

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.

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Supreme Court Case No. 72171  
District Court Case No. C287414-1  
Elizabeth A. Brown  
Clerk of Supreme Court

PETITION FOR REHEARING

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

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

ATTORNEYS FOR PETITIONER

THE HONORABLE JUDGE  
DOUGLAS W. HERNDON  
REGIONAL JUSTICE CENTER  
200 LEWIS AVENUE, 16<sup>TH</sup> 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 3<sup>rd</sup> Floor  
Las Vegas, NV 89101

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

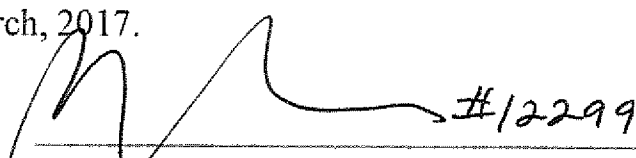
ATTORNEYS FOR THE STATE

### NRAP 26.1 DISCLOSURE STATEMENT

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

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

DATED this 23 day of March, 2017.

 #12299  
\_\_\_\_\_  
ANTHONY P. SGRO, ESQ.  
Nevada Bar No. 3811  
IVETTE AMELBURU MANINGO, ESQ.  
Nevada Bar No. 7076  
720 S. 7<sup>th</sup> Street, 3<sup>rd</sup> Floor  
Las Vegas, NV 89101

## **TABLE OF CONTENTS**

|  |    |
|--|----|
| Table Of Authorities .....   | iv |
| I. Brief Summary of Argument for Rehearing.....  | 1  |
| II. Standard of Review .....   | 2  |
| III. Argument .....  | 3  |
| A. The Court Has Overlooked That Sims Has Demonstrated<br>Extraordinary Relief Is Warranted .....  | 4  |
| 1. Sims Showed He Has No Plain, Speedy, And Adequate<br>Remedy In The Ordinary Course Of Law ..... | 5  |
| 2. Sims Showed An Important Issue Of Law That Needs<br>Clarification .....                         | 6  |
| B. The Court Has Overlooked Or Failed To Consider Two<br>Dispositive Cases .....                   | 7  |
| IV. Conclusion .....   | 9  |
| Certificate Of Compliance .....  | 10 |
| Certificate of Service .....   | 12 |

## TABLE OF AUTHORITIES

| <u>Case</u>  | <u>Page</u>     |
|--|-----------------|
| <i>Giglio v. United States</i> ,<br>405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).....                             | 8               |
| <i>Kyles v. Whitley</i> ,<br>514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).....                                 | 8               |
| <i>Mazzan v. Warden</i> ,<br>116 Nev. 48, 993 P.2d 25 (2000).....  | 2,8,9           |
| <i>Mineral County v. State, Dept. of Conservation and Natural Resources</i> ,<br>117 Nev. 235, 20 P.3d 800 (2011)..... | 4               |
| <i>Pan v. Eighth Judicial Dist. Court</i> ,<br>120 Nev. 222, 88 P.3d 840 (2004).....                                   | 3,4             |
| <i>Quisano v. State</i> ,<br>368 P.3d 415, 132 Nev. Adv. Op. 9 (2016).....   | 2,7,8           |
| <i>State v. Eighth Judicial District Court of Nevada</i><br>2013 Nev. Unpub LEXIS 126, 2013 WL 324283 .....            | 6               |
| <br><u>Statute</u>   | <br><u>Page</u> |
| Nevada Revised Statute 34.160 .....  | 3               |
| Nevada Revised Statute 34.170 .....  | 3               |
| Nevada Revised Statute 34.320 .....  | 3               |
| Nevada Revised Statute 34.330 .....  | 3               |
| Nevada Rule of Appellate Procedure 21 .....  | 4               |
| Nevada Rule of Appellate Procedure 40.....   | 2,3             |

## I.

### **BRIEF SUMMARY OF GROUNDS FOR REHEARING**

At issue in Petitioner Maurice Manuel Sims's (hereinafter "Sims") *Petition for Writ of Mandamus or Writ of Prohibition* was whether or not the State has a duty to disclose to a criminal Defendant the content of proffers made by Co-Defendants who have signed plea agreements where the State represents it will provide the Defendant all inculpatory evidence intended to be used at trial in its case-in-chief. *Petition for Writ of Mandamus or Writ of Prohibition* at pg. 1 ("PW 1").

Sims argued that a memorandum disseminated by the Clark County District Attorney's Office to Clark County Judges and defense counsel states the State would hand all inculpatory evidence it intends to use at trial to the Defense (PW 10-12); that Sims's Co-Defendants have taken plea deals, plan to testify against him, and their testimony will be inculpatory (PW 12-14); and that Sims is also entitled to the proffer content as impeachment evidence (PW 16-18). The State is alleging murder against Sims, and filed their *Notice of Intent to Seek the Death Penalty* on March 8, 2013. PW 2.

On March 15, 2017, the Nevada Supreme Court denied Sims's Petition without making a decision upon the merits, stating Sims "fails to demonstrate that extraordinary relief is warranted." See Exhibit A. Sims respectfully asks the Court

for rehearing, as Sims contends the Court has overlooked his showing that extraordinary relief is warranted. Further, Sims contends the Court has overlooked and failed to consider its previous decisions in *Quisano v. State*, 368 P.3d 415, 132 Nev. Adv. Op. 9 (2016) (unpublished disposition) and in *Mazzan v. Warden*, 116 Nev. 48, 993 P.2d 25 (2000) in making its decision to deny his Petition.

## II. STANDARD OF REVIEW

Nevada Rule of Appellate Procedure 40 governs petitions for rehearing. Subsection (a)(2) states:

The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present ... Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue.

Subsection (c) of NRAP 40 dictates the scope of the petition and states rehearing will be considered when: (1) “the court has overlooked or misapprehended a material fact in the record or a material question of law in the case”; or (2) “the court has overlooked, misapplied or failed to consider a statute,

procedural rule, regulation or decision directly controlling a dispositive issue in the case.”

Per NRAP 40(a)(1), the time to file a petition for rehearing is 18 days after the filing of the underlying decision. The Court’s Order denying Sims’s *Petition for Writ of Mandamus or Writ of Prohibition* was issued March 15, 2017, so this *Petition for Rehearing* is timely filed.

### III. ARGUMENT

Sims filed his *Petition for Writ of Mandamus or Writ of Prohibition* on January 24, 2017 after the district court granted, reconsidered, then denied his request for the content of oral proffers made by two former Co-Defendants who took generous plea bargains and are expected to testify against Sims at his capital murder trial.

In its *Order Denying Petition*, this Court stated:

Having considered the petition and appendix, and without deciding upon the merits of any claims raised therein, we conclude that petitioner fails to demonstrate that extraordinary relief is warranted. See NRS 34.160; NRS 34.170; NRS 34.320; NRS 34.330; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (“Petitioners carry the burden of demonstrating that extraordinary relief is warranted.”). Accordingly, we order the petition denied.

See Exhibit A. Sims demonstrated a need for extraordinary relief, and the Court has overlooked two Nevada Supreme Court cases which go directly to the

matter at issue in his *Petition for Writ of Mandamus or Writ of Prohibition*. Therefore, Sims's *Petition for Rehearing* should be granted.

**A. THE COURT HAS OVERLOOKED THAT SIMS HAS DEMONSTRATED EXTRAORDINARY RELIEF IS WARRANTED.**

In its *Order Denying Petition*, the Court cited to *Pan*, which states "a writ of mandamus is proper only when there is no plain, adequate and speedy legal remedy" and when the petition contains the required parts outlined in NRAP 21(a), and states the petitioner has the burden to demonstrate extraordinary relief is warranted. *Pan*, 120 Nev. at 224, 228, 88 P.3d 841, 844 (citing *Mineral County v. State, Dept. of Conservation and Natural Resources*, 117 Nev. 235, 20 P.3d 800 (2011)). In *Mineral County*, the Court stated:

A writ of mandamus is available "to compel the performance of an act" by an inferior state tribunal, corporation, board, or person, but the action being compelled must be one already required by law. This court has original jurisdiction to issue writs of mandamus under Nevada Constitution Article 6, Section 4. Generally, mandamus will not issue if petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. However, where circumstances reveal urgency or strong necessity, this court may grant extraordinary relief. Moreover, "where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified."

*Id.* at 242-243, 805 (internal citations omitted).

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**1. Sims Showed He Has No Plain, Speedy, And Adequate Remedy In The Ordinary Course Of Law.**

In his *Peition for Writ of Mandamus or Petition for Writ of Prohibition*, Sims argued he had no “plain, speedy, and adequate remedy in the ordinary course of the law” because the issue of the proffer content concerns preparation for trial and the issue is not independently appealable prior to the disposition of Sims’s case. PW 10.

Sims pointed out that his former Co-Defendants’ previous statements to the police were “mildly incriminating, at best,” at that the Co-Defendants, and Sims alleges that, in light of the generous plea deals both former Co-Defendants have taken, their testimony at trial will change from what they told the police. PW 12-13; Petitioner’s Appendix, vol. I, pg. 81-82 (“PA I:81-82”). Sims’s counsel mentioned former Co-Defendant Williams in particular because, in exchange for her testimony, “she’s pled to a couple of robberies and she was previously facing first degree murder.” PW 13; PA II:258-259. Further, Sims argued that neither former Co-Defendant would agree to an interview with Sims’s counsel, further showing his lack of access to the content of his former Co-Defendant’s probable trial testimony. PW 13; PA I:101.

It stands to reason that such favorable plea agreements mean the former Co-Defendants will give testimony at trial that will be more helpful to the State and inculcate Sims. PW 13. The State, through the Discovery Memo disseminated to

Judges and Defense attorneys on April 13, 2016 (“the Memo”), made an explicit promise that the State would turn all inculpatory evidence intended to be used at trial during the State’s case-in-chief to the defense. PW 4; PA I:35-36. Sims argued that the State now refuses to follow its own promise to the Defense. PW 14; PA I:213.

As the district court already ruled in favor of Sims, then reversed its decision on reconsideration, as the State refuses to turn any content of the proffers over to the Defense, and as the former Co-Defendants refuse to be interviewed by Sims’s counsel, Sims has no plain, speedy, and adequate remedy in the ordinary course of the law.

## **2. Sims Showed An Important Issue Of Law That Needs Clarification.**

Sims argued that his case is distinguishable from *State v. Eighth Judicial District Court of Nevada*, 2013 Nev. Unpub. LEXIS 126, 2013 WL 324283 (2013) (unpublished disposition), which was relied upon by the State and by the district court when the district court granted the State’s reconsideration and denied Sims relief. PW 14; PA II:260.

In *State*, the Nevada Supreme Court found that it had “no controlling legal authority” to compel the State to disclose the content of an oral proffer made during negotiations with a co-defendant to counsel for the other co-defendant. *Id.*; PW 14.

However, three years later and after the State started disseminating Discovery Memos making further discovery promises to the defense, the Nevada Supreme Court decided *Quisano*, which found prosecutorial misconduct in withholding evidence the State had promised to the defense through its own discovery policy. *Quisano v. State*, 368 P.3d 415, 425, 132 Nev. Adv. Op. 9 (2016) (unpublished disposition). This is an important issue of law that needs clarification, which was stated by Sims in his Petition. PW 10; 16.

**B. THE COURT HAS OVERLOOKED OR FAILED TO CONSIDER TWO DISPOSITIVE CASES.**

Quisano was charged with murder and entered into a plea agreement. *Quisano*, 368 P.3d at 418-19. At sentencing, Quisano called as a witness the mother of the alleged victim, who testified Quisano should receive a light sentence. *Id.* at 419-20. The State, during cross-examination, used an affidavit the witness had previously signed, which was not disclosed to Quisano. *Id.*

Just as Sims is relying on the State's Memo, the Court found Quisano also reasonably relied upon a similar discovery policy of the State and, therefore, the failure of the State to disclose the affidavit to Quisano prior to sentencing constituted misconduct. *Id.* at 425.

The discovery policy referenced in *Quisano* is similar to the Memo referenced here. PW 15. Though *Quisano* was withdrawn from publication, per NRAP 36(c)(2), Sims cites the case for its persuasive value due to the similarity of

the facts at issue in both cases. Like Quisano, Sims is also facing a murder charge. Unless relief is granted, he will be forced to contend with the testimony of his former Co-Defendants at trial when he does not know what their testimony will be, and strongly suspects their testimony will be inculpatory towards him. PW 13.

This issue of the proffer content also involves Sims's right to impeachment evidence under *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). This Court, in *Mazzan v. Warden*, 116 Nev. 48, 993 P.3d 25 (2000), stated:

Due process does not require simply the disclosure of "exculpatory" evidence. Evidence also must be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.

*Id.* at 67, 37 (citing *Kyles v. Whitley*, 514 U.S. 419, 442 n.13, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

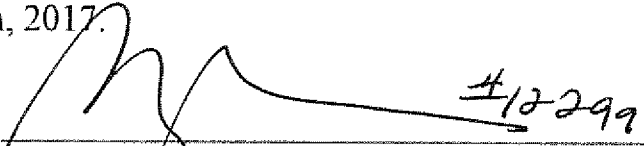
Sims's counsel argued, at the September 9, 2016 hearing, that *Giglio* and its progeny does not support the State using its own discretion "as to when to memorialize materials that may yield impeachment information." PW 17; PA I:85. Sims's counsel also argued that because the former Co-Defendants had minimized their involvement with the alleged crime to the police, in order to receive such generous plea deals, the Co-Defendants would necessarily need to testify to facts

different from those which were told to law enforcement. PW 17-18. This is impeachment evidence to which Sims is entitled under *Mazzan*.

IV.  
CONCLUSION

Based upon the foregoing, the Petitioner respectfully contends that the Order filed by this Court on March 15, 2017 needs to be reevaluated to comport with Nevada law. Accordingly, a rehearing on this matter is warranted and Petitioner respectfully requests this Honorable Court to grant this Petition for Rehearing.

DATED this 23 day of March, 2017.

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

### CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 40(b)(4), I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman font, size 14. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 because it is proportionally spaced, has a typeface of 14 points or more, contains 1,994 words, and does not exceed 10 pages.

I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the

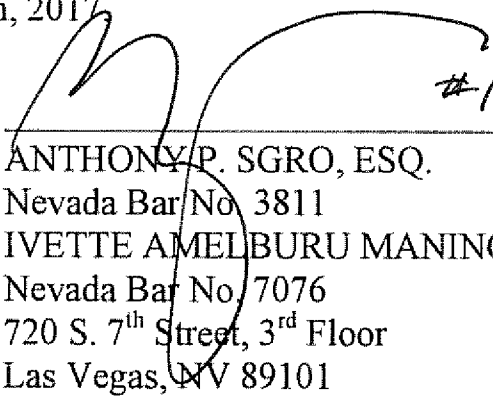
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requirements of the Nevada Rules of Appellate Procedure.

DATED this 23 day of March, 2017

 #12299  
\_\_\_\_\_  
ANTHONY P. SGRO, ESQ.

Nevada Bar No. 3811

IVETTE AMELBURU MANINGO, ESQ.

Nevada Bar No. 7076

720 S. 7<sup>th</sup> Street, 3<sup>rd</sup> Floor

Las Vegas, NV 89101

**CERTIFICATE OF MAILING**

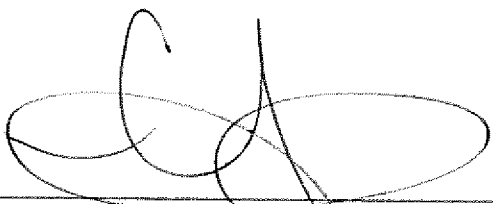
I HEREBY CERTIFY that service of the foregoing PETITION FOR REHEARING was made this 23<sup>rd</sup> day of March, 2017, by depositing a true copy of the same for mailing, first class mail, at Las Vegas, Nevada, addressed as follows:

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

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

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

Dated this \_\_\_\_ day of March, 2017.

  
\_\_\_\_\_  
An Employee of Patti, Sgro & Roger

**EXHIBIT A**

**EXHIBIT A**

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICE MANUEL SIMS,  
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF CLARK;  
AND THE HONORABLE DOUGLAS W.  
HERNDON, DISTRICT JUDGE,  
Respondents,  
and  
THE STATE OF NEVADA,  
Real Party in Interest.

No. 72171

FILED

MAR 15 2017

CLERK OF THE SUPREME COURT  
BY *[Signature]* DEPUTY CLERK

ORDER DENYING PETITION

This petition for a writ of mandamus or prohibition challenges a district court order denying a defense motion to disclose the contents of unrecorded proffers made by codefendants who have signed guilty plea agreements and will presumably provide testimony during the State's case-in-chief. Having considered the petition and appendix, and without deciding upon the merits of any claims raised therein, we conclude that petitioner fails to demonstrate that extraordinary relief is warranted. See NRS 34.160; NRS 34.170; NRS 34.320; NRS 34.330; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) ("Petitioners carry the burden of demonstrating that extraordinary relief is warranted."). Accordingly, we

ORDER the petition DENIED.

*[Signature]*, J.  
Douglas

*[Signature]* J.  
Gibbons

*[Signature]*, J.  
Pickering

17-08763

cc: Hon. Douglas W. Herndon, District Judge  
Patti, Sgro & Roger  
The Law Offices of Ivette Amelburu Maningo  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk