to the memo, they're
8 unwilling to turn those over.

9 THE COURT: Well, and just to be clear, is that your policy that if a
10 defendant makes an oral statement, let's say a confession, makes an oral
11 confession to a witness that you're informed about, that you don't believe that
12 is discoverable?

13 MS. WECKERLY: Right. That's not covered by the statutes.

14 THE COURT: Even if you want to put the witness on the stand at trial
15 and use it to convict the defendant?

16 MS. WECKERLY: Yes. And just -- well, I'll let Ms. Maningo finish, but
17 we cited case on that.

18 THE COURT: Okay. Okay.

19 MS. MANINGO: And I actually did see the case law and I think it's a
20 Thompson -- I think it's a Thompson case. And we're aware of what that case
21 says.

22 THE COURT: Right.

23 MS. MANINGO: But I think along the lines of what Mr. Sgro has been
24 shedding light on, that goes in direct violation to their -- and I use the word
25 "violation" --

1 THE COURT: Right.

2 MS. MANINGO: -- but it's against their own policy. And, again, another
3 point that Mr. Sgro made, it's also against the federal law and what's done in
4 the federal system and he made the point that, basically, depending on which
5 motion we're arguing, they're picking and choosing whether or not the federal
6 law is on their side or not. And in the federal rules disclosure of defendants oral
7 statements are common and allowed.

8 THE COURT: Right.

9 MS. MANINGO: And it's not just a statement he may make to a police
10 officer or to a C.O. or to a witness in general, it's also statements that may be
11 imputed to him. For example, if -- if someone says something and he adopts
12 something, that's a statement that's going to be used against him. That's
13 something that we should know about. Especially in case like this where this
14 has happened to me in trial where a codefendant's sitting on the stand and all
15 of a sudden all these statements are coming out because it's a statement made
16 by a co-conspirator in the course of a conspiracy.

17 THE COURT: Okay.

18 MS. MANINGO: Those are statements that are imputed to our client and
19 those are statements we believe we should be -- have access to. I mean, his
20 own words, to us it's a reasonable request, it's in accordance with their policy
21 with regards to giving us inculpatory evidence that's going to use -- be used at
22 trial, and it's in accordance with the federal law. So, again, that -- this is
23 honing in on a very specific issue and what we're asking for. But it goes -- it
24 dovetails basically everything Mr. Sgro's been talking about.

25 THE COURT: All right. Ms. Weckerly.

1 MS. WECKERLY: So, Your Honor, I dispute that we're sort of picking and
2 choosing with the federal rules. Obviously, what I've cited to are constitutional
3 standards and those, I really don't have any knowledge of the federal rules of
4 discovery. I'm sure the defense is much more knowledgeable about that than
5 me. But the constitutional obligations, obviously, we have to respect those.

6 I would refer the Court in our opposition to page 3 of our -- of our --
7 of our opposition where we did cite, as Ms. Maningo mentioned, the Thompson
8 case, which held that pretrial discovery of the accused statement is not
9 constitutionally compelled by the Fourteenth Amendment. Obviously, we have
10 discovery statutes in Nevada and that statute specific states --

11 THE COURT: Is there -- is there no other case on that in the last 40 years
12 than Thompson, just out of curiosity? I mean --

13 MS. WECKERLY: Not that I could find.

14 THE COURT: -- I didn't Shepardize it, run it, or do anything on my own
15 with that particular issue but --

16 MS. MANINGO: No, but I could tell you that there is a policy of the
17 District Attorney --

18 THE COURT: Well, no, I --

19 MS. MANINGO: -- and that's the point.

20 MS. WECKERLY: And -- and --

21 THE COURT: We'll talk about the policy in a minute, but --

22 MS. WECKERLY: -- and if I could speak to that, obviously, we have a
23 different interpretation and I'm sure the Court --

24 THE COURT: Right.

25 MS. WECKERLY: -- you can make your ruling on what evidence is. If he

1 wrote it down, yes; if it's on a machine, you know, like, an answering machine
2 or voicemail or whatever, that is written or that is recorded.

3 THE COURT: Okay.

4 MS. WECKERLY: That's definitely, yes, that falls under the discovery
5 statute itself explicitly. A statement that's made orally, that -- it's just not
6 contemplated by it. Now, I mean, in reality, a lot of times, informally, we will
7 say, hey, look, you know, this is what's going to happen.

8 THE COURT: Right.

9 MS. WECKERLY: But, I mean, to say that we're obligated to when it isn't
10 provided for constitutionally or by the statutes, we -- we oppose that. I
11 understand the Court maybe interprets the memo differently than I do.

12 THE COURT: Right.

13 MS. WECKERLY: But I think that the term "evidence" is in contemplation
14 of something that's written or recorded, not an oral statement. But above and
15 beyond that, it's the State's position that there is no authority compelling us to
16 do that.

17 THE COURT: Well, I agree that there is nothing within -- within 174.235
18 that compels you to do that. And I don't disagree or I don't think you've
19 misstated Thompson at all. I think Thompson says exactly what it says.

20 But I think in terms of everybody trying to play, you know, I'll go
21 back to what Tony said about just tell me what the rules are, if -- if you're
22 telling people that you're going to give them all the inculpatory evidence that
23 you intend on using at trial, you can't parcel out and say, well, really evidence
24 means a this, evidence means an object, it doesn't mean somebody's
25 testimony. I mean, evidence is evidence. Whatever you're going to use to

1 convict somebody, inculpatory evidence that you have, and nothing may be
2 more important than a guy confessing that he committed a crime.

3 So I just -- and, honestly, I can't imagine that you two wouldn't tell
4 somebody that, knowing you.

5 MS. WECKERLY: Well --

6 THE COURT: That if -- if you got a case and you've got fingerprints and
7 you've got this and you've got that and then one of the witnesses, oh, by the
8 way the guy confessed to me, you're going to tell them.

9 MS. WECKERLY: But -- and I agree. I agree.

10 THE COURT: I know you are.

11 MS. WECKERLY: Because informally there are discussions. I guess my
12 fear, Your Honor, is that, you know, we'll say, hey, look this witness is going to
13 say X, Y, and Z and we forget one part of it and it's inculpatory.

14 THE COURT: Well --

15 MS. WECKERLY: That -- that's -- that's the fear. And then it's, like, or
16 they say something that they haven't told us before that is inculpatory, you
17 know, or they, oh, Mr. Sims said one more thing as we were walking out the
18 door of the apartment.

19 THE COURT: Right.

20 MS. WECKERLY: That, you know, just --

21 THE COURT: Well --

22 MS. WECKERLY: -- by happenstance didn't come up.

23 THE COURT: Well, look, this an incredibly different view of, I just didn't
24 tell you that, you know, the next-door neighbor told me that your client gave an
25 admission da, da, da, da, and I forget to tell you what the guy said the shoes he

1 was wearing at the time when he -- when, you know I told you how he
2 confessed to everything, he also told the neighbor that he was wearing a pair of
3 black Nike high-tops or something, I forget to tell you about that because
4 somebody found one near the scene or something. There's a difference
5 between that --

6 MS. WECKERLY: Sure.

7 THE COURT: -- and just not talking about the oral statement at all. And
8 what I'm getting at is I think that you would tell them an oral statement of
9 something like that and I can't imagine that this is that big of a bone of
10 contention.

11 MS. MANINGO: And, Your Honor, I just want to one more point, and
12 really what is the spirit of this? What are we talking? What is the difference if
13 he says something on a jail phone call or he says something to somebody else?

14 THE COURT: That's recorded though.

15 MS. MANINGO: No, but what I'm saying is, I think you alluded to this,
16 the -- how incriminating that evidence is, it's going to be used to convict him,
17 his own words. It comes -- it's exactly the same. And not only that, but oral
18 statements are even less reliable. In other words, if you don't know what's
19 coming -- or the point is they're even harder to challenge and so you would
20 think you would be notified of that in order to properly prepare for trial. So, and
21 I think when they say we are going to turn over inculpatory evidence we're
22 going to use at trial, it's under the principle that, yes, you know, you should
23 have your own client's statements.

24 THE COURT: Well, here's --

25 MS. MANINGO: Regardless of how you -- the prosecutor gets it.

1 THE COURT: -- what I'll say, just to kind of get us moving along, I think
2 there is an obligation to turn over -- I think you've bound yourself through your
3 stated memo as to giving inculpatory evidence to let people know if there's an
4 oral statement of the defendant that's inculpatory. You know, parceling out,
5 you know, whether it was produced in a full format or not, I mean, you know,
6 those might be arguments to have in a particular case in a particular situation.
7 I've always thought that the biggest fear from the prosecutor's side was, well,
8 what if we don't know about an oral statement that a guy made to somebody,
9 we don't want to be held accountable for that, and I don't think you are.

10 To the extent you learn about something later on, you turn it over,
11 you're fine. But there's no obligation to go out early on in the case and say, oh,
12 let's go back and talk to everybody again and make sure this guy didn't say
13 anything to anybody that we didn't know about already. I mean, you discover
14 things, that's why there's ongoing obligations, and you turn it over. But, and
15 I'm not trying to set policy for the world, but I'm just going to say in this
16 particular case, if there are any oral statements that were made by the
17 defendant that would fall within inculpatory evidence to be used at trial, I do
18 want you to go ahead and let the defense know.

19 MS. MANINGO: And, Your Honor, I just want to make a point that there
20 are two codefendants that are going to testify and their -- those -- again,
21 whatever they say my client might have said at the scene, wherever, those are
22 going to be imputed to him.

23 THE COURT: Well --

24 MS. MANINGO: And they have probably -- they -- it's possible that
25 they've learned --

1 THE COURT: Well, I mean, that's not imputed to him, you're talking
2 about things that they've said that he said which are oral -- oral statements --

3 MS. MANINGO: Oral statements.

4 THE COURT: -- of the defendant himself.

5 MS. MANINGO: Which, of course, they're saying we are not entitled to.
6 No, I just want to make it clear that those -- that includes those type of -- H.

7 THE COURT: No, I'm not limiting to who it comes from.

8 MS. MANINGO: Okay.

9 THE COURT: I'm saying if there's an oral statement that -- that -- an oral
10 statement of the defendant that they become aware of that is inculpatory
11 evidence that they would use at trial, they need to go ahead and let you know.
12 Okay.

13 MS. WECKERLY: And I understand what the Court's saying, we have
14 e-mailed you that case because it's sort of on topic of what Ms. Maningo's --

15 THE COURT: Of this too?

16 MS. WECKERLY: Yeah, on the content of a proffer.

17 THE COURT: Of a proffer?

18 MR. SGRO: Can we get a copy of that e-mail?

19 MR. DIGIACOMO: You did. I sent it to Tony. Ivette's kicked back to me
20 but Tony had it.

21 THE COURT: You were supposed to give it to --

22 MR. DIGIACOMO: The law clerk, I sent it to you and to Molly. I didn't
23 know which one of you could get it on e-mail.

24 THE COURT: You were supposed to give it to -- Molly's not even here.
25 You were supposed to give it to Katherine. I told you to give it to Katherine.

1 MR. DIGIACOMO: I'm sorry.

2 THE COURT: Do you have the cite?

3 MR. DIGIACOMO: I didn't realize your law clerk's new name. I thought
4 maybe her name was Katherine. So I thought you meant your law clerk.

5 THE COURT: That is my law clerk's new name -- my new law clerk's
6 name is Katherine.

7 Katherine, raise your hand.

8 MR. DIGIACOMO: There you are. I wasn't looking at counsel table.

9 THE COURT: I'm sorry.

10 MR. DIGIACOMO: She was up there before, Judge, I thought she was
11 wasn't in the room any longer.

12 THE COURT: No, no, no. Hold on. Okay. Let me pull it up here. All
13 right.

14 State versus Eighth Judicial District Court, 20 -- well, this is just a
15 Lexis citation.

16 MR. DIGIACOMO: It's unpublished, so it's only going to have a Lexis
17 citation.

18 THE COURT: Okay. And there is a Westlaw one too.

19 Katherine, it's 2013, Nevada unpublished opinion, Lexis 126 or
20 2013 W.L. 324283. Sometimes it's easier, you know what, I'm going to
21 forward this to you, just print it out.

22 THE LAW CLERK: You are right now?

23 THE COURT: That'll be much easier.

24 MR. DIGIACOMO: Well, if she still has the department 05 law clerk, she
25 already has it, Judge.

1 THE COURT: Department 3 law clerk?
2 MR. DIGIACOMO: Department 3 law clerk.
3 THE COURT: Yeah, she has that address.
4 MR. DIGIACOMO: She already has it.
5 THE COURT: Go let me know if you don't get it. Thank you. All right.
6 Okay. We'll set --
7 MS. WECKERLY: So, but, I mean -- -
8 THE COURT: Go ahead.
9 MS. WECKERLY: I'm just asking that the Court review that case before
10 you fashion the order on the proffer content.
11 MR. SGRO: Can I just point out, Your Honor, I'm going through it now,
12 the case was decided in January --
13 THE COURT: Well, hold off, let me -- I haven't even read it, so let me
14 read it first. And then we'll go back --
15 MR. SGRO: All I was going to suggest was the date of the opinion
16 versus --
17 THE COURT: January 2015?
18 MR. SGRO: -- the date of the memo. It predates the memo by three
19 years.
20 THE COURT: Right. Okay. All right.
21 How about juvenile records?
22 MR. SGRO: Your Honor, this is one of those ones where I think there is a
23 stock opposition in the State's computers, but we -- typically when we get to
24 this point we don't -- there's really not an opposition.
25 THE COURT: Okay.

1 MR. SGRO: What I have done, even with these prosecutors in other
2 cases, to the extent that there are persons that would have a juvenile record
3 and, frankly, because of the nature of juvenile records, we do have witnesses
4 and victims in this case that are younger, you know, they're in their 20s, right?
5 So typically what we would do is we would submit an order to the court
6 directing Juvenile Court to submit to Your Honor --

7 THE COURT: Right.

8 MR. SGRO: -- to the extent that there are any juvenile records,
9 submission for *in camera* review. We would then look at them or you would
10 disclose them, whatever -- whatever you want to do, and that's how we would
11 deal with this issue and that's in cases where it's not clear because there are
12 obviously some witnesses that are only 17, 18, and they do have a juvenile
13 records' history and that's a different matter.

14 Our witnesses and victims, I think Sasha Williams is in her early
15 20s. That's the reason for the motion. So I would propose, Your Honor --

16 THE COURT: But, so, but you're not saying you have any belief that
17 there's a juvenile record of anybody, just that --

18 MR. SGRO: Well --

19 THE COURT: -- you're kind of just wanting to make sure there's not or?

20 MR. SGRO: Your Honor, the -- this is twofold, right? There's evidence
21 that may be relevant at trial relative to impeachment.

22 THE COURT: Okay.

23 MR. SGRO: There's evidence that may be relevant at penalty, should we
24 get there, to the victims in this case. Just so the Court's aware, one of the
25 witnesses, Sasha Williams, in her original statement to the police, described

1 these victims, including the surviving victim, as pimps.

2 THE COURT: Okay.

3 MR. SGRO: It is established throughout the discovery that the victims in
4 this case had a fraudulent gift card scheme going which was the premise under
5 which everyone finds themselves together, is the printing of fake gift certificate
6 cards. And I don't want to -- I know we're just here with the, Court but
7 obviously the victim's participation in their own criminal conduct can be a
8 mitigating circumstances, as the Court is aware. And so the extent to which
9 they are involved in a number of crimes such that they run the risk relative to
10 having a violent confrontation, as unpalatable as that may feel to express to a
11 jury, is certainly something that can be considered for mitigation. And so I
12 don't know that anyone specifically has a criminal problem that occurred then
13 they were 18 or 19 years old.

14 THE COURT: Okay.

15 MR. SGRO: And now has been sealed. I don't have access to SCOPE.
16 We're not in the P.D.'s office or Special P.D.'s office.

17 THE COURT: Well, but you guys can get it through Molly. I mean, Molly
18 runs SCOPE for defense attorneys.

19 MR. SGRO: Right. So -- and --

20 THE COURT: There's a form you guys fill out. And so here's what I
21 would say, go ahead and do that first.

22 MR. SGRO: Okay.

23 THE COURT: Then if there's something in there because even though a
24 person may get to a certain adult age, you can look on SCOPE and there's
25 indicators in there about when their criminal history started, even though it may

1 no longer be in there, that would tell you they've got something from a juvenile
2 standpoint. Absent some belief that there's something there, more than what's
3 been stated today, I would think that it would be inappropriate to issue an order
4 just, you know --

5 MR. SGRO: Fair enough.

6 THE COURT: -- to go fishing.

7 MR. SGRO: When does she return, Your Honor?

8 THE COURT: She'll be back on Monday.

9 MR. SGRO: Okay. Great. Thank you very much.

10 THE COURT: Okay. All right. So I'm going to deny that for now. But if
11 you find out more information, you can re-raise that.

12 All right. Henthorn material.

13 MR. SGRO: Again, Your Honor, this one seems pretty basic. We have a
14 right to receive materials in a police officer -- in a testifying police officer's file
15 relative to things that could be used to establish bias or go to credibility and we
16 would ask that this material -- and, again, this has been granted in this district
17 many times. The material typically goes to the Court and the Court can make
18 its determination on whether anything that the Court has received would be
19 relevant as to credibility or bias. And that's it, Your Honor.

20 THE COURT: State.

21 MS. WECKERLY: I agree that if there is information for a testifying officer
22 that we, you know, that reflects on their truthfulness, that we are obligated to
23 turn that over. I think the distinction, honestly, between the federal case law
24 and the Nevada case law is whether or not we're required to just run it just
25 because.

1 THE COURT: Right.

2 MS. WECKERLY: I mean, I guess the Court can order us to run it and
3 turn it over.

4 THE COURT: Well, I mean, what is -- and I hate to go back to the word
5 policy.

6 MS. WECKERLY: The practice?

7 THE COURT: But I know, you know, the practices used to be I would
8 always get this, Judge, once we hit calendar call, we make inquiry and if
9 there's anything related to the officers, we'll let the defense know. So I
10 didn't -- and I don't know that I ever had that conversation with specialty
11 deputies, but it was what I would be told by my track deputies all the time.

12 MS. WECKERLY: Yeah, I think if --

13 THE COURT: Not that they're the ones setting policy for the office, but
14 that's how that came up.

15 MS. WECKERLY: Well, I think what we do is we -- we run it, and then if,
16 you know, if we're going to use the witness. I mean, we don't run everybody
17 under the sun.

18 THE COURT: Sure.

19 MS. WECKERLY: And then if there's something that we think is --
20 reflects on truthfulness, we turn it over directly. If we aren't sure and we want
21 the Court to make the determination --

22 THE COURT: Right.

23 MS. WECKERLY: -- we submit it *in camera*.

24 THE COURT: But you're saying that you all, as a matter of course as
25 you're getting ready for trial, if you know you're going to call certain police

1 officers as witness, you do make inquiry and then if there's something there,
2 you either turn it over or give it to the Court?

3 MS. WECKERLY: There is -- there is a mechanism in place for us to do
4 that.

5 THE COURT: Okay.

6 MS. WECKERLY: Where we just, like, list out the P number, send it over
7 by e-mail, and then we get the -- the documents.

8 THE COURT: Okay. So, and that's what I'm getting at, so that already
9 occurs?

10 MS. WECKERLY: That does occur.

11 THE COURT: Okay.

12 MS. WECKERLY: I don't want to represent to the Court that it's done in
13 every case.

14 THE COURT: Okay.

15 MS. WECKERLY: Because I don't know that. But there is an ability for
16 us to do that.

17 THE COURT: Okay.

18 MR. SGRO: And I guess the only -- the only point of impasse, Your
19 Honor, is I would like the Court to flip through them and make a determination.
20 And admittedly, Your Honor, it doesn't happen that there are numerous officers
21 that have this situation. We live, though, in a unique district relative to Metro
22 because they have the, you know, you-lie-you-fly policy and all that. They
23 have -- there are a number of restrictions in play at Metro that don't exist
24 nationally. And so we would ask the Court to make determinations relative to
25 relevancy as opposed to the State.

1 We don't expect it's going to be bankers boxes of material.
2 Frankly, it's probably going to be, if anything, a few pages of material. And so
3 we agree on everything other than who is the -- who is the authority making the
4 decision. That's all.

5 THE COURT: Yeah, I know. But doesn't this go back to that thing that
6 we're talking about of they -- the Court can't be like the discovery master for
7 things.

8 MR. SGRO: I agree.

9 THE COURT: So there's got to be -- they've got to have that ability to
10 look at things originally and say, okay, this we have a question about, so if we
11 have any question, we're giving it to the Court to look at *in camera*. But if
12 there's nothing there, then, I mean, even they've got to be able to say, okay,
13 there's nothing in this one, there's nothing to send over to the Court or --

14 MR. SGRO: Your Honor, the only thing I'll tell you, if this is a
15 hand-to-hand sale --

16 THE COURT: Right.

17 MR. SGRO: -- by an undercover agent to an unsuspecting defendant, you
18 know, I get a lot of where the Court's coming from.

19 THE COURT: Right.

20 MR. SGRO: The -- the difficulty for us is the ultimate consequence if the
21 State gets their way, right, is the execution date being set for Mr. Sims, right?
22 So it raises the bar, in our view, relative to some of these protocols. So, you
23 know, the juvenile records, having Molly run the search, great, that's an
24 effective, quick remedy.

25 THE COURT: Okay.

1 MR. SGRO: Henthorn should be, in our humble view, the same. If
2 there's a protocol that exists to run P numbers, not that I'm looking to give
3 Molly extra work to do, but it seems that that --

4 THE COURT: Well, Molly can't do that. She's not going to get any of
5 that.

6 MR. SGRO: Well, I'm just suggesting, Your Honor, to the extent that
7 trying to balance not having this Court be a discovery master versus the
8 preservation of the integrity of this case because it is a capital case, I think
9 somewhere in there lies a balance of the Court doing some things relative to
10 ensuring the integrity of the process. And this is not to castigate these
11 prosecutors, it's to preserve a record so that down the road in ten years from
12 now when memories are foggy, if there is something in play that says, well, the
13 Court reviewed these, that eliminates so much down the road.

14 THE COURT: Well, here's what I'll say, I'm not -- look, I'll look at
15 whatever you want to send over *in camera*, but I don't think that you can parcel
16 out police officer's personnel files versus lay witnesses versus the coroner
17 versus anybody else to say this is an area where I need to make them give me
18 all their discovery to review independently and those other areas I'm fine with
19 them being the gatekeeper. I just think that I have to respect their ability to be
20 the initial gatekeeper on things.

21 MR. SGRO: Of course.

22 THE COURT: And if they have -- now, would I say -- does Tony make
23 good point? Yeah, it's not a hand-to-hand sale case, so maybe you're really,
24 really cautious about, you know, this one is I don't think it is but, gee, I could
25 see where that argument could be made, let me send this one to the judge. So

1 I'm not going to order you to do anything different than is legally required of
2 you other than, kind of, giving you that same, let's be really, really cautious and
3 make sure we're dotting I's and crossing T's.

4 MR. SGRO: So, is the order, Your Honor, denied as styled, but the order
5 is that the State's going to run the --

6 THE COURT: Yes, I'm denying the order as styled. The State, what I
7 said was, look, if they -- if they want me to look at things *in camera* I'm happy
8 to look at whatever they want to give me *in camera*. If they feel like, you know
9 what, we don't really care on this case, we're just going to give the judge
10 everything, that's fine. If they say, nope, we're abiding by what we normally
11 do in screening these things first ourselves and if we think there's anything
12 potentially there, then we're just going to let judge take a look at it.

13 MR. SGRO: I guess the predicate factual part of the order is someone
14 from the State's going to actually run the information. Based on what they
15 glean from running the information, that's when everything else kick kicks in --

16 THE COURT: Yes.

17 MR. SGRO: -- about whether they send it anything? Okay. I just wanted
18 to make sure I was clear on that.

19 And the same -- same thing with the juvenile records, it's denied as
20 styled but should Molly's inquiry --

21 THE COURT: Yeah. The juvenile records isn't anything on the State.
22 The juvenile records --

23 MR. SGRO: Correct.

24 THE COURT: -- is denied and should you learn of any other information
25 that would give rise to a belief that there's potentially something there to be

1 discovered, then I'll revisit that. So you get the SCOPes and everything from
2 Molly or something from anywhere else, you can bring it back to me.

3 MR. SGRO: Okay. Thank you.

4 THE COURT: Okay?

5 Motion for disclosure of uncharged acts regarding prior defendant's
6 conduct -- defendant's prior conduct.

7 MS. MANINGO: Yes, Your Honor. The State's oppositions basically set
8 out that at this time they have no intent to bring in any bad acts and they
9 would file the appropriate motion and Petrocelli hearing --

10 THE COURT: Right.

11 MS. MANINGO: -- if they felt that was the case. As a -- we wanted to
12 be cautious and make sure that we filed it to -- we don't want to be in a
13 position where we're a week out from trial and we are having to deal with
14 things we may not know about, any prior bad acts or anything like that.

15 THE COURT: Okay.

16 MS. MANINGO: They did also mention that they would be using prior bad
17 acts, again also styled as other matter evidence, in the penalty hearing. But
18 said that they did not have access or did not have those records yet in their
19 possession.

20 THE COURT: Okay.

21 MS. MANINGO: I don't know if that's changed --

22 THE COURT: Has that changed at all?

23 MS. MANINGO: -- since they've done the opposition and I didn't see
24 anything in the file review.

25 THE COURT: Okay.

1 MS. MANINGO: So I do want to clarify that because if there is something
2 new, we would like to have that.

3 THE COURT: So is that just kind of a generic, if we find evidence that
4 we want to use in penalty, we're going to let you know when we get or is there
5 something specific that you all were referencing?

6 MS. WECKERLY: I don't think there's anything specific. We're filing our
7 15-day-notice today.

8 THE COURT: Okay.

9 MS. WECKERLY: And I -- I, actually, think I've read defense counsel's
10 name on one of his cases, you know, that's, for all intents and purposes, other
11 matter evidence.

12 THE COURT: Okay.

13 MS. WECKERLY: I don't think there will be anything unexpected in there.
14 But I would say --

15 MS. MANINGO: And if they are filing --

16 MS. WECKERLY: -- they're entitled to it, certainly, under the
17 15-day-notice.

18 THE COURT: Okay.

19 MS. WECKERLY: And if there is -- I think they have that discovery. I
20 don't think there's anything missing at this point. When the opposition was
21 written, obviously, that notice wasn't done.

22 THE COURT: Right.

23 MR. DIGIACOMO: And for the -- for the record --

24 MS. MANINGO: And that was -- that's in regard to penalty phase, Your
25 Honor. But, obviously, we're -- we're asking about both phases. And at the

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. C28741b-1
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Clerk of Supreme Court

PETITIONER'S
APPENDIX

VOLUME I

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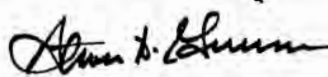
ATTORNEYS FOR THE STATE

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10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 **MAURICE MANUEL SIMS, #2684920**
14 **SASHA WILLIAMS, #2865547**
15 **BRANDON JEROME RANGE, aka**
Brandon J. Range, #1969959
DARON MORRIS, #2797197

16 Defendant(s).
17

CASE NO: C-13-287414-1

DEPT NO: III

INDICTMENT

18 STATE OF NEVADA }
19 COUNTY OF CLARK } ss.

20 The Defendant(s) above named, MAURICE MANUEL SIMS, SASHA WILLIAMS,
21 BRANDON JEROME RANGE, aka, Brandon J. Range, DARON MORRIS, accused by the
22 Clark County Grand Jury of the crime(s) of CONSPIRACY TO COMMIT BATTERY
23 (Gross Misdemeanor – NRS 199.480, 200.481); BATTERY WITH A DEADLY WEAPON
24 (Category B Felony – NRS 200.481); CONSPIRACY TO COMMIT BURGLARY (Gross
25 Misdemeanor - NRS 199.480, 205.060); BURGLARY WHILE IN POSSESSION OF A
26 FIREARM (Category B Felony - NRS 205.060); CONSPIRACY TO COMMIT ROBBERY
27 (Category B Felony - NRS 199.480, 200.380); ROBBERY WITH USE OF A DEADLY
28 WEAPON (Category B Felony - NRS 200.380, 193.165); CONSPIRACY TO COMMIT

1 MURDER (Category B Felony - NRS 199.480, 200.010); MURDER WITH USE OF A
2 DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); ATTEMPT
3 MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010,
4 200.030, 193.330, 193.165); and POSSESSION OF FIREARM BY EX-FELON (Category
5 B Felony - NRS 202.360), committed at and within the County of Clark, State of Nevada, on
6 or between January 4, 2013 and January 8, 2013 as follows:

7 COUNT 1 - CONSPIRACY TO COMMIT BATTERY

8 Defendants MAURICE MANUEL SIMS and DARON MORRIS, did, on or about the
9 4th day of January, 2013, then and there meet with each other and between themselves, and
10 each of them with the other, wilfully and unlawfully conspire and agree to commit a crime,
11 to-wit: battery and/or battery with a deadly weapon, and in furtherance of said conspiracy,
12 Defendants did commit the acts as set forth in Count 2, said acts being incorporated by this
13 reference as though fully set forth herein.

14 COUNT 2 - BATTERY WITH A DEADLY WEAPON

15 Defendants MAURICE MANUEL SIMS and DARON MORRIS, did, on or about the
16 4th day of January, 2013, then and there wilfully and unlawfully use force or violence upon
17 the person of another, to-wit: KENNETH SCOTT by striking the said KENNETH SCOTT
18 with a deadly weapon, to-wit: a firearm, the defendants being responsible under the
19 following theories of criminal liability, to-wit: 1) by directly committing the acts constituting
20 the offense; and/or 2) by aiding and abetting each other by Defendant MAURICE MANUEL
21 SIMS calling Defendant DARON MORRIS to the scene, thereafter by Defendant DARON
22 MORRIS handing a firearm to Defendant MAURICE MANUEL SIMS, thereafter
23 Defendant MAURICE MANUEL SIMS striking the said KENNETH SCOTT with the
24 firearm, the defendants counseling and encouraging and acting in concert throughout; and/or
25 3) by a conspiracy to commit battery and/or battery with a deadly weapon.

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1 COUNT 3 - CONSPIRACY TO COMMIT BURGLARY

2 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
3 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
4 day of January, 2013, then and there meet with each other and between themselves, and each
5 of them with the other, wilfully and unlawfully conspire and agree to commit a crime, to-wit:
6 burglary, and in furtherance of said conspiracy, Defendants did commit the acts as set forth
7 in Count 4, said acts being incorporated by this reference as though fully set forth herein.

8 COUNT 4 - BURGLARY WHILE IN POSSESSION OF A FIREARM

9 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
10 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the
11 8thday of January, 2013, then and there wilfully, unlawfully, and feloniously enter, while in
12 possession of a firearm, with intent to commit theft and/or a felony, to-wit: robbery, that
13 certain building occupied by LAURICE BRIGHTMAN and/or ANTHONY ANDERSON
14 and/or EVIN RUSSELL, located at 370 East Harmon Avenue, Apartment No. P-102 thereof,
15 Las Vegas, Clark County, Nevada, the Defendants did possess and/or gain possession of a
16 deadly weapon consisting of a firearm during the commission of the crime and/or before
17 leaving the structure, the Defendants being criminally liable under one or more of the
18 following principles of criminal liability, to-wit: (1) by directly committing this crime;
19 and/or (2) by aiding or abetting in the commission of this crime, with the intent that this
20 crime be committed, by providing counsel and/or encouragement and by entering into a
21 course of conduct whereby the Defendants entered the residence, three of them possessing a
22 firearm; and/or (3) pursuant to a conspiracy to commit this crime.

23 COUNT 5 - CONSPIRACY TO COMMIT ROBBERY

24 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
25 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
26 day of January, 2013, then and there meet with each other and between themselves, and each

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1 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a
2 crime, to-wit: robbery, and in furtherance of said conspiracy, Defendants did commit the
3 acts as set forth in Counts 6 through 8, said acts being incorporated by this reference as
4 though fully set forth herein.

5 COUNT 6 - ROBBERY WITH USE OF A DEADLY WEAPON

6 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
7 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
8 day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal
9 property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones,
10 jewelry and/or U.S. currency, from the person of LAURICE BRIGHTMAN, or in his
11 presence, by means of force or violence or fear of injury to, and without the consent and
12 against the will of the said LAURICE BRIGHTMAN, said Defendants using a deadly
13 weapon, to-wit: a firearm, during the commission of said crime, the Defendants being
14 criminally liable under one or more of the following principles of criminal liability, to-wit:
15 (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of
16 this crime, with the intent that this crime be committed, by providing counsel and/or
17 encouragement and by entering into a course of conduct whereby one or more of the co-
18 conspirators demanded money from the said LAURICE BRIGHTMAN and/or took said
19 property, three of the co-conspirators possessing a firearm; and/or (3) pursuant to a
20 conspiracy to commit this crime.

21 COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON

22 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
23 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
24 day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal
25 property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones,
26 jewelry and/or U.S. currency, from the person of ANTHONY ANDERSON, or in his
27 presence, by means of force or violence or fear of injury to, and without the consent and
28 against the will of the said ANTHONY ANDERSON, said Defendants using a deadly

1 weapon, to-wit: a firearm, during the commission of said crime, the Defendants being
2 criminally liable under one or more of the following principles of criminal liability, to-wit:
3 (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of
4 this crime, with the intent that this crime be committed, by providing counsel and/or
5 encouragement and by entering into a course of conduct whereby one or more of the co-
6 conspirators demanded money from the said ANTHONY ANDERSON and/or took said
7 property, three of the co-conspirators possessing a firearm; and/or (3) pursuant to a
8 conspiracy to commit this crime.

9 COUNT 8 - ROBBERY WITH USE OF A DEADLY WEAPON

10 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
11 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
12 day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal
13 property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones,
14 jewelry and/or U.S. currency, from the person of EVIN RUSSELL, or in his presence, by
15 means of force or violence or fear of injury to, and without the consent and against the will
16 of the said EVIN RUSSELL, said Defendants using a deadly weapon, to-wit: a firearm,
17 during the commission of said crime, the Defendants being criminally liable under one or
18 more of the following principles of criminal liability, to-wit: (1) by directly committing this
19 crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that
20 this crime be committed, by providing counsel and/or encouragement and by entering into a
21 course of conduct whereby one or more of the co-conspirators demanded money from the
22 said EVIN RUSSELL and/or took said property, three of the co-conspirators possessing a
23 firearm; and/or (3) pursuant to a conspiracy to commit this crime.

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1 COUNT 9 - CONSPIRACY TO COMMIT MURDER

2 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
3 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
4 day of January, 2013, then and there meet with each other and between themselves, and each
5 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a
6 crime, to-wit: murder, and in furtherance of said conspiracy, Defendants did commit the acts
7 as set forth in Counts 10 through 12, said acts being incorporated by this reference as though
8 fully set forth herein.

9 COUNT 10 - MURDER WITH USE OF A DEADLY WEAPON

10 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
11 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
12 day of January, 2013, then and there wilfully, feloniously, without authority of law, and with
13 premeditation and deliberation, and with malice aforethought, kill ANTHONY
14 ANDERSON, a human being, by shooting at and into the body of the said ANTHONY
15 ANDERSON, with a deadly weapon, to-wit: firearm, the Defendants being criminally liable
16 under one or more of the following principles of criminal liability, to-wit: (1) by directly
17 committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with
18 the intent that this crime be committed, by providing counsel and/or encouragement and by
19 entering into a course of conduct whereby one of the co-conspirators shot at and into the
20 body of the said ANTHONY ANDERSON while the other co-conspirators stood nearby
21 and/or acted as lookouts; and/or (3) pursuant to a conspiracy to commit this crime.

22 COUNT 11 - MURDER WITH USE OF A DEADLY WEAPON

23 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
24 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
25 day of January, 2013, then and there wilfully, feloniously, without authority of law, and with
26 premeditation and deliberation, and with malice aforethought, kill EVIN RUSSELL, a
27 human being, by shooting at and into the body of the said EVIN RUSSELL, with a deadly
28 weapon, to-wit: firearm, the Defendants being criminally liable under one or more of the

1 following principles of criminal liability, to-wit: (1) by directly committing this crime;
2 and/or (2) by aiding or abetting in the commission of this crime, with the intent that this
3 crime be committed, by providing counsel and/or encouragement and by entering into a
4 course of conduct whereby one of the co-conspirators shot at and into the body of the said
5 EVIN RUSSELL while the other co-conspirators stood nearby and/or acted as lookouts;
6 and/or (3) pursuant to a conspiracy to commit this crime.

7 COUNT 12 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

8 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON
9 JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th
10 day of January, 2013, then and there, without authority of law, and malice aforethought,
11 willfully and feloniously attempt to kill LAURICE BRIGHTMAN, a human being, by
12 shooting at and into the body of the said LAURICE BRIGHTMAN, with a deadly weapon,
13 to-wit: a firearm, the Defendants being criminally liable under one or more of the following
14 principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by
15 aiding or abetting in the commission of this crime, with the intent that this crime be
16 committed, by providing counsel and/or encouragement and by entering into a course of
17 conduct whereby one of the co-conspirators shot at and into the body of the said LAURICE
18 BRIGHTMAN while the other co-conspirators stood nearby and/or acted as lookouts; and/or
19 (3) pursuant to a conspiracy to commit murder.

20 COUNT 13 - POSSESSION OF FIREARM BY EX-FELON

21 Defendant MAURICE MANUEL SIMS, did, on or between the 4th day and the 8th
22 day of January, 2013, then and there wilfully, unlawfully, and feloniously own or have in his
23 possession, or under his control, a weapon, to-wit: firearm, the said Defendant being an ex-
24 felon, having in 2009, been convicted of Attempt Grand Larceny From the Person, in Case
25 No. C250644A, in the Eighth Judicial District Court, Clark County a felony under the laws
26 of the State of Nevada.

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28 ///

1 COUNT 14 - POSSESSION OF FIREARM BY EX-FELON

2 Defendant BRANDON JEROME RANGE, aka, Brandon J. Range, did, on or about
3 the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously own or
4 have in his possession, or under his control, a weapon, to-wit: firearm, the said Defendant
5 being an ex-felon, having in 2006, been convicted of Conspiracy to Commit Robbery and
6 Robbery, in Case No. C214982 and/or having in 2009, been convicted of Attempt Burglary,
7 in Case No. C251043, all felonies in the Eighth Judicial District Court, Clark County a
8 felony under the laws of the State of Nevada.

9 DATED this 12th day of February, 2013.

10
11 STEVEN B. WOLFSON
12 Clark County District Attorney
13 Nevada Bar #001565

14 BY


15 MARC DIGIACOMO
16 Chief Deputy District Attorney
17 Nevada Bar #006955

18 ENDORSEMENT: A True Bill

19 
20 Foreperson, Clark County Grand Jury
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1 Names of witnesses testifying before the Grand Jury:

2 BRIGHTMAN, LAURICE, c/o CCDA, 200 Lewis Ave, LV, NV

3 GAVIN, LISA, CC CORONER'S OFFICE

4 JENSEN, BARRY, LVMPD# 3662

5 MATZKE, BRAD, c/o CCDA, 200 Lewis Ave, LV, NV

6 SCOTT, KENNETH, JR., 2101 W WARM SPRINGS RD #3718, HENDERSON NV 89104

7 WILDEMAN, MARTIN, LVMPD# 3516

8
9 Additional witnesses known to the District Attorney at time of filing the Indictment:

10 BUNN, CHRISTOPHER, LVMPD# 4407

11 CUSTODIAN OF RECORDS, CCDC

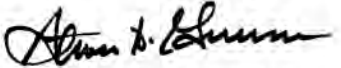
12 CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

13 CUSTODIAN OF RECORDS, LVMPD RECORDS

14 TOLBERT, VENNIE, 629 W 129TH PLACE, CHICAGO, IL, 60628

15 WILLIAMS, TOD, LVMPD# 3811

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28 LVMPD EV# 1301084025
(TK11)


CLERK OF THE COURT

NISD
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-VS-

MAURICE MANUEL SIMS,
#2684920,
DARON MORRIS,
#2797197,
Defendants.

CASE NO: **C-13-287414-1**
C-13-287414-4

DEPT NO: **III**

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC DIGIACOMO, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing for a conviction of Murder in the First Degree on either COUNTS 10 or 11 of the Indictment filed in the instant case. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

**AGGRAVATING CIRCUMSTANCES WHICH APPLY TO BOTH DEFENDANT
SIMS AND MORRIS AND BOTH MURDERS IN COUNTS 10 AND 11**

1. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a

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1 person shall be deemed to have been convicted of a murder at the time the jury verdict of
2 guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

3 Defendants have been charged with Murder With Use of a Deadly Weapon for two
4 (2) murders in COUNTS 10 (ANTHONY ANDERSON) and 11 (EVIN RUSSELL) of the
5 instant Indictment. It is anticipated that Defendants will be convicted on both counts
6 resulting in this aggravating circumstance. [NRS 200.033(12)]. Therefore, each defendant
7 will have been convicted of more than one offense of murder in the first or second degree at
8 the time of the penalty hearing.

9 2. The murder was committed by a person who, at any time before a penalty
10 hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a
11 felony involving the use or threat of violence to the person of another and the provisions of
12 subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL
13 SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and
14 DARON MORRIS, did, on or about the 8th day of January, 2013, then and there, without
15 authority of law, and malice aforethought, willfully and feloniously attempt to kill
16 LAURICE BRIGHTMAN, a human being, by shooting at and into the body of the said
17 LAURICE BRIGHTMAN, with a deadly weapon, to-wit: a firearm, the Defendants being
18 criminally liable under one or more of the following principles of criminal liability, to-wit:
19 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of
20 this crime, with the intent that this crime be committed, by providing counsel and/or
21 encouragement and by entering into a course of conduct whereby one of the co-conspirators
22 shot at and into the body of the said LAURICE BRIGHTMAN while the other co-
23 conspirators stood nearby and/or acted as lookouts; and/or 3) pursuant to a conspiracy to
24 commit murder. [See NRS 200.033(2)(b)]

25 Defendants are charged with ATTEMPT MURDER WITH USE OF A DEADLY
26 WEAPON in the instant Indictment in COUNT 12. The State anticipates that both
27 defendants may be convicted of such charge prior to any penalty hearing in the instant case.

28 //

1 Attempt Murder with Use of a Deadly weapon is a felony involving the use or threat
2 of violence by its elements and/or the facts of the instant case. Therefore, at the time of the
3 penalty hearing in the instant case, the defendants will have been convicted of a felony
4 involving the use or threat of violence.

5 3. The murder was committed by a person who, at any time before a penalty
6 hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a
7 felony involving the use or threat of violence to the person of another and the provisions of
8 subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL
9 SIMS and DARON MORRIS, did, on or about the 4th day of January, 2013, then and there
10 wilfully and unlawfully use force or violence upon the person of another, to-wit: KENNETH
11 SCOTT by stiking the said KENNETH SCOTT with a deadly weapon, to-wit: a firearm, the
12 defendants being responsible under the following theories of criminal liability, to-wit: 1) by
13 directly committing the acts constituting the offense; and/or 2) by aiding and abetting each
14 other by Defendant MAURICE MANUEL SIMS calling Defendant DARON MORRIS to
15 the scene, thereafter by Defendant DARON MORRIS handing a firearm to Defendant
16 MAURICE MANUEL SIMS, thereafter Defendant MAURICE MANUEL SIMS striking the
17 said KENNETH SCOTT with the firearm, the defendants counseling and encouraging and
18 acting in concert throughout; and/or 3) by a conspiracy to commit battery and/or battery with
19 a deadly weapon. [See NRS 200.033(2)(b)]

20 Defendants are charged with BATTERY WITH A DEADLY WEAPON in the instant
21 Indictment in COUNT 2. Battery with Use of a Deadly Weapon is a felony involving the
22 use or threat of violence by its elements and the facts of the instant case. The State
23 anticipates that both defendants may be convicted of such charge prior to any penalty
24 hearing in the instant case.

25 4. The murder was committed by a person who, at any time before a penalty
26 hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a
27 felony involving the use or threat of violence to the person of another and the provisions of
28 subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL

1 SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and
2 DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully,
3 unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a
4 MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of
5 LAURICE BRIGHTMAN, or in his presence, by means of force or violence or fear of injury
6 to, and without the consent and against the will of the said LAURICE BRIGHTMAN, said
7 Defendants using a deadly weapon, to-wit: a firearm, during the commission of said crime,
8 the Defendants being criminally liable under one or more of the following principles of
9 criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting
10 in the commission of this crime, with the intent that this crime be committed, by providing
11 counsel and/or encouragement and by entering into a course of conduct whereby one or more
12 of the co-conspirators demanded money from the said LAURICE BRIGHTMAN and/or took
13 said property, three of the co-conspirators possessing a firearm; and/or 3) pursuant to a
14 conspiracy to commit this crime, [See NRS 200.033(2)(b)]

15 Defendants are charged with ROBBERY WITH USE OF A DEADLY WEAPON in
16 the instant Indictment in COUNT 6. Robbery with Use of a Deadly Weapon is a violent
17 felony by its elements and the instant facts. The State anticipates that both defendants may
18 be convicted of such charge prior to any penalty hearing in the instant case.

19 5. The murder was committed by a person, for himself or another, to receive
20 money or any other thing of monetary value. [See NRS 200.033(6)]. The evidence will
21 show that Defendant's originally targeted these victims and this apartment as they believed
22 that the victim's owed Sasha \$200.00 and/or a television set. The Defendants originally
23 attempted to acquire the \$200.00 or television set, however, when those efforts failed, they
24 proceeded to rob and kill the victims.

25 6. The murder was committed while the person was engaged, alone or with
26 others, in the commission of, or an attempt to commit or flight after committing or
27 attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home
28 or kidnapping in the first degree, to- wit: BURGLARY WHILE IN POSSESSION OF A

1 FIREARM as alleged in COUNT 4 of the instant Indictment. That count alleges that
2 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME
3 RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of
4 January, 2013, then and there wilfully, unlawfully, and feloniously enter, while in possession
5 of a firearm, with intent to commit theft and/or a felony, to-wit: robbery, that certain building
6 occupied by LAURICE BRIGHTMAN and/or ANTHONY ANDERSON and/or EVIN
7 RUSSELL, located at 370 East Harmon Avenue, Apartment No. P-102 thereof, Las Vegas,
8 Clark County, Nevada, the Defendants did possess and/or gain possession of a deadly
9 weapon consisting of a firearm during the commission of the crime and/or before leaving the
10 structure, the Defendants being criminally liable under one or more of the following
11 principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by
12 aiding or abetting in the commission of this crime, with the intent that this crime be
13 committed, by providing counsel and/or encouragement and by entering into a course of
14 conduct whereby the Defendants entered the residence, three of them possessing a firearm;
15 and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(4)].

16 **AGGRAVATING CIRCUMSTANCES WHICH APPLY TO**
17 **BOTH DEFENDANT SIMS AND MORRIS AND THE MURDERS**
18 **IN COUNT 10 (ANTHONY ANDERSON)**

19 7. The murder was committed by a person who, at any time before a penalty
20 hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a
21 felony involving the use or threat of violence to the person of another and the provisions of
22 subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL
23 SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and
24 DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully,
25 unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a
26 MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of EVIN
27 RUSSELL, or in his presence, by means of force or violence or fear of injury to, and without
28 the consent and against the will of the said EVIN RUSSELL, said Defendants using a deadly
weapon, to-wit: a firearm, during the commission of said crime, the Defendants being

1 criminally liable under one or more of the following principles of criminal liability, to-wit:
2 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of
3 this crime, with the intent that this crime be committed, by providing counsel and/or
4 encouragement and by entering into a course of conduct whereby one or more of the co-
5 conspirators demanded money from the said EVIN RUSSELL and/or took said property,
6 three (3) of the co-conspirators possessing a firearm; and/or 3) pursuant to a conspiracy to
7 commit this crime. [See NRS 200.033(2)(b)]

8 Defendants are charged with ROBBERY WITH USE OF A DEADLY WEAPON in
9 the instant Indictment in COUNT 8. Robbery with Use of a Deadly Weapon is a crime
10 involving the use or threat of violence by its elements and the facts of this case. The State
11 anticipates that both defendants may be convicted of such charge prior to any penalty
12 hearing in the instant case.

13 8. The murder was committed while the person was engaged, alone or with
14 others, in the commission of, or an attempt to commit or flight after committing or
15 attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home
16 or kidnapping in the first degree, to- wit: ROBBERY WITH USE OF A DEADLY
17 WEAPON as alleged in COUNT 7 of the instant Indictment. That count alleges that
18 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME
19 RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of
20 January, 2013, then and there wilfully, unlawfully, and feloniously take personal property,
21 to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or
22 U.S. currency, from the person of ANTHONY ANDERSON, or in his presence, by means of
23 force or violence or fear of injury to, and without the consent and against the will of the said
24 ANTHONY ANDERSON, said Defendants using a deadly weapon, to-wit: a firearm, during
25 the commission of said crime, the Defendants being criminally liable under one or more of
26 the following principles of criminal liability, to-wit: 1) by directly committing this crime;
27 and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime
28 be committed, by providing counsel and/or encouragement and by entering into a course of

1 conduct whereby one or more of the co-conspirators demanded money from the said
2 ANTHONY ANDERSON and/or took said property, three of the co-conspirators possessing
3 a firearm; and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(4)].

4 **AGGRAVATING CIRCUMSTANCES WHICH APPLY TO BOTH DEFENDANT**
5 **SIMS AND MORRIS AND THE MURDERS IN COUNT 11 (EVIN RUSSELL)**

6 9. The murder was committed by a person who, at any time before a penalty
7 hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a
8 felony involving the use or threat of violence to the person of another and the provisions of
9 subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE
10 MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J.
11 Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there
12 wilfully, unlawfully, and feloniously enter, while in possession of a firearm, with intent to
13 commit theft and/or a felony, to-wit: robbery, that certain building occupied by LAURICE
14 BRIGHTMAN and/or ANTHONY ANDERSON and/or EVIN RUSSELL, located at 370
15 East Harmon Avenue, Apartment No. P-102 thereof, Las Vegas, Clark County, Nevada, the
16 Defendants did possess and/or gain possession of a deadly weapon consisting of a firearm
17 during the commission of the crime and/or before leaving the structure, the Defendants being
18 criminally liable under one or more of the following principles of criminal liability, to-wit:
19 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of
20 this crime, with the intent that this crime be committed, by providing counsel and/or
21 encouragement and by entering into a course of conduct whereby the Defendants entered the
22 residence, three of them possessing a firearm; and/or 3) pursuant to a conspiracy to commit
23 this crime. [See NRS 200.033(2)(b)]

24 Defendants are charged with ROBBERY WITH USE OF A DEADLY WEAPON in
25 the instant Indictment in COUNT 8. Robbery with Use of a Deadly Weapon is a violent
26 felony by its elements and the facts of this case. The State anticipates that both defendants
27 may be convicted of such charge prior to any penalty hearing in the instant case.

28 //

1 10. The murder was committed while the person was engaged, alone or with
2 others, in the commission of, or an attempt to commit or flight after committing or
3 attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home
4 or kidnapping in the first degree, to-wit: ROBBERY WITH USE OF A DEADLY
5 WEAPON as alleged in COUNT 7 of the instant Indictment. That count alleges that
6 Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME
7 RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of
8 January, 2013, then and there wilfully, unlawfully, and feloniously take personal property,
9 to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or
10 U.S. currency, from the person of EVIN RUSSELL, or in his presence, by means of force or
11 violence or fear of injury to, and without the consent and against the will of the said EVIN
12 RUSSELL, said Defendants using a deadly weapon, to-wit: a firearm, during the
13 commission of said crime, the Defendants being criminally liable under one or more of the
14 following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or
15 2) by aiding or abetting in the commission of this crime, with the intent that this crime be
16 committed, by providing counsel and/or encouragement and by entering into a course of
17 conduct whereby one or more of the co-conspirators demanded money from the said EVIN
18 RUSSELL and/or took said property, three of the co-conspirators possessing a firearm;
19 and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(4)].

20 DATED this 8th day of March, 2013.

21 Respectfully submitted,

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

25 BY /s/ Marc DiGiacomo
26 MARC DIGIACOMO
27 Chief Deputy District Attorney
28 Nevada Bar #006955

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CERTIFICATE OF FACSIMILE TRANSMISSION

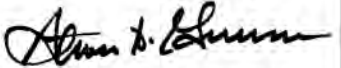
I hereby certify that service of Notice Of Intent To Seek Death Penalty, was made this
8th day of March, 2013, by facsimile transmission to:

CARL ARNOLD, Esq.
363-2534

IVETTE MANINGO, Esq.
386-2737

BY: /s/ R. Johnson
R. JOHNSON
Secretary for the District Attorney's Office

MD/rj/M-1


CLERK OF THE COURT

MOT

IVETTE AMELBURU MANINGO, ESQ.
Nevada Bar No. 7076
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720 South Seventh Street, 3rd Floor
Las Vegas, Nevada 89101
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ANTHONY P. SGRO, ESQ.
Nevada Bar No.: 3811
PATTI, SGRO, LEWIS & ROGER
720 South Seventh Street, 3rd Floor
Las Vegas, Nevada 89101
Telephone: (702) 385-9595
Fax: (702) 386-2737
tsgro@pslrfirm.com
Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

MAURICE MANUEL SIMS,
#268490

Defendant.

CASE NO. C-13-287414-1

DEPT. III

**MOTION TO COMPEL DISCOVERY BASED ON
DISTRICT ATTORNEY OPEN FILE POLICY**

COMES NOW, the Defendant, MAURICE MANUEL SIMS ("Sims" or "Defendant"), by and through IVETTE AMELBURU MANINGO, ESQ. of the Law Offices of Ivette Amelburu Maningo, and ANTHONY P. SGRO, ESQ., of Patti, Sgro, Lewis & Roger, and hereby moves this Court to compel discovery which is crucial to a full and fair development of the material facts in this capital case.

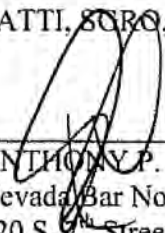
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1 This Motion is made and based upon the attached Points and Authorities, all the papers and
2 pleadings on file herein, and oral argument at the time set for hearing this Motion.

3 DATED this 27 day of June, 2016.

4
5 PATTI, SGRO, LEWIS & ROGER

6
7 
8 ANTHONY P. SGRO, ESQ.
9 Nevada Bar No. 3811
10 720 S. 7th Street, Suite 300
11 Las Vegas, NV 89101
12 *Attorney for Defendant*

13 **NOTICE OF MOTION**

14 TO: THE STATE OF NEVADA, Plaintiff; and

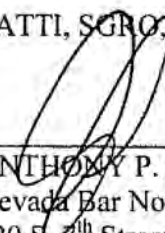
15 TO: STEVEN B. WOLFSON, District Attorney,

16 **YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the undersigned will
17 bring the foregoing Motion on for hearing before the above-entitled Court on the 07 day of
18 JULY, 2016, at the hour of 9:00A, or as soon thereafter as counsel may be heard.

19 DATED this 27 day of June, 2016.

20 Respectfully Submitted By:

21 PATTI, SGRO, LEWIS & ROGER

22
23 
24 ANTHONY P. SGRO, ESQ.
25 Nevada Bar No. 3811
26 720 S. 7th Street, Suite 300
27 Las Vegas, NV 89101
28 *Attorney for Defendant*

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On April 13, 2016, the Clark County District Attorney's Office (the "DA") issued a memorandum seeking to clarify its discovery practice (the "Memo"). The Memo asserts that the DA has no duty to discover evidence that is in the possession of government agencies acting on its behalf. (**Exhibit 1**, at 3.). Further, the Memo asserts that the DA does not have an "open-file policy" as interpreted by Nevada courts. *Id.* These portions of the Memo violate the constitutional mandates set forth by Nevada and Federal law and cannot be the parameters as to how discovery will be provided in the instant case. As such, this Court must order the DA to fulfill its prosecutorial duties by disclosing to Defendant evidence in its possession, as well as evidence in the possession of other law enforcement agencies.

II.

PROCEDURAL HISTORY

Sims and his codefendants, Sasha Williams ("Williams"), Brandon Jerome Range, aka Brandon J. Range ("Range"), and Daron Morris ("Morris"), were charged via Indictment dated February 13, 2013 with 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, and Count 12: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON. Sims is also charged in the same Indictment with Count 1: CONSPIRACY TO COMMIT BATTERY, Count 2: BATTERY WITH A DEADLY WEAPON. These counts arise from a separate incident

1 which occurred four days earlier, on January 4, 2013, for an alleged battery against Kenneth Scott.
2 Finally, Sims is charged with Count 13: POSSESSION OF FIREARM BY EX-FELON.

3 On March 8, 2013, the State filed a Notice of Intent to Seek Death Penalty against
4 codefendants Maurice Sims and Daron Morris.

5 On July 3, 2013, Williams filed a Motion to Sever her trial from that of her codefendants.
6 The State stipulated to severing Range from his codefendants and on September 10, 2013, the
7 Court granted Williams' Motion with respect to Morris but not with respect to Sims. Williams was
8 being tried only with codefendant Sims, until on or about April 13, 2016, when she entered a plea
9 agreement, and now is going to testify against Defendant Sims. Moreover, codefendant Range has
10 also plead and is going to testify against Sims.
11

12 III.

13 STATEMENT OF FACTS

14 A. The Memo.

15 On April 13, 2016, the DA issued a Memo seeking to "clarify" how it would now conduct
16 its discovery practice. (**Exhibit 1**, at 1). Interestingly, the Memo initially states that all deputy
17 district attorneys are required to abide by "the controlling opinions of the Nevada Supreme Court,
18 the Ninth Circuit Court of Appeals, and the United States Supreme Court with regard to *Brady v.*
19 *Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 10 (1972), and their progenies.
20 (**Exhibit 1**, at 1). Other pertinent provisions of the Memo are as follows:
21

22 The invitation for a 'case file review' is not a promise to disclose the entirety of the State's
23 case file and does not extend to anything more than discovery required by statute and
24 *Brady*. (**Exhibit 1**, at 3).

25 All inculpatory evidence that the deputy district attorney intends to use at trial during
26 his/her case-in-chief will be provided. Inculpatory evidence that the deputy district attorney
27 does not intend to use during his/her case-in-chief, but may use in cross-examination or in
28 rebuttal, is not discoverable pursuant to this policy. Irrelevant material will not be provided.
(**Exhibit 1**, at 2).

1 The invitation for a "case file review" shall not be construed as a representation that the
2 deputy district attorney is in possession of all material in possession of law enforcement.
(Exhibit 1, at 3).

3 The Clark County District Attorney's Office does not have an "open-file" policy, as that
4 phrase has been interpreted by courts to relieve defense counsel of its obligation to exercise
5 due diligence in discovering impeachment and exculpatory evidence. Upon request,
however, a defense attorney may be permitted to review the case file of the deputy district
attorney assigned the prosecution. *Id.*

6 Finally, the invitation for a "case file review" does not relieve defense counsel of its
7 obligation to discover material which is available to the defense from other sources,
8 including diligent investigation by the defense. *Id.*

9 The Clark County District Attorney's Office does not represent any policy agency,
10 including the Las Vegas Metropolitan Police Department ("LVMPD"). *Id.*

11 A valid defense subpoena to LVMPD must include the trial date or an evidentiary hearing
12 date (this is true even though the subpoena may request documents or records "in lieu of
appearance"), unless the defense has a court order authorizing the subpoena for pre-trial
production of records. *Id.*

13 LVMPD will not comply with a subpoena which requests investigative records related to
14 someone other than the client of the defense attorney issuing the subpoena. (Exhibit 1, at
15 4).

16 ALL OTHER SUBPOENAS DUCES TECUM for discovery-type materials will be
17 objected to by LVMPD. The following process will be instituted to protect LVMPD should
litigation ensue from that objection: *Id.*

18 If LVMPD does not have their own objection to releasing the records:

19 1) If the subpoena is not for a pending court date and merely orders records to be provided
20 directly to the defense, LVMPD will send a letter indicating that the Nevada Revised
21 Statutes in criminal cases do not provide a lawful mechanism for records to be provided
22 directly to the defense without a court order. Should the defense seek these records, they
should request the records from the deputy district attorney assigned to the case. *Id.*

23 The following section will demonstrate how the foregoing excerpts of the Memo violate Nevada
24 and Federal law.

25 ///

26 ///

27 IV.

ARGUMENT

A. The DA Must Be Compelled to Allow Defendant to View All Evidence in Its Possession.

In the Memo, the DA states that the defense is not entitled to all evidence in the State's possession. Specifically, the Memo states the following:

The invitation for a 'case file review' is not a promise to disclose the entirety of the State's case file and does not extend to anything more than discovery required by statute and *Brady*. (**Exhibit 1**, at 3).

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. (**Exhibit 1**, at 2).

In making this assertion, however, the DA cites no State or Federal law. Indeed, the DA's assertion violates the open-file policy that Nevada courts have found it to have. *Rippo v. State*, 113 Nev. 1239, 1258 (1997); *Quisano v. State*, ___, P.3d ___, 2016 WL 670887, at *5 (Nev. App. February 18, 2016). The DA has a duty to disclose all evidence in its possession to the defense. *McKee v. State*, 112 Nev. 642, 647–48, 917 P.2d 940, 943–44 (1996) (“where a prosecutor maintains an open-file policy, the prosecutor is under a duty to disclose all evidence in the State's possession, regardless of whether the evidence is inculpatory or exculpatory.”) (emphasis added). The State may not lawfully withhold inculpatory evidence from Defendant simply because it does not intend to present the material or information during its case in chief. *State v. Harrington*, 9 Nev. 91, 94 (1873); *People v. Carter*, 312 P.2d 665, 675 (Cal. 1975); *People v. Bunyard*, 765 P.2d 795, 809 (Cal. 1988); NRS 175.141.

Moreover, it is not the DA's duty to determine what materials are relevant. In criminal cases, the determination of whether evidence is relevant “rests within the district court's sound discretion.” *State v. Dist. Ct. (Armstrong)*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (2011); *Thomas v. State*, 122 Nev. 1351, 1370, 148 P.3d 727, 734 (2006). Yet, despite this clear principle

1 of Nevada law, the DA asserts that it has authority to determine what evidence the defense can or
2 cannot have.

3 For these reasons, the above-mentioned portion of the DA's Memo violates Nevada law,
4 and the State must be compelled to disclose all evidence in its possession to the Defendant.

5 **B. The DA Must Be Compelled to Learn of Any Favorable Evidence Known to Others**
6 **Acting on the Government's Behalf.**

7 The DA's Memo states the following.

8 The invitation for a "case file review" shall not be construed as a representation that the
9 deputy district attorney is in possession of all material in possession of law enforcement.
(Exhibit 1, at 3).

10 This clearly violates both Nevada and Federal law, and is unconstitutional. The prosecutor has a
11 duty to learn of any favorable evidence known to those acting on the government's behalf,
12 including law enforcement. *State v. Bennett*, 119 Nev. 589, 603 (2003); *Kyles v. Whitley*, 514 U.S.
13 419, 437, 115 S. Ct. 1555, 1567, 131 L. 2d 490 (1995). If the police know about exculpatory
14 information, including impeachment material, it is considered to be within the possession of the
15 prosecution and must be disclosed pursuant to *Brady/Kyles*, even if the police never told the
16 prosecutor about it. *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 126 S.Ct. 2188, 2190
17 (2006). Thus, by failing to discover evidence in the possession of others acting on its behalf, the
18 DA is effectively suppressing such evidence, which violates the Defendant's constitutional right to
19 due process. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression by the
20 prosecution of evidence favorable to the accused violates the accused's constitutional right to due
21 process).

22 For these reasons, the above-mentioned portion of the Memo violates Nevada and Federal
23 law, and is unconstitutional. This is despite the fact that the DA initially states in the Memo that it
24 will follow *Brady* and its progeny. (Exhibit 1, at 1). Accordingly, the DA must be compelled to
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26
27
28

1 recover and thereafter disseminate evidence in the possession of others acting on the State's
2 behalf.

3 **C. The DA Must Be Compelled to Voluntarily Provide Defendant with All Favorable**
4 **Evidence.**

5 The Memo states:

6 The Clark County District Attorney's Office does not have an "open-file" policy,
7 as that phrase has been interpreted by courts to relieve defense counsel of its
8 obligation to exercise due diligence in discovering impeachment and exculpatory
9 evidence. Upon request, however, a defense attorney may be permitted to review
the case file of the deputy district attorney assigned the prosecution. (**Exhibit 1**, at
3).

10 By requiring that the defense "exercise due diligence in discovering impeachment and
11 exculpatory evidence" and requiring a "request" by the defense to see such materials, the DA
12 clearly violates Federal law. "*Brady* and its progeny require a prosecutor to disclose evidence
13 favorable to the defense when that evidence is material either to guilt or to punishment." *Mazzan v.*
14 *Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Prosecutors must disclose favorable evidence
15 even without a specific request from the defense. *U.S. v. Bagley*, 473 U.S. 667, 680-82 (1985).
16 Failure to disclose such material to the defense violates the defendant's constitutional right to due
17 process. *Brady*, 373 U.S. at 87. Accordingly, pursuant to Federal law, the DA has a duty to
18 voluntarily provide the defense with all favorable evidence.

19
20 Additionally, the foregoing portion of the Memo also violates Nevada law. The Nevada
21 Rules of Professional Conduct ("NRPC") imposes the same *Brady* obligation on the prosecution,
22 but removes the materiality standard. Specifically, NRPC 3.8(d) requires the prosecutor to
23

24 Make timely disclosure to the defense of all evidence or information known to the
25 prosecutor that tends to negate the guilt of the accused or mitigates the offense,
26 and, in connection with sentencing, disclose to the defense and to the tribunal all
unprivileged mitigating information known to the prosecutor, except when the
27 prosecutor is relieved of this responsibility by a protective order of the tribunal.
28

1 (emphasis added). Thus, whenever there is any tendency that evidence negates guilt or mitigates an
2 offense, the onus is on the prosecution to voluntarily provide the evidence to the defense. There is
3 no limitation as to “information known to the prosecutor,” as it also applies to those acting on the
4 prosecutor’s behalf, such as law enforcement. *Bennett*, 119 Nev. at 603 (2003); *Kyles*, 514 U.S. at
5 437.

6 Based on the foregoing, the above-mentioned portion of the Memo violates Nevada and
7 Federal law, and is unconstitutional. Accordingly, the DA must be compelled to voluntarily
8 provide Defendant with all favorable evidence.
9

10 **D. The DA Must Be Compelled to Disclose All Evidence to Defendant Before Imposing a**
11 **Due Diligence Obligation.**

12 The DA attempts to impose a blanket due diligence requirement on the defense to discover
13 materials from other sources. Specifically, the DA states in the Memo,

14 ... the invitation for a “case file review” does not relieve defense counsel of its obligation
15 to discover material which is available to the defense from other sources, including diligent
16 investigation by the defense. (**Exhibit 1**, at 3).

17 This statement fails to acknowledge, however, that the due diligence requirement only arises once
18 the State has disclosed all of the evidence in its possession to the defense. *Rippo v. State*, 113 Nev.
19 1239, 1257–58 (1997). For example, in *Rippo*, the prosecution told the jury that a particular
20 witness would testify as to incriminating statements of the defendant. *Id.* at 1256. The defendant
21 moved for a mistrial, arguing the State violated a discovery order by not telling the defendant
22 about the statements beforehand. *Id.* The State, however, pointed out that it had in fact identified
23 the witness and disclosed his statements prior to trial. *Id.* The court agreed with the State, and also
24 added that because the defense knew that the witness spoke to the defendant right after the crime,
25 the defense had notice the witness would testify about the incriminating statements. *Id.* at 1257–
26 58. Consequently, the court reasoned the defense should have exercised due diligence in obtaining
27 the evidence, especially given the State’s open-file policy and the defense had ample time. *Id.*
28

1 Therefore, because the defense failed to exercise due diligence, after being on notice and having
2 knowledge of the evidence in question, the court found no discovery violation. *Id.* at 1258.

3 Other cases also demonstrate that the due diligence obligation only arises after the defense
4 has knowledge of the particular evidence and then fails to obtain it. *See e.g., Steese v. State*, 114
5 Nev. 479, 493, 960 P.2d 321, 330 (1998) (records of collect telephone calls allegedly made by
6 defendant at time of victim's murder were not *Brady* material that state was required to disclose to
7 defense; defendant had knowledge of collect calls he allegedly made, and defense counsel could
8 have independently obtained the records through diligent investigation); *see also Allen v. State*,
9 854 So.2d 1255, 1259 (Fla.2003) (stating that "[t]he defendant's duty to exercise due diligence in
10 reviewing *Brady* material applies only after the State discloses it" and therefore "[o]nce the State
11 obtained the results of the hair analysis, it was required to disclose them to the defendant").
12

13 In addition, the DA's imposition of a due diligence requirement is contradicted by the plain
14 language of the Memo.
15

16 ALL OTHER SUBPOENAS DUCES TECUM for discovery-type materials will be
17 objected to by LVMPD. The following process will be instituted to protect LVMPD should
18 litigation ensue from that objection:

19 If LVMPD does not have their own objection to releasing the records:

20 1) If the subpoena is not for a pending court date and merely orders records to be provided
21 directly to the defense, LVMPD will send a letter indicating that the Nevada Revised
22 Statutes in criminal cases do not provide a lawful mechanism for records to be provided
23 directly to the defense without a court order. **Should the defense seek these records, they
24 should request the records from the deputy district attorney assigned to the case.**
25 **(Exhibit 1, at 4) (emphasis added).**
26

27 Thus, the DA mandates the defense, through "due diligence," discover material from other
28 sources, only to get denied from the other sources, and then request them directly from the
prosecutor. Take, for another example, the following:

1 LVMPD will not comply with a subpoena which requests investigative records related to
2 someone other than the client of the defense attorney issuing the subpoena. (**Exhibit 1**, at
3 4).

4 This too requires the defense to seek the records from the DA, since it will be denied by outside
5 sources.

6 Accordingly, because the Memo's blanket due diligence obligation violates constitutional
7 principles set forth by Nevada law and is contradicted by other portions of the Memo, it is
8 unconstitutional. Thus, the State must be compelled to disclose all evidence in its possession to the
9 defense before imposing a due diligence obligation.

10 **E. The DA Has No Authority to Determine What Constitutes a Valid Subpoena.**

11 The DA claims in the Memo to have the authority to determine what constitutes a valid
12 subpoena.
13

14 A **valid** defense subpoena to LVMPD must include the trial date or an evidentiary hearing
15 date (this is true even though the subpoena may request documents or records "in lieu of
16 appearance"), unless the defense has a court order authorizing the subpoena for pre-trial
17 production of records. (**Exhibit 1**, at 3)

18 LVMPD will not comply with a subpoena which requests investigative records related to
19 someone other than the client of the defense attorney issuing the subpoena. (**Exhibit 1**, at
20 4).

21 The DA, however, cites no law as to where it was granted the authority to determine what
22 constitutes a "valid" defense subpoena. This is probably because such authority is clearly within
23 the purview of the courts, as determined by the Nevada Legislature. *See* NRS 174.335(2) (If
24 compliance with a subpoena would be unreasonable or suppressive, then a motion must be brought
25 for the **court** to quash or modify the subpoena.) (emphasis added). As such, this portion of the
26 Memo violates Nevada law and is unconstitutional.

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28 ///

1 **F. The DA's Representation That It Does Not Represent the Las Vegas Metropolitan**
2 **Police Department is False.**

3 As evidenced by approximately two-pages of the Memo in which the DA provides "the
4 procedure" to be followed by the CCDA and the LVMPD, the DA's conduct demonstrates that it
5 represents LVMPD. (See **Exhibit 1**, at 3–5). Take, for instance, the following statement:

6 LVMPD will not comply with a subpoena which includes a date other than the trial date or
7 an evidentiary hearing date as provided by NRS 174.315. (**Exhibit 1**, at 3–4).

8 Clearly, by establishing procedures and telling LVMPD how to respond to a subpoena—a
9 document with legal significance—the DA is rendering legal advice. It is without a doubt that
10 rendering legal advice to an individual or organization is conduct that is typical of an attorney-
11 client relationship. See NRPC 2.1.

12 Further, the Memo demonstrates how the DA consults LVMPD on the means by which it
13 should accomplish certain legal objectives, such as alleviating litigation harm:

14 ALL OTHER SUBPOENAS DUCES TECUM for discovery-type materials will be
15 objected to by LVMPD. The following process will be instated to protect LVMPD should
16 litigation ensue from that objection. (**Exhibit 1**, at 4) (emphasis added).

17 By laying out a process by which LVMPD is to act in order to protect itself from litigation, the DA
18 consults LVMPD on the means to accomplish a legal objective. This is, yet once again, typical of
19 an attorney-client relationship. See NRPC 1.2.

20 Despite dedicating almost two-full pages in its Memo advising, consulting, and advocating
21 for LVMPD, the DA claims that it does not represent LVMPD. Specifically, it states,

22 The Clark County District Attorney's Office does not represent any police agency,
23 including the Las Vegas Metropolitan Police Department ("LVMPD"). (**Exhibit 1**, at 3).

24 The DA cannot dispel its representation of LVMPD by merely stating such, especially given that
25 its conduct clearly evidences the existence of an attorney-client relationship. See *Cashill v. Second*
26 *Judicial Dist. Court of State ex rel. City of Washoe*, No. 57519, 2012 WL 627750, at *2 (Nev. Feb.
27 28

1 23, 2012); *see also Zenith Ins. Co. v. Cozen O'Connor*, 148 Cal.App.4th 998, 55 Cal.Rptr.3d 911,
2 920 (Ct. App.2007) (both cases noting that an attorney-client relationship may be impliedly
3 established by way of conduct and irrespective of the words said between the parties).

4 **CONCLUSION**

5 Based on the foregoing authorities and arguments, Defendant respectfully requests that this
6 Court compel the State to:

- 7 1. Obtain all evidence known to others acting on the State's behalf in this case;
8
9 2. Voluntarily provide Defendant with all evidence in its possession that is exculpatory
10 or tends to negate guilt or mitigates the offenses against Defendant; and
11
12 3. Allow Defendant to view all evidence in the State's possession.

13 DATED this 27 day of June, 2016.

14 PATTI, SGRO, LEWIS & ROGER

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16
17 ANTHONY P. SGRO, ESQ.
18 Nevada Bar No.: 3811
19 720 S. 7th Street, Suite 300
20 Las Vegas, NV 89101
21 *Attorney for Defendant*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of June, 2016, I served a true and correct copy of the foregoing document entitled: DEFENDANT'S MOTION TO COMPEL DISCOVERY as indicated below:

 sending a copy via facsimile to the parties herein, as follows; and/or

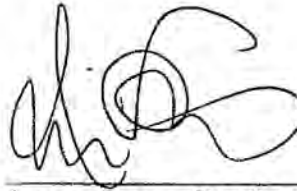
 J sending a copy via electronic mail, and/or

 placing the original copy in a sealed envelope, first-class, postage fully pre-paid thereon, and depositing the envelope in the U.S. mail as Las Vegas, Nevada addressed as follows:

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EXHIBIT 1

EXHIBIT 1

APPENDIX B

**Memorandum from Steven B. Wolfson, Clark County
District Attorney Re: Clark County District Attorney
Discovery Practice, dated April 13, 2016**



App.021

**CLARK COUNTY
OFFICE OF THE DISTRICT ATTORNEY**

Criminal Division

STEVEN B. WOLFSON
District Attorney

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Director D.A. Family Support

MEMORANDUM

TO: EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY PUBLIC DEFENDER'S OFFICE
SPECIAL PUBLIC DEFENDER'S OFFICE
CLARK COUNTY OFFICE OF APPOINTED COUNSEL
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

FROM: STEVEN B. WOLFSON
CLARK COUNTY DISTRICT ATTORNEY

DATE: APRIL 13, 2016

SUBJECT: CLARK COUNTY DISTRICT ATTORNEY DISCOVERY PRACTICE

In an effort to clarify the Clark County District Attorney's Office discovery practice, the following information is provided to interested parties:

I. CONSTITUTIONAL REQUIREMENTS

The Clark County District Attorney's Office will comply with constitutional requirements as follows:

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.

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II. STATUTORY REQUIREMENTS

The Clark County District Attorney's Office will comply with statutory requirements as follows:

All deputy district attorneys are expected to be familiar – and comply – with the statutory discovery obligations contained within the Nevada Revised Statutes, as well as those legal opinions interpreting the State's discovery obligations.

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.

Pursuant to NRS 174.235(1), at the request of the defense, the prosecuting attorney shall permit the defense to inspect and to copy or photograph any:

- (a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
- (b) Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and
- (c) Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

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III. CASE FILE REVIEW

On February 18, 2016, the Nevada Court of Appeals, in *Quisano v. State*, considered "whether, under the facts of the present case, the State maintained an open-file policy" (emphasis added). In a 2-1 opinion, the Court held that "the State's discovery policy constituted an open-file policy."

The Clark County District Attorney's Office does not have an "open-file" policy, as that phrase has been interpreted by courts to relieve defense counsel of its obligation to exercise due diligence in discovering impeachment and exculpatory evidence.¹ Upon request, however, a defense attorney may be permitted to review the case file of the deputy district attorney assigned the prosecution.

The invitation for a "case file review" is not a promise to disclose the entirety of the State's case file and does not extend to anything more than discovery required by statute and *Brady*. Expressly excluded from the case file is any attorney work product or other privileged material not otherwise discoverable under *Brady*. The invitation for a "case file review" shall not be construed as a representation that the deputy district attorney is in possession of all material in possession of law enforcement. Finally, the invitation for a "case file review" does not relieve defense counsel of its obligation to discover material which is available to the defense from other sources, including diligent investigation by the defense.

IV. LAS VEGAS METROPOLITAN POLICE DEPARTMENT REQUESTS

The Clark County District Attorney's Office does not represent any police agency, including the Las Vegas Metropolitan Police Department ("LVMPD"). However, in an effort to facilitate the acquisition of material from LVMPD, the Clark County District Attorney's Office provides the following procedure for informational purposes only and, where applicable, will comply with the procedure outlined below:

As a general rule, upon receipt of a defense subpoena, LVMPD will contact the deputy district attorney assigned the case to determine if the requested material already has been provided to the State. If so, the State will be asked to provide the material to the defense.

A valid defense subpoena to LVMPD must include the trial date or an evidentiary hearing date (this is true even though the subpoena may request documents or records "in lieu of appearance"), unless the defense has a court order authorizing the subpoena for pre-trial production of records. LVMPD will not comply with a subpoena which includes a

¹ The Clark County District Attorney's Office discovery practice remains virtually unchanged. Although the phrase "open-file" policy may have been used in the past, such terminology was not uniformly defined - - and not reflective of our practice as interpreted - - by some courts. This memorandum does not represent a change in our discovery practice; it is simply an attempt to clarify and communicate the Clark County District Attorney's Office discovery practice to judges and the defense bar.

date other than the trial date or an evidentiary hearing date as provided by NRS 174.315. Calendar Call is not an evidentiary hearing.

LVMPD will not comply with a subpoena which requests investigative records related to someone other than the client of the defense attorney issuing the subpoena.

Subject to the conditions outlined above, if LVMPD receives a subpoena for any of the following items, LVMPD will voluntarily provide the information to the defense:

- 1) LVMPD 911 and Radio Traffic Recordings and CAD printouts.
- 2) LVMPD photographs from the event number assigned the case.
- 3) CCDC records if the attorney issuing the subpoena represents the person whose records are being requested.

In the case of 911 calls, CADs and photographs, the deputy district attorney assigned to the case will not be notified of the request and will not receive a copy of items being provided. In the case of CCDC records, the deputy district attorney assigned to the case will get a copy of the records being provided.

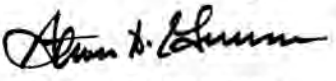
ALL OTHER SUBPOENAS DUCES TECUM for discovery-type materials will be objected to by LVMPD. The following process will be instituted to protect LVMPD should litigation ensue from that objection:

If LVMPD does not have their own objection to releasing the records:

- 1) If the subpoena is not for a pending court date and merely orders records to be provided directly to the defense, LVMPD will send a letter indicating that the Nevada Revised Statutes in criminal cases do not provide a lawful mechanism for records to be provided directly to the defense without a court order. Should the defense seek these records, they should request the records from the deputy district attorney assigned to the case.
- 2) If the subpoena is for a pending court date, but indicates that the records may be provided directly to the defense IN LIEU of appearance, LVMPD will send a similar letter indicating that the Nevada Revised Statutes in criminal cases do not provide a lawful mechanism for records to be provided directly to the defense. Notwithstanding, LVMPD will inform the defense that the request for records has been forwarded to the deputy district attorney assigned to the case and the deputy should be prepared to address the issue regarding the records at the identified court date. AT THAT NEXT COURT DATE, the deputy should raise the issue regarding the records with the court and either provide them to the defense as discovery or, if there is an issue with disclosure, litigate the issue before the court.

In the case of records to which LVMPD has an independent objection:

LVMPD will send a similar letter indicating not only that the Nevada Revised Statutes in criminal cases do not provide a lawful mechanism for records to be provided directly to the defense, but that they also object to certain records on substantive grounds. Notwithstanding, the procedure above will be followed with the exception that LVMPD will decide whether it wants to intervene by way of motion to quash for the records to which LVMPD has an independent objection.


CLERK OF THE COURT

1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 PAMELA WECKERLY
6 Chief Deputy District Attorney
7 Nevada Bar #006163
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 MAURICE MANUEL SIMS,
13 #2684920

14 Defendant.

CASE NO: C-13-287414-1

DEPT NO: III

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL**
16 **DISCOVERY BASED ON DISTRICT ATTORNEY OPEN FILE POLICY**

17 DATE OF HEARING: 7/21/16
18 TIME OF HEARING: 9:00 AM

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
19 District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and
20 hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to
21 Compel Discovery Based on District Attorney Open File Policy.

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

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1 **POINTS AND AUTHORITIES**

2 Defendant Sims claims that the memorandum clarifying the discovery policy of the
3 Office of the District Attorney states (1) the Office of the District Attorney has no obligation
4 to discover evidence of government agencies acting on its behalf and (2) the Office does not
5 have an “open file policy” and this “violate(s) the constitutional mandates set forth by Nevada
6 and Federal law and cannot be the parameters as to how discovery will be provided in the
7 instant case.” With regard to the first claim, the State does not dispute that it has the obligation
8 to seek and produce exculpatory evidence from agencies working with the State on this
9 particular case. See Section II, supra. With regard to the contention that disavowing an “open
10 file” policy, as interpreted by the Nevada Appellate Court, constitutes a violation of state and
11 federal law, the State disagrees.

12 In the motion, the remedy Sims seeks is for the Court to order the State to: (1) “obtain
13 all evidence known to others acting on the State’s behalf in this case; (2) provide “Defendant
14 with all evidence in its possession that is exculpatory or tends to negate guilt or mitigates the
15 offenses against Defendant;” and (3) “[a]llow Defendant to view all evidence in the State’s
16 possession.” The State opposes in part.

17 **I. No Law Requires the State to Maintain an Open File Policy**

18 Defendant Sims erroneously suggests to this Court that Nevada Courts have determined
19 that the State has an “open file” policy. To support this contention, Sims cites to Rippo v.
20 State, 113 Nev. 1239, 1258 (1997), and Quisano v. State, 2016 WL 670887 (Nev. App.
21 February 18, 2016). Motion at 6. The State notes that both Rippo and Quisano occurred
22 before the issuance of the 2016 memo. Thus, while, Rippo does reference the State’s open
23 file policy, see 113 Nev. at 1258, it does not hold that such a policy is mandated by State or
24 federal law. Indeed, the “open file” reference in Rippo was to an alleged Brady violation
25 which the court concluded was without merit because the statement at issue was not
26 exculpatory and could have been discovered by the defendant upon review of the State’s file.
27 Notably, this is no different than the practice currently in place and described in the 2016
28 Memo--an avenue for defense counsel to review the State’s file.

1 What the State is disavowing is the Nevada Appellate Court's manufactured, broad and
2 formalistic definition of what an "open file" policy represents. In Quisano v. State, Quisano
3 raised a Brady claim regarding an affidavit used by the State to cross-examine a witness at a
4 sentencing hearing. The affidavit was used to impeach a witness testifying favorably for
5 Quisano at sentencing. 2016 Nev. App. LEXIS 11. p. 18. The Nevada Appellate Court
6 summarily dismissed the Brady claim as the affidavit was in no way exculpatory. Referencing
7 language in the State's Receipt of Copy form, the appellate court noted the form guaranteed
8 "the State's intent to provide access to 'all discovery' in its possession to Quisano." Id. at 19.
9 From that language and the State's invitation to the defense to view the LVMPD case file as
10 well as physical evidence, the court concluded the "State's discovery policy constituted an
11 open-file" policy." In essence, the appellate court extrapolated that an "open-file" local
12 convention was tantamount to a legal undertaking or Open File pledge. Id.

13 From there, the appellate court then interpreted what "Open File" meant as a legal term
14 of art. To make this determination, the Nevada Appellate Court referenced not the standards
15 and practices in Clark County, but cited to a case from Humboldt County, McKee v. State,
16 112 Nev. 642, 647-8, 917 P.2d. 940, 943-44 (1996). In McKee, a prosecutor allowed defense
17 counsel to review his file, but excluded an inculpatory photo the prosecutor intended to use
18 only if the defendant testified. Finding error, the Nevada Supreme Court noted that although
19 "the boundaries of that [open] file policy do not appear to be defined, the record shows that
20 McKee's counsel believed that the open file policy meant that the District Attorney's Office
21 would make available all relevant inculpatory, as well as, exculpatory evidence." Id. at 647.
22 Relying on McKee, the Nevada Appellate Court held that it was error for the State in Quisano
23 not to have disclosed the affidavit used to impeach the sentencing witness. The court stated,
24 "Quisano could reasonably rely on the State's promise under the open-file policy to provide
25 discovery as it became available, just like the defendant in McKee who reasonably relied on
26 the State's open file policy." Quisano, 2016 U.S. Dist. LEXIS at 27.

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1 Significantly, the discovery statutes in Nevada do not provide for an open file. Indeed,
2 in Quisano, the Nevada Appellate Court recognized that the “open file” policy went further
3 than the statutory discovery requirements by noting that:

4 On appeal, the State selectively quotes the third paragraph of the policy and
5 argues that it only committed to disclose evidence under NRS 174.235, Brady,
6 and Giglio. We note that if the policy allowed the State to unilaterally assess
7 whether materials are discoverable before disclosing those materials to Quisano,
the policy would serve no purpose other than to signal the State’s intent to
comply with the law.

8 2016 Nev. App. LEXIS at 18-19.

9 The 2016 Memo put all defense counsel on notice that the State does not have an “open
10 file” policy as interpreted by the Nevada Appellate Court, meaning the State will comply with
11 the law and is not obligating itself to any further discovery disclosure. Moreover, Defendant
12 Sims cites to no statute that requires the State to have such a policy.

13 **II. That State Has An Obligation to Seek and Discover Favorable Evidence in the**
14 **Possession of Other Agencies that the Defense Cannot Discover.**

15 Defendant Sims erroneously claims that the State has a responsibility to learn of any
16 favorable information known to others acting on the government’s behalf. Motion at 7. In
17 reality, the obligation is to seek and discover information from others acting on the
18 government’s behalf that the defense could not obtain through its own effort.

19 The State has an obligation to produce exculpatory evidence pursuant to Brady v.
20 Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Giglio v. United States, 405 U.S. 150, 92 S. Ct.
21 763 (1972), requires that certain impeaching material be disclosed as well. The rule of Brady
22 v. Maryland, 373 U.S. 83 (1963), which requires the State to disclose to the defendant any
23 exculpatory evidence, is founded on the constitutional requirement of a fair trial. Brady is not
24 a rule of discovery, however. As the Supreme Court held in Weatherford v. Bursy, 429 U.S.
25 545, 559, 97 S. Ct. 837, 846 (1977):

26 There is no general constitutional right to discovery in a criminal case, and Brady
27 did not create one... ‘the Due Process Clause has little to say regarding the
28 amount of discovery which the parties must be afforded....’ Wardius v. Oregon,
412 U.S. 470, 474 [93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973)].

1 Moreover, the Supreme Court recognized the concept of imputed knowledge in Kyles
2 v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995). In Kyles, the Supreme Court held that state
3 prosecutors have a duty to disclose impeachment evidence known to the police, even if the
4 prosecutors themselves were not actually aware of the information. The Court stated:

5 ...the prosecution, which alone can know what is undisclosed, must be assigned
6 the consequent responsibility to gauge the likely net effect of all such
7 [undisclosed favorable] evidence and make disclosure when the point of
8 “reasonable probability” is reached. This in turn means that the individual
9 prosecutor has a duty to learn of any favorable evidence known to others acting
10 on the government’s behalf in the case, including the police.

11 Id. at 437, 115 S. Ct. at 1567.

12 Whether an individual or agency is part of the “prosecution team” is typically analyzed
13 according to the facts of a particular case. Clearly, it would include other prosecutors in the
14 same office and the police or other investigative agencies involved in the prosecution of a
15 particular case, as held in Kyles. Id. at 437-38, 115 S. Ct. at 1567. It has also been held to
16 include other government agencies that participated in the investigation and prosecution of a
17 case. See United States v. Endicott, 869 F.2d 452, 456 (9th Cir. 1989) (knowledge of promises
18 made by ATF agents to witnesses imputed to prosecutor, because agency was part of the
19 prosecution); United States v. Steel, 759 F.2d 706, 714 (9th Cir. 1985) (knowledge of
20 information held by FBI imputed to prosecutor because investigative officers were also part
21 of the prosecution); United States v. Butler, 567 F.2d 885, 889-91 (9th Cir. 1978) (government
22 is responsible for non-disclosure of DEA agents because they are “an arm of the prosecutor”).

23 The Ninth Circuit extended the concept to include agencies “interested in the
24 prosecution.” See United States v. Wood, 57 F.3d 733 (9th Cir. 1995) (in prosecution for
25 conspiracy to defraud Food and Drug Administration, prosecutor was required to disclose
26 information known to FDA even though unknown to prosecutor because, as agency interested
27 in the prosecution, FDA was “part of the prosecution for Brady purposes”). In addition, in a
28 different case, the circuit held that the prosecutor had an obligation to discover its key
witness’s “corrections file” and disclose exculpatory information to the defense. Carriger v.
Stewart, 132 F.3d 463, 479-82 (9th Cir. 1997) (holding that State had duty under Kyles to learn

1 of any exculpatory evidence “known to others acting on the government’s behalf,” and
2 therefore to obtain a corrections file, which included prison records and institutional
3 evaluations of the witness’s credibility, and disclose it to the defense).

4 This does not mean there is a duty to search “all agencies of the same government.”
5 Odle v. Calderon, 65 F. Supp. 2d 1065, 1071-72 (N.D. Cal. 1999), reversed and remanded on
6 other grounds by 238 F.3d 1084 (9th Cir. 2001). Rather, the duty is limited to agencies
7 involved in the investigation or prosecution of the defendant. United States v. Zuno-Arce, 44
8 F.3d 1420, 1427 (9th Cir. 1995) (the prosecution is deemed to have knowledge of and access
9 to anything in the custody and control of any federal agency participating in the same
10 investigation of the defendant); United v. Morris, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (in
11 prosecution for mail fraud and wire fraud, prosecutor had no duty to search for, and was not
12 charged with knowledge of, allegedly exculpatory information held by the Office of Thrift
13 Supervision, the Securities and Exchange Commission, or the Internal Revenue Service, where
14 the prosecutor was unaware of the existence of the information and those agencies were not
15 part of the investigation or prosecution team); see also United States v. Avellino, 136 F.3d
16 249, 255 (2d Cir. 1998) (declining to impose unlimited duty on prosecutor to inquire of other
17 offices not working with prosecutor’s office on the case, because to do so would be to adopt a
18 “monolithic view of the government” that ultimately would lead to prosecutorial paralysis).

19 Further, in United States v. Harris, 738 F.2d 1068, 1072 (9th Cir. 1984), the court
20 suggested that federal prosecutors had no duty to obtain material in possession of a different
21 government entity. In Harris, state authorities were investigating the defendant and during the
22 course of that investigation, learned of possible federal offenses. The state authorities
23 contacted the federal government and were informed that the defendant had been indicted
24 federally, but not yet arrested. At a suppression hearing, the federal defense team learned of
25 the existence of tape recordings of telephone conversations between the defendant and an
26 informant that were captured in the state investigation. The defense requested the federal
27 government produce the tapes. The federal prosecutors refused “because they were in the
28 state’s not the federal government’s possession.” Id. at 1072. On appeal, the defense

1 contended that this refusal was error. Upon review, the Ninth Circuit noted that the defense
2 never raised an objection to the prosecution's inaction in the proceedings with regard to this
3 issue. The court also noted that the "government's position—that it had no obligation to
4 disclose tapes since they were in California's possession—is not plainly erroneous; to the
5 contrary, it may even be correct." *Id.*

6 Similarly, in *Ganci v. Berry*, 702 F. Supp. 400 (E.D.N.Y. 1988), the court ruled that
7 state prosecutors were not obligated to find exculpatory material possessed by the F.B.I. In
8 *Ganci*, local and federal law enforcement investigated a bank robbery. F.B.I. agents
9 interviewed witnesses who gave a descriptions of the robber which were arguably inconsistent
10 with the defendant's appearance. Neither the local police nor the district attorneys had seen
11 the reports regarding the interviews. *Id.* at 403. On appeal, Ganci claimed that the F.B.I.
12 reports were exculpatory and that the district attorneys had an obligation to inquire of the F.B.I.
13 what information it had and to furnish that information to the defense. *Id.* at 404. The court
14 ruled otherwise, holding "[a] state prosecutor who does not have knowledge or possession of
15 exculpatory material is not obliged by the *Brady* decision to find out if the F.B.I. has such
16 material, particularly where the defense has knowledge that the F.B.I. has investigated the
17 case." *Id.* If the reports were in the possession of the state, however, they would have to be
18 produced to the defense. *See id.*

19 It is unreasonable to impose on the State a burden to uncover information that it
20 attenuated from the case and held in government entities outside of the prosecution team. For
21 instance, in *Lovitt*, 403 F.3d 171 (4th Cir. 2005), a prison inmate/professional snitch testified
22 on behalf of the state. Unknown to the prosecutors, the witness had cooperated with the
23 government in three cases outside of the county of the Lovitt prosecution and one case within
24 the county. *Id.* at 185. On appeal, Lovitt claimed the state should have provided him with the
25 history of the witness's cooperation in the other cases. *Id.* With regard to the three cases
26 outside of the county prosecution, the circuit court found no *Brady* violation because the
27 witness's cooperation was unknown to the local prosecutors. Acknowledging *Kyles*, the court
28 stated, "we do not think this duty crossed jurisdictional lines in Lovitt's case. As the district

1 court stated, 'to require a prosecutor to mine the records of every surrounding jurisdiction in
2 both the Commonwealth of Virginia and the District of Columbia absent some specific
3 information triggering such an inquiry would be patently unreasonable.'" Id. at 185-86
4 (citations omitted). The local case in which the witness had cooperated resulted in a guilty
5 plea so the witness never testified. Id. at 185. In addition to noting that the case within the
6 jurisdiction involved a plea rather than testimony, the circuit court observed that the witness
7 had told the defense attorney of his cooperation in that prior, local case and the incident was
8 discussed on cross-examination in Lovitt's trial. Id. at 186. Therefore, the court concluded
9 that no material exculpatory evidence was suppressed. Id.

10 Moreover, it is important to note that the Brady duty to search for favorable information
11 extends only to information in the possession or control of law enforcement. See United States
12 v. Plunk, 153 F.3d 1011, 1027 (9th Cir. 1988), overruled on other grounds by United States v.
13 Hankey, 203 F.3d 1169 (9th Cir. 2000) (no Brady duty to disclose information in federal public
14 defender's files regarding prior inconsistent statements made by a government witness; Brady
15 duty extends only to information in the possession or control of law enforcement personnel);
16 United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979) (government had no Brady
17 obligation with regard to co-defendant's diary about which it had no knowledge of the
18 information contained in it, no access to it, and no control over it); see also United States v.
19 Hughes, 211 F.3d 676 (1st Cir. 2000) (government had no obligation to produce photographs
20 that were taken by Mexican officials and not provided to the prosecution).

21 **III. Material Falls Under Brady When it is Not Otherwise Discoverable by the Defense**
22 **Through Diligent Effort.**

23 Sims misstates the law when the defense argues that Brady requires the State to provide
24 the defendant with all favorable evidence. Adhering to the law, the 2016 Memo does not
25 relieve the defense of investigating its case diligently. Brady does not require the State to
26 conduct trial preparation and investigation on behalf of the defense. The requirement is to
27 produce exculpatory information which the defense would not be able to obtain itself in an
28 ordinary exercise of diligence. Although information may be exculpatory, if the defense is

1 aware of impeachment material and has the ability to obtain it, the State is not required to
2 produce the information. In United States v. Aichele, 941 F.2d 761 (9th Cir. 1991), the
3 prosecution had produced the criminal record of a testifying witness. Prior to cross-
4 examination, defense counsel advised the court that it still sought witness's first California
5 Department of Corrections file, which was under the control of California officials. The
6 prosecution did not obtain these documents for the defense and, on appeal, the defendant
7 claimed a Brady violation occurred. The Ninth Circuit disagreed, holding that the
8 "prosecution is under no obligation to turn over materials not under its control." Id. at 764.
9 "When, as here, a defendant has enough information to be able to ascertain the supposed Brady
10 material on his own, there is no suppression by the government." Id.

11 In United States v. Lovitt, 403 F.3d 171, 184 (4th Cir. 2005), the circuit court
12 highlighted that the defense cannot claim a Brady violation when, through reasonable efforts,
13 the defense should have discovered the information. In Lovitt, the defendant stabbed the
14 victim to death. In the course of investigation, detectives found various pairs of scissors, one
15 pair with blood, and considered them a possible murder weapon. During trial, the pathologist
16 who performed the autopsy was not asked if the bloody scissors admitted into evidence were
17 consistent with causing the victim's injuries. Prior to trial, she examined two pairs of scissors
18 and opined that scissors could not have caused all of the victim's injuries. This opinion was
19 not revealed to defense team. The defense did have a report which explained that investigators
20 presented her with scissors prior to trial. After the victim's DNA was found on one pair of the
21 scissors, the doctor reconsidered her opinion.

22 On appeal, Lovitt claimed that the pathologist's original opinion was exculpatory. The
23 circuit court disagreed, noting that Lovitt's lawyers had access to the autopsy report which
24 mentioned the doctor examining pairs of scissors and they had an opportunity to cross-examine
25 her at trial. Id. at 181-83. The court also noted that the defense had access to the doctor before
26 trial and could have asked her to compare the scissors to the victim's injuries. Id. at 184.
27 Noting these facts, the court stated, "[w]e have explained before that 'where the exculpatory
28 information is not only available to the defendant but also lies in a source where a reasonable

1 defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine.”
2 Id. (citations omitted).¹

3 **IV. The Defense Obligation to Diligently Investigate Its Case Is Not Conditioned on**
4 **Disclosure by the State.**

5 Noting that the 2016 Memo places the defense on notice that it must pursue its
6 investigation of exculpatory information from other sources, Sims misstates the law and argues
7 that the “due diligence” requirement placed on the defense is only triggered “once the State
8 has disclosed all of the evidence in its possession to the defense.” Motion at 9. Defendant
9 Sims cites three cases for this proposition. Rippo v. State, 113 Nev. 1239 (1997), Steese v.
10 State, 114 Nev. 479 (1998), and Allen v. State, 854 So.2d 1255 (Fla. 2003).

11 The Nevada authority, by which this Court is bound, does not hold that the defense due
12 diligence requirement only arises once the State has disclosed all of the evidence in its
13 possession to the defense. What Rippo and Steese explain is that material information does
14 not constitute Brady material if it could have been discovered by the defense through diligent
15 effort. The cases do not premise that interpretation of Brady material on a finding that the
16 “state has disclosed all of the evidence in its possession to the defense” as Sims claims in his
17 motion. In other words, Rippo and Steese do not stand for the proposition that the due
18 diligence requirement on the defense “only arises once the State has disclosed all of the
19 evidence in its possession to the defense.” Motion at 9.

20 With regard to the Rippo, 113 Nev. 1239 (1997), Defendant Sims cites to pages 1257-
21 58 to support his claim that the due diligence requirement of the defense only arises once the
22 State has disclosed all of the evidence in its possession. In fact, in Rippo specifically states
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24

25 ¹ Somewhat similarly, the Nevada Supreme Court, in an unpublished opinion, suggested that
26 records about which the defense was aware were not a basis of a Brady violation. See Cacho
27 v. State (Unpublished) 2010 WL 3271513, *4 (Nev. 2010) (holding that when the defense
28 announced ready for trial although it was missing CPS records it desired, Cacho failed to
demonstrate any intent by the State to withhold the evidence or any prejudice, and thus there
was no Brady violation).

1 that no Brady violation occurs when the defense, exercising due diligence, could have obtained
2 the information. The Nevada Supreme Court noted:

3 Federal courts have consistently held that a Brady violation does not result if the
4 defendant, exercising reasonable diligence, could have obtained the information.
5 See, e.g., Williams v. Scott, 35 F.3d 159, 163 (5th Cir.) (Brady claim fails where
6 appellant could have obtained exculpatory statement through reasonable
7 diligence), *cert. denied*, 513 U.S. 1137, 130 L. Ed. 2d 901, 115 S. Ct. 959 (1995);
8 United States v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) ("if the means
9 of obtaining the exculpatory evidence has been provided to the defense, the
10 Brady claim fails"); United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983)
11 (where prosecution disclosed identity of witness, it was within the defendant's
12 knowledge to have ascertained the alleged Brady material); United States v.
13 Brown, 582 F.2d 197, 200 (2d Cir. 1978) (no violation where defendant was
14 aware of essential facts enabling him to take advantage of the exculpatory
15 evidence).

16 113 Nev. at 1257. This analysis makes sense because, if it were otherwise, all post-trial Brady
17 inquiries would simply be a question of whether the State was in possession of exculpatory
18 information. The inquiry about whether information was "withheld," which centers upon
19 whether the information was otherwise discoverable, would be irrelevant. See Brady v.
20 Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

21 In Steese, 114 Nev. 479 (1998), the Nevada Supreme Court found that no Brady
22 violation occurred when the State did not disclose phone records which could be used to
23 bolster Steese's alibi claim. Although the State was in possession of the records and they were
24 arguably exculpatory, there was no Brady violation. The Nevada Supreme Court found:

25 Furthermore, Brady does not require the State to disclose evidence which is
26 available to the defendant from other sources, including diligent investigation
27 by the defense. Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994); *accord*
28 United States v. Davis, 787 F.2d 1501 (11th Cir. 1986). Here, Steese certainly
had knowledge of the collect calls he allegedly made to Rock. Through diligent
investigation, defense counsel could have obtained the phone records
independently. Therefore, we conclude that the State did not violate Brady by
failing to provide these records to the defense.

29 Id. at 495. Therefore, because Steese specifically holds that although the material was in
30 possession of the State, failing to produce it to the defense was not a Brady violation because
31 Steese could have discovered its existence on his own. This clearly contradicts Sims' claim
32 that the due diligence requirement on the defense is predicated on any particular or thorough
33 disclosure by the State.

1 Sims also cites to the non-binding case of Allen v. State, 854 So.2d 1255 (Sup. Ct. Fla.
2 2003). In Allen, the State tested two hairs found in a victim's hand. The analysis excluded
3 the defendant. The State did not produce the results of the testing. On post-conviction, Allen
4 claimed a Brady violation. The Florida Supreme Court agreed. The State argued that because
5 Allen was aware the hairs had been analyzed so it had no duty to provide the results. The
6 Florida court disagreed, stating that the "defendant's duty to exercise due diligence in
7 reviewing Brady material applies only after the State discloses it." Id. at 1259. Notably, while
8 Allen places more of a burden on the State than Steese and Rippo, in that it holds that although
9 the defense was aware that testing had been done, it had no obligation to seek the results, the
10 decision does not state, as Sims argues, that the duty of due diligence arises only after the State
11 has disclosed all of the evidence in its possession to the defense. Instead, the opinion notes
12 that the results of the testing, which were exculpatory or Brady material had to be disclosed
13 without any inquiry by the defense.

14 Moreover, the Allen opinion is somewhat inconsistent with another Florida case,
15 Maharaj v. Florida, 778 So.2d 944 (Sup. Ct. Fla. 2000). In Maharaj, after conviction, the
16 defendant alleged a Brady violation based on evidence allegedly withheld by the State. The
17 evidence at issue was the contents of a victim's briefcase, the existence of which was known
18 to the defense prior to trial. The Florida Supreme Court found no violation because the
19 defendant knew of the contents of the briefcase and could have compelled production of it.
20 Id. at 954. In Allen, the court distinguished Maharaj by noting that in Allen, the State had
21 possession of the hair analysis while the briefcase in Maharaj was returned to the victim's
22 family and could have been produced in court by the defense. 854 So.2d at 1259. Finally, in
23 Ward v. State, 984 So.2d 650 (Ct. App. Fla. 2008), a court interpreting Allen implied that the
24 holding applied only to disclose "duly requested exculpatory information." Id. at 654
25 (emphasis added).

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1 **IV. The 2016 Memo Accurately Details the Law on Defense Subpoenas.**

2 Next Sims takes issue with the 2016 Memo detailing the law regarding defense
3 subpoenas. Sims misunderstands the Memo and complains that the Office of the District
4 Attorney is claiming to have the authority to determine what constitutes a valid subpoena. In
5 reality, the Memo details the position LVMPD will take if in receipt of a defense subpoena
6 and why that is the case.

7 NRS 174.305 states:

8 Except as provided in NRS 172.195 and 174.315:

9 1. A subpoena must be issued by the clerk under the seal of the court. It must
10 state the name of the court and the title, if any, of the proceeding, and must
11 command each person to whom it is directed to attend and give testimony at the
12 time and place specified therein. The clerk shall issue a subpoena, signed and
sealed but otherwise in blank, to a party requesting it, who shall fill in the blanks
before it is served.

13 2. A subpoena must be issued by a justice of the peace in a proceeding before
the justice of the peace under the seal of the court.

14 NRS 172.195 relates to Grand Juries and is irrelevant here. NRS 174.315 states:

15 1. The prosecuting attorney may issue subpoenas subscribed by the prosecuting
16 attorney for witnesses within the State, in support of the prosecution or whom
the grand jury may direct to appear before it, upon any investigation pending
before the grand jury.

17 **2. The prosecuting attorney or the attorney for the defendant may issue**
18 **subpoenas subscribed by the issuer for:**

19 **(a) Witnesses within the State to appear before the court at which an**
20 **indictment, information or criminal complaint is to be tried.**

21 (b) Witnesses already subpoenaed who are required to reappear in any Justice
22 Court at any time the court is to reconvene in the same case within 60 days, and
the time may be extended beyond 60 days upon good cause being shown for its
extension.

23 3. Witnesses, whether within or outside of the State, may accept delivery of a
24 subpoena in lieu of service, by a written or oral promise to appear given by the
witness. Any person who accepts an oral promise to appear shall:

25 (a) Identify himself or herself to the witness by name and occupation;

26 (b) Make a written notation of the date when the oral promise to appear was
27 given and the information given by the person making the oral promise to appear
identifying the person as the witness subpoenaed; and

28 (c) Execute a certificate of service containing the information set forth in
paragraphs (a) and (b).

1 4. A peace officer may accept delivery of a subpoena in lieu of service, via
2 electronic means, by providing a written promise to appear that is transmitted
3 electronically by any appropriate means, including, without limitation, by
4 electronic mail transmitted through the official electronic mail system of the law
5 enforcement agency which employs the peace officer.

6 5. A prosecuting attorney shall orally inform any witness subpoenaed as
7 provided in subsection 1 of the general nature of the grand jury's inquiry before
8 the witness testifies. Such a statement must be included in the transcript of the
9 proceedings.

10 6. Any subpoena issued by an attorney for a defendant for a witness to appear
11 before the court at which a preliminary hearing is to be held must be calendared
12 by filing a motion that includes a notice of hearing setting the matter for hearing
13 not less than 2 full judicial days after the date on which the motion is filed. A
14 prosecuting attorney may oppose the motion orally in open court. A subpoena
15 that is properly calendared pursuant to this subsection may be served on the
16 witness unless the court quashes the subpoena.

17 (Emphasis added). As these statutes clearly indicate, a subpoena, whether issued by the clerk
18 of the court, the prosecuting attorney, or a defendant's attorney, is only enforceable if the
19 subpoena requires the person to appear in Court for testimony.

20 The production of documents is also covered by the Nevada Revised Statutes. NRS
21 174.335 states:

22 1. Except as otherwise provided in NRS 172.139, a subpoena may also command
23 the person to whom it is directed to produce the books, papers, documents or
24 other objects designated therein.

25 2. The court on motion made promptly may quash or modify the subpoena if
26 compliance would be unreasonable or oppressive.

27 **3. The court may direct that books, papers, documents or objects**
28 **designated in the subpoena be produced before the court at a time before**
the trial or before the time when they are to be offered in evidence and may,
upon their production, permit the books, papers, documents or objects or
portions thereof to be inspected by the parties and their attorneys.

29 (Emphasis added). As is plain from the language of the statute, a subpoena may only direct
30 that the *duces tecum* of the subpoena may only require the items to be brought to Court for the
31 testimony of the witness. The only exception to this rule is if the Court requires the items to
32 be lodged with the Court and then permits both parties to review the items. Only after a motion
33 before the Court, with notice to the parties, could the subpoena ever require the items sought
34 to be produced be required to be provided prior to the testimony.

1 This legislative intent is confirmed by the only other manner in which a subpoena may
2 be issued for a time different than the trial. NRS 174.375 directs the procedure for issuing a
3 subpoena for taking depositions. That statute states in relevant part:

4 1. An order to take a deposition authorizes the issuance by the clerk of the court
5 for the county in which the deposition is to be taken of subpoenas for the persons
named or described therein.

6 Thus, in order to issue a subpoena for a deposition, which occurs at a time different than trial,
7 an order of the Court must be issued to the clerk of the court. Absent such an order, the
8 subpoena is unenforceable. Thus, the order to show cause must be denied.

9 A reading of the criminal statutes as they relate to subpoenas may appear to create an
10 unfair situation if they are not understood in context of the criminal discovery statutes. Under
11 Common Law, a defendant has no right of discovery. State v. Wallace, 399 P.2d 909, 97 Ariz.
12 296 (1965). This, of course, can be superseded by statutory enactment and that is the case in
13 Nevada. Regarding the law of discovery in the State of Nevada, NRS 174.235, *et. seq.*
14 controls. The Nevada Supreme Court has held that even an accused's statement is not
15 constitutionally compelled through pre-trial discovery. Mears v. State, 83 Nev. 3, 7, 422 P.2d
16 230, 232 (1967), Thompson v. State, 93 Nev. 342, 565 P.2d 1011 (1977).

17 In Franklin v. Eighth Judicial District Court, 85 Nev. 401, 455 P.2d 919 (1969), the
18 Nevada Supreme Court held that the lower court erred in granting defendant's Motion to
19 Discovery, inspect and copy statements of all persons to be called by the prosecution as
20 witnesses at trial, since NRS 174.245 does not authorize discovery of inspection of statements
21 made by State witnesses or perspective State witnesses to agents of the State.² Nor does the
22 defendant enjoy a constitutional right to discover them. With regard to the discovery statutes
23 previously alluded to, the Court stated that:

24 Those provisions (NRS 174.235-174.295) represent the legislative intent with
25 respect to the scope of allowable pre-trial discovery and are not lightly to be
26 disregarded.

27
28 ² Since Franklin, the legislature did amend the statutes to cover some, if not all of this information, however, the
reasoning of Franklin is still good law.

1 From the aforementioned, it is clear that Nevada's discovery and subpoena statutes are to be
2 strictly construed and adhered to since no Common Law right of discovery existed. It should,
3 therefore, also be clear that the defendant's "subpoena," so far as it exceeds the requirements
4 of NRS 174.305, *et. seq.*, is not enforceable.

5 Again, the rule of Brady v. Maryland, which requires the State to disclose to the
6 defendant any exculpatory evidence is founded on the constitutional requirement of a fair trial.
7 It is not a rule of discovery. Weatherford v. Bursy, 429 U.S. 545, 559, 97 S.Ct. 837, 846
8 (1977). Thus, nonexculpatory evidence is obtainable in advance of trial only by virtue of
9 discovery statutes or compliance with the subpoena rules which require a motion and hearing.
10 United States v. Kaplan, 554 F.2d 544 (3rd Cir. 1977).

11 **V. The Office of the District Attorney Does Not Represent the Las Vegas**
12 **Metropolitan Police Department.**

13 The Las Vegas Metropolitan Police Department maintains and is the custodian of its
14 own records. The 2016 Memo did not change that. The Memo attempted to clarify the most
15 efficient way to get information from Metro and to clarify the policy of the Office of the
16 District Attorney in light of the Quisano decision. None of these steps create any sort of
17 agency between the Office of the District Attorney and LVMPD. Finally, Sims cites no
18 persuasive authority for his claim that representation exists.

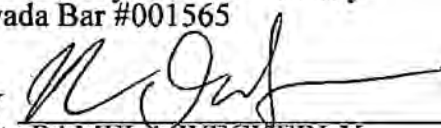
19 **CONCLUSION**

20 The State asks the Court to hold the State to its statutory and constitutional discovery
21 obligations.

22 DATED this 14th day of July, 2016.

23 Respectfully submitted,

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

26 BY 
27 ✓

28 PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF SERVICE

I certify that on the 14 day of July, 2016, I e-mailed a copy of the above and foregoing, to:

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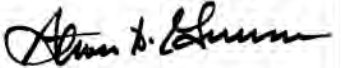
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BY


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PW/tgd/MVU


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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

MAURICE MANUEL SIMS,
#268490

Defendant.

CASE NO. C-13-287-414-I
DEPT. III

Date of Hearing: July 21, 2016
Time of Hearing: 9:00 AM

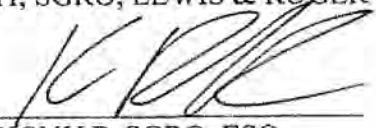
**REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY
BASED ON DISTRICT ATTORNEY OPEN FILE POLICY**

COMES NOW, the Defendant, MAURICE MANUEL SIMS ("Sims" or "Defendant"), by and through IVETTE AMELBURU MANINGO, ESQ. of the Law Offices of Ivette Amelburu Maningo and ANTHONY P. SGRO, ESQ. and KEIVAN A. ROEBUCK, ESQ., of Patti, Sgro, Lewis & Roger, and hereby files this Reply to compel discovery which is crucial to a full and fair development of the material facts in this capital case.

1 This Reply is made and based upon the attached Points and Authorities, all the papers and
2 pleadings on file herein, and oral argument at the time set for hearing this Defendant's motion.

3 DATED this 20th day of July, 2016.

4 PATTI, SGRO, LEWIS & ROGER

5 
6 ANTHONY P. SGRO, ESQ.

7 Nevada Bar No. 3811

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10 720 S. 7th Street, Suite 300

11 Las Vegas, NV 89101

12 *Attorneys for Defendant*

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I.**

15 **INTRODUCTION**

16 On June 27, 2016, Defendant filed his Motion to Compel Discovery Based on District
17 Attorney Open File Policy. The Motion challenged the Clark County District Attorney's Office's
18 (the "DA") memorandum which attempted to "clarify" the DA's discovery practice (the
19 "Memo").¹ On July 14, 2016, the State filed an untimely Opposition to Defendant's Motion²,
20 which fails to disprove that the Memo violates Nevada and Federal law by implementing and
21 endorsing unconstitutional discovery practices that must not be permitted in this case, or ever. As
22 such, Defendant again respectfully requests that this Court order the DA to fulfill its prosecutorial
23 duties by disclosing to Defendant all evidence in its possession, as well as evidence in the
24 possession of others acting on its behalf.

25 ///

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28 ¹ See Memo, pg. 3, attached hereto as Exhibit A.

² See EDCR 3.20(c).

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II.

ARGUMENT

A. THE STATE MUST ADHERE TO THE REQUIREMENTS MANDATED BY AN OPEN-FILE POLICY BECAUSE IT HAS ADMITTED TO HAVING AN OPEN-FILE POLICY.

The State argues that “Defendant Sims erroneously suggests to this Court that Nevada Courts have determined that the State has an ‘open file’ policy.”³ Notably, the State later disproves its own statement by acknowledging that in *Rippo v. State*, 113 Nev. 1239, 1258 (1997), the Nevada Supreme Court found that the State has an open-file policy.⁴

Furthermore, the State’s contention that Nevada Courts’ failure to hold that such a policy is mandated by State or federal law is irrelevant to the problem proposed in Defendant’s Motion. Specifically, Defendant’s Motion argues that the State cannot admit to having an “open-file policy,”⁵ which is a legal term of art with a specific meaning,⁶ and then fail to adhere to that specific meaning. The specific meaning of “open-file policy,” which has already been established by Nevada law, requires the State to disclose all evidence in its possession to the defense. *McKee v. State*, 112 Nev. 642, 647–48 (1996) (“where a prosecutor maintains an open-file policy, the prosecutor is under a duty to disclose all evidence in the State’s possession, regardless of whether the evidence is inculpatory or exculpatory.”). Accordingly, the State’s refusal to provide all evidence in its possession to the defense is a violation of the Nevada Supreme Court’s holding in *McKee*, and thus the State’s Memo violates Nevada law.

///

³ See State’s Opposition, pg. 2, lines 18-19, on file herein.

⁴ See State’s Opposition, pg. 2, lines 22-23, on file herein.

⁵ See Memo, pg. 3, attached hereto as **Exhibit A** (noting that the State does have an “open-file policy,” but not “as that phrase has been interpreted by courts to relieve defense counsel of its obligation to exercise due diligence in discovering impeachment and exculpatory evidence).

⁶ See State’s Opposition, pg. 3, lines 13-15, on file herein.

1 **B. THE STATE HAS AN OBLIGATION TO SEEK AND DISCOVER**
2 **FAVORABLE EVIDENCE IN THE POSSESSION OF OTHERS ACTING ON**
3 **THE STATE'S BEHALF.**

4 Next, the State argues, "Sims erroneously claims that the State has a responsibility to learn
5 of any favorable information known to others acting on the government's behalf."⁷ It is troubling
6 that the State can argue this, given the clear holding of the paramount United States Supreme
7 Court case of *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to
8 learn of any favorable evidence **known to others acting on the government's behalf in the case**,
9 including police.") (emphasis added).

10 Nonetheless, the State argues that the actual rule from *Kyles* is that the prosecution has the
11 obligation "to seek and discover information from others acting on the government's behalf that
12 *the defense could not obtain through its own effort*."⁸ In making this assertion, however, the State
13 cites no authority, and such a requirement rings hollow, given the prosecution's obligation to
14 disclose exculpatory evidence to the Defendant, which is described more fully in Sections C and D
15 below.

16 Then, in an effort to minimize its duty to investigate, the State cites a number of cases
17 where the prosecution was not held to have a duty to seek out favorable evidence for the defense.
18 All of the cases cited by the State, however, do not fall under the duty to investigate mandated by
19 *Kyles* because they deal with other agencies, entities, governments, and individuals that were **not**
20 **acting on the government's behalf in the case**. See *Lovitt v. True*, 403 F.3d 171 (4th Cir. 2005)
21 (the local governments of three other counties did not act on behalf of the local government that
22 was trying the defendant); *United States v. Plunk*, 153 F.3d 1011, 1027 (9th Cir. 1988) (the federal
23 government was not acting on behalf of the state government); *United States v. Hughes*, 211 F.3d
24 676 (1st Cir. 2000) (Mexican government was not acting on behalf of local government that was
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26
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28 ⁷ See State's Opposition, pg. 4, lines 15-16, on file herein.

⁸ See State's Opposition, pg. 4, lines 17-18, on file herein.

1 prosecuting the defendant); *Ganci v. Berry*, 702 F. Supp. 400 (E.D.N.Y. 1988) (the federal
2 government was not acting on behalf of the state government).

3 Accordingly, the State's misinterpretation of *Kyles* fails to demonstrate that the State does
4 not have a duty to learn of any favorable evidence known to others acting on the government's
5 behalf in the case, and this duty must be enforced.

6
7 **C. MATERIALS FALLS UNDER BRADY WHEN THEY HAVE FIRST BEEN**
8 **DISCLOSED BY THE STATE AND ARE NOT OTHERWISE**
9 **DISCOVERABLE BY THE DEFENSE THROUGH DILIGENT EFFORT.**

10 The State contends, "Sims misstates the law when the defense argues that *Brady* requires
11 the State to provide the defendant with all favorable evidence." The State goes on to assert that the
12 actual "...requirement is to produce exculpatory information which the defense would not be able
13 to obtain itself in an ordinary exercise of diligence." The State yet again misinterprets a paramount
14 United States Supreme Court case, which serves to protect one of Defendant's fundamental rights.
15 The true requirement is that the State first disclose the existence of its exculpatory evidence to
16 Defendant. Then, if Defendant cannot otherwise obtain the material through diligent effort and the
17 prosecution suppresses it, a *Brady* violation occurs. As set forth below, the legal authority cited by
18 the State does not support its misguided position.

19
20 First, the State cites *United States v. Aichele*, 941 F.2d 761 (9th Cir. 1991), for the
21 proposition that if a defendant can ascertain the material on his own, there is no suppression.⁹ The
22 State erroneously relies on *Aichele*, however, because it is merely dictum. *See Aichele*, 941 F.2d at
23 764; *see also Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002) (noting the foregoing
24 proposition from *Aichele* is only dictum). Indeed, the *Benn* Court, in referring to the *Aichele*
25 Court's proposition, noted, "Certainly, that observation is overbroad, at the very least." *Id.*
26
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⁹ See State's Opposition, pg. 9, lines 9-10, on file herein.

1 Rather, *Aichele* held the “prosecution is under no obligation to turn over materials not
2 under its control,” and the facts of that case are wholly inapplicable to the case at hand. *Aichele*,
3 941 F.2d at 764. Specifically, *Aichele* dealt with whether the federal prosecutor had a duty to seek
4 out and provide evidence of a state governmental entity that was not acting on behalf of the federal
5 prosecutor. Because *Brady* only requires the government to seek out the evidence in possession of
6 others acting on its behalf, the *Aichele* Court found no *Brady* violation had occurred.

7
8 The State also cites *Lovitt v. True*, 403 F.3d 171 (4th Cir. 2005) in support of its position.
9 *Lovitt*, however, supports Defendant’s position that the State has a duty to disclose all exculpatory
10 evidence to the defense. Specifically, in *Lovitt*, the state’s expert witness initially opined before
11 trial that the potential murder weapon could not have caused all of the victim’s wounds. *Id.* at 184.
12 The expert, thereafter, changed her opinion. *Id.* Nonetheless, her initial opinion was never
13 disclosed to the defense, and the defense claimed that this was a *Brady* violation. *Id.* The Court
14 disagreed, however, finding that the defense had been given the expert’s report before trial, which
15 explicitly mentioned that she analyzed the potential murder weapons. *Id.* From this disclosed
16 evidence, the defense could have easily accessed the statement that it sought by way of cross-
17 examination. Nonetheless, the state in *Lovitt* did, notably, disclose the exculpatory evidence to the
18 defense.
19

20 Accordingly, the State fails to cite any authority that dispels of its obligation to disclose
21 exculpatory evidence to the defense.
22

23 **D. THE DEFENSE’S OBLIGATION TO DILIGENTLY INVESTIGATE ITS CASE**
24 **IS CONDITIONED ON DISCLOSURE BY THE STATE.**

25 The State contends that the Nevada authority Defendant cites in his Motion, *Rippo v. State*,
26 113 Nev. 1239 (1997) and *Steese v. State*, 114 Nev. 479 (1998), do “not hold that the defense due
27 diligence requirement only arises once the State has disclosed all of the evidence in its possession
28

1 to the defense.”¹⁰ The State suggests that these cases hold “that material information does not
2 constitute *Brady* material if it could have been discovered by the defense through diligent effort.”
3 This argument is identical to the State’s previously mentioned argument that the State only has to
4 disclose exculpatory evidence “which the defense would not be able to obtain itself in an ordinary
5 exercise of diligence,”¹¹ and refuted by Defendant’s contention that the State must always disclose
6 its exculpatory evidence.¹²

7
8 First, the State contends, “*Rippo* specifically states that no *Brady* violation occurs when the
9 defense, exercising due diligence, could have obtained the information.”¹³ In support of its
10 assertion, the State cites the following excerpt from *Rippo*:

11 Federal courts have consistently held that a *Brady* violation does not result if the defendant,
12 exercising reasonable diligence, could have obtained the information. *See, e.g., Williams v.*
13 *Scott*, 35 F.3d 159, 163 (5th Cir.) (*Brady* claims fails where appellant could have obtained
14 exculpatory statement through reasonable diligence), *cert denied*, 513 U.S. 1137, 130 L.
15 Ed. 2d 901, 115 S. Ct. 959 (1995); *United States v. Dupuy*, 760 F.2d 1492, 1501 n.5 (9th
16 Cir. 1985) (“if the means of obtaining the exculpatory evidence has been provided to the
17 defense, the *Brady* claim fails”); *United State v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983)
18 (where prosecution disclosed identity of witness, it was within the defendant’s knowledge
19 to have ascertained the alleged *Brady* material); *United States v. Brown*, 582 F.2d 197, 200
20 (2d Cir. 1987) (no violation where defendant was aware of essential facts enabling him to
21 take advantage of the exculpatory evidence).

22 The State yet again misinterprets the law. *Rippo* does not dispel the requirement that the State must
23 first disclose its exculpatory evidence to the defense before a due diligence requirement is
24 triggered. Rather, *Rippo* and the cases cited in *Rippo* are consistent with the State’s obligation to
25 fulfill its obligation under *Brady* to disclose exculpatory evidence. Then, the defense must take
26 further reasonable action to obtain it in order to later assert that a *Brady* violation occurred.

27 The State further asserts that *Rippo* supports its position because “... if it were otherwise,
28 all post-trial *Brady* inquiries would simply be a question of whether the State was in possession of

¹⁰ See State’s Opposition, pg. 10, lines 15-17, on file herein.

¹¹ See State’s Opposition, section III, on file herein.

¹² See Section C of this Reply.

¹³ See State’s Opposition, pg. 10, line 22 through pg. 11, lines 1-2, on file herein.

1 exculpatory information,” and not whether the State “withheld” the information.¹⁴ This argument,
2 however, is not counter-intuitive to the duty of the prosecution to disclose all *Brady* evidence in its
3 possession, and fails to consider that the State can withhold evidence in one of two ways: (1) by
4 failing to disclose the exculpatory evidence; and (2) by disclosing the exculpatory evidence and
5 then not providing it to the defense when the defense cannot through reasonable due diligence
6 access it. Moreover, if the rule is what the State asserts it to be, then the United States Supreme
7 Court’s holding in *Bagley* that prosecutors must disclose favorable evidence even without a
8 specific request from the defense would be superfluous. *See U.S. v. Bagley*, 473 U.S. 667, 680–82
9 (1985) For these reasons, the State’s argument cannot stand.
10

11 The State further supports its position by citing *Steese*:

12 Furthermore, *Brady* does not require the State to disclose evidence which is available to the
13 defendant from other sources, including diligent investigation by the defense. *Stockton v.*
14 *Murray*, 41 F.3d 920, 927 (4th Cir. 1994); *accord United States v. Davis*, 787 F.2d 1501
15 (11th Cir. 1986). Here Steese certainly had knowledge of the collect calls he allegedly
16 made to Rock. Through diligent investigation, defense counsel could have obtained the
phone records independently. Therefore, we conclude that the State did not violate *Brady*
by failing to provide these records to the defense.

17 114 Nev. At 495. In *Steese*, however, the State did not have to disclosed the exculpatory evidence
18 to the defense. Because the evidence was the collect calls that the defendant, himself, had made.
19 *Id.* As such, the Court reasoned that the defense certainly had knowledge of the collect calls that he
20 had made, and thus the State did not have to disclose their existence to the defense. *Id.*

21 Nowhere in its Opposition does the State cite any authority that dispels the State’s
22 obligation to disclose the existence of evidence to the Defendant before any due diligence
23 requirement is triggered. Thus, it is clear that “[t]he defendant’s duty to exercise due diligence in
24 reviewing *Brady* material applies only after the State discloses it.” *Allen v. State*, 854 So.2d 1255,
25 1259 (Fla.2003).
26
27
28

¹⁴ See State’s Opposition, pg. 11, lines 10-14, on file herein.

1 The State is also obligated to disclose favorable evidence under the Nevada Rules of
2 Professional Conduct ("NRPC"). As already mentioned in Defendant's Motion, NRPC 3.8(d)
3 requires, among other things, the prosecutor to "[m]ake timely disclosure to the defense of all
4 evidence ... that tends to negate the guilt of the accused." This unambiguous obligation is clearly
5 spelled out in NRPC 3.8(d), yet the State failed to so much as address it in its Opposition.

6 **E. THE 2016 MEMO DOES NOT ACCURATELY DETAIL THE LAW ON**
7 **DEFENSE SUBPOENAS.**

8 The State alleges that "Sims misunderstands the Memo and complains that the Office of the
9 District Attorney is claiming to have the authority to determine what constitutes a valid subpoena."
10 Sims, however, is not mistaken. The Memo clearly states the following:

11 A **valid** defense subpoena to LVMPD must include the trial date or an evidentiary hearing
12 date (this is true even through the subpoena may request documents or records "in lieu of
13 appearance"), unless the defense has a court order authorizing the subpoena for pre-trial
14 production of records.¹⁵

15 The State fails to cite any legal authority granting it authority to determine what constitutes a valid
16 defense subpoena. As such, the State has zero authority to reject a statutorily-compliant subpoena,
17 and must follow the appropriate procedure which is to file a motion to quash. *See* NRS 174.335(2),
18

19 Furthermore, the State attempts to argue that a subpoena is only enforceable if it requires
20 the person to appear in Court for testimony.¹⁶ In support of this assertion, the State cites to NRS
21 174.305 and NRS 174.315. Specifically, NRS 174.305 states, in pertinent part, the following:

22 A subpoena must be issued by the clerk under the seal of the court. It must state the name
23 of the court and the title, if any, of the proceeding, and must command each person to
24 whom it is directed to attend and give testimony at the time and place specified therein.
25 The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party
26 requesting it, who shall fill in the blanks before it is served.

26 NRS 174.315, on the other hand, states in pertinent part:
27

28 ¹⁵ See Memo, pg. 3, attached hereto as Exhibit A.

¹⁶ See State's Opposition, pg. 14, lines 11-13, on file herein.

1 2. A prosecuting attorney or an attorney for a defendant may issue subpoenas subscribed
2 by the issuer for:

3 (a) Witnesses within the State to appear before the court at which a preliminary hearing is
4 to be held or an indictment, information or criminal complaint is to be tried.

5 The State's argument, however, overlooks that a subpoena may also be enforceable if it
6 requires a person to appear at a location other than Court for testimony. For example, a subpoena
7 may require that a person appear at a specific location to be deposed. See NRS 174.375.
8 Accordingly, such a subpoena to LVMPD may be valid under Nevada law without including a trial
9 date or an evidentiary hearing date.

10 Further, the DA's purported authority to determine what constitutes a valid subpoena is
11 further demonstrated by the following statement from its Memo:

12 LVMPD will not comply with a subpoena which request investigative records related to
13 someone other than the client of the defense attorney issuing the subpoena. (**Exhibit 1**, at
14 4).

15 Once again, in the Memo and in its Opposition, the State cited no authority as to where it got this
16 authority to determine what makes a subpoena valid for LVMPD to comply with. For this reason,
17 the DA cannot be the decision-maker as to what constitutes a valid subpoena, and thus, if the
18 LVMPD or the DA disputes the validity of a subpoena, they must object in accordance in Nevada
19 law.
20

21 In addition, the State completely misstates the law regarding subpoenas for the production
22 of documents. Specifically, the State contends,

23 ...a subpoena may only direct that the *duces tecum* of the subpoena may only require the
24 items to be brought to Court for the testimony of the witness. The only exception to this
25 rule is if the Court requires the items to be lodged with the Court and then permits both
26 parties to review the items. Only after a motion before the Court, with notice to the parties,
27 could the subpoena ever require the items sought to be produced be required to be provided
28 prior to the testimony.

1 In support of its argument, the State references NRS 174.335, which governs subpoenas for the
2 production of documents and states the following:

3 **NRS 174.335 Subpoena for production of documentary evidence and of objects.**

4 1. Except as otherwise provided in NRS 172.139, a subpoena may also command the
5 person to whom it is directed to produce the books, papers, documents or other objects
6 designated therein.

7 2. The court on motion made promptly may quash or modify the subpoena if compliance
8 would be unreasonable or oppressive.

9 3. The court may direct that books, papers, documents or objects designated in the
10 subpoena be produced before the court at a time before the trial or before the time when
11 they are to be offered in evidence and may, upon their production, permit the books,
12 papers, documents or objects or portions thereof to be inspected by the parties and their
13 attorneys.

14 The State's interpretation of the statute completely overlooks subsection 1, which provides for a
15 situation in which the Defense may request materials be provided to the defense in lieu of
16 testimony. No court order is required to do such. Instead, a court order is only required when the
17 materials is to be disclosed to the court.

18 **F. THE OFFICE OF THE DISTRICT ATTORNEY DOES REPRESENT THE LAS
19 VEGAS METROPOLITAN POLICE DEPARTMENT.**

20 The State argues that it does not represent the LVMPD by reciting the purpose of the
21 Memo, and enumerating some of the job duties of the LVMPD. The State does not, however,
22 address any of Defendant's arguments in his Motion regarding how the State's actions establish an
23 attorney-client relationship. Finally, the State asserts that Defendant failed to cite any "persuasive
24 authority for his claim that representation exists," but this is certainly false, as Defendant cited
25 Nevada case law and NRPC in his Motion in support of his position.

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III.

CONCLUSION

Based on the foregoing authorities and arguments, Defendant respectfully requests that this Court compel the State to:

1. Obtain all evidence known to others acting on the State's behalf in this case;
2. Voluntarily provide Defendant with all evidence in its possession that is exculpatory or tends to negate guilt or mitigates the offenses against Defendant; and
3. Allow Defendant to view all evidence in its possession.

DATED this 20th day of July, 2016.

PATTI, SGRO, LEWIS & ROGER



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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2016, I served a true and correct copy of the foregoing document entitled: REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY BASED ON DISTRICT ATTORNEY OPEN FILE POLICY as indicated below:

_____ sending a copy via facsimile to the parties herein, as follows; and/or

X sending a copy via electronic mail, and/or

_____ placing the original copy in a sealed envelope, first-class, postage fully pre-paid thereon, and depositing the envelope in the U.S. mail as Las Vegas, Nevada addressed as follows:

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MARC DIGIACOMO, ESQ.
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EXHIBIT A

EXHIBIT A



App.021

**CLARK COUNTY
OFFICE OF THE DISTRICT ATTORNEY**
Criminal Division

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District Attorney

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MEMORANDUM

TO: EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY PUBLIC DEFENDER'S OFFICE
SPECIAL PUBLIC DEFENDER'S OFFICE
CLARK COUNTY OFFICE OF APPOINTED COUNSEL
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

FROM: STEVEN B. WOLFSON
CLARK COUNTY DISTRICT ATTORNEY

DATE: APRIL 13, 2016

SUBJECT: CLARK COUNTY DISTRICT ATTORNEY DISCOVERY PRACTICE

In an effort to clarify the Clark County District Attorney's Office discovery practice, the following information is provided to interested parties:

I. CONSTITUTIONAL REQUIREMENTS

The Clark County District Attorney's Office will comply with constitutional requirements as follows:

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.

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II. STATUTORY REQUIREMENTS

The Clark County District Attorney's Office will comply with statutory requirements as follows:

All deputy district attorneys are expected to be familiar – and comply – with the statutory discovery obligations contained within the Nevada Revised Statutes, as well as those legal opinions interpreting the State's discovery obligations.

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.

Pursuant to NRS 174.235(1), at the request of the defense, the prosecuting attorney shall permit the defense to inspect and to copy or photograph any:

- (a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
- (b) Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and
- (c) Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

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III. CASE FILE REVIEW

On February 18, 2016, the Nevada Court of Appeals, in *Quisano v. State*, considered “whether, under the facts of the present case, the State maintained an open-file policy” (emphasis added). In a 2-1 opinion, the Court held that “the State’s discovery policy constituted an open-file policy.”

The Clark County District Attorney’s Office does not have an “open-file” policy, as that phrase has been interpreted by courts to relieve defense counsel of its obligation to exercise due diligence in discovering impeachment and exculpatory evidence.¹ Upon request, however, a defense attorney may be permitted to review the case file of the deputy district attorney assigned the prosecution.

The invitation for a “case file review” is not a promise to disclose the entirety of the State’s case file and does not extend to anything more than discovery required by statute and *Brady*. Expressly excluded from the case file is any attorney work product or other privileged material not otherwise discoverable under *Brady*. The invitation for a “case file review” shall not be construed as a representation that the deputy district attorney is in possession of all material in possession of law enforcement. Finally, the invitation for a “case file review” does not relieve defense counsel of its obligation to discover material which is available to the defense from other sources, including diligent investigation by the defense.

IV. LAS VEGAS METROPOLITAN POLICE DEPARTMENT REQUESTS

The Clark County District Attorney’s Office does not represent any police agency, including the Las Vegas Metropolitan Police Department (“LVMPD”). However, in an effort to facilitate the acquisition of material from LVMPD, the Clark County District Attorney’s Office provides the following procedure for informational purposes only and, where applicable, will comply with the procedure outlined below:

As a general rule, upon receipt of a defense subpoena, LVMPD will contact the deputy district attorney assigned the case to determine if the requested material already has been provided to the State. If so, the State will be asked to provide the material to the defense.

A valid defense subpoena to LVMPD must include the trial date or an evidentiary hearing date (this is true even though the subpoena may request documents or records “in lieu of appearance”), unless the defense has a court order authorizing the subpoena for pre-trial production of records. LVMPD will not comply with a subpoena which includes a

¹ The Clark County District Attorney’s Office discovery practice remains virtually unchanged. Although the phrase “open-file” policy may have been used in the past, such terminology was not uniformly defined - - and not reflective of our practice as interpreted - - by some courts. This memorandum does not represent a change in our discovery practice; it is simply an attempt to clarify and communicate the Clark County District Attorney’s Office discovery practice to judges and the defense bar.

date other than the trial date or an evidentiary hearing date as provided by NRS 174.315. Calendar Call is not an evidentiary hearing.

LVMPD will not comply with a subpoena which requests investigative records related to someone other than the client of the defense attorney issuing the subpoena.

Subject to the conditions outlined above, if LVMPD receives a subpoena for any of the following items, LVMPD will voluntarily provide the information to the defense:

- 1) LVMPD 911 and Radio Traffic Recordings and CAD printouts.
- 2) LVMPD photographs from the event number assigned the case.
- 3) CCDC records if the attorney issuing the subpoena represents the person whose records are being requested.

In the case of 911 calls, CADs and photographs, the deputy district attorney assigned to the case will not be notified of the request and will not receive a copy of items being provided. In the case of CCDC records, the deputy district attorney assigned to the case will get a copy of the records being provided.

ALL OTHER SUBPOENAS DUCES TECUM for discovery-type materials will be objected to by LVMPD. The following process will be instituted to protect LVMPD should litigation ensue from that objection:

If LVMPD does not have their own objection to releasing the records:

- 1) If the subpoena is not for a pending court date and merely orders records to be provided directly to the defense, LVMPD will send a letter indicating that the Nevada Revised Statutes in criminal cases do not provide a lawful mechanism for records to be provided directly to the defense without a court order. Should the defense seek these records, they should request the records from the deputy district attorney assigned to the case.
- 2) If the subpoena is for a pending court date, but indicates that the records may be provided directly to the defense IN LIEU of appearance, LVMPD will send a similar letter indicating that the Nevada Revised Statutes in criminal cases do not provide a lawful mechanism for records to be provided directly to the defense. Notwithstanding, LVMPD will inform the defense that the request for records has been forwarded to the deputy district attorney assigned to the case and the deputy should be prepared to address the issue regarding the records at the identified court date. AT THAT NEXT COURT DATE, the deputy should raise the issue regarding the records with the court and either provide them to the defense as discovery or, if there is an issue with disclosure, litigate the issue before the court.

In the case of records to which LVMPD has an independent objection:

LVMPD will send a similar letter indicating not only that the Nevada Revised Statutes in criminal cases do not provide a lawful mechanism for records to be provided directly to the defense, but that they also object to certain records on substantive grounds. Notwithstanding, the procedure above will be followed with the exception that LVMPD will decide whether it wants to intervene by way of motion to quash for the records to which LVMPD has an independent objection.