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Elizabeth A. Brown  
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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

IVONNE CABRERA,	)	
	)	Case No.: 74341
Appellant,	)	
	)	MOTION FOR ADDITIONAL
vs.	)	TIME TO FILE OPENING BRIEF
	)	and APPENDIX
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
_____	)	

COMES NOW, Patricia M. Erickson, counsel for Appellant IVONNE CABRERA, and respectfully requests this Court enter an order, pursuant to N.R.A.P. 26(b), extending the time within which to file Ms. CABRERA's Opening Brief and Appendix which is due to be filed on March 2, 2018.

By this Motion, counsel for Appellant CABRERA requests an additional forty-five (45) days within which to file Ms. CABRERA's pleadings. If this Honorable Court grants this request, Ms. CABRERA's Opening Brief and Appendix will be due to be filed on or before April 16, 2018.

This motion is made and based upon the fact that this direct appeal arises from a double homicide committed by Ms. CABRERA's co-defendant on April 26, 2012. Additionally, between October 1, 2012 and June 26, 2017, numerous motions were filed and litigated before Ms. CABRERA's jury trial began on June 26, 2017 and ended, when the jury decided that a sentence of life without the possibility of parole should be imposed, on July 20, 2017.

This motion is also based upon large number of constitutional issues that must be raised during this appeal which are based upon the following facts and procedural history.

Ms. CABRERA's criminal case began on May 2, 2012 when a criminal complaint was filed with the clerk of the North Las Vegas Justice Court. This complaint alleged that on April 26, 2012, IVONNE CABRERA and JOSE GONZALES committed two counts of murder with use of a deadly weapon, two counts of attempt murder with use of a deadly weapon, burglary while in possession of a deadly weapon and conspiracy to commit murder.

On August 21, 2012, the date that the preliminary hearing was scheduled to commence, the prosecutor provided twelve pages of crime scene diagrams to defense counsel who had specifically requested these documents two weeks before the preliminary hearing date.

Based upon the receipt of this discovery in court, counsel for Ms. CABRERA requested a continuance of the preliminary hearing which was denied. Subsequently, counsel for Ms. CABRERA informed the Justice Court judge that he was unable to proceed with the preliminary hearing and was required to advise Ms. CABRERA to waive her right to a preliminary hearing.

On August 27, 2012, an information was filed in the district court which alleged the same crimes as were set forth in the criminal complaint. Ms. CABRERA was arraigned in the district court on September 6, 2012. During this hearing, Ms. CABRERA asserted her right to a speedy trial. A status hearing was scheduled for September 12, 2012 to set a trial date.

The September 12<sup>th</sup> hearing was conducted before the Honorable Kathleen Delaney who was the judge assigned to preside over Ms. CABRERA's trial. At this hearing, Ms. CABRERA again asserted her desire to have trial within sixty days. Based upon the fact that the state would be determining whether to seek the death penalty, as to either one defendant or as to both, another status hearing regarding the scheduling of the trial date was scheduled for October 10, 2012.

Prior to the October 10<sup>th</sup> status hearing, a motion to sever Ms. CABRERA's trial from the co-defendant's trial was filed.

On October 1, 2012, argument on this motion was presented to the district court. Specifically, the court was informed that,

This past April 26<sup>th</sup>, [co-defendant Jose] Gonzales killed two people. The factual issue in this case is whether Ms. Cabrera intended to be part of that killing. It is uncontested that she was present. It is uncontested that [Ms. Cabrera and co-defendant Gonzales] both returned in the same car. The factual issue is why she did that. ...

[Ms. Cabrera's defense is] mutually antagonistic because [she] was present [at the crime scene]. Not just present because she was forced to be present but she observed the entire shooting. She is going to be able to point a finger at Mr. Gonzales and explain to you exactly how he painstakingly killed two people and wounded two other individuals. She was there. There is no question about that.

[Ms. Cabrera] will point the finger at [Jose Gonzales] and say he's the one who did it. I saw him go into the room. I heard the shooting....

The fact of the matter is [Ms. Cabrera] is going to testify that the reason she was forced to go along or the reason she went with him is because she was scared of him, because she knew of his character. She knew of his prison record. She knew the gangs that he was involved with. She was afraid of him. She heard of the violence he had been involved with. ... She knew that she could be beaten up and she could be the next victim if she didn't if she didn't do exactly what she was told to do.<sup>1</sup>

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<sup>1</sup> Transcript of 10.01.2012 hearing pp.4, 6-7.

Basically, the district court was informed that counsel for Ms. CABRERA intended to introduce a significant amount of evidence, including other bad acts and/or crimes, regarding Jose Gonzales. In effect, counsel for Ms. CABRERA would be acting as a second prosecutor in the case.

The district court denied Ms. CABRERA's motion to sever because the court viewed the trial as one defendant pointing the finger at the other defendant who would then point the finger back at the other.<sup>2</sup> Further, regarding Ms. CABRERA's right to trial within sixty days, the court determined that,

as long as the non-invoking party (Jose Gonzales) is not unreasonably requesting continuances that work to the prejudice against the other defendant (Ms. CABRERA), the fact that one has invoked and one has not alone is not enough to sever [the trials].<sup>3</sup>

Subsequently, Ms. CABRERA's trial was continued over and over based upon the co-defendant's need to investigate and prepare for a penalty hearing.

At the next hearing to schedule the trial date, counsel for Ms. CABRERA informed the district court that they would be prepared to go to trial in May of 2013.

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<sup>2</sup> Transcript of 10.01.2012 hearing pp.19.

<sup>3</sup> Id.

When the court determined that the trial should commence in August of 2013, counsel for the co-defendant were not available due to a different capital trial. Therefore, the court scheduled the joint trial to begin on October 7, 2013.<sup>4</sup>

On July 3, 2013, counsel for the co-defendant filed a motion to continue the trial based upon the need to travel to Mexico and complete additional penalty phase investigation. That motion was denied on July 24, 2013.

On July 31, 2013, counsel for the co-defendant filed a renewed motion to continue trial which was supported by a declaration of counsel which was filed under seal. Unfortunately, on August 19, 2013, counsel for Ms. CABRERA were forced to join the request to continue the trial based on the fact that one of Ms. CABRERA's counsel was required to start a trial in the federal court on September 16, 2013.<sup>5</sup>

On August 21, 2013, counsel for Ms. CABRERA informed the court that they could have been prepared to begin trial on an available February 2014 date. However, co-defendant counsel were not available for that date. Trial was then set to begin on June 23, 2014.<sup>6</sup>

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<sup>4</sup> Transcript of 10.17.2012 pp.7-8.

<sup>5</sup> Transcript of 08.19.2013 p.4.

<sup>6</sup> Transcript of 08.21.2012 pp.4-5.

On April 9, 2014, counsel for the co-defendant filed another motion to continue trial based upon the need to travel to Mexico and finish their penalty phase investigation. On April 24, 2014, counsel for Ms. CABRERA objected to the continuance and reminded the court that for all but one trial date, Ms. CABRERA's counsel have been ready for trial and were ready again.<sup>7</sup> Over this objection, a status hearing was set so that all counsel could review their calendars and determine a trial date sometime between November 10th and December 8th of 2014.<sup>8</sup>

At the next hearing, counsel for Ms. CABRERA were willing to change the date of another trial so that Ms. CABRERA's trial could be scheduled to being on December 8, 2014. Again, counsel for the co-defendant asserted that they would not be able to conduct a trial during the time frame that the court enunciated on April 24, 2014. Ultimately, the court scheduled the joint trial to commence almost one year later on May 11, 2015.<sup>9</sup>

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<sup>7</sup> Transcript of 04.24.2014 pp.5-6, 9-13.

<sup>8</sup> Transcript of 04.24.2014 p.18.

<sup>9</sup> Transcript of 05.14.2014 p.12.

On March 2, 2015, after obtaining years of additional time to complete penalty phase investigation, counsel for co-defendant JOSE GONZALES filed a motion to sever his trial from Ms. CABRERA's trial. This motion was based upon the statement that Ms. CABRERA provided to law enforcement on the date she was arrested - April 27, 2012. The district court granted the co-defendant's motion to sever.

Ultimately, Ms. CABRERA's trial commenced in June of 2017.

During the ongoing trial date litigation, the state determined to seek the death penalty against Ms. CABRERA. Pursuant to Rule 250, the state was required to file a notice to seek the death penalty within thirty days of August 27, 2012. On September 25, 2012, the state filed a "Notice of Evidence in Support of Aggravating Circumstances"; a notice to seek the death penalty was not filed within thirty days of August 27, 2012.

Instead, on October 4, 2012, the state filed a "Notice of Motion and Motion to File Corrected Notice of Intent to Seek the Death Penalty." In this motion, the prosecutor alleged that the required notice of intent to seek the death penalty was "mistitled" "due to a clerical error".

Ms. CABRERA's counsel opposed the state's motion to file a corrected notice because an original notice was never filed.



Therefore, counsel for Ms. CABRERA argued that the state should be seeking to late file the notice of intent. In order to late file a notice of intent, the state must established good cause for the failure to timely file the notice of intent.

Relying upon this Court's decision in State v. Second Judicial District Court (Marshall), which noted that an attorney's inadvertence does not establish good cause for the late filing of a notice of intent, Ms. CABRERA's counsel argued that a "clerical error" cannot be distinguished from an attorney's inadvertence. Therefore, the state had failed to establish good cause in Ms. CABRERA's case. This district court disagreed and the state was permitted to file a "Corrected Notice of Intent to Seek the Death Penalty."

In preparing for the September 21, 2015 separate trial scheduled for Ms. CABRERA, her counsel filed a motion to strike four aggravating circumstances enunciated by the state which were based upon the conviction of a felony involving the use or threat of violence to the person of another, great risk of death to more than one person and that the killing was at random and without apparent motive. This motion was based upon the fact that the state entirely premised Ms. CABRERA's criminal liability for the murder and attempt murder crimes upon conspiracy and aiding and abetting.

Counsel for Ms. CABRERA asserted that permitting the state to seek the death penalty for a person, who all parties agreed, never held the gun nor shot the gun that killed two men and injured two women violated the Eighth and Fourteenth Amendments to the federal constitution and also violated the constitution of the state of Nevada. The district court determined that these constitutional challenges were a matter for decision by a jury.<sup>10</sup>

Subsequently, a motion for the jury to view the scene of the crimes was filed on Ms. CABRERA's behalf. The state's opposition to this motion argued, for the first time in almost four years even though counsel for Ms. CABRERA clearly enunciated on October 1, 2012 that duress would her defense, that a defense based on duress was unavailable based upon NRS 194.010(8). Additionally, the state asserted that the common law policy that a person should allow herself to be killed before choosing to kill another established that the fear for one's own life does not justify killing another.

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<sup>10</sup> Counsel recognizes that Ms. CABRERA was not sentenced to death which normally results in this Court deciding not to address penalty phase issues. However, it is submitted that the constitutional invalidity of seeking aggravating circumstances which focus on the mental state of the person who actually committed the murder or violent act are inapplicable to a person convicted of murder through imputed liability is subject to reoccurring in the future and is so important that this Court should consider any and all issues related to the state's decision to seek the death penalty in the case at bar.

Although every opinion relied upon by the state regarding the “choice of evils” policy involved a defendant who, contrary to Ms. CABRERA, actually and personally killed another person, the district court determined that Ms. CABRERA was precluded from asserting a duress defense to the two charges of murder.

Subsequently, the state convinced the district court that because every crime allegedly committed by Ms. CABRERA required the state to prove murder occurred, Ms. CABRERA would be precluded from asserting a duress defense to all of the crimes she allegedly committed.

Jury selection in Ms. CABRERA’s case began on June 26, 2017 and concluded on June 28, 2017. The state began calling witnesses on July 5, 2017 and rested on July 10, 2017.

Ms. CABRERA called numerous witnesses to testify during her case in chief. One of the witnesses counsel for Ms. CABRERA sought testimony from was JOSE GONZALES, Ms. CABRERA’s co-defendant. Mr. GONZALES was transported to court from High Desert State Prison.<sup>11</sup>

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<sup>11</sup> On the date of his calendar call, co-defendant Jose Gonzales pleaded guilty to two counts of First Degree Murder with Use of a Deadly Weapon and two counts of Attempt Murder with Use of a Deadly Weapon. Even though Mr. Gonzales was the actual killer, he was sentenced to life WITH the possibility of parole as well as consecutive sentences for the

After the district court required Mr. GONZALES to take the stand, he refused to identify himself and refused to answer any questions. Ultimately, the district court found that Mr. GONZALES was unavailable as a witness. When Ms. CABRERA's counsel sought to introduce Mr. GONZALES' judgment of conviction and sentencing, the district court denied admission of those documents. Ms. CABRERA also testified during her trial. The defense rested on July 17, 2017.

Many issues, which must be raised during this direct appeal, arose during the ten days of trial proceedings.

On the afternoon of July 18, 2017 the jury returned from the deliberations and found Ms. CABRERA guilty of committing conspiracy to commit murder, two counts of first degree murder with use of a deadly weapon, two counts of attempt murder with use of a deadly weapon and burglary while in possession of a firearm.

Ms. CABRERA's penalty hearing was conducted on July 18 and July 20, 2018. On July 20<sup>th</sup>, the jury found that the state had proven the existence of five aggravating circumstances including the circumstance that the murder was committed by a person who knowingly caused great risk of death.

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attempt murder pleas.

The jury also determined that seven mitigating circumstances existed. The jury decided that life without the possibility of parole should be imposed for the commission of the two counts of first degree murder.

Additional significant legal issues arose during the penalty proceeding which must be raised before this Honorable Court.

Based upon the forgoing facts and the number of legal issues that must be raised during the present appeal, it is respectfully requested that the Honorable Court grant the present motion and order that the opening brief and appendix be filed on April 16, 2018.

DATED this 2nd day of March, 2018.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2<sup>nd</sup> day of March, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven Owens, Clark County Chief Deputy District Attorney

Adam Laxalt, Attorney General

Patricia M. Erickson

/s/ Patricia M. Erickson  
Patricia M. Erickson