

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
Electronically Filed
Jan 24 2017 09:13 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITIONER'S
APPENDIX

VOLUME II

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

IVETTE A. MANINGO, ESQ.
Nevada Bar No.: 7076
LAW OFFICES OF IVETTE A.
MANINGO
720 S. 7th Street, 3rd Floor
Las Vegas, NV 89101
TEL: (702) 385-9595
FAX: (702) 386-2737

ATTORNEYS FOR PETITIONER

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

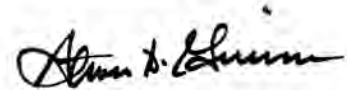
STEVEN B. WOLFSON
Clark County District Attorney
Attn: Appellate Division
200 Lewis Avenue 3rd Floor
Las Vegas, NV 89101

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

ATTORNEYS FOR THE STATE

TABLE OF CONTENTS

<u>Volume</u>	<u>Document</u>	<u>Page No.</u>
I	Indictment	1
I	Motion to Compel Discovery Based on District Attorney Open File Policy	19
I	Notice of Intent to Seek Death Penalty	10
I	Opposition to State's Motion to Reconsider Court's Ruling on Defendant's Motion to Compel Discovery Based on District Attorney Open File Policy.....	209
I	Reply in Support of Motion to Compel Discovery Based on District Attorney Open File Policy.....	57
I	State's Motion to Reconsider Court's Ruling on Defendant's Motion to Compel Discovery Based on District Attorney Open File Policy	202
I	State's Opposition to Defendant's Motion to Compel Discovery Based on District Attorney Open File Policy.....	40
II	Transcripts from October 6, 2016 Hearing	216
I	Transcripts from September 9, 2016 Hearing	76


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.: C287414-1

DEPT. NO.: III

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

13 THURSDAY, OCTOBER 6, 2016

14
15 **RECORDER'S TRANSCRIPT OF STATE'S MOTION TO RECONSIDER COURT'S**
16 **RULING ON DEFENDANT'S MOTION TO COMPEL DISCOVERY BASED ON**
17 **DISTRICT ATTORNEY'S OPEN-FILE POLICY; AND STATUS CHECK:**
18 **SUPPLEMENTAL BRIEFS/DECISION: MOTION TO STRIKE NOTICE OF THE**
19 **DEATH PENALTY**

20 APPEARANCES:

21 For the State:

PAMELA WECKERLY
Chief Deputy District Attorney

22
23 For Defendant Sims:

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

24
25 RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, THURSDAY, OCTOBER 6, 2016, 11:19 A.M.

2 * * * * *

3 THE COURT: Okay. And then Mr. Sims's matter on page 3, 287414.
4 He is present with Mr. Sgro and Ms. Maningo. Ms. Weckerly's present for the
5 State. This was on today for we've got a couple of motions that are on
6 calendar. We've had some discussions at the bench about issues with our trial
7 setting. One of the motions that's on calendar the constitutional challenge to
8 the -- to the notice to seek the death penalty, and maybe I was wrong about
9 this, but at least from the defense standpoint, you believed it was on today to
10 figure out how much time you needed to file any supplement.

11 MR. SGRO: Yes, sir.

12 THE COURT: I think the State thought it was on today to argue about it.

13 MR. SGRO: I realized that --

14 THE COURT: I kind of thought --

15 MR. SGRO: -- this morning. Yes, sir.

16 THE COURT: Yeah, I kind of thought it was as well. But I was probably
17 going to ask you guys do a little more because, and here's what I'll say as you
18 move forward trying to do whatever further supplements, and this is part of,
19 kind of, what we started to get into at the bench as well about who the proper
20 litigants are in certain things. Part of what I have focused on is in the
21 McConnell case, even though the Supreme Court was ruling in the State's favor
22 in the language they were using in McConnell, they also made it a point of
23 saying that -- make sure I don't misquote this -- McConnell's argument largely
24 consists of speculative allega -- accusations, excuse me, and he cites no part of
25 the record where he challenged the constitutionality of lethal injection before the

1 district court.

2 So clearly that's being challenged here before the district court. But
3 then the Supreme Court goes on to say, McConnell's claim raises fact intensive
4 issues which require consideration by a fact-finding tribunal and are not properly
5 before this court in the first instance. So I think that -- and I'm kind of
6 surprised, in light of how old McConnell is, that this hasn't come up before in
7 some fashion, that the Supreme Court's saying, look, we kind of understand the
8 argument that you're making, but it can't be made here first and it's a
9 fact-intensive review and the lower court essentially is what I would view as
10 the fact-finding tribunal would have to make those factual finding before you
11 could then pursue that.

12 Now, I think part of their or the primary part of their focus on terms
13 of what those facts would be are also focused on Nevada because they are
14 saying there is no evidence of any botched executions or anything like that in
15 Nevada. So, clearly that's part of that focus. But I don't think that excludes
16 the ability to talk about other jurisdictions that have a similar protocol that --
17 that it's anticipated that we have.

18 So I, kind of, think that you're entitled, if not mandated, to have
19 that before you could ultimately pursue this on an appeal later on. But you all
20 obviously caught on to, you know, one of the questions that I have in my own
21 mind which is, well, who's the litigant on that. And I think, you know, as Pam
22 said, I don't know that that's really us in the D.A.'s office, I think that's
23 probably more the Attorney General's office.

24 Then the other aspect is since there's not any real direction in the --
25 the McConnell case as to does it occur within the confines of this case or is it a

1 civilly filed petition that's just, kind of, related to our case? I don't know that I
2 know the answer to that. So I'm, kind of, giving you all a little more homework
3 so to speak in terms of -- of those kinds of issues.

4 MS. WECKERLY: And just, I mean, obviously, those two issues and just,
5 thirdly, that the State's sort of original petition is is it's not ripe in his case,
6 obviously.

7 THE COURT: Well, no, no, no, I get that. But if you read McConnell, it's
8 almost a Catch-22. If it's not ripe until he gets sentenced to death but
9 McConnell says it's not a first impression issue here you have to do it in a lower
10 court, then at some -- then you've essentially got to do it in the lower court
11 first, right?

12 MS. WECKERLY: I think so. But I think that would be in his
13 post-conviction litigation not a pretrial motion.

14 THE COURT: Okay.

15 MS. WECKERLY: I mean, I don't dispute --

16 THE COURT: No.

17 MS. WECKERLY: -- that you need to develop the record in the lower
18 court, but --

19 THE COURT: Yeah, yeah. No. I get what you're saying.

20 MS. WECKERLY: But I thought that -- that's how I interpreted that.

21 THE COURT: I guess my -- my cautionary fear is kind of what we
22 discussed somewhat before, if -- if the protocol is inappropriate then we all
23 know what the argument the defense would make and, look, I'm -- it's an
24 argument that I'm willing to bet at least half of our Supreme Court would find
25 to have some merit, is you shouldn't be death qualifying a jury and putting that

1 out there if it's something that could never be effectuated as a sentence legally
2 so that they should have just been qualified on potential life sentences.
3 Because any guy that gets convicted and then sentenced to life without is going
4 to argue that they only gave me life without because the death penalty was
5 there and there's some, kind of, you know, compromise in the middle of that if
6 they didn't want to give me death.

7 So my fear is am I setting it up for some kind of reversal if we
8 wouldn't do that ahead of time.

9 MS. WECKERLY: Uh-huh.

10 THE COURT: I'm not saying I'm ready to make that decision that it
11 absolutely has to be prior to trial as opposed to what you're suggesting from a
12 post-conviction standpoint before it could go up, I'm just saying those are
13 issues that I've got. So as you're, kind of, moving forward with any
14 supplemental, any more supplemental briefing, I think those are things that we,
15 kind of, need to be answering to whomever can help us.

16 Now, I know what you were saying at the bench, Tony, was also
17 that you've contacted some -- some private law firms that do capital appellate
18 litigation on, kind of, similar issues.

19 MR. SGRO: Yes, sir.

20 THE COURT: And so you're kind of hopeful to get one of them involved.

21 MR. SGRO: Yes, sir. And it's actually capital -- the hope is to get them
22 on board pretrial litigation.

23 THE COURT: Right.

24 MR. SGRO: And apparently there are some global-type firms, you know,
25 the 2500 person law firm that has offices all over.

1 THE COURT: Right.

2 MR. SGRO: They have a dedicated pro bono section that has, with some
3 success, litigated the infrastructure and institutional attack relative to the
4 administration of the death penalty. Coincidentally, I happen to have tried
5 some -- and done some work with some partners at a law firm called White and
6 Case. The office that I deal with is principally located in Los Angeles. I have
7 reached out to them since the hearing that we had and they were receptive to
8 assisting and up until yesterday we'd been texting back and forth. I'm just
9 waiting on the green light to go ahead and move forward.

10 We've also met, Your Honor, with all the department heads from
11 the Federal Defender's office, the Special Public Defender's office, and our
12 Public Defender's office, because this is a case of first impression, we had this
13 meeting about a week ago and no one -- because of the recency of Glossip and
14 the timing of it --

15 THE COURT: Right.

16 MR. SGRO: -- no one's yet pioneered this territory, so we're trying to
17 marshal resources so that we --

18 THE COURT: That's another lucky me moment.

19 MR. SGRO: Yes, sir. Indeed. So I guess the good news is we're trying
20 to make it so that there is some uniformity.

21 THE COURT: Sure.

22 MR. SGRO: In our district and that was why the outreach occurred to the
23 other department heads. The White and Case situation is developing over the
24 next, I expect I'll have an answer sometime in the next week, relative to their
25 assistance on a pro bono basis.

1 To answer the question, by the way, as to whether it's a civil
2 remedy or, as the Court pointed out at the bench, it may simply be not Ms.
3 Weckerly advancing the argument, it may be as simple as representatives from
4 the Attorney General's office because they're the ones that deal the public
5 information officer.

6 THE COURT: Right.

7 MR. SGRO: They're the ones dealing with the Department of Prisons.
8 They're the ones dealing with the mental health and the -- and the actual health
9 care physician that's supposed to be appropriated for these things. I believe
10 what -- what the Court will see and what Ms. Weckerly will find, just on the
11 scratching the surface of this since we last were together is that the Attorney
12 General's office has all the contacts and will be most likely the one --

13 THE COURT: Right.

14 MR. SGRO: -- riding the train on this particular issue. I could be wrong
15 about that, but that's my guess.

16 THE COURT: Well, the other thing that I wanted to add is, at least it was
17 my -- my belief based on our discussion at the bench, is even if it's decided that
18 the appropriate vehicle is to file a civil petition, you all are going to want to get
19 it back in here.

20 MR. SGRO: Correct.

21 THE COURT: As opposed to having it randomly assigned to an all-civil
22 judge that doesn't even deal with capital litigation, period.

23 MR. SGRO: Exactly. And not only that, Your Honor, but it makes sense
24 to have the issue in front of the same judge on the same defendant.

25 THE COURT: Sure.

1 MR. SGRO: Because they would be filing the litigation on behalf of Mr.
2 Sims, so.

3 THE COURT: So what I had indicated was I don't -- I don't think that
4 Judge Gonzalez, as chief civil, assuming it gets filed before the end of the year,
5 would have any problem reassigning it in that fashion. You might need to file a
6 motion to consolidate or move it over. But I have -- I, obviously, have no
7 problem, you know, taking it back in.

8 But the other thing I wanted to clarify as well, just as we're starting
9 to talk about trial dates is, it's only your contemplation to get other attorneys
10 involved on this singular issue not to then have them have to be involved in any
11 ultimate trial so that we're having to --

12 MR. SGRO: Oh, no.

13 THE COURT: -- wait for them to be --

14 MR. SGRO: No, no. No, sir.

15 THE COURT: -- up to speed on anything? It's just they're for this
16 singular issue and then they would be done with their work on the case.

17 MR. SGRO: Yes, sir. And very -- I was very surprised that these larger
18 national firms have departments dedicated to simply do this litigation.

19 THE COURT: Right.

20 MR. SGRO: Frankly, I don't think I ever knew that before. And they go
21 in and they specifically do, they move for injunctive relief to enjoin the particular
22 jurisdiction to preclude them from being able to advance on a death penalty
23 case.

24 THE COURT: Right.

25 MR. SGRO: And from there, as you know, the -- whether or not they get

1 the T.R.O. or preliminary injunction, on an ex parte basis is one thing. But what
2 that does is it sets it up for a hearing and then the judge, in which case this
3 would be you, would make an election relative to the evidentiary hearing, how
4 long it's going to be, who's going to be called, who's relevant, who's not. That
5 would all be under the rubric of whether or not this moves forward under a
6 civil -- a civil filing of a lawsuit. And the lawsuit, obviously, seeks the remedy
7 of injunctive relief which would go from a preliminary or temporary to
8 permanent. That's my understanding. So to answer your question about the
9 trial, definitely not. They come in and they simply do that civil part.

10 THE COURT: Okay.

11 MR. SGRO: And I've spoken to Drew Christensen and, you know, we
12 appropriate the experts, so we pay for the experts, we pay for the costs, but
13 they donate their team and their time relative to the litigation and their travel
14 and all that sort of thing.

15 THE COURT: Okay.

16 MR. SGRO: So that's my understanding, again, how it works. I don't
17 have White and Case on board yet. I don't know what I will. But it looks
18 promising.

19 THE COURT: Okay.

20 MR. SGRO: But I do have some sense of assurance that we have
21 uniformity relative to the department heads so that this motion doesn't start
22 pinging in every department with multiple judges proceeding differently.

23 THE COURT: Well, look, the reality is that's kind of up to us as judges. I
24 mean, even if they agreed or not -- or didn't agree, it's kind of like we get a lot
25 of, you know, requests for hearings regarding how we draw in jurors now. And

1 we've said, look, we've had the hearings with the Jury Commissioner, we've
2 given everybody an opportunity to examine her. I even had a case that finally
3 got up to the Supremes on appeal where they approved, you know, the decision
4 I made based on the use of the transcripts from that hearing.

5 So, obviously, yeah, we don't want to keep recreating the wheel in
6 every case. If we have a hearing and we go through everything, regardless of
7 whether you all are the attorneys involved or the P.D.'s office or the S.P.D. was
8 involved or whatever, it would be my intent, obviously, to hopefully have that
9 apply to everybody's cases moving forward. I'm sure if we have a hearing,
10 whatever the decision is, one of you is going to appeal it and then we're going
11 to get another decision from the Supreme Court on that and hopefully, you
12 know, everybody, kind of, abides by that moving forward so we're not creating
13 any delays in any other cases. But what about our trial date as well then?

14 MR. SGRO: So, Your Honor, as I discussed at the bench, I have a
15 personal matter, insofar as one of my kids is getting mattered the week after
16 we were supposed to begin jury selection.

17 THE COURT: Right.

18 MR. SGRO: So as a result of that the State and Ms. Maningo and I have
19 been conferring during your morning calendar and we would like to ask the
20 Court to entertain us following a case called --

21 MS. WECKERLY: Rodriguez.

22 MR. SGRO: -- Rodriguez which Ms. Weckerly has scheduled in
23 September.

24 THE COURT: Okay. So --

25 MR. SGRO: That also gives me the time to get White and Case rolling

1 and get all that done as well.

2 THE COURT: Also, in September I have a very old case where I reversed
3 a guy's murder conviction on post-conviction. Chris Oram has it now named
4 Oliveras and I don't know who has Oliveras.

5 MS. WECKERLY: Yeah, I do. But he won't -- remember, I'm not sure if
6 the Court remembers this, when we set Rodriguez, Mr. Oram and I spoke --

7 THE COURT: Right.

8 MS. WECKERLY: -- and we agreed we're doing Rodriguez and we'll --

9 THE COURT: Okay.

10 MS. WECKERLY: We'll move the other one.

11 THE COURT: Okay. So then that's fine. Oliveras is right now set for the
12 11th, but Rodriguez is just a penalty hearing and we -- I think we thought we
13 could get it done in a week?

14 MS. WECKERLY: I think so.

15 THE COURT: So if you want me to set this maybe the week of 18th
16 instead in September?

17 MS. WECKERLY: That's fine.

18 THE COURT: Okay. But what about Morris? Are we going to leave
19 Morris for now where he is?

20 MS. WECKERLY: Leave -- yeah, he'll stay.

21 THE COURT: All right. Because I just want, if for some reason Morris
22 has to get moved again, I still want you to be able to find time ahead of this
23 one, since the idea was to do that one first.

24 MS. WECKERLY: Right. That would -- I mean, I don't -- his issue of
25 having to move the trial should, you know, have no bearing on Morris.

1 THE COURT: No. I agree. Okay. So we will vacate the currently
2 scheduled trial date for Mr. Sims's matter which is September the, or excuse
3 me, April the 3rd or, no, that's Morris, April the 24th and the calendar call of
4 April the 20th. We will reset the trial for Mr. Sims's matter to September 18th,
5 2017, 10:00 a.m. for trial. Calendar call will be September the 14th at 9:00
6 a.m.

7 And then we need to -- do you want to discuss the other motion
8 that's on today or you want to pass that over until we're coming back on this
9 motion? What's your pleasure?

10 MR. SGRO: It's up to --

11 MS. WECKERLY: Whatever the Court's pleasure.

12 MR. SGRO: Whatever the Court desires.

13 THE COURT: I'm putting it on you, look, I'm just sitting here doing my
14 job.

15 MR. SGRO: We can just -- we can just do it today, Your Honor.

16 THE COURT: Okay. All right. And then how much time are you going to
17 want to file any supplemental briefs on the death penalty motion?

18 MR. SGRO: 120 days.

19 THE COURT: That's going to be --

20 THE CLERK: February 2nd.

21 MS. WECKERLY: So we can probably use the same date because it's, I
22 mean, it's sort of, right, don't you think, like, it's not really responsive briefing?
23 It's more --

24 MR. SGRO: Right.

25 THE COURT: Yeah. Okay. Because I want to get that back into court as

1 quick as we can because if we need to have a hearing I don't want that --

2 MR. SGRO: Yes, sir.

3 THE COURT: -- impeding on our September trial date.

4 MR. SGRO: And, by the way, Your Honor, I think I can do better than
5 120 days. If I do get it done earlier, I have no objection to just simply getting
6 on a call with the Court's chambers and saying, hey, it's filed, we can set a
7 date now.

8 THE COURT: Well, I mean, look, February is fine. I think that gives us
9 plenty of time to come in court on the motion and then still find time to have
10 the hearing. But just understand that when you have communications with
11 White and Chase [sic], they need to know, I've got a September trial date.

12 MR. SGRO: Yes, sir.

13 THE COURT: And if they're going to get involved, they've got to be able
14 to stay within our schedule.

15 MR. SGRO: Yes, sir.

16 THE COURT: So we'll have -- we'll actually just do the 3rd because
17 that's a Friday. We'll have any supplemental briefings filed by each side by
18 Friday February the 3rd. And then we can come back on calendar for argument
19 on the motion on February the 16th, 2017 at 9:00 a.m., that's a Thursday.

20 MS. MANINGO: Your Honor, I think I wrote down the wrong date, Your
21 Honor. What was February 10th? Was that a date?

22 THE COURT: February -- for this case?

23 MS. MANINGO: Yeah, I thought you just said February -- so it was
24 February 23rd --

25 THE COURT: Was that the 120 days?

1 THE CLERK: No.

2 THE COURT: February 3rd is the 120-day date for filing the supplemental
3 pleadings.

4 MS. MANINGO: Okay. Okay.

5 THE COURT: Yeah, the 10th I don't think is a date on this one.

6 MS. MANINGO: Okay. And then the 16th is that the actual hearing?

7 THE COURT: 16th will be the hearing date, a couple weeks after.

8 MR. SGRO: And that's supplemental for both parties, Your Honor,
9 because that's really doesn't give us a response-and-reply situation.

10 THE COURT: Yeah, yeah, I mean --

11 MR. SGRO: Okay.

12 THE COURT: -- it's just each of you are filing whatever supplement you
13 want to give me to consider on it. And then we'll come back and argue about
14 it.

15 Okay. And then the remaining motion on calendar today from the
16 State asking to revisit the decision on the Court's ruling regarding the proffer.

17 MR. SGRO: Yes, sir. So, Your Honor, because of the posture of the case
18 and very informal communications the State and I have had relative to this issue
19 and whether or not, especially now that we have some time, whether it goes up
20 on a writ, et cetera.

21 THE COURT: Okay.

22 MR. SGRO: The first prong, before we get into the merits from our
23 perspective would be whether or not it was appropriate to have standing to
24 consider a motion for reconsideration because of the burden that must be met.
25 So, for example, I think the first threshold inquiry before you get to whether or

1 not you can reconsider has to be whether there's new law that was not
2 available at the time of the decision, which the answer is no.

3 The case that they brought up, by the way, they brought it up if he
4 last hearing and I can't remember now if they actually gave you a copy of it at
5 that time or they gave you the cite to it.

6 THE COURT: I know I've read it since then. I hadn't read it before then.

7 MR. SGRO: I can't -- I can't remember with clarity if we had it that day
8 or not. I remember Ms. Weckerly referencing it, but if you look -- I do know it's
9 in the brief and it's a 2013 case, which --

10 THE COURT: Correct.

11 MR. SGRO: -- predates the memorandum which is the subject at issue.
12 But also, and more importantly for our purposes, was available at the time of
13 the hearing. So there's no new law, Your Honor, that exists. There's no new
14 facts that exist. The standard then would be under the Masonry case which is
15 113 Nevada 737, whether it's clearly erroneous. And so I guess before -- I did
16 not want there to be a presupposition that we were jumping into the merits.

17 THE COURT: Okay.

18 MR. SGRO: For appellate review, Your Honor, the first threshold inquiry
19 is whether or not this court finds, as a matter of law, that the motion for
20 reconsideration is even ripe because we would need a record, Your Honor, to be
21 developed relative to what the new, and I underscore the word new, not
22 omitted, inadvertently forgotten.

23 THE COURT: Correct.

24 MR. SGRO: Clerical error, those aren't the standards. What new law
25 would there be at -- that was not available to this Court at the time of the

1 hearing and what -- or alternatively, what new facts would there be that were
2 not available to this Court.

3 Because in the absence of either of those, Your Honor, then the
4 record is what it is, and then appropriate remedies can sought et cetera. So
5 before we even get to the point of getting into the merits, I would like the Court
6 to visit the issue of whether there is standing to move forward on to the merits.

7 THE COURT: Okay. As to that, Ms. Weckerly,

8 MS. WECKERLY: Just as to that, the original motion, I think, if the Court
9 recalls was to enforce the State's open-file policy and it was in the context --
10 filed by the defense.

11 THE COURT: Right.

12 MS. WECKERLY: -- and it was in the context of that motion, although
13 not specifically raised in their motion, it was just a general request that we
14 adhere to an open-file policy. The State filed the opposition and then in the
15 context of the argument on that motion part of the, I guess, defense argument
16 that in compliance with the alleged open-file policy the State would have to
17 produce the contents of the proffer that was made in this case.

18 THE COURT: Correct.

19 MS. WECKERLY: And so it wasn't actually explicitly briefed. On the day
20 of the argument, the State referred the Court -- because we were specifically
21 talking about the proffer contents and not the general request in the motion --
22 the State referenced the Court to the unpublished decision where Judge Bixler
23 had ordered the production of the contents of a proffer.

24 THE COURT: Correct.

25 MS. WECKERLY: And so, I mean, it's the State's position that this

1 wasn't specifically raised in the generalized, like, that motion was raised and
2 the Court's narrow ruling on it was, well, because the discovery memo that
3 was issued by the D.A.'s office in 2016, that's the predicate by which I'm
4 relying on for the State to have to make this production of the contents of the
5 proffer.

6 So I think there is a new, you know, a new situation because the
7 Court's reasoning was predicated on that memo and that wasn't, kind of, raised
8 in the context of the original motion.

9 THE COURT: Here's my recollection was that in the context of the
10 argument, the issue of the proffer came up and I was focusing on language in
11 the memo.

12 MR. SGRO: Yes, sir.

13 THE COURT: That I thought was binding to the State. And I -- and I --
14 my recollection is that at the time of the hearing the State raised the 2013
15 case.

16 MR. SGRO: Yes, sir.

17 THE COURT: And I can't remember the name. I think it's just State like
18 State v --

19 MS. WECKERLY: It's -- it's State, yeah, it's State v. Eighth Judicial
20 District Court.

21 THE COURT: I hadn't read that. But I believe the State was representing
22 at that time, hey, Judge, the Supreme Court has said proffers, no, we don't
23 have to turn that over. I hadn't read that case. I've obviously read it since
24 then. As well as I think both of you wanted me to read Quisano despite the
25 fact that it's been withdrawn in some fashion. It's just -- it's a legal oddity that

1 it was there and then it's not there or maybe simply it's just not a published
2 opinion any longer.

3 But I think, look, when motions for reconsideration come up,
4 whether it's right or wrong, in my mind the idea is make sure you got it right.
5 So it's not just is there new law or facts that weren't discussed before, it's did
6 you misapprehend, did you misapply some laws, or some reason to revisit that.
7 So I definitely think that case gives me pause to think it needs to be revisited.

8 MR. SGRO: So, Your Honor, may I briefly comment on that?

9 THE COURT: Yeah. So I -- but hold on. So I think it needs to be
10 addressed on the merits because I think that, sure, the law in that -- in the
11 State V. Eighth Judicial District Court, that case was available to them before.
12 But I would agree that the motion to compel discovery wasn't specific to the
13 proffer issue until we got into court and started discussing it. And then they
14 brought up that case which I hadn't read and which I didn't, you know, know
15 how to apply to the situation, so I made the order.

16 Now whether that changes anything, I don't know. But I think it
17 needs -- we need to discuss the merits of it. So go ahead.

18 MR. SGRO: So, Your Honor, I understand what you just said, but
19 here's -- here's the troubling aspect from our perspective relative to the
20 underpinnings of what it takes to get on a motion for reconsideration. I heard
21 your explanation and your assessment. It's somewhat troubling because the
22 law appears to me, in my humble view, to be very clear that in the absence of
23 new law or new facts, I don't know that the Court has the discretion to simply
24 hear it. The other --

25 THE COURT: But I don't -- do you think that that new law means it can

1 only be law that occurred from the time of the hearing forward or it's law that
2 wasn't brought up to the Court's attention in the earlier pleadings?

3 MR. SGRO: I believe the cases suggested as to laws that did not --
4 cases, not laws.

5 THE COURT: Right.

6 MR. SGRO: -- cases that were not available at the time of the hearing.
7 So if the case that Ms. Weckerly relies on came down the day after --

8 THE COURT: Right.

9 MR. SGRO: -- easy motion for consideration, right?

10 THE COURT: Sure. Sure.

11 MR. SGRO: And here's the other troubling thing, and you know, Your
12 Honor, from all the times we've been in court and litigated, I respect the State,
13 I -- I think they're doing, you know, what they need to do to advocate their
14 position. With that having been said, here's what should have happened at the
15 time of the hearing, Judge, we believe that now we've gone from a specific,
16 sort of, motion now or general type of motion to a conversation that involves a
17 very specific issue which we've raised before. Right? Here's the case, can we
18 defer ruling on this matter for whatever, two weeks, 30 days, whatever it is.
19 We want to provide you a supplemental brief.

20 THE COURT: Okay.

21 MR. SGRO: Right? And then allow the defense to respond and then
22 reset it for hearing. That's not what occurred. What occurred was the State,
23 and I'm going to say allowed, I know they didn't allow you, but the State
24 allowed you to render a decision without seeking the appropriate relief such that
25 now we're in a situation procedurally for a motion for reconsideration.

1 So what I'm suggesting to the Court is we're stuck with a
2 procedural history that has been developed, right. According to the cases that
3 are in the brief that we submitted, it seems to me that in order to entertain a
4 motion for reconsideration, the Court has to make a finding that's a new law or
5 new case that was not considered. Not as Ms. Weckerly says, a new situation.
6 The new situation should have been addressed contemporaneously with when
7 we were doing that debate over -- over the issue.

8 And by the way, yes, it did come up during a specific motion. But
9 Your Honor will recall we had numerous arguments on numerous motions
10 related to the open file.

11 THE COURT: Understood.

12 MR. SGRO: Or whether or not it occurred.

13 THE COURT: Right.

14 MR. SGRO: The fact that Sasha Williams and Brandon Range are now
15 testifying, cooperating codefendants came up a number of times in the
16 pleadings.

17 THE COURT: Right.

18 MR. SGRO: And so at what moment in time it occurred may not be the
19 most accurate way to assess its relevancy because it occurred multiple times
20 over several hours of hearings that were had in this courtroom. So my problem
21 is this, I'm not sure the appropriate record has been laid such that this Court
22 has the opportunity to entertain a motion for reconsideration. That's how --
23 that's how the State has styled it.

24 THE COURT: Okay.

25 MR. SGRO: I completely and heard and respect what you just said about,

1 you know, what -- what -- how you're interpreting that. My dilemma is that
2 that particular interpretation does not seem to manifest in the cases that we
3 had. They seem to be more in the bright-line area of what's the new case or
4 what's the new fact that you did not know about. And so that's the trouble I
5 have with proceeding. Now, obviously, I've made my record in terms of
6 whether or not it goes anywhere from here.

7 THE COURT: Right.

8 MR. SGRO: But I think as to the first issue, I'd like to be certain that
9 we're all comfortable with moving forward as opposed to, as opposed to simply
10 allowing the State's remedy to be to pursue whatever avenue they -- they --
11 they could have pursued relative to what occurred after the first hearing was
12 over. In other words, I'm not here asking you for any sort of ruling that
13 mandates that they have nothing, if not this.

14 THE COURT: Right.

15 MR. SGRO: Right? That's not my position. My position is why
16 potentially invite error into this record where none potentially needs to exist.
17 Right? So my thought, high level, has always been no one wants to do this for
18 batting practice.

19 THE COURT: Sure.

20 MR. SGRO: If we don't have the appropriate record laid for the motion
21 for reconsideration, the State may well have alternative, viable remedies that
22 have nothing to do with what happens today relative to this motion should the
23 Court find that there is an absence of new law or new facts, particularly in light
24 of the specifics of this case, that the case existed in 2013, that it predates the
25 discovery memorandum, right, that -- that was submitted -- only came into

1 being April of this year, and that was mentioned at the hearing.

2 THE COURT: Right.

3 MR. SGRO: And that they could have sought a remedy for to invite the
4 Court. And, Judge, you've been given both sides all kinds of different
5 deference related to when things occur, how we're going to do things, millions
6 of times in this case.

7 THE COURT: Right.

8 MR. SGRO: It's strikes me that in the specifics of this case they've not
9 met the burden to be able to pursue a motion for reconsideration. So I want the
10 Court to consider that such that the record remains clean with the rulings intact
11 as they are instead of arguing on the merits of whether or not they should have
12 been here anyway.

13 In other words, the record they have -- if you look at their pleading,
14 Your Honor, there's nothing different in their pleading that they submitted on
15 their motion for reconsideration as opposed to what they argued other than
16 they have the cite now, they have the case, they articulate the facts in writing.

17 THE COURT: Correct.

18 MR. SGRO: Other than that, everything else is the same. So the position
19 hasn't changed. And so I only submit to the Court that I would -- I would urge
20 the Court to test whether or not my read of the cases relative to how to invite a
21 motion for reconsideration is accurate. If the Court reviews the cases and has
22 its different opinion, fine, let's move on to the merits of the case. Right?

23 THE COURT, well here's what I think, I mean, there's two reasons why I
24 think it's appropriate to go ahead and do it on the merits. Number one, I do
25 think that reconsideration lends itself towards existing case law that wasn't

1 provided to the Court on an issue whether it's inadvertence or oversight or
2 people didn't know about a particular case at the time an issue was raised and
3 that's in the interest of -- of judicially getting something right.

4 I don't think those cases lend themselves just to it has to have
5 occurred after the Court issued this decision and now this new case pops up
6 and so now you're moving for reconsideration.

7 The second aspect of it is, by everybody's account, the State raised
8 the State versus Eighth J.D. case at the argument. So it was raised at that
9 time. Even if you're going to set aside the reconsideration issue on whether it's
10 a new case or not, they raised it during the argument at that time. I hadn't
11 read it. So any opinion that I gave at that time that didn't consider that case or
12 appropriately consider that case, in my mind is wrong on my behalf. I mean, so
13 that's a situation where you're looking at it and saying, okay, look, I misapplied
14 a case or didn't -- didn't take the time to say, I need to go read that case and
15 figure out how it works into this.

16 So if you -- even if you want to say it's not new case or new facts,
17 it's certainly, potentially a misapplication, you know, of the legal part. So I do
18 think that it's appropriate to grant reconsideration and then reconsider and now
19 have us talk about the merits of what their -- their request is.

20 And I still, just as you're kind of starting to argue on this, have the
21 concern, Pam, about the memo being not just the Court interpreting an
22 interagency memo, but a memo that your boss gave to everybody, the defense
23 bar and the judges, to say this is our policy on how we're going to deal with
24 discovery. So while I understand the case, just because the case exists for a
25 certain principle doesn't mean the D.A. couldn't take the position that they're

1 going to provide something that -- that had been previously, the Supreme Court
2 said you don't really have to provide that, you all could obviously change your
3 position and provide it.

4 But anyway, go ahead.

5 MS. WECKERLY: So, okay, so, I mean, and I think that's --

6 THE COURT: And I'm not saying that you did, I'm not saying -- I haven't
7 ruled that way yet. I'm just saying just because the Supreme Court says
8 there's something that you don't have to do, you could decide in any individual
9 case or office-wide, hey, we want to go ahead and do that in the future.

10 MS. WECKERLY: I think we could and I think that's the point of, actually,
11 the dissent in Quisano that it's, you know, a policy of the D.A.'s office, a
12 separate agency from the judiciary, is our own interpretation, our own policy,
13 it's not a law.

14 THE COURT: Right.

15 MS. WECKERLY: It's not, you know, it's not a contract with the defense
16 and it's not a regulation. It's nothing. I mean, obviously the Court can hold us
17 to constitutional standards or -- or statutory standards. But in ruling that we
18 had to disclose the contents of the proffer, the Court -- the Court's basis wasn't
19 rooted in law because clearly the Nevada Supreme Court has said,
20 case-law-wise at least, we don't have to do it. And in that case it said that
21 you'd never have to give the contents of the proffer based on the discovery
22 statutes.

23 So the Court's basis for enforcing this order on us is our own memo
24 and we interpret it differently than the Court. Because the way we read the
25 memo is, under the statutory section of what will be provided that that's where

1 the sentences that the Court predicated its ruling on. But -- and so the State's
2 perspective is, well, respectfully, we get to decide what the memo means
3 because there's no legal mechanism that the Court can enforce its view of what
4 our policy is.

5 Now I think Quisano is arguably different. Obviously the State
6 disagreed with the majority opinion on it.

7 THE COURT: Right.

8 MS. WECKERLY: But I think the reason why the majority ended up with
9 that conclusion that the affidavit or that interview had to have been produced
10 under the open-file policy is there was some discussion in the majority's opinion
11 that there was sort of a detrimental reliance on the concept that an open-file
12 policy existed. And so that's why the majority reached the conclusion, like,
13 look, that should have been provided, the State has an open-file policy.

14 So after Quisano comes out, the D.A.'s Office issues our memo and
15 we say, hey, look, we don't have an open-file policy, this is what we're
16 adhering to. And it just is a policy, I mean, it's nothing that we're guaranteeing
17 in the sense of -- of a contract or any kind of representation beyond the
18 discovery statutes. And to the extent that the Court or defense counsel reads
19 it -- reads into it an obligation beyond that, it's, sort of, our prerogative as an
20 agency to say that's not what it means and that's where I think the dissent in
21 Quisano is instructive because it talks about the separation of powers and the
22 executive agencies and how a policy within a branch of government is not
23 externally enforceable or it's -- or an interpretation that's not consistency -- not
24 consistent with the agency's interpretation is simply not enforceable. It's not a
25 statute. It's not a regulation. It doesn't violate the Constitution, which

1 obviously the Court could --

2 THE COURT: Right.

3 MS. WECKERLY: -- could absolutely intervene. It's something that this
4 Court and defense counsel has said this one sentence in your agency's policy
5 means something different than you're saying it means. And the State's
6 perspective is, respectfully, you can't tell us what our own policy means. You
7 can hold us -- you can hold us to constitutional standards. And, certainly, I'm
8 not disputing the Court has remedies, you know, available if you believe we're
9 acting inappropriately.

10 But in terms of what we meant when we wrote that policy that --
11 that's our interpretation of it and there's no mechanism, respectfully, legally
12 where that -- another interpretation or a broader interpretation could be
13 enforced on us.

14 THE COURT: You don't have to keep saying respectfully. I know it's
15 respectfully. It's all right. I'm not taking any umbrage at it.

16 MS. WECKERLY: So, I mean -- so, I mean, that -- I mean, in the end
17 that's the, you know, that's kind of the bottom line is our position is there's no
18 legal way you can enforce that on us. And so in doing so, knowing that it's
19 contrary to at least unpublished case law, there's no -- there's no mechanism
20 the Court has available to it other than exceeding into our, I guess, branch of
21 government where we have our own policy and we interpret it differently.

22 THE COURT: Okay. All right. Okay. Tony.

23 MR. SGRO: So, Your Honor, a couple things. First of all, to grant a
24 motion for reconsideration there are standards which must be met, clearly
25 erroneous, clearly contrary to the law because you've already heard these

1 arguments and made a ruling, so their burden today becomes much greater than
2 what existed at the time the original motion was heard.

3 Having said that, Your Honor, I heard nothing today, nothing, and I
4 was flipping through I did not bring the transcript with me of the last hearing,
5 but I'm hard-pressed to recall any difference in the comments made today
6 versus comments made previously the last time we heard this.

7 I do want to comment on a couple things. Prior to Quisano there
8 was a case called McKee. And as State of Nevada versus Eighth Judicial
9 District Court, Judge Bixler and Prentice Marshall, Ms. Weckerly and I had a
10 case with Prentice Marshall. This -- this -- the McKee case was a case where
11 police officers -- police officers had gone into search a defendant's car and in
12 the defendant's car they found a camera. They developed the film of the
13 camera. It was -- it was a drug case. The prosecutor in McKee made a specific
14 election in their own head that they were going to not use the photographs
15 developed from that camera which were photographs that depicted the
16 defendant holding and having drugs. They were going to only use them in
17 rebuttal. Okay?

18 And so, therefore, we weren't going to use them in the trial or we
19 were going use -- or in our case-in-chief, we're just going to do it in rebuttal.
20 And this goes to the parsing that the State's attempting to do right now relative
21 to this proffer.

22 I'll read you, Your Honor, from the case. The prosecutor committed
23 an act of deception which was unfair and extremely prejudicial to the drug
24 defendant's defense when it failed to place in defendant's open file photographs
25 showing defendant in possession of drugs and then used the photographs to

1 impeach the defendant. Defendant reasonably believed that pursuant to a
2 prosecutor's open-file policy the prosecutor would make available all relevant,
3 inculpatory, as well as exculpatory evidence.

4 Now, that case came out in February of 2013. So we now -- why
5 is McKee relevant? Because McKee's cited in Quisano.

6 THE COURT: Right.

7 MR. SGRO: Right? As part of the -- as part of the majority decision.
8 And I'll go to -- I'm just reading from page 15 of the Quisano opinion.

9 THE COURT: Okay.

10 MR. SGRO: It says, The Court in McKee heavily emphasized the
11 importance of securing a just conviction.

12 THE COURT: Correct.

13 MR. SGRO: Right? Even more egregious, however, are attempts by
14 representatives of the government to resort to these reprehensible means to
15 shortcut their responsibility to ferret out all admissible evidence and use only
16 that to meet their burden of proof. We fear resort to such conduct indicates
17 either an absence of sufficient evidence to convict or reflects shoddy
18 government efforts that have failed to unearth admissible evidence. He has no
19 obligation to win at all costs and serves no higher purpose by so attempting.

20 Your Honor, I mean, I've read a lot of opinions from the Nevada
21 Supreme Court, I know you have as well. That's pretty strong. That's pretty
22 strong language. And to suggest -- it is so hollow and transparent to suggest
23 that this discovery memo that they drafted means, quote, unquote, "nothing."
24 Ms. Weckerly just said it means nothing.

25 Your Honor, cases are, over our history, rife with promises and

1 assurances that aren't even reduced to writing. There is a case called
2 Santobello versus the United States, it's the seminal law school case that talks
3 about an oral promise by a prosecutor to offer a defendant a plea negotiation.
4 The defendant later takes the -- later wants to take the deal and the prosecutor
5 recants. And it's done under a contract theory.

6 THE COURT: Right. Hold on just sec.

7 MS. MANINGO: And, Your Honor, Mr. Sims has asked to take a quick
8 bathroom break. We can continue. But I'd like to just put on the record that
9 he's walking out for a few minutes.

10 THE COURT: No, no, no. We can -- we'll take a break for a minute. It's
11 okay. We've been going for several hours this morning, everybody probably
12 needs a break. Go ahead. Thank you.

13 MS. MANINGO: Thank you.

14 [Recess at 12:02 p.m.; proceedings resumed at 12:15 p.m.]

15 THE COURT: We're back on the record. Same parties all present
16 including Mr. Sims. Okay. Mr. Sgro.

17 MR. SGRO: Your Honor, we were discussing just before the break, a
18 case, the seminal case of Santobello versus United States.

19 THE COURT: Correct.

20 MR. SGRO: States. Which is the case that stands for the proposition
21 that prosecutors are held contractually to even oral representations that are
22 made to defense attorneys and/or defendants relative to plea negotiations. That
23 whole case was about an oral representation about a plea offer.

24 THE COURT: Correct.

25 MR. SGRO: The defendant then wants to take it, no, no deal. There was

1 detrimental reliance. It's literally, like, a contract analysis, detrimental reliance.
2 The case stood for the proposition that the promises notwithstanding not being
3 written by the prosecutor were tantamount to being binding. Now, and if you
4 look at -- there are other examples, Your Honor, in our jurisprudence. I don't
5 think I need to go through all of them.

6 But I will tell you that that language is echoed in the Quisano
7 opinion at page 15. It talks about looking to the principles of contract law. The
8 Court cited several cases involving the State's failure to comply with terms of a
9 plea agreement. That was the McKee case, right? Including Citti, C-I-T-T-I,
10 versus State, where the Court held when the State enters a plea agreement it is
11 held to the most meticulous standards of both promise and performance. The
12 violation of the terms of the spirit of the plea bargain requires reversal.

13 They -- now that comes -- that is very analogous to Santobello,
14 right? They've probably parroted some of the language from that case relative
15 to the police.

16 THE COURT: Right.

17 MR. SGRO: But then it goes on to say, Based on those principles, right,
18 the contract, sort of, principles, I want the backdrop of this to be Ms.
19 Weckerly's statement that the memo, quote, unquote, "means nothing."
20 Compare that to Santobello and its progeny, the Quisano case which they
21 discussed in their brief, the principles of contract law set forth.

22 The next sentence, Based on these principles, these being the
23 contract principles, the Supreme Court concluded that, quote, "A prosecutor, as
24 an agent of the State, is held to a high ethical standard and must abide by
25 promises he makes." Now, that is what they told us in Quisano. It is wildly

1 incredible to me that the State can generate this memorandum which ostensibly
2 they're going to live by, otherwise what's the point of the memo. If the memo
3 means nothing, why'd they take the time to generate it? It's a nonsensical,
4 nonstarter of an argument.

5 I understand the precarious position this particular prosecutor finds
6 herself in in this particular case. But to suggest globally that the memo really
7 means nothing is hollow and inadequate, Your Honor. And I gotta mention also
8 that I can't even imagine the criticism that would come this direction if we
9 consistently refer to a dissenting opinion in a case as an authority. How is that
10 possible?

11 And I hear it time and time again where with a straight face they
12 keep coining the dissenting opinion in Quisano. It's mind-numbing. And the
13 other thing that they do, Your Honor, is they not only cite to the dissent, but
14 they also misstate and overbroadly apply what the dissent was. Now, to me,
15 I'm not the judge, obviously, if I were a judge I would say, well, isn't that the
16 dissent and the argument may well have been cut off at that point. Let's
17 assume we care about the dissent. Let's evaluate what the dissent actually
18 stands for.

19 It starts, and this is page 1 of the dissenting opinion, I agree, this is
20 Judge -- Judge Tao's words, I agree with much that the majority writes
21 including the portion of the opinion affirming the decision to permit and use
22 reporters to cover Quisano's sentencing hearing. Unfortunately, I cannot join in
23 the portion of its analysis relating to the scope and applicability of the
24 prosecutor's open-file policy.

25 So can we, at least if we're going to cite the dissent, which is

1 unheard of, can we at least talk about what he was dissenting from? Because
2 the first sentence is, I agree with much that the majority writes. The problem
3 that Judge Tao had to deal with how far the open policy goes. The issue in
4 Quisano was a sentencing hearing, for god sakes. It had nothing to do with
5 anything pretrial.

6 It says, The majority judicially interprets the prosecutor's open-file
7 policy so that it now, so that it now must be understood to apply not only to
8 trial, which is what the particular prosecutor in this case apparently understood
9 it to mean, but from now on also to extend to determination of guilt, until entry
10 of judgment of conviction.

11 So can we please, if we're going to use stuff that's not authority,
12 not cite it incorrectly or overbroadly. I mean, it's ridiculous to stand here and
13 argue to you, Judge, that Tao's dissent is anything other than suggest we don't
14 want to -- apples to apples, we don't want to give the proffer at sentencing,
15 we're only going to give it to Mr. Sims at trial. Okay. Maybe you have
16 something there if you're going to use nonpersuasive authority in violation of all
17 the rules. Right?

18 But to suggest somehow that Judge Tao did anything other than
19 disagree with the majority's application of the open file through sentencing is
20 inaccurate. So where are we? Where are we now, Your Honor? We have an
21 open-file memo, or I'm sorry, we have this discovery memorandum, which I
22 don't remember the page right now, I don't have it memorized, but it includes
23 the language that anything inculpatory shall be given to the defense if the
24 prosecutor intends to use in their case-in-chief. Right?

25 We have to have the backdrop of the McKee case that's not

1 applicable right now because everyone agrees that these cooperating witnesses
2 are going to come in the State's case-in-chief.

3 THE COURT: Right.

4 MR. SGRO: That was a representation made at the prior hearing. And
5 we have then the backdrop of the knowledge that these folks are going to be
6 used in the case-in-chief, the knowledge that these folks are going to offer
7 inculpatory evidence and a refusal thereafter to comply with the terms of their
8 own agreement. The only argument really being made is we get to interpret our
9 own agreement our own way and really it doesn't mean anything anyway.

10 And that's on the heels of, Your Honor, you already made a ruling.
11 You already made a ruling. Right? We already have law of the case. Now you
12 have to find that your ruling was clearly erroneous because the memo really
13 means nothing and because subjectively every prosecutor can interpret the
14 memo as he or she deems appropriate. Imagine the logical conclusion of that
15 conversation, right. Well, if the defendant's African-American, I interrupt this to
16 mean X. If the defendant's a white male, I interpret it to be Y. That's not our
17 case today. I get that.

18 But understand, laws need to make sense, rulings need to make
19 sense. A ruling that says that this memorandum is the subjective interpretation
20 of the individual reading it, but only if they read it from the desk labeled D.A.'s
21 office is nonsensical at best.

22 They put in the memo all sorts of recurrent obligations, both
23 directions. They instruct defense attorneys how they're to appropriate
24 materials. There's information in there relative to Metro. Many of the things
25 we discussed over hours and hours of hearings some weeks ago which do not

1 need to be unearthed again right now.

2 I will tell you, Your Honor, from -- from our perspective, number
3 one, their, quote, unquote, "new law" happened in 2013, which is in opposite.
4 It is three years -- it three years predates the memo. So the Supreme Court did
5 not have the ability to interpret the order of the proffer in conjunction with the
6 memo which is the subject at issue today, different -- different situation.

7 Number two, they self-drafted that memorandum. I wasn't there.
8 Defense attorneys weren't there. They did it. I think Mr. Daskas in another
9 case we have told just Judge Walsh he actually authored the memo.
10 Mr. Daskas, as I understand, is the Assistant District Attorney. So he is a
11 person who is in some level of authority there. I assume he drafted it so that all
12 the deputies under his supervision followed the memo. I don't think he would
13 tell you that he drafted the memo because he had an extra couple of hours to
14 kill on a lazy Sunday afternoon.

15 So in the absence of new law, in the absence of new facts, in the
16 absence of an argument advanced today that was not advanced, I think the
17 State fails.

18 If we move on to the next level in terms of the merits, Your Honor, I
19 don't see clear -- an overriding, clearly erroneous ruling that occurred in this
20 case such that it needs to be reversed because the same language in the memo
21 exists. Really if they wanted to cure this problem from the last time we were
22 here 'til this time we were here, a new memo would have gone out. This is
23 how the D.A.'s office interprets this.

24 You cannot allow, Your Honor, as a jurist, the proposition that every
25 defense attorney is subjected to the individual discovery whims of a particular

1 prosecutor. Can you imagine the litigation that that would -- that that would
2 spawn? We have to have some uniformity relative to discovery.

3 And I understand the statutes, I understand Giglio and Brady and all
4 of the things we come in here and argue about every day. I get it. But if
5 you're going to take a position as to what's not now going to be included that's
6 an implicit admission that it used to be. And if you're now going to make a
7 statement as to what is going to be included, that's a contract. And we have a
8 contractual right to rely on that memo if that's the policy.

9 And that memo starts with, Judge, It is now the policy of the Clark
10 County District Attorney's office, that's how it starts.

11 THE COURT: Right.

12 MR. SGRO: And again, with due respect to counsel, Ms. Weckerly, her
13 statement that this means nothing is not in the memo. Her statement that it's
14 our subjective interpretation, not in the memo. To the contrary it says,
15 Prosecutors are expected to understand Brady, Giglio, Kyles, et cetera, and
16 understand their constitutional obligation to provide certain discovery in addition
17 to what's statutorily required.

18 Does that -- does that mean nothing as well, Your Honor? I mean,
19 clearly, I don't want to beat a dead horse, but I want to make the point that the
20 argument advanced today has only been advanced from a position of a -- of the
21 beginnings of something that is untenable which is to unwind a ruling for which
22 there is no new reason or new evidence or new argument, frankly, to unwind it.

23 So unless the Court has further inquiry, Your Honor, I'll -- one
24 moment, Your Honor.

25 Your Honor, just without submitting, Your Honor, my recollection, if

1 you recall at the hearing when we first went back and forth, the case that was
2 the basis of the motion for reconsideration we talked about it, I discussed with
3 my co-counsel at the break I thought we actually had it e-mailed to us during
4 the hearing, and so --

5 THE COURT: That may be right. I mean, you may be right. I know I
6 hadn't read Quisano and we had talked about that in the context of it as well
7 before I could kind of figure out and --

8 MR. SGRO: So we got it, Your Honor, we got an e-mail at 11:34 a.m.

9 THE COURT: Okay.

10 MR. SGRO: During argument, State of Nevada versus Eighth Judicial
11 which is the case that's -- that's the subject of the, quote, unquote, "new law."

12 So I understand the Court's prior ruling, but not to belabor the
13 issue, I think it definitely, at least, goes to whether or not you should reconsider
14 your original ruling.

15 THE COURT: Okay.

16 MR. SGRO: If it doesn't put to bed the fact that there's no standing
17 because we had the e-mail of the motion and the remedy to seek appropriate
18 relief was not suggested which is, Judge, can we have a couple weeks.

19 THE COURT: Right.

20 MR. SGRO: I think at a minimum, at a minimum, Your Honor, it clearly
21 makes our point that there's nothing here today different than what was
22 advanced at the hearing. And, like I say, we got it at 11:34 a.m. on the day of
23 the hearing.

24 MS. WECKERLY: So, just my recollection of this hearing is none of this
25 proffer content was briefed. It did come up in argument, so.

1 THE COURT: No, I agree with that.

2 MS. WECKERLY: Okay.

3 THE COURT: I agree with that.

4 MS. WECKERLY: If I could just respond? We are not talking about our
5 Brady vi -- or our Brady obligation. We are not talking about our Giglio
6 obligation.

7 THE COURT: Right.

8 MS. WECKERLY: We are talking about something the Nevada Supreme
9 Court has looked at and said we're not obligated to produce. Okay. We're not
10 talking about --

11 THE COURT: Unless it falls into some other necessity --

12 MS. WECKERLY: Right.

13 THE COURT: -- i.e., Brady or Giglio.

14 MS. WECKERLY: Exactly. Exactly. But the contents of a proffer, the
15 Nevada Supreme Court has looked at this issue and said it's not covered, you
16 don't have to produce it. Okay? So the only thing we're talking about now is
17 does our internal memo obligate us to produce it.

18 And Mr. Sgro make -- talks about our ethical obligations. We're not
19 even -- no one's debating that. We have those obligations. Those are
20 constitutional.

21 THE COURT: Right.

22 MS. WECKERLY: It's whether a memo of our office obligates us to
23 produce something that other than that we wouldn't have to produce it. He
24 relies on the Quisano case and the McKee case.

25 In McKee the State represented it had an open-file policy. The

1 defense comes to review the file. Prior to them looking at it, the State removes
2 a photo that they are only going to use in rebuttal, if the defendant testifies.
3 The defendant testifies. Here comes the photo. There was detrimental reliance
4 in that situation. Right? Because they represented, Here's our open file. They
5 take something out of it and they spring it on them at trial. That's detrimental
6 reliance when you say you have an open-file policy.

7 Quisano, our office disagrees with the majority's interpretation of
8 the facts, but it was the same thing, that there was an open-file policy and that
9 the State represented that it had this policy and then springs an affidavit that
10 the defense wasn't aware of at sentencing. So there was detrimental reliance.
11 And these are contractual concepts.

12 This is pretrial. We've never represented that we're going to supply
13 the contents of a proffer. We've always taken the position we're not obligated
14 to provide that. The only thing that the defense is relying on to say that we're
15 obligated to provide that is an interpretation of the memo which we say it
16 doesn't mean. I mean, that's the issue. So --

17 THE COURT: I -- I agree. Look, here's the thing, here's the thing, I am
18 going to reverse the decision that I made earlier and I'll explain why. I think I
19 made two errors. I think, number one, and, look, I'll be honest with you, I still
20 believe it should be provided, okay, that's just my personal opinion. I think it
21 would be appropriate to provide that. And quite honestly, I'm kind of
22 flabbergasted when I read -- and I'm not saying you all are doing anything
23 wrong from the State's perspective -- but I'm kind of flabbergasted when I read
24 and re-read and read again McConnell trying to think, really, does it -- where did
25 I put it that -- does it, kind of, say what I think it just said. Because -- because

1 that just kind of seems to be incredibly illogical to me.

2 But -- or excuse me -- not McConnell, State v. Eighth Judicial
3 District Court. Where it said, While we appreciate the District Court's
4 concerns, which were obviously the same concerns I have about Price facing
5 trial without knowing the precise substance of Edelman's oral proffer, the State
6 cannot be compelled to disclose information that it has no duty to disclose.

7 That's, I mean, at the heart of what my concern was is that we
8 have codefendants who have engaged in cooperating agreements with the
9 State, they've given oral proffers about what they're going to testify to, and the
10 Supreme Court basically said, Nah, we get your concerns, Judge, but that's --
11 that's really of no moment to us, they have to legal obligation to provide that
12 other than, and this is what I'm saying, if any of those proffers fall within a
13 prior inconsistency or whatever it may be, that they're usable for impeachment
14 evidence, Brady, Giglio, whatever it may be, then you've got to provide it.

15 MS. WECKERLY: Sure.

16 THE COURT: But in any event, I think that's my error on not taking the
17 time to go back and look at that case and think about it more, less in terms of
18 what I wanted to happen because I thought it was what should happen and
19 more in terms of what do I think legally is appropriate.

20 Beyond that, I think I also made an error in that in regard to the
21 memo, because the memo was disseminated to everybody with this idea of
22 judges, defense bar, private defense bar, you know, whomever it is, here's
23 what our policy's going to be and there's a statement in there. I think I, kind
24 of, looked at it in exactly the way you were talking about it a moment ago,
25 Tony. And I think in reviewing it, again, I was wrong in having looked at it that

1 way. That you should be basically judicially estopped from doing anything
2 different.

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

10 When a -- in a civil case a defendant comes into court and says
11 we're going to concede liability for this accident, they don't then get to go to
12 trial and say, well, actually we're going -- we're going to argue against liability.
13 You're judicially estopped. You took that position within the context of that
14 case and you cannot back out of that position now. And I think that's the
15 same idea of Santobello and some of the other cases you cited about oral
16 promises, kind of, having a contractual nature, but they're things that are being
17 promised within that context of the case.

18 Nobody ever came in in this case and said, We promise that we're
19 going to provide proffers, or We promise that we're going to provide any and all
20 pieces of exculpatory evidence no matter what it is if we intend in using it in
21 our trial. I'm interpreting that from their memo. And, look, I --

22 Separate and apart from Quisano, Quisano, really, to be quite
23 honest, you guys, doesn't have a lot of play in this for me. It's did I hold them
24 to a standard because of the memo that -- of judicial estoppel that I don't think
25 I really can and did I not, admittedly, give the weight to State v. Eighth Judicial

1 District that I should have because I wanted -- I wanted a certain thing to occur
2 because I thought it should occur and that you should have that and I still think
3 it should have occurred, I still think you should have that. But I think that that
4 case pretty clearly tells me that they don't have to provide that.

5 Part of the problem, and I just say this moving forward is you've
6 had D.A.s that do provide that. And Tony raises a very good point. I mean, it's
7 going to be wildly inconsistent when one D.A. says, well, sure, I'll tell what
8 you, you know, was told to us and that and others say, No, no, no, there's --
9 by law, we don't have to do that.

10 But that's, kind of, what I was saying earlier that even though a law
11 may say you don't have to do something in a particular case, you know, the
12 law says polygraphs are generally inadmissible, but you guys can decide in a
13 case, stipulate that we want to go ahead and admit it in this case. And then in
14 another case the State may say we don't want to admit a polygraph, so we're
15 not going to agree to that. They have the right to do that and I guess the
16 differing attorneys have the right to do that.

17 But I think it's -- it creates a lot of uncertainty if people are -- and
18 granted, when Fleck, Michelle provided it in the other case, it was in part
19 because I told them, I think you need to provide that, they need to know about
20 what that oral proffer was if she's going to be testifying at trial against this
21 guy. And they said, No problem, we'll give them the notes and tell them what
22 the proffer was.

23 MR. SGRO: Your Honor, may I -- may I ask a question?

24 THE COURT: Yeah.

25 MR. SGRO: Because we're talking about the proffer, how could there,

1 under Giglio, when someone makes a statement to the police --

2 THE COURT: Okay.

3 MR. SGRO: -- that is exculpatory, let's just say, I had nothing to do with
4 this crime.

5 THE COURT: Right.

6 MR. SGRO: Right? Then they make a deal with the State to be a
7 cooperating witness.

8 THE COURT: Right.

9 MR. SGRO: Right? Now they had everything to do with the crime, right?
10 And not only did they, but the persons against whom their testimony will be
11 offered --

12 THE COURT: Right.

13 MR. SGRO: -- was also a principal actor, right? Everything that they say
14 in the proffer is an inconsistent statement, right?

15 THE COURT: Well, I don't know that it is or not.

16 MR. SGRO: Well, but I'm giving you --

17 THE COURT: Okay.

18 MR. SGRO: -- an extreme situation. Let's just say, the future
19 cooperating witness, now suspect, is going to be a defendant, right, is --
20 waives Miranda and speaks to the police.

21 THE COURT: Right.

22 MR. SGRO: What happened in this murder? I don't know anything,
23 nothing happened. I had nothing to do with it. You got the wrong person.

24 THE COURT: Right.

25 MR. SGRO: Right? Fast forward two years, that same defendant now

1 becomes a cooperating witness.

2 THE COURT: Right.

3 MR. SGRO: I did everything you guys think I did and here's what my
4 codefendants also did.

5 THE COURT: Right.

6 MR. SGRO: Every single statement uttered in that proffer will be an
7 inconsistent statement --

8 THE COURT: And in that situation they may say, We have to divulge that
9 because it falls within that --

10 MR. SGRO: But I'm not -- I'm not hearing that, Your Honor, is the
11 difficulty. Because I'll tell you in our case, it's not that extreme. There are
12 partial, partial, to be fair to the State, there are partial admissions. However,
13 there is significant minimization, okay. Sasha Williams, who's one of the
14 cooperating codefendants in our case was beaten up, not physically but
15 verbally, beaten up by the two detectives that interviewed her over and over
16 and over because their position during the entire interview was she was
17 protecting Maurice Sims because at that time they were romantically involved.

18

19 THE COURT: Okay.

20 MR. SGRO: Okay? She doesn't say Maurice did anything in this case.
21 Now, she's going to, other than he had a gun, okay, that's the one
22 incriminating piece of evidence.

23 THE COURT: Okay.

24 MR. SGRO: Now she's going to come in and say he did all sorts of
25 things. And how do I know that? I know that because she's pled to a couple

1 of robberies and she was previously facing first degree murder. I'm assuming
2 the proffer went very well. So how then, notwithstanding what you just ruled
3 on, how then do I not get the proffer anyway because other than calling her to
4 testify as to an inculpatory fact that he possessed a weapon, everything that
5 she says relative to the ongoing inside the residences where these victims
6 were killed is inconsistent.

7 And it's important because Nevada, although we adopt our
8 evidence code from the Federal rules, prior inconsistent statements is an area of
9 departure. Why? Because in our State, prior inconsistent statements are
10 always admissible as substantive evidence, substantive evidence, not
11 impeachment like the Federal rules.

12 THE COURT: Right.

13 MR. SGRO: It's one of the -- it's one of the places our evidence code
14 differs from the Federal interpretation. We are more inclusive. So --

15 THE COURT: But the problem is your position basically is to say that any
16 proffer is potentially exculpatory or potentially usable as impeachment evidence
17 because of the very nature of somebody, basically, getting a deal to reduce
18 their charges.

19 MR. SGRO: No.

20 THE COURT: And they must have more information now to provide.

21 MR. SGRO: No. No, sir.

22 THE COURT: But hold on, hold on.

23 And so, therefore, it renders meaningless State v. Eighth Judicial
24 District Court. And even if it's not that, even if it's a, okay, we acknowledge
25 that there are some proffers that probably are exactly what that person

1 confessed to but the State's just decided they need help at trial --

2 MR. SGRO: Exactly.

3 THE COURT: -- so they're going to do that. Okay. So even if we say,
4 okay, we can acknowledge that carve-out so it's not an all-the-time thing.

5 MR. SGRO: Right.

6 THE COURT: The reality is that it would render State v. Eighth Judicial
7 meaningless if I said, well, you got to turn over the proffers so they can decide
8 whether or not they want to challenge its admissibility or not. They have to be
9 the gatekeeper on that.

10 And the risk they run is we go to trial, there is testimony, and then
11 you say that testimony should have been turned over earlier because it was -- it
12 was -- would have been good for us to use and evaluate before trial in talking
13 about whether to negotiate the case, in preparing to be able to impeach this
14 person because we think it did not fall within what they said it did and they
15 should have disclosed it and now we want to reverse the conviction.

16 They run that risk if they don't evaluate it with a very, very
17 cautious eye in deciding what, if any, portions of it to turn over.

18 MR. SGRO: Right. I think, though, it's a case-by-case assessment. I
19 don't mean to paint it as a broadbrush rule.

20 THE COURT: Right.

21 MR. SGRO: But maybe the factual predicate in State versus Eighth
22 Judicial District Court was a situation, listen, people confess all the time, right?

23 THE COURT: Right.

24 MR. SGRO: If the confessor becomes the cooperating witness because
25 that confessor was less culpable in the eyes of the State, that's situation A,

1 right?

2 THE COURT: Right.

3 MR. SGRO: Situation B is what we have. We have, in our case, the
4 former girlfriend of this defendant through the police officer's words protecting
5 him. But what does that mean? Protecting because she's not incriminating
6 him. Right? Other than the ownership of a weapon at the scene, I guess she
7 you puts him there.

8 THE COURT: Right.

9 MR. SGRO: Okay. Relative to the ongoings of what occurred in that
10 apartment before there were two dead people, her testimony's going to be
11 significantly different than what she told the police. Otherwise they wouldn't
12 call her.

13 THE COURT: But you don't know that. You don't -- I mean, we're
14 presupposing that as opposed to just presupposing that the State's decided
15 they want her, as his former girlfriend, to testify and put him there with a gun.
16 Maybe that's all they want, I don't know.

17 MR. SGRO: Well, here's the other thing we do know for sure, in her
18 statements, Your Honor, she said she didn't do anything wrong.

19 THE COURT: Right.

20 MR. SGRO: One of the -- so Wildemann and -- oh, my gosh, I'm
21 blanking -- the two detectives involved in the case.

22 THE COURT: Jensen.

23 MR. SGRO: Thank you, sir.

24 -- Wildemann and Jensen interview the four defendants, and
25 Wildemann makes the comment, and it's the line in the case and he says, you

1 know, We interviewed you, you didn't shoot anybody; we interviewed this
2 person, this person; no one shot anyone, it's an F-ing miracle anyone was shot
3 in this place. Right? Now, and what's the point of that statement? The point
4 of that statement is Sasha Williams said to the police she didn't do anything
5 wrong, zero.

6 THE COURT: Right.

7 MR. SGRO: She did nothing wrong. Now, how do I know that that
8 testimony's going to change? Because she's now entered a plea to four
9 robberies.

10 THE COURT: But you know that.

11 MR. SGRO: But I don't know what she told the D.A. How do I know,
12 how do I know what she told the D.A. relative to her responsibility because I
13 read the canvass, Your Honor.

14 THE COURT: Right.

15 MR. SGRO: And the canvass was one of those ones that went sort of
16 like, you know, Are you agreeing to the information; do you want me to read it;
17 no, I don't. But she was not asked --

18 THE COURT: Actually, I read it. I basically ask them to acknowledge --

19 MR. SGRO: Correct.

20 THE COURT: -- the factual predicate from the information.

21 MR. SGRO: Correct. And that's perfectly fine, stylistically, other courts
22 have said the old --

23 THE COURT: Tell me what you did.

24 MR. SGRO: Exactly.

25 THE COURT: Right.

1 MR. SGRO: Exactly. We don't have tell-me-what-you-did. Right?

2 Whatever she says as that answer, tell me what you did, clearly is going to be
3 impeachment material which we've not received anything for by the way. The
4 proffer happened months ago.

5 THE COURT: Right.

6 MR. SGRO: We still to date have nothing. So what I'm suggesting to the
7 Court --

8 THE COURT: Well, that's because we're trying to decide this motion
9 before --

10 MR. SGRO: No.

11 THE COURT: -- they figure out exactly what they're required to do by my
12 order and then what they think they need to do under the law, if anything.

13 MR. SGRO: Why, Your Honor, why do we need to wait until this motion?
14 Because this motion was to turn over summary of the proffer.

15 THE COURT: Right.

16 MR. SGRO: Their Giglio responsibility occurred as words were being
17 uttered out of this woman's mouth. And I'm only talking about Sasha right
18 now. B Rich, Brandon Range, is in the same category.

19 THE COURT: Understood.

20 MR. SGRO: He did the same thing. He minimized and he took people
21 out. And, in fact, he was protecting -- he was accused of protecting Sasha in
22 his statement.

23 THE COURT: Right.

24 MR. SGRO: Okay? So what I'm suggesting to the Court is that there, in
25 our view, has already been a breach of responsibility under Giglio which has

1 nothing to do with the memo, which has nothing to do with our argument.

2 Because, because we know if you take it in the simplest form, Sasha Williams
3 said, I did nothing wrong. Now, it took her a couple of hours to say it, but the
4 net effect of what she said --

5 THE COURT: Right.

6 MR. SGRO: -- is I did nothing wrong. She has since pled guilty to a
7 number of robberies in front of Your Honor.

8 THE COURT: Right.

9 MR. SGRO: The canvass, as we discussed, was one of those ones where
10 you just had her acknowledge, which is fine. But the State had an obligation at
11 that second to give us the Giglio material. They haven't.

12 Forget about the memo, forget about whether or not a judicial
13 estoppel occurred or did not occur, forget about an attachment of an obligation
14 that's not statutory, forget about the whether the memo was contractual or not
15 or triggers any of those items, where's the Giglio material which has nothing to
16 do with anything we've been talking about today? So what I'm suggesting to
17 the Court is we still have received no Giglio material from either of these two
18 individuals, both of whom gave, not a hundred percent exonerating, but close,
19 exonerating statement. Sasha did, she did nothing wrong.

20 THE COURT: Okay.

21 MR. SGRO: Right? And when I say exonerating, there is theories of
22 responsibility through conspiracy laws, et cetera.

23 THE COURT: Correct.

24 MR. SGRO: But her, personally, did nothing wrong. Right? So maybe
25 she's going to say that the only thing that inculcates her is as an aider and

1 abettor and knowledge that a crime was being committed.

2 THE COURT: Look, maybe -- she's not -- wouldn't be the first person
3 that maintained that I didn't do anything wrong, but when you're basically
4 charged in a quadruple defendant double homicide says, My attorney thinks I
5 should plead to these charges, I'm going to plead guilty to these reduced
6 charges and -- and be a cooperating witness.

7 So, I mean, again, I get your concern and I share it. But what I'm
8 saying is without telling them you have to disclose the proffer, which would
9 violate State v. Eighth Judicial District, you're just asking me to presume that it
10 must be more, there must be something else in there because --

11 MR. SGRO: No. Let's ask the question.

12 THE COURT: -- because she pled guilty.

13 MR. SGRO: When's it due? Do I have a due date? When's it -- when is
14 the Giglio material due for a proffer that existed months ago? Could we at least
15 have a due date?

16 THE COURT: Okay.

17 MR. SGRO: I think that's fair. I'm not asking you to rule on anything, I
18 guess.

19 MS. WECKERLY: Well --

20 THE COURT: All right.

21 MR. SGRO: If there's Giglio material.

22 THE COURT: No, you are and that's fine. I get that.

23 MR. SGRO: I want a deadline.

24 THE COURT: I know you want --

25 MR. SGRO: Because I want I want to know.

1 THE COURT: -- you want it all, but all I'm trying to say is in terms of
2 what we're trying to decide today, State v. Eighth Judicial District has meaning
3 to me and it says the proffers -- oral proffers do not have to be disclosed. So
4 that's my ruling. I reversed the earlier decision. And I'm saying they don't
5 have to disclose it absent some other legal thing to disclose it.

6 Now, I also presume that they know that same obligation. So if
7 they believe there was something Giglio or Brady within those proffers they
8 would have already disclosed it and we wouldn't be having this discussion.

9 MR. SGRO: So --

10 THE COURT: But we are --

11 MR. SGRO: -- can we -- right.

12 THE COURT: -- are having the discussion, so I'm assuming, and I'm
13 going to ask Pam, but I'm assuming that they don't believe there is anything in
14 there that falls within those two things.

15 MS. WECKERLY: If -- I would say this, United States versus Ruiz,
16 United States Supreme Court says Giglio is a trial right meaning it has to come
17 out at trial, whatever the issue. I have taken proffers where the person giving
18 me the proffer has watered down my premeditation theory and I have only a
19 felony murder theory left.

20 THE COURT: Okay.

21 MS. WECKERLY: I've disclosed that because I view that as exculpatory
22 information.

23 THE COURT: Right.

24 MS. WECKERLY: I have given proffers where --

25 THE COURT: Which is the incredibly low threshold cautionary approach

1 to it.

2 MS. WECKERLY: Right. But I mean --

3 THE COURT: Which is what I want.

4 MS. WECKERLY: -- that's like purely exculpatory, I mean, we're talking
5 about something different between Giglio and when that, you know, when that
6 obligation presents itself.

7 THE COURT: Right.

8 MS. WECKERLY: Versus a Brady.

9 THE COURT: Okay.

10 MS. WECKERLY: And the law on Giglio is very clear that that's a trial
11 right.

12 THE COURT: Okay.

13 MS. WECKERLY: Now, if we hear exculpatory information, we have a
14 pretrial right to disclose that in time to be used at trial which, oh, gosh, is a
15 year from now. And, I mean, I don't make light of that. But, I mean, that
16 obligation, we're well aware of, of a Brady obligation.

17 A Giglio obligation or what Mr. Sgro's asking for, no, we're
18 nowhere close to trial. We may decide not to use either one of them. I mean,
19 you know, but if there's something exculpatory as to this defendant, we would
20 have to disclose that in time for use at trial. That's when our obligation kicks
21 in.

22 THE COURT: But, and I know you understand this, and I'm sure you'll
23 probably even concede this, these things particularly when we're dealing with
24 death penalty litigation, greatly impact their ability to talk to their client about
25 negotiations or how they're going to approach trial or any other -- any other

1 motions they want to file in front of the court.

2 MS. WECKERLY: Sure.

3 THE COURT: So when -- when we view things simply as, well, look, this
4 is more of a trial right, so as we get to close to trial, then we'll have that
5 discussion, then we end up with motions to continue trial even though it's a
6 year off. And I agree with that, and I didn't think that was disrespectful at all.
7 But it just, it causes an issue.

8 So I think they're being reasonable in saying, okay, well, let's just
9 assume that the proffers haven't been evaluated yet for Brady or Giglio
10 purposes, when could we expect that they would be, that's, kind of, the
11 question.

12 MS. WECKERLY: We, I mean, I would say well in advance of Morris's
13 trial because --

14 THE COURT: Well --

15 MS. WECKERLY: -- you know, because -- because we would have to
16 disclose anything, you know, useful.

17 THE COURT: Right.

18 MS. WECKERLY: For them, so.

19 THE COURT: So --

20 MS. WECKERLY: They'll actually get the head-start.

21 THE COURT: Could I say -- could I say maybe by February 3rd?

22 MS. WECKERLY: Yes. Sure.

23 THE COURT: Okay.

24 MR. SGRO: Did Morris -- when's Morris's trial?

25 THE COURT: April 3rd.

1 MS. WECKERLY: April.

2 THE COURT: February 3rd is when you guys got to get all your stuff
3 filed.

4 MR. SGRO: Okay.

5 THE COURT: So that sounds like a wonderful date to me to say please
6 evaluate them.

7 MS. WECKERLY: Yes.

8 THE COURT: I recognize your position on Giglio and the procedural
9 differences from Brady, but I want to maintain this yet-again continued trial
10 date and have them be able to have things well enough in advance to engage in
11 intelligent discussions with you all about, okay, in light of this, I want to talk to
12 my client and would you be willing to consider A, B, C, or D. And maybe Mr.
13 Sims says, I don't want you to have that conversation, I don't care about that.

14 MS. WECKERLY: Yeah.

15 THE COURT: But to do their jobs I think they need to have that.

16 MS. WECKERLY: Okay.

17 MR. SGRO: Thank you, Your Honor.

18 THE COURT: All right, guys. Thank you very much. I'll see you back in
19 February.

20 PROCEEDING CONCLUDED AT 12:52 P.M.

21 * * * * *

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

24

25



SARA RICHARDSON
Court Recorder/Transcriber