IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WILLIAM RANDOLPH

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 73825

Direct Appeal From A Judgment Of Conviction
Eighth Judicial District Court
The Honorable Stefany Miley, District Judge
District Court No. 09C250966

APPELLANT'S OPENING BRIEF

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18-909186

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I

JURISDICTIONAL STATEMENT

A. BASIS FOR APPELLATE JURISDICTION

NRAP 4(b); NRS 177.015(3); NRS. 177.055.

B. FILING DATES ESTABLISHING TIMELINESS OF APPEAL

08-23-17: Judgment of Conviction filed[1]

08-23-17: Notice of Appeal filed[2]

C. ASSERTION OF FINAL ORDER OR JUDGMENT

This appeal is from the judgment of conviction filed on August 23, 2017 and the Order Of Execution filed on August 23, 2017,[3] and all other appealable orders and findings in this case.

II

ROUTING STATEMENT

Pursuant to NRAP 17(a)(1), this death penalty case is assigned to the Supreme Court of Nevada.

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1 ROA/24/5062-5064.
2 ROA/24/5067-5068.
3 ROA/24/5072.

III

STATEMENT OF ISSUES

ISSUE NO. 1: **Whether RANDOLPH's State and Federal 5th and 14th amendment rights to due process, equal protection, and a fair trial were violated amounting to prejudicial error and requiring reversal of all convictions where the conspiracy conviction was not supported by any evidence, and the murder convictions were predicated upon a theory that RANDOLPH conspired with Michael Moore to kill his wife (Sharon Randolph) and then killed Michael Moore to silence the "hit man."**

ISSUE NO. 2: **Whether RANDOLPH's State and Federal 5th and 14th amendment rights to due process, equal protection, and a fair trial were violated amounting to prejudicial error and a denial of the Full, Faith And Credit clause of the United State Constitution where a Utah prosecutor was permitted to testify at a *Petrocelli* hearing and at trial about expunged cases, in violation of Utah Code Ann. Section 77-40-108.**

ISSUE NO. 3: **Whether RANDOLPH's 5th and 14th Amendment rights to due process and a fair trial were violated and the Court committed manifest error in admitting evidence of a prior charge against RANDOLPH for murdering his second wife (Becky) and then attempting to hire someone to beat up her lover (Tarantino), where RANDOLPH was acquitted of the murder charge and all records relating to the Becky and Tarantino incidents were expunged by the Utah court.**

ISSUE NO. 4: **Whether RANDOLPH's state Constitutional right to bail and his Sixth Amendment right to a speedy trial were violated where there was no evidence of a conspiracy to support the state's theory, and RANDOLPH was held without bail for over eight years awaiting trial, based in part on misconduct of the state in withholding exculpatory witness statements and improperly seeking admission of prior expunged 20-year-old records.**

ISSUE NO. 5: **Whether RANDOLPH's 5th and 14th Amendment rights to due process and a fair trial were violated amounting to reversible error where the prosecutor infected the court and the jury with several instances of misconduct, including but not limited to, intentionally misinforming both the Court and the jury on several occasions that RANDOLPH was a serial wife murderer.**

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ISSUE NO. 6: **Whether RANDOLPH's state and federal constitutional rights to due process of law, equal protection, a fair trial, and a fair and impartial jury were violated by the procedures employed during jury selection to dismiss qualified jurors for cause, and use peremptory challenges to stack the jury in favor of the death penalty.**

ISSUE NO. 7: **Whether RANDOLPH's 5th and 14th Amendment rights to due process and a fair trial were violated amounting to reversible error where the court denied RANDOLPH's request to argue last during the penalty phase.**

ISSUE NO. 8: **Whether the sentence of death in this case should be reversed because it was imposed under the influence of passion, prejudice and other arbitrary factors, because it is excessive considering both the crime and the defendant, it is unconstitutional under the current Execution Manual of 2017, and it is unenforceable given drug manufacturers' pending litigation to prohibit use of their products for executions.**

IV

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a case about a vindictive Utah prosecutor (McGuire)[4] and Utah police officer (Conley) who tricked Nevada police and prosecutors into believing that RANDOLPH is a serial wife killer who must be put to death regardless of the means to that end. This vendetta arose out of a failed prosecution of RANDOLPH by McGuire and Conley 29 years ago when RANDOLPH's wife (Becky) committed suicide. Thereafter, RANDOLPH successfully sued McGuire and Conley for malicious prosecution. All records of that failed prosecution were expunged by the Utah courts; however McGuire and Conley in violation of the

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[4] ROA/3/537.

Utah expungement statute kept private records of the RANDOLPH prosecution, and McGuire testified against him at a *Petrocelli* hearing in this case. Both testified against him during trial.

In this case, RANDOLPH walked in on his wife (Sharon) laying in a pool of blood, and then shot and killed her assailant (Michael Miller) who surprised RANDOLPH when he walked in on the scene. The state's theory in this case is that RANDOLPH hired Miller to kill Sharon for life insurance money and then killed Miller. However, there was absolutely no evidence of a conspiracy between RANDOLPH and Miller to commit murder, and the grand jury expressed concern about that.

The court in this case allowed in evidence of the Becky prosecution, and RANDOLPH was convicted not because there was evidence that he hired Miller to kill Sharon but because the prosecutor was allowed through evidence of the Becky prosecution to convince the jury that RANDOLPH was a bad person – a serial wife killer. RANDOLPH stated it best when he said at a November 26, 2012 hearing after being incarcerated for four years:

> **THE DEFENDANT: ....I'M GOING TO BE FOUND GUILTY FOR SOMETHING I DIDN'T DO IN LAS VEGAS, BASED ON SOMETHING I DIDN'T DO IN UTAH BACK IN 1983 (SIC) AND I'VE ALREADY BEEN TRIED AND ACQUITTED OF IT. IT'S JUST – IT'S CRAZY; IT'S INSANE.**[5]

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[5] ROA(Sealed)/8/1551-1552.

B. COURSE OF PROCEEDINGS

??-??-81	Randolph meets Becky where they are working at Albertsons[6]
??-??-81	Becky has nervous breakdown.[7]
03-??-82	Randolph meets Tarantino at Timberline Cabinets.[8]
11-??-82	Randolph approaches Tarantino about killing Becky.[9]
12-??-82	Tarantino left Timberline.[10]
01-??-83	Randolph was laid off from Timberline Cabinets.[11]
02-??-83	Tarantino goes to work for Herkle Cabinets.[12]
04-??-83	Randolph goes to work for Herkle Cabinets.[13]
04-08-83	Randolph divorce from Kathryn (1st wife) final.[14]
04-08-83	Randolph and Becky (2nd wife) get married.[15]
08-??-83	Tarantino has affair with Becky.[16]
08-26-84	Tarantino starts fire in trailer where Becky was sleeping.[17]
11-06-86	**Becky commits suicide**[18]
11-07-86	Randolph discovers Becky's body after release for DUI.[19]
??-??-88	McGuire flies to New Hampshire to interview Tarantino.[20]
01-08-89	Randolph tries to hire someone to "whack" Tarantino.[21]
??-??-89	Randolph tried and acquitted of Becky murder.[22]
05-??-89	Randolph pleads to witness tampering to clear girlfriend (Wendy)[23]
09-16-89	Kathryn Thomas (1st wife) letter re Connely vendetta.[24]

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6 ROA(Sealed)/38/8230-8231.
7 ROA/22/4681.
8 ROA/2/366, 17/3589.
9 ROA/2/366, 17/3592-3593.
10 ROA/17/3589.
11 ROA/2/366.
12 ROA/2/366, 17/3595.
13 ROA/2/366.
14 ROA/22/4641.
15 ROA(Sealed)/38/8232, 39/8438.
16 ROA/17/3613.
17 ROA/2/366, 22/4693, 4707, 4712.
18 ROA(Sealed)/38/8304, 39/8438.
19 ROA/2/366.
20 ROA/3/524.
21 ROA(Sealed)/39/8419, 8423, 8428; ROA/2/368.
22 ROA(Sealed)/39/8461.
23 ROA/2/368.

??-??-89	Randolph sues Utah prosecutors and wins.[25]
10-06-89	Utah court finds that Tarantino is a liar.[26]
07-21-92	Utah Order lowering WT (witness tampering) to misdemeanor.[27]
01-20-94	Torgensen (Utah Assistant AG) letter that Randolph illegally sentenced on WT charge.[28]
??-??-97	Randolph is welfare case worker.[29]
??-??-03	Randolph goes on disability.[30]
04-??-04	Randolph 4th wife (Frances) dies from surgery complications.[31]
??-??-04	Randolph sues hospital for Frances death and wins.[32]
05-03-07	Randolph marries Sharon Randolph.[33]
12-??-07	Randolph meets Miller.[34]
05-08-08	**Sharon Randolph and Michael Miller killed**[35]
08-26-08	O'Kelly (LVPD) obtains recorded statements about the Becky case.[36]
12-16-08	Grand Jury wanted more info of conspiracy to commit murder.[37]
01-06-09	Grand Jury (continued)[38]
01-07-09	Randolph arrested in Utah.[39]
01-15-09	Randolph incarcerated in Nevada.[40]
02-04-09	Death Penalty Notice[41]
03-13-09	Randolph motion to set bail[42]
04-01-09	Hearing on bail motion.[43]

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24 ROA/25/5441-542.
25 ROA(Sealed)/39/8469.
26 ROA/2/428, 7/1513.
27 ROA/7/1509.
28 ROA/2/414, 431, 7/1503, 1511.
29 ROA/31/6660.
30 ROA/31/6662.
31 ROA/22/4626-4627, 31/6662.
32 ROA/22/4773.
33 ROA/2/365.
34 ROA/2/363.
35 ROA/1/13.
36 ROA(Sealed)/38/8227-8470.
37 ROA/1/7, 199, 2/268.
38 ROA/1/82.
39 ROA/1/185.
40 ROA/1/185.
41 ROA/1/170, 3/443.
42 ROA/1/184.

06-11-09 Randolph indigent; change of attorneys to PD (Brown).[44]
07-15-09 Randolph attorney from Florida associates with PD (Galanter).[45]
08-05-09 PD withdraws.[46]
08-19-09 Galanter admitted pro hac vice, and associates Brent Bryson.[47]
09-23-09 State motion to admit bad act evidence. State has facts of Utah case from "trial transcripts, officers' reports and witness statements."[48]
03-17-10 Hearing where Randolph asserts he does not have "trial transcripts, officers' reports and witness statements," relating to Utah case.[49]
03-17-10 Bail issue raised; needs to help with defense. Motion denied.[50]
04-??-10 CCDC removed Randolph from pain medication.[51]
07-20-10 Randolph motion to exclude McGuire testimony per Utah law.[52]
07-30-10 Randolph again asserts at hearing that he does not have "trial transcripts, officers' reports and witness statements," relating to Utah case which State claimed on 9-23-09 to have in its possession.[53]
07-30-10 Court allows McGuire to testify at *Petrocelli* hearing.[54]
07-30-10 *Petrocelli* hearing.[55]
09-22-10 Decision allowing evidence of Becky and Tarantino cases.[56]
11-28-11 Randolph motion to argue last at penalty phase.[57]
11-28-11 Motion to prohibit peremptories to death certify jury.[58]
11-28-11 Motion to challenge lethal injection.[59]
01-06-12 Motion to withdraw counsel. Denied.[60]

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43 ROA/2/266.
44 ROA/2/300, 305.
45 ROA/2/312, 318.
46 ROA/2/326.
47 ROA/2/330.
48 ROA/2/361, 365.
49 ROA/3/476.
50 ROA/3/477, 483.
51 ROA/3/572.
52 ROA/3/487.
53 ROA/3/499-500. (Conley gave copies of his files to O'Kelly, ROA/10/2185)
54 ROA/3/501.
55 ROA/3/490.
56 ROA/3/575.
57 ROA/3/634.
58 ROA/4/681.
59 ROA/4/688.
60 ROA/5/1051.

02-10-12 Bryson and Galanter motions to withdraw.[61]
02-13-12 Motions to withdraw granted.[62]
02-27-12 Reed confirmed as counsel.[63]
??-??-12 Defense receives copies of witness statements for first time.[64]
07-06-12 Randolph motion for reconsideration of bad acts.[65]
08-03-12 Order denying motion for reconsideration re bad acts.[66]
09-10-12 Randolph asks court to move things along.[67]
04-22-13 Hearing on motion to withdraw counsel. Denied[68]
09-05-13 Randolph renewed motion to reconsider bad acts.[69]
09-18-13 Order allowing Randolph access to laptop.[70]
10-02-13 Hearing on Randolph renewed motion to reconsider bad acts.[71]
11-20-13 Findings of Fact on bad action motion. Denied.[72]
01-08-14 Randolph request for continuance. State withholding evidence.[73]
02-24-14 Randolph motion to supplement *Petrocelli.*[74]
03-06-14 Hearing on Motion to supplement *Petrocelli.*[75]
03-27-14 Reed motion to withdraw as counsel for Randolph.[76]
04-02-14 Schieck confirms as Randolph counsel.[77]
03-29-16 Randolph MIL to preclude reference to PBA as "murder cases" or "murder for hire" cases.[78]

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61 ROA/6/1133, 1137.
62 ROA/6/1161.
63 ROA/6/1166.
64 ROA/10/2082, 2086-2087.
65 ROA/6/1240.
66 ROA/6/1301.
67 ROA(Sealed)/7/1420.
68 ROA/8/1751, 1758.
69 ROA/7/1501.
70 ROA/8/1562.
71 ROA/8/1727.
72 ROA/9/1764-1765.
73 ROA/9/1820.
74 ROA(Sealed)/9/1834. (State attaches copies of 8-26-08 witness statements which it falsely claims it did not have until after the *Petrocelli* hearing of 8-16-10.)
75 ROA/10/2081.
76 ROA(Sealed)/10/2096.
77 ROA/10/2104, 2111.
78 ROA/10/2177.

03-29-16 Randolph motion to supplement *Petrocelli.*[79]
01-23-17 Hearing on MIL to refer to PBA as Utah case and Tampering With Witness; granted.[80]
04-05-17 Randolph motion re jury selection.[81]
06-12-17 Jury Trial begins[82]
06-14-17 Hearing re PBA (prior bad acts).[83]
06-15-17 Hearing re PBA.[84]
06-16-17 Tarantino Testimony.[85]
06-28-17 Jury Verdict; Guilty of conspiracy and double murder.[86]
06-28-17 Penalty phase begins.[87]
07-05-17 Special Verdict for death.[88]
08-23-17 Judgment Of Conviction.[89]
08-23-17 Warrant of Execution (lethal injection).[90]
08-23-17 Sentencing.[91]
08-23-17 Order of Execution.[92]
08-23-17 Order to stay execution.[93]
08-23-17 Notice of appeal.[94]

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79 ROA/10/2181.
80 ROA/11/2331-2332.
81 ROA/11/2360.
82 ROA/13/2665.
83 ROA/14/3037.
84 ROA/15/3238.
85 ROA/17/3584.
86 ROA/21/4480.
87 ROA/21/4607.
88 ROA/23/5032-5038.
89 ROA/24/5062.
90 ROA/23/5058.
91 ROA/24/5079.
92 ROA/24/5072.
93 ROA/24/5073.
94 ROA/24/5075.

C. DISPOSITION BY THE COURT BELOW

COUNT	CHARGE	SENTENCE[95]
1	Conspiracy to commit murder (NRS 200.010, 200.030)	32-84 months
2	Murder w/use of Sharon Randolph (NRS 200.010, 200.030)	Death + consec. 96-240
3	Murder w/use of Michael Miller (NRS 200.010, 200.030)	Death + consec. 96-240

V

STATEMENT OF RELEVANT FACTS

On May 8, 2008 Randolph and his wife, Sharon, returned home after having dinner out. Randolph stopped in the driveway to let his wife out of the car. When Randolph entered the house a short while later, he found his wife lying face down at the end of the hallway. After seeing shadows, Randolph got his gun and thereafter fired several shots at a masked intruder who then fell into the garage. Additional shots were fired at the intruder after he had fallen in the garage. The intruder was later determined to be Michael Miller, a friend of Randolph's. Randolph called 911 but medical personnel were unable to revive either Sharon or Michael Miller.[96]

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95 ROA/24/5062-5064.

96 ROA/3/577.

The court allowed the state to introduce evidence of a prior prosecution of RANDOLPH for the murder of his second wife, Becky Randolph, where Becky was found dead in her residence. She was found lying on a water bed in the master bedroom with a single gunshot wound to her right temple. Detective Dick Martin moved the gun before crime scene analysts or detectives arrived on the scene, and then tried to recreate the location of the gun. A suicide note was found on the kitchen table downstairs encircled by Becky's wedding ring.[97] Becky had tried to commit suicide before,[98] and had been having an affair with Tarantino, a friend of Becky and RANDOLPH. After RANDOLPH found out about the affair, he started divorce proceedings against Becky, their house was being foreclosed, and Becky had lost her job.[99] He also beat up Tarantino and left his bloody glove at the work place of Tarantino's wife, so she would know that he had avenged the disloyalty of Becky and Tarantino. Tarantino was the main witness against RANDOLPH during his trial for Becky's murder, claiming that RANDOLPH had come up with several scenarios for ways to kill his wife, Becky. However, there was never any contention by anyone that Tarantino was involved in any way in Becky's death, despite all the supposed scenarios where Tarantino was to be the trigger man. And, Tarantino claimed that these plans were being discussed before RANDOLPH

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97 ROA/10/2184-2185.
98 ROA/10/2185.
99 ROA/10/2184.

was even married to Becky,[100] yet his purported purpose was to obtain money from life insurance on Becky's life[101] – insurance that would not even be in place until RANDOLPH married Becky! RANDOLPH was acquitted and Tarantino was later determined by Utah authorities to have borne false witness against RANDOLPH and was a person not to be trusted.

While in prison awaiting trial, RANDOLPH tried to hire a man to again beat up Tarantino, but the man he tried to hire was a undercover agent and he was arrested for "witness tampering." RANDOLPH served some time for that charge, which was eventually reduced to a misdemeanor after the court learned of Tarantino's lies. RANDOLPH ultimately obtained a Utah order expunging all files relating to the Becky and Tarantino prosecutions,[102] and successfully sued Utah authorities for malicious prosecution.

The Nevada court determined that evidence of the Becky and Tarantino prosecutions was relevant and admissible to show knowledge, intent, preparation, plan, motive, and identity "because in the instant case, Defendant admittedly knew (and was friends with) the man who allegedly shot his wife."[103]

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100 See "Course Of Proceedings" above.
101 ROA/17/3597.
102 ROA/3/578-580.
103 ROA/3/584.

VI

SUMMARY OF ARGUMENT

It is the state's position that RANDOLPH solicited Michael Miller to kill Sharon Randolph in a staged burglary, following which he ambushed and killed an unsuspecting Miller. The state further contends that the motive for these killings was over $400,000 in life insurance proceeds on the life of Sharon Randolph.[104]

It is RANDOLPH's position that he is innocent. He did not kill Sharon Randolph or conspire with Miller to kill her, and there was absolutely no evidence presented of a conspiracy between RANDOLPH and Miller to commit murder. He contends that evidence of the Becky and Tarantino prosecutions 29 years earlier was inherently false and unreliable and was improperly admitted in the instant case for no other purpose than to establish in the jury's mind that RANDOLPH was a serial wife murderer, and that its admission violated choice of law rules by ignoring Utah's expungement laws which precluded McGuire (Utah prosecutor) from offering any type of testimony about those matters either at trial or during the *Petrocelli* hearing.

RANDOLPH further contends that the prosecutor committed misconduct throughout the pendency of the case by convincing the court and the jury through false representations that RANDOLPH had killed four or five of his six wives. It

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104 ROA/3/578.

also withheld important exculpatory evidence which would have been invaluable to RANDOLPH during the *Petrocelli* hearing for use in cross-examining McGuire. This information in the form of hundreds of pages of recorded and transcribed witness interviews was not produced to the defense until after the *Petrocelli* hearing.

Additionally, it wrongfully obtained hundreds of pages of the expunged files from the Utah cases in violation of the Utah expungement order, which it used to gain an advantage over the defense in the *Petrocelli* hearing to get an order admitting evidence of the prior Utah prosecutions.[105] Finally, it referred to the prior Utah cases as the murder cases in direct violation of a prior order granting RANDOLPH's motion in limine on that very issue,[106] and referred to the shooting of Miller as an "execution" also in direct violation of a prior court order.

RANDOLPH further contends that jurors were improperly excused for cause and through peremptory challenges because of stated reservations about the death penalty even though they assured the court that they would follow her directions and would return a sentence of death if warranted. He also submits that the death penalty cannot be carried out in this state for various reasons, including but not limited to, problems with the lethal injection protocol under the November, 2017 Execution Manual, and current pending litigation by manufacturers of the lethal

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105 ROA/7/1503.

106 ROA/10/2177.

drugs over whether their products can be used to carry out Nevada's death protocol.

Finally, Randolph asserts that justice delayed is justice denied, and his imprisonment for 8-1/2 years pre-trial without bail violated basic Constitutional rights to a speedy trial, and to meaningfully assist with his defense.

VII

ARGUMENT

A. NO EVIDENCE OF A CONSPIRACY TO COMMIT MURDER

(Standard of Review: de novo)

Claims of convictions which are supported by insufficient evidence are reviewed de novo.[107] We review de novo claims of insufficiency of the evidence.[9] "Evidence is sufficient if, when viewed in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[108] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

RANDOLPH's state and federal constitutional rights to due process of law, equal protection, a fair trial, and right to be convicted based upon only evidence

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107 *United States v. Shipsey,* 363 F.3d 962, 971 n.8 (9th Cir. 2004); *United States v. Bieganowski,* 313 F.3d 264, 291 (5th Cir. 2002).

108 *United States v. Loveland*, 825 F.3d 555, 558–59 (9th Cir. 2016).

establishing guilt beyond a reasonable doubt were violated.[109]

In reviewing an insufficiency of the evidence claim, a court must determine whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.[110] A conviction that fails to meet that standard violates due process.[111]

1. Grand Jury Indictment Not Supported By The Evidence

There was absolutely no evidence presented at trial to support the state's contention that there was ever a conspiracy between Michael Miller and RANDOLPH to kill Sharon Randolph. In fact this very issue was questioned by the grand jury when the case was presented to it on December 16, 2008. The foreperson stated as follows:

> THE FOREPERSON: Mr. District Attorney, we're having a problem deliberating on this, these issues, because we feel we don't have enough information....We're worried about conspiracy issues.[112]

In light of the grand jury's issue regarding the conspiracy count, the district attorney continued the grand jury proceeding to January 6, 2009, when it reconvened the grand jury. At that time, the district attorney presented testimony

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109 U.S. Const. amend. V, VI, XIV; Nevada Const.Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21

110 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Thompson v. State*, 221 P.3d 708, 714-15 (Nev. 2009).

111 *Mikes v. Borg*, 947 F.2d 353, 356 (9th Cir. 1991).

112 ROA/1/77-78.

of Michael Miller's aunt (Vida Miller) to the effect that she was Michael Miller's aunt, he was living with her and her husband at the time of his death, and he was a friend of RANDOLPH's. She testified that Michael did handyman work for RANDOLPH and that developed into a friendship. She said at one point, RANDOLPH left a message on her phone for Michael Miller, stating that Michael had one of RANDOLPH's guns which he would like returned.[113] The district attorney also called Clifton Miller to testify. He was Michael Miller's cousin, and he stated that Michael Miller had told him that the purpose of his relationship with RANDOLPH was to sell pills – Lortab, Xanax, and Oxycontin.[114]

The Indictment alleges conspiracy to commit murder, not to sell drugs. There was no testimony before the grand jury about any conspiracy to commit murder.

2. Conspiracy Not Addressed In Habeas Decision

On March 13, 2009, RANDOLPH brought a petition for habeas relief contending there was insufficient evidence to support the indictment.[115] The court denied the habeas petition without ever addressing the conspiracy issue.[116] Yet, without a conspiracy, there could be no indictment of RANDOLPH for the murder of Sharon because there was no question but that Michael Miller killed Sharon. So,

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113 ROA/1/126-130.
114 ROA/1/137-138.
115 ROA/1/192.
116 ROA/2/279-280.

the only way to indict RANDOLPH for her murder was if he had conspired with Miller to commit her murder. The court committed error in denying the habeas petition.

3. No Evidence Of Conspiracy At Trial

According to this court's case law, conspiracy is "an agreement between two or more persons for an unlawful purpose."[117] Absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy.[118] Conspiracy means an agreement to commit a crime, not commission of the crime. Though that might sound less serious to a layman, lawyers know that the conspiracy charge affects much about trial and sentencing, all to the advantage of the prosecution. Without an agreement, there is no conspiracy.[119] There was no evidence presented at trial that there existed any agreement between RANDOLPH and Miller to kill RANDOLPH's wife, Sharon.

At trial, Michael's aunt, (Vida Miller) testified that Michael was her husband's (Billy) nephew and he had come to live with them in January, 2008.[120] Michael did odd jobs for RANDOLPH, Sharon Randolph, Sharon's daughter

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117 *Thomas v. State,* 114 Nev. 1127, 1143 (1998), *cert. denied,* 528 U.S. 830 (1999).

118 *Doyle v. State,* 112 Nev. 879, 894 (1996); *Garner v. State*, 116 Nev. 770, 780 (2000), *overruled by Sharma v. State*, 118 Nev. 648 (2002).

119 *United States v. Loveland*, 825 F.3d 555, 557 (9th Cir. 2016).

120 ROA/18/3790-3791.

(Colleen), as well as for Vida and Billy.[121] Michael told Vida just prior to his death that he was going to be coming into some money and he would be moving back with his girlfriend who lived in another state.[122] Michael's uncle (Billy Miller) testified at trial that Michael had told him that he and Randolph were going to be coming into some money and that they were going to go out and buy jet skis with it.[123]

There was no paper trail of monies exchanged, no testimony that RANDOLPH had mentioned killing his wife, or evidence that Miller and RANDOLPH had anything but a friendship between them, and perhaps a conspiracy to sell prescription drugs. There was absolutely no evidence that Miller and RANDOLPH had reached an agreement or entered into a conspiracy to kill Sharon.

The government has the burden of proving beyond a reasonable doubt the creation and existence of the conspiratorial agreement, as well as the defendant's entry into that agreement.[124] Furthermore, "[t]he government has the obligation to

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121 ROA/18/3798-3799.

122 ROA/18/3796.

123 ROA/18/3751.

124 *See United States v. Loveland*, 825 F.3d 555 (9th Cir. 2016); *United States v. Moe*, 781 F.3d 1120 (9th Cir. 2015); *United States v. Lennick*, 18 F.3d 814 (9th Cir. 1994).

establish not only the opportunity but also the actual meeting of minds. Mere association and activity with a conspirator does not meet the test." [125]

RANDOLPH submits that in viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could find the essential elements of conspiracy to commit murder beyond a reasonable doubt. Under these circumstances, there is insufficient evidence to support the charge of conspiracy to commit murder. [126] That conviction must therefore be vacated. And, without a conspiracy, the conviction of RANDOLPH for the murder of Sharon cannot stand, and the case must be remanded for a new trial to determine if the shooting of Michael Miller was in self-defense or defense of others.

B. NEVADA VIOLATED UTAH EXPUNGEMENT LAW

(Standard of Review: manifest error)[127]

"....[B]efore evidence of a prior bad act can be admitted, the state must show, by plain, clear and convincing evidence that the defendant committed the offense."[128] In this case, the court held a *Petrocelli* hearing to determine whether evidence of RANDOLPH's prior prosecutions in Utah could be admitted in this

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125 *United States v. Lapier*, 796 F.3d 1090 (2015), *United States v. Espinoza-Valdez*, 889 F.3d 654, 656–57 (9th Cir. 2018).

126 See *Sharma v. State*, 118 Nev. 648, 654, 56 P.3d 868,872 (2002); *Bolden v. State*, 121 Nev. 908, 124 P.3d 191 (2005).

127 *Acosta v. State,* 127 Nev. 1113 (2011).

128 *Petrocelli v. State*, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), *holding modified by Sonner v. State*, 112 Nev. 1328, 930 P.2d 707 (1996).

case in Nevada. The only witness against RANDOLPH who testified at the *Petrocelli* hearing was William McGuire. RANDOLPH contends that Utah law barred William McGuire from testifying at the *Petrocelli* hearing because he was the district attorney who prosecuted RANDOLPH in Utah. RANDOLPH prevailed in those Utah cases and they were expunged pursuant to Utah law. Thereafter, RANDOLPH successfully sued McGuire and others for malicious prosecution in Utah. So, not only was McGuire precluded by Utah's expungement statute from testifying against RANDOLPH in Nevada, he was precluded by bias.

Pursuant to an order of the Second Judicial District Court of Utah, Randolph's court records in the case of Utah v. Randolph (Case No. 88170 6212) and Utah v. Randolph (Case 89170 6277) were ordered expunged.[129] The Davis County district attorney petitioned to open those expunged records, pursuant to Utah Code 77-18-14(9) which states that a court may open the expunged records in the event the person who obtained the expungement is subsequently charged with a felony. On July 16, 2010, the Honorable Glen R. Dawson denied the State of Utah's Petition to open the Defendant's expunged records for the purposes of the instant Nevada case.[130] As such, no records from the Utah case were admissible in the pending Nevada case against RANDOLPH.[131]

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129 ROA/3/487.
130 ROA/3/580.
131 ROA/3/487.

However, unbeknownst to the court in this case, the State already had a plethora of records from the Utah case which had been surreptitiously provided by Conley (detective in the Utah case).

> **Q. (O'Kelley) Oh yeah, absolutely. I'm amazed you can remember what you, what you've told us. Was there anything else that, ah, that you think that...**
> **A. (Conley) You wanna, you wanna, you wanna flip through this real quick?**
> **Q. (O'Kelley) You know I do but we'll do it off, off, ah, recording....[132] (Emphasis added)**

The Nevada district court recognized that Nevada recognizes the full faith and credit clause of the US Constitution,[133] and it recognized that in this case, not only was there a Utah order mandating expungement of the records, but the order was recently affirmed by the Davis County, Utah Court.[134] It went on to state that there was no choice of law issue in this case because Nevada echoes the law in Utah.[135] The court then relied heavily on the holding in the Nevada case of *Zana* for the proposition that while the records, themselves, could not be admitted, persons could testify about their memories of expunged events.[136] Based on this faulty reasoning, the court allowed William K. McGuire to testify at the *Petrocelli* hearing to determine whether or not evidence of RANDOLPH's purported

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132 ROA(Sealed)/38/8289-8290.
133 *Karow v. Mitchell*, 110 Nev. 958 (1994); ROA/3/488.
134 ROA/3/488.
135 ROA/3/488.
136 *Zana v. State,* 125 Nev. 541 (2009).

participation in the Becky "murder" and the Tarantino "witness tampering" could be admitted in the Nevada trial against RANDOLPH for the murder of Sharon Randolph and Michael Miller.[137]

McGuire was the attorney for the state who prosecuted the expunged cases in Utah,[138] and was subsequently successfully sued by RANDOLPH for malicious prosecution after RANDOLPH was acquitted of the Becky "murder."[139] The Nevada court denied RANDOLPH's request to question Mr. McGuire about that subsequent malicious prosecution action, stating that it was collateral matter.[140]

The problem with the court's reasoning on allowing McGuire to testify (setting aside McGuire's obvious bias stemming from RANDOLPH's successful malicious prosecution lawsuit) lies in the fact that Utah's expungement statute is different from Nevada's sealing statute in one very important aspect. The Utah statute ***precludes a state official*** from divulging information contained in the expunged record.[141]

> (5) Unless ordered by a court to do so, or in accordance with Subsection 77-40-109(2), ***a government agency or official may not*** **divulge information** or records which have been expunged regarding the petitioner contained in a record of arrest, investigation, detention, or conviction after receiving an expungement order. (emphasis added)

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137 ROA/3/501.
138 ROA/3/488.
139 ROA/14/3057.
140 ROA/14/3058-3060.
141 ROA/3/488; Utah State Code 77-18-14(5); now, Utah Code Ann. Section 77-40-108.

The Nevada statute contains no such prohibition as to its officials. Instead, it merely restores to the person whose records have been expunged or sealed various enumerated civil rights, not the least of which is the right to answer to any inquiry that he is free of arrest or conviction for the expunged or sealed offense.[142] The Nevada statute applies only to the defendant whose records have been sealed. The Utah statute places prohibitions on state officials and bars them from presenting testimony regarding the sealed records. Mr. McGuire, testified that he was unaware of this prohibition.[143] Nevertheless, in light of the difference between the two statutes, the Nevada court's reliance on the Nevada case of *Zana* to support its decision that McGuire could testify, was misplaced. Moreover, *Zana* involved testimony by prior ***victims*** of similar sexual misconduct as charged in the *Zana* case – not testimony of the attorney who prosecuted a prior case against the defendant.

Mr. McGuire testified during a proffer regarding his testimony that, (1) he did no independent investigation into the Randolph matter in 1986, (2) he gathered no evidence on his own, (3) he had no information regarding the incident or its investigation other than what other investigators told him,[144] (4) the only witness

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142 NRS 179.285.
143 ROA/3/515.
144 ROA/3/509-510.

he talked to when investigating the matter was Mr. Tarantino,[145] (5) the police narrative reports, the official file, and all witness statements were part of the expunged files,[146] and (6) things that he recalls are part of the expunged files.[147]

> MR. GALANTER: ....are you gonna let this witness testify as to matters that are in the expunged record?
> THE COURT: I don't think that's how the State's offering. I think the State is, and correct me if I'm wrong, you're going to offer him as a person who has knowledge of the witnesses who would be available to testify at the time of trial because certainly his record – I mean, he wouldn't be qualified to testify to that himself at the time of trial. Is that correct?
> MR. DASKAS: You're exactly right, Judge. We're not going to ask him to testify about records that had been sealed. I was gonna ask him questions about the Utah investigation, the trial itself and the witnesses who had testified....[148]

The court allowed Mr. McGuire to testify at the *Petrocelli* hearing to determine whether there was clear and convincing evidence that RANDOLPH murdered Becky Randolph which would be admissible as a prior bad act at time of trial.[149] He was also allowed to testify over many objections regarding RANDOLPH's purported attempt to hire a man to "whack" Tarantino.[150]

This objection to McGuire's testimony was renewed on July 30, 2010 at the *Petrocelli* hearing. As the defense argued at that time, "[i]t's a little different than

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145 ROA/3/512.
146 ROA/3/513-514.
147 ROA/3/514.
148 ROA/3/502.
149 ROA/3/519.
150 ROA/3/529, 530-531. (RANDOLPH claimed that by "whack" he meant "beat him up.") ROA/3/533.

what we've got here because first of all we have the statutory mandate. The *Zana* case they're talking about individual percipient witnesses and alleged victims in that case. This particular witness that the State is wanting to call is an official and is clearly barred from testifying under Subsection 5 of the aforementioned code that I cited for this Court."[151] And, furthermore what this witness in essence has to say is based upon what other people have told him, for the most part. He has no first hand personal knowledge of the events which transpired there. In other words, he was not an eyewitness to any alleged misconduct of Mr. Randolph.[152] The Court overruled those objections.[153]

Later, in 2014, RANDOLPH brought to the court's attention that at the time of the *Petrocelli* hearing two years prior, the state had access to eight witness statements taken in 2008 by O'Kelly (Nevada metro) in connection with investigation of the Sharon death, which were never provided to the defense until after the *Petrocelli* hearing. These included a statement by McGuire which could have been used by the defense in cross-examining him at the *Petrocelli* hearing.[154] The Court chose to believe that prior defense counsel had failed to provide the statements to current defense counsel, rather than believe that the prosecution had

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151 ROA/8/1584-1585. Utah Code Title 77, Chapter 18, Section 14, Subsection 5 of the Utah laws as it pertains to expungement. See, also, *State v. Norris*, 48 P.3d 872 (Utah 2001).

152 ROA/8/1585.

153 ROA/9/1764-1765.

154 ROA/(Sealed)/9/1834-2080; ROA/10/2082-2083, 2086-2088.

withheld them.[155] It completely disregarded the fact that prior defense counsel did not cross-examine McGuire at the time of the *Petrocelli* hearing about matters contained in the McGuire 2008 statement, which suggests that RANDOLPH's attorneys were correct, and the prior attorneys did not have those statements![156]

Be that as it may, the point is that pursuant to a Utah statute to which Nevada owes full faith and credit, McGuire as the prosecuting attorney and an employee of the Utah district attorney's office, was absolutely precluded from testifying in Nevada about anything having to do with the prior Utah cases involving either Becky's death or RANDOLPH's attempt to have Tarantino beat up. If the state wanted to bring in evidence of those prior bad acts, they had to have a *Petrocelli* hearing with an actual witness to the events who was not an official of a Utah entity subject to the expungement orders – someone, such as Tarantino, himself.

It was error to allow McGuire to testify at the *Petrocelli* hearing, and therefore, error to admit evidence of the prior prosecutions against RANDOLPH at time of trial, because there had not first been a valid *Petrocelli* hearing.

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155 ROA/10/2092.

156 ROA/10/2184.

C. PRIOR BAD ACT EVIDENCE IMPROPERLY ADMITTED

(Standard of Review: manifest error)[157]

RANDOLPH contends that the court in this case improperly allowed in evidence of prior prosecutions in Utah which had no other effect than to convince the jury that RANDOLPH is a serial wife killer. Such admission was violative of NRS 48.045.

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[158]

In addition to violating Nevada's statute against admission of prior bad acts, RANDOLPH asserts that admission of evidence regarding prior prosecutions in Utah 20 years earlier failed the due process test of fundamental fairness and deprived RANDOLPH of a fair trial in violation of his 5th and 14th Amendment rights as guaranteed by the United States Constitution.[159]

Nevada regards admission of prior bad acts with disfavor.[160] Prior bad acts often force the accused to defend against vague and unsubstantiated charges.[161] A

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157 *Acosta v. State,* 127 Nev. 1113 (2011); *Thompson v. State,* 102 Nev. 348, 351-352 (1986); *Brown v. State,* 81 Nev. 394 (1965).

158 NRS 48.045(2).

159 *Dowling v. U.S.,* 493 U.S. 342, 352 (1990).

160 *Rhymes v. State*, 121 Nev. 17 (2005).

161 *Walker v. State*, 116 Nev. 442 (2000).

presumption of inadmissibility attaches to all prior bad act evidence.[162] The danger is that a jury will convict a person because they feel he is a bad person, and not because he committed the crime at hand. That is exactly what happened in this case.

To overcome the presumption of inadmissibility, the state must prove by clear and convincing evidence that the act or acts occurred. Additionally, the state must prove that the probative value substantially outweighs the danger of unfair prejudice.[163] The test for admitting prior bad acts is (1) the incident is relevant to the crime charged, (2) the act is proven by clear and convincing evidence, and (3) the probative value is not substantially outweighed by the danger of unfair prejudice.[164] The improper admission of bad act evidence is common grounds for reversal,[165] and RANDOLPH contends it is certainly grounds for reversal in this case.

In fact, the state in this case from the very beginning infected the proceedings with suggestions that RANDOLPH was a serial wife killer. That was the state's entire theory. It told the court in its 2009 motion to admit prior bad acts that "Defendant Thomas Randolph has been married six times. Four of his ex-

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162 *Ledbetter v. State,* 122 Nev. 252, 259 (2006).

163 *Petrocelli v. State*, 101 Nev. 46 (1985); *Tinch v. State*, 113 Nev. 1170 (1997).

164 *Fields v. State,* 125 Nev. 785 (2009); *Tinch v. State,* 113 Nev. 1170 (1997).

165 *Rosky v. State,* 121 Nev. 184, 194-195 (2005).

wives are dead."[166] This suggested that RANDOLPH had killed four of his ex-wives. In fact, RANDOLPH was married six times, as follows:

(1) Kathryn Randolph

(2) Becky Randolph (deceased, suicide)

(3) Leona Randolph (deceased, cancer)

(4) Gayna Randolph

(5) Frances Randolph (deceased, surgery complications)

(6) Sharon Randolph (deceased, murder)

Two of RANDOLPH's prior wives are still alive (Kathryn and Gayna). Leona and Frances died from health-related problems. RANDOLPH was acquitted of murdering Becky and her death deemed to be a suicide. Sharon is the subject of the instant action.

But, this case has really always been about Becky's death, not Sharon's. This was revealed in the state's closing argument in the penalty phase where the prosecutor stated, **"[a]t the end of the day, Thomas Randolph deserves to die because Becky Randolph deserved to live...."**[167] It was about the "prior bad acts," with the prosecutor's entire case theory being that RANDOLPH killed Becky and was a serial wife murderer. It knew it didn't have the evidence to win on its case for Sharon's murder without the prior bad acts relating to Becky's

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166 ROA/2/362.

167 ROA/23/4987.

death, because there was never any evidence of a conspiracy between RANDOLPH and Miller to murder Sharon. (discussed above) Without the conspiracy, Miller is the lone murderer of Sharon, and RANDOLPH who walked in on the event was justified in defending himself by killing Miller who was robbing his house and had just shot his wife.

The two prosecutions (prior bad acts) which the court allowed to come into evidence in this case, were (1) the death of Becky which the state claimed had been the result of RANDOLPH shooting her in the head and then staging it to look like a suicide, and (2) RANDOLPH's attempt to hire someone to "whack" Tarantino because (according to Tarantino and the state) RANDOLPH had previously discussed his plans to kill Becky with Tarantino, so RANDOLPH wanted Tarantino killed to get rid of the "evidence" against him.

As stated above, RANDOLPH did not kill Becky. He was tried for that murder and acquitted. William McGuire was the prosecutor. Scott Conley was a Utah detective who investigated Becky's death.[168] After RANDOLPH was acquitted, he sued McGuire and Conley for malicious prosecution and won.[169] Conley saved his records in violation of Utah's expungement laws, and then

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168 ROA/17/3551-3556.

169 ROA/10/2184.

worked with Nevada police and prosecutors to seek his vengeance against RANDOLPH in this case.[170]

As to the Tarantino issue, RANDOLPH did not attempt to hire someone to kill Tarantino. He attempted to hire someone to "whack" Tarantino, which RANDOLPH intended to mean beat him up.[171] And, the motivation for that was because Tarantino had not only slept with his wife, Becky, which led to RANDOLPH divorcing Becky and them losing their home, arguably leading to Becky's despondency and suicide. But, on top of that, Tarantino lied to police about RANDOLPH, telling them that RANDOLPH had discussed several different scenarios for killing Becky. He did this because he knew what he had done to RANDOLPH and he was afraid of him,[172] so he figured if he framed him for Becky's murder, he could get him out of the way for good.

The Utah Attorney General and the courts both found that Tarantino was a liar and that the whole prosecution of RANDOLPH was unfounded and maliciously undertaken.

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170 ROA/10/2184-2185.
171 ROA(Sealed)/39/8377-8378.
172 ROA/17/3610.

> The information tends to show that the investigating officer was dishonest in his investigation, **that witnesses Williams and Tarrantino are self-serving, conniving and dishonest**, and that the defendant [Randolph] was a victim of the system and forced into tampering with a witness in order to protect himself.[173] (emphasis added)

Despite all of this, the Nevada court in this case allowed in evidence of the Becky murder prosecution (where RANDOLPH was acquitted), and the Tarantino witness tampering (which was determined by the Utah authorities to be justified, and ultimately reduced to a misdemeanor). These are discussed separately below.

1. Tarantino Witness Tampering

As stated above, Tarantino is a liar. This was documented by a Utah Court which issued a ruling as follows:

> The information tends to show that the investigating officer [Conley] was dishonest in his investigation, that witnesses Williams and Tarrantino are self-serving, conniving and dishonest, and that the defendant **[Randolph] was a victim of the system and forced into tampering with a witness in order to protect himself.**[174] (emphasis and parentheticals added)

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173 ROA/2/411.

174 ROA/2/411, 7/1511-1513.

Additionally, the Assistant Attorney General of Utah wrote:

> I was asked to write a letter concerning Tom Randolph, specifically describing why his criminal sentence was overturned by the Second District Court for the State of Utah. I represent the State of Utah in my capacity as an Assistant Attorney General for the State of Utah. I became involved in representing the State on a writ of habeas corpus that Tom Randolph filed. **In my review of his case it became evident that he had been illegally sentenced based upon factual allegations that were untrue but adopted by the judge.** I reviewed the case with Carvel Harward, the Davis County Attorney that prosecuted the case. **We jointly decided that Mr. Randolph had been illegally sentenced and we stipulated to a new sentencing.** Part of this procedure was to clear up alleged facts that were not correct.[175] (emphasis added)

Against this backdrop, we have the witness tampering charge against RANDOLPH which arose out of his attempt from jail to hire someone to beat Tarantino up. Witness tampering has absolutely nothing to do with the case at bar, and was merely an end-run attempt to get in evidence to show that RANDOLPH is a bad guy.

The whole "witness tampering" incident came about because of a vendetta which developed between Tarantino and RANDOLPH who were once friends, over their mutual interest in Becky. RANDOLPH met Becky in 1981 when they were both working at Albertsons.[176] During the time they were dating, Becky had a nervous breakdown.[177] She attempted suicide and was put in a mental health

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175 ROA/2/414, 7/1503.
176 ROA(Sealed)/38/8230-8231.
177 ROA/22/4681.

program.[178] RANDOLPH met Tarantino in 1982 when the two of them worked together at Timberline Cabinets.[179] **Tarantino claimed that RANDOLPH began talking to him about various scenarios to kill Becky when he first met Tarantino, which was before RANDOLPH and Becky were even married!!!!**[180] RANDOLPH and Becky weren't married until April, 1983.[181] At some point after that, Tarantino started having an affair with Becky,[182] and in August, 1984 he tried to kill her by starting a fire in a trailer where she was sleeping, presumably to keep Tarantino's wife from finding out about the affair.[183] RANDOLPH found out about the affair and beat up Tarantino.[184] He left the bloody gloves he used to beat up Tarantino at the office of Tarantino's wife to let her know that they had both been avenged.[185] He also separated from Becky, and quit making payments on their home. Becky had lost her job and was despondent. On November 6, 1986, she went to RANDOLPH and Becky's home which was in foreclosure (with all utilities turned off), went upstairs to their bedroom, and committed suicide by shooting herself one time in the head. She left a suicide note

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178 ROA(Sealed/5/1001.
179 ROA/2/366.
180 See "Course Of Proceedings" above.
181 ROA(Sealed)/38/8232, 39/8438.
182 ROA/2/367, 3/558-559, 17/3598, 3613.
183 ROA/2/366, 22/4693, 22/4707, 22/4712. (Tarantino ultimately received an immunity agreement for this attempted murder. ROA/14/3057, 38/8263, 38/8266-8267)
184 ROA/17/3600, 22/4706.
185 ROA/17/3600-3601.

downstairs on the counter with her wedding ring wrapped around it. A stated above, Becky had attempted suicide before.[186]

Tarantino was mad because RANDOLPH had beat him up, and so he decided to try to pin Becky's death on RANDOLPH. He made up stories which he told to the police (Conley) and prosecutors (McGuire) claiming that RANDOLPH had wanted Tarantino to kill Becky so he could get the life insurance money and that RANDOLPH had come up with many scenarios which he discussed with Tarantino for killing her, including burglary gone bad, shooting accident, slip and fall over a steep canyon, to name a few.[187]

These stories were believed by the authorities who arrested and prosecuted RANDOLPH for Becky's murder.[188] This incensed RANDOLPH who was completely innocent, so that he attempted to hire someone from jail (where he was awaiting trial for the Becky murder because of Tarantino's lies) to go and beat up Tarantino again.[189] The person that RANDOLPH tried to hire turned out to be an undercover police agent who was going to accept the pink slip to a car as payment for beating up Tarantino.[190] Since RANDOLPH was in jail, he had his girlfriend

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186 ROA(Sealed)/5/1001.

187 ROA/17/3594, 3596.

188 RANDOLPH was ultimately acquitted of all charges and sued the Utah authorities for malicious prosecution, and won.

189 ROA(Sealed)/39/8377-8378.

190 ROA/17/3623, 17/3626-3631.

(Wendy Moore) deliver the registration papers to the "hit man."[191] She was arrested by the undercover officer when she met up with him.[192] RANDOLPH pled guilty to witness tampering[193] in exchange for dropping all charges against Wendy Moore,[194] who knew nothing about the scheme, and just thought she was delivering papers to a friend of RANDOLPH's who was going to help with his legal defense.[195]

The district attorney in this Nevada case, argued that the Utah case was probative to show common plan in the death of Michael Miller – that RANDOLPH learned from his previous mistake that he should not leave an accomplice alive, and that's why he killed Michael Miller.[196] However, there was never any allegation that Tarantino was an accomplice or participated in any way in bringing about Becky's death. So, supposedly, according to the state, RANDOLPH was trying to kill Tarantino to quiet him from talking about unsubstantiated fantasies -- that RANDOLPH had discussed killing Becky with Tarantino, before RANDOLPH was even married to Becky. As stated above, the Utah authorities determined that these rantings of Tarantino were nothing but lies.

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191 ROA/37/8277-8278.

192 ROA/17/3623-3631, 38/8277-8278.

193 ROA/3/539. He pled guilty to witness tampering, which was reduced to a misdemeanor after RANDOLPH completed his probation.

194 ROA(Sealed)/39/8380; ROA/17/3631.

195 ROA/17/3627.

196 ROA/2/373.

The Nevada court in this case allowed in evidence of the witness tampering charge against RANDOLPH which occurred over 20 years ago in Utah. In so doing, the Nevada court reasoned that RANDOLPH's solicitation of someone to "kill" Mr. Tarantino was similar to the instant Sharon case where the allegation was that RANDOLPH befriended Michael Miller to try to solicit him to kill his wife.[197] The Nevada court went on to state, "[w[ell, this time instead of having to get someone else to kill the wife, such as what's alleged in the Utah case, he, as the State alleges killed the hit man himself, okay."[198] The court was mixing apples and oranges. First of all it extrapolated RANDOLPH's solicitation of someone to beat up Tarantino (for sleeping with his wife) to hiring someone to kill Becky, and said that was like this case. But, there was never any allegation in the Utah case that a hit man killed Becky. There was never an allegation that any third party, Tarantino or otherwise, was involved in Becky's death. The theory in Utah was that RANDOLPH killed Becky and made it look like a suicide. He was acquitted of that. There was no hit man involved at all. So, there was no reason for RANDOLPH to try to get rid of Tarantino for being the hit man, because there was never a scenario where it was contended by anyone that Tarantino was the one who killed Becky. There was no conspiracy between RANDOLPH and Tarantino to

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[197] ROA/16/3439. (Absolutely no evidence of this "conspiracy" as discussed above.)

[198] ROA/16/3439.

kill Becky. RANDOLPH wanted to beat up Tarantino for telling lies about him and sleeping with his wife.

The test for admitting prior bad acts is (1) incident is relevant to the crime charged, (2) act is proven by clear and convincing evidence, and (3) probative value is not substantially outweighed by danger of unfair prejudice.[199]

It is difficult to understand why the Nevada court allowed in evidence of the Tarrantino witness tampering. She specifically said she wasn't allowing it in for common plan or scheme.[200] Then, on several different occasions, the court said that she was admitting the evidence because "...the murder for hire plot [witness tampering] is relevant to show knowledge, intent, preparation, plan, motive, and identity because in the instant case....Defendant admittedly knew (and was friends with) the man who allegedly shot his wife. Thus, the fact that Defendant wanted to have Tarantino killed (a man with whom Defendant spoke with (sic) regarding killing his wife in a staged burglary) in the Utah case is relevant to the crime charged."[201]

First of all, this makes no sense. The Court was assuming that Tarantino killed Becky, and that RANDOLPH hired him to do it. But, such was not the case. There was never an allegation that Tarantino shot Becky. So, there would be no

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199 *Fields v. State*, 220 P.3d 709 (2009); *Tinch v. State*, 113 Nev. 1170 (1997).
200 ROA/16/3429.
201 ROA/3/584.

reason for RANDOLPH to kill Tarantino to keep him from talking about a plot to kill Becky. There was never any agreement between RANDOLPH and Tarantino to kill Becky, Tarantino did not kill Becky, and such was never alleged. So, there was nothing about the Utah case that was relevant in any way to the Nevada case, as regards Tarantino. Moreover, everything that Tarantino said about the purported conversations with RANDOLPH to kill Becky, was highly suspect, in light of the Utah attorney general letter and the ruling by the Utah court, both of which found that Tarantino was a liar, and that RANDOLPH had been framed. Moreover, even if true, talk is cheap. Talking about killing someone and actually doing it are two different things. And, as stated above, Tarantino was claiming that RANDOLPH was talking to him about killing Becky before RANDOLPH was even married to Becky, all for the supposed purpose of getting life insurance money when there was not even a policy in effect! The lies from Tarantino were rampant.

Second of all, we have no clear record from the Nevada court as to the purpose for which the Tarantino witness tampering incident was being admitted. First, the court said it was not being admitted to prove common plan.[202] Then, the

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202 ROA/16/3429.

court said it was being admitted to prove knowledge, intent, preparation, plan, motive, and identity.[203]

a. Knowledge

The court said it was relevant to show **knowledge** because in both cases RANDOLPH knew the man ***who shot his wife***.[204] Once again, there was never an allegation that Tarantino shot Becky. RANDOLPH did not know two men who ended up killing his wives. That is just not true. The court was obviously confused about the facts. Additionally, this is not a correct application of the "knowledge" exception. The knowledge exception turns on an absence of mistake, as where it is used to show knowledge of a fact material to the specific crime charged. Thus, evidence of previous instances of possession of drugs might be used to show the defendant's knowledge of the controlled nature of a substance, when such knowledge is an element of the offense charged.[205] In the case at bar, the fact that RANDOLPH knew Tarantino had no tendency in reason to prove any fact material to the instant case. As stated above, Tarantino did not shoot Becky, and RANDOLPH's friendship with Tarantino did not in any way prove a conspiracy between RANDOLPH and Miller to kill Sharon.

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203 ROA/3/584.

204 ROA/3/584.

205 *Cirillo v. State,* 96 Nev. 489, 492 (1980).

b. Intent

The court said it was relevant to show **intent** that RANDOLPH did not kill Miller in self-defense, but to get rid of a witness to the plot who might talk.[206] But, there was never any evidence or even a claim that Tarantino was in any way involved in or knew about the so-called plot to kill Becky. Tarantino and RANDOLPH were not even friends at the time that Becky died, and Tarantino lived on the other side of the country.[207] RANDOLPH wanted to have Tarantino beaten up not because of some plot the two of them ever had to kill Becky, but because Tarantino had slept with his wife and was trying to frame him for her death. This was acknowledged by the Utah authorities after RANDOLPH was acquitted of her murder.

c. Preparation

There was no issue regarding **preparation** and the court never indicated that she was admitting the evidence to show preparation.

d. Motive

The court said it was relevant to show **motive** because there were life insurance policies on both Becky and Sharon.[208] However, the witness tampering case was not necessary to show motive, and was not relevant as to insurance

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206 ROA/3/585.
207 ROA/17/3605.
208 ROA/3/584-585.

policies. All the state had to do to show motive in the Nevada case was to show that there was a life insurance policy on Sharon with RANDOLPH as the beneficiary.

e. Identity

"As this court explained in *Mortensen v. State*, modus operandi evidence falls within the identity exception to NRS 48.045(2). Generally, modus operandi evidence is proper in 'situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial.'"[209]

The court in this case could not have admitted the witness tampering evidence to show **identity** because there was no issue of identity in the Nevada case. It was undisputed that Miller shot Sharon, and then RANDOLPH shot Miller. Identity was not an issue.

f. Common Plan

Clearly, the evidence was not admissible to show **common plan.** The common scheme or plan exception of NRS 48.045(2) is applicable when both the prior act evidence and the crime charged constitute an integral part of an overarching plan explicitly conceived and executed by the defendant. The test is not whether the other offense has certain elements in common with the

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209 *Rosky v. State,* 121 Nev. 184, 196-97 (2005).

crime charged, but whether it tends to establish a *preconceived plan* which resulted in the commission of that crime.[210] There was no plan commencing in 1986 with the death of Becky, to kill Sharon in 2008! This is just ridiculous. And, in the Utah case, the allegation was that RANDOLPH killed Becky. The Nevada case occurred 22 years later and involved a third party killer (Miller). The Utah case in no way tended to show a preconceived plan **in 1986** to kill Miller or Sharon in 2008, both of whom RANDOLPH didn't even know until 2007![211]

For all the foregoing reasons, it was reversible error for the district court to allow into evidence testimony about the witness tampering incident which occurred more than 20 years prior to trial, and which the Utah authorities found to be highly suspect.

2. Becky Death

The second piece of evidence that was admitted over objection in the instant Nevada case was testimony about the trial in Utah where RANDOLPH was acquitted of murdering Becky. This was admitted after several motions by three sets of RANDOLPH attorneys to exclude the testimony, and so many unbelievable representations by the prosecution, that it is almost impossible to relate the events in a cogent manner for this Honorable Court.

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210 *Ledbetter v. State,* 122 Nev. 252, 260-61 (2006).

211 *Nester v. State,* 75 Nev. 41, 47 (1959)(The offense must tend to establish a preconceived plan which resulted in commission of the charged crime.)

In August, 2008, Detective O'Kelley (LVPD) interviewed several witnesses in Utah in recorded statements. One of the persons who was statementized was William McGuire (Utah prosecutor). These statements had not been produced to the defense over a year later when the state on **September 23, 2009** brought its motion to admit bad act evidence.[212] The state argued that the evidence should be admitted to prove motive and common plan that RANDOLPH killed his wives to get their insurance proceeds.[213] In the motion papers, the state referred to details surrounding the Utah case which it could have only gleaned from the actual records, which had been expunged and should not have existed.[214] For instance, the state knew that RANDOLPH last saw Becky alive at 3:30 p.m. on November 6, 1986, that RANDOLPH was arrested for DUI at 3:11 a.m. on November 7, 1986, that he was booked into jail at 5:36 a.m., and that he was released at 12:22 p.m. on November 7, 1986. It knew that he called police on November 7, 1986 at 2:09 p.m. after finding Becky's body.[215] These are details that could not possibly be remembered by anyone 20 years after the fact without reference to records which had been expunged by the Utah courts. These records were obviously in the possession of Nevada prosecutors which were denying to the court[216] and to the

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212 ROA/2/361.
213 ROA/2/369-370.
214 ROA/2/366.
215 ROA/2/366.
216 ROA/3/483, 7/1382-1383.

defense[217] that they had such records. In fact, the state out of one side of its mouth, admitted that it had these records, while telling the court and defense counsel out of the other side of its mouth, that it didn't have those records.

> The facts from the Utah case are gleaned from **trial transcripts**, officers' reports and witness statements.[218] (emphasis added)
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> .....
>
> THE COURT: Are you saying you don't have it?
> MR. DASKAS: That's correct, judge.[219]

Unbeknownst to the defense or the court, these records had been provided by Scott Conley (Ogden PD) to O'Kelly (Nevada detective) during his 2008 interview.

Conley admitted knowing about the expungement order but claimed he had never been personally served with it.[220] However, the Ogden police department certainly had, and Conley was a detective with that governmental agency at the time it was served. Conley offered to let O'Kelly flip through his file, but they opted to do it ***off recording***.[221]

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217 ROA/3/476.

218 ROA/2/365, fn1. (This was a footnote contained in the state's 9-23-09 motion to admit bad acts prepared by the Nevada prosecutor, Mr. Daskas. ROA/8/1736-1737)

219 ROA/7/1382-1383.

220 ROA(Sealed)/38/8266-8267, 38/8270.

221 ROA/10/2184-2185.

Q. (O'Kelley) Oh yeah, absolutely. I'm amazed you can remember what you, what you've told us. Was there anything else that, ah, that you think that...
A. (Conley) You wanna, you wanna, you wanna flip through this real quick?
Q. (O'Kelley) You know I do but we'll do it off, off, ah, recording....[222] (Emphasis added)

A *Petrocelli* hearing was conducted on **July 30, 2010.**[223] The only person who testified at that hearing was William McGuire.[224] His statement taken by O'Kelley more than a year before had still not been provided to the defense, so it did not have that information for cross examination of McGuire. Moreover, the defense objected to McGuire testifying because his testimony violated the Utah expungement laws (discussed above).[225] In allowing the evidence to come into evidence, the court relied heavily on the Nevada case of *Zana v. State*,[226] where prior bad acts of criminal proceedings had been admitted even though the records had been sealed or expunged. **On September 22, 2010** the court issued its decision finding that the Utah case was relevant and admissible while noting that the state was not seeking its admission to prove that RANDOLPH killed Becky.[227] It found it was admissible to show **motive** because RANDOLPH was the

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222 ROA(Sealed)/38/8289-8290.
223 ROA/3/500.
224 ROA/3/542-543.
225 ROA/3/542-543.
226 *Zana v. State,* 125 Nev. 541 (2009).
227 ROA/3/584.

beneficiary of the life insurance policies on Becky and Sharon.[228] The court also found that the death of Becky was relevant to show **preparation, plan, and knowledge**, because there were striking similarities between the two cases, to wit: (1) defendant discovered the body, (2) victim was shot in the head, (3) Randolph was the beneficiary of the life insurance policies, and (4) there was a triangle of defendant, acquaintance of defendant and the wife.[229] Then, the court made a finding that the state had proved by clear and convincing evidence that RANDOLPH killed Becky.[230]

Regarding motive, it was not necessary to bring in the Becky evidence. All that was needed to show motive, was the insurance policies that pertained to Sharon. They were all before the jury admitted into evidence as exhibits.

Regarding preparation, the Becky evidence was completely unlike the Sharon scenario. In the Becky scenario, the allegation was that RANDOLPH killed Becky. In the Sharon scenario, the allegation was that RANDOLPH hired Miller to kill Sharon. The only similarities between the two scenarios was that RANDOLPH was married to the victims.

Regarding plan, there was no evidence of any plan to kill Sharon which relating back 20 years to the time when Becky was found dead.

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228 ROA/3/584-585.
229 ROA/3/586.
230 ROA/3/588.

Regarding knowledge, the court apparently felt that because RANDOLPH knew Miller, that somehow tied back to the fact that he also knew Tarantino. However, there was never any contention that Tarantino had anything to do with Becky's death.

It almost seemed that the court was finding the Becky scenario was admissible because RANDOLPH and Becky had a friend (Tarantino) and RANDOLPH and Sharon had a friend (Miller). But, that's where the similarities end. Woe be to anyone who has a friend. While Miller robbed and shot Sharon, that was not the scenario in the Becky incident. Becky was found dead in her bed with a gun in her hand and a suicide note on the table. Tarantino was on the other side of the country at the time. The court thought it was important that in both cases RANDOLPH found the body. But, in Becky's case, RANDOLPH found a corpse a day after her life ended. In Sharon's case, he walked in on the crime as it was being committed and tried to save his dying wife.

On July 25, 2012 the defense brought a motion for reconsideration of the bad act issue asserting that it wanted to have a chance to question Tarantino who is the one who would actually be testifying at time of trial.[231] The court found there was no legal basis for reconsideration because there was nothing new.[232]

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231 ROA/7/1433.

232 ROA/7/1438-1439.

On September 5, 2013 the defense brought a renewed motion for reconsideration where it brought to the court's attention the Utah court ruling and the letter from the Utah Attorney General calling into question the reliability of Tarantino. It also argued that the court granted the bad acts motion based on evidence which it should not have considered because of the Utah expungement order, and that the state was in possession of information from the Utah case which it should not have had.[233] That motion was denied.[234]

On February 24, 2014 the defense filed a motion to supplement the *Petrocelli* hearing and attached under seal, copies of the statements of the Utah witnesses (taken by O'Kelley in 2008) which were not available to the defense at the time of the *Petrocelli* hearing, and which it could have used to cross examine McGuire.[235] The state denied withholding those statements and claimed that they had been provided to the defense prior to the *Petrocelli* hearing.[236] The defense denied receiving them.[237] The court said, "frankly, I feel more confident that the State would provide you with their file then (sic) perhaps defense counsel providing you with their complete file."[238] **On March 29, 2016** the defense pointed out that if the prior defense counsel had had the 2008 statements, they

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233 ROA/7/1503, 1511-1513.
234 ROA/8/1736.
235 ROA(Sealed)/9/1834-2080.
236 ROA/10/2085.
237 ROA/10/2086-2087.
238 ROA/10/2092.

would assuredly have used them to impeach McGuire, and the fact that it did not was evidence that the defense did not have those 2008 statements.[239] It listed various matters in the statements which were previously unknown to the defense and which it could have used at the *Petrocelli.*[240]

On April 4, 2017, the defense brought supplemental *Petrocelli* authority to the attention of the court by informing the court of the recently decided *Cooney* case (discussed below).[241] The court was undaunted, and Tarantino and others were permitted to testify regarding the Becky incident at RANDOLPH's trial.[242]

3. Danger Of Prejudice Outweighed Probative Value

Even if the Court finds that the evidence was relevant to show knowledge, intent, preparation, plan, motive, and identity, RANDOLPH contends that its probative value was completely outweighed by the danger of unfair prejudice. In the case of *Cooney v. State*, this Court held that evidence of charges brought 20 years before for which the defendant had been acquitted ***were improperly admitted*** and constituted an abuse of discretion because the danger of unfair prejudice was great. It reasoned that such error could only be deemed harmless if it could conclude *beyond a reasonable doubt* that the jury would have reached the same

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239 ROA/10/2183, 2184.
240 ROA/10/2184-2185.
241 *Cooney v. State,* 392 P.3d 165 (Nev. 2017, unpublished disposition).
242 ROA/16/3511 (McGuire), 17/3550 (Conley), 17/3584 (Tarantino), 17/3621 (Moore).

result if the error had not occurred.[243] Accordingly, the judgment of conviction was reversed and remanded. Such is the case here.

> We hold the district court abused its discretion in concluding the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice. The incident occurred over 20 years ago, and Linda was acquitted of all charges.[244]

In *Cooney* the trial court allowed in evidence that the defendant had shot and killed her ex husband 20 years earlier (in 1992) with the same gun she used in self defense to shoot her son (in 2011). She had used the same self-defense argument in the 1992 case, for which she had been acquitted. On appeal, this Court held that admission of evidence of the prior 1992 incident constituted an abuse of discretion. It found that evidence that demonstrated the defendant was familiar with the gun could have been presented to the jury without disclosing the 1992 shooting. It further held that the evidence was unquestionably unfairly prejudicial to defendant's case, and implied that defendant was wrongfully acquitted in the previous trial. It stated that, "[g]iven the gravity of the 1992 incident, and the evidence's minimal probative value, we have no doubt that the principal effect of

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243 *Cooney v. State,* 392 P.3d 165 (Nev. 2017, unpublished disposition, Docket No. 66179); See, also, *Rosky v. State,* 121 Nev. 184, 198 (2005); *Longoria v. State,* 99 Nev. 754, 757 (1983).

244 *Cooney, supra,* at 2.

such evidence was to emphasize Linda's bad character or her predisposition to commit violent crimes."[245]

Like *Cooney*, this case involves charges that were more than 20 years old at the time of trial. And, like *Cooney*, RANDOLPH was acquitted of those charges. As in *Cooney*, the evidence was so prejudicial, that it would be impossible to say beyond a reasonable doubt that RANDOLPH would have been convicted if the prior evidence had not been admitted. As in *Cooney*, RANDOLPH's convictions should be reversed and remanded for a new trial where this 20-year-old highly suspect and prejudicial evidence is excluded.

D. RANDOLPH HELD WITHOUT BAIL FOR OVER EIGHT YEARS

(Standard of Review: de novo)[246]

RANDOLPH was arrested in Utah on January 7, 2009.[247] His jury trial did not commence until June 12, 2017.[248] He was held without bail that entire time – over eight years! RANDOLPH contends that his statutory (and perhaps Eighth Amendment) right to bail, and his Sixth Amendment right to a speedy trial were both infringed by this lengthy pre-trial incarceration.

On April 1, 2009 there was a bail hearing. At that time, the defense pointed out that this was a circumstantial case and there was no evidence of any

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245 *Cooney, supra.*

246 *United States v. Corona-Verbera,* 509 F.3d 1105, 1114 (9th Cir. 2007).

247 ROA/1/185.

248 ROA/13/2665.

conspiracy.[249] Incredibly, the state argued that RANDOLPH was a danger because he had killed four of his previous six wives, and that he was a flight risk because he was facing the death penalty.[250] This type of circular reasoning would deny bail to any person once the state files a two-page document asserting that it will be seeking the death penalty. The court denied RANDOLPH's request for bail because "there is sufficient evidence which would show a great or high likelihood of conviction, [and] the Court notes that there is no dispute in this particular case, that Mr. Randolph did in fact kill Mr. Miller."[251] The court also noted that RANDOLPH had similar charges brought against him in the past, and because of the death penalty, he was a flight risk.[252] This was outrageous. The fact that RANDOLPH killed Miller was not material, since if RANDOLPH killed him in self defense, the killing was justified. The key issue was whether or not there was a ***conspiracy*** between RANDOLPH and Miller to kill Sharon, and the court never even inquired into that or recognized that as the key issue in the case.

The defense advised the court that RANDOLPH's continued incarceration was interfering with his health because he was not receiving pain medication which he needed for his many ailments.[253] The defense raised this issue again

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249 ROA/2/286.
250 ROA/2/288.
251 ROA/2/290.
252 ROA/2/292.
253 ROA/2/293.

three months later on **August 19, 2009.**[254]

On February 26, 2010, the defense raised the issue of bail once again, asserting that the state was delaying the trial by seeking to admit evidence of prior bad acts.[255] The state asserted that the delay was RANDOLPH's fault for refusing to un-expunge the Utah records![256]

On March 17, 2010, the court conducted a bail hearing at which time the defense alerted the court that RANDOLPH's health was declining and he was hampered by his incarceration from assisting with his defense. Once again, the state argued that RANDOLPH was creating the delay by opposing the unsealing of the Utah records.[257] The court denied the motion to set bail, finding that the motion had been brought before, and the defense had not shown anything new to justify a different result.[258]

On September 20, 2010, the defense once again raised the issue of RANDOLPH's deteriorating health and his incarceration's interference with his ability to assist with his defense.[259]

On March 7, 2013, RANDOLPH brought a pro per motion for medical assistance, stating that he was diagnosed with Hepatitus C in 1994 and that he was

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254 ROA/2/352-353.
255 ROA/3/461.
256 ROA/3/472.
257 ROA/3/476-479.
258 ROA/3/483.
259 ROA/3/572.

declared totally and permanently disabled in 2000.[260]

On April 12, 2016, Dr. Roitman opined that because RANDOLPH had been taken off his regular pain medications by the jail, he was not competent to stand trial because of the intense pain.[261] **On April 18, 2016** the matter was referred to competency court.[262] **On April 20, 2016,** RANDOLPH was found competent to stand trial.[263] **By January 23, 2017** RANDOLPH had put back on pain medications that allowed him to help with defense of his case.[264] By this time, RANDOLPH had been in jail for eight years!!!!

1. **Bail Issue**

The Eighth Amendment to the United States Constitution prohibits the federal government from imposing excessive bail. The excessive bail clause has not been applied to the states. However, the matter is currently pending before the United States Supreme Court in the case of *Timbs v. Indiana,*[265] where the high court will determine if this clause applies to the states within the context of the due process clause of the 14th Amendment. Accordingly, RANDOLPH reserves his right to argue on appeal to the United States Supreme Court in the event the instant appeal is unsuccessful, that his 8th Amendment right to bail was infringed in this

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260 ROA/7/1461.
261 ROA/11/2231-2232, 2274.
262 ROA/11/2287.
263 ROA/40/8602.
264 ROA/11/2336.
265 *Timbs v. Indiana,* 138 S.Ct. 2650 (2018).

case.

NRS 178.484(4) provides that a person arrested for murder may be admitted to bail unless proof is evident or the presumption great that the person committed the murder. The burden lies with the state to supply that proof.[266] The factors to be considered in determining the amount of bail or whether a person should be released without bail are set forth in NRS 178.498 and NRS 178.4853. The court in this case never got to those issues because it determined that proof was evident and the presumption was great that RANDOLPH committed the murders for which he was charged. However, RANDOLPH contends that finding constituted an abuse of discretion in light of the fact that there was no evidence presented of a conspiracy between Miller and RANDOLPH to kill Sharon. Without that conspiracy, there could be no proof that RANDOLPH had anything to do with Sharon's murder or that his killing of Miller was not in self defense.

RANDOLPH recognizes that this Court has held that there is no right to bail in a capital case where the proof is evident and the presumption is great.[267] However, that cannot mean that all the state has to do is give notice that it is seeking the death penalty in order to deny a person bail. That seems to be what happened in this case.

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266 *Howard v. Sheriff of Clark County,* 83 Nev. 48, 50 (1967).

267 *Application of Knast,* 96 Nev. 597, 598 (1980)(right to bail does not exist in capital case where proof is evident and presumption is great).

In *Howard,* this Court held that failure to offer at the preliminary hearing, a murder weapon, fingerprint evidence, ballistic studies, eyewitness testimony, admissions, confessions, or other evidence tending to establish the elements of first degree murder, rendered the court's refusal to set bail, erroneous. This was reiterated in *Wheeler,* where this Court stated that some competent evidence tending to prove the commission of a capital offense must be offered before the accused's right to bail may be limited.[268] In this case, the matter was presented to a Grand Jury which specifically questioned the absence of any evidence of a conspiracy. No such evidence was ever presented by the state, either to the Grand Jury, or at any other time.[269]

Hence, it was reversible error for the court in this case to refuse RANDOLPH's many request to be released on bail.

2. Speedy Trial Issue

The Sixth Amendment to the Constitution provides defendants in criminal matters with the right to a speedy trial.

The Unites States Supreme Court in *Doggett* recognized that, "unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by

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268 *Application of Wheeler,* 81 Nev. 495, 500 (1965).

269 ROA/2/286.

dimming memories and loss of exculpatory evidence.[270] The Court went on to state that, "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify....[and] it is part of the mix of relevant facts, and its importance increases with the length of delay."[271]

This Court recognized that in *Doggett* presumptive prejudice resulted from a delay of 8-1/2 years and constituted a violation of the defendant's Sixth Amendment right to a speedy trial.[272] This is exactly what happened in this case.

The length of the delay triggers the inquiry into the speedy trial issue. Once it is triggered, the court must consider other factors such as (1) reason for the delay, (2) whether the defendant asserted his right to a speedy trial, and (3) prejudice to the defendant.[273]

The **reason for the delay** in this case was several-fold. The state delayed while it attempted to get RANDOLPH's Utah files un-expunged. It stated many times that RANDOLPH held the keys to the jail, so to speak, and that all he had to do to speed things along was to agree to waive his statutory right under Utah law to have his files expunged. The delay was further occasioned by the state's failure to

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270 *Doggett v. United States,* 505 U.S. 647, 654 (1992).

271 *Doggett, supra,* at 655-656.

272 *Middleton v. State,* 114 Nev. 1089, 1110 (1998).

273 *Barker v. Wingo,* 407 U.S. 514, 530-533 (1972); *United States v. Corona-Verbera,* 509 F.3d 1105, 1114 (9th Cir. 2007).

produce documents it had wrongfully obtained from the Utah prosecutor and detective (McGuire and Connely) pertaining to the Utah cases, and its failure through two sets of defense attorneys to produce statements taken by O'Kelley in 2008. Finally, the trial was delayed because RANDOLPH was in so much pain because of his incarceration that he had to be evaluated by outside doctors and the competency court to determine if he was even competent to stand trial given the pain he was experiencing.

RANDOLPH was unable to **assert his right** to a speedy trial because his attorneys were not prepared for trial owing to the recalcitrance of the state in failing to produce all documents and statements it had in its possession, and the inability because of pain for RANDOLPH to meaningfully participate in his defense.

RANDOLPH asserted **prejudice** on many occasions, claiming time and again that he was not receiving adequate medical treatment and that he was impaired in his ability to assist in his defense. Additionally, the more than eight-year delay is presumptively prejudicial.[274]

The delay between arrest and trial in this case was egregious. The state's actions and prosecutorial misconduct (discussed below) were rampant. RANDOLPH has now spent nine years in prison for crimes he did not commit.

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274 *United States v. Corona-Verbera, supra,* at 1116.

His convictions should be reversed and remanded with instructions that bail be set in a reasonable amount (considering his current indigency) so that he can be released pending a new trial in this matter.

E. PROSECUTOR MISCONDUCT

(Standard of Review: abuse of discretion)[275]

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. "[276] "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Implicit in any concept of ordered liberty is the principle that a State may not knowingly use false evidence, including false testimony to obtain a tainted conviction. To prevail on a claim based on *Napue*, a defendant must show that (1) the testimony or evidence was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material. [277]

In the case at bar, there were a multitude of false statements made to the court and to the jury, as well as many failures to follow court rulings, as will be discussed in detail below. As a result, RANDOLPH was denied his right to a fair

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275 *United States v. Steele,* 298 F.3d 906, 911 (9th Cir. 2002). Improper suppression of exculpatory evidence is reviewed de novo. *United States v. Hernandez,* 109 F.3d 1450, 1454 (9th Cir. 1997).

276 *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

277 *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

and impartial trial in violation of the 14th Amendment and his right to due process of law.[278]

1. Vindictive Arrest

The prosecutor and Detective O'Kelley were so imbued with hatred and prejudice for RANDOLPH because of the stories told to them by Conley and McGuire (Utah detective and prosecutor), that they could not be objective in following the facts to a logical conclusion, and instead developed an attitude that the ends justified any means. As RANDOLPH's first wife, Kathryn stated in a **September 16, 1989** letter:

> Detective Connely (sic) repeatedly presented these allegations as facts to me throughout the interview. In retrospect and sparing details, I found many of these allegations to be untrue. It is my opinion that Scott Connely (sic) had to (sic) many personal feelings against Thom to have preformed (sic) his duties with integrity.[279]

And, as stated above twice (because it is so important) Conley had illegally provided O'Kelley copies of the Utah case from Conley's personal file in violation of Utah's expungement laws.

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278 *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

279 ROA/25/5441-5442.

Q. (O'Kelley) Oh yeah, absolutely. I'm amazed you can remember what you, what you've told us. Was there anything else that, ah, that you think that...
A. (Conley) You wanna, you wanna, you wanna flip through this real quick?
Q. (O'Kelley) You know I do but we'll do it off, off, ah, recording....[280] (Emphasis added)

The Nevada prosecutor's outrageous conduct in this case, began with RANDOLPH's arrest. Defense counsel attempted to deal with the Nevada district attorney to get information regarding when the grand jury would meet and to agree to an arranged surrender of RANDOLPH.

> MR. GRASSO: ....And Mr. Stanton told me from the beginning that he was not going to agree to any release conditions or anything, so I moved on from that request and basically was saying, well, when is the grand jury going to meet so that I can tell my client to at least be available?....And I wanted to be able to tell him at least, so that he doesn't have to go through an extradition or anything like that, that hey, the true bill came down and you need to be in town; you need to go to the jail and turn yourself in right now. And he was more than willing to do that.... I remember talking to Mr. Stanton and saying, when's the grand jury going to do it? And the best I ever got was sooner than later....And it was the first week of the new year, basically, that the grand jury met again.... and I didn't know about it until it was too late. I'll tell you who did know about it. *Dateline NBC* and these other people knew all about it, and they were at Mr. Randolph's residence in Utah filming his arrest, and everything was filmed and it was a big, you know, a big event when all that could have been, you know, avoided with just some little bit of back and forth.[281]

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280 ROA(Sealed)/38/8289-8290.

281 ROA/2/284-285.

The district attorney would not agree to an arranged surrender,[282] and refused to disclose the progress of the grand jury. A true bill was issued before the defense could react. RANDOLPH was subject to an unnecessary SWAT raid to arrest him, with NBC news cameras rolling. He was manhandled and tazed during the arrest.[283] Detective O'Kelley actually admitted that when he went to Utah to arrest RANDOLPH he had pre-arranged for Dan Slepian from *Dateline* to ride over with him – a little ride-along!

2. Suggestion That RANDOLPH Was Serial Wife Killer

This hatred of RANDOLPH continued from the beginning of the prosecutor's dealings with the grand jury and the court, right through trial in front of the jury. The state's theory throughout was that RANDOLPH was a serial wife killer. **On January 7, 2009**, the prosecutor told the grand jury that RANDOLPH had been married six times, and four of his wives were now dead, and three of them died under suspicious circumstances.[284] As explained above, this was a lie.

On March 26, 2009 the prosecutor told the judge that RANDOLPH had been married six times, and four of RANDOLPH's wives were dead, two of whom died under suspicious circumstances. He asserted that RANDOLPH had solicited

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282 ROA/1/186.
283 ROA/1/187.
284 ROA/10/2120.

Tarantino to help him kill Becky.[285] That was a lie. Tarantino had nothing to do with Becky's death. He was living in New Hampshire when Becky died in Utah.

On April 1, 2009, the prosecutor told the court that four of RANDOLPH's previous six wives are dead, which meant that if you're married to RANDOLPH, there's a 70 percent chance you're going to die of something other than old age. It went on to state that if you fall within that 70 percent, there's a 50 percent chance you're going to get shot in the head![286] This was outrageous. Two of the four in the 70 percent scenario died of medical causes, and the prosecution was well aware of that. **On September 23, 2009,** the prosecutor again emphasized that four of RANDOLPH's ex-wives were dead,[287] intimating once again that RANDOLPH caused their deaths, and that he was a serial wife killer.

On June 28, 2017, the prosecution upped the ante during the penalty phase by stating that RANDOLPH was married six times, and that as to *five* of those wives, he either attempted to kill, hired someone to kill, or killed five of those women.[288] All lies. Kathryn was RANDOLPH's first wife and the mother of his two children. She is alive.[289] Becky was the second wife and she committed

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285 ROA/2/229.
286 ROA/2/288.
287 ROA/2/362.
288 ROA/21/4616-4617.
289 ROA/21/4617.

suicide. RANDOLPH was acquitted of murdering her.[290] Gayna was the third wife. She is alive.[291] (Actually, Leona was the third wife. She died of cancer. ROA/362, fn.1.) Frances was the fifth wife. She died of complications after heart surgery.[292] She was born with a hole in her heart.[293] RANDOLPH sued the hospital and received a large settlement for Frances' death.[294] Sharon was RANDOLPH's last wife, and the subject of the instant action.

On June 29, 2017 during closing argument for the penalty phase, the state told the jury that Dr. Roitman (Doctor who gave testimony regarding mitigating factors) was unaware of the fact that the defendant had attempted to, hired someone to, or killed five out of his six wives.[295] It stated that the whole reason why RANDOLPH marries women and gets insurance policies, was so he could kill them and gain a profit.[296]

All of these constant statements and assertions to the judge and the jury were deliberate and blatant attempts to inflame the court and the jury. This is prohibited by law and good conscience.[297] "[P]rosecutors 'may not argue facts or inferences

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290 ROA/22/4641.

291 ROA/22/4625. Actually, Leona was the third wife. She died of cancer. ROA/2/362, fn.1.

292 ROA/22/4626-4627

293 ROA/22/4784.

294 ROA/22/4773.

295 ROA/23/4970.

296 ROA/23/4971.

297 *Valdez v. State,* 124 Nev. 1172, 1191 (2008).

not supported by the evidence.'"[298] A prosecutor may not "blatantly attempt to inflame a jury."[299]

3. Improper Use Of Expunged Records

As argued above, the prosecution attempted through the course of the case to improperly use the Utah files which had been expunged by the Utah courts. It denied having records it had previously admitted having. The state advised in its **September, 2009** motion to admit prior bad acts that it gleaned its information regarding the Utah case from trial transcripts, officer's reports and witness statements. As of **March 17, 2010**, none of those documents had been provided to the defense.[300]

The Nevada prosecutors failed to produce transcripts and records of the Utah case which it had obtained from Conley.

> **Q. (O'Kelley) Oh yeah, absolutely. I'm amazed you can remember what you, what you've told us. Was there anything else that, ah, that you think that...**
> **A. (Conley) You wanna, you wanna, you wanna flip through this real quick?**
> **Q. (O'Kelley) You know I do but we'll do it off, off, ah, recording....[301] (Emphasis added)**

The Nevada prosecutors failed to produce statements regarding the Utah case that they had obtained before RANDOLPH was arrested, and which the

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298 *Byars v. State,* 130 Nev. 848, 865 (2014).
299 *Valdez v. State,* 124 Nev. 1172, 1191 (2008).
300 ROA/3/476.
301 ROA(Sealed)/38/8289-8290.

prosecutors denied having until after the *Petrocelli* hearing. Conley (Utah detective) was actually the worst actor in violating the expungement order and turning over a multitude of documents to the Nevada detective (O'Kelley).

> A (Conley).....Um, the decision was made you know for me to make the phone call to Eric and I think I got, I still got the taped conversation in here, plus I got a transcript of it.[302]
> Q. (O'Kelly) Wow.
> A. Um, these are all my records. I mean this is, this isn't City records, these are my notes and what I put together on the case and his associated and everything. Un, so this isn't anything that's City property, its all my property. Um, I made the phone call to Eric, ah, one afternoon, and ah, I was probably on the phone with him for about, uh, two and a half, maybe three hours....[303]
> A. ....There was an agreement that was written by Weaver County and Riverdale City, ah, you know for the fire, ah, to where he was granted immunity from it.[304]
> - - -
> Q .....I think they were served with this, an expungement order and of the public records are sealed.
> A. I haven't been.
> Q. You haven't been served with that?
> A. No, I haven't been served with any expungement order.
> Q. Well that's good to note.[305]
>
> **Q. (O'Kelly) Oh yeah, absolutely. I'm amazed you can remember what you, what you've told us. Was there anything else that, ah, that you think that...**
> **A. (Conley) You wanna, you wanna, you wanna flip through this real quick?**
> **Q. (O'Kelly) You know I do but we'll do it off, off, ah, recording....[306] (Emphasis added)**

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302 ROA(Sealed)38//8265.
303 ROA(Sealed)/38/8266.
304 ROA(Sealed/38/8266-8267.
305 ROA(Sealed)/38/8270.
306 ROA(Sealed)/38/8289-8290.

Both Conley and O'Kelly knew that Conley was an official of the State of Utah, and that the expungement order applied to him. They knew they were violating that order, and the Nevada prosecutors knew that they were violating the Utah expungement laws by accepting and even looking at the records which O'Kelley unlawfully obtained from Conley. They admitted that they knew there was an order sealing and expunging the Utah case.[307] The prosecutors blatantly lied to the court when they represented that they did not have the records. The following colloguy took place on **June 8, 2012,** more than three years after RANDOLPH was arrested, and just shy of three years after the *Petrocelli* hearing:

> MR. REED: ....If I could also address the seal order. Here's my understanding of what happened in Utah. The Court expunged the records, ordered them sealed; this is regarding the trial case in Utah. I don't know how that material was ever produced to anyone, to the police, to the prosecution to the defense. So, I don't know if Mr. Stanton's saying there's some sealed file somewhere where there's material that we don't have.
>
> And then the question is how do we obtain it in order to prepare an adequate defense when there's a specific order from the Utah court saying you can't have it, it can't be unsealed, you're not entitled to it? Unless Mr. Stanton knows more about this than I do, that's a concern for us too because if there's material out there that we don't have or don't have access to that puts us in quite a quandary. And I don't know why prior counsel was saying we don't have all of this material because we can't have it in order to conduct a proper cross-examination or they're just saying well that's – however you got it make sure we get it so we have it to use. And I don't have an answer to the Court on that particular point.

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307 ROA/2/401.

MR. DASKAS: ....it is within the discretion of one person in this courtroom to get that information and that's Thomas Randolph.

....

THE COURT: Are you saying you don't have it?
MR. DASKAS: That's correct judge.[308]

....

MR. DASKAS: ....It is solely within their prerogative and their control the information that they're able to gather to confront the witnesses from the Utah case. The State has no control over that despite our best efforts to gather the material....

....

THE COURT: I would tend to agree. I think Mr. Randolph has more information than anyone in this courtroom regarding those proceedings and he's the only one that has the ability to access those. So, I think you need to discuss that with your client.[309] (emphasis added)

Two years later, after the defense had finally received all the witness statements obtained by O'Kelly in 2008, it brought it to the attention of the Court that those would have been valuable in cross examining McGuire (Utah prosecutor) at the *Petrocelli* hearing. The state used the fact that RANDOLPH by that time had different attorneys than he had at the time of the *Petrocelli* hearing to confuse the issue and claim that it had provided those statements to prior counsel.[310] The court believed the prosecutors, and concluded that the statements had been provided to prior defense counsel.[311] It never addressed RANDOLPH's observation that if the defense had those statements at the time of the *Petrocelli,* it

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308 ROA/7/1382-1383.
309 ROA/7/1385.
310 ROA/10/2082-2092.
311 ROA/10/2092.

would have used them in its cross-examination of McGuire.[312] The state backpedaled and argued that the statements wouldn't have helped anyway, so no harm no foul.[313]

4. Disregard Of Court Orders

On March 29, 2016 the defense brought a motion in limine to preclude references to the Utah case as the murder case. The defense argued that referring to the Utah cases using the term "murder" violates the presumption that RANDOLPH is innocent and RANDOLPH's right to due process and a fair trial.[314] It argued that the verbal references might provide an appearance of guilt that could be as damning as bringing the accused into court in shackles. RANDOLPH's motion in limine was granted, and it was agreed that the case involving Becky's death would be referred to as the Utah case, and the attempt to have Tarantino beat up would be referred to as the witness tampering case.[315] The state disregarded this order.

On June 16, 2017, during trial, the prosecutor asked Wendy Moore (RANDOLPH girlfriend who was arrested in connection with witness tampering case), "[n]ow, while you were dating Mr. Randolph, did there come a point in time he was arrested and he was incarcerated at the detention center and **charged with**

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312 ROA/10/2184-2185.
313 ROA/11/2334-2335.
314 ROA/10/2178. *Haywood v. State,* 107 Nev. 285 (1991).
315 ROA/11/2330-2332.

the murder of his wife?" [316](emphasis added) The defense objected.[317] There was no reason to add any words to that question beyond "at the detention center." Incredibly, the court ruled that use of the term "murder" was not violative of the court's order.[318] Scott Conley referenced the murder for hire plot in violation of the court's previous order.[319] The defense objected.[320] Conley was asked about charges of attempting to kill Eric Tarantino. Defense objections were overruled.[321] RANDOLPH moved for a mistrial which was denied.[322] The court stated that it did not recall ever saying that the state could not refer to the murder for hire case.[323] The court then referred back to her previous ruling and acknowledged that she had ruled that the Becky death was to be referred to as the Utah case and the murder for hire was to be referred to as witness tampering which is what RANDOLPH ultimately pled guilty to. The court still refused to grant a mistrial.[324] She went on to say, "I think from this point forward I want to be careful as far as how we reference them because the concern has always been, you know, we don't want to indoctrinate the jury by using those terms over and over

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316 ROA/17/3624.
317 ROA/17/3625.
318 ROA/17/3636.
319 ROA/17/3565.
320 ROA/17/3565.
321 ROA/17/3565-3566.
322 ROA/17/3574.
323 ROA/17/3580.
324 ROA/17/3581.

again. Again, taking into consideration the fact he was acquitted and it was also dropped down to a misdemeanor."[325] Too late! The court also recognized that there had been testimony all day that the basis of the witness tampering was soliciting the murder of Mr. Tarantino, but she didn't think that it was prejudicial.[326]

On June 17, 2017 during Opening Statement, the prosecution **again** referred to the Tarantino incident as a murder for hire, not witness tampering, as the court had ordered in its previous ruling on RANDOLPH's motion in limine.[327]

In *Valdez*, this Court held that the prosecutor's violation of a district court ruling constituted misconduct.[328] While the court held that the one violation, alone, would not warrant reversal, when considered in conjunction with the multiple errors in the case, cumulative error warranted reversal. RANDOLPH contends that such is the case here. There was so much prosecutorial misconduct that the cumulative effect was to render RANDOLPH's trial a sham, and not really a trial to determine if he was involved in Sharon's murder, but, instead, one to portray him as a vicious serial wife murderer.

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325 ROA/17/3581.
326 ROA/17/3581.
327 ROA/11/2332, 16/3434, 16/3481.
328 *Valdez v. State,* 124 Nev. 1172, 1194 (2008).

On June 22, 2017, there was quite a bit of back and forth with objections and motion for a mistrial over the prosecution's reference to RANDOLPH's shooting of Miller as "execution style" or "coup de grace." [329] The court stated:

> THE COURT: Look, I think the term coup de grace is extremely prejudicial. I don't think that you needed it, number one. I think it's very prejudicial to the State, (sic) because it's basically – the image that it puts in the jury's mind. So I'm going to order them to disregard that statement. Then you can make whatever motion you want to make at the break.[330]
>
> ....
>
> THE COURT: ....With respect to the statement of coup de grace...[t]he court felt that it was extremely prejudicial, and in addition to it being prejudicial, i just simply think that it was outside the scope of this person's – this witness's ability to testify in that, you know, as its definition, a coup de grace is the death shot, it's a mercy shot, it's – I think that's outside the – the witness's ability to testify whether or not that was, in fact, the death shot, in addition to the fact that I just thought the statement was so entirely prejudicial and unnecessary.
>
> The second issue that was brought up by the defense was a reference to it being an execution shot....The defense objected to that. However, the Court agreed with the defense's objection, sustained the objection on that ground. But at the defense's request, the Court did not instruct the jury to disregard any statements regatrding the execution or the – the execution of the other case. The defense's reasoning for asking the Court not to tell the jury to disregard statements regarding an execution was the defense felt that should its request for a mistrial not be granted, that if the Court were to bring up the phrase execution again, it would just further taint the jury. So it was at the defense's request that the Court did not issue a curative instruction at that time.[331]

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329 ROA/20/4182-4186.

330 ROA/20/4186-4187.

331 ROA/20/4251-4216.

RANDOLPH's request for a mistrial was denied.[332]

Then, after all this, **on June 26, 2017**, the state during its rebuttal closing argument, referred to RANDOLPH "executing a homeowner,"[333] the "circumstances of why he was executed."[334] Once again, RANDOLPH moved for a mistrial.[335] Once again, it was denied, but this time the court said that it went to the state's theory of the case.[336]

5. Misrepresentations To The Court And The Jury

On April 1, 2009, the prosecutor told the judge that the Grand Jury had asked during the presentation on the first day about the timing of a phone call from a neighbor.[337] This was not true. In fact, the Grand Jury asked for more information about the relationship between Miller and Randolph and between Sharon and Thomas Randolph. Never did they ask for more information about a phone call.[338]

On September 23, 2009, the prosecution told the judge that RANDOLPH was following Tarantino from job to job to get him to kill his wife, Becky, and that these solicitations began in 1982 when the two were working together at

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332 ROA/20/4219.
333 ROA/21/4425.
334 ROA/21/4427.
335 ROA/21/4431.
336 ROA/21/4431.
337 ROA/2/273-274.
338 ROA/1/77-79.

Timberline Cabinets. However, the prosecutor knew this could not be true, since RANDOLPH did not even marry Becky until April 8, 1983.[339] To be fair, however, these misrepresentations were based on falsehoods from Tarantino. Nevertheless, the state knew the facts and should have connected the dots. Had it done so, it might have realized early on what the Utah authorities realized 20 years previously – that Tarantino was a liar.

On November 16, 2009, the prosecution intimated that RANDOLPH did something nefarious after finding Becky's body by leaving the house and going to his father's home to call 9-1-1. However, the prosecution knew that the home where he found Becky's body was in foreclosure and phone service had been stopped, so there was no way for RANDOLPH to call from that location.[340] The state further asserted that Tarantino had previously witnessed a failed attempt by RANDOLPH to kill Becky by starting their mobile home on fire. **On June 15, 2017,** the state told the judge that RANDOLPH's attempted murder of Becky by starting the fire is the reason that Tarantino left Utah.[341] The prosecutor also told that judge that a child was injured in the fire, despite absolutely no evidence at all to support that.[342] The state knew this was all false because Tarantino admitted

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339 ROA/2/366, 2/232.
340 ROA/2/417.
341 ROA/16/3440.
342 ROA/16/3440.

that he was the one who started the fire.[343] Tarantino sought and obtained immunity for starting that fire.

On June 17, 2017, the state in its Opening Statement, told the jury that 20 years earlier, RANDOLPH had hired Tarantino to kill his then wife, Becky.[344] That was a blatant lie. There was never any evidence that any money ever changed hands between Tarantino and RANDOLPH to murder anyone, and Tarantino was in New Hampshire at the time of Becky's death.

During its Opening Statement and its Closing Argument, the state referred to an **insurance contract** and a May 1, 2008 letter telling RANDOLPH the value of the contract. The inference was that the insurance was a life insurance policy on Sharon's life and RANDOLPH was checking to see how much money was in the insurance because he was planning to kill Sharon and wanted to make sure all his ducks were in a row before committing the dirty deed. [345] Another lie. RANDOLPH had inquired about an *annuity* in his mother's name.[346] RANDOLPH had actually funded the annuity so that the money would be safe where he couldn't get his hands on it – sort of a savings account. A few weeks before Sharon's death, he and Sharon had been in Utah visiting RANDOLPH's parents, and had discussed cashing the annuity to purchase some property in Utah halfway between Las Vegas

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343 ROA/2/366-367, 2/418.
344 ROA/16/3474.
345 ROA/16/3495, 20/4364.
346 ROA/23/4845.

and where RANDOLPH's parents lived in Utah.[347] RANDOLPH's mother signed to get the annuity on May 2, 2008 and the money was to be paid out to Thomas Randolph **before Sharon's death.**[348] The letter from the insurance company which the state pointed to as evidence of RANDOLPH's nefarious plan was attached as a State exhibit.[349] That letter refers to Contract No. R0342747, the same contract number as the actual annuity ***in the name of Dorothy Randolph*** (RANDOLPH's mother)![350] The state offered the letter and the annuity as exhibits, so it was well aware that this was not a life insurance policy on Sharon's life about which RANDOLPH was inquiring, but an annuity he had funded, and which ***both he and Sharon*** wanted to cash out in order to buy some property. Just one more lie.

6. Jurors Asked To Put Themselves In Victim's Place

During the penalty phase, the prosecutor sought to admit a video from a news station where Becky's mother stated during an interview that RANDOLPH killed Becky and that he would kill again. It also talked about the fact that RANDOLPH had the records expunged after he was acquitted.[351] The state argued that it needed this information before the jury because it was using the prior Becky

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347 ROA/19/4156, 23/4851-4852.
348 ROA/24/5209, 24/5210-5214.
349 ROA/24/5208.
350 ROA/24/5209.
351 ROA/22/4745, 22/4748.

incident as one of its aggravators.[352] But, it could not use that as an aggravator because RANDOLPH was acquitted of that alleged crime. Becky committed suicide! And, it didn't need any prior crime as an aggravator, since it was alleging that RANDOLPH had killed two people in the instant case. The court allowed the state to play the tape to the jury, despite her expressed concern that the State could not use an expunged case as an aggravator.[353]

Basically, what the state did in playing this news clip, was to use Becky's mother to suggest that if the jury did not put RANDOLPH to death, he would kill again. This same ploy was found to constitute prosecutorial misconduct in *McGuire v. State*, where this Court found similar remarks to be highly inflammatory.[354] While the statements in *McGuire* were made by the prosecutor, unlike here where the court allowed the video to be played, the result is no less egregious. It was just that instead of the prosecutor actually saying the words, he used Becky's mother to put the same idea in the jury's mind – kill this guy, or it might be your loved one, next.

7. Conclusion

How many lies and how much double dealing can a man on trial for his life sustain without being overwhelmed. In *Rowland*, this court held that the level of

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352 ROA/22/4795.

353 ROA/22/4806, 22/4812, 23/4853-4854. See, *Serman v. State,* 114 Nev. 998 (1998)(evidence of victim impact from previous crimes not admissible.)

354 *McGuire v. State,* 100 Nev. 153, 157 (1984).

misconduct necessary to reverse a conviction depends on how strong and convincing is the evidence of guilt. If the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial.[355] As stated above, there was no evidence of a conspiracy between Miller and RANDOLPH to kill Sharon. There were no overheard conversations, and there was no exchange of money. Without a conspiracy, there could be no finding of guilt of RANDOLPH for Sharon's murder. It is precisely because the state's case was so weak that it had to resort to prosecutorial misconduct in order to get a conviction. What happened in this case was a travesty, and at a minimum, RANDOLPH deserves a new trial.

F. JURORS IMPROPERLY DISMISSED

(Standard of Review: abuse of discretion) [356]

RANDOLPH's state and federal constitutional rights to due process of law, equal protection, a fair trial, and a fair and impartial jury were violated by the procedures employed during jury selection, the erroneous dismissal of potential jurors for cause, and the removal pursuant to peremptory challenges of qualified jurors in order to stack a jury in favor of the death penalty.[357]

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355 *Rowland v. State,* 118 Nev. 31, 38 (2002).

356 *United States v. Gonzalez,* 214 F.3d 1109, 1112 (9th Cir. 2000).

357 U.S. Const. Amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec.21.

"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." [358]

The district court abused its discretion in dismissing prospective jurors for cause who were qualified to serve as jurors. The district court dismissed three prospective jurors based upon erroneous challenges for cause presented by the State. The district court erred in dismissing these jurors. "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." [359] "To permit the exclusion for cause of other prospective jurors based on their views on the death penalty unnecessarily narrows the cross section of venire members. It 'stacks the deck against the petitioner. To execute such a death sentence would deprive him of his life without due process of law.'"[360] In considering whether the district court abused its discretion in addressing a cause challenge, this Court reviews the views expressed by the prospective juror in the

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358 *Witherspoon v. Illinois,* 391 U.S. 510 (1968).

359 *Lockhart v. McCree*, 476 U.S. 162, 176 (1986).

360 *Gray v. Mississippi*, 481 U.S. 648, 658-59 (1987) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968)).

jury questionnaire and during voir dire. "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[361]

> Guided by neither rule nor standard, free to select or reject as it (sees) fit, a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.[362]

In this case, the following jurors were dismissed for cause even though they said they could set aside their strongly held beliefs against the death penalty.

Oscar McGuire, Juror 259

> MR. PATRICK: ....What we're trying to do is to determine if when given the set of laws by the Judge, if you would be able to follow it. Do you think you would be able to do that?
> PROSPECTIVE JUROR NO. 259: Yes.
> MR. PATRICK: Okay. And if in those set of laws it said that even though you have strong beliefs against the death penalty, which nobody will ever try to change, would you fairly consider it as one of the four possible penalties at the end of this trial?
> PROSPECTIVE JUROR NO. 259: If it's in those options, I have to.
> MR. PATRICK: ....So you could set aside your strongly – strongly-held beliefs and follow the law and do what the Judge tells you to do?

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361 *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

362 *Witherspoon, supra,* at 519-520.

PROSPECTIVE JUROR NO. 259: Yeah, as to the Judge.[363]

.....

THE COURT: I am going to grant the challenge for cause for McGuire....I think that Mr. McGuire was pretty consistent saying that he does have a significant problem with the death penalty...And he did state on examination strongly that he cannot be involved in a process that involves taking a life, which gives the Court concern that he could fulfill his obligations as a – as a juror.. So he will be granted for cause.[364]

Georgia Reckers, Juror 263

MR. PATRICK: ....When she filled this out and she said, I believe if there is something significant enough to require it, it seems just. Answer 26, I believe the death penalty appropriate in some murder cases. So when she filled out the questionnaire, she could – stated that she could consider all four. Talking to me she can consider all four. Whether or not – again, whether or not she wrote in two spots that it's up to God to judge, not her, she did say for both side that she would consider and be fair.[365]

....

MR. PATRICK: And in your questionnaire you wrote that you could fairly consider all four forms of punishment?
PROSPECTIVE JUROR NO. 263: Yes, sir.[366]

....

MR. PATRICK: And, you know, you've heard us talk as nauseam about the Judge will give you a set of laws that she will ask you to follow if you're picked as a juror.
PROSPECTIVE JUROR NO. 263; Yes.
MR. PATRICK: Would you be able to follow them?
PROSPECTIVE JUROR NO. 263: Yes, sir.
MR. PATRICK: Okay. And of those laws it's going to say that there's four choices that you have to give equal and fair consideration to...And one of those choices being the death penalty....So as you sit

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363 ROA/15/3145.
364 ROA/15/3186-3187.
365 ROA/15/3189.
366 ROA/15/3159.

here today, would be able to follow the law and give equal consideration to all four forms of those penalties should you be chosen?
PROSPECTIVE JUROR NO. 263: If I were chosen, yes, I would be able to do that for you guys. Yes.[367]
.....

THE COURT: ....I'm going to grant the challenge for cause for Ms. Reckers....I'm concerned about her repeated statement, which was stated in her questionnaire rather strongly on page 8 where she says it's God's job to judge, not mine. She – she reiterated that upon questioning that she can't be the judge for someone else.[368]

Minerva Acac, Juror 536

MR. PIKE: Okay. You had indicated that you could consider all four potential penalties in this case if you were called upon to do that.
PROSPECTIVE JUROR NO. 536: I will.[369]
MR. PIKE: ....And you indicated that you had a belief in the – in the death penalty.
PROSPECTIVE JUROR NO. 536: I do if everything, the evidence, were properly shown.
MR. PIKE: And it serves a purpose in your mind for the community?
PROSPECTIVE JUROR NO. 536: Yes, sir.[370]
....
MR. PIKE: She does – she should be [inaudible] when a life is on the line. She didn't indicate that she had had problems since she filled it out, just [inaudible] there were inconsistencies. I don't think that meets the level for cause.
THE COURT: I was going to let her go. I couldn't get a good feel on her. The one thing that she kept coming back to was that she would hold the State to a higher burden. And she – you know, I just don't think she – I think she would hold the State to the higher burden and that's my concern.[371]

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367 ROA/15/3160-3161.
368 ROA/15/3189.
369 ROA/16/3348.
370 ROA/16/3349.
371 ROA/16/3380.

As the High Court noted in *Witherspoon,* "it is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law."[372]

The improper removal of a juror for cause is not subject to harmless error review and requires that the sentence of death be vacated.[373]

In addition to the removal of jurors for cause, the state used its peremptories to remove any other juror who did not express unequivocal support for the death

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372 *Witherspoon v. State of Ill.*, 391 U.S. 510, 521–23 (1968).
373 *Gray*, *supra*, at 659.

penalty. The jurors actually empaneled in this case all expressed a belief in the death penalty in their jury questionnaires.[374] The use of peremptory challenges to exclude scrupled jurors creates further unfairness when used in combination with the challenges for cause allowed under *Witherspoon*. This gives the prosecution an advantage designed to protect the state's interest in enforcing its death penalty laws, and makes the jury more death prone than the general population. One federal district court has held that the use of peremptory challenges to get rid of people who are against the death penalty violates the Sixth Amendment.[375]

> In this case the state went beyond the "Witherspoon-excludables" and used its peremptory challenges to remove every prospective juror who expressed some uncertainty about capital punishment. The state accomplished, through its use of peremptory challenges, what it could not constitutionally do through challenges for cause, i.e., "stack the deck against the petitioner."
>
> The peremptory challenge is not exempt from scrutiny under the Sixth Amendment. The prosecutor's historical privilege of peremptory challenge free of judicial control, is an important right for the state as well as the accused, but it is certainly no more important than the accused's Sixth and Fourteenth Amendment rights to be tried by an

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374 Myna Bowie, Juror 141 (ROA/31/6757); Nancy Carlson, Juror 653 (ROA/32/6829); Jeff Corbin, Juror 15 (ROA/31/6717); Nadine Haag, Alternate 464 (ROA/31/6805); Chelsi Johnson, Juror 167 (ROA/31/6765); Jaime Johnson, Juror 354 (ROA/31/6789); Brent Layman, Alternate 465 (ROA/31/6813); Taylor Lenz, Alternate 438 (ROA/31/6797); Sal Milano, Juror 133 (ROA/31/6749); Allyson Reynosa, Juror 232 (ROA/31/6773); Karen Schott-Miller, Juror 51 (ROA/31/6733); Craig Shadel, Juror 31 (ROA/31/6725); Emily Sinaca, Juror 343 (ROA/31/6781); Lillian Tran, Juror 115 (ROA/31/6741); Audrey Verba, Alternate 579 (ROA/32/6821); Tony Woo, Juror 657 (ROA/32/6837).

375 *Brown v. Dixon*, 693 F.Supp. 381 (WDNC 1988). Reversed by *Brown v. Dixon*, 891 F.2d 490 (CA4 1989).

> impartial jury. The Supreme Court has repeatedly recognized, and recently reiterated, that "*peremptory challenges are a creature of statute and are not required by the constitution.*" [Emphasis added.] *Ross v. Oklahoma,* 108 S.Ct. 2273, 2279 (1988). Where a constitutional right comes into conflict with the statutory right of peremptory challenges the constitutional right prevails. [376]

While RANDOLPH recognizes that *Brown* is not controlling law in any jurisdiction, its precepts are worth noting, and raise the question of whether a state should be allowed through peremptories that which the Constitution guards against in the use of challenges for cause. Quite simply, the state should not be permitted by any means to stack a jury against a defendant, especially in a capital case where the death penalty is sought. Such practice denies a defendant's right to be judged by a jury of his peers, half of which in the United States today reject death as an acceptable means of punishment. In this case, out of 180 veniremen, one-third expressed reservations about the death penalty. Not one of those jurors made it onto the panel.[377] In addition 7 of the 12 jurors were women who would be more susceptible to a theory that RANDOLPH was a serial wife killer, and if believed, so afraid that they would be more apt to seek the death penalty.[378] Quite simply, RANDOLPH's jury was one which was stacked in favor of meting out the death

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376 *Brown v. Dixon,* 693 F.Supp. 381, 392-93 (W.D.N.C. 1988), *aff'd in part, rev'd in part sub nom. Brown v. Dixon,* 891 F.2d 490 (4th Cir. 1989).

377 See attached juror list with references to the pages of the ROA where information is found. It shows the juror names and numbers, and yes, no or maybe indicating whether they expressed views in favor (yes), against (no), or neutral (maybe) on the death penalty.

378 See attached juror chart.

penalty, in violation of RANDOLPH's Sixth Amendment right to be tried by a jury of his peers. As a result, the sentence of death in this case, should be vacated.

G. RANDOLPH REQUEST TO ARGUE LAST AT PENALTY

(Standard of Review: abuse of discretion) [379]

On November 28, 2011, RANDOLPH brought a motion to allow him to argue last at the penalty phase.[380] Allowing the State to present the final argument, and not limiting the final argument to rebuttal, violates due process.

In *State v. Jenkins*[381], the Ohio Supreme Court stated that the decision to allow the defense to open and close final argument in the penalty phase is within the sound discretion of the trial Court. *Jenkins* makes it clear that the trial court may allow the defense the right to argue last to the jury.

Due process and the concept of a fair trial supports allowing the defense to argue last during the penalty phase in a death penalty case. Due process entitles a defendant to a "meaningful opportunity to present a complete defense."[382] The United States Supreme Court has recognized that "death is a different kind of punishment, than any other which may be imposed in this country."[383] It follows that a higher standard of due process is required in death cases than other cases

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379 *State v. Jenkins,* 15 Ohio St. 3d 164, 214-215 (1984).
380 ROA/3/629.
381 *State v. Jenkins,* 15 Ohio St. 3d 164, 214-215 (1984).
382 *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).
383 *Gardner v. Florida,* 430 U.S. 349 (1977).

because of the severity and finality of the punishment. The Supreme Court, in considering the scope of due process required in such cases, stated:

> [I]t is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations.[384]

> [T]he extent to which procedural process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss...."[385]

At least two other jurisdictions have sought to alleviate the inherent unfairness in allowing the prosecution to speak last before the jury. The Kentucky statute which prescribes a penalty phase hearing, states:

> The prosecuting attorney shall open and the defendant shall conclude the argument.[386]

California has reached the same result through judicial interpretation.

> Equal opportunity to argue is...consistent with the Legislature's strict neutrality in governing the jury's choice of penalty....Accordingly, hereafter the prosecution should open and the defense respond. The prosecution may then argue in rebuttal and the defense close in surrebuttal.[387]

The essential fairness of this position has application in Nevada. While RANDOLPH recognizes that this Court has rejected this contention,[388]

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384 *Griffin v. Illinois,* 351 U.S. 12, 28 (1956).

385 *Goldberg v. Kelly,* 397 U.S. 254, 262-263 (1970).

386 Ky.Rev.Stat., Section 532.025(1)(a).

387 *People v. Bandhauer,* 66 Cal.2d 524, 530-531 (1967).

388 See *Blake v. State*, 121 Nev. 779, 800 (2005); *Witter v. State*, 112 Nev. 908, 922-923 (1996); NRS 175.141(5).

he respectfully submits that those decisions should be overruled. The defense should open with mitigation and the prosecution may then counter. The prosecution should then make a closing statement, followed by the closing statement of the defense. It is fundamentally unfair for the prosecution to have the last chance to speak to the jury in a case where the defendant is facing the death penalty. RANDOLPH should have had the last opportunity to plead for his life.

In *Skipper v. South Carolina*, the United States Supreme Court reversed a death sentence based upon the fact that the prosecutor made an argument concerning future dangerousness, but the defendant was not allowed to rebut that argument with evidence that he would not be eligible for parole.[389] Because the defendant was not allowed to rebut evidence and argument used against him, the defendant was denied due process. In the case at bar, during the state's rebuttal argument, it asserted that Dr. Roitman, a psychiatrist who testified on behalf of RANDOLPH, had gotten it wrong, was unaware of pertinent facts,[390] and had missed the "fact" that RANDOLPH was a "psychopath and a sociopath."[391]

> That, ladies and gentlemen, once again is something that Mr. (sic) Roitman misses, because that is truly how a psychopath and a sociopath thinks.[392]

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389 *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 9 (1986).

390 ROA/23/5002.

391 ROA/23/5002.

392 ROA/23/5003. The state constantly referred to Dr. Roitman as Mr. Roitman, despite his testimony that he was a ***doctor,*** board certified in adult and child

In this case, the jury was left with the prosecutor's diagnosis of RANDOLPH's mental condition with no opportunity for RANDOLPH to respond to these outrageous assertions.

RANDOLPH's state and federal constitutional rights to due process, a fair penalty trial, and a reliable sentence were violated by the district court's decision to permit the State to present the final closing argument to the jury. Sending a man to death "on the basis of information which he had no opportunity to deny or explain" violates fundamental notions of due process.[393] The right to be heard is a core requirement of due process. This right was denied in this case because RANDOLPH was denied the ability to respond to allegations made by the state during its penalty phase rebuttal argument.

H. NEVADA'S DEATH PENALTY IS UNCONSTITUTIONAL

(Standard of Review: de novo)[394]

1. Death Penalty Scheme Too Broad

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers.[395]

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psychiatry. (ROA/23/4879) These belittling references occurred at ROA/23/5001, 5002, and 5003. They were not inadvertent mistakes.

393 *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality decision).

394 *United States v. Naghani*, 361 F.3d 1255, 1259 (9th Cir. 2004). *United States v. Voilla-Gonzalez,* 208 F.3d 1160, 1165 (9th Cir. 2000).

395 *Woodson v. North Carolina*, 428 U.S. 280, 296 (1976).

A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. [396] Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually any and all first-degree murderers. As a result, in 2001, Nevada had the second most persons on death row per capita in the nation.[397] Nevada's high rate of death penalty sentences is due to the fact that neither statutes defining eligibility for the death penalty nor the case law interpreting these statutes narrows the class of persons eligible for the death penalty.[398]

RANDOLPH recognizes that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme.[399] Nonetheless, this Court has never explained the rationale for its decision and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

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396 *Hollaway v. State*, 116 Nev. 732, 745 (2000); *Arave v. Creech*, 507 U.S. 463, 474 (1992); *Zant v. Stephens*, 462 U.S. 862, 877 (1982); *McConnell v. State*, 121 Nev. 25, 30 (2005).

397 James S. Liebman, A Broken System: Error Rates in Capital Cases, 1973-1995 (2000); U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 2001.

398 See NRS 200.033 (continuously expanding the number and variety of aggravators from 1977 to 2005).

399 See *Leonard v. State*, 117 Nev. 53, 83, (2001) and cases cited therein.

2. No Functioning Clemency Program

Nevada's lack of a constitutionally adequate clemency process requires that the death sentence be vacated. RANDOLPH's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners.[400] Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that every one of the 32 states that has the death penalty also has clemency procedures.[401] Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process.[402] Nevada's clemency statutes, do not ensure that death penalty inmates receive procedural due process.[403] As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death in Nevada.[404] RANDOLPH is informed and believes and on that basis alleges that since the reinstatement of the death penalty, only a single death sentence in Nevada has been commuted and in that case, it was commuted only because the defendant

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400 NRS 213.010.

401 *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 293 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part).

402 *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

403 NRS 213.005-213.100. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

404 Bureau of Justice Statistics Report, Capital Punishment 2006 (December 2007 NCJ 220219).

was intellectually disabled and the United States Supreme Court found that the intellectually disabled (formerly called "mentally retarded") could no longer be executed. It cannot have been the legislature's intent to create clemency proceedings in which the Board merely rubber-stamps capital sentences. The fact that Nevada's clemency procedure is not exercised on behalf of death-sentenced inmates means, in practical effect, that it does not exist. "'Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.'" [405] "Far from regarding clemency as a matter of mercy alone, [the Court has] called it the fail safe in our criminal justice system." Id. (internal quotations omitted). The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring that RANDOLPH's death sentence be vacated. RANDOLPH recognizes that this Court rejected this argument in *Nunnery.*[406] He raises this issue here to provide this Court with the opportunity to overrule *Nunnery* and to preserve the issue for federal review.

3. Execution Manual Does Not Comport With *Baze*

The United States Supreme Court reviewed Kentucky's lethal injection protocol and found it to be Constitutional and not to constitute cruel and unusual

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405 *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993)).

406 *Nunnery v. State*, 127 Nev. 749, 782-783 (2011).

punishment because the state's written protocol required that (1) members of the IV team have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman, (2) warden and deputy warden be present in the execution chamber with the prisoner, (3) the warden redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness in 60 seconds.[407] The Court did state that "...failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride."[408] In response to *Baze,* Nevada came out with a new execution manual in November, 2017.[409] It falls short in the following respects of the safeguards outlined in *Baze* necessary to pass Eighth Amendment muster.

First, it does not require that members of the IV team have at least one year of professional experience. It does provide that an EMT shall perform the venipuncture, but it does not specific any experience level for the EMT.[410]

Second, it only requires that the Warden remain in the execution chamber with the defendant while the execution is being performed.[411] The Kentucky

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407 *Baze v. Rees,* 128 S.Ct. 1520, 1533-1534 (2008).
408 *Baze, supra,* at 1533-34.
409 ROA/7/1401.
410 11-07-17 Execution Manual, Section 110.01D.
411 11-07-17 Execution Manual, Section 110.01E.

protocol approved in *Baze* required the Warden and Assistant Warden to both be present, presumably as a back up in case the Warden became incapacitated or otherwise unable to perform his duties.

Third, the Nevada protocol does not provide for a backup site that the drugs can be redirected to if anything goes wrong. Instead, the protocol states that, "[i]f at any point, the Attending Physician determines that the condemned inmate's responses to the lethal drugs deviates from as expected, the Drug Administrators, Warden and Director will pause the procedure...."[412] Since the only person in the actual execution chamber would be the Warden, anyone outside the room who would be "pausing" the procedure, would only be able to stop the flow of drugs into the IV line. However, there is no way provided to stop the flow of drugs already in the IV line from entering the inmate's body, unlike the situation in *Baze* where the Warden had the ability to redirect the flow of drugs into a backup line.

For the foregoing reasons, Nevada's protocol for lethal injection as set forth in the most recent Execution Manual has insufficient safeguards against an inmate having to endure excruciating pain in the event something goes wrong with the injection process and he does not achieve deep sleep under the anesthesia portion of the injection protocol.

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412 11-07-17 Execution Manual, Section 110.02D(2).

4. Lethal Injection Barred By Drug Manufacturers

The drugs to be used for the lethal injection under the new November, 2017 Execution Manual, are Diazepam, Fentanyl, and Cis-atracurium.[413] The state obtained Midazolam which is similar to Diazepam and acts as a sedative intended to render the inmate unconscious before the person is given the synthetic opioid Fentanyl and then the paralytic agent Cisatracurium. This combination was going to be used in the execution of Scott Dozier. Alvogen, which is the manufacturer of Midazolam, sued to stop the state from using its drug in the lethal injection protocol.[414] On September 28, 2018, the district court granted a preliminary injunction enjoining the state from using Midazolam as part of its lethal injection cocktail. The state appealed, and filed its Opening Brief on November 20, 2018 in Nevada Supreme Court Case No. 77100. The case is still in the briefing stage, with the Answering Brief which was due on December 10, 2018, still not having reached the Court's on-line docket. This case raises the issue of whether any drugs can ever be used to put a person to death, owing to the negative ramifications which would result to the drug manufacturers if their products are used in a life-taking as opposed to life-preserving purpose. Certainly, RANDOLPH cannot be executed by lethal injection as long as this case and its sister cases brought by the manufacturers of Fentanyl and Cis-atracurium are pending, which could be years if

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413 11-07-17 Execution Manual, Section 103.03 C(1)c(i).

414 Nevada Eighth Judicial District Court No. A-18-777312-B.

any or all of them are taken to the United States Supreme Court. The Warrant Of Execution in the case at bar does not provide for execution by any means other than lethal injection.[415] RANDOLPH is 62 years old, and in failing health.

In light of the foregoing, judicial economy and the realities of the situation would best be served if RANDOLPH's sentence of death were vacated in favor of life without possibility of parole.

5. Death Excessive Under These Facts

RANDOLPH's state and federal constitutional rights to due process of law, equal protection, and right to be free from cruel and unusual punishment were violated because the death penalty is excessive under the facts of this case.[416]

Pursuant to NRS 177.055(2), this Court must review every death sentence and consider, in part, whether the sentence of death is excessive considering both the crime and the defendant. This Court considers the totality of the circumstances in making this determination and also may use as a frame or reference other similarly situated defendants.[417] RANDOLPH respectfully submits that the death penalty is excessive under the facts of this case. The facts here are not extraordinary in comparison to other murder cases that are routinely reviewed by this Court. See, e.g., *Lamb v. State,* 127 Nev. 26 (2011)(defendant shot his sister

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415 ROA/23-24/5058-5061.

416 U.S. Const. amend. V, VI, XIV; Nevada Const. Art. 1, Sec 3, 6 and 8; Art. IV, Sec. 21.

417 *McConnell v. State,* 212 P.3d 307, 315-316 (Nev. 2009).

eight times outside of her daughter's grade school after extensively stalking her and conducting legal research -- sentence of life without the possibility of parole); *Mack v. Estate of Mack,* 206 P.3d 98, 104 (Nev. 2009)(Mack was convicted of murder and attempting to murder a state district court judge – the State did not seek the death penalty); *Cortinas v. State,* 195 P.3d 315, 318 (Nev. 2008)(defendant strangled the victim for nearly an hour, broke her neck, suffocated her and then stabbed her in the back three times with a knife -- no indication that the death penalty was sought or obtained); *Chartier v. State,* 191 P.3d 1182 (Nev. 2008)(defendant was convicted of two counts of murder -- received sentences of life without the possibility of parole); *Summers v. State,* 122 Nev. 1326, 1329-31 (2006)(defendant was convicted of first-degree murder, attempted murder, and assault – each with use of a deadly weapon – and was sentenced to life without the possibility of parole).

Under the totality of the circumstances presented here, the application of the death penalty to the facts of the underlying offense, even considering the two aggravators, is excessive. RANDOLPH is 62 years old, in ill health, and has been determined to be able to be housed successfully, and is helpful to other inmates.[418] If the state's contentions are to be believed, RANDOLPH is only a danger to wives on whom he has obtained life insurance policies, which currently and from this day

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[418] ROA/4892-4893.

forward renders him no threat to anyone. Additionally, there is the very real possibility in this case, that the state got it wrong, and RANDOLPH did not commit these crimes.

VIII

CONCLUSION

All convictions in this case should be vacated and the matter remanded for a new trial because (1) there was no evidence to support the conspiracy conviction, upon which the two murder convictions rest, (2) evidence of 20-year-old prior bad acts of which RANDOLPH was acquitted and which were expunged by the Utah courts was improperly admitted, (3) Utah officials were allowed to offer testimony and they provided evidence relating to the Utah cases to Nevada prosecutors in violation of Utah's expungement laws, (4) the case was infected throughout by prosecutorial misconduct which prejudiced the judge and the jury, and (5) the state stacked the jury by improperly challenging jurors who expressed any aversion to the death penalty.

Upon remand, the trial court should be instructed that reasonable bail be set for RANDOLPH pending a new trial. By the time this case is decided by this Court, this 62-year-old man will have already been in prison over ten years, and though the State has sought the death penalty, there is absolutely no evidence to support the conspiracy charge which is a threshold for finding RANDOLPH guilty

of murder in this case.

At a minimum, the death penalty should be vacated in favor of life without possibility of parole, because it is excessive under the facts of this case, unconstitutional under the current Execution Manual, and unenforceable in light of pending litigation by the drug manufacturers.

Respectfully submitted,

Dated this 14th day of December, 2018.

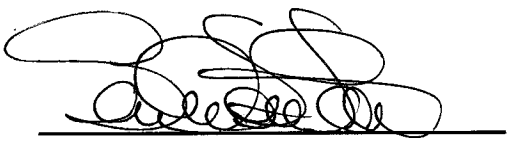
SANDRA L. STEWART, Esq.
Attorney for Appellant

IX

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this opening brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I further certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7)(B) because it involves a capital case and contains only 23,973 words.

DATED: December 14, 2018



SANDRA L. STEWART, Esq.
Appellate Counsel for
THOMAS RANDOLPH

X

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

APPELLANT'S OPENING BRIEF

by mailing a copy on December 14, 2018 via Priority mail, postage thereon fully prepaid, to the following:

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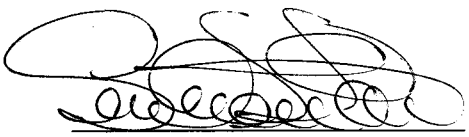

SANDRA L. STEWART

JURY LIST WITH CHALLENGES FOR CAUSE

NAME	NO.	YES	NO	MAYBE	JUROR
ABRAMONSKI, PETER	309		7881		
ACAC, MINERVA	536	7296			CAUSE-3380
ACHUFF, PAUL	034		7152		CAUSE-2946
ANDERSEN, CHRISTY	066	6846			
ARREOLA, MARIA	228			7777	
ASTORGA, ROSIO	559		7320		STIP-3336
ATTAWAY, MI	280		7833		
AUSTIN, TONI	693		8097		
BAILIN, CYNTHIA	093	6886			
BAKER, WILLIAM	286	6934			
BANKS, ELLYSIA	666		8081		
BARBOTI, MARK	290	7857			
BATES, BRITTANY	158		7681		
BERNDT, STACIE	253	7047			
BERTA, JENNIFER	641	7127			
BLAIR, DARLENE	616	7328			
BOSS, BRUCE	160			7697	
BOUSSEAU, MARLYS	080	6870			
BOWIE, MYNA	141	6757			JUROR-4305
BRICKMAN, BETTE	014	7457			
BROWN, YOLINIA	314	7232			
BUSH, TAMMY	181	6910			
BUTAYA, JUDITH	662		8073		
CALLAHAN, SUSAN	122		7617		
CAMARENA, ROXANNE	304			7873	
CARLSON, NANCY	653	6829			JUROR-4305
CARNATE, EDDIE	159			7689	
CAUGHRON, JAMES	164	7705			
CHA, YOUNG	189	6918	3105		
CHAN, CHELSIE	153	7184			
CHELGREN, MICHAEL	281		7425		
CHENG, YAO	030			7497	
CHUNG, WEI	281			7841	
CINCO, LEILANI	516			7280	
CODA, YENGENIYA	361	7913			
CONRAD, ROBERT	291	6942			
CORBIN, JEFF	015	6717			JUROR-4305
CORTEZ, ANGEL	671			8089	
CRIST, DAVID	224	6926			
CUNNINGHAM, JANJIT	213	7401			
DALY, SANDRA	090		7015		
DARBY, DOUGLAS	608		7111		
DELACRUZ, JULIE	727	7135			
DENKOVA, LORA	266		7817		
DERBYSHIRE, ELENA	033		7505		

JURY LIST WITH CHALLENGES FOR CAUSE

NAME	NO.	YES	NO	MAYBE	JUROR
DIAZ, ALEX	257		7055		
DIAZ, LILIA	059	7160	2928		CAUSE-2947
DRUM, ANGELA	528	6974			
DUAN, JENNIFER	567			8025	
DUFF, ANSHUN	023	7489			
ENGLER, MELANIE	089	7561			
ESPINOZA, MICHAEL	337	6950			
ESTEP, BRANDON	091			6878	
FRANCHELIN, NANCY	230	7785			
FREEMAN, LEN	491		7272		STIP-3334
GALLOFIN, LEO	512		7993		
GALVIN, GRADY	047	6999			
GARNETT, MEGAN	732	8129			
GARVIN, OLIVE	501	7095			
GENERALAO, DIANE	095	7023			
GEORGIOU, BYRON	048	7529			
GOLDBERG, KENNETH	099	7569			
GOMEZ, VILMA	226			7769	
GRANADA, JEE	557	7312			STIP-3336
GRIJALVA, MARJA	248		7809		
GUARDIAN, LORENA	513	8001			
GUEVARA, BILLY	523		7288		STIP-3262
GUNAWAN, NOULTA	304	7433			
HAAG, NADINE	464	6805			ALT-4305
HALVERSON, LARRY	072	6854			
HARRIS, CYNTHIA	640	8049			
HENSEL, CHRIS	627	8041			
HERNANDEZ, ARLEEN	245		7801		
HULET, TATE	071	7553			
INABA, JENNIFER	107	6894			
IRVING, JOHN	294		7865		
JARNER, KENNETH	140	7649			
JELINEK, LINDA	019		6991		
JEWELL, KIRK	250			7417	
JOHNSON, CHELSI	167	6765			JUROR-4305
JOHNSON, GREGORY	310	7889			
JOHNSON, JAIME	354	6789			JUROR-4305
JOHNSON, LUKE	470	7969			
JONES, JACKALYN	119		7601		
KELLEY, DANIEL	578	8033			
KHALID, SAIMA	273		7063		
KNOBLOCH, MARIA	407	7256			STIP-3247
KOEBCKE, APRIL	175	7039			
LAYMAN, BRENT	465	6813			ALT-4305
LEFLER, ROBERT	274	7825			

JURY LIST WITH CHALLENGES FOR CAUSE

NAME	NO.	YES	NO	MAYBE	JUROR
LENZ, TAYLOR	438	6797			ALT-4305
LISCANO, NICOLE	060	7353			
LOPEZ, ACEABELL	121		7609		
LOPEZ, TARA	550			7304	
LYNN, MICHELE	542		8009		
MACARANAS, JANELLA	111	7585			
MAGDALENO-VALDERRAMA, NANCY	154	7192			
MALICDEM, DEAN	138	7641			
MARADIAGA-CORNEJO, ALEJANDRO	070	7545			
MARTINEZ, ALICIA	214			7761	
MASUDA, RYAN	743		8145		
MATHERLY, ROSA	742	8137			
MATTHEWS, NORMA	145	7657			
MC KINLEY, PATRICIA	112	7593			
MC GUIRE, OSCAR	259	3145	7208		CAUSE-3186
MC KAY, JOHN	068	7537			
MENCHACA-LOBATI, OLIVIA	138		7369		
MERCADO, LILIANA	329		7897		
MEYER, LINDA	076	6862			
MILANO, SAL	133	6749			JUROR-4305
MILLER, ANTONI	215	7200			
MODAFFERI, ROXANNE	619	7119			
MOLARO, SCOTT	192		7745		
MONTANO, CARMEN	379	7248			STIP-3333
MOORE, BRITTNEY	287	7849			
MORAN, MILGYN	527	6966			
MUNOZ, SARAH	040		7513		
MURDY, WINDY	170	7721			
NIEMIEC, JASON	659	7344			
NOEL, JOHN	081	7176			
OCKEY, EDWARD	472	7977			
OLSEN, PHILIP	233	7793			
PALERE, JONATHAN	198	7753			
PAYNE, DALE	634	7336			
PITTS, RALEIGH	187		7393		
POTTER, CHRISTOPHER	001	7441			
PRICE, JONA-MARIE	168		7713		
PRINCE, TAUSHA	171		7729		
PULIDO, NETI	130	7625			
PYATT, QUARA	372	7929			
QI, MINDY	432			8153	
RAINFORD, THOMAS	074	7168	2966		CAUSE-3032
RAMIREZ, MARIA	175			7377	
RAYAN, JUAN	230	7409			
REAGAN, JAMIE	106	7577			

JURY LIST WITH CHALLENGES FOR CAUSE

NAME	NO.	YES	NO	MAYBE	JUROR
RECKERS, GEORGIA	263	7224	3158		CAUSE-3189
REED, LORRAN	698		8113		
RESTON, DONALD	016	7465			
REYES, OMAR	149	7665			
REYNOLDS, DALLAS	696	8105			
REYNOSA, ALLYSON	232	6773			JUROR-4305
RODRIGUEZ, ROYELLE	504	7985			
RUDER, ASHLEE	358		7905		
RYZHOV, SERGEY	082	7007			
SALAZAR, STEPHANIE	463	7264			STIP-3262
SAMIA, MARIAH	370	7921			
SANDOVAL, MAXINE	394		7087		
SANTOS, BERNARDINO	279		7071		
SAX, HARRY	152	7031			
SCHMIDT, JOHANNA	649	8057			
SCHOTT-MILLER, KAREN	051	6733			JUROR-4305
SEGURA, NANCY	157	7673			
SHADEL, CRAIG	031	6725			JUROR-4305
SICHO, ROMAN	546	8017			
SIERRA, ANTHONY	378			7945	
SINACA, EMILY	343	6781			JUROR-4305
STAGNER, NICOLE	409		7953		
STEINHOFF, SCOTT	021		7481		
SUEN, JING	261	7216			STIP-3187
TILL, BRUCE	143	6902			
TORRES, LISA	452		7961		
TRAN, LILLIAN	115	6741			JUROR-4305
TUASON, CARL	041		7521		
TURNER, MARK	136		7633		
VAZQUEZ, MONICA	190		7737		
VEGA, YANIRA	376			7937	
VELASQUEZ, VICTOR	005	7449			
VENTURA, DOROTHY	362		7240		STIP-3247
VERBA, AUDREY	579	6821			ALT-4305
VILMAN, JONATHAN	701		8121		
WALTON, CAROL	435	6958			
WEIMS, ROBERT	011	7144			
WHITE, BILLY	356	7079			
WILLIAMS, L. KIRK	185	7385			
WILSON, ENDREA	018		7473		
WOO, TONY	657	6837			JUROR-4305
WOODARD, WILLIAM	119		7361		
YATES-CHAMBERS, SUSAN	603	7103			
YIN, JASON	673	6982			
ZUCKER, EVAN	652	8065			