IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No.

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, AND THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE,

Respondents.

and

FRANCISCO MERINO OJEDA,

Real Party In Interest.

_____/

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

Introduction

This writ petition asks the Court to examine whether a district court has the legal authority to compel the State of Nevada to disclose its work product to the defendant. The State contends the district court's authority to order such disclosure must be rooted in either the Constitution, the Nevada Revised Statutes, case law, the common law, or some court rule.

Where the authority to order the disclosure of information is not found in any of those sources, a district court has no authority to issue such an order. In this case, the State contends the district court lacked the authority to order the State to disclose its information regarding the jury venire, and therefore requests this Court to issue a writ of prohibition and/or mandamus prohibiting the district court from enforcing its order.

Routing Statement

Pretrial writ proceedings challenging discovery orders or orders resolving motions *in limine* are presumptively assigned to the Court of Appeals. NRAP 17(b)(14). Cases that raise as a principal issue a question of statewide public importance are retained by the Supreme Court. NRAP 17(a)(11).

The writ petition in this case raises the question of whether the district courts of this state have the authority to order the State of Nevada in a criminal case to disclose information it has acquired about a jury venire. The issue is of statewide importance because some district courts order the State to disclose jury venire information, while others deny defense motions to

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disclose that information. This Court should resolve the issue so that there is unanimity among the courts.

The issue is also important as it will clarify and define the sources of authority the district court is vested with in determining the lawfulness of its orders.

Accordingly, the State respectfully requests that the Nevada Supreme Court retain and decide this writ petition.

Procedural history

This matter is scheduled for trial in the Second Judicial District Court in Washoe County on October 30, 2017, before the Honorable Lynne Simons. In an information, the State charges Mr. Ojeda with Murder With the Use of a Deadly Weapon (Petitioner's Appendix, hereafter "PA", 1-4). On January 25, 2016, Ojeda filed a Motion for Equal Access to Juror Information (PA, 5-14). The State filed a response on January 29, 2016 (PA, 15-31). On February 12, 2016, the district court filed an order granting Ojeda's motion (PA, 32-36). The order requires the State to "disclose the criminal histories the State gathers, if any, for potential venire members . . . ." *Id*. at 4. The State seeks a writ of mandamus or prohibition ordering Judge Simons to refrain from

requiring the State to disclose its work product regarding juror information, specifically the criminal history of any potential juror who may serve in the trial of this case.

Argument

A. Overview

The theme of the district court order is that the "fundamental right to fair play" requires the State to disclose its work product about the jury venire; otherwise, there would be a disparity of information between the State and the defense (PA, 34). The district court relied on NRS 179A.100(7)(j) as authority to order the State to release its jury venire information. The district court also based its order on the following considerations: (1) the Court did not prohibit a trial court from ordering disclosure of juror information in *Artiga-Morales v. State*, 130 Nev. Adv. Op. 77, 335 P.3d 179 (2014); and (2) a growing number of jurisdictions permit the prosecution and the defense equal access to venire member information.

The State contends the district court had no authority to issue its order. A district court has the authority to act only where the Constitution, statute, legal precedent, common law, or court rule authorizes the action,

i.e., where there is a legally recognized authority that supports the court action. *See* NRS 1.030 (the "common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State."); *Stephens v. First Nat. Bank of Nev.*, 64 Nev. 292, 303, 182 P.2d 146, ___ (1947) ("Our Nevada courts, as do the state courts generally in the United States, derive their power and jurisdiction from the Constitution and laws of the state."); *Howard v. State*, 291 P.3d 137, 140,128 Nev. Adv. Op. 67 (2012) ("A court's authority to limit or preclude public access to judicial records and documents stems from three sources: constitutional law, statutory law, and common law.")[1]

Here, the district court had no statutory, constitutional, or other authoritative basis to order the State to divulge its work product regarding

[1]A court also has the inherent authority to do certain things–none of which implicate its authority to order the State to divulge its work product. *See e.g., Halverson v. Hardcastle*, 123 Nev. 245, 261-63, 63 P.3d 428, 440-41 (2007) (the judiciary has "inherent authority to administrate its own procedures and to manage its own affairs, meaning that the judiciary may make rules and carry out other incidental powers when " 'reasonable and necessary' " for the administration of justice. . . . Further, courts have inherent power to prevent injustice and to preserve the integrity of the judicial process . . . . Generally, a court's inherent authority is limited to acts that are reasonably necessary for the judiciary's proper operation.").

the jury venire. Specifically, the idea that the Due Process Clause provides some kind of right to "parity of information," "symmetry of information," or "equality of information" between the prosecution and defense is inconsistent with the United States Supreme Court's interpretation of the Clause, and is therefore indefensible. Due process (and thus fundamental fairness) tolerates a great deal of "information asymmetry." The only due process requirement the State is obligated to meet regarding evidence is the disclosure of *Brady* material, i.e., exculpatory or impeachment evidence.

Even if there were a separate obligation under the fundamental fairness doctrine of the Due Process Clause, the disclosure of jury venire information does not qualify as a recognized right under that doctrine. The United States Supreme Court has limited the fundamental fairness doctrine to only a few areas of concern and has stated there are probably no other such areas. *Teague v. Lane*, 489 U.S. 288, 313 (1989). This Court, moreover, has rejected the idea that "fundamental fairness" as a constitutional precept, requires the State to disclose the juror information at issue here. *See Artiga-Morales v. State*, 130 Nev. Adv. Op. 77, 335 P.3d 179, 181 (2014) (noting there is "neither a constitutional nor statutory basis for us to reverse [the

defendant's] conviction based on the district court's denial of his motion to compel disclosure of prosecution-gathered juror background information.").

NRS 179A.100(7)(j), which the district court relied on as authority to fashion its order, is not applicable either. That statute, in part, only requires a criminal justice agency to disseminate criminal record history to a person or agency if a court order requires dissemination. But the statute does not address the Court's authority to make such an order, i.e., whether such an order is legally sustainable, which is the State's challenge in this case.

The district court had no other authority to issue its order in this case. Accordingly, the State respectfully requests the Court to issue a writ of prohibition and/or mandamus to the district court prohibiting the district court from enforcing its order.

B. Writ Standard

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also* NRS 34.160; *Humphries v. Eighth Judicial Dist. Court*, ___ Nev. ___, ___, 312 P.3d 484, 486 (2013). A writ of

prohibition is appropriate when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, ___ Nev. ___, ___, 276 P.3d 246, 249 (2012); *see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991).

Where there is no "plain, speedy, and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.170; NRS 34.330; *see Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, ___ Nev. ___, ___, 335 P.3d 1234, 1238 (2014). A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Determining whether to consider a petition for extraordinary relief is solely within this Court's discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851.

An appeal is generally an adequate remedy precluding writ relief. *Pan*, 120 Nev. at 224, 88 P.3d at 841; *see also Bradford v. Eighth Judicial Dist. Court*, ___ Nev. ___, ___, 308 P.3d 122, 123 (2013). Accordingly, this Court generally declines to consider writ petitions challenging interlocutory district court orders. *Oxbow Constr.*, ___ Nev. at ___, 335 P.3d at 1238. The State does not have the right to appeal from "a final judgment or verdict in a criminal case."

NRS 177.015(3). The Court may also consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, ___ Nev. ___, ___, 335 P.3d 199, 202 (2014).

In the context of writ petitions, this Court reviews district court orders for an arbitrary or capricious abuse of discretion. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Questions of law are reviewed *de novo*, even in the context of writ petitions. *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

C. Reasons for Considering the Writ.

This Court's intervention is appropriate in this case for the following reasons. First, the State has no right to appeal if the case proceeds to trial. Either the defendant will be convicted, in which case the State will not be an aggrieved party with standing to appeal, or the defendant will be acquitted, in which case the State cannot appeal. *See* NRS 177.015(3). Second, the issue of disclosing jury venire information occurs with some frequency in the Second Judicial District Court, and the district courts in Washoe County view the issue differently: some courts order the State to disclose the

information, and some do not. Thus, the Court is presented with an issue of law that needs clarification, and would serve the interest of judicial economy. Finally, it is important to control a district court's actions that go beyond its lawful authority. The rule of law preserves the social order by not only holding the citizenry accountable in equal measure, but also by ensuring that the courts act within their lawful authority.

D. The Due Process Clause Neither Requires Nor Allows a District Court to Order the State to Disclose its Work Product Regarding the Jury Venire.

"[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U.S. 419, 436-437 (1995). Due process, in fact, "requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id*. at 437. Due process does not require disclosure of all evidence or information requested by a criminal defendant, or disclosure of inculpatory or neutral information; instead, due process mandates only that the government disclose exculpatory evidence that is "material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the

requirement of due process"); *accord United States v. Agurs*, 427 U.S. 97, 107 (1976) ("We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution. Our construction of that Clause will apply equally to the comparable Clause in the Fourteenth Amendment applicable to trials in state courts").

The United States Supreme Court has explicitly *rejected* the argument that the definition of "material" in the due process context "should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence." *Agurs*, 427 U.S. at 113 n.20.

There is, accordingly, "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case," *Moore v. Illinois*, 408 U.S. 786, 795, 92 S. Ct. 2562, 2568 (1972), and "the prosecutor is not required to deliver his entire file to defense counsel." *Bagley*, 473 U.S. at 675. Due process also does not

require the prosecution to reveal witnesses who will testify against a defendant at trial, *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably"), and it "does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." *Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). *See also United States v. Kelly*, 35 F.3d 929, 936 (4th Cir. 1994) ("when defense counsel could have discovered the evidence through reasonable diligence, there is no *Brady* violation if the government fails to produce it"); *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990) (*Brady* does not obligate the prosecution "to conduct a defendant's investigation or to assist in the presentation of the defense's case"), *cert. denied*, 498 U.S. 1000.

The United States Supreme Court, emphasizing the limited scope of disclosure required by due process, has observed "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor," *Agurs*, 427 U.S. at 106, and "[w]e have never held that the

Constitution demands an open file policy." *Kyles*, 514 U.S. at 437. This Court has affirmed the idea that the State has no duty to find evidence that may aid the defense. *See Evans v. State*, 117 Nev. 609, 627, 28 P.3d 498, 511 (2001) ("Evans seems to assume that the State has a duty to compile information or pursue an investigative lead simply because it could conceivably develop evidence helpful to the defense, but he offers no authority for this proposition, and we reject it.")

As far as due process is concerned, then, "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford*, 429 U.S. 545, 559-60 (1977). *See also Bagley*, 473 U.S. at 675 n.7 (defendant's right to exculpatory evidence does not "create a broad, constitutionally required right of discovery").

Due process, in other words, does not require parity of information between the prosecution and defense; it does not even require the State to disclose information that is merely favorable to the defense or that would be helpful to the defense's trial preparation. Due process requires only the disclosure of evidence that is material to a defendant's guilt or innocence because it is either materially exculpatory or materially impeaching–nothing

more. Courts have, in many instances, rejected *Brady* claims involving evidence that, while favorable to the defense, does not rise to a level where it would qualify as being "material."[2]

In short, the Due Process Clause does not, by itself, require the State to disclose jury venire information because it is not material, and it has no impeaching or exculpatory value.

1. Because the *Brady* doctrine encompasses all of the due process concerns in criminal discovery, fundamental fairness is not a due process consideration in criminal discovery.

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[2] *See, e.g., Wood v. Bartholomew*, 516 U.S. 1, 4-9 (1995) (prosecution's failure to produce polygraph examinations of two government witnesses did not constitute due process violation); *Agurs*, 427 U.S. at 100-114 (government's failure to disclose victim's criminal history did not violate *Brady* duty because evidence was not material); *United States v. Si*, 343 F.3d 1116, 1122-1123 (9th Cir. 2003) ("As to the withheld documents, while these reports can be considered favorable to [the defendant] because, as information about [the confidential informant's] ongoing informant activities, they would constitute impeachment evidence tending to show [the informant's] motives in testifying for the government, they are not material"); *Strickler v. Greene*, 527 U.S. at 273-296 (in capital murder case, undisclosed documents that "cast serious doubt on [eyewitness'] confident assertion of her 'exceptionally good memory' " were impeaching and favorable to defendant, but not material); *United States v. Ross*, 372 F.3d 1097, 1108-1109 (9th Cir. 2004) (although defendant argued that suppressed evidence of green card illegally arranged for government informant was relevant to entrapment defense in showing "a pattern of government misconduct in the course of [defendant's] prosecution," evidence was held to be immaterial under *Brady*; while "perhaps allowing for speculation that the government would take other unlawful steps to induce [defendant] into the cocaine deal," the undisclosed information was "insufficient 'to put the whole case in such a different light as to undermine confidence in the verdict'") (*quoting Kyles*, 514 U.S. at 435).

In terms of legal authority supporting judicial action, due process "expresses the requirement of 'fundamental fairness.' " *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 24-25 (1981). The Due Process Clause, in other words, embodies and is the source of "fundamental fairness," and the limits of due process are thus the limits of fundamental fairness. There is no freestanding doctrine of "fundamental fairness" that exists independent of due process and that applies to criminal discovery. Any disclosures required in criminal cases by "fundamental fairness" therefore cannot extend beyond the limits *Brady* places upon due-process disclosures, as due process and "fundamental fairness" are one-in-the-same doctrine. If disclosure is not required by *Brady*, it is not required by "fundamental fairness." A number of decisions from other courts reflect this analysis.[3]

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[3] *See Wansley v. Georgia*, 352 S.E.2d 368, 369-370 (Ga.1987) (district attorney not required to turn over jury records; "the prosecution is not required to reveal or produce investigatory work routinely performed in criminal cases unless it is subject to discovery under OCGA § 17-7-210 (statements by defendant in custody), § 17-7-211 (scientific reports), or under *Brady v. Maryland* (exculpatory evidence)," and jury records do not constitute exculpatory evidence); *Illinois v. Franklin*, 552 N.E.2d 743, 750-751 (Ill. 1990) (prosecutor had no duty to disclose police records relating to venire persons; "the police records did not qualify as evidence under *Brady*, because they did not contain any information that was either favorable or unfavorable to the defendant; the records merely contained information relating to the criminal histories of the venirepersons" and failure to disclose

them did not deny defendant his right to an impartial jury); *Kelley v. Alabama*, 602 So.2d 473, 477 (Ala. Cr. App. 1992) ("This court has held that arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* and that a trial court will not be held in error for denying an appellant's motion to discover such documents"); *Montana v. White*, 909 S.W.2d 391, 394 (Mo. App. W.D. 1995) ("Rejecting defendant's claim that the "state's use of the criminal records of two veniremen gave the prosecution an unfair advantage," holding that "[t]he prosecution is not under obligation to disclose information absent a statutory provision making such discovery a matter of right of the defense," and noting that "[n]o rationale is presented as to why striking a person convicted of assault from the panel results in prejudice or bias against the defendant"); *Washington v. Farmer*, 805 P.2d 200, 206-207 (Wash. 1991) (no error in denying defendant "access to information about past juror service allegedly contained in the prosecutor's office"; the information sought by defendant "clearly does not fall within the provisions of" the statute setting forth the "prosecutor's discovery obligations in criminal proceedings," and "none of the cases" cited by the defendant addressing "the constitutional right to an impartial jury, the importance of peremptory challenges and the importance of discovery in obtaining relevant material . . . support [defendant's] position that he is entitled to discover past juror service information"); *Louisiana v. Jackson*, 450 So.2d 621, 628 (La. 1984) ("The criminal records of prospective jurors may be useful to the state in its desire to challenge jurors with inclinations or biases against the state. But they are not pertinent to the purpose of defendant's voir dire: to challenge jurors whom defendant believes will not approach the verdict in a detached and objective manner. Whatever the practical desire of trial counsel, the recognized purpose of full voir dire is not to pack the jury with persons favorable to the defendant or to the State. Under the circumstances of this case, defendant was not entitled to disclosure of the criminal records. Hence, the trial judge did not err in denying defendant's motion for disclosure"); *North Carolina v. Ward*, 555 S.E.2d 251, 264 (N.C. 2001) (rejecting defendant's claim that denial of his pretrial motion for disclosure of jury information known to the prosecution due to its "vast investigative resources" "deprived him of the 'basic tools of an adequate defense' "; "personal information about prospective jurors is not subject to disclosure by the State" under discovery statute, and therefore there was "no violation of defendant's discovery rights"); *United States v. Falange*, 426 F.2d 930, 933 (2nd Cir. 1970) (rejecting "contention that it is fundamentally unfair to deprive defendants of" information provided to prosecution via FBI background investigation of panel of jurors and noting that "[t]he fact that some members of the panel were challenged does not mean that those who

Any claim that due process or fundamental fairness (whether fundamental fairness is framed in terms of "a level playing field," "equality or parity of information," "symmetry of information," or otherwise) requires the disclosure of certain information must be squarely grounded in *Brady* and its progeny, which is to say that it must comprise a claim that the evidence is materially exculpatory or impeaching.

The information Ojeda seeks in this case–venire-member criminal history information obtained by the State–does not pertain to the merits of the charges at issue in the trial, is not exculpatory or "material either to guilt or to punishment," and does not constitute evidence that will be "admissible at trial for either substantive or impeachment purposes." *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) ("[T]he issue of materiality for *Brady* purposes pertains only to the question of a defendant's guilt or innocence, not the issue of a defendant's ability or inability to prepare for trial"; "Certainly, information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at

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were not were biased or prejudiced"), *cert. denied, Falange v. U.S.*, 400 U.S. 906.

trial for either substantive or impeachment purposes") (*citing Agurs*, 427 U.S. at 112 n. 20). *See also United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) ("To be material under *Brady*, undisclosed information or evidence acquired through that information must be admissible"), *cert. denied*, 494 U.S. 1008 (1990). The United States Supreme Court and other courts have in fact rejected *Brady* claims involving evidence and information actually addressing the merits of the charges against criminal defendants–evidence and information that would have been far more helpful to the defense than the information the defendant seeks here. *See* Footnote 2, *supra*. *Brady*–that is, due process–does not require disclosure of venire-member criminal history information obtained by the State.

2. Even if fundamental fairness is a recognizable doctrine apart from *Brady*, it is not applicable in this case.

In *Hampton v. United States*, 425 U.S. 484, 490 (1976), the Supreme Court stated that "[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the Defendant." The State concedes that Ojeda has a right to *Brady* material. Aside from that right, the only other right Ojeda might claim under the Constitution to access jury venire

information is possibly his right to an impartial jury. *See* U.S. Const. amends. VI, XIV; *Rivera v. Illinois*, 556 U.S. 148, 158-59 (2009) (*per curiam*) (The United States Constitution guarantees a criminal defendant trial "by an impartial jury" and "due process of law," as safeguards of "the fundamental elements of fairness in a criminal trial."). But that right does not support the district court's order either.

As noted above, there is no general constitutional right to discovery in a criminal case. *Weatherford,* 429 U.S. at 559. It is also true that the States may withhold peremptory challenges "altogether without impairing the constitutional guarantee of an impartial jury and a fair trial[,]" *Georgia v. McCollum*, 505 U.S. 42, 57 (1992), because although "peremptory challenges are 'one means of assuring the selection of a qualified and unbiased jury,' " they are not "indispensable to a fair trial." *Rivera v. Illinois*, 556 U.S. 148 (2009) (*per curiam*) (*quoting People v. Rivera*, 227 Ill.2d 1, 16, 316 Ill. Dec. 488, 879 N.E.2d 876 (2007), and *Batson v. Kentucky*, 476 U.S. 79, 91 (1986)). In short, "the U.S. Constitution guarantees a fair trial before an impartial jury, not a trial before what a party perceives as a favorable jury." *Commonwealth v. Sanchez*, 36 A.3d 24, 57 (Pa. 2011).

The Court has held that a defendant does not have a right to a "petit jury composed in whole or in part of persons of his own race." *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880). It would naturally follow then that a defendant has no right to have a juror possessed of any particular characteristic–whether it be based on education, wealth, political view, gender, ethnicity, profession, or any quality–except that of fairness and impartiality. *See e.g.*, *Commonwealth v. Albrecht*, 510 Pa. 603, 618, 511 A.2d 764, 771 (1986) ("A criminal defendant is also 'not entitled to the services of any particular juror but only as to twelve unprejudiced jurors.' ") (*quoting Commonwealth v. Fisher*, 447 Pa. 405, 410, 290 A.2d 262, 265 (1972)), *cert. denied*, 480 U.S. 951, (1987); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").

If there is no constitutional right to peremptory challenges, and no right to any particular type of juror, except to one who is fair and impartial, there is no constitutional right to the background information of potential jurors in aid of the right to an impartial jury or a fair trial. While it might be nice for the criminal defendant to have as much information as possible

from which to pick a jury, the Constitution does not require the possession of the fullest amount of information possible, or any information that will render a jury the most philosophically aligned to a certain viewpoint. Accordingly, the fact that a defendant does not have background information of potential jurors does not violate his right to an impartial jury–the only constitutional right, aside from *Brady*, that might be implicated regarding the background information of potential jurors.

The Supreme Court has declared the Due Process Clause may, at times, be extended beyond the rights set forth in the Bill of Rights, but only in very limited circumstances:

> Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. As we observed in *Lovasco*, . . .
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> > "Judges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' ... [They] are to determine only whether the action complained of ... violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' . . . and which define 'the community's sense of fair play and decency,' . . . ."

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Dowling v. United States, 493 U.S. 342, 352-53 (U.S. Virgin Islands, 1990) (citations omitted); *See also*, *Medina v. California*, 505 U.S. 437, 443-44 (1992) ("The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 653, 17 L.Ed.2d 606 (1967), 'it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.' ").

Fundamental fairness, if viewed as something beyond the contours of *Brady*, must therefore be strictly construed to those areas deemed as "fundamental conceptions of justice which lie at the base of our civil and political institutions," and which define "the community's sense of fair play and decency."

Possessing jury venire information is not part of our conception of justice that forms the base of our institutions, and that define our sense of

fair play and decency. In the area of new constitutional rules of criminal procedure, the Supreme Court has held that new rules are not applicable to cases that have become final before the new rules are announced. *Teague v. Lane*, 489 U.S. 288, 310 (1989). One exception permits a new rule to be applied retroactively if it requires the observance of "those procedures that … are 'implicit in the concept of ordered liberty.' " *Id.* at 307 (citations omitted). But this exception is reserved for " 'watershed rules of criminal procedure' that are necessary to the *fundamental fairness* of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990) (emphasis added) (*citing Saffle v. Parks*, 494 U.S. 484 (1990); and *Teague*, 489 U.S. at 311). The Supreme Court has "usually cited *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Saffle*, 110 S. Ct. at 1264. To fit within the exception, a new rule must do more than improve the accuracy of the trial; it must alter the understanding of the "bedrock procedural elements essential to the fairness of a proceeding." *Sawyer*, 110 S. Ct. at 2831. Besides the right to counsel, the Supreme Court has enunciated only a few

examples, such as the introduction of a coerced confession or adjudication by a biased judge, which approach the watershed of fundamental fairness. *See Rose v. Clark*, 478 U.S. 570, 577 (1986). The Court itself has acknowledged that it is "unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. Given the rights the Supreme Court has identified as watershed rules of criminal procedure that are necessary to the fundamental fairness of a criminal proceeding; and the rigorous standard used to identify those rights, the right to the background information of potential jurors does not rank as one of those rights within the boundaries of fundamental fairness.

3. The district court's reliance on the dissent in *Artiga-Morales* is misplaced.

In its order granting Ojeda's motion, the district court observed that "a compelling dissent [in *Artiga-Morales*] noted that a failure to disclose venire member information demonstrates prejudice and a lack of fairness," and "the growing number of jurisdictions . . . permit equal access between the prosecution and the defendant to venire member information." (PA, 34).

The district court failed to recognize the better-reasoned majority opinion in *Artiga-Morales* that prejudice is not a viable argument: "the clear

majority of these courts as well have found no reversible error in a trial court's denial of access to prosecution-developed juror background information, concluding, as we do here, that the injury, if any, in the particular case was speculative and/or prejudice was not shown." *Artiga-Morales*, 130 Nev. Adv. Op. 77, 335 P.3d at 180. It is simply too speculative to assert that prejudice exists as a matter of law whenever the defense does not have juror background information, especially where the defense cannot ground its asserted right to such information in any constitutional protection. As the State has demonstrated above, no constitutional or statutory authority demands a prosecuting authority to disclose its work product under the banner of fairness.

In *Artiga-Morales*, this Court also repudiated the district court's observation that the growing number of jurisdictions require the prosecutor to disclose jury venire information: "Almost without exception, courts have declined to find reversible error in a trial court denying the defense access to juror background information developed by the prosecution. . . . Most courts have held that, in the absence of a statute or rule mandating

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disclosure, no such disclosure obligation exists." *Artiga-Morales*, 130 Nev. Adv. Op. 77, 335 P.3d at 180.

Furthermore, the cases the dissent cites in *Artiga-Morales* rely on vague references to "fundamental fairness" without grounding the concept in any source of legitimate legal authority, whether statutory or constitutional, and without engaging in any meaningful analysis. *See People v. Murtishaw*, 29 Cal.3d 733, 175 Cal. Rptr. 738, 631 P.2d 446, 465 (1981) ("[A] trial judge will have discretionary authority to permit defense access to jury records and reports of investigations available to the prosecution[,]" based "on the fairness of the criminal process"), *superseded on other grounds by statute as stated in People v. Boyd*, 38 Cal.3d 762, 215 Cal. Rptr. 1, 700 P.2d 782, 790 (1985); *Losavio v. Mayber*, 178 Colo. 184, 496 P.2d 1032, 1035 (1972) ("The requirements of fundamental fairness and justice dictate" allowing defense counsel access to criminal histories of veniremembers); *State v. Bessenecker*, 404 N.W.2d 134, 138 (Iowa 1987) ("[C]onsiderations of fairness and judicial control over the jury selection process requires" equal access to juror information.); *Commonwealth v. Smith*, 350 Mass. 600, 215 N.E.2d 897, 901 (1966) ("The public interest in assuring the defendant a fair trial is, we think, equal to the public interest in assuring such a trial to the Commonwealth.");

State v. Goodale, 144 N.H. 224, 230, 740 A.2d 1026, 1031 (1999) ("We conclude that fundamental fairness requires that official information concerning prospective jurors utilized by the State in jury selection be reasonably available to the defendant."). Other cases are inapposite and unpersuasive for other reasons. The court in *Tagala v. State*, 812 P.2d 604, 612 (Alaska Ct. App. 1991), for example, held that disclosure of criminal background checks conducted by the prosecution was required upon request under an Alaska rule of criminal procedure for which Nevada has no analog.

The district court also reasoned that *Artiga-Morales* "did not mandate or preclude disclosure of juror information." (PA, 34). But this Court noted that

> *Artiga–Morales* thus has established neither a constitutional nor statutory basis for us to reverse his conviction based on the district court's denial of his motion to compel disclosure of prosecution-gathered juror background information. "If policy considerations dictate that defendants should be allowed to see [prosecution-developed jury] dossiers, then a court rule should be proposed, considered and adopted in the usual manner." . . . Such a formal rule-making procedure is implicitly authorized by NRS 179A.100(7)(j) and better suited to the job of assessing the scope of the disparity, the impact on juror privacy interests, the need to protect work product, practicality, and fundamental fairness than this case, with its limited record and arguments.

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Artiga-Morales, 130 Nev. Adv. Op. 77, 335 P.3d at 181-82. (citations omitted)(brackets in *Artiga-Morales*).

No "formal rule-making procedure" has been used–at least in this district–to propose, consider and adopt a court rule that would authorize the district court to issue the order it did in this case. Thus, we are still left with the question of where the district court's authority resides to issue the order it did in this case. *See e.g., People v. McIntosh*, 400 Mich. 1, 252 N.W.2d 779, 782 (1977) ("Defendants have no constitutional or statutory right to see jury dossiers compiled by the prosecutor from public records."), *overruled on other grounds by Peoptherle v. Weeder*, 69 Mich. 493, 67, 4 N.W.2d 372 (2004) ("Defendants have no constitutional or statutory right to see jury dossiers compiled by the prosecutor from public records.") Accordingly, neither the majority nor the dissent in *Artiga-Morales* support the district court order.

E. The Defense Has Failed to Establish That Criminal History Information Is Not Available from Other Sources.

Since "*Brady* does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense," *Steese*, 114 Nev. at 495, 960 P.2d at 331, a

defendant cannot legitimately seek to compel disclosure of information via *Brady* if he has the ability to obtain it himself. Even if it were assumed for the sake of argument that the information sought by the defense constituted *Brady* material, the defense has not established that his lawyers or investigators cannot obtain the requested information from their LexisNexis criminal history database of arrest, corrections, and court conviction records, from other commercial criminal history databases commonly used by investigators, or from other criminal information repositories available to the public.[4]

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[4]*See Steese*, 114 Nev. at 495, 960 P.2d at 331 (*Brady* "does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense"); *Marrero*, 904 F.2d at 261 (*Brady* does not obligate the prosecution "to conduct a defendant's investigation or to assist in the presentation of the defense's case"). *See also Browning v. State*, 120 Nev. 347, 370, 91 P.3d 39, 55 (2004) ("We further conclude that under *Brady* the State did not withhold this information because it was reasonably available to the defense, as *Browning* acknowledges by claiming that his counsel should have interviewed the officer and discovered it") (*citing Steese*, 114 Nev. at 495, 960 P.2d at 331); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986) ("the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources") (*cited with approval in Steese*, 114 Nev. at 495, 960 P.2d at 331); *United States v. Dupuy*, 760 F.2d 1492, 1502 n.5 (9th Cir. 1985) ("if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails"); *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992) ("Evidence cannot be regarded as 'suppressed' by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence"); *Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir.2002) ("The *Brady* rule does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense"); *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001) ("The

Ojeda has the burden of establishing that he cannot obtain juror background information from other sources; naked, conclusory assertions are not enough. *See Ritchie*, 480 U.S. at 59; *Sonner*, 930 P.2d at 715-716. *Brad*y addresses the defendant's access to material evidence, not convenience. It would probably be more convenient and economical for a defendant if the government had to provide a detailed accounting of all investigatory work done on a case, or provide open-file discovery, or provide a list of trial witnesses, but due process–i.e., *Brady*–requires none of these things. Likewise, convenience in obtaining records from the State is not a legal basis for ordering disclosure where the defense with diligence could access the information it seeks from other sources.

Conclusion

Ojeda has failed to ground his claim for blanket disclosure of jury-venire information in any legitimate court rule, statute, or constitutional provision. No statute or court rule requires the requested disclosure. Disclosure is not required by due process, fundamental fairness, or *Brady*

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government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels"). The information could also be obtained by questioning the venire members about their criminal histories during *voir dire*.

because the information is not materially exculpatory or materially impeaching.

The notion that due process somehow requires symmetry of information is artifice. As the United States Supreme Court's decisions make clear, due process in fact tolerates a great deal of "information asymmetry" so long as that information is not materially exculpatory or impeaching. In light of the United States Supreme Court's decisions in the *Brady* context, it cannot be credibly argued that there is some remote corner of the Due Process Clause, somehow missed or overlooked by the Supreme Court, that requires more 'information symmetry' for voir dire than for the substantive guilt-or-innocence phase of a criminal trial. Due process does not require blanket disclosure of venire-member criminal history information obtained by the prosecution, nor does NRS Chapter 179A.

For the forgoing reasons, the State of Nevada respectfully requests this Court to issue a writ of prohibition or mandamus directing the district court

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to rescind its order compelling the State to disclose any information, specifically the criminal history, it obtains of any potential juror in this case.

DATED: February 27, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: _____
JOSEPH R. PLATER
Appellate Deputy

AFFIDAVIT OF JOSEPH R. PLATER

STATE OF NEVADA

COUNTY OF WASHOE

I, JOSEPH R. PLATER, do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. That your affiant is a duly licensed attorney in the State of Nevada and is counsel of record for Petitioner.

2. That your affiant has read the foregoing Petition and he believes that it correctly describes the procedural history of this case.

3. That his Petition is brought in good faith and not for purposes of delay or any other improper reason.

JOSEPH R. PLATER

Subscribed and sworn to before me
on this 27th day of February, 2017
by Joseph R. Plater.

Notary Public

C. THEUMER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 16-1804-2 - Expires January 5, 2020

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 this petition has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Constantia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. 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 that this petition 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 of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 27, 2017.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 27, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joseph Goodnight
Deputy Public Defender

Kate A. Hickman
Deputy Public Defender

Destinie Allen
Washoe County District Attorney's Office