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.

_____/

PETITIONER'S APPENDIX

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DA #15-2756

RPD RP04-36689

CODE 1800
Christopher J. Hicks
#7747
P.O. Box 11130
Reno, NV 89520
(775) 328-3200

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

FRANCISCO MERINO OJEDA,

Defendant.
_____/

Case No.: CR15-0829

Dept. No.: D06

INFORMATION

CHRISTOPHER J. HICKS, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above entitled Court that FRANCISCO MERINO OJEDA, the defendant above named, has committed the crime of:

MURDER WITH THE USE OF A DEADLY WEAPON, a violation of NRS 200.010, NRS 200.030, and NRS 193.165, a felony, (F720) in the manner following:

That the said defendant, FRANCISCO MERINO OJEDA, on September 17 to September 23, 2004, or thereabout, and before the filing of this Information, at and within the County of Washoe, State

of Nevada, did willfully, unlawfully, and with malice aforethought, deliberation, and premeditation, kill and murder Kyla Annan, a human being, in that the defendant strangled the victim, and/or asphyxiated the victim by compressing her chest or abdomen or using his hands or arms to cover her mouth and nose, or the defendant killed the victim by other unknown means, thereby inflicting mortal injuries upon Kyla Annan from which she died between September 17, 2004, and September 23, 2004, and the Defendant did use a deadly weapon in the commission of the crime, which was a bat, rod, dowel, or electric cable, which the defendant used to subdue and incapacitate Annan, and to cut off her oxygen, by forcefully placing the implement across and pressing it against her neck and throat or chest; or

That the defendant FRANCISCO MERINO OJEDA did willfully and unlawfully kill Kyla Annan in the perpetration or attempted perpetration of the felony crimes of burglary and/or sexual assault, in that the killing occurred when the defendant entered Annan's residence at 624 Quincy Street in Reno, with the intent to commit sexual assault, assault and/or battery upon a person, sexual penetration of a dead human body, or larceny therein, and thereafter the defendant did beat and strike Annan about the face, head, and extremities; did bite Annan about the breast; did use a deadly weapon, which was a bat, rod, dowel, or electric cable, which the defendant used to subdue and incapacitate Annan, and to cut off her oxygen, by forcefully placing the implement across and pressing it against her neck and throat or chest; did subject Annan to sexual penetration against her will by forcibly causing her to submit to anal and/or

vaginal intercourse or did sexually penetrate Annan's dead body; and did inflict mortal injuries upon Annan by strangling and/or asphyxiating her, from which she died.

All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By: /s/ LUKE PRENGAMAN
LUKE J. PRENGAMAN
6094
CHIEF DEPUTY DISTRICT ATTORNEY

The following are the names and addresses of such witnesses as are known to me at the time of the filing of the within Information:

RENO POLICE DEPARTMENT
DUSTIN ALLEN
RON CHALMERS
ROYA MASON
JEFFREY HOYT
WENDY VAN DIEST
LYLE STEPHENS
DEBORAH THOMPSON
TERRY K. NAUGHTON
L. DUKE STEFFENS

TONI LEAL-OLSEN, WASHOE COUNTY CRIME LABORATORY

TRAVIS GORDON MILLER, 50 BUTTE PL., RENO, NV 89503

REMSA,

MARIKIA MORRIS, WASHOE COUNTY MEDICAL EXAMINER'S OFFICE

CHRISTIE ELLIOTT, WASHOE COUNTY MEDICAL EXAMINER'S OFFICE

LUIS ALTAMIRANO, FEDERAL BUREAU OF INVESTIGATION

The party executing this document hereby affirms that this document submitted for recording does not contain the social security number of any person or persons pursuant to NRS 239B.230.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By: /s/ LUKE PRENGAMAN
LUKE J. PRENGAMAN
6094
CHIEF DEPUTY DISTRICT ATTORNEY

PCN: RPD1504378C-OJEDA

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ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

v.

FRANCISCO MERINO OJEDA,

Defendant.
_____/

CASE NO: CR15-0829

DEPT. NO.: 6

MOTION FOR EQUAL ACCESS TO JUROR INFORMATION

Comes Now, FRANCISCO MERINO OJEDA, Defendant, by and through JEREMY T. BOSLER, Washoe County Public Defender, and CHRISTOHER FREY, Deputy Public Defender, and hereby moves for an order compelling disclosure of juror information gathered by means unavailable to the defense, or precluding the State from running veniremembers' criminal histories.

This motion is based on the attached points and authorities, all other documents and papers filed herein, and relevant statutory and constitutional provisions.

ARGUMENT

The defense anticipates that the State, pursuant to office policy, will prepare for *voir dire* by running the criminal histories of veniremembers through databases unavailable to the defense, thus equipping the prosecution with information about prospective jurors beyond the

defense's reach. Mr. Ojeda objects to the information asymmetry.

I. FUNDAMENTAL FAIRNESS REQUIRES EQUAL ACCESS TO JUROR INFORMATION.

If the State elects to investigate prospective jurors by means unavailable to the defense, fundamental fairness demands that it disclose its results. See Losavio v. Mayber, 496 P.2d 1032, 1035 (Colo. 1972) ("fundamental fairness" requires disclosure of law enforcement records of prospective jurors produced to the State); accord People v. Aldridge, 209 N.W.2d 796, 801 (Mich. Ct. App. 1973) (no "rational basis" exists for the information asymmetry and noting that "fundamental fairness requires placing defendant upon an equal footing by requiring disclosure . . . [s]ince . . . nondisclosure . . . [would] place a premium upon "gamesmanship" to the subversion of the trial's search for truth"); People v. Murtishaw, 631 P.2d 446, 465 (Cal. 1981) (the defense may be permitted to "access to jury records and reports of investigations available to the prosecution" to combat inequality and unfairness in the trial process), overruled on other grounds by People v. Lee, 738 P.2d 752 (Cal. 1987); State v. Bessenecker, 404 N.W.2d 134, 138 (Iowa 1987) ("[A]gree[ing] with the reasoning of those courts that generally have allowed defendants equal access to jurors' rap sheets obtained by the county attorney" on grounds "that considerations of fairness and judicial control over the jury selection process requires this result"); Tagala v. State, 812 P.2d 604, 613 (Alaska Ct. App. 1991) ("[W]e believe that the prosecutor should disclose to the defense, upon request, criminal records of jurors, at least in cases where the prosecution intends to rely on them. If the state is entitled to examine criminal records of jurors for jury selection, it is fair for the defense to have access to the same information."); State v. Goodale, 740 A.2d 1026, 1031 (N.H. 1999) ("[F]undamental fairness requires that official information concerning prospective jurors utilized by the State in jury selection be reasonably available to the defendant."); Commonwealth v. Smith, 215 N.E.2d 897, 901 (Mass. 1966) (concluding that the results of police investigation into potential jurors "should be as available to the defendant as to the district attorney"); In re State, 46 A.3d 616,

(N.J. Super. Ct. Law Div. 2012) (denying State's request for juror information after balancing the interest in disclosure against the "privacy rights of citizens and the due process rights of defendants"); cf. Ira P. Robbins, 'Bad Juror' Lists and the Prosecutor's Duty to Disclose, Cornell J.L. & Pub. Pol'y (2012) (noting that when prosecutors are permitted to put their thumbs on the scale of justice during jury selection, the entire system suffers, including the rights of potential jurors, the rights of the defendant, the reliability of the outcome of the proceedings, and the appearance of justice.). But see Tagala, 812 P.2d at 613 (recognizing divergent authority supporting the minority position).

II. EQUAL ACCESS TO JUROR INFORMATION IS CONSTITUIONALLY REQUIRED.

If the State investigates prospective jurors by means unavailable to the defense, disclosure is required by the Sixth Amendment to the United States Constitution.

A meaningful ability to select an impartial jury is a basic component to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution. The Nevada Supreme Court recognized as much in the following terms:

> The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country. The *voir dire* process is designed to ensure—to the fullest extent possible—that an intelligent, alert and impartial jury which will perform the important duty assigned to it by our judicial system is obtained. The purpose of *voir dire* examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given.

Whitlock v. Salmon, 104 Nev. 24, 27, 752 P.2d 210, 212 (1988) (citations omitted).

In Nevada, attorney-conducted *voir dire* is the accepted norm See id.; NRS 175.031. Under this method, the trial judge initiates questioning, while the attorneys "are entitled to supplement the examination by such further inquiry as the court deems proper." Id. The attorney-conducted portion of *voir dire*, like the judicial portion, "'plays a critical function in

assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.'" In re Hitchings, 860 P.2d 466, 472 (Cal. 1993) (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion)).

Allowing the State to withhold juror information beyond the reach of the defense that may reveal a voting predilection or disqualifying characteristic impairs the defense's ability to select an impartial jury. Condoning any information asymmetry of this sort during jury selection therefore "place[s] a premium upon 'gamesmanship' to the subversion of the trial's search for truth," Aldridge, 209 N.W.2d at 801, undermines Whitlock's articulation of the very purpose of *voir dire*, and, in a word, violates the Sixth Amendment.

III. EQUAL ACCESS TO JUROR INFORMATION IS REQUIRED BY BRADY V. MARYLAND.

If the State investigates prospective jurors by means unavailable to the defense, disclosure is required as a matter of due process, as Mr. Ojeda is entitled to material within the actual or constructive possession of the State that is favorable to his defense. See Brady v.Maryland, 373 U.S. 83 (1963); Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000).

IV. EQUAL ACCESS TO JUROR INFORMATION IS REQUIRED BY STATUTE AND RESTRICTING THE DEFENSE'S ACCESS TO JUROR CRIMINAL HISTORIES HAS NO RATIONAL BASIS.

In addition to impairing an accused's right to an impartial jury generally, and violating Brady, nondisclosure impairs specific rights guaranteed by statute.

Under Nevada's attorney-conducted *voir dire* regime, "any supplemental examination [by attorneys] must not be unreasonably restricted." NRS 175.031. Condoning asymmetric information, however, would unreasonably restrict the defense's ability to question a prospective juror, and thus dilute an accused's statutory right to meaningful supplemental examination. See NRS 175.031. There is no "rational basis" for condoning such a tilted playing field in *voir dire*. See Aldridge, 209 N.W.2d 7at 801.

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Moreover, allowing nondisclosure impairs the defense's ability to raise and meaningfully pursue challenges for cause under NRS 175.036. See Hitchings, 860 P.2d at 472 ("'Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (quoting Rosales-Lopez, 451 U.S. at 188)). Likewise, it inhibits the intelligent exercise of peremptory challenges under NRS 175.051.[1] Id. ("[The] lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule.'" (quoting Rosales-Lopez, 451 U.S. at 188)).

V. ARTIGA-MORALES V. STATE, 130 NEV. ADV. OP. 77 (OCT. 2, 2014),

The recent decision in Artiga-Morales v. State, 130 Nev. Adv. Op. 77 (October 2, 2014) involving a sharply divided Nevada Supreme Court is not controlling of the present motion, and is distinguishable on the following grounds.

First, the defendant in Artiga-Morales made a much more limited argument for disclosure in district court, and the record on appeal was incomplete, id. at *2, 7 (noting the "limited record and arguments" presented), thus inhibiting a full and considered resolution of the issue. The argument that the court was asked to consider was similarly limited on appeal. The appellant relied exclusively on a "theoretical argument" regarding fundamental fairness, and failed to raise the specific claims under the specific source of law raised here. Id. at *4.

Second, the structure of the court's analysis in Artiga-Morales is telling. The court there held that denying a similar motion was not "reversible error" since the State's obligation to disclose juror NCIC information was not codified in a source of positive law, and the

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[1]Information asymmetry leads to a general inequality in the ability to exercise peremptories. But the defense is also prevented from intelligently resisting the State's use of its own peremptories, since nondisclosure deprives the defense of the ability to conduct a comparative juror analysis in aid of a claim of purposeful discrimination when advancing a Batson challenge. See Nunnery v. State, 127 Nev. ___, ___, 263 P.3d 235, 258 (2011) (resolving the issue of purposeful discrimination in the context of a Batson challenge through the lens of comparative juror analysis).

appellant failed to demonstrate actual prejudice. Id. However, by focusing its attention on the reversibility of the error and the sufficiency of the showing of prejudice on appeal, the Artiga-Morales majority implicitly endorsed the policy merits of that argument. It only disagreed with the dissent as to how that policy should be instituted in the district courts. Compare 130 Nev. Adv. Op. 77 *1-7 with id. at *1-3 (Cherry, J., dissenting).

Third, the appellant in Artiga-Morales was unable to show actual prejudice on appeal as far as his limited efforts went. This does not mean that actual prejudice is not a consequence of the asymmetry. On the contrary, actual prejudice exists in every case where asymmetry regarding jurors' NCIC records is tolerated. As discussed, it inhibits the defense from pursuing meaningful cause and peremptory challenges. It makes it impossible for the defense to challenge a prosecutor's race-neutral explanation when defending against a Batson challenge, or determine whether the prosecutor's explanation has a basis in verifiable fact or is pretextual. Moreover, the asymmetry equips the State with greater intelligence to exercise its peremptory challenges. Presumably, the primary, if not sole reason, the State secretly obtains this information is so that it can excuse without explanation jurors with criminal histories, and specifically jurors who have been convicted of a crime similar to the offense being tried.

Finally, given that this asymmetry inherently alters the fairness of the jury selection process and thus the trial itself, and may produce consequences that are "necessarily unquantifiable and indeterminate," contrary to the analysis of the Altira-Morales majority, tolerating an asymmetry as to juror NCIC information during jury selection is, like other juror-seating errors, see, e.g., State v. Buchanan, 130 Nev. Adv. Op. 82 (October 2, 2014) (declining to conduct an evidentiary hearing on defendant's motion to strike a venire was structural error); Brass v. State, 128 Nev. Adv. Op. 68, 291 P.3d 145, 149 (2012) (structural error to deprive defendant of an adequate opportunity to respond to the State's proffer of race-neutral reasons or to show pretext), in the nature of structural error, and thus not susceptible to harmless error review. See Cortinas v. State, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008).

VI. RECEIVING AND USING THE CRIMINAL HISTORIES OF PROSPECTIVE JURORS VIOLATES STATE AND FEDERAL LAW.

The State is precluded by state and federal law from accessing and using the criminal histories of unsuspecting veniremembers to secure a litigation advantage in *voir dire*.

Under NRS 179A.100, the restricted dissemination of a "record of criminal history" is the rule, though with a number of statutorily defined exceptions. One exception is delineated under NRS 179A.100(7)(h). That provision allows dissemination of a record of criminal history to "[a]ny agency of criminal justice of the United States or another state or the District of Columbia," dissemination to an "agency of criminal justice."

While NRS 179A.100(7) authorizes dissemination to an "agency of criminal justice" such as the Washoe County District Attorney's Office, it is limited to a select number of end-uses. As discussed below, investigating the criminal histories of unsuspecting veniremembers to select a jury of the State's choice is not one of them.

State law defines an "agency of criminal justice" as "[a]ny court" and "[a]ny governmental agency which performs a function in the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its budget to a function in the administration of criminal justice." NRS 179A.030. The "administration of criminal justice," in turn, is defined as the

> detection, apprehension, detention, release pending trial or after trial, prosecution, adjudication, correctional supervision or rehabilitation of accused persons or criminal offenders, and includes criminal identification activities and the collection, storage and dissemination of records of criminal history.

NRS 179A.020. These are the only authorized end-uses to which a "record of criminal history" can be put by a prosecutor under state law.

The prohibition against using a "record of criminal history" beyond these end-uses does not vary because of record's provenance. State law is indifferent to concerns of a record's origin. Regardless of who generated a record or where, it must be "treat[ed] . . . as

confidentially as is required by the provisions of . . . chapter [NRS 179A])." NRS 179A.100(8). Accordingly, whether a record of criminal history is maintained by the National Crime Information Center (NCIC)[2] or by a state equivalent, that information cannot be accessed and used by a prosecutor during *voir dire* for mere litigation advantage.

Federal law outlines a similar prohibition against invading the privacy of veniremembers for a prosecutor's litigation gain. Like NRS 179A.030, federal law defines a "[c]riminal justice agency" as "[c]ourts" and "[a] governmental agency or any subunit thereof that performs the administration of criminal justice pursuant to a statute or executive order, and that allocates a substantial part of its annual budget to the administration of criminal justice." 28 C.F.R. § 20.3(g). In turn, similar to NRS 179A.020, the "[a]dministration of criminal justice" is defined as

> [d]etection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information.

28 C.F.R. § 20.3(b). The same restrictions on authorized end-uses exist under federal law as under state law. Thus the same prohibition against exceeding these end-uses applies.

The Washoe County District Attorney's Office is an "agency of criminal justice" under state and federal law. See NRS 179A.030; 28 C.F.R. § 20.3(g). But running the criminal histories of veniremembers without their knowledge to gain a tactical advantage in selecting a jury of the prosecution's choice is not the "administration of justice." See NRS 179A.020; 28 C.F.R. § 20.3(b). If the State refuses to share the criminal histories of prospective jurors, then it should be precluded from running the criminal histories of prospective jurors.

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[2]Under state law, "records of criminal history of the United States" are defined as records "originat[ing] in an agency of criminal justice of the Federal Government." NRS 179A.0715. These presumably include records maintained by NCIC, which is overseen by the Federal

CONCLUSION

Based on the foregoing, unless the state files a non-opposition stipulating to disclose information on prospective jurors, Mr. Ojeda respectfully requests an order compelling the State to disclose juror information gathered by means unavailable to the defense, or be precluded from running the criminal histories of veniremembers.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 25th Day of January, 2016.

JEREMY T. BOSLER
Washoe County Public Defender

By: /s/ Christopher Frey
CHRISTOPHER FREY
Deputy Public Defender

Bureau of Investigation. See http://www.fbi.gov/about-us/cjis/ncic (last visited: October 10, 2013). The Washoe County District Attorney's Office is an NCIC licensee.

CERTIFICATE OF SERVICE

I, JEREMY RUTHERFORD, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I electronically forwarded a true copy of the foregoing document to:

Luke Prengaman, Deputy District Attorney
District Attorney's Office

DATED this 25th Day of January, 2016.

/s/ Jeremy Rutherford
JEREMY RUTHERFORD

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

FRANCISCO MERINO OJEDA,

Defendant.

_____/

Case No. CR15-0829

Dept. No. 6

RESPONSE TO DEFENDANT'S MOTION "FOR EQUAL ACCESS TO JUROR INFORMATION"

Comes now the State of Nevada, by and through Luke J. Prengaman, Chief Deputy District Attorney, and hereby responds to the Defendant's "Motion for Equal Access to Juror Information." This Response is based upon the attached Memorandum of Points and Authorities.

DATED this 29th day of January, 2016.

Christopher J. Hicks
Washoe County District Attorney

By /s/ LUKE PRENGAMAN
Luke Prengaman
6094
Chief Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

The defense claims that (1) "fundamental fairness"/*Brady;* (2) the Sixth Amendment; (3) NRS 175.031; and (4) NRS 179A require that all venire-member criminal history information obtained by the State must be turned over to the defense. These claims are all made in error. Due process does not require disclosure, nor does the Sixth Amendment, nor NRS 175.031, nor NRS Chapter 179A. In fact, the notion 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" so long as that information is not material exculpatory or material impeachment information. The Nevada Supreme Court, moreover, has rejected the very position advanced by the Defendant. The Defendant "has established neither a constitutional nor statutory basis"[1] for his Motion and it should be denied.

II. ARGUMENT

A. Due Process does not require disclosure of venire-member criminal history information

1. Due Process disclosure requirements

"[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."[2] 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."[3] Due

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[1] *Artiga-Morales v. State,* 335 P.3d 179, 181 (2014).
[2] *Kyles v. Whitley,* 514 U.S. 419, 436-437, 115 S. Ct. 1555, 1567 (1995).
[3] *Kyles,* 514 U.S. at 437, 115 S. Ct. at 1567.

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[4] that is "material[5] either to guilt or to punishment."[6] 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."[7]

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[4] Impeachment material is included within the definition of "exculpatory" evidence. *United States v. Bagley,* 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985) ("This Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence") (citing *Giglio v. United States,* 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972)). According to the United States Supreme Court, the right to exculpatory and impeachment information recognized in *Brady* and *Giglio* are "trial-related rights." *United States v. Ruiz,* 536 U.S. 622, 631, 122 S. Ct. 2450, 2456 (2002).

[5] Due process is therefore concerned only with *material* exculpatory evidence and *material* impeachment evidence. "Material" in the due process context "does not mean material in the evidentiary sense" of being relevant. *United States v. Coppa,* 267 F.3d 132, 141 (2d Cir. 2001). Evidence qualifies as material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley,* 473 U.S. at 682, 105 S. Ct. at 3383. *See also Strickler v. Greene*, 527 U.S. 263, 291, 119 S. Ct. 1936, 1953 (1999) (evidence suppressed by the government is not material if there is only "a reasonable *possibility* that either a total, or just a substantial, discount of [a witness's] testimony might have produced a different result"); *United States v. Agurs,* 427 U.S. 97, 109-110, 96 S. Ct. 2392, 2400 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense"). "In Nevada," however, "after a specific request for evidence, a *Brady* violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the outcome." *Mazzan v. Warden,* 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

[6] *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1196 (1963). *See also Bagley,* 473 U.S. at 675, 105 S. Ct. at 3379-3380 ("The *Brady* rule is based on the requirement of due process"). *Accord Agurs,* 427 U.S. at 107, 96 S. Ct. at 2399 ("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").

[7] *Agurs,* 427 U.S. at 113 n.20, 96 S. Ct. at 2402 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,"[8] and "the prosecutor is not required to deliver his entire file to defense counsel."[9] Due process does not oblige the prosecution to reveal witnesses who will testify against a defendant at trial,[10] 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."[11]

The United States Supreme Court, emphasizing the limited scope of disclosure required by due process, has further observed that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor,"[12] and that "[w]e have never held that the Constitution demands an open file policy."[13] It thus

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[8] *Moore v. Illinois,* 408 U.S. 786, 795, 92 S. Ct. 2562, 2568 (1972).
[9] *Bagley,* 473 U.S. at 675, 105 S. Ct. at 3379-3380.

[10] *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S. Ct. 837, 845-846 (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"). *See also United States v. Cruz-Velasco,* 224 F.3d 654, 665-662 (7th Cir. 2000) ("the prosecution has no constitutional obligation to reveal its witnesses prior to trial"), *cert. denied, Cuevas v. U.S.,* 540 U.S. 909, 124 S. Ct. 282 (2003); *United States v. Phillip,* 948 F.2d 241, 249 (6th Cir. 1991) ("the issue of materiality for *Brady* purposes pertains only to the question of a defendant's guilt or innocence, not to the issue of a defendant's ability or inability to prepare for trial"), *cert. denied, Phillip v. U.S.,* 504 U.S. 930, 112 S. Ct. 1994 (1992).

[11] *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, 111 S. Ct. 561.

[12] *Agurs,* 427 U.S. at 106, 96 S. Ct. at 2399.

[13] *Kyles,* 514 U.S. at 437, 115 S. Ct. at 1567. *See also United States v. Hamilton,* 107 F.3d 499, 509 (7th Cir. 1997) (government need not disclose "every possible shred of evidence that could conceivably benefit the defendant"), *cert. denied, Hamilton v. U.S.,* 521 U.S. 1127, 117 S. Ct. 2528; *Evans v. State,* 117 Nev. 609, 627, 28 P.3d 498, 511 (2001) ("Evans seems to assume that the State

remains true that, as far as due process is concerned, "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[14]

Due process, in other words, does not require parity of information between the prosecution and defense. It does not even require equality of 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.[15]

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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").

[14] *Weatherford,* 429 U.S. 545, 559-60, 97 S. Ct. 837, 846 (1977). *See also Bagley,* 473 U.S. at 675 n.7, 105 S. Ct. 3375, 3380 n.7 (defendant's right to exculpatory evidence does not "create a broad, constitutionally required right of discovery").

[15] 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." *See, e.g., Wood v. Bartholomew,* 516 U.S. 1, 4-9, 116 S. Ct. 7, 9-11 (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, 96 S. Ct. at 2396-2402 (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, 119 S. Ct. at 1944-1955 (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, 115 S. Ct. 1555); *Williams v. Woodford,* 384 F.3d 567, 597-599 (9th Cir. 2004) ("no due process violation for failure to disclose an agreement with a testifying witness when the prosecution made no promises, and only suggested that the witness might receive a reduced penalty if he testified") (citing *Williams v. Calderon,* 52 F.3d 1465, 1474-5 (9th Cir. 1995)); *United States v. Ciccone,* 219 F.3d 1078, 1085-1086 (9th Cir. 2000) (cumulative

2. The doctrine of *Brady* does not require disclosure of venire-member criminal history information

As cited above, the Due Process Clauses of the Fifth and Fourteenth Amendments are the source of the *Brady* doctrine, and *Brady* and its progeny represent the United States Supreme Court's direct interpretation and application of due process – that is, fundamental fairness[16] – in the context of evidence disclosure in criminal cases. Any appeal to 'fundamental fairness' in this realm is therefore an appeal to due process, which is in turn an appeal to the *Brady* doctrine. The requirements of *Brady* thus represent the outer limits of what fundamental fairness requires the prosecution to disclose to a

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impact of suppressed information about three witnesses, including criminal history of "co-schemer" who testified against defendant, did not rise to level of *Brady* violation); *United States v. Mendoza-Prado,* 314 F.3d 1099, 1103 (9th 2002) (failure to disclose list of false names used by government's chief witness did not violate *Brady*); *United States v. Zuno-Arce,* 44 F.3d 1420, 1425 -1430 (9th Cir. 1995) (assuming suppressed interview was exculpatory, no *Brady* violation because it was not material), *cert. denied, Zuno-Arce v. U.S.,* 516 U.S. 945, 116 S. Ct. 383; *United States v. Kennedy,* 890 F.2d 1056, 1059 (9th Cir. 1989) (no *Brady* violation where undisclosed doctor's letter was inadmissible hearsay, would not have been admissible, and would not have led to admissible evidence; "To be material under *Brady*, undisclosed information or evidence acquired through that information must be admissible"), *cert. denied, Kennedy v. U.S.,* 494 U.S. 1008, 110 S. Ct. 1308 (1990); *Felder v. Johnson,* 180 F.3d 206, 212-213 (5th Cir. 1999) (failure to disclose prior arrest of prosecution witness not material; "the shadow cast upon [the witness's] testimony by potentially-discoverable evidence of her dishonesty does not 'put the whole case in such a different light as to undermine confidence in the verdict'") (quoting *Kyles,* 514 U.S. at 435, 115 S. Ct. at 1566); *United States v. Martin,* 431 F.3d 846, 850-851 (5th Cir. 2005) (various items of suppressed evidence, including a police report and letter written by defendant recanting his confession and claiming it was made under duress, was *Brady* material because the items "were favorable to the defendant" and "could have been used at trial to challenge the prosecution's case," but government's failure to disclose was not due process violation because evidence found not to be material), *cert. denied, Martin v. U.S.,* 547 U.S. 1059, 126 S. Ct. 1664 (2006) ; *Summers v. Dretke,* 431 F.3d 861, 880-881 (5th Cir. 2005) (suppression of charges pending against government witness did not constitute *Brady* violation), *cert. denied, Summers v. Quarterman,* 549 U.S. 840, 127 S. Ct. 353 (2006); *Buehl v. Vaughn,* 166 F.3d 163, 181 (3d Cir.1999) (undisclosed statement that person other than defendant possessed murder weapon three weeks after the murder held not material "[i]n light of [] overwhelming evidence that [the defendant] had the [murder weapon] at the time of the killings and that he was the murderer").

[16] Due process "expresses the requirement of 'fundamental fairness.'" *Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18, 24-25, 101 S. Ct. 2153, 2158 (1981).

criminal defendant. If a disclosure is not required by *Brady,* it is not required by due process or fundamental fairness.

Due process, therefore, is not a blank check for criminal defendants to write upon when it comes to information disclosure. "[T]he Constitution does not require the prosecutor to share all useful information with the defendant,"[17] and due process, accordingly and simply, does not require discovery of everything a defendant might consider fair or helpful. *Brady* and its progeny carefully delimit the scope of due-process-required disclosures, and due process requires only the disclosure of evidence that is "material either to guilt or to punishment" because it is exculpatory or because it constitutes impeachment material. The Due Process Clause simply does not mandate any disclosures over and above this requirement.[18] 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 materially impeaching.

The Due Process Clauses thus cannot be relied upon as authority for the judicial action here requested by the Defendant. The information he seeks – 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

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[17] *United States v. Ruiz,* 536 U.S. 622, 629, 122 S. Ct. 2450, 2455 (2002).

[18] *See, e.g., Bagley,* 473 U.S. at 675 n.7, 105 S. Ct. 3375, 3380 n.7 (defendant's right to exculpatory evidence does not "create a broad, constitutionally required right of discovery"); *Wardius v. Oregon,* 412 U.S. 470, 474, 93 S. Ct. 2208, 2212 (1973) ("the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . . ."); *Weatherford,* 429 U.S. at 559-60, 97 S. Ct. at 846; *Ruiz,* 536 U.S. at 629, 122 S. Ct. at 2455.

impeachment purposes."[19] 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.[20] *Brady* – that is, due process – does not require disclosure of venire-member criminal history information obtained by the State.

3. The cases cited by the Defendant are inapposite in light of *Brady* and its progeny

The defense cites several cases from other states wherein a court has held that the prosecution must provide the defense with various forms of venire-member background information. These cases, which represent a minority view, are inapposite and unpersuasive. One, which is cited throughout the defense's Motion – *People v. Aldridge,* 209 N.W.2d 796 (Mich. App. 1973) – is no longer good law.[21] Most of them, like *Aldridge*, rely upon vague references to "fundamental fairness" without grounding the concept in

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[19] *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 trial for either substantive or impeachment purposes") (citing *Agurs,* 427 U.S. at 112 n. 20, 96 S. Ct. at 2401–02 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).

[20] *See* Footnote 15, supra.

[21] *Aldridge* was a decision of an intermediate appellate court, and its holding that "fundamental fairness" dictates disclosure of jury dossiers compiled by the prosecution was later rejected by the Michigan Supreme Court. *See People v. McIntosh,* 400 Mich. 1, 8-9, 252 N.W.2d 779, 782 (Mich. 1977) (rejecting *Aldridge* and holding that "Defendants have no constitutional or statutory right to see jury dossiers compiled by the prosecutor from public records. If policy considerations dictate that defendants should be allowed to see these dossiers, then a court rule should be proposed, considered and adopted in the usual manner. Until then, the prosecutor need not share this information with the defense, so long as it is reasonably available to the defense from other sources"), *reversed on other grounds by People v. Weeder,* 674 N.W.2d 372 (Mich. 2004).

any source of legitimate legal authority, whether statutory or constitutional, and without engaging in any meaningful analysis. Most of these cases thus provide no statutory or constitutional justification for the decision requiring disclosure.[22]

In terms of legal authority supporting judicial action, due process "expresses the requirement of 'fundamental fairness.'"[23] 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.

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." Many decisions representing the majority position include the appropriate due process analysis.[24]

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[22] Others are inapposite and unpersuasive for other reasons. The court in *Tagala,* one of the cases cited by the defense, held that disclosure of criminal background checks conducted by the prosecution was required upon appropriate request under an Alaska rule of criminal procedure for which Nevada has no analog. *See Tagala v. State,* 812 P.2d 604, 612-613 (Alaska App. 1991).

[23] *Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18, 24-25, 101 S. Ct. 2153, 2158 (1981).

[24] *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"). Other majority-position cases include the following: *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

4. 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,"[25] a defendant cannot legitimately seek to compel disclosure of information via *Brady* if he has the ability to obtain it himself. Even were it 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

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criminal records of two veniremen gave the prosecution 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 were not were biased or prejudiced"), *cert. denied, Falange v. U.S.,* 400 U.S. 906, 91 S. Ct. 149.

[25] *Steese,* 114 Nev. at 495, 960 P.2d at 331.

records, from other commercial criminal history databases commonly used by investigators, or from other criminal information repositories available to the public.[26] The burden of establishing lack of availability from other sources is on the defense; naked, conclusory assertions are not enough.[27]

Brady speaks to *access* to material evidence, not convenience. It would likely 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.

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[26] *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 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.

[27] *See Ritchie,* 480 U.S. at 59; *Sonner,* 930 P.2d at 715-716.

B. The Sixth Amendment does not require disclosure of venire-member criminal history information

The defense claims that the Sixth Amendment requires disclosure of venire-member criminal history information obtained by the prosecution, but the only authorities included in the Motion relate to the general function of voir dire. The cited cases do not state or even suggest the proposition that the Sixth Amendment requires the prosecution to disclose venire-member criminal history information. The defense fails to support this novel proposition with apposite authority, and it should be rejected by the Court.[28] Moreover, "[t]he Supreme Court has thus far only evaluated disclosure claims" like the Defendant's "under the Due Process Clause of the Fifth and Fourteenth Amendments."[29] Therefore, the Defendant's "suggestion that the Confrontation Clause of the Sixth Amendment provides an independent ground for upholding the district court's order is incorrect."[30]

C. NRS 175.031, 175.036, and 175.051 do not require disclosure of venire-member criminal history information

Nevada Revised Statutes 175.031, 175.036, and 175.051 do not set forth any requirement for the prosecution to disclose venire-member criminal history information. The plain language of these statutes cannot be read to even suggest or hint at such a

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[28] *See Maresca v. State,* 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court"); *Quillen v. State,* 112 Nev. 1369, 1380, 929 P.2d 893, 900 (1996) ("We conclude that the district court properly refused the proffered instruction. First, Quillen has presented no authority in support of such an instruction. *See Tahoe Village Realty v. DeSmet,* 95 Nev. 131, 136, 590 P.2d 1158, 1162 (1979) (summarily rejecting novel proposition when no relevant authority cited)"); *Plankinton v. Nye County,* 95 Nev. 12, 12, 588 P.2d 1025, 1025 (1979) (contention unsupported by citation to relevant authority fails to affirmatively demonstrate error and need not be considered); *Cunningham v. State,* 94 Nev. 128, 130, 575 P.2d 936, 937 (1978) (novel propositions of law unsupported by relevant authority will not be entertained).

[29] *United States v. Prochilo,* 629 F.3d 264, 271 (1st Cir. 2011).

[30] *Id.*

requirement. The suggestion that "equal access to juror information is required by" NRS 175.031, 175.036, and 175.051 represents a novel construction of these statutes. The defense fails to support this novel proposition with apposite authority, and it should be rejected by the Court.

D. Obtaining venire-member criminal history information does not violate state or federal law

The defense's construction of NRS Chapter 179A is again novel. The defense conflates the definition of "agency of criminal justice" with an extra-statutory term of its own creation, "end uses," in order to make its 'violation of state law' argument.

Under Chapter 179A, an "agency of criminal justice" includes "[a]ny governmental agency which performs a function in the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its budget to a function in the *administration of criminal justice*."[31] Under NRS 179A.020, "'*[a]dministration of criminal justice'* means detection, apprehension, detention, release pending trial or after trial, prosecution, adjudication, correctional supervision or rehabilitation of accused persons or criminal offenders, and includes criminal identification activities and the collection, storage and dissemination of records of criminal history." An "agency of criminal justice" thus includes the District Attorney's Office, which performs functions in the "prosecution," and arguably the "adjudication" of accused criminals.

Nevada Revised Statutes 179A.020 and 179A.030 thus define "agency of criminal justice" (ACJ). These statutes, by their plain language, do not purport to place any specific limits on the particular uses for which criminal history records may be employed by an ACJ performing broad "prosecution" functions.

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[31] NRS 179A.030(2) (emphasis added). The State's points and authorities apply equally to the federal analogs referenced by the defense.

Nevada Revised Statute 179A.100 addresses dissemination of criminal history records; under 179A.100(7)(h), records "must be disseminated . . . upon request" to "[a]ny agency of criminal justice of the United States or of another state or the District of Columbia." Nevada Revised Statute 179A.100(7)(h) thus authorizes dissemination to an ACJ, but does not purport to place any specific limits on the particular uses for which criminal history records may be employed by an ACJ performing broad "prosecution" functions.

Even if these statutes could be read to somehow limit the "end uses" of records disseminated to the District Attorney's Office under 179A.100(7)(h), the limit would be to the broad category of "prosecution" functions. By any reasonable interpretation of this plain statutory reference, conducting voir dire in the course of a criminal prosecution is a "prosecution" function that falls squarely within the category of "prosecution" uses. The defense's argument therefore fails.[32]

E. The Defendant fails to establish a constitutional, statutory, or court-rule basis for blanket disclosure of venire-member criminal history information

The Defendant is in an even less legally-supported position than the accused in *Artiga-Morales v. State.*[33] Mr. Artiga-Morales made two claims, one very general and one very specific. The general claim was similar to the Defendant's claim here – a blanket request for "'a summary of any jury[] panel information gathered by means unavailable to the defense.'"[34] The specific claim was that the State's "superior access to juror background information" allowed the prosecutor to unfairly "question [a specific venire member] about her son's detention in the Washoe County Jail on gang-related charges and then . . . defend its peremptory challenge of her on that basis."[35] Both claims failed, rejected by the

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[32] Additionally, Chapter 179A does not create a cause of action for injunctive relief, nor confer standing upon an individual criminal defendant to enforce the provisions of NRS 179A.100(7)(h).

[33] 335 P.3d 179 (2014).
[34] *Artiga-Morales,* 335 P.3d at 180.
[35] *Id.* at 181.

Nevada Supreme Court, which found no error in Mr. Artiga-Morales' lack of access to the prosecution's jury panel information.

The Court found that Artiga-Morales was unable to ground his claims in any statutory or constitutional basis that required relief. The Court noted that Nevada's discovery statute "does not mandate disclosure of prosecution-developed juror background information," and recognized no constitutional basis for requiring blanket disclosure of such information. In fact, the Nevada Supreme Court highlighted the fact that no legal authority for such an order presently exists when it observed that "'[i]f 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.'"[36] The Court also found that Mr. Artiga-Morales' general and specific claims were insufficient to establish that any of his trial jurors were not fair and impartial, and thus that he failed to establish that he was denied his right to a fair and impartial jury.[37]

The Defendant, like Mr. Artiga-Morales, has failed to ground his claim for blanket disclosure of venire-member background information in any legitimately applicable court rule, statute, or constitutional provision. No statute or court rule requires the requested disclosure. Disclosure is not required by due process/fundamental fairness/*Brady* because the information is not materially exculpatory or materially impeaching. And the Defendant has marshalled no apposite authority suggesting a Sixth Amendment right of any kind to blanket disclosure of the information.

The Defendant's suggestion that "actual prejudice exists in every case where asymmetry regarding jurors' NCIC records is tolerated," is simply wrong. This was the position of the *Artiga-Morales* dissent, which *ipso facto* is not the law – it is, in fact,

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[36] *Artiga-Morales,* 335 P.3d at 181-2 (quoting *People v. McIntosh,* 252 N.W.2d 779, 782 (Mich. 1977).

[37] *Id.*

expressly, unequivocally not the law. If it was the law, the result in *Artiga-Morales* would necessarily have been different, and decades of United States Supreme Court precedent regarding the Sixth Amendment and the Due Process Clauses would have swept aside.

III. CONCLUSION

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 material exculpatory or material impeachment information. 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 the Sixth Amendment, nor NRS 175.031, nor NRS Chapter 179A. The defense Motion should therefore be denied.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 29th day of January, 2016.

Christopher J. Hicks
Washoe County District Attorney

By /s/ LUKE PRENGAMAN
Luke Prengaman
6094
Chief Deputy District Attorney

CERTIFICATE OF SERVICE BY E-FILING

I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

CHRISTOPHER FREY, ESQ.

DATED this 29th day of January, 2016.

/s/LUKE PRENGAMAN
LUKE PRENGAMAN

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CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs.

FRANCISCO MERINO OJEDA,

Defendant.
_____/

Case No. CR15-0829

Dept. No. 6

ORDER GRANTING MOTION FOR EQUAL ACCESS TO JUROR INFORMATION

Before this Court is Defendant FRANCISCO MERINO OJEDA's ("Mr. Ojeda") *Motion for Equal Access to Juror Information*, filed January 25, 2016 through his counsel Christopher Frey, Deputy Public Defender. The State of Nevada (the "State") filed its *Response to Defendant's Motion for Equal Access to Juror Information* on January 29, 2016 through its counsel, Luke J. Prengaman, Chief Deputy District Attorney. Both the State and Mr. Ojeda appeared before this Court on February 10, 2016, wherein the Court addressed and granted Mr. Ojeda's *Motion*. This written Order follows.

Mr. Ojeda moves this Court for an Order compelling the State to disclose juror information, specifically, criminal histories, of potential venire members prior to trial in this matter. Mr. Ojeda alleges that the State, pursuant to its office policy, runs the criminal history records of potential jurors to use in *voir dire*, and that the use of that information, by the State alone, during *voir dire* places Mr. Ojeda on unequal footing with the State. Mr.

Ojeda asserts, *inter alia*, that equal access to this information to select an impartial jury is required under his Sixth Amendment right to a fair trial and must be disclosed under NRS 175.031. Mr. Ojeda also argues the State is precluded by state and federal law from accessing and using the criminal histories of venire members to secure an advantage during *voir dire*.

The State opposes Mr. Ojeda's motion on the grounds that disclosure of potential venire members' criminal history is not required under Brady, is not mandated by the prosecution's disclosure obligations under NRS 174.235, and may be used for any purpose under NRS 179A.100, as the State is an agency of criminal justice.

Both parties also rely on a recent Nevada Supreme Court decision, Artiga-Morales v. State, 130 Nev. Adv. Op. 77, 335 P.3d 179 (2014), to support their respective positions on disclosure of juror information. In the Artiga-Morales case, the defendant appealed a district court's denial of his motion to compel disclosure of juror background information gathered by the prosecutor, specifically criminal histories. Id. at 180. The Nevada Supreme Court noted that most courts have not found a disclosure obligation of the prosecution's juror background information absent a statute or court rule. Id. However, the Court also recognized the disparity that exists when the prosecution has "ready access to criminal history . . . on prospective jurors, and the defense . . . does not." Id. The Court was influenced by People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446 (1981) (*superseded by statute on other grounds*), which held that trial courts can compel disclosure of prosecution-developed juror background materials; however, a trial court's refusal to compel disclosure was not reversible error absent prejudice. Id. citing Murtishaw.

Although Artiga-Morales further held Nevada's disclosure statutes do not mandate

disclosure of juror background information, it also did not prohibit a trial court from ordering its disclosure. *See* Artiga-Morales.[1] In fact, a compelling dissent noted that a failure to disclose venire member information demonstrates prejudice and a lack of fairness. Id. at 182 (Cherry, J., with whom Douglas and Saitta, JJ., agree, dissenting). The dissent argued the prosecution was afforded an advantage over defense counsel when using venire member information, because defense counsel was "unable to verify the truthfulness of the venire member's answers or develop independent questions suggested by the omitted information." Id. The dissent also noted the growing number of jurisdictions that permit equal access between the prosecution and the defendant to venire member information. Id. at 182-83. In sum, Artiga-Morales did not mandate or preclude disclosure of juror information.

Finally, a review of applicable law holds that disclosure of criminal history records are appropriate if the court so orders it. NRS 179A.100(7) provides that "[r]ecords of criminal history must be disseminated by an agency of criminal justice, upon request, to the following persons or governmental entities: . . . (j) persons and agencies authorized by statute, ordinance, executive order, court rule, court decision or court order as construed by appropriate state or local officers or agencies." NRS 179A.100(7)(j).

As this Court indicated during the February 10, 2016 proceeding, it believes in the fundamental right to fair play. Allowing only the State to use the criminal histories of potential jurors creates a disparity. That disparity is removed if both the State and Mr. Ojeda have equal access to the criminal history of potential venire members.

In light of the foregoing, the circumstances of this case, adherence to parity in the

[1] Suggesting, instead, that a formal rule-making procedure can better assess the policy considerations that accompany this request, and noting that NRS 179A.100(7)(j) implicitly authorizes it.

parties' positions, and good cause appearing therefore,

IT IS HEREBY ORDERED the State must disclose the criminal histories the State gathers, if any, for potential venire members, in compliance with federal restrictions.

IT IS FURTHER ORDERED the State shall provide a hard copy of the criminal histories of venire members to this Court no later than 4:00 P.M. the Friday before trial.

IT IS FURTHER ORDERED Mr. Ojeda's counsel shall retrieve the hard copy from this Court no later than 5:00 P.M. the Friday before trial.

Dated this 15th day of February, 2016.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 12th day of February, 2016, I electronically filed the foregoing with the Clerk of the Court which will send a notice of electronic filing to the following:

LUKE PRENGEMAN, ESQ.

CHRISTOPHER FREY, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Judicial Assistant

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