

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 02 2018 10:47 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

IVONNE CABRERA,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

Case No. 74341

APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME III

**Appeal from Judgment of Conviction
Eighth Judicial District Court**

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TRAN
CASE NO. C-12-283700-1
CASE NO. C-12-283700-2
DEPT. NO. 25



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JOSE GONZALES,)
IVONNE CABRERA,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT
OF
STATUS CHECK ON TRIAL
READINESS
250 RULE

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: WEDNESDAY, AUGUST 19, 2015

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

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APPEARANCES:

For the State: MICHAEL STAUDAHER, ESQ.

For the Defendant: ALZORA JACKSON, ESQ.

CLARK PATRICK, ESQ.

BRET WHIPPLE, ESQ.

PATRICIA ERICKSON, ESQ.

* * * * *

1 LAS VEGAS, NEVADA; WEDNESDAY, AUGUST 19, 2015

2 P R O C E E D I N G S

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4
5 THE COURT: Page 2 and 3, State of Nevada vs.
6 Yvonne Cabrera and Jose Gonzales.

7 May I have counsel come to the bench, please.

8 MS. ERICKSON: We're missing Mr. Whipple.

9 THE COURT: Come to the bench anyway.

10 MS. ERICKSON: Just wanted to let you know.

11 (Discussion held at the bench.)

12 THE COURT: Based on our discussion at the
13 bench, I would note for the record -- let me have you give
14 appearances for the record first.

15 MS. ERICKSON: Patricia Erickson for Ms.
16 Cabrera.

17 MR. PATRICK: Clark Patrick and Alzora Jackson
18 for Mr. Gonzales.

19 MR. STAUDAHER: Michael Staudaher for the State.

20 THE COURT: I would note that -- oh, here is Mr.
21 Whipple. Just in time Mr. Whipple.

22 Ms. Cabrera and Mr. Gonzales are present in
23 custody.

24 The discussion that we had, Mr. Whipple, just
25 few minutes ago before you came in I asked counsel to come

1 to the bench. Ms. Erickson had made it clear that you
2 were coming back in and wanted to be present, but all I
3 told her was that the court was not able to review the
4 oppositions that had come in on two of the motions, and
5 even though we do have the briefing on the other motions
6 it is this court's preference to have the opportunity to
7 review all of the motions and be prepared to rule on all
8 of the motions. And I know Ms. Erickson had also
9 indicated she wanted an opportunity to do a brief response
10 to these two additional oppositions.

11 So the court is going to give that time, and then we
12 will come back and hear all Ms. Cabrera's matters
13 together.

14 How much time do you need, Ms. Erickson.

15 MS. ERICKSON: I should be able to get those
16 filed by Friday.

17 THE COURT: So should we come back Monday or
18 Wednesday. Wednesday would be my preference only because
19 we'll be pretty busy with Monday calendar.

20 MS. ERICKSON: I'll do it over the weekend. If
21 I don't get them in first thing in the morning you won't
22 see them, so I think Wednesday is best.

23 THE COURT: Typically we do catch things even if
24 it's late in the day. It is easier for us to prep. So
25 we'll put you on then next Wednesday for that.

1 THE CLERK: August 26th at 9:00.

2 THE COURT: Of course we'll be prepared to also
3 discuss trial readiness and have our status check on that
4 as well.

5 MS. ERICKSON: Thank you, Judge.

6 MR. WHIPPLE: I'm in front of Judge Gonzales for
7 trial next week. I don't think there will be a problem.
8 I may ask the court to pull is earlier versus later.

9 THE COURT: We'll be happy to accommodate that
10 for everybody that's here. Of course the court needs to
11 be here too, so we note that that is happening. I ran
12 into Mr. Staudaher in the elevator and had a discussion
13 about one of the reasons why the court has difficulty on
14 many occasions getting started earlier. But we'll do our
15 best to get you in and out so you can go. Not a problem
16 to do that. So we'll see you on that date again.

17 THE CLERK: August 26th at 9:00.

18 MS. ERICKSON: Thank you, Judge.

19 THE COURT: I gave the 25h as a due date on
20 something, but that's not a criminal calendar date.

21 We now are prepared to proceed with the status check
22 on trial readiness for Mr. Jose Gonzales. This matter is
23 bifurcated so obviously there isn't a reason why we could
24 not have that discussion with regard to him.

25 Mr. Patrick did you have something you wanted to --

1 MR. PATRICK: Your Honor, no. We just have the
2 same problem that the court has heard from us several
3 times about our mitigation. We are working different
4 angles on that. At this time nothing is firmed up. So
5 that's all I can really represent to the court, is we are
6 working on different angles. Should they pan out, we
7 anticipate being ready in May. Should they not pan out,
8 we can discuss that at a later date.

9 THE COURT: You know, I appreciate that some
10 check-ins can be maybe more substantive than others, even
11 if we have to do them in chambers to preserve
12 confidentiality. But one of the reasons why, in these
13 matters, I've begun doing monthly status checks is because
14 we need to identify what issues there are. We need to
15 identify what things are being done for those issues.

16 I'm aware of the difficulties of the circumstances
17 here, but, you know, again, for the record, we do have a
18 trial date right now that is significantly in the future,
19 from this court's perspective. More than 6 months away
20 now. So I would anticipate whatever those circumstances
21 are we'll prevail through them. Summer months will soon
22 be over and perhaps we'll be cooler and have better
23 opportunities for those issues. I know the travel
24 circumstances were difficult. But we have the ultimate
25 circumstances we still face with where you're going and

1 dealing with your mitigation issues.

2 We have to be able to have some predictability that
3 the trial stack we have will proceed. So I'm not going
4 ask for more today, but perhaps when the other trial is
5 complete and you have more insight, you can give us maybe
6 more substantive status check the next time.

7 MR. PATRICK: Understood.

8 THE COURT: Ms. Jackson, anything you had or
9 wanted to add.

10 MS. JACKSON: No, thank you. Thank you, your
11 Honor.

12 THE COURT: Mr. Staudaher.

13 MR. STAUDAHER: One thing. Maybe this was just
14 an error. I noted that Mr. Patrick mentioned May as the
15 trial date. I have April 25th as our trial date.

16 THE COURT: No, I have May.

17 The calendar reflects it. I can't say I
18 independently recollect this, but I have the calendar call
19 as May 2nd, and the jury trial as May 9th.

20 MS. JACKSON: I think the last time we were here
21 the court noted that I have a capital case set with Mr.
22 Staudaher -- Nevada vs. Keith Barlow in another department
23 that we anticipate going. And what the court did at that
24 time to basically accommodate counsel to make sure we had
25 at least some type of a gap to give more reliability for

1 this trial date was discuss with the clerk leeway and
2 pushed it back a little bit so that we could have a bit of
3 a cushion.

4 MR. STAUDAHER: I couldn't remember. I didn't
5 have it written down.

6 MS. JACKSON: That's what happened.

7 THE COURT: I have some recollection of that
8 discussion now that you are telling us Ms. Jackson. I
9 think that is how we ended up with those dates. But that
10 is what's reflected on the calendar.

11 MR. STAUDAHER: I wanted to make sure everybody
12 is on the same page.

13 THE COURT: I had also mentioned the general
14 dates and I haven't given the dates again.

15 Anything from the State's perspective that you have.
16 I know on resent updates we've had discussions about there
17 is -- discovery has been handed over. I think there has
18 been file reviews.

19 Do we have anything like that pending.

20 MR. STAUDAHER: Not that I'm aware of. I
21 believe we were outstanding on the back-up data and it has
22 been provided, so I'm not aware of anything.

23 THE COURT: Anything else the State is waiting
24 on they have requested from anybody.

25 MR. STAUDAHER: Not at this point.

1 THE COURT: Our next status check won't be in 30
2 days. It will be more like 45, because I want to set it
3 out after what I would expect to be the conclusion of the
4 other trial. So we'll go 60 days out for this one.

5 MR. PATRICK: That's fine.

6 THE CLERK: October 21st at 9:00.

7 THE COURT: Thank you all.

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CERTIFICATE
OF
CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.

A handwritten signature in cursive script, appearing to read "Sharon Howard", is written over a horizontal line. The signature is fluid and includes a large, circular flourish at the end.

Sharon Howard
C.C.R. #745



CLERK OF THE COURT

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IVONNE CABRERA

DISTRICT COURT

COUNTY OF CLARK, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

IVONNE CABRERA,

Defendant.

Case No.: C-12-283700-1
Dept. No.: XXV

**REPLY TO STATE'S RESPONSE TO MOTION TO STRIKE AGGRAVATING
CIRCUMSTANCES**

Hearing Date: August 26, 2015
Hearing Time: 9:00 a.m.

COMES NOW, Defendant, IVONNE CABRERA, by and through her counsel, Bret O. Whipple and Patricia M. Erickson, and submits the following as her reply to the state's response to the motion for order striking specific aggravating circumstances alleged in the state's Corrected Notice of Intent to Seek the Death Penalty.

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1 I. The Eighth and Fourteenth Amendments prohibit application of three of the
2 alleged aggravating circumstances: (1) conviction of felony involving use or
3 threat of violence; (2) great risk of harm to more than one person; and, (3)
4 at random and without motive

5 **A. Ms. CABRERA’s motion enunciates binding authority which**
6 **permits this Honorable Court to strike unconstitutional**
7 **aggravating circumstances**

8 In it’s response to Ms. CABRERA’s constitutional challenge to the application of
9 aggravating circumstances which impute liability to a non-killer aider/abettor/conspirator,
10 the state first asserts that Ms. CABRERA failed to provide this Court “with any Nevada
11 authority which supports the relief requested” and implies that this fact requires the denial
12 of the Ms. CABRERA’s motion.¹ This analysis is flawed for a number of reasons.

13 First, as this Court is well aware, the Eighth Amendment applies to capital cases
14 litigated in the state of Nevada. Second, as this Court is also well aware, United States
15 Supreme Court cases interpreting the application of the Eighth Amendment are binding
16 authority in capital cases litigated in the state of Nevada. All of the United States
17 Supreme Court cases, cited in Ms. CABRERA’s motion, explicitly and/or implicitly
18 authorize a state court to strike unconstitutional aggravating circumstances. Third, in her
19 motion, Ms. CABRERA cited Nevada authority which establishes this Court’s ability to
20 strike invalid aggravating circumstances.

21 In McConnell v. State, 120 Nev 1043 (2004), cited at fn. 14 of the motion, the
22 Court stated that “[t]he most significant issue raised is: in a prosecution seeking death for
23 a felony murder, does an aggravator based on the underlying felony constitutionally
24 narrow death eligibility?”

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28 ¹ See p.7 lines 7-8 of state’s response.

1 In deciding this issue, the Nevada Supreme Court specifically noted that:

2 [t]he Eighth Amendment prohibits the infliction of cruel and unusual
3 punishment. In 1972, the Supreme Court held that capital sentencing
4 schemes which do not adequately guide the sentencer's discretion and thus
5 permit the arbitrary and capricious imposition of the death penalty violate
6 the Eighth and Fourteenth Amendments.² As a result, the Court has held
that to be constitutional a capital sentencing scheme 'must genuinely
narrow the class of persons eligible for the death penalty and must
reasonably justify the imposition of a more severe sentence on the
defendant compared to others found guilty of murder.'³

7 Further, the Court concluded that sections 6 and 8(5) of Article 1 of the Nevada
8 Constitution also require the same narrowing process.⁴

9 Based upon these constitutional principles, the Nevada Supreme Court concluded
10 (1) Nevada's definition of felony murder does not constitutionally narrow the class of
11 persons eligible for the death penalty;⁵ (2) the narrowing capacity of the felony murder
12 aggravating circumstance is largely theoretical;⁶ and, (3) the practical effect of the felony
13 murder aggravator in felony murder cases is so slight that the aggravator "fails to
14 genuinely narrow the death eligibility of felony murders and reasonably justifies imposing
15 death on all defendants to whom it applies."⁷ The Court did not strike the aggravating
16 circumstance in McConnell because it was clear that he plead guilty to premeditated,
17 deliberate first degree murder and not to felony murder.

18 However, the Court subsequently determined that the felony murder aggravating
19 circumstance's failure to genuinely narrow those murderers eligible for the death penalty

20 ² McConnell at 1063 citing Gregg v. Georgia, 428 U.S. 153, 200, 206-07, 96
21 S.Ct. 2909, 49 L.Ed.2d 859 (1976)(plurality opinion).

22 ³ Id. citing Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d
23 235 (1983).

24 ⁴ Id.

25 ⁵ Id. at 1066.

26 ⁶ Id. at 1067.

27 ⁷ Id. at 1069

1 was a substantive change in law and was, therefore, retroactively applicable to previously
2 decided cases.⁸ Subsequent to the publication of McConnell and Bejarano, the Nevada
3 Supreme Court has either stricken the felony murder aggravating circumstance itself or
4 affirmed the district court's decision to strike the aggravator in five cases.⁹

5 In McConnell, the Nevada Supreme Court applied the Eighth/Fourteenth
6 Amendment principles, directly relied upon in Ms. CABRERA's motion, to the
7 determination of whether an aggravating circumstance was constitutional. Clearly, and
8 contrary to the state's assertion, Ms. CABRERA has provided this Court binding
9 precedent which specifically authorizes this Court to strike aggravating circumstances
10 which violate the Eighth and Fourteenth Amendments. Therefore, this Court has the
11 jurisdiction to grant Ms. CABRERA's constitutional challenges to the application of NRS
12 200.033(2)b), and subsections 3 and 9, find these circumstances cannot be presented
13 to the jury, and conclude these circumstances are not a basis for Ms. CABRERA's jury
14 to find her death eligible.

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19 ⁸ Bejarano v. State, 122 Nev. 1066 (2006).

20 ⁹ State v. Harte, 124 Nev. 969 (2008)(affirming the district court's decision to
21 strike the felony murder aggravating circumstance and determination that a new penalty
22 hearing was required); Hernandez v. State, 124 Nev. 978 (2008)(burglary felony murder
23 aggravator invalid but jury consideration harmless) overruled on different ground by
24 Armentia-Carpio v. State, __ Nev. __, 306 P.3d 395 (2013); Archanian v. State, 122 Nev.
25 1019, 1022-23 (2006)(robbery aggravator invalid under McConnell); Rippo v. State, 122
26 Nev. 1086 (2006)(court held three aggravators based on felonies of burglary, kidnapping
27 and robbery were invalid but jury's consideration of these aggravators was harmless
error); see also, Bennett III, 121 Nev. 802, 807 (2005)(as case was reversed for a new
penalty hearing, it was not final and McConnell applied regardless of whether the case
was retroactive or not). The Court also authored eight unpublished opinions regarding
the application of McConnell when the appellant was required to establish cause and
prejudice to overcome a procedural bar.

1 **B. The state's response fails to provide any reasoned basis for**
2 **denying Ms. CABRERA's Eighth/Fourteenth Amendment**
3 **challenge to NRS 200.033(2)(b), subsections 3 and 9**

4 The state's opposition to Ms. CABRERA's Eighth and Fourteenth Amendment
5 challenge to the application of four aggravating circumstances ¹⁰ - anticipated conviction
6 of attempt murder charges,¹¹ great risk of death to more than one person,¹² and, murder
7 committed at random and without apparent motive ¹³ - must not impact on this Court's
8 determination of the merits of Ms. CABRERA's constitutional challenge to imputed liability
9 of these circumstances. The state's response regarding this issue is completely flawed
10 for a number of other reasons.

11 First, the specific language of the great risk of death to more than one person
12 aggravating circumstance establishes that NRS 200.033(3) cannot apply to an
13 aider/abettor or conspirator like Ms. CABRERA. In order for this circumstance to
14 legitimately apply, the state must prove, beyond a reasonable doubt, that the "murder
15 was committed by a person who knowingly created a great risk of death to more than
16 one person." Ms. CABRERA is not the person who committed the murder of either
17 James Headrick or Erik Quesada Morales - JOSE GONZALEZ committed these murders.
18 Even **if** Ms. CABRERA aided/abetted or conspired with GONZALEZ, she did not
19 **knowingly** create a great risk of death to more than one person - only JOSE GONZALEZ
20 knew that he was going to shoot into each room regardless of how many people were

21 ¹⁰ The initial motion incorrectly states that the Eighth and Fourteenth
22 Amendment analysis requires the striking of five aggravating circumstances. See motion
23 p.8 line 10.

24 ¹¹ Aggravating circumstances numbered 3 and 4, in the state's Corrected
25 Notice of Intent to Seek the Death Penalty, based upon NRS 200.033(2)(b).

26 ¹² Aggravating circumstance number 5, in the state's Corrected Notice of
27 Intent, based upon NRS 200.033(3).

28 ¹³ Aggravating circumstance number 7, in the state's Corrected Notice of
Intent, based upon NRS 200.033(9).

1 there. As the state is required to prove every element of this aggravating circumstance,
2 which cannot be done in Ms. CABRERA's case, the two NRS 200.033(3) aggravators do
3 not apply to the case at bar, cannot be presented to Ms. CABRERA's jury and are not a
4 basis for the jury to find her death eligible.

5 Second, the state did not support its opposition to Ms. CABRERA's Eighth and
6 Fourteenth Amendment challenge to the unconstitutionality of imputed liability, in relation
7 to NRS 200.033(3)(great risk of death) and subsection 9 (random and without apparent
8 motive), by citation to ANY decision by the Nevada Supreme Court, any other state high
9 court, the Ninth Circuit Court of Appeals or the United States Supreme Court.¹⁴ The
10 state's entire opposition, to the constitutionally based request to strike the great risk of
11 death and random/motiveless aggravating circumstances, relies upon the assertions that
12 the application of these circumstances "is a question of fact to be determined by the jury"
13 and that being charged as an aider/abettor/conspirator does not "absolve" Ms. CABRERA
14 for "criminal liability."¹⁵

15 These assertions are ridiculous. It is axiomatic that the state is required to
16 enunciate a legal basis, not just a factual basis, for the application of each aggravating
17 circumstance alleged to exist in a case. If this were not true, the Nevada Supreme Court
18 would validate the application of each and every aggravating circumstance found by the
19 sentencer.

20
21 ¹⁴ This fact is all the more amazing given the state's incorrect assertion that
22 Ms. CABRERA's motion "cites to no legal authority in Nevada which supports the relief
requested." See response p.7 lines 7-8.

23 ¹⁵ See pp. 7-8 lines 27-28 (factual determination) and p.8 lines 1-2 (criminal
24 liability) regarding random/motiveless circumstance. See p. 8 line 9 (factual
25 determination) and p. 8 lines 10-13 (criminal liability) regarding great risk of death
26 circumstance. Of course, if found guilty of being an aider/abettor or conspirator, ie.
27 criminally liable under those theories of culpability, Ms. CABRERA is guilty of first degree
murder. However, the state fails to recognize that there is no legal basis to impute
application of NRS 200.033(2)(b), subsections 3 and 9, which are based entirely upon the
actions of JOSE GONZALEZ, to Ms. CABRERA and thus make her death eligible.

1 However, it is very clear that the Nevada Supreme Court reviews the constitutionality -
2 legal basis - of every aggravating circumstance whenever requested.¹⁶

3 In fact, and clearly contrary to the state's "question of fact assertion," the Nevada
4 Supreme Court has written thirty-four decisions analyzing the application of the great risk
5 of death to more than one person aggravating circumstance; five of these opinions were
6 not published.¹⁷ Of the remaining twenty-nine published opinions, the Court concluded
7 that the circumstance - actually found by the sentencer - was legally inapplicable in four
8 cases.¹⁸

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11 ¹⁶ This fact is clearly established by the Court's decisions to grant
12 extraordinary relief, through mandamus review of the legality of the application of different
13 aggravating circumstances, prior to trial and/or penalty hearing. See Nunnery v. Eighth
14 Judicial District Court, 124 Nev. 477 (2008)(Nunnery I)(conspiracy to commit robbery
15 does not fulfill elements of NRS 200.033(2)(b); Hidalgo v. District Court, 124 Nev. 330
16 (2008)(solicitation to commit murder does not fulfill elements of NRS 200.033(2)(b));
17 Redeker v. District Court, 122 Nev. 164 (2006)(conviction of second degree arson does
18 not fulfill elements of NRS 200.033(2)(b) requiring the conviction must be for a felony
19 involving use or threat of violence); and, Bennett v. Eighth Judicial District Court, 121 Nev.
20 802 (2005)(Bennett III)(state cannot allege additional aggravating circumstances known
21 to exist, but were not sought to be applied, by the state at time of original proceedings).

22 ¹⁷ See Lisle v. State, __ Nev. __, 351 P.3d 725 (2015)(Lisle IV); Nunnery II,
23 Nev. __, 263 P.3d 235 (2011); Nunnery I, 124 Nev. 477 (2008); Summers v. State, 122
24 Nev. 1326 (2006); Bennett III, 121 Nev. 802 (2005); State v. Bennett, 119 Nev. 589
25 (2003)(Bennett II); Leslie v. Warden, 118 Nev. 773 (2002)(Leslie II); Floyd v. State, 118
26 Nev. 156 (2002); Evans v. State, 117 Nev. 609 (2001)(Evans II); Villanueva v. State, 117
27 Nev. 664 (2001)(not a death penalty case); Schoels v. State, 114 Nev. 981 (1998); Lane
28 v. State, 114 Nev. 299 (1998)(Lane II); Leslie v. State, 114 Nev. 8 (1998)(Leslie I); Lisle
v. State, 113 Nev. 540 (1997)(Lisle I); Flanagan v. State, 112 Nev. 1409 (1996)(Flanagan
V); Evans v. State, 112 Nev. 1172 (1996)(Evans I); Domingues v. State, 112 Nev. 683
(1996); Wesley v. State, 112 Nev. 503 (1996); Lane v. State, 110 Nev. 1156 (1994)(Lane
I); Hogan v. Warden, 109 Nev. 952 (1993); Homick v. State, 108 Nev. 127 (1992);
Flanagan v. State, 107 Nev. 243 (1991)(Flanagan III); Jimenez v. State, 105 Nev. 337
(1989); Moran v. State, 103 Nev. 138 (1987); Hogan v. State, 103 Nev. 21 (1987); Ford
v. State, 102 Nev. 126 (1986); Nevius v. State, 101 Nev. 238 (1985); Harvey v. State, 100
Nev. 340 (1984); and, Bishop v. State, 95 Nev. (1979).

29 ¹⁸ See Lane II, 114 Nev. 299 (1998); Leslie I, 114 Nev. 8 (1998); Lane I, 110
Nev. 1156 (1994); and, Jimenez, supra, 105 Nev. 337 (1989).

1 The Supreme Court's conclusions, in these four cases, refute both the state's legally
2 unsupported assertion that the application of these circumstances "is a question of fact
3 to be determined by the jury" and the state's implicit suggestion that this Court cannot
4 determine that the Eighth and Fourteenth Amendments forbid imputed liability of NRS
5 200.033(3) to the non-killing defendant. This Court has the jurisdiction to make this
6 Eighth/Fourteenth Amendment decision and it should grant Ms. CABRERA's motion.

7 Further, there are two published decisions which actually discuss the application
8 of NRS 200.033(3) to co-defendants.¹⁹ While the 1996 Flanagan V opinion does not
9 address the federal constitutional challenge set forth in Ms. CABRERA's motion, and is
10 therefore inapplicable, the Supreme Court's 2005 Nunnery I decision actually supports
11 Ms. CABRERA's assertion that death eligibility/liability for the great risk of death cannot
12 be imputed to her.

13 In Nunnery I, where imputed accomplice liability was particularly alleged as a
14 challenge to the death sentence, the Supreme Court specified that the state did not seek
15 application of NRS 200.033(3) on a theory of imputed liability. Rather, the Court
16 recognized that the description, in the notice of evidence in aggravation, did not suggest
17 accomplice liability because it elucidated Nunnery's own course of conduct.²⁰ Nunnery
18 "chose the victims and the locations of the armed robbery and fired his gun repeatedly
19 while numerous people" were waiting, walking and standing nearby.²¹

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24 ¹⁹ Nunnery II, __ Nev. __, 263 P.3d 235 (2011) and Flanagan V, 112 Nev. 1409
25 (1996)(great risk of death circumstance not imputed to either Flanagan or Moore because
each defendant shot at an intended victim while another person was in near proximity).

26 ²⁰ Nunnery I, *supra* at 255.

27 ²¹ Nunnery I, *supra* at 256.

1 While the Court did not engage in an Eighth/Fourteenth Amendment analysis, Nunnery
2 lends support to the conclusion that the Nevada Supreme Court will not permit imputed
3 liability for a co-defendant killer's actions as a basis for the application of NRS 200.033(3)
4 to the non-killing defendant. Therefore, Ms. CABRERA's motion should be granted.

5 Next, and again contrary to the state's "question of fact" assertion, the Nevada
6 Supreme Court has issued thirty-one separate opinions analyzing the application of NRS
7 200.033(9), the random/motiveless aggravating circumstance; three of these opinions
8 were not published.²² Of the remaining twenty-eight published decisions, the Court
9 overruled eight of its decisions where it previously upheld application of NRS
10 200.033(9).²³ These eight opinions directly refute both the state's legally unsupported
11 assertion that the application of the random/motiveless aggravating circumstance "is a
12 question of fact to be determined by the jury" and the state's implicit suggestion that this
13 Court cannot determine that the Eighth/Fourteenth Amendments forbid imputed liability
14

15 ²² See Nika v. State, 124 Nev. 1272 (2008)(Nika III); Nika v. State, 120 Nev.
16 600 (2004)(Nika II); Clem v. State, 120 Nev. 307 (2004)(not a death case); Bennett II, 119
17 Nev. 589 (2003); Leslie II, 118 Nev. 773 (2002); Floyd v. State, 118 Nev. 156 (2002);
18 Servin v. State, 117 Nev. 775 (2001); Geary v. State, 115 Nev. (1999)(Geary III);
19 Middleton v. State, 114 Nev. 1089 (1998); Lane II, 114 Nev. 299 (1998); Calambro v.
20 State, 114 Nev. 106 (1998)(Calambro II); Geary v. State, 114 Nev. 100 (1998)(Geary II);
21 Leslie I, 114 Nev. 8 (1998); Nika v. State, 113 Nev. 1424 (1997)(Nika I); Greene v. State,
22 113 Nev. 157 (1997); Geary v. State, 112 Nev. 1434 (1996)(on rehearing from Geary I);
23 Evans I, 112 Nev. 1172 (1996); Calambro v. State, 111 Nev. 1015 (1995)(Calambro I);
24 Lane I, 110 Nev. 1156 (1994); Paine v. State, 110 Nev. 609 (1994)(Paine II); Geary v.
25 State, 110 Nev. 261 (1994)(Geary I); Paine v. State, 107 Nev. 998 (1991)(Paine I);
26 Doleman v. State, 107 Nev. 409 (1991)(Doleman I); Bennett v. State, 106 Nev. 135
27 (1990)(Bennett I); Mazzan v. State, 105 Nev. 745 (1989)(Mazzan III); Moran v. State, 103
28 Nev. 138 (1987); Ford v. State, 102 Nev. 126 (1986); and, Bishop v. State, 95 Nev.
(1979).

24 ²³ See Bennett I, 106 Nev. 135 (1990); Paine I, 107 Nev. 998 (1991)([and
25 therefore both Doleman I, 112 Nev. 843 (1991) and Paine II, 110 Nev. 609 (1994)]); Lane
26 I, 110 Nev. 1156 (1994)([and consequently Lane II, 114 Nev. 299 (1998)]); Nika I, 113
27 Nev. 1424 (1997); and, Leslie I, 114 Nev. 8 (1998). All of these previous opinions
28 regarding application of NRS 200.033(3) were overruled by Leslie II, 118 Nev. 773,
781-82, 59 P.3d 440, 446 (2002).

1 of the random/motiveless aggravating circumstance to the non-killing defendant. This
2 Court has the jurisdiction to make this federal constitutionally based decision and it should
3 grant Ms. CABRERA's motion.

4 Moreover, while two published opinions interpreted the application of NRS
5 200.033(9) to co-defendants,²⁴ neither impacts the legitimacy of the Eighth/Fourteenth
6 Amendment analysis enunciated in Ms. CABRERA's motion. In Greene, the non-killing
7 co-defendant (Winfrey) failed to raise an Eighth/Fourteenth Amendment challenge to his
8 imputed liability under NRS 200.033(3). Therefore, the Supreme Court's conclusion that
9 200.033(9) applied to Winfrey does not apply or, in any manner, control this Court's
10 decision in the case at bar and Ms. CABRERA's motion should be granted.

11 Further, the Supreme Court's decision in Doleman I does not impact on Ms.
12 CABRERA's constitutional challenge to the imputed liability of the random/motiveless
13 circumstance. This 1991 decision would have been overruled by Leslie II, just as that
14 case overruled Paine I,²⁵ if Doleman remained death eligible in 2002.²⁶ Clearly, given
15 these circumstances, the Supreme Court's prior affirmance of the application to NRS
16 200.033(3) in Doleman I does not apply or, in any way, control this Court's decision in the
17 case at bar and Ms. CABRERA's motion should be granted.

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20 ²⁴ See Greene, supra, 113 Nev. 157 (1997) and Doleman, 112 Nev. 843 (1991).

21 ²⁵ Paine and Doleman were co-defendants; Mr. Doleman went to trial before
22 Mr. Paine which resulted in a separate opinion from the Nevada Supreme Court regarding
23 errors alleged during the Doleman appeal. Moreover, Doleman I does not effect Ms.
24 CABRERA's Eighth/Fourteenth Amendment challenge because a federal constitutional
challenge to his imputed liability was never raised during the direct appeal nor the appeal
from the denial of state habeas relief.

25 ²⁶ See Doleman v. State, 112 Nev. 843 (1996)(Doleman II). As undersigned
26 counsel's was also Mr. Doleman's counsel after the case was remanded for new penalty
27 hearing, she knows that Mr. Doleman stipulated to imposition of life without possibility of
parole sentences prior to commencement of a new penalty hearing.

1 Additionally, fourteen other states permit death eligibility to be based upon the
2 aggravating circumstance/factor "great risk of death" to more than one person.²⁷ Not one
3 single high court, in any of these fourteen states, has engaged in an Eighth Amendment
4 analysis of the application of this circumstance/factor to a person found guilty of first
5 degree or capital murder as an aider/abettor or conspirator. Obviously, none of the
6 highest courts in any of these states has found that the application of the
7 circumstance/factor to an aider/abettor or conspirator is immune from an
8 Eighth/Fourteenth Amendment challenge. These facts provide further support that Ms.
9 CABRERA's federal constitutional challenge should be granted.

10 Finally, the state utterly failed to provide this Court with any factual or legal analysis
11 disputing Ms. CABRERA's federal constitutional challenge to the application of NRS
12 200.033(2)(b) which is based entirely upon co-defendant GONZALES' attempt to murder
13 Melissa Marin and Ashley Wantland. The state's sole response is that if Ms. CABRERA
14 is convicted of these crimes before the penalty hearing, the statute allows submission of
15 two aggravating circumstances, pursuant to NRS 200.033(2)(b), to Ms. CABRERA's jury.
16 Again, the state bears the burden to establish a legal basis for the application of an
17 aggravating circumstance and complete failure to do so requires this Court to grant Ms.
18 CABRERA's motion to strike these two aggravating circumstances.²⁸

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22 ²⁷ These states are Florida, Idaho, Kentucky, Louisiana, Mississippi, Missouri,
23 Nebraska, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Utah
24 and Wyoming.

25 ²⁸ Contentions unsupported by specific argument or authority should be
26 summarily rejected. See Mazzan v. Warden, Ely State Prison, 116 Nev. 48, 75, 993 P.2d
27 25, 42 (2000)(Mazzan VI)(applying this principle to appeals). The reasoning, underlying
28 the application of this principle to appeals, applies with equal force to pretrial motions to
 strike aggravating circumstances.

Given the forgoing, it is respectfully submitted that this Honorable Court should completely disregard all of the state's assertions in it's response, engage in the requested Eighth/Fourteenth Amendment analysis, and, find that application of NRS 200.033(2)(b), subsections 3 and 9 to the non-killing defendant is unconstitutional and grant the motion to strike these four aggravating circumstances from the state's Corrected Notice of Intent to Seek the Death Penalty.

II. The two aggravating circumstances, based upon NRS 200.033(2)(a), are statutorily inapplicable to the case at bar

The state's sole response to Ms. CABRERA's federal constitutional challenge to the application of NRS 200.033(2)(a), which is based upon the presumed conviction of first degree murder regarding James Headrick and Erik Quesada Morales, is the assertion that the language of the statute - conviction "at any time before a penalty hearing" - establishes that NRS 200.033(2)(a) is an appropriate aggravating circumstance. Again, this statement is utterly flawed.

First, the state completely ignores the explicit language of NRS 200.033(2)(a) which limits the application of this circumstance to cases where “the provisions of subsection 12 do not otherwise apply.” Apparently, this limiting language means nothing to the state. However, this limiting language, the legislative history of subsection 12 and opinions of the Nevada Supreme Court clearly establish that NRS 200.033(2)(a) is altogether inapplicable to Ms. CABRERA.

NRS 200.033 was amended to include subsection 12, the aggravating circumstance that the “defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree,” during the 1997 legislative session by SB281.

III

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1 While SB281 initially focused upon making sexual penetration of a body of a murder
2 victim an aggravating circumstance,²⁹ later, it also enunciated subsection 12 and clarified
3 when subsection 12 would apply rather than subsection 2(a).³⁰

4 Initially, the fact that only subsection 12, and not NRS 200.033(2)(b), was intended
5 to apply when the defendant was convicted of murder in the immediate proceeding is
6 established by both the discussion conducted during the June 18, 1997 Senate Judiciary
7 Committee hearing and the June 11, 1997 memo from Ben Graham to Members of the
8 Senate Judiciary.

9 During the hearing's discussion, when Senator James asked what was wrong with
10 the "previously convicted of another murder" language, he was informed that "currently
11 a person would need to have been convicted of murder at the time of commission of a
12 subsequent murder in order to invoke" that aggravating circumstance. "With passage of
13 the proposed amendment (subsection 12), a person would only need to have been
14 convicted at the sentencing stage prior to the commission of a subsequent murder ..."³¹
15 These statements clarify that subsection 2(a) applies to prior murder convictions while
16 subsection 12 applies when the person is convicted of another murder during the
17 preceding trial.

18 Moreover, Mr. Graham's memo requested NRS 200.033 (subsection (2)(a)) be
19 amended to state "the murder was committed by a person who, at the time of
20 consideration of aggravating circumstances was convicted of another murder .."³²

22 ²⁹ See p.4-6 of the minutes of the "Senate Committee on Judiciary" dated April
23 15, 1997, attached as Exhibit "A" and incorporated by reference.

24 ³⁰ See p.2 of the June 18, 1997 minutes of the "Senate Committee on
25 Judiciary" attached as Exhibit "B" and incorporated herein.

26 ³¹ Id. Emphasis added.

27 ³² Memo attached as Exhibit "C" and incorporated by reference. This memo
28 was also submitted to the Senate Judiciary Committee, on June 18, 1997, as Exhibit "C".

1 This memo clarifies that NRS 200.033(2)(a) applies to prior murder convictions.

2 The fact that NRS 200.033(2)(a) is only intended to apply when the defendant has
3 been separately convicted of murder prior to the murder currently being litigated is also
4 established by both the discussion conducted on July 1, 1997 during the Assembly
5 Committee on Judiciary hearing and Justice Cliff Young's letter dated April 22, 1997
6 which was provided to the committee on July 1, 1997.

7 During the committee discussion, Mr. Graham discussed the situation where a
8 homicide was committed in Nevada but the case was not solved until some later date.
9 If that person committed another murder, in between the commission of the Nevada
10 murder and the date the person was brought back to Nevada, that situation would not be
11 covered by the language then enunciated in NRS 200.033(2). Therefore, Mr. Graham
12 informed the committee that the language of subsection (2) needed to make clear that if
13 at the time of the sentencing for the Nevada murder, the person had been convicted of
14 a separate murder, which occurred after the commission of the Nevada murder, this
15 murder would still be considered an aggravating circumstance pursuant to NRS
16 200.033(2)(a).³³

17 Additionally, Justice Young's April 22, 1997 letter also clarifies that NRS
18 200.033(2)(a) should only apply to murder convictions sustained prior to the litigation of
19 a current murder. In his letter, Justice Young asked that NRS 200.033(2) be amended
20 to state "[t]he murder was committed by a person who was previously convicted of
21 another murder ..." Justice Young based this request upon the court's consideration of
22 a case where the defendant murdered someone after the homicide being currently
23 considered by the court.

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26

27 ³³ See p.6 of the July 1, 1997 minutes of the Assembly Judiciary Committee
meeting attached as Exhibit "D" and incorporated by reference.

28

1 Justice Young recognized that, in this situation, the language “previously convicted” would
2 seem to mean that the murder committed after the current murder would not be an
3 aggravating circumstance.³⁴

4 The complete legislative history of SB281 establishes that NRS 200.033(2)(a)
5 applies when a murder conviction is sustained prior to the murder currently being litigated
6 and subsection 12 applies when a person is convicted of another murder charge during
7 the currently litigated murder case. Therefore, NRS 200.033(2)(a) does not apply to Ms.
8 CABRERA who has not previously been convicted of murder.

9 Finally, in Greene v. State, the Nevada Supreme Court specifically held:

10 Under subsection **2**, any convictions for murders ... in **previous**
11 proceedings can be properly admitted to aggravate first degree murder. On
12 the other hand, subsection **12** aggravates first degree murder where the
13 accused is convicted of more than one murder in the **instant** proceeding.³⁵

14 Further, in Archanian v. State, the Nevada Supreme Court determined that the fact that
15 the defendant had been convicted of killing two people during his trial established that the
16 jury correctly found NRS 200.033(12) applied.³⁶ Therefore, the Nevada Supreme Court
17 has also establishes that NRS 200.033(2)(a) does not apply to Ms. CABRERA who has
18 not previously been convicted of murder.

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24 ³⁴ Justice Young’s April 22, 1997 letter attached as Exhibit “E” and
25 incorporated by reference. This letter was presented to the Assembly Judiciary
26 Committed as Exhibit “C” on July 1, 1997. See Exhibit “D” p.6.

27 ³⁵ Greene v. State, 113 Nev. 157, 172, 931 P.2d 54, 63 (1997)(citations
28 omitted).

³⁶ Archanian v. State, 122 Nev. 1019, 1022 (2006).

Based upon the language and legislative history of NRS 200.033(12) and the published opinions of the Nevada Supreme Court, this Honorable Court should strike the aggravating circumstances, numbers 1 and 2, from the state's "Corrected Notice of Intent to Seek the Death Penalty."

Respectfully Submitted,

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Exhibit “A”

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Sixty-ninth Session
April 15, 1997**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:50 a.m., on Tuesday, April 15, 1997, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Mike McGinness
Senator Maurice Washington
Senator Ernest E. Adler
Senator Dina Titus
Senator Valerie Wiener

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Maddie Fischer, Administrative Assistant
Barbara Moss, Committee Secretary

OTHERS PRESENT:

Dennis M. Hetherington, Executive Director, Clark County Pro Bono Project
Ben Graham, Lobbyist, Legislative Representative, Nevada District Attorneys' Association
David L. Stanton, Chief Deputy District Attorney, Major Violators Unit, District Attorney's Office, Washoe County
Eric S. Cooper, Lobbyist, Legislative Advocate, Nevada Sheriffs and Chiefs Association, Washoe County Sheriff's Office
Jerry Mather, Chief Deputy, Sheriff's Department, Carson City
Karl E. Neathainmer, Former Judge

The Chairman opened the hearing by requesting committee introduction on Bill Draft Request (BDR) 7-926.

SENATOR PORTER MOVED TO REQUEST A BILL DRAFT FOR ADDITIONAL ATTENTION TO SECURITY AT 24-HOUR SHOPPING CENTERS.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

Senator James opened the hearing on Senate Bill (S.B.) 281.

SENATE BILL 281: Makes sexual penetration of body of murder victim circumstance aggravating murder. (BDR 15-1508)

Ben Graham, Lobbyist, Legislative Representative, Nevada District Attorneys' Association, introduced David L. Stanton, Chief Deputy District Attorney, Major Violators Unit, District Attorney's Office, Washoe County, and indicated Mr. Stanton dealt with capital murder offenses on a daily basis. Mr. Graham said the intent of S.B. 281 was to show that aggravating circumstances of sexual assault and mutilation occurred during a killing while the person was still alive, or if they died contemporaneously and it occurred then. He explained there was no plausible way to determine when a person died from mutilation and sexual assault without a videotape or an eyewitness. Mr. Graham stated the language of S.B. 281 was not compatible with its intent and would require clarification by the bill drafters.

David L. Stanton, Chief Deputy District Attorney, Major Violators Unit, District Attorney's Office, Washoe County, explained the problem began in a 1996 case, entitled Doyle v State, found at 112 Nev. 879. In Doyle v State, four Nevada Supreme Court justices concluded that the legislative intent of Nevada Revised Statutes (NRS) 200.366, the rape statute in the state of Nevada, did not specifically state whether or not a prosecutor had to prove if a victim was alive or not when a person was raped. In the decision, the four justices concluded that the legislative intent of the rape statute in Nevada, as currently articulated, required the state to prove beyond a reasonable doubt that the victim was alive at the time penetration or acts of fellatio or cunnilingus occurred. As a result, in Doyle v State, the rape conviction was overturned and the subsequent aggravation found by the jury in support of the death penalty

became defective because of the finding. Mr. Stanton opined, the most intelligent opinion in the decision was written by Justice Thomas L. Steffan who said the court adequately addressed the interpretation of a sexual assault statute. The court stated, during the course of conduct of a sexual assault leading into murder, it was largely irrelevant for the state to prove the victim was alive for purposes of defining sexual assault or an aggravator.

Mr. Stanton said it was difficult for anyone, including a highly-trained forensic pathologist (a doctor trained in the area of examining tissues and bodies to determine how trauma was inflicted) to determine whether or not a person was alive when sexually penetrated. Mr. Stanton said a pathologist could ascertain whether or not tissue or a wound involved bleeding. Dead people do not bleed, he remarked. Thus, if the heart was stopped and a wound inflicted upon the body, it was easy to determine if it was a postmortem wound at autopsy. He explained, during the course of death the heart began to slow, blood pressure was reduced from a wound to a jugular vein, major vessel, or an organ, and evidence of bleeding in the wound became difficult to ascertain at autopsy. There was a gray area regarding time of death and medical science could not be any more precise than it was currently, he added.

When asked if the length of time of death varied from case to case, Mr. Stanton indicated it did, indeed, vary. He said a person shot in the head would technically be alive for approximately 4 minutes. In his experience, when people were murdered death was not instantaneous, but occurred over a period of time. Mr. Stanton cited a well-publicized case that occurred recently in Washoe County which involved the brutal stabbing of a high school student. There were disturbing wounds on the girl's body and it could not be determined whether or not she was alive or conscious during the stabbing. The tissue was studied microscopically to determine whether or not there was evidence of bleeding, but it could not be ascertained in some areas or groupings of the wounds.

Mr. Stanton indicated an issue arose regarding the definition of sexual assault, as well as mutilation, which articulated the aggravator factors for purposes of the death penalty. Mr. Stanton said it was prudent for prosecutors, defense attorneys, and judges teaching law, to clarify subsection 8 (mutilation), as well as for purposes of sexual assault, during the same course of conduct it was irrelevant to prove if a person was alive or dead.

In the opinions of Mr. Stanton and Justice Steffan, the majority "missed the boat" when saying if a person was dead and sexually assaulted the necrophilia

statute applied. Necrophilia referred to a sexual act or penetration of a dead body for the purpose of bizarre gratification. In murder it was clear the offender did not penetrate or sexually assault the victim because the person was dead. In fact, the perpetrator was probably unaware the victim was dead other than struggle had ceased, Mr. Stanton added.

Therefore, the interpretation of statutory or legislative intent inferred by the Nevada Supreme Court in Doyle v State was wrong, and S.B. 281 would remedy the error. Another state supreme court adopted the rule that during the course of conduct of a murder it was not necessary to prove the victim was alive or dead. The amendment to subsection 8 of S.B. 281, and to the rape statute of NRS 200.366, would resolve the problem.

Mr. Graham explained, when seeking the death penalty in a first-degree murder situation, the state had responsibility to prove at least one or more aggravating factors prior to obtaining the death penalty after a finding of guilt. Mr. Stanton said the net effect in the Doyle v State case was to "unplug or undo" an aggravator for the death penalty. Senator James indicated the issue was not whether or not penetration occurred before or after death. Mr. Stanton suggested amending NRS 200.366 to redefine sexual assault. Senator James added if sexual assault occurred as part of the crime, it was the aggravator. Mr. Stanton suggested, relative to aggravator number 8 [subsection 8] under NRS 200.033, which was mutilation, the same logic would be compelled in that section.

Mr. Graham volunteered to work with the bill drafters to arrive at acceptable language. Senator James indicated he had spoken with [Supreme Court Justice Cliff Young] Justice Young on another issue regarding an aggravator. Mr. Graham indicated if the issue was compatible and appeared to be desired by the committee, it could be added to S.B. 281. Mr. Stanton said the aggravating factor was a significant aggravator reviewed by the Nevada Supreme Court, therefore, he postulated Justice Young would find the breadth of the term problematic. The Washoe County District Attorney's Office did not pursue it currently because of the nature of its favor in the Nevada Supreme Court, he remarked. Senator James concluded the discussion by emphasizing the situation should be addressed before cessation of acceptance of bill draft requests.

Brad Wilkinson, Committee Counsel, Legal Division, Legislative Counsel Bureau (LCB), indicated depravity of mind had been deleted from subsection 8 of NRS

200.033. Mr. Stanton said torture, depravity of mind, and mutilation were previously under one aggravate. Senator James indicated an amendment would be returned to the committee reflecting the discussion.

There being no further testimony, the hearing was closed on S.B. 281. The hearing was opened on Senate Bill (S.B.) 285.

SENATE BILL 285: Revises provisions relating to certain records, fingerprints and photographs of certain juveniles. (BDR 5-863)

Senator Washington indicated S.B. 285 was a simple bill that worked in three areas: record retention, fingerprints, and photographs. Because of the aggressive nature of crimes committed by juveniles, S.B. 285 would: allow records to remain open for certain categories (Category A and B crimes); mandate fingerprints be taken for felonies, gross misdemeanors, sexual offenses, and misdemeanors; and allow offenders to be photographed for identification. The records would be retained by the central repository and used for investigative purposes of law enforcement agencies. Senator Washington noted it was an important bill, particularly in regard to legislation passed in the last two legislative sessions that addressed juvenile crimes and sexual assaults. He declared it was an enhancement to public safety.

Eric S. Cooper, Lobbyist, Legislative Advocate, Nevada Sheriffs and Chiefs Association, Washoe County Sheriff's Office, indicated the existing statute was created in 1973 and was "ground breaking stuff" for law enforcement. The statute allowed fingerprinting of juveniles, whereas approval of a judge was required in the past. He emphasized S.B. 285 was the kind of legislation needed in law enforcement at the present time, particularly with the type of juveniles encountered. Many juveniles were becoming repeat offenders, he added. The statute-mandated fingerprints could only be taken if there were existing latent prints. Mr. Cooper said it was important for law enforcement to have fingerprint cards on repeat offenders. Latent fingerprints were often left at the scene of a crime from juveniles who had never been fingerprinted, although they had been in the criminal justice system. Mr. Cooper expressed support for S.B. 285 and stressed it was vitally needed by law enforcement to deal with repeat juvenile offenders.

Jerry Mather, Chief Deputy, Sheriff's Department, Carson City, said Carson City Sheriff Rod Bannister had expressed support for S.B. 285. He indicated the

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Exhibit "B"

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Sixty-ninth Session
June 18, 1997**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:30 a.m., on Wednesday, June 18, 1997, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Mike McGinness
Senator Maurice Washington
Senator Ernest E. Adler
Senator Valerie Wiener

COMMITTEE MEMBERS ABSENT:

Senator Jon C. Porter, Vice Chairman (Excused)
Senator Dina Titus (Excused)

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Maddie Fischer, Administrative Assistant
Randall C. Robison, Committee Secretary

OTHERS PRESENT:

Ben Graham, Lobbyist, Nevada District Attorneys' Association
Leonard I. Gang, General Counsel, Commission on Judicial Discipline
I.R. (Renny) Ashleman, II, Lobbyist, Nevada Health Care Association

Chairman James opened the hearing on Senate Bill (S.B.) 281.

SENATE BILL 281: Makes sexual penetration of body of murder victim
circumstance aggravating murder. (BDR 15-1508)

Chairman James distributed to the committee a memorandum from Ben Graham, Lobbyist, Nevada District Attorneys' Association (Exhibit C) stating he understood the committee had already voted on this bill and the proposed amendments were suggesting a substantial change from that vote. Mr. Graham pointed out two amendments to aggravating circumstances provisions in the bill (Exhibit C). He noted the previous vote was an amend and do pass with a stipulation to bring language back to the committee. Chairman James asked what was wrong with the "previously convicted of another murder" language, to which Mr. Graham remarked it was too confusing. Brad Wilkinson, Committee Counsel, Legal Division, Legislative Counsel Bureau, added currently a person would need to have been convicted of murder at the time of commission of a subsequent murder in order to invoke aggravating circumstances; whereas, with passage of the proposed amendment, a person would only need to have been convicted at the sentencing stage prior to commission of a subsequent murder in order to invoke aggravating circumstances. Chairman James agreed, asking whether the second amendment related to the victim not needing to be alive, to which Mr. Graham responded in the affirmative. Mr. Wilkinson interjected the only problem with number 13 (Exhibit C) is the word "immediately" because it is too broad. He suggested language regarding whether the act occurred during the course of conduct of the murder. Mr. Graham stated again he and the legal staff were working on language reflecting that sentiment, and apologized for not having it ready for this meeting, adding when he got it he would share it with the committee and seek their approval. Chairman James commented he could show it to him and, with the agreement of the committee, he would take it to the floor. He emphasized, however, he would like to move the bill along as quickly as possible.

Senator Adler asked whether section 12 makes mass murder an aggravating circumstance. Mr. Graham responded the language concerning threatening the life of one or more persons would be the mass-murder contingency of this bill. Senator Adler suggested including the language "caused the death of" or something similar, to which Mr. Graham responded he would look into it.

Chairman James again encouraged Mr. Graham to get language drafted and presented with due haste. He then closed the hearing on S.B. 281 and proceeded to the work session.

ASSEMBLY BILL 344: Revises provisions governing commission on judicial discipline. (BDR 1-334)

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Exhibit "C"

MEMO

To: Senator Mark James,
Members Senate Judiciary

From: Ben Graham
Nevada District Attorneys' Association

Subject: SB281, Aggravating Circumstances/Death Penalty

Date: June 11, 1997

After much discussion and consideration with the prosecutors, discussion with the defense bar and a meeting with Justice Young and staff, it is urged that the following language be approved... upon the previous amend and do pass motion.

NRS 200.003 Section 1 subsection 2 be Amended as follows:

"The murder was committed by a person who, at the time of consideration of aggravating circumstances was convicted of another murder or of a felony involving the use or threat of violence to the person of another."

Also add aggravating circumstance #13 to address the issues presented in Doyle decision 112 Nev.879,921 P.2d. 9901 (1996)

#13. The person, alone or with others, either immediately prior to, during or immediately after the murder was accomplished, committed or attempted to commit a nonconsensual sexual penetration on the body of the victim. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his conduct. Death of the victim in such a condition.

(b) "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by the person, either alone or with others, into the genital or anal openings of the body of the victim, including sexual intercourse in what would be its ordinary meaning. The victim need not be alive for a sexual penetration to occur.

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Exhibit “D”

**MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY**

**Sixty-ninth Session
July 1, 1997**

The Committee on Judiciary was called to order at 7:50 a.m., on Tuesday, July 1, 1997. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Ms. Barbara Buckley, Vice Chairman
Mr. Clarence (Tom) Collins
Ms. Merle Berman
Mr. John Carpenter
Mr. Don Gustavson
Mr. Dario Herrera
Mrs. Ellen Koivisto
Mr. Mark Manendo
Ms. Genie Ohrenschall
Mr. Brian Sandoval
Mrs. Gene Segerblom

COMMITTEE MEMBERS ABSENT:

Mr. Nolan
Mr. Perkins

GUEST LEGISLATORS PRESENT:

Senator Jon C. Porter, Clark County Senatorial District No. 1

STAFF MEMBERS PRESENT:

Risa L. Berger, Committee Counsel
Juliann K. Jenson, Senior Research Analyst
Brenda Olson, Committee Secretary

OTHERS PRESENT:

ASSEMBLYMAN HERRERA MOVED TO DO PASS S.B. 449.

ASSEMBLYMAN MANENDO SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Testimony commenced on S.B. 281.

**SENATE BILL 281 - Makes changes to provisions relating to circumstances
aggravating first degree murder.**

Ben Graham, Representative, Nevada District Attorney's Association, addressed the committee. He explained simply committing a murder did not necessarily justify the sentencing of a person to death. There had to be aggravating circumstances which outweighed any mitigating circumstance. Mr. Graham supplied the committee with a letter (Exhibit C) from Justice Cliff Young which expressed his concerns about the current wording in statute as it related to aggravating circumstance 2, found in NRS 200.003.

Mr. Graham explained that when a homicide was committed in the state of Nevada, the perpetrator may leave the area and the case may not be solved until some time later. In the meantime, the perpetrator has committed more offenses, either homicide or a similar heinous crime, in another jurisdiction, and possibly been convicted of that offense. This occurred before they were brought back to Nevada for prosecution. This situation was not a proper aggravator. It needed to be made clear that if at the time of sentencing in Nevada, under NRS 175.552, which dealt with the death penalty, they had been convicted even though it occurred after the existing murder in Nevada, it could still be considered an aggravating circumstance.

Subsection 13 of section 1 dealt with a fact pattern, where the acts were occurring during a homicide. A sexual assault was being attempted or occurring and it went on. The unknown factor was when the actual death of the victim occurred. Under current law, unless it could be proved beyond a reasonable doubt that the person was alive while they were being assaulted, it was not an aggravating circumstance. The new language provided that if a sexual assault or attempted sexual assault was occurring immediately prior, during or immediately after expiration of the victim, it could still be used as an aggravating circumstance. Mr. Graham directed the committee to page 2 and 3 of Exhibit C which described a murder case. He noted state needed latitude in determining aggravating circumstances. He provided to the committee a national survey on state laws (Exhibit D) which illustrated the aggravating circumstances for all the states which had the death penalty.

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Exhibit “E”

2
S B281

SUPREME COURT OF NEVADA
CLIFF YOUNG, JUSTICE
CAPITOL COMPLEX
CARSON CITY, NEVADA 89710



April 22, 1997

BEN GRAHAM
LOBBYISTS' ROOM
NEVADA STATE LEGISLATURE
CAPITOL COMPLEX
CARSON CITY NV 89710

Re: Amending NRS 200.033(2)

Dear Ben:

I called the other day and left word at your office that I wanted to have you give me a call. I am interested in amending NRS 200.033(2), to wit: "2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another." (Emphasis added.)

We are presently considering a case where the defendant murdered someone after the homicide in the instant case. The argument was naturally made by defense counsel that the statute refers only to those "previously convicted." If a statute is to be construed in favor of the defendant, it would seem that a murder committed after the instant case would not be an aggravating circumstance.

Accordingly, I suggest that the aggravator be modified to indicate a more inclusive period, namely, "who was previously or thereafter convicted"

I am sure this is what the legislature meant although it did not so clearly indicate.

Sincerely,

Cliff Young

Submitted to the Committee on Judiciary on 7-1-97
by Ben Graham, Representative
Nevada District Attorneys Association EXHIBIT C

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2015, I requested that a file stamped true and correct copy of the forgoing REPLY TO STATE'S RESPONSE TO MOTION TO STRIKE AGGRAVATING CIRCUMSTANCES be served through the court's efilng service to counsel for the parties at the below email addresses:

Counsel for the State:

Michael.Staudaher@clarkcountyda.com
Hetty.Wong@clarkcountyda.com

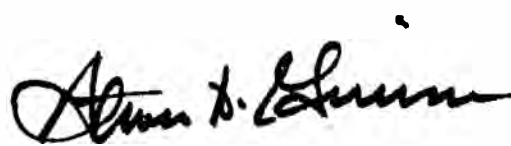
Counsel for Co-Defendant Gonzales:

cpatrick@clarkcountynv.gov
ajackson@clarkcountynv.gov

Co-counsel:

admin@justice-law-center.com

/s/ Patricia M. Erickson
Patricia M. Erickson


CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,)	
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Plaintiff,)	Case No: C-12-283700-1
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vs.)	Dept. No: 25
)	
IVONNE CABRERA,)	
)	
Defendant.)	
)	
)	

BEFORE THE HONORABLE KATHLEEN DELANEY

AUGUST 26, 2015, 9:00 A.M.

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

APPEARANCES:

(See separate page)

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

1 APPEARANCES:
2 For the Plaintiff:
3 MICHAEL STAUDAHER, ESQ.
4 Chief Deputy District Attorney
5 200 Lewis Avenue
6 Las Vegas, Nevada 89155
7
8 For the Defendant:
9 PATRICIA M. ERICKSON, ESQ.
10 601 S. Tenth Street, Suite 206
11 Las Vegas, Nevada 89101
12
13 BRETT O. WHIPPLE, ESQ.
14 JUSTICE LAW CENTER
15 1100 S. Tenth Street
16 Las Vegas, Nevada 89104
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<p>1 LAS VEGAS, CLARK COUNTY, NEVADA</p> <p>2 WEDNESDAY, AUGUST 26, 2015, 9:00 A.M.</p> <p>3 PROCEEDINGS</p> <p>4 * * *</p> <p>5 THE COURT: State of Nevada versus Ivonne</p> <p>6 Cabrera. I see that Ms. Cabrera was transported for</p> <p>7 purposes of today's motion. Let's shortcut this. I</p> <p>8 would like to start with the jury questionnaire motion.</p> <p>9 I am a little concerned at this point, and I</p> <p>10 think it's just the nature of the beast that these things</p> <p>11 happen sometimes and I think you can see that I am a</p> <p>12 little concerned about the timing of our ability to get</p> <p>13 this out but we obviously are going to do it, I just</p> <p>14 wanted to see if we could shortcut this by doing it this</p> <p>15 way.</p> <p>16 The Motion Requesting Use of a Jury</p> <p>17 Questionnaire is not opposed by the State but there are</p> <p>18 some specific objections that the State has made to</p> <p>19 Questions 5, 36, 37, 44 and 53. I have those questions.</p> <p>20 Rather than giving you a discussion here today, unless</p> <p>21 somebody wants to make some argument for the record, I</p> <p>22 think it is fairly obvious what the objections and the</p> <p>23 concerns are from the documentation and the Court can</p> <p>24 just make the call to complete the questionnaire and</p> <p>25 let's get it in process.</p> <p>3</p>	<p>1 objection to 44.</p> <p>2 THE COURT: Okay. No problem. I will clarify.</p> <p>3 That is fine. I can clarify. If there is not</p> <p>4 an objection to 44, and if I misspoke then --</p> <p>5 MS. ERICKSON: Yes.</p> <p>6 MR. STAUDAHER: Whatever the Court wants to do.</p> <p>7 If the Court would just note the issues that the State</p> <p>8 has and with that I will submit it to the Court's</p> <p>9 decision.</p> <p>10 THE COURT: Okay.</p> <p>11 MS. ERICKSON: Judge, it is in Word format; is</p> <p>12 that okay?</p> <p>13 THE COURT: That's perfect.</p> <p>14 MS. ERICKSON: Okay.</p> <p>15 THE COURT: All right. Let me take the next one</p> <p>16 that I think we should address is Defendant's Motion</p> <p>17 Requesting an Order Requiring the State Update the</p> <p>18 Addresses of the Witnesses That Would be Called to</p> <p>19 Testify During Their Case in Chief.</p> <p>20 The response is, I would say, a fairly standard</p> <p>21 response saying that it is not clear; that there has been</p> <p>22 attempts to be made that witnesses could not be found and</p> <p>23 what the circumstances are. I think typically the way</p> <p>24 that this request is being made is to make sure that if</p> <p>25 the State comes into possession of information that the</p> <p>5</p>
<p>1 Is anybody opposed to doing that?</p> <p>2 MR. STAUDAHER: Not from the State, Your Honor.</p> <p>3 MS. ERICKSON: Not from the defense, Your Honor.</p> <p>4 THE COURT: So the motion is granted to allow</p> <p>5 for the use of the jury questionnaire. The Court will</p> <p>6 make a final determination as to the five questions in</p> <p>7 dispute.</p> <p>8 Who has an electronic version of the jury</p> <p>9 questionnaire?</p> <p>10 MS. ERICKSON: I do, Judge.</p> <p>11 THE COURT: Ms. Erickson, if you have not</p> <p>12 already done so, and I'm just not aware if you have done</p> <p>13 so or not, please immediately forward that to chambers.</p> <p>14 The Court will take care of getting that finalized. And</p> <p>15 of course we will let counsel have a last look before we</p> <p>16 submit it to Jury Services.</p> <p>17 MS. ERICKSON: Okay. And, Judge, in reviewing</p> <p>18 other things I felt we had only questions related to</p> <p>19 Numbers 5, 36, 37 and 53.</p> <p>20 THE COURT: So you don't have an ongoing dispute</p> <p>21 as to 44?</p> <p>22 MR. STAUDAHER: Which was the --</p> <p>23 THE COURT: 44 is related to -- I have to go</p> <p>24 back and look. I don't have the details in my notes.</p> <p>25 MS. ERICKSON: No. I don't think they had an</p> <p>4</p>	<p>1 addresses are not current or have changed that that</p> <p>2 information would be proactively provided to the defense</p> <p>3 based upon on prior requests.</p> <p>4 Am I misunderstanding what the request here is,</p> <p>5 Ms. Erickson?</p> <p>6 MS. ERICKSON: No. I know that the addresses</p> <p>7 for Ms. Wantland and Ms. Marin are wrong. And apparently</p> <p>8 the State just filed a Notice of Witnesses that I have</p> <p>9 not seen yet but I know that those are wrong and those</p> <p>10 are primarily the most important to the defense.</p> <p>11 We have a right to interview those witnesses if</p> <p>12 they wish to be interviewed. We do not have to accept an</p> <p>13 unsupported statement by the State that they had made it</p> <p>14 clear that they don't wish their address to be provided</p> <p>15 or that they don't want to be interviewed. We have a</p> <p>16 constitutional obligation.</p> <p>17 THE COURT: Do you have other means of</p> <p>18 contacting besides an address? I mean certainly we can</p> <p>19 appreciate the Court has fashioned ways in which the</p> <p>20 defense counsel would have the contact if in fact those</p> <p>21 individuals were willing but not necessarily that anybody</p> <p>22 has a known address. I mean I think we can understand</p> <p>23 why we have made arrangements in certain circumstances as</p> <p>24 to why the State would be the contact address but there</p> <p>25 could be contact facilitated.</p> <p>6</p>

<p>1 So I agree with the argument that we can and</p> <p>2 shouldn't just ever take counsel's representation that</p> <p>3 these individuals don't want to be contacted. There</p> <p>4 needs to be made some opportunity to have that concern by</p> <p>5 those individuals.</p> <p>6 MS. ERICKSON: I can understand that idea but</p> <p>7 the thing is that we're in a position where these are the</p> <p>8 two key witnesses who are the only ones who support all</p> <p>9 of the charges against Ms. Cabrera.</p> <p>10 Over the years I have come to find that</p> <p>11 witnesses that are scheduled by the State to have an</p> <p>12 interview end up immediately saying, I don't want to be</p> <p>13 interviewed. That they have had some conversation with</p> <p>14 the State, and I am not saying that they make any</p> <p>15 inappropriate statements like, Don't answer any</p> <p>16 questions, but I am sure that they couch things in the</p> <p>17 same manner that I might to my client or to any</p> <p>18 witnesses. You can speak to the defense if you wish to,</p> <p>19 however, should you not want to then you just definitely</p> <p>20 don't have to. And they ask, Well, should I? And then</p> <p>21 you say, Well, again, that is up to you and I am not</p> <p>22 telling you one way or the other.</p> <p>23 THE COURT: Ms. Erickson, we know how it goes</p> <p>24 down, but in this particular --</p> <p>25 MS. ERICKSON: It does not promote an interview.</p> <p>7</p>	<p>1 THE COURT: Have they been provided phone</p> <p>2 numbers for those two witnesses?</p> <p>3 MR. STAUDAHER: No. And those two witnesses</p> <p>4 have specifically, absolutely told us they do not want to</p> <p>5 talk to the defense. Now, I am actually going to be in</p> <p>6 communication with both of them today. I can ask them</p> <p>7 once again if their position has changed at all with</p> <p>8 regard to whether they want to speak with the defense.</p> <p>9 The fact of the matter is I never tell</p> <p>10 witnesses, No, don't talk to the defense or whatever.</p> <p>11 Clearly, they don't even have to come talk to me. But we</p> <p>12 didn't have to my knowledge a good address for one or the</p> <p>13 other. One of them was actually in jail recently. So</p> <p>14 clearly the address that was listed for them before was</p> <p>15 not a good address, however, we do have and have been</p> <p>16 able to contact them.</p> <p>17 I will talk to them today and if they wish to</p> <p>18 speak with the defense I will make them available.</p> <p>19 THE COURT: Mr. Staudaher, proceed today as you</p> <p>20 intend to proceed. You are you going to provide -- I am</p> <p>21 going to grant in part and deny in part the Motion. At</p> <p>22 this time I am not inclined to deny it without prejudice</p> <p>23 to provide addresses to the defense. Should you come in</p> <p>24 possession of the addresses, of course, based on the</p> <p>25 information I am going to mandate they be provided. You</p> <p>9</p>
<p>1 THE COURT: In this particular circumstance I am</p> <p>2 not inclined at this point to mandate that they just give</p> <p>3 you an address. But I am inclined to ensure that you</p> <p>4 have a reasonable opportunity to confirm whether or not</p> <p>5 these individuals wish to speak with the defense. They</p> <p>6 are not required to do so.</p> <p>7 MS. ERICKSON: No, they are not required to,</p> <p>8 absolutely. But I have a client who has constitutional</p> <p>9 rights.</p> <p>10 THE COURT: Absolutely.</p> <p>11 MS. ERICKSON: I have a client that I have to</p> <p>12 effectively represent. I have to schedule witness</p> <p>13 interviews in a way that I believe that I might be able</p> <p>14 to get something rather than having the DA say, I want to</p> <p>15 be present, I want my investigator present, and that's</p> <p>16 what they do and I don't think that's appropriate.</p> <p>17 THE COURT: Mr. Staudaher, what's the</p> <p>18 compromise? What's the solution you have on your end?</p> <p>19 MR. STAUDAHER: Well, first of all, in this</p> <p>20 particular case it sounds like those are the two</p> <p>21 witnesses that are an issue here. As far as the State --</p> <p>22 we have just started the pretrial process so I don't even</p> <p>23 know if we are going to have an issue with the witnesses</p> <p>24 that's why I said if they have a problem with an address</p> <p>25 or contact information, just let us know.</p> <p>8</p>	<p>1 are not to disclose that to your client.</p> <p>2 I am going to then mandate that they provide</p> <p>3 good working telephone numbers for these individual</p> <p>4 witnesses so that the defense may make direct contact and</p> <p>5 make those determinations on their.</p> <p>6 And, of course, the State has already</p> <p>7 represented that it would not seek to influence in any</p> <p>8 way, shape or form what these witnesses will or will not</p> <p>9 do and I will take the State at its word that it will not</p> <p>10 do that. But provide the phone numbers by the end of the</p> <p>11 business day today to Ms. Erickson and Mr. Whipple so</p> <p>12 that they can make that direct contact.</p> <p>13 I would note that I did not perceive the motion</p> <p>14 as specifically requesting phone numbers as much as I</p> <p>15 perceive it as requesting addresses, however, I</p> <p>16 ultimately perceive it as requesting meaningful contact</p> <p>17 information and at this time I will protect the addresses</p> <p>18 unless there is some reason to believe that there has not</p> <p>19 been able to be contact at which point, again, this is</p> <p>20 without prejudice, I may very well require disclosure of</p> <p>21 the addresses.</p> <p>22 But if the phone numbers can be sufficient and</p> <p>23 these individuals will talk to the counsel and express</p> <p>24 their own willingness or lack of willingness directly</p> <p>25 then I don't think we have an issue. But I will mandate</p> <p>10</p>

1 the State provide that information for that reason.
2 I have the Defendant's Motion to Strike
3 Aggravating Circumstances. Obviously, I have briefed
4 these. Is there any oral argument that counsel wishes to
5 add for the record?
6 MS. ERICKSON: Just briefly, Judge. Aggravating
7 circumstances focus on the actions of the murderer and
8 they focus on the actions of the murderer because it's a
9 state of mind. Grandeur and motive is an aggravating
10 circumstance if the person who does the killing -- it is
11 giving them a reason that makes that killing worse.
12 Great risk applies to one or more person. That is the
13 mindset of the killer because that person doesn't care
14 whether there is more than one person who might be hit,
15 injured or killed. That makes the murder more
16 aggravating.
17 It cannot be aggravated in that same way by an
18 aider and abettor. And I think that the difference
19 between the *Edmonds v. Florida* case and the *Tison v.*
20 *Arizona* case show that completely. In *Edmonds* the aider
21 and abettor they said it didn't apply. And then in *Tison*
22 they said that the felony murder applied.
23 If you added the language reckless indifference
24 to death and major participation, that then focuses on
25 the mental state of the -- not the person who killed but
11

1 the felony murder person.
2 So I think that the State has provided you with
3 absolutely no reason not to make this decision.
4 THE COURT: Can I get some clarification before
5 I hear from Mr. Staudaher. And I don't mean this as a
6 criticism. It is just an honest take on my part. It was
7 a little bit confusing to ensure that I understood which
8 aggravating factors you were challenging.
9 I believe you are challenging the aggravating
10 factors 1 through 7. And 1 and 2 would be based on and I
11 think more of the argument you just made now I believe
12 you are also challenging factors 3 through 7. Can you
13 clarify for me it that's the case.
14 MS. ERICKSON: No. I am challenging aggravator
15 1 and 2 because those --
16 THE COURT: That is the argument that we have
17 made now.
18 MS. ERICKSON: Correct. 1 and 2 are statutory
19 challenge because the language of Section 2(A) applies to
20 prior convictions.
21 THE COURT: I understand the basis. I just
22 don't understand which aggravators you are challenging.
23 MS. ERICKSON: 1 and 2 are statutory. 3, 4, 5
24 and 7. I am not challenging 6 because that's a felony
25 murder, which I agree is appropriate and so that is a
12

1 jury question. And I am sorry if I was unclear.
2 THE COURT: No apology necessary.
3 Mr. Staudaher.
4 MR. STAUDAHER: First of all, there is
5 absolutely no authority by which counsel can cite to that
6 indicate even an aider and abettor could not in fact
7 become essentially the actions of that individual and
8 it's not like another individual could not be used as an
9 aggravator in a felony murder.
10 Secondly, this person is not being charged as
11 simply just -- clearly there were actions that go to that
12 but she is one of the direct participants at the time of
13 the killing in both locations, meaning both bedrooms.
14 They break into the house together. They go into the
15 house together. She is the one that calls out to the
16 victims in the case. They then go into the rooms
17 together.
18 Now just because the codefendant is the one who
19 has a weapon in his hand and pulls the trigger does not
20 mean that she is not a primary sort of aggressor, primary
21 in charge individual. She is charged with conspiracy,
22 aiding and abetting and as a primary aggressor in this
23 particular case because she is all of those things.
24 There is no basis whatsoever for them to say
25 that because she could be a conspirator she could be an
13

1 aider and abettor or both or a primary aggressor that in
2 fact she somehow absolves herself from liability from
3 this because somehow or another it does not fall within
4 the aggravators as they are listed statutorily.
5 If you look at the aggravators there is nothing
6 in it that says, Gosh, this is only if you are not an
7 aider and abettor or a conspirator. There is no mention
8 of that whatsoever.
9 So to rely upon precedent in this state which
10 would support that there is none because she hasn't
11 relied upon any and this individual is not charged with
12 that.
13 Does the Court want me to address the other
14 issues as well?
15 THE COURT: Factors 1 and 2 of the statutory --
16 MR. STAUDAHER: Sure. I would agree that at
17 least the way that it's outlined specifically in the
18 charging document related to the murder portion, the
19 murder charges themselves under Subsection 2. That that
20 primarily relates to prior murders, however, it does
21 reference Subsection 12. The purpose under *Hidalgo* of
22 the notice in the first place is to put the defendant on
23 notice of aggravating circumstances which might come
24 before the court, before the jury to essentially
25 aggravate the crime of murder to a capital offense.
14

<p>1 The fact that in that particular aggravator, or</p> <p>2 actually in both of those aggravators, the alleged acts</p> <p>3 or the things they are put on notice of is a murder</p> <p>4 related to the other victim so that at the time of</p> <p>5 sentencing that they would have been convicted of a prior</p> <p>6 murder.</p> <p>7 It does not matter whether you go to Section 12</p> <p>8 or Section 4. They are put on notice that a murder of a</p> <p>9 second person is going to be used as an aggravator.</p> <p>10 And specifically if you looked at <i>Hidalgo</i>, and</p> <p>11 <i>Hidalgo</i> specifically -- I think it's 124 Nev. 330. It's</p> <p>12 a 2008 decision -- goes to the same issue. There was an</p> <p>13 aggravator that was listed in that which the supreme</p> <p>14 court found was incomprehensible when they could not</p> <p>15 figure out what it meant in relation to the aggravating</p> <p>16 circumstances per se.</p> <p>17 They knew that the conduct in general was</p> <p>18 alleged and they said that basically if it's an issue go</p> <p>19 back and allow the State to amend it to fix it.</p> <p>20 So to the extent that they want us to plead it</p> <p>21 under 12, we'll plead it. But it's pled reference is 12.</p> <p>22 The conduct of the notice is as a second murder. It's</p> <p>23 not some unknown crime or some aggravator that comes out</p> <p>24 of left field. They are on notice of it. It's a charged</p> <p>25 offense in the first place. It's reference as the actual</p> <p>15</p>	<p>1 in my motion.</p> <p>2 MR. STAUDAHER: She is charged under aiding and</p> <p>3 abetting, not just aiding and abetting but under a</p> <p>4 premeditation, deliberation and conspiring and aiding and</p> <p>5 abetting theory.</p> <p>6 THE COURT: I think I have the record on that.</p> <p>7 I apologize. I didn't meant to cut you off. I do want</p> <p>8 you to make whatever full record you need to make, but</p> <p>9 the place where the Court has a question, though, is with</p> <p>10 regard to the statutory if you want to rebut.</p> <p>11 You have taken the position that this should</p> <p>12 only be in the legislative history showing a prior crime</p> <p>13 and be prior in time unrelated.</p> <p>14 The argument is being made here that it is</p> <p>15 essentially prior in that there will be, arguably if it</p> <p>16 happens a second murder that occurred that could be</p> <p>17 utilized even though it was contemporaneous. So I just</p> <p>18 want to know if you have any case law to point to that</p> <p>19 would support your position.</p> <p>20 MS. ERICKSON: I have cited to <i>Green</i> and to</p> <p>21 <i>Archiarin</i> (phonetic).</p> <p>22 THE COURT: More specifically on point -- I</p> <p>23 appreciate you probably cited to whatever you had.</p> <p>24 MS. ERICKSON: Well, <i>Green</i> says 12 is the one to</p> <p>25 be charged under. It says clearly that's the one for a</p> <p>17</p>
<p>1 aggravator that they reference and it also pertains to a</p> <p>2 murder of another individual, a second individual in the</p> <p>3 case not just the person that they have.</p> <p>4 You can use Section 12 aggravator for each one;</p> <p>5 you have two of them. Or you can have Section 2</p> <p>6 aggravator for each one. It has to do with murder. It</p> <p>7 has to do with notice. That is what they are on deck for</p> <p>8 essentially. Is there another part? I think we covered</p> <p>9 both.</p> <p>10 THE COURT: I think you covered it.</p> <p>11 Ms. Erickson, did you want to address any</p> <p>12 rebuttal?</p> <p>13 MS. ERICKSON: Yes, Judge. We are not arguing</p> <p>14 that Ms. Cabrera is not liable under a criminal theory of</p> <p>15 first degree murder. It seems to be where the State goes</p> <p>16 in all of our pleadings. She is not charged as a</p> <p>17 premeditated murder because she didn't kill anyone. She</p> <p>18 is charged as an aider/abettor/co-conspirator; therefore,</p> <p>19 these are not applicable.</p> <p>20 THE COURT: Are you talking about the statutory?</p> <p>21 I just wanted counterargument on statutory.</p> <p>22 MS. ERICKSON: Just on statutory?</p> <p>23 THE COURT: Well, go ahead if you need to make</p> <p>24 the record.</p> <p>25 MS. ERICKSON: No, no. I'm fine. I think it's</p> <p>16</p>	<p>1 present charge. But the State has to know the law. The</p> <p>2 State is required to know the law. If the Court thinks</p> <p>3 that they should be able to change it to 12, then that's</p> <p>4 fine. But my position is it can only be one aggravator.</p> <p>5 It's not two aggravators. That's why I think they can't</p> <p>6 charge 2(a) because they want two aggravators out of it.</p> <p>7 It is a murder in a prior conviction. It's one</p> <p>8 aggravator. I don't think that it should be two</p> <p>9 aggravators and that's my position.</p> <p>10 THE COURT: All right. The Court's</p> <p>11 determination is to grant in part and deny in part the</p> <p>12 motion to strike the aggravating circumstances. The</p> <p>13 Court denies the aggravators 3, 4, 5 and 7.</p> <p>14 I do believe that all of these are properly</p> <p>15 questions of fact to be decided by the jury and that the</p> <p>16 State has illustrated to the Court the circumstances as</p> <p>17 to why that should be the case through its argument.</p> <p>18 I am persuaded that the factors or the</p> <p>19 aggravators 1 and 2 however should not be considered as</p> <p>20 two aggravators but as one aggravator. And that the</p> <p>21 argument that I do find persuasive based on the reading</p> <p>22 of the statute and the legislative history that this</p> <p>23 should, if at all, be under Section 12 not Section 2(a).</p> <p>24 And to the extent that the State wishes to make</p> <p>25 that adjustment the Court will not preclude that but the</p> <p>18</p>

1 motion is granted as to the aggravators 1 and 2.
2 MR. STAUDAHER: So the Court is allowing the
3 State to amend it if we want to --
4 THE COURT: The Court will give leave to the
5 State to amend if they choose to do so.
6 MS. ERICKSON: But only one aggravator.
7 THE COURT: One aggravator.
8 The last motion we have on the calendar before
9 we do the status check on trial readiness is the Motion
10 to Preclude Introduction of Statement or in the
11 Alternative to Redact Statement.
12 Any other arguments to add here, Ms. Erickson?
13 MS. ERICKSON: Yes, I do want to add. After
14 reviewing the State's response they assert first that the
15 statements that I had highlighted as orange as hearsay
16 are not being offered for the truth of the matter
17 asserted. Well, unfortunately for the State in
18 *Deutscher*, D-e-u-t-s-c-h-e-r, *versus State*, 95 Nev. 669
19 between 63 and 85, 1979, the supreme court specifically
20 addressed this issue.
21 In that case the detective did an interviewed
22 statement with the defendant and made statements
23 concerning what he had been told by Mr. Deutscher's wife
24 and what Ms. Deutscher had said to the police officer.
25 The State argued there it wasn't for the truth of the

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1 matter asserted and the Court said, We can perceive no
2 hearsay exceptions to what appellant's wife said let
3 alone what the officer has stated. Additionally, it
4 cannot seriously be argued that the purpose was only to
5 show that the statements were made or conversations had
6 or that they were to show the circumstances of the
7 appellant's statement.
8 The officer had even said to appellant, Henry,
9 your wife is present in the room, are you going to make a
10 liar out of her.
11 The purpose of these statements were merely to
12 show the surrounding circumstances. We believe they
13 would have been irrelevant statements by the appellant
14 himself could have and should have been admitted
15 themselves.
16 So the Court rejects the State's argument. That
17 is the only legal argument that they have made. The
18 second legal argument they made is this:
19 There is no basis for altering a defendant's
20 answer. I did not ask the Court to do that. My entire
21 motion is to preclude any questions that include hearsay,
22 90 percent of which Detective Prieto doesn't says where
23 he even gets it. It's just a hearsay statement that is
24 asserted.

25 And I am also asking that the 65 lines of

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1 information where the detective is asserting that Ms.
2 Cabrera is a liar, is lying, is untruthful, is not
3 stating what the facts are, should be stricken. It is
4 inappropriate. Absolutely inappropriate for a lead
5 detective to have those words coming in front of a jury
6 which shows his opinion that my client is lying when she
7 is trying to explain to him what the facts were.
8 He didn't like them. He said she's a liar. It
9 is totally prejudicial for those statements to come in
10 saying that my client's defense is a lie and that's what
11 he is doing.
12 In the other, the blue, where he is telling her
13 to wait, listen, stop talking, he overrides what she's
14 saying and he says that is 149 lines of that information
15 in this statement -- these are all of my objections
16 starting at line 159 and go through line 1130, which is
17 the last line in the statement.
18 So he is saying, Wait, wait, no, listen, no, no,
19 this, that. He is asserting that 149 lines. There are
20 79 lines that include hearsay information. Six of these
21 lines are directly connected to statements where he is
22 asserting that Ms. Cabrera is untruthful. And 43 lines
23 are directly connected to times where he is telling her
24 to wait, stop, listen, I want you to know that this is
25 what you are supposed to say basically.

21

1 The remaining 30 lines of hearsay information is
2 in close proximity either to the hearsay or to telling
3 her she is not truthful.
4 So all of those statements are inadmissible.
5 Hearsay is inadmissible. It is more for the truth of the
6 matter asserted otherwise it shouldn't be in there; it's
7 irrelevant and prejudicial.
8 The lines that say she is untruthful are
9 absolutely inappropriate and unlawful because that is
10 telling the jury that Ms. Cabrera is a liar and anything
11 about her case should not be believed.
12 This is the lead detective who investigates the
13 case and the jury is going to believe, so whatever we do
14 in defense of her if it's what is being said in that
15 statement is a lie and that is absolutely inappropriate.
16 That would be our response.

17 THE COURT: Mr. Staudaher, do you want to
18 clarify if it is not hearsay what is it.

19 MR. STAUDAHER: Well, any statement -- the
20 technical definition of hearsay is an out of court
21 statement offered for the truth of the matter asserted.

22 THE COURT: Right. What is this being offered
23 for?

24 MR. STAUDAHER: First of all, it's contextual.
25 In the interview defendants are confronted by police with

22

1 both true and untrue information to elicit some sort of
2 response to find out if they are willing to talk about
3 what took place in the first place, whether they are
4 going to deny something or admit something.
5 A lot of times in those interviews, as the Court
6 is aware, they go through them and they ask information.
7 Questions clearly are not statements made offered for the
8 truth of the matter asserted because they are in the form
9 of a question.
10 If they are asked a question and a person
11 responds in a certain way or doesn't respond in a certain
12 way then it addresses how the individual reacts to that
13 information whether it comes in or doesn't come in as far
14 as an admission or a denial or whatever.
15 If there is some information where somebody is
16 talking about a prior conviction or a prior crime that
17 this person has been involved with and there's an
18 admission, clearly, I would agree with counsel that those
19 kinds of things can be redacted. But simply to call
20 somebody a liar when in fact in the very statement that
21 we're talking about there's denial and then there's
22 admissions.
23 So clearly she starts off with being untruthful
24 and then she starts to tell some of what took place yet
25 still denying other parts of it in the case.

23

1 I know that one of the things that counsel has
2 represented at least in the litigation up to this point
3 that somehow or another she was coerced, that she was
4 forced to do this at gunpoint, that somehow she was -- I
5 think even in her statement she says at one point that
6 she was scared and that's when she starts admitting to
7 things down the road.
8 But to come in and say that a question by a
9 police officer to a defendant somehow or another is
10 hearsay is without any basis. It's not a statement that
11 I would ever come into court and argue was true or that I
12 would try to elicit from the detective was true. And to
13 that extent the Court can admonish the State not to do
14 that.
15 There is no basis there for us not putting forth
16 or to excise or surgically take out bits and pieces or
17 large sections of a defendant's statement to the police
18 when questioned about a murder, in this case a double
19 murder.
20 The other part of it is the statements that she
21 makes in relation to or in essentially contradiction or
22 admission or whatever to whatever the question is asked
23 by the detective are in fact not hearsay because they are
24 part of the admission. They are statements made by the
25 defendant herself.

24

1 So there is no basis in this case because they
2 haven't pointed to a prior crime or prior bad act that
3 would need to be excised that indicate in any way that
4 the statement itself has to or should be altered other
5 than to eliminate those kinds of references which aren't
6 there.
7 So I don't think that there is anything to say
8 that there's an out of court statement that would ever be
9 offered for the truth of the matter asserted and for
10 those that would it would be a party opponent admission
11 which would not be hearsay either.
12 THE COURT: Ms. Erickson, do you have anything
13 that you have not already argued before. I don't need to
14 hear the same argument that you've already made.
15 MS. ERICKSON: No. I am not going to, Judge.
16 With regard to the truthful or untruthfulness of being
17 admissive, the Kansas Supreme Court at *State v. Elnicki*,
18 E-l-n-i-c-k-i, 279 Kansas 47, 2005, reviewed the
19 different states that held that language that says that
20 the detective thinks the person is truthful or not
21 truthful and came to the conclusion that a synthesis of
22 the referenced case law leads us to conclude that it was
23 error for Detective Hatims', H-a-t-i-m-s, comments
24 disputing Elnicki's, the appellant, credibility to be
25 presented to the jury.

25

1 The jury heard a law enforcement figure
2 repeatedly tell Elnicki that he was a liar, that Elnicki
3 was bullshitting him and weaving a web of lies.
4 The jury also heard the same law enforcement
5 figure suggesting that he could tell Elnicki was lying
6 because Elnicki's eyes were shifting. A jury is clearly
7 prohibited from hearing such statements from the witness
8 stand being tendered and likewise would be prohibited
9 from hearing them in a videotape even if the statements
10 are recommended and effective police interrogation
11 tactics.
12 As far as context for Elnicki's answers are
13 concerned the State could have safely accomplished its
14 goals simply by having Detective Hatims testify and point
15 out the progression as the tape played minus having
16 numerous negative comments on Elnicki's credibility. The
17 absence of eliminating instruction merely compounded the
18 already serious problem.
19 It is not out of Nevada but it is a case that
20 synthesizes all of the different cases that they have
21 reviewed and tell that that is completely inappropriate.
22 And with regard to the State's argument that it
23 is contextual truth and untruth is absolutely -- it is
24 not that it is true or untrue but that is the province of
25 the jury and that's why we are challenging the

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1 admissibility of that kind of evidence.
2 They provided you with absolutely not one
3 single, not one single authority to deny this motion and
4 I would ask the Court to grant it in the totality.
5 THE COURT: The Court has reviewed the
6 pleadings, reviewed the arguments argued here today, of
7 course, and is determined to grant in part and deny in
8 part the motion.
9 The statement will be redacted to remove any
10 references regarding any prior allegations of her actual
11 prior bad acts or uncharged crimes which have not been
12 the subject of a Petrocelli hearing.
13 The State will also redact and remove any
14 references to the officer's opinion that the defendant is
15 lying in the statement. That ultimately the Court does
16 find persuasive even though it is not binding on this
17 Court the analysis cited by the defense but also any
18 statements that could be viewed by the jurors as the
19 opinion of a detective as to the truthfulness of this
20 defendant is essentially the functional equivalent as
21 vouching for the State or potentially could be deemed
22 that and the concern that the Court has there of the
23 prejudice to the jury for that.
24 So to those extents those items will be
25 redacted, however, the other assertions in the Motion

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1 with regard to hearsay the Court does not find those to
2 be hearsay statements and those will not be redacted,
3 however, that will be without prejudice and the Court
4 will certainly reserve the right to hear objections and
5 rule on objections during the point in time of trial.
6 MS. ERICKSON: Judge, could I just ask for the
7 basis of the denial of hearsay.
8 THE COURT: The Court finds persuasive as far as
9 the State's argument the questions asked and other
10 circumstances in which these matters are being stated are
11 not themselves offered for the truth of the matter
12 asserted. The Court can also determine that information
13 can be determined to be used for other purposes besides
14 the truth of the matter, what actions are taken next,
15 contextual actions.
16 But, again, ultimately, the Court finds the
17 State's arguments persuasive. But, again, it is without
18 prejudice to and as we proceed and as the statement maybe
19 ultimately utilized to the extent the Court in that
20 moment in time hears an objection and views it otherwise,
21 I don't know if it's possible, but at this time I do not
22 view these things to be hearsay for the reasons argued by
23 the State.
24 MS. ERICKSON: Just because it's a capital case
25 I thought it would be important for the record to reflect

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1 your thoughts.
2 THE COURT: I appreciate that. And I thought I
3 had. I apologize.
4 Ms. Erickson, will you please prepare the orders
5 related to the matters that are on calendar today in
6 terms of the State has objected to and we need to get
7 those out as soon as we can.
8 And last but not least, do we have any updates
9 necessary for trial readiness.
10 MR. STAUDAHER: Just one point. As I said
11 earlier, we are starting the pretrial process. I
12 determined yesterday that in dealing with the crime scene
13 people that were involved in the case that there are
14 probably some additional photographs. I have asked that
15 person just to present me with the entirety of the -- we
16 have different productions which total around 800
17 photographs from autopsies to crime scene and the like.
18 The ones I am focused on or was interested in
19 were related to those witnesses who were just related to
20 the crime scene because in the photographs we have I
21 noticed that we didn't see any ones with cones and so
22 forth and when I asked the crime scene person about that
23 she indicated that there were photographs taken of cones
24 where evidence was recovered so she is going to produce
25 to me her production, her actual photographs that she

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1 took. I will make those available.
2 And as I told counsel there probably will be a
3 lot of redundancy there but to the extent that there is
4 then at least they'll have those. Also I will make sure
5 they have all the reports. She had a number of reports
6 one of which I just didn't recognize offhand and produced
7 that today as well. I will forward that to them.
8 As of right now anything else that comes in or
9 comes out as we go through the pretrial process I will
10 try to provide that.
11 The one last thing was, and I don't know if the
12 Court is aware of this, Dr. Tellganhoff (phonetic) was
13 the medical examiner in this case. He is no longer
14 working for the medical examiner's office. He has some
15 serious medical problems. I don't believe I had asked
16 counsel this earlier if they were going to be disputing
17 cause and manner of death, I don't believe they are, then
18 we will be utilizing a different medical examiner to come
19 in and talk about the individuals died of gunshot wounds.
20 So with that, those are the only things that have come to
21 light that we are aware of at this point before trial.
22 THE COURT: Ms. Erickson.
23 MS. ERICKSON: Judge, we have no objection. We
24 are not challenging the cause of death. Dr. Gavin is
25 certainly qualified to come in and talk about those

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1 injuries and cause of death.
2 We talked earlier about the prediction of the
3 new photographs; we don't object. We also discussed the
4 production of a new report; we don't object as long as we
5 get them relatively quickly.
6 For our purposes we are on track.
7 THE COURT: I will just remind you to get the
8 jury questionnaire.
9 MS. ERICKSON: Oh, no. It's right here.
10 Forward immediately to chambers. So I am going back to
11 my office straight and I will get that to you.
12 THE COURT: All right. Thank you.
13 MR. STAUDAHER: Thank you, Your Honor.
14
15 * * *
16
17 MS. ERICKSON: Your Honor, I just wanted you to
18 file this in open court. We had discussed it at the
19 bench because it is color-coded I can't file --
20 THE COURT: Yes.
21 MS. ERICKSON: I'm sorry. I forgot.
22 THE COURT: Recalling the matter of State versus
23 Ivonne Cabrera for the purpose of counsel providing an
24 exhibit to the Motion to Preclude Introduction Statement
25 or in the Alternative to Redact Statement.

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1 There was some color-coding, some difficulty
2 with this being filed in the electronic method and so you
3 have provided it to the Court now and the Court will see
4 that it gets added to the record.
5 MS. ERICKSON: Thank you, Judge. And I
6 previously provided one to you and to the State.
7 THE COURT: Yes. Thank you.
8 (Proceedings were concluded.)
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1 REPORTER'S CERTIFICATE
2
3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss.
5
6 I, BRENDA SCHROEDER, a certified court reporter
7 in and for the State of Nevada, do hereby certify that
8 the foregoing and attached pages 1-33, inclusive,
9 comprise a true, and accurate transcript of the
10 proceedings reported by me in the matter of THE STATE OF
11 NEVADA, Plaintiff, versus IVONNE CABRERA, Defendant, Case
12 No. C283700, on August 26, 2014.
13
14
15
16 Dated this 27th day of August, 2015.
17
18 /s/ Brenda Schroeder
19 BRENDA SCHROEDER, CCR NO. 867
20
21
22
23
24
25

33



CLERK OF THE COURT

MOT
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MICHAEL V. STAUDAHER
Chief Deputy District Attorney
Nevada Bar #008273
200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

IVONNE CABRERA, aka,
Yvonne Cabrera, #1617623,

Defendant.

CASE NO: C-12-283700-1

DEPT NO: XXV

**NOTICE OF MOTION AND MOTION TO ADMIT EVIDENCE OF OTHER
CRIMES, WRONGS, OR ACTS**

DATE OF HEARING: 9/14/15
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through MICHAEL V. STAUDAHER, Chief Deputy District Attorney, and files this Notice of Motion and Motion to Admit Evidence of Other Crimes, Wrongs, and Or Acts.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

NOTICE OF HEARING


YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department

1 XXV thereof, on Monday, the 14th day of September, 2015, at the hour of 9:00 o'clock A.M.,
2 or as soon thereafter as counsel may be heard.

3 DATED this 4th day of September, 2015.

4 STEVEN B. WOLFSON
5 Clark County District Attorney
6 Nevada Bar #001565

7 BY


8 MICHAEL V. STAUDAHER
9 Chief Deputy District Attorney
10 Nevada Bar #008273

11 **POINTS AND AUTHORITIES**

12 **STATEMENT OF FACTS**

13 On April 26, 2012, North Las Vegas officers and detectives responded to 2039 Webster
14 in reference to a possible gunshot victim. Initial responding officers on scene discovered two
15 gunshot victims. Police first located victim, Melissa Marin, at the gateway entrance to the
16 apartment complex, and later discovered victim, Ashley Wantland, at the front door of
17 apartment C. Both victims were conscious.

18 Officers asked Marin who had shot them and she responded that a subject known to her
19 as "Smokey" had done it. Officers then spoke with victim Ashley Wantland who stated that
20 she and her boyfriend had been shot and that her boyfriend was still inside the residence. Both
21 females were subsequently transported to University Medical Center (UMC) for treatment of
22 their multiple gunshot wounds.

23 Officers then went inside the residence to check for additional victims and located the
24 two deceased victims, later identified as Erik Quezada-Morales and James Headrick, in
25 separate bedrooms within the residence. During the initial sweep of the residence, officers
26 noticed that the bathroom window was open and various bathroom items had been knocked
27 onto the floor. Officers further noted that footprints were located inside the bathtub and that it
28 appeared that someone may have entered the residence through the bathroom window.

1 Officers also saw several shell casings in the bedrooms, as well as the hallway and living room
2 area.

3 The residence was subsequently sealed while detectives obtained a search warrant for
4 the 2039 Webster, Apartment C location. It was later determined that victim Morales was in
5 the southeast bedroom and deceased victim Headrick was on the floor in the northeast
6 bedroom. Both victims appeared to have suffered numerous gunshot wounds. In the
7 bathroom, police observed that the shower curtain had been knocked down and additionally
8 they located a crowbar on the floor of the bathroom. Crime scene personnel processed the
9 scene for prints and DNA and recovered other evidence.

10 While at the scene, detectives learned that Marin was able to talk and was giving
11 information to officers at UMC. Detectives responded to UMC and interviewed Marin. Marin
12 told detectives that two suspects came into her residence: a Hispanic male known to her as
13 "Smokey" and a female known to her as "Chinola." Marin recalled that earlier in the morning
14 she heard knocking at her bedroom door. Marin said she recognized Chinola's voice and that
15 Chinola asked her to open the door. At about the same time, her boyfriend, Morales, got up
16 to answer the door and she heard several gunshots. Marin said she told her boyfriend not to
17 open the door. The door was then forced open and she saw Smokey with a gun pointed at
18 them. Marin pleaded with Smokey not to shoot them, but he proceeded to shoot both Morales
19 and her several times. Marin then saw Smokey and Chinola flee out of the front door of the
20 residence.

21 Marin stated that despite her injuries, she was able to go into Wantland's and Headrick's
22 bedroom, where she saw Headrick laying on the floor and Wantland laying in the bed -- both
23 with apparent gunshot wounds. Marin said she was able to get Wantland up from the bed and
24 get out of the residence.

25 Detectives asked Marin if she knew why Smokey and Chinola shot them. Marin
26 responded that they let Chinola use their vehicle and Chinola failed to bring it back. Marin
27 said Morales had called Chinola and left a message, asking them to return the vehicle. Marin
28

1 said that started some type of verbal altercation and she believed that is the reason why Smokey
2 and Chinola came over and shot them.

3 Marin was able to give police directions to Chinola's residence, which was located at
4 1927 Bassler in North Las Vegas. With the names supplied by Marin, police were able to
5 identify Ivonne Cabrera as a possible female suspect who used the name Chinola. Police
6 obtained and then showed Marin a picture of Cabrera. Marin positively identified Cabrera as
7 the suspect who entered Marin's apartment and shot both her and Morales.

8 At approximately 11:00 p.m., on the same day, police, who were watching the Bassler
9 location, observed Cabrera get in a vehicle with several other subjects. Police saw Cabrera
10 packing numerous items into the trunk of a vehicle before leaving. Police subsequently
11 stopped Cabrera's vehicle and detained her. Police were able to locate a large amount of
12 Cabrera's clothing in the trunk, which was consistent with the clothing that the witnesses had
13 described Cabrera wearing at the time of the shooting. It appeared as though Cabrera was
14 trying to escape before being apprehended.

15 Detectives then responded to the location where Cabrera was being detained and took
16 her into custody. Detectives transported Cabrera to the Detective Bureau, where she was
17 questioned after being advised of her Miranda rights. During the taped interview of Cabrera,
18 she initially denied any involvement in the shooting. Later, however, Cabrera admitted to
19 going to the victim's residence with Smokey. Cabrera said she knew Smokey had a gun at the
20 time. Cabrera said that Smokey climbed through the bathroom window and then let her into
21 the apartment through the front door. Cabrera admitted to knocking on the bedroom doors
22 and asking the victims to let them into the rooms. Cabrera said that Smokey shot about nine
23 times at the victims. Cabrera further stated that they both fled from the residence following
24 the shooting, leaving in the grey Dodge Intrepid they had borrowed from Morales.

25 Cabrera said they later abandoned the vehicle on Bonanza Road and that they were
26 picked up by Smokey's sister. Cabrera said Smokey told her that he was only going to scare
27 them. Cabrera told police that she did it because she was scared. After the shooting, however,
28 Cabrera made no attempts to contact the police. Cabrera was then questioned as to why she

1 and Smokey went to the apartment and shot the victims. Cabrera would only respond that
2 there was some type of problem between them.

3 **INJURIES TO LIVING VICTIMS:**

4 According to the nurses at UMC, Marin suffered bullet "grazes" to her right buttock
5 and her right arm. Marin also had gunshot wounds to her left shoulder, right arm, back and
6 right breast. Marin had to have a tube inserted into her chest cavity to drain the blood which
7 had collected around her lungs. It also appeared as though she suffered several broken bones.

8 Wantland also suffered multiple gunshot wounds: two to her right arm; at least two in
9 her chest; and one at the base of her chin underneath her jaw. According to the nurses, at the
10 time of her initial hospitalization, there were still two bullets inside Wantland's body (one had
11 lodged in her tongue and one was near her right breast). Wantland also had to have a chest
12 tube inserted to drain blood from around her lungs.

13 **AUTOPSY:**

14 On April 27, 2012, Dr. Gary D. Telgenhoff conducted an autopsy of Morales and
15 Headrick. Dr. Telgenhoff determined that cause of death for both victims was multiple gunshot
16 wounds and that the manner of death was homicide.

17 **FOLLOW UP INVESTIGATION:**

18 On April 28, 2012, police identified Jose Alejandro Gonzales as a possible suspect who
19 went by the name of "Smokey." Gonzales fit the description of the suspect given by the
20 victims. Armed with this information, police obtained a photo of Gonzales and took that photo
21 to the North Las Vegas Jail where Cabrera was being detained. Police showed Cabrera the
22 photograph of Gonzales and she identified him as the suspect who went into the residence with
23 her and shot the victims. Cabrera wrote on the edge of the picture, "this is the guy that shot
24 the individuals," and signed her name. Cabrera further told police that she and Gonzales were
25 the only ones who entered the residence on the night of the shooting.

26 Police later went to UMC and contacted victims Marin and Wantland. Because the
27 victims personally knew both Smokey and Chinola, police showed them the photographs of
28 Cabrera and Gonzales. Marin positively identified Gonzales as the person who shot both her

1 and Morales. Wantland also viewed the photograph of Gonzales and positively identified him
2 as the person who shot both her and Headrick. Wantland also identified Cabrera as the other
3 suspect.

4 On April 26, 2012, crime scene investigators processed the following shooting scenes
5 at 2039 Webster St "C" for fingerprints: the exterior of the northeast bedroom window, the
6 exterior and interior of the bathroom window, the exterior of the sliding glass door, the exterior
7 of the living room window, and the bathtub/shower walls. All recovered latent lifts suitable
8 for comparison purposes were compared to Jose Gonzales and Ivonne Cabrera. The results of
9 those comparisons revealed that a latent lift recovered from the bathtub edge opposite the
10 bathroom window of the residence was a positive match to the left middle finger of Jose
11 Gonzales.

12 **SUBSEQUENT APPREHENSION OF JOSE GONZALES:**

13 On June 11, 2012, at approximately 1:33a.m., the primary operator of the Z portal at
14 the Otay Mesa Port of Entry (OTM POE), processed a grey Chevrolet Impala
15 (NVUS/4PEG102) driven by Marsha Darlene Miller as it attempted to enter the United States.
16 As the Impala moved through the Z portal at the port of entry, the vehicle underwent an X-ray
17 examination. The Z portal operator observed X-ray anomalies in the trunk area of the vehicle.

18 As Miller applied for entry as the driver of the silver Chevy Impala, she presented a
19 Nevada State Driver's License as her only form of identification, and declared herself to be a
20 United States Citizen. Miller appeared to be abnormally talkative and her hands were shaking
21 as she presented her documents. Miller stated that she was in Mexico "for fun" and presented
22 two negative declarations.

23 The passenger in the vehicle was Crystal Hoag (the girlfriend of Jose Alejandro
24 Gonzales). Hoag also presented an identification card from Nevada and declared that she was
25 a United States Citizen. When the customs agent queried Hoag's name on her computer, she
26 received a computer generated alert from the FBI. The agent then referred the vehicle and
27 occupants to the vehicle secondary lot for further inspection.

28

1 The Otay Mesa Port of Entry Port Enforcement Team inspected the Impala and
2 subsequently discovered – concealed in the truck of the Impala – an individual who was
3 attempting to elude Customs and Border Protection (CPB) inspection. That individual was
4 identified at Jose Alejandro Gonzales (aka Jose Alex Gonzales). The San Ysidro Port of Entry
5 Criminal Enforcement Unit was immediately contacted and later confirmed that there was an
6 active arrest warrant for Jose Gonzales for the double homicide from the State of Nevada.
7 Gonzales was then referred to the aforementioned CBP Enforcement Unit for further
8 processing and disposition and was subsequently extradited back to Las Vegas, Nevada to
9 answer to the charges against him.

10 FACTS LEADING UP TO SHOOTING

11 Ashley Wantland disclosed the following information during a pretrial conference with
12 the State on September 3, 2015:

13 In early April 2012, Wantland and her boyfriend, Headrick, moved into 2039 Webster
14 Street #C with Miguel Villegas, the lessee of the apartment. Two weeks later, Villegas was
15 arrested on multiple traffic warrants. After Villegas' arrest, Wantland retrieved Villegas'
16 vehicle and property, including Villegas' unemployment card. Because rent was coming due
17 at the beginning of the month, Villegas instructed Wantland to pay the rent using the money
18 on the unemployment card – to which Wantland agreed.

19 In the meantime, Wantland instructed Headrick not to tell Defendant that Villegas was
20 in jail for fear that Defendant would try to burglarize the apartment during Villegas' absence.
21 Headrick, however, did not heed Wantland's advice and informed Defendant that Villegas had
22 been arrested. Later that day, Defendant invited Wantland and Headrick to come over to a
23 friend's house. While at the friend's house, Wantland had placed her purse and apartment
24 keys on the counter. Defendant later told Wantland that she needed to go somewhere and
25 instructed Wantland and Headrick to stay in the friend's apartment and that she would be back.
26 Soon thereafter, Wantland noticed that her apartment keys were missing from the counter. She
27 suspected Defendant had taken them. Defendant returned to the apartment 45 minutes later
28 with Gonzales. When Wantland and Headrick asked Defendant to take them back home,

1 Defendant said she could not take them because she had to do something with Gonzales. As
2 a result, Wantland and Headrick walked home.

3 When they arrived at their apartment, Wantland and Headrick noticed that their
4 apartment had been ransacked and that all of Villegas' tools had been stolen. The following
5 day, Wantland confronted Defendant about the burglary. When Wantland informed Defendant
6 that she had called the police to report the incident, Defendant admitted that she was
7 responsible for the burglary. Defendant returned the stolen keys to Wantland and later sold
8 Villegas' stolen tools to Morales.

9 Furthermore, approximately one week prior to the April 26, 2012 shooting, Headrick
10 recruited Defendant into a retail scam whereby Defendant and Gonzales' sister, "Loca,"
11 helped drive Headrick and Wantland to various Walmart stores to return computer games
12 Headrick had previously stolen. Defendant also participated in the scam by returning stolen
13 computer games herself. Headrick successfully obtained \$180.00 from Walmart as a result of
14 this scam. Later that day, Headrick purchased 3.5 grams of methamphetamine through a
15 supplier of Defendant's. Defendant received .6 grams of methamphetamine from Headrick as
16 a result of her participation in the scam.

17 On the day before the shooting, Wantland ran into Defendant at a mutual friend's house.
18 During this encounter, Defendant told Wantland that "Loca" was "going to get [Headrick]."
19 Defendant was upset that she and Loca only received .6 grams of methamphetamine for their
20 roles in the retail scam.

21 Additionally, Defendant demanded that Wantland and Headrick give her Villegas'
22 unemployment card. Defendant further complained that she never received money from
23 Headrick for the tools she had sold him. As Defendant was about to drive away from the
24 residence (in Morales' vehicle), she warned Wantland that "it would be in her best interest" to
25 turn over the unemployment card. Less than twelve hours after this conversation, Defendant
26 and Gonzales broke into the victims' apartment and fired multiple shots at Marin, Wantland,
27 Morales, and Headrick. Prior to shooting Headrick, Gonzales asked, "You got the
28 unemployment card?"

1 After the shooting, Detectives asked the other surviving victim, Marin, if she knew why
2 Gonzales and Defendant shot them. Marin responded that they let Defendant use their vehicle
3 and she failed to bring it back. Marin said Morales had called Defendant and left a message,
4 asking them to return the vehicle. Marin said that started some type of verbal altercation and
5 she believed that is the reason why Defendant and Gonzales came over and shot them.

6 ARGUMENT

7 The State is seeking to admit in its Case-in-Chief evidence that just days prior to the
8 April 26, 2012 shooting, Defendant and the victims had a dispute over money, drugs, tools, a
9 vehicle, and an unemployment card. The State seeks to admit this evidence pursuant to the
10 res gestae doctrine and pursuant to NRS 48.045(2), which provides as follows:

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

16 NRS 48.045(2) (emphasis added).

17 In Bigpond v. State, 270 P.3d 1244, 128 Nev. Adv. Op. 10 (2012), the Nevada
18 Supreme Court held that evidence of other crimes, wrongs or acts may be admitted under the
19 statute for a relevant, non-propensity purpose other than those listed in NRS 48.045(2). The
20 Court explained that the statutory construction “is consistent with the use of the expression
21 ‘such as,’ which indicates that the list of ‘other purposes’ is illustrative rather than exhaustive”
22 and “traditional exceptions become simply illustrations of the kinds of use that are not
23 prohibited by the general rule.” Id. at 1249-1250. Thus, the plain language of NRS 48.045(2)
24 provides that other bad act evidence is inadmissible to prove propensity but is admissible for
25 any other purpose and provides examples of some other purposes. Id.

26 The trial court must consider three factors in making a determination regarding the
27 admissibility of a prior bad act: (1) the incident is relevant to the crime charged; (2) the act is
28 proven by clear and convincing evidence; and (3) the probative value of the evidence is not
substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170,

1 1176 (1997). The decision to admit or exclude evidence of a defendant's prior bad acts rests
2 within the sound discretion of the trial court. Consequently, a decision by a trial court to admit
3 or exclude such evidence will not be reversed absent manifest error. Daly v. State, 99 Nev.
4 564 (1983); Kazalyn v. State, 108 Nev. 67 (1992); Halbower v. State, 93 Nev. 212 (1977)

5 **I. EVIDENCE THAT DEFENDANT AND THE VICTIMS HAD A DISPUTE**
6 **OVER MONEY, DRUGS, TOOLS, A VEHICLE, AND AN UNEMPLOYMENT**
7 **CARD IS ADMISSIBLE TO PROVE DEFENDANT'S MOTIVE AND/OR**
8 **INTENT AND/OR STATE OF MIND.**

8 Evidence of prior bad acts may be admissible to explain to the jury what motivated the
9 defendant to commit the acts charged. Ledbetter v. State, 122 Nev. 252, 262-63, 129 P.3d
10 671, 678-79 (2006). Such acts are admissible under the motive exception of NRS 48.045(2),
11 provided the three-factor test set forth in Tinch is satisfied. Id. In Ledbetter, the defendant
12 was prosecuted for sexually assaulting his former minor stepdaughter. The district court
13 permitted the State to introduce in its case-in-chief evidence that defendant had previously
14 sexually abused his biological minor daughter and his former minor step-granddaughter. In
15 affirming the district court's admission of the prior bad acts, the Court held that evidence of
16 the defendant's prior acts of sexual abuse of his daughter and step-granddaughter were highly
17 probative in showing defendant's sexual attraction to and obsession with the young female
18 members of his family, which explained to the jury his motive for sexually assaulting his
19 stepdaughter. Id. at 263. The Court further concluded:

20 It therefore remains the law in Nevada that "whatever might 'motivate' one to
21 commit a criminal act is legally admissible to prove 'motive' under NRS
22 48.045(2)," so long as the three-factor test for admissible is satisfied.

22 (quoting Richmond v. State, 118 Nev. 924, 937, 59 P.3d 1249, 1258 (2002)).

23 Finally, in affirming the district court's ruling below, the Ledbetter Court further
24 concluded that the prejudicial effect of admitting defendant's prior bad acts was minimal given
25 the overall strength of the State's case against defendant. Id. at 263. Only where the prior act
26 evidence is admitted to bolster an otherwise weak case does the likelihood of unfair prejudice
27 become heightened. Id.

1 In the instant case, evidence that Defendant had a dispute with the victims over money,
2 drugs, tools, a vehicle, and an unemployment card is necessary to show Defendant's intent and
3 state of mind and to explain to the jury what motivated Defendant and Gonzales to break into
4 an apartment and shoot four unarmed people asleep in their beds. This evidence will show
5 that Defendant was angry with Wantland and Headrick because 1) Defendant thought
6 Wantland reported the apartment burglary to the police; 2) Headrick only gave Defendant .6
7 grams of methamphetamine for participating in the retail scam; and 3) Wantland and Headrick
8 would not give Defendant Villegas' unemployment card. Evidence of the dispute over the
9 unemployment card is also relevant and provides context to Gonzales' remark, "You got the
10 unemployment card?" prior to shooting Headrick and Wantland.

11 In regards to the other two victims, Defendant was upset with Morales because Morales
12 had not paid Defendant for the stolen tools she sold him. Defendant was also upset with Marin
13 and Morales following a verbal argument the parties had over Defendant not returning
14 Morales' vehicle after borrowing it. In fact, just hours prior to the shooting, Marin and
15 Morales had asked Gonzales to bring Morales' vehicle back, but Gonzales refused.

16 Evidence of Defendant's dispute with the victims over money, drugs, tools, a vehicle,
17 and an unemployment card is absolutely necessary to explain to the jury why Defendant and
18 Gonzales entered the victims' apartment on April 26, 2012 and attempted to execute all four
19 persons inside without any apparent provocation.

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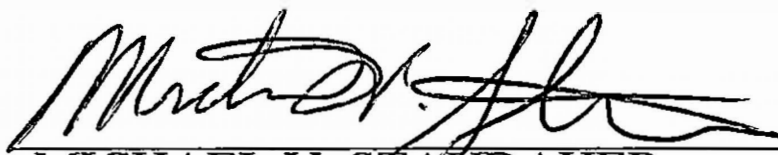
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1 CONCLUSION

2 Based on the foregoing, the State respectfully requests that the Court grant the State's
3 request for an evidentiary hearing to establish clear and convincing evidence of the fact that
4 Defendant had a dispute with the victims over money, drugs, tools, and an unemployment card
5 less than a week before the shootings.

6 DATED this 4th day of September, 2015.

7 STEVEN B. WOLFSON
8 Clark County District Attorney
9 Nevada Bar #001565


10 BY 
11 MICHAEL V. STAUDAHER
12 Chief Deputy District Attorney
13 Nevada Bar #008273

14 CERTIFICATE OF SERVICE

15 I certify that on the 4th day of September, 2015, I e-mailed a copy of the foregoing
16 State's Motion to Admit Evidence of Other Crimes, Wrongs or Acts, to:

17 BRET O. WHIPPLE, Esq.
18 admin@justice-law-center.com

19 PATRICIA M. ERICKSON, Esq.
20 pme@pmericksonlaw.com

21 BY 
22 T. Driver
23 Secretary for the District Attorney's Office

24
25
26
27
28 HW/hw/MVU



CLERK OF THE COURT

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Counsel for Defendant:
IVONNE CABRERA

DISTRICT COURT

COUNTY OF CLARK, NEVADA

THE STATE OF NEVADA,	)	Case No.:	C-12-283700-1
	)	Dept. No.:	XXV
Plaintiff,)		
)		
vs.)		
)		
YVONNE CABRERA,)		
)		
Defendant.)		

NOTICE OF MOTION AND MOTION TO CONTINUE TRIAL

Hearing Date: _____
Hearing Time: 9:00 a.m.

COMES NOW, Defendant, YVONNE CABRERA, by and through her counsel, Bret O. Whipple and Patricia M. Erickson, and requests this Honorable Court enter an order continuing Ms. CABRERA's trial. This request is based entirely upon the state's September 4, 2015 disclosure of "facts" that Ashley Wantland, one of the state's key witnesses, is now prepared to provide to the jury during trial.¹

///

¹ See the facts enunciated in p.7 through 9 of the State's Motion to Admit Evidence of Other Crimes, Wrongs or Acts, filed September 4, 2015, which are attached as Exhibit "A" and incorporated by reference.

1 Prior to September 4, 2015, the entirety of the information provided to the defense
2 regarding the information Ms. Wantland would present during trial was contained within
3 the 1.5 page transcript of a May 1, 2012 interview conducted while Ms. Wantland was at
4 UMC.² Now - **three years, 4 months and 9 days after the April 26, 2012 murders**, the
5 defense is informed of a multitude of facts which, even if overtly referenced in the
6 discovery, did not require investigation.

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26 ² See transcript of recorded interview of Ashley Wantland attached as Exhibit
27 "B" and incorporated by reference.

1 Because the state purportedly did not learn the "Facts Leading Up to The
2 Shooting" until September 3, 2015 and did not disclose these facts until September 4,
3 2015, Ms. CABRERA is entirely unprepared to challenge the state's new "motive" facts
4 at the trial which is now scheduled to begin on September 21, 2015.³

5 DATED this 7th day September, 2015.

6 Respectfully Submitted,
7

8 /s/ Bret O. Whipple
Bret O. Whipple
9 Nevada Bar No. 6168
1100 South Tenth St.
10 Las Vegas, NV 89101
(702) 731-0000
11 admin@justice-law-center.com

/s/ Patricia M. Erickson
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(702) 388-1055
pme@pmericksonlaw.com

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14 ///

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16 _____
17 ³ It should be remembered that as long ago as **January 4, 2013**, the state
18 filed a motion requesting the ability to depose both Melissa Marin and Ashley Wantland.
19 This motion was premised on the fact that "prior conduct by both witnesses have
20 suggested they may not be available or may be 'unable to attend' the trial" which was
21 then scheduled to begin on September 30, 2013. This pleading makes it very clear that
22 prosecutor Staudaher and his investigator spoke with both witnesses at the time the
23 preliminary hearing was supposed to be conducted and that "the state does currently
24 have contact with the witnesses." See state's "Motion to Take Depositions," p.8 lines 8-10,
25 p.9 lines 7-10, p.9 lines 19-20, and, p.10 line 4.

22 Further, it must be remembered that on **August 14, 2015**, the state asserted
23 that witnesses Marin and Wantland "have made it abundantly to the State that they do not
24 want to be contacted by the defense, nor do they want their address or contact
25 information disclosed to the defense." See "State's Response to Defendant's Motion for
an Order Requiring the State Update the Addresses of the Witnesses that Will be Called
to Testify During Their Case in Chief," p.2 lines 19-21.

26 Both of these pleadings clearly establish that the state had contact with
27 Ashley Wantland on different dates and had her contact information since January 4,
28 2013. The state obviously had the ability to obtain these NEW facts months if not years
before September 3, 2015.

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NOTICE OF MOTION

TO: STATE OF NEVADA,
TO: Chief Deputy District Attorneys Michael V. Staudaher and Hetty O. Wong:
YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned
will bring the foregoing Motion on for hearing before the Honorable Kathleen Delaney on
the ²¹____ day of September, 2015, at the hour of 9:00 a.m., in Department XXV, or as
soon thereafter as counsel may be heard.

DATED this 7th day of September, 2015.

Respectfully Submitted,

/s/ Patricia M. Erickson

Patricia M. Erickson, Esq.
Nevada Bar No.3506
601 South Tenth Street, Suite 206
Las Vegas, Nevada 89101
Counsel for Defendant Yvonne Cabrera
(702) 388-1055

MEMORANDUM OF POINTS AND AUTHORITIES

The Sixth Amendment guarantees to every defendant the right "to have the
Assistance of Counsel for his defence." The Supreme Court has long recognized that the
constitutional right is the right to "the **effective** assistance of counsel".⁴ The due process
clause of the Fourteenth Amendment makes this requirement applicable to the states.⁵

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⁴ McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d
763 (1970)(emphasis added).
⁵ Gideon v. Wainwright, 372 F.2d U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799
(1963).

1 A denial of a motion to continue is an abuse of discretion if it leaves the defense
2 with inadequate time to prepare for trial.⁶ Further, denial of a defendant's request for
3 continuance of trial, which is based upon a need that is not the defendant's fault, can be
4 an abuse of discretion.⁷ Finally, "it is clear that an amendment of substance to a
5 complaint will carry a corresponding obligation to allow the defense adequate time to
6 prepare an 'amended defense.'"⁸

7 In the case at bar, the defense has been diligently preparing for Ms. CABRERA's
8 trial - investigation of the state's case has been conducted, motions were timely filed,
9 meetings with defense witnesses have been conducted, notice of the fact that the
10 defense will call Dr. Bradley to testify, as well as the substance of her testimony, was
11 timely filed, trial preparatory meetings between counsel and the investigator have been
12 conducted, a meeting for discussion of potential jurors - as required by the Court - has
13 been scheduled for September 9, 2015, and the notice of witnesses was going to be filed,
14 more than five days before trial, on September 11, 2015.

15 However, on Friday September 4, 2015 at 11:42 a.m, the state filed a "Motion to
16 Admit Evidence of Other Crimes, Wrongs of Acts."⁹ This motion is based, entirely, upon
17 facts that Ashley Wantland has known since April 26, 2012.

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21 ⁶ Higgs v. State, Nev. ___, 222 P.3d 648, 653 (2010)(citing Zessman v.
22 State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978).

23 ⁷ Higgs 222 P.3d at 653 (citing Rose v. State, 123 Nev. 194, 206, 163 P.3d
24 408, 416 (2007)).

25 ⁸ Application of Groesbeck, 77 Nev. 412, 415, 365 P.2d 491, 493 (1961).

26 ⁹ The efilng system did not generate an email notification regarding the filing
27 of the state's bad act motion until 2:39 p.m.. Patricia M. Erickson did not see this email
28 until approximately 5:00 p.m. on September 4, 2015. 5:00 p.m. on Friday was, of course,
the beginning the three day Labor Day weekend.

1 While the charging document underlying Ms. CABRERA's trial has not been
2 amended, based upon the new facts disclosed on September 4, 2015, the state is now
3 clearly able to amend the substance of its theory regarding the "motive" for the underlying
4 murders and, more importantly, Ms. CABRERA's alleged reasons to be at 2036 Webster
5 apartment "C" on the morning of April 26, 2012. The new facts will be argued by the state
6 to establish their theories of criminal liability - aiding/abetting and co-conspirator - and
7 refute Ms. CABRERA's defense that she was merely present and had no reason to
8 encourage or help co-defendant Jose Gonzales commit the murders and attempt
9 murders.

10 Given the significance of the new "motive" facts, the defense MUST be given time
11 to investigate and thus be prepared to adequately confront and cross examine one of the
12 state's key witness, Ashley. Wantland, during trial. This investigation will take a
13 significant amount of time given the state's decision to either withhold or not obtain all the
14 relevant information regarding Ms. Wantland's new version of the "facts". While, it is
15 inconceivable that the prosecution did not ask Ms. Wantland to identify any of the
16 following facts, they are clearly absent from the state's motion:

- 17 (1) where Wantland obtained Mr. Villegas' vehicle, property and unemployment
18 card from;¹⁰
19 (2) what day, which friend, and to what location did Ms. CABRERA invite
20 Wantland and Headrick to come over to;¹¹

21 ///

22 ¹⁰ See Exhibit "A" p.7 lines 15-16. While the state notes that Mr. Villegas was
23 in custody due to traffic warrants, there are six (6) separate jurisdictions in the Las Vegas
24 area that could have issued the traffic warrants and taken Mr. Villegas into custody: Las
25 Vegas Municipal Court, Las Vegas Justice Court, North Las Vegas Municipal Court, North
26 Las Vegas Justice Court, Henderson Municipal Court and Henderson Justice Court.
Failure to identify where Ms. Wantland obtained the noted items requires investigation at
all six (6) jurisdictions.

27 ¹¹ See Exhibit "A" p.7 lines 22 through 25

- 1 (3) what date and at what location did Ms. CABRERA allegedly admit she
2 committed a burglary of 2039 Webster #C;¹²
- 3 (4) what date and at what location did Ms. CABRERA purportedly return Ms.
4 Wantland's keys;¹³
- 5 (5) what date and at what location did Ms. CABRERA supposedly sell Villegas'
6 stolen tools (and which tools) to murdered "Morales";¹⁴
- 7 (6) locations of the "various Walmart stores" Ms. CABRERA allegedly drove
8 Wantland/Headrick to so that Headrick could return stolen computer
9 games;¹⁵
- 10 (7) to which Walmart location(s) did Ms. CABRERA supposedly return stolen
11 computer games herself;¹⁶
- 12 (8) name and location of Ms. CABRERA's purported "supplier" that Headrick
13 purchased 3.5 grams of methamphetamine from;¹⁷ and,
- 14 (9) name and location of the "mutual friend's house" where Ms. CABRERA
15 supposedly informed Wantland that "Loca was going to get Headrick" and
16 then "demanded" Wantland/Headrick "give Villegas' unemployment card"
17 to her;¹⁸

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19 ///

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21 ¹² See Exhibit "A" p. 8 lines 5-7.

22 ¹³ See Exhibit "A" p. 8 line 7.

23 ¹⁴ See Exhibit "A" p. 8 lines 7-8.

24 ¹⁵ See Exhibit "A" p.8 lines 9-12.

25 ¹⁶ See Exhibit "A" p.8 lines 12-13.

26 ¹⁷ See Exhibit "A" p.8 lines 14-15.

27 ¹⁸ See Exhibit "A" p.8 lines 17-18 and 21-22.

28

1 Based upon the above noted missing facts, the defense must endeavor to
2 determine if there were other people present during the time frame that Ms. CABRERA
3 allegedly “invited” Wantland/Headrick to “a friend’s house” and thereafter “instructed
4 Wantland/Headrick to stay in the friend’s apartment.”¹⁹ Further, the defense must
5 investigate whether any other persons can verify or refute all of Ms. Wantland’s other
6 factual assertions that clearly will be relied upon the state to further their theories of
7 liability and refute Ms. CABRERA’s defense.

8 In response to the present motion, it is anticipated that the state will assert either
9 (1) it somehow failed to obtain any of the forgoing information, vital to the defense’s
10 ability to investigate, during the September 3, 2015 pretrial conference with Ms.
11 Wantland, and/or that (2) the state is not required “to investigate the case for” the
12 defense.²⁰ Regardless of which or any answer the state presents, it is submitted that the
13 defense absolutely must determine the above noted missing facts in order to effectively
14 represent Ms. CABRERA and in order to protect Ms. CABRERA’s federal constitutional
15 rights to due process, a fair trial and to confront the witnesses against her.

16 Moreover, while all of the above noted facts must be investigated so that Ms.
17 CABRERA’s counsel can adequately cross examine Ms. Wantland, another critical fact
18 that absolutely mandates additional time to investigate is that on an unknown date, at an
19 unknown location:

20 ///

21
22 ¹⁹ While the use of “apartment” and “house” might be inadvertent, the fact that
23 the state uses both while discussing this completely NEW information makes investigation
of this alleged interaction all the more difficult.

24 ²⁰ Mr. Staudaheer made this exact comment in response to the defense’s
25 September 4, 2015 email requesting disclosure of the documents underlying Ms.
26 Wantland’s conviction for attempt possession of a stolen vehicle in case no. C-14-
27 296720-1. Ms. Wantland was sentenced in this case on August 7, 2014 to probation
which was revoked on May 12, 2015. Both the PSI and Petition for Revocation of
Probation are sealed.

1 Defendant returned to the apartment 45 minutes later with **Gonzales**.
2 When Wantland and Headrick asked Defendant to take them back home
3 Defendant said she could not take them because she had **something to**
4 **do with Gonzales**²¹

5 Until September 4, 2015, there has not been any direct evidence that Ms. CABRERA
6 knew, much less was seen in the presence of and intended to do something with, co-
7 defendant Gonzales. The defense clearly needs to determine where this supposed
8 encounter between Wantland, CABRERA and co-defendant Gonzales occurred and who
9 else might have been present when this interaction allegedly occurred.

10 Denial of this requested continuance, which is **not based upon anything the**
11 **defense has done or not done** but is based entirely upon the state's decision to wait
12 until eighteen days before trial to discuss the facts known by Ms. Wantland, would be an
13 abuse of discretion. Further, it would clearly violate Ms. CABRERA's Fifth, Sixth and
14 Fourteenth amendment rights.

15 Moreover, the state's new ability to rely upon facts known to Ashley Wantland
16 since April 26, 2012 which were undisclosed until September 4, 2015 - three years, 4
17 months and 9 days after the April 26, 2012 murders - is clearly a circumstance that carries
18 a corresponding obligation to allow the defense adequate and additional time to review,
19 absorb, investigate and prepare an "amended defense."²² Without additional time to
20 investigate, reflect, absorb and prepare an "amended defense," undersigned counsel will
21 not be able to render effective assistance of counsel.

22 ///

23 ///

24 ///

25

26 ²¹ See Exhibit "A" p.7 line 27 through p.8 line1. Emphasis added.

27 ²² Groesbeck, 77 Nev. at 415.

1 Finally, Ms. CABRERA's federal constitutional rights to due process, fair trial and
2 to confront the witnesses against her, as protected by the Fifth, Sixth and Fourteenth
3 Amendments of the United States Constitution, will be decimated if her trial, presently
4 scheduled to begin seventeen days after the disclosure of the entirely new sequence of
5 events, is not continued.

6 Based upon the forgoing, it is respectfully requested that this Honorable Court
7 continue Ms. CABRERA's trial to a later date which provides sufficient time for the
8 defense to investigate all of the new facts disclosed three years, 4 months and 9 days
9 after the April 26, 2012 murders.

10 DATED this 7th day September, 2015.

11 Respectfully Submitted,

12
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EXHIBIT 'A'

1 The Otay Mesa Port of Entry Port Enforcement Team inspected the Impala and
2 subsequently discovered – concealed in the truck of the Impala – an individual who was
3 attempting to elude Customs and Border Protection (CPB) inspection. That individual was
4 identified at Jose Alejandro Gonzales (aka Jose Alex Gonzales). The San Ysidro Port of Entry
5 Criminal Enforcement Unit was immediately contacted and later confirmed that there was an
6 active arrest warrant for Jose Gonzales for the double homicide from the State of Nevada.
7 Gonzales was then referred to the aforementioned CBP Enforcement Unit for further
8 processing and disposition and was subsequently extradited back to Las Vegas, Nevada to
9 answer to the charges against him.

10 FACTS LEADING UP TO SHOOTING

11 Ashley Wantland disclosed the following information during a pretrial conference with
12 the State on September 3, 2015:

13 In early April 2012, Wantland and her boyfriend, Headrick, moved into 2039 Webster
14 Street #C with Miguel Villegas, the lessee of the apartment. Two weeks later, Villegas was
15 arrested on multiple traffic warrants. After Villegas' arrest, Wantland retrieved Villegas'
16 vehicle and property, including Villegas' unemployment card. Because rent was coming due
17 at the beginning of the month, Villegas instructed Wantland to pay the rent using the money
18 on the unemployment card – to which Wantland agreed.

19 In the meantime, Wantland instructed Headrick not to tell Defendant that Villegas was
20 in jail for fear that Defendant would try to burglarize the apartment during Villegas' absence.
21 Headrick, however, did not heed Wantland's advice and informed Defendant that Villegas had
22 been arrested. Later that day, Defendant invited Wantland and Headrick to come over to a
23 friend's house. While at the friend's house, Wantland had placed her purse and apartment
24 keys on the counter. Defendant later told Wantland that she needed to go somewhere and
25 instructed Wantland and Headrick to stay in the friend's apartment and that she would be back.
26 Soon thereafter, Wantland noticed that her apartment keys were missing from the counter. She
27 suspected Defendant had taken them. Defendant returned to the apartment 45 minutes later
28 with Gonzales. When Wantland and Headrick asked Defendant to take them back home,

1 Defendant said she could not take them because she had to do something with Gonzales. As
2 a result, Wantland and Headrick walked home.

3 When they arrived at their apartment, Wantland and Headrick noticed that their
4 apartment had been ransacked and that all of Villegas' tools had been stolen. The following
5 day, Wantland confronted Defendant about the burglary. When Wantland informed Defendant
6 that she had called the police to report the incident, Defendant admitted that she was
7 responsible for the burglary. Defendant returned the stolen keys to Wantland and later sold
8 Villegas' stolen tools to Morales.

9 Furthermore, approximately one week prior to the April 26, 2012 shooting, Headrick
10 recruited Defendant into a retail scam whereby Defendant and Gonzales' sister, "Loca,"
11 helped drive Headrick and Wantland to various Walmart stores to return computer games
12 Headrick had previously stolen. Defendant also participated in the scam by returning stolen
13 computer games herself. Headrick successfully obtained \$180.00 from Walmart as a result of
14 this scam. Later that day, Headrick purchased 3.5 grams of methamphetamine through a
15 supplier of Defendant's. Defendant received .6 grams of methamphetamine from Headrick as
16 a result of her participation in the scam.

17 On the day before the shooting, Wantland ran into Defendant at a mutual friend's house.
18 During this encounter, Defendant told Wantland that "Loca" was "going to get [Headrick]."
19 Defendant was upset that she and Loca only received .6 grams of methamphetamine for their
20 roles in the retail scam.

21 Additionally, Defendant demanded that Wantland and Headrick give her Villegas'
22 unemployment card. Defendant further complained that she never received money from
23 Headrick for the tools she had sold him. As Defendant was about to drive away from the
24 residence (in Morales' vehicle), she warned Wantland that "it would be in her best interest" to
25 turn over the unemployment card. Less than twelve hours after this conversation, Defendant
26 and Gonzales broke into the victims' apartment and fired multiple shots at Marin, Wantland,
27 Morales, and Headrick. Prior to shooting Headrick, Gonzales asked, "You got the
28 unemployment card?"

1 After the shooting, Detectives asked the other surviving victim, Marin, if she knew why
2 Gonzales and Defendant shot them. Marin responded that they let Defendant use their vehicle
3 and she failed to bring it back. Marin said Morales had called Defendant and left a message,
4 asking them to return the vehicle. Marin said that started some type of verbal altercation and
5 she believed that is the reason why Defendant and Gonzales came over and shot them.

6 ARGUMENT

7 The State is seeking to admit in its Case-in-Chief evidence that just days prior to the
8 April 26, 2012 shooting, Defendant and the victims had a dispute over money, drugs, tools, a
9 vehicle, and an unemployment card. The State seeks to admit this evidence pursuant to the
10 res gestae doctrine and pursuant to NRS 48.045(2), which provides as follows:

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

16 NRS 48.045(2) (emphasis added).

17 In Bigpond v. State, 270 P.3d 1244, 128 Nev. Adv. Op. 10 (2012), the Nevada
18 Supreme Court held that evidence of other crimes, wrongs or acts may be admitted under the
19 statute for a relevant, non-propensity purpose other than those listed in NRS 48.045(2). The
20 Court explained that the statutory construction “is consistent with the use of the expression
21 ‘such as,’ which indicates that the list of ‘other purposes’ is illustrative rather than exhaustive”
22 and “traditional exceptions become simply illustrations of the kinds of use that are not
23 prohibited by the general rule.” Id. at 1249-1250. Thus, the plain language of NRS 48.045(2)
24 provides that other bad act evidence is inadmissible to prove propensity but is admissible for
25 any other purpose and provides examples of some other purposes. Id.

26 The trial court must consider three factors in making a determination regarding the
27 admissibility of a prior bad act: (1) the incident is relevant to the crime charged; (2) the act is
28 proven by clear and convincing evidence; and (3) the probative value of the evidence is not
substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170,

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EXHIBIT 'B'

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2 Q. Um, I'm talking with uh, Ashley Wantland. Uh, we're at uh, University
3 Medical. Uh, this is gonna be in reference to Case Number 12 or it's gonna be
4 12-7466. Okay um, Ashley I want to ask you a couple questions or - or you
5 just to tell me what happened on the day of the shooting when it occurred.
6 What you remember. Okay?

7 A. Okay. Uh, I remember waking up to a couple voices in the house. My
8 boyfriend got up out of bed went and checked to see who it was. And he
9 opened the door and I saw like a half an inch of (Chinola)'s face...

10 Q. (Chinola)?

11 A. ...come into our door - our doorway. And then I heard some guy's voice. And
12 he comes like about halfway into the doorway and asks my boyfriend if he
13 had um, the unemployment card. And then my boyfriend started to say that he
14 was gonna - that he cut it in half or whatever. And then the guy's voice pretty
15 much he didn't say anything. And he - all I heard was gunshots. One and then
16 I lo- I look up and that's what's happening he's shooting my boyfriend. He shot
17 him once. My boyfriend screamed and he said, "Oh my God," and then he
18 shot him again. And then like not even four seconds later he looked at me and
19 he shot me twice.

20 Q. Okay. Do you know that guy?

21 A. I've seen him once before.

22 Q. And do you know what they call him?

23 A. Smoky.

24 Q. Smoky? Okay. Um, after the shooting do you remember thing- anything after
25 that?

26 A. After the shooting?

27 Q. Yeah. After he shot you.

28 A. Um, I passed out like twice...

29 Q. Yeah.

30 A. ...tryin' to get out of bed.

31 Q. And then?

- 32 A. And Melissa - the girl that - the other two people that were in the house um,
33 she came in after that and started freakin' out. But I can't remember too much
34 of that 'cause I was tryin' to get out of bed. So...
- 35 Q. Okay. And pretty much that was it for the (unintelligible).
- 36 A. Pretty much. Yeah. And then the paramedics came and all that.
- 37 Q. So you did watch Smoky shoot your boyfriend?
- 38 A. Yes. Yes.
- 39 Q. And that would've been (James)?
- 40 A. Yes. (James).
- 41 Q. And then he turned the gun and shot you?
- 42 A. Yes.
- 43 Q. Okay. Is that all you can remember?
- 44 A. That's all I have for you.
- 45 Q. Okay. All right. Uh, this concludes the interview.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2015, I emailed a true and correct copy of the forgoing NOTICE OF MOTION and MOTION TO CONTINUE TRIAL to the prosecutors at the following email addresses:
Michael.Staudaher@clarkcountyda.com
Hetty.Wong@clarkcountyda.com

Further, I hereby certify that on the 7th of September, 2015, I requested that a file stamped true and correct copy of the forgoing NOTICE OF MOTION and MOTION TO CONTINUE TRIAL be served through the court's efiling service to counsel for the parties at the below email addresses:

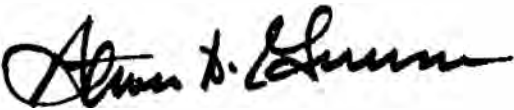
Counsel for the State:
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Counsel for Co-Defendant Gonzales:
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Co-counsel:
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/s/ Patricia M. Erickson
Patricia M. Erickson

/s/ Patricia M. Erickson
Patricia M. Erickson


CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,)	
)	
Plaintiff,)	Case No: C-12-283700-1
)	
vs.)	Dept. No: 25
)	
IVONNE CABRERA,)	
)	
Defendant.)	
)	
)	

BEFORE THE HONORABLE KATHLEEN DELANEY

SEPTEMBER 9, 2015, 9:00 A.M.

REPORTER'S TRANSCRIPT
OF
MOTION TO CONTINUE TRIAL

APPEARANCES:

(See separate page)

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

1 APPEARANCES:
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19 JUSTICE LAW CENTER
20 1100 S. Tenth Street
21 Las Vegas, Nevada 89104
22
23 (Telephonic appearance)
24
25

<p>1 LAS VEGAS, CLARK COUNTY, NEVADA</p> <p>2 WEDNESDAY, SEPTEMBER 9, 2015, 9:00 A.M.</p> <p>3 PROCEEDINGS</p> <p>4 * * *</p> <p>5 THE COURT: State of Nevada versus Ivonne</p> <p>6 Cabrera. I see that Ms. Cabrera was transported and is</p> <p>7 present in custody.</p> <p>8 We did receive a request from Mr. Whipple's</p> <p>9 office to appear telephonically, so we do have the number</p> <p>10 where we were going to call him. The arguments are going</p> <p>11 to be well covered by counsel present, so let's get him</p> <p>12 on the line.</p> <p>13 (Clerk places call.)</p> <p>14 THE COURT: Mr. Whipple, this is Judge Delaney</p> <p>15 calling the Cabrera matter in open court. Can you hear</p> <p>16 us okay?</p> <p>17 MR. WHIPPLE: I can, Your Honor.</p> <p>18 THE COURT: All right. I know that when counsel</p> <p>19 is standing at the table and the mic is not terribly</p> <p>20 close that it can be difficult to hear. Will you indulge</p> <p>21 us and I will come back to you and if there's anything</p> <p>22 you missed I'll fill you in, okay?</p> <p>23 MR. WHIPPLE: Thank you, Your Honor.</p> <p>24 THE COURT: All right. Thank you.</p> <p>25 This matter is on calendar for a Motion to</p> <p>3</p>	<p>1 THE COURT: Well, all right. Good luck with</p> <p>2 that.</p> <p>3 Ms. Erickson, I don't mean to be facetious but</p> <p>4 we have some things to be concerned about here so --</p> <p>5 MR. STAUDAHER: I am a little taken aback,</p> <p>6 actually, by at least the implication that somehow or</p> <p>7 another this is all new. Maybe the connections are new</p> <p>8 but the information is not.</p> <p>9 As a matter of fact, the police reports, the</p> <p>10 discovery mentions all of these things not necessarily in</p> <p>11 how they flow together, but counsel has been aware of</p> <p>12 them from the beginning. Counsel has a defendant who is</p> <p>13 present for all of these things and certainly has access</p> <p>14 to that information that she could ask questions of.</p> <p>15 Back on 5/14 of 2014, over a year ago,</p> <p>16 codefendant when this was not a severed case came into</p> <p>17 court on the record and said that they spoke with Ashley</p> <p>18 Wantland. I don't know if Ashley talked to her or not, I</p> <p>19 am talking defense counsel. We provided the phone</p> <p>20 numbers that the Court requested. They supposedly</p> <p>21 contacted each other. I don't know if they discussed</p> <p>22 anything or if she refused to talk to her.</p> <p>23 But back in 2014 in May, Ashley Wantland talked</p> <p>24 to defense counsel for Mr. Gonzalez in this case and said</p> <p>25 the same things, so we didn't know the actual flow of how</p> <p>5</p>
<p>1 Continue Trial filed on behalf of Ms. Cabrera. We have</p> <p>2 not seen a written response from the State. I know that</p> <p>3 there was a concern expressed yesterday morning when this</p> <p>4 matter was brought to the Court's attention that if we</p> <p>5 were to set something on today's calendar it would</p> <p>6 potentially not give the State the opportunity to</p> <p>7 respond. There's always an opportunity, but I appreciate</p> <p>8 and I am not holding it against the State that there's</p> <p>9 not a written response.</p> <p>10 The reason I put it on this calendar is because</p> <p>11 I thought it was important enough to start to attempt to</p> <p>12 address this matter and then to the extent that we needed</p> <p>13 something in writing and because we are already on</p> <p>14 calendar on Monday for the State's motion that sort of</p> <p>15 precipitated this motion then we could carry matters over</p> <p>16 to that day.</p> <p>17 But I did want us to address because if there is</p> <p>18 not an argument against continuance, then, really what we</p> <p>19 need to do is perhaps address that matter quickly and</p> <p>20 move on and deal with the other matters on Monday.</p> <p>21 If there is an argument against continuance then</p> <p>22 we really need to flush this out and figure out what the</p> <p>23 circumstances are.</p> <p>24 MR. STAUDAHER: We absolutely are going to</p> <p>25 oppose a continuance, Your Honor.</p> <p>4</p>	<p>1 things went, but all of the parts were there. The issue</p> <p>2 about the unemployment card, the drugs that were on</p> <p>3 board, both decedents had drugs in their system at the</p> <p>4 time. The defendant herself admitted to using at the</p> <p>5 time, so drug use was certainly an issue.</p> <p>6 The fact that the tools and the car, all that</p> <p>7 were around and part and parcel to how and why this all</p> <p>8 came to be. But as far as the actual flow of how all</p> <p>9 that happened that's what we obtained in a pretrial</p> <p>10 conference.</p> <p>11 We provided that information immediately to</p> <p>12 defense counsel. It was over and above what the State is</p> <p>13 required to do. There is no vendor report of a statement</p> <p>14 that we have gotten. It's nothing related to</p> <p>15 impeachment. As far as any of that is concerned we</p> <p>16 provided that information because in the context of</p> <p>17 trying to ferret out at the trial what actually happened</p> <p>18 which precipitated the events before the actual killings</p> <p>19 in this case that that information is important for a</p> <p>20 jury to know.</p> <p>21 THE COURT: If all of that information is so</p> <p>22 important and the State needs that in the case why wasn't</p> <p>23 the motion to admit the other bad acts done before?</p> <p>24 MR. STAUDAHER: Well, we interviewed the</p> <p>25 witness. If the Court will recall, there is two parts to</p> <p>6</p>

1 this that I think the Court needs to be aware of.
2 Certainly counsel from a strategic standpoint did what
3 they did, and I totally get why they did it, but there
4 was a preliminary hearing. This didn't go to a grand
5 jury. There was a preliminary hearing scheduled.
6 Both of the witnesses in this case that the
7 State proffered to the Court early on failed to appear at
8 that preliminary hearing. They did eventually appear
9 when we were both present. Both defense counsel for
10 Gonzalez and for Cabrera elected at that point to waive
11 the preliminary hearing, ostensibly because they knew how
12 difficult these witnesses were and how scared they were
13 at the time, and hoping that we would not preserve
14 testimony.
15 So we could have gone forward, all of this
16 information could have been ferreted out back then. The
17 State then because of its concern over the witnesses
18 actually brought a motion to ask for depositions of these
19 witnesses in advance of trial. That was opposed by
20 defense counsel, both defense counsel, and the Court
21 actually denied the State's request.
22 So that was another opportunity for all parties
23 to go through this and ferret out that information and to
24 get it.
25 Also Ms. Wantland has been in custody and

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1 defense counsel for Mr. Gonzalez actually got access to
2 her while she was in jail, told the Court and Counsel
3 that they had done this and got that information and said
4 that they had spoken with her.
5 So to come back and say that they haven't had an
6 opportunity to get the details especially when all of
7 those details centered around her client's direct
8 involvement and she can simply ask her client is really
9 disingenuous.
10 I mean, they thwarted the State, they thwarted
11 the Court for the process and trying to ferret out this
12 information on two separate occasions when the State a
13 month in advance of trial does a pretrial conference and
14 gives some detail with a witness and brings that before
15 the Court -- because we're not so concerned about trying
16 to give that information out from the State's
17 perspective, but any question from either side related to
18 this witness or the other witness that is related to the
19 actual killing, which would be Melissa Marin as well as
20 to what was going on; why there was a dispute over tools
21 or unemployment card or something to that effect, that
22 goes to the underpinnings of the other acts which are
23 considered bad acts. That's why we brought the motion.
24 We brought it in a timely fashion. And the fact
25 that we bring it when we get the information doesn't mean

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1 that it's something that is a problem for the State. The
2 defense failed to let us even try to ferret this
3 information out. So if we had gone to a preliminary
4 hearing --
5 THE COURT: Now you are repeating yourself,
6 Mr. Staudaher. And I have a really heavy calendar this
7 morning. I will come back to you.
8 Ms. Erickson, one of the things that is
9 difficult to digest in the argument about this is all new
10 and how are we going to handle this and we need more time
11 is the fact that the vast majority, if not all of these
12 issues do involve your client actually being involved.
13 It's somebody's testimony about these circumstances, but
14 you know, your client to the extent that any of these
15 instances took place, whatever, would have been there and
16 could have spoken to them as well. So that is a
17 difficult thing to understand how information that is
18 potentially in the control of your client is something
19 that causes a delay or a need for a continuance.
20 MS. ERICKSON: Well, Number 1, Judge, we are
21 court appointed. We have to submit requests for funding
22 for investigation. Investigation is -- we don't do
23 investigation of things that are tangential. Had this
24 been important the State would have done their motion in
25 a timely manner because, of course, 250 requires motions

9

1 to be filed in a manner that allows the judge to decide
2 them 30 days before trial. So the assertion that this is
3 a timely motion is not true.
4 Yes, it's information that is in my client's
5 mind, maybe, I don't know because there's nothing
6 illustrating that there's a tangential discussion at the
7 very end about tools.
8 And it's not even a complete discussion. It's
9 about when the detective was overruling her and telling
10 her this and that. If it was so important then the State
11 would have, again, done this motion for bad acts many
12 months ago. They only tied this all together on
13 September 4th, how am I supposed to tie this all
14 together.
15 There is a few lines in a report that talks
16 about a tool that was going to be sold, that talk about
17 the car and that talk about the unemployment card. That
18 does not tell me that there is any motive because now of
19 course this is the motive. We have been random and
20 motiveless for three years, four months and nine days.
21 Now we have a motive and that is exactly what the State's
22 motion says. This is the motive.
23 We never had a motive to be investigating. We
24 don't just investigate random facts. In fact, there is
25 tons of facts in every report in everything and of every

10

1 person. If it doesn't seem to be relevant to the case
2 then it's not going to be part of our investigations
3 because it has no bearing.
4 And it is most amazing that the State's entire
5 recitation of these facts failed to contain any of the
6 things that would be determined on during direct
7 examination; who, what, where and when. None of those
8 facts are in there. None. It makes it almost possible
9 to figure out what's going on.
10 The State has to request a hearing on this
11 matter, on the other bad acts matter because they will
12 then need to have Ms. Wantland testify and then we will
13 have an ability to potentially find out these facts that
14 are missing from the factual basis that Ashley Wantland
15 is going to now testify at trial.
16 I am not a mind reader and I am not supposed to
17 have to determine out of this entire notion of facts how
18 they all fall together unless it is very clear that this
19 is what is going on.
20 This is their motive now. I was supposed to
21 figure out their motive?
22 THE COURT: All right. So here's how we are
23 going to proceed --
24 MR. STAUDAHER: The Court said that you were
25 going to allow me to finish up.

11

1 THE COURT: I'm sorry, Mr. Staudaher. I did say
2 that. I apologize.
3 MR. STAUDAHER: Just so we're clear on this, the
4 points regarding the car, the drug use, the unemployment
5 card and the tools, those items were out there. She has
6 access to her client. To come in and say that she didn't
7 know or couldn't have an investigator to go in, she
8 doesn't need an investigator to turn to her client in an
9 interview and say, What about this, what about that, what
10 about that, what was going on that day. That is
11 something that doesn't take any money. It doesn't take
12 any effort on the part of an investigator and it would
13 have been something that would have been forth coming
14 because it is absolutely known by the defense in this
15 case. So to indicate that she needs to have an
16 investigator do that is one thing.
17 Secondly, I would like to hear what actual
18 investigation she needs to do at this point related to
19 those statements about the fact that there was a scam
20 involving sort of a stealing scam to get money to buy
21 drugs and there was a dispute over how much in the way of
22 drugs or money was used and essentially that probably was
23 just the basis for these two going over and just flat out
24 executing or attempting to execute four people.
25 MS. ERICKSON: Judge, I would like to respond.

12

1 Number one, I did speak to my client about these
2 things and I did not receive the answers that
3 Ms. Wantland is giving him, okay. So I did do the
4 investigation that Mr. Staudaher and the Court thinks I
5 should have done.
6 We discussed these facts and they were not in
7 any way the motive for this killing. They were not in
8 any way what Mr. Staudaher has put them --
9 THE COURT: But doesn't that beg the question of
10 that's cross-examination worth, not necessarily
11 continuance investigation worthy?
12 MS. ERICKSON: No because, first, there is no
13 evidence anywhere of this stealing scam. None. Zip.
14 Not anywhere in any discovery was there any discussion of
15 a stealing scam at Walmart, so that I couldn't have
16 investigated.
17 There is a necessity to investigate who else was
18 present when these alleged things occurred because other
19 people may show that Ms. Wantland is not being truthful.
20 That is not cross-examination. That is investigation.
21 That is finding the people that were also present when
22 these things occurred, so that is what needs to be
23 investigated. I can't do that in 12 days.
24 THE COURT: Here is what we are going to do.
25 This Motion to Continue Trial is going to be continued to

13

1 Monday. I expect the State to file a response in writing
2 by the end of the day tomorrow and I will give Ms.
3 Erickson an opportunity by the end of the day Friday as
4 well to file any reply she wishes to file. We will
5 address this matter on Monday.
6 I appreciate that we have given a deadline also
7 on Friday for jury questionnaires. We expect that
8 deadline to be met because there is no final
9 determination yet on whether this case is going to
10 continue.
11 This is not an ideal position but we will work
12 out and ultimately resolve on Monday. That will give an
13 opportunity to have a full record on this. The Court
14 will also be addressing procedural concerns about the
15 timing but also ultimately the substantive matters here.
16 It does help to know where the positions are for
17 the counsel and we will get this decided and we will get
18 this determined. But I do have concerns about what has
19 been brought to the Court's attention. I have heard the
20 State's oral response today, but I want to see a written
21 response as well and I think our record should not only
22 have that but mandates having that in the circumstances
23 of this case. And we will address that as well at the
24 State's motion to the extent that it needs to be dealt
25 with in that timely fashion, depending on the outcome of

14

1 the motion to continue trial. That matter could be
2 continued but everybody should be prepared to address
3 that as well.
4 Ms. Erickson, any final scheduling questions?
5 MS. ERICKSON: We have a second motion to strike
6 an aggravator that's scheduled for the first day of
7 trial. I don't know if you want us to move that up to
8 the 14th or calendar call or not.
9 THE COURT: At this point I think there's enough
10 burden on everybody's plate to address the matters that
11 will be heard on Monday, so at this point on Monday we
12 will talk about the scheduling of that matter and whether
13 we leave it be or whether we adjust it to another day.
14 MS. ERICKSON: Okay. And also I have prepared
15 an order for daily transcripts as requested by your
16 clerk.
17 THE COURT: That is fine.
18 MR. STAUDAHER: And, Your Honor, just from a
19 logistical standpoint, Ms. Wong will be here on Monday
20 because I will be out of the jurisdiction. Ms. Wong will
21 be here on Monday to argue and deal with the issues
22 related to the calendar call as well as any other matters
23 that the Court would like to address.
24 THE COURT: Okay. That's certainly fine.
25 MR. STAUDAHER: And also the State has already

15

1 gone through the jury -- we spent the weekend going
2 through the jury questionnaires. We sort of have our
3 marching orders and we took that very seriously and got
4 that done.
5 THE COURT: I only brought that up because I
6 know that there had been some discussion at some point
7 and I have obviously lost track of when that discussion
8 occurred but not the possibility of if this matter was
9 resolved sooner that might save some time on the prep of
10 the questionnaires.
11 It appears that they have been done because,
12 again, at some point, you know, if we are going to
13 proceed then they need to be done, so out of an abundance
14 of caution it's always better.
15 I know Ms. Erickson had indicated she had been
16 going through them.
17 Mr. Whipple, is there anything that you need for
18 me to recap or that you would like to add today?
19 MR. WHIPPLE: No, Your Honor. I will see you on
20 Monday.
21 THE COURT: All right. Thank you. See
22 everybody on Monday.
23 MS. ERICKSON: Thank you, Judge.
24 (Proceedings were adjourned.)
25

16

1 REPORTER'S CERTIFICATE
2
3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss.
5
6 I, BRENDA SCHROEDER, a certified court reporter
7 in and for the State of Nevada, do hereby certify that
8 the foregoing and attached pages 1-17, inclusive,
9 comprise a true, and accurate transcript of the
10 proceedings reported by me in the matter of THE STATE OF
11 NEVADA, Plaintiff, versus IVONNE CARBERA, Defendant, Case
12 No. C283700, on September 9, 2015.
13
14
15
16 Dated this 12th day of September, 2015.
17
18 /s/ Brenda Schroeder
19 BRENDA SCHROEDER, CCR NO. 867
20
21
22
23
24
25



CLERK OF THE COURT

1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MICHAEL V. STAUDAHER
6 Chief Deputy District Attorney
7 Nevada Bar #008273
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 **IVONNE CABRERA, aka**
13 **Yvonne Cabrera, #1617623**
14 **JOSE GONZALES, aka**
15 **Jose Alejandro Gonzales, #2636822**
16 Defendant.

CASE NO: **C-12-283700-1**

DEPT NO: **XXV**

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO CONTINUE

DATE OF HEARING: 9/14/15
TIME OF HEARING: 9:00 A.M.

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney,
20 through MICHAEL V. STAUDAHER, Chief Deputy District Attorney, and hereby submits
21 the attached Points and Authorities in Opposition to Defendant's Motion to Continue Trial.

22 This Opposition is made and based upon all the papers and pleadings on file herein, the
23 attached points and authorities in support hereof, and oral argument at the time of hearing, if
24 deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

Applicable Law

Eighth Judicial District Court Rule 7.30(a) does state that a party may move to continue a Jury Trial "for good cause." The Nevada Supreme Court has held:

The matter of continuance is traditionally within the discretion of the trial judge and not every denial of a request for additional time violates due process. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); Polito v. State, 71 Nev. 135, 282 P.2d 801 (1955). Each case must turn on its own circumstances, with emphasis upon the reasons presented to the trial judge at the time the request is made. See, Nilva v. United States, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415 (1957).

Zessman v. State, 94 Nev. 28, 31 (1978).

In Zessman, the State amended a murder charge to add premeditation, which was done at the time of trial. Id. The defense requested more time to prepare based upon the new theory, and the Court denied the request. Id. The Nevada Supreme Court stated the Court should have granted the continuance.

In this case, the State has not amended the charges and Defendant Cabrera is not facing an additional or a different theory of criminal liability. The factual underpinnings of the information provided by Ms. Wantland also have not changed and have been in evidence since the inception of this case. Additionally, nothing procedurally has changed since the last trial setting which defense moved to continue.

Defense counsel now claims that they have need to perform additional investigation, but they do not delineate really what that investigation would entail, if it could even be done, other than vague references to finding out additional information. It is important to note that the defense claims that they have not had access to information provided by victim Ms. Wantland concerning the days preceding the shooting. This assertion has no basis and is not reasonably or rationally valid. Specifically:

1. Defense counsel has had full access to her client since the beginning of this case. Defendant is fully capable of providing a firsthand account to defense counsel of what took place in the days leading up the shooting. In addition, Defendant was clearly present regarding essentially all of the events prior to the shooting described by Ms. Wantland and defense counsel has admittedly had numerous discussions

with Defendant in preparation for trial. To claim that defense counsel never queried Defendant on these issues is simply disingenuous;

2. On August 21, 2012, defense counsel had an opportunity to question Ashley Wantland about events leading up to the shooting. Defense counsel, however, elected to waive Defendant's preliminary hearing for strategic purposes to prevent the State from preserving the testimony of Ms. Wantland;

3. On January 30, 2013, defense counsel again rejected the opportunity to question Ms. Wantland on these very issues when defense counsel actively opposed the State's request to take the deposition of Ms. Wantland. Again, for strategic purposes defense counsel prevented the elicitation and preservation of Ms. Wantland's testimony regarding the events leading up to the shooting;

4. Defense counsel also never attempted to contact or meet with Ms. Wantland regarding her version of events, despite knowing that Ms. Wantland was in custody in the Clark County Detention Center and that she had been interviewed by counsel for Defendant Gonzales. This point is illustrated in the May 14, 2014, transcript regarding an exchange with the Court and defense counsel for Ms. Cabrera and Mr. Gonzales regarding readiness and scheduling of trial. (See Exhibit 1) Beginning on page 6 of the transcript, defense counsel for Ms. Cabrera claimed to be ready for trial and that they had fully investigated the case.

It was at that point that defense counsel for Mr. Cabrera, Ms. Jackson, stated in open court that they had interviewed one of the victims (Ms. Wantland) and that, according to that victim, they were the first attorneys to speak to her. This was a time when Ms. Wantland was incarcerated in the Clark County Detention Center and was apparently cooperative with defense counsel and was willing to talk to them about events surrounding the shooting. In fact, Ms. Jackson stated in court with defense counsel for Defendant Cabrera present that she did not "understand how you can prepare a case and not speak to the witnesses."

Despite knowing that Ms. Jackson had spoken with Ms. Wantland and that Ms. Wantland was in the detention center and was willing to speak to opposing counsel, defense counsel for Ms. Cabrera made no attempts to interview her; and

5. With regard to investigating the case, it should also be noted by the Court that as early as July 24, 2012, **three months after the shooting and one month before the preliminary hearing**, that defense counsel for Defendant Cabrera requested and was granted funds to conduct an investigation. That was very early on in the case and clearly with the aid of information from their client, should have provided some insight into the circumstances surrounding the shooting.

"Good cause," therefore, does not exist to again continue this case on Defendant's motion. The Court should note that this case has been continued three times before, each time by the defense. The reasons stated in the defense's motion are without good cause to continue this case yet again.

///

///

1 CONCLUSION


2 Nothing has been articulated by the Defense in this case that would constitute "good
3 cause" to continue this case. The State, the victims, the witnesses, and the judicial system as
4 a whole all require the expeditious handling of criminal cases. To allow defense attorneys to
5 continuously prolong trials without "good cause" is exactly what causes the criminal justice
6 system to fail everyone. The State simply asks that defense counsel be held to some standard
7 of preparedness and that the defense motion be denied.

8 DATED this 10 day of September, 2015.

9 Respectfully submitted,

10 STEVEN B. WOLFSON
11 Clark County District Attorney
Nevada Bar #001565

12
13 BY


14 MICHAEL V. STAUDAHER
15 Chief Deputy District Attorney
Nevada Bar #008273

16 CERTIFICATE OF FACSIMILE TRANSMISSION &/OR ELECTRONIC MAIL

17 I hereby certify that service of State's Opposition To Defendant's Motion to Continue
18 Trial, was made this 10th day of September, 2015, by Facsimile Transmission &/or email to:

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26
27 
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28 MS/tgd/MVU



CLERK OF THE COURT

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Counsel for Defendant:
YVONNE CABRERA

DISTRICT COURT

COUNTY OF CLARK, NEVADA

THE STATE OF NEVADA,	)	Case No.:	C-12-283700-1
	)	Dept. No.:	XXV
Plaintiff,)		
)		
vs.)		
)		
YVONNE CABRERA,)		
)		
Defendant.)		

REPLY TO STATE'S OPPOSITION TO MOTION TO CONTINUE TRIAL

Hearing Date: September 14, 2015
Hearing Time: 9:00 a.m.

COMES NOW, Defendant, YVONNE CABRERA, by and through her counsel, Bret O. Whipple and Patricia M. Erickson, and submits the following as her reply to the state's opposition to the motion to continue trial.

1. An additional basis for continuance of the trial was learned on September 10, 2015

In the early morning hours of September 10, 2015, the prosecution sent the following new information, in an email, to counsel:

///

///

1 With regard to prior felonies or possible crimes of moral turpitude for Ashley
2 Wantland and Melissa Marin we have learned the following:

3 Ashley Wantland – Nothing other than the local PSV case (in Odyssey and
4 bound over on an unconditional waiver).

5 Melissa Marin – nothing local, but she has a misdo out of Chilress County,
6 TX for False Info to Police; as well **as three apparent felony convictions**
7 **in Memphis, TX for Forgery of Financial Instruments.**¹

8 The disclosure that one of the state's key witnesses, Melissa Marin, has felony
9 convictions for forgery - a crime of moral turpitude - **eleven days** before trial is to begin
10 provides an additional fact which requires a continuance of the trial. Failure to disclose
11 this classic impeachment evidence absolutely precluded Ms. CABRERA from obtaining
12 evidence which is clearly admissible.²

13 Although Ms. Marin may admit that she has sustained these convictions, if she
14 doesn't, the defense will not be able to refute any denial. Moreover, Ms. CABRERA
15 should not be required to accept Ms. Marin's memory of the "three apparent felony
16 convictions." Ms. CABRERA is entitled to obtain the judgments of conviction to establish
17 when the convictions occurred and exactly what crime(s) the conviction(s) were for.³

18 ¹ Emphasis added. See email attached as Exhibit "A" and incorporated
19 herein by reference.

20 ² [W]hen the defense is attempting to impeach a prosecution
21 witness, a question concerning a prior felony conviction
22 should be permitted if the defense has a reasonable belief
23 that such prior conviction exists, regardless of whether the
24 defense is prepared to prove it with a judgment of conviction.
25 If the witness denies the conviction, questioning concerning
26 the prior conviction must cease. The defense, however, may
27 rebut such denial with a certified copy of the judgment of
28 conviction.

Corbin v. State, 111 Nev. 378, 383 84, 892 P.2d 580 (1995).

³ Ms. CABRERA's team does not have access to NCIC. While Ms.
CABRERA's team investigated Ms. Marin, they did not locate any evidence of these
felony convictions. Therefore, Ms. CABRERA's team did not know these convictions
existed until September 10, 2015.

1 The state's failure to learn of and disclose this information, prior to September 10,
2 2015, was a direct violation of the discovery order prepared by the Court and filed on May
3 26, 2015. In the order, this Court specified:

4 The State shall also provide any materials and/or information that relates
5 to specific **instances of misconduct** of [Alise Esfandiar, James Headrick,
6 Salvador Jimenez, Melissa Marin, Felicia Montel, Eric Quezada-Morales,
7 Heather Redland, Christina San Juan, Lawrence Vierra, and Ashley
Wantland], or other material witnesses from which it could be inferred that
the person is **untruthful**.⁴

8 Felony convictions for forgery are much more than instances of misconduct and this
9 Court's order clearly required the state to determine whether felony convictions and
10 instances of misconduct relating to truthfulness existed regarding the two key witnesses.

11 Finally, the state's September 10, 2015 disclosure regarding Ashley Wantland's
12 gross misdemeanor conviction for attempt possession of a stolen vehicle also violated this
13 Court's order.

14 On September 4, 2015, after discovering Ms. Wantland's conviction and the fact
15 that her probation had been revoked in the case, counsel contacted prosecutor Staudaher
16 regarding the disclosure of the documents underlying this conviction. Mr. Staudaher's
17 response was:

18 Let me be clear, we are not going to investigate the case for you. All of the
19 documents you requested from C-14-296720-1 are on Odyssey and can be
20 downloaded, I just checked. If for some reason you can't download them
then go to chambers and have the JEA do it for you. The conviction is for
a GM anyway so I'm not sure how you plan to use it for impeachment
purposes.

21 When counsel informed Mr. Staudaher that the petition for revocation of probation was
22 sealed, his response was "[i]f it's sealed get it from the court."

23 ///

24 ///

27 ⁴ Emphasis added. See Order p.4 lines 11-19.

1 This Court's order clearly required Mr. Staudaher to disclose the existence of Ms.
2 Wantland's case, the fact that she was convicted and the fact that Ms. Wantland's
3 previously imposed probation was revoked on May 12, 2015. Given the fact that Mr.
4 Staudaher's office was prosecuting Ms. Wantland, there isn't any reason why this
5 information wasn't available to be disclosed at a time close to the May 12, 2015 probation
6 revocation. Had the state complied with this Court's May 26, 2015 order by just disclosing
7 Ms. Wantland's conviction, undersigned counsel would have investigated the status of the
8 case and found Ms. Wantland was in jail. Had the state complied with the order, it is
9 possible that the present motion to continue Ms. CABRERA's trial would not have been
10 required.⁵

11 **2. The state's opposition does not establish that Ms. CABRERA should**
12 **have discerned the new "motive" evidence from the discovery**
13 **documents**

14 The information contained in the state's written opposition adds no further
15 information, than what was stated in open court on September 9th, for this Court's
16 consideration in determining whether to continue Ms. CABRERA's trial.

17 **A. Failure to respond to this Court's specific question proves the**
18 **discovery did not inform any party of the new "motive" evidence**

19 The state's opposition provides this Court with additional reasons to continue the
20 trial. On September 9, 2015, this Court specifically asked the prosecution if the "motive"
21 facts were contained within the discovery why didn't the state file it's motion to admit that
22 evidence prior to September 4, 2015? The state did not answer that question on
23 September 9, 2015. The Court then provided the state with additional time and the ability
24 to answer this question. However, the state's opposition absolutely **failed** to provide any
25 answer to this question.

26 ⁵ There isn't any way of knowing whether Ms. Wantland would have spoken
27 with counsel at that point in time. The state provided a telephone number for Ms.
28 Wantland on August 26, 2015 and she has not responded to any calls.

1 Failure to answer this key question should be viewed by this Court as an admission
2 that the discovery did not even inform the state of the new “motive” evidence. If the state
3 couldn’t discern the motive from the discovery then why would the defense see any need
4 to investigate the vague mention of tools, a vehicle and/or an unemployment card?⁶

5 The state’s failure to answer the Court’s key question and the additional failure to
6 identify what actual discovery document(s) supposedly advised Ms. CABRERA that any
7 random mention of tools, a vehicle, and/or an unemployment card was the “motive”
8 compels a finding that the discovery documentation did not inform **ANYONE** of the
9 existence of Ms. Wantland’s new “motive”.⁷

10 ///

11 ///

12 ///

13 ///

14 _____
15 ⁶ Obviously, Ms. CABRERA’s team investigated Melissa Marin’s assertions
16 regarding the failure to return the one car. This information was clearly disclosed in the
17 discovery and was also the basis for the random/motiveless aggravating circumstance.
18 The discovery did not apprise the defense that an investigation should be conducted
regarding Ms. Wantland’s new assertion that she obtained Mr. Villegas’ vehicle.

19 ⁷ The state tries to convince this Court that the continuance request should
20 be denied because Ms. CABRERA does not specify what investigation would be
21 completed. Unfortunately for the state, undersigned counsel specifically stated on
22 September 9, 2015 that the investigation that would be conducted would focus on
identifying other persons who were present at the apartment, the house, and the other
vaguely identified places where the new facts supposedly occurred. Counsel stated that
this investigation was required in order to determine whether Ashley Wantland was
untruthful regarding the new “motive” evidence.

23 It is incredible that the state can insinuate that the defense investigation might not
24 even be able to be completed because of the defense’s vagueness when that vagueness
25 is entirely based on the state’s refusal to include the address and/or location of the house
or apartment where the new actions occurred; and, the state’s refusal to include the
26 names of the “friends” whose apartment or house these new actions occurred at. If the
state continues to refuse to provide the who, where and when underlying Ms. Wantland’s
27 facts, the state should be completely precluded for adducing any such facts at Ms.
CABRERA’s trial.

1 B. State's failure to amend notice of intent to remove random/motiveless
2 aggravating circumstance proves the discovery did not inform any
3 party of the new "motive" evidence

4 The state's August 18, 2015 assertion that the "random" and "without apparent
5 motive" was a question for the jury, completely belies their present contention that the
6 discovery alerted Ms. CABRERA to the new "motive" for the murders/attempt murders.⁸
7 If the state was able to discern the facts underlying this "motive", from the discovery,
8 continuing to seek the death penalty based upon an aggravating circumstance that the
9 state knew would not be supported by the facts is outrageous and egregious prosecutorial
10 misconduct. Which is why counsel asserts that the discovery could not possibly have
11 informed the state of this "motive" evidence. If the state didn't know, how was the
12 defense to know?

13 C. Counsel discussed with Ms. CABRERA facts about the tools,
14 because the information was contained in her police interview and
15 is directly contrary to Wantland's new information, and the
16 unemployment card because there was a random and vague
17 reference to it in the discovery

18 The state re-argues that a continuance is not required because counsel had
19 access to Ms. CABRERA and categorically states "to claim that defense counsel never
20 queried the Defendant on these issues is simply disingenuous."⁹ Again, the state failed
21 to hear undersigned counsel's direct response to this claim on September 9th - counsel
22 did speak with Ms. CABRERA regarding the tools. This discussion took place **solely**
23 because there was mention of tools at the end of Ms. CABRERA's police interview.
24 Specifically, the following exchange occurred:

25 Q. Do you know anything about the stuff that was stolen from Miguel's apartment?

26 A. No.

27 ...

28 ⁸ Opposition p.2 lines 16 through 18.

29 ⁹ Opposition p.2 line 26 through p.3 line 1,

1 Q. Who might a taken it?
2 ...
3 A. James [HEADRICK] was stealing some of his stuff. ... [T]o be able to keep the
4 apartment.
5 Q. ... [Y]ou help [HEADRICK] sell it?
6 A. Some of it.
7 Q. So you help him sell some of the stuff from .. Miguel's apartment?
8 A. It was , um, tools.
9 ...
10 Q. Okay do you help him sell some of it though? ...
11 ...
12 A. [JAMES] just gave me some drills and that's it sir.¹⁰
13 This exchange between Ms. CABRERA and Detective Prieto is absolutely contrary to Ms.
14 Wantland's new "facts". The state knows what Ms. CABRERA said on April 27, 2012 and
15 to claim that the defense should have learned from Ms. CABRERA what Ms. Wantland
16 now say about the tools is truly "disingenuous."
17 Additionally, undersigned counsel actually discussed Mr. Villegas' unemployment
18 card because there was a vague and extremely confusing reference to it. The information
19 obtained from Ms. CABRERA did not provide counsel with any reason to believe that the
20 unemployment card was a motive for the alleged murders/attempt murders.
21 This portion of the state's re-argument for why a continuance should not be
22 granted is clearly refuted by the information contained in Ms. CABRERA's statement.
23 Additionally, counsel did exactly what the state claims was not completed - counsel spoke
24 with Ms. CABRERA.
25

26 ¹⁰ See YVONNE CABRERA's April 27, 2012 statement, previously provided
27 to the Court, lines 969-1005 and lines 1021-1026.

1 Counsel never learned anything that made her believe the tools or unemployment card
2 were the “motive” for what occurred on April 26, 2015. Therefore, Ms. CABRERA’s
3 request to continue the trial should be granted.

4 D. Arguing defense had an opportunity to learn Ms. Wantland’s
5 new information categorically proves the discovery did not
6 inform Ms. CABRERA about the new “motive” evidence

7 Next, the state re-argues the completely untenable claim that Ms. CABRERA’s trial
8 should not be continued because counsel had the ability to question Ms. Wantland (1) at
9 the scheduled preliminary hearing, and (2) when the state requested this Court enter an
10 order allowing the state to depose her. Arguing that Ms. CABRERA’s counsel had the
11 opportunity to learn the information completely **contradicts** the state’s assertion that the
12 **discovery** informed Ms. CABREA’s counsel of the new “motive” evidence.

13 Moreover, Ms. CABRERA’s counsel had a legal right the waive the preliminary
14 hearing. Additionally, counsel opposed deposing Ms. Marin and Ms. Wantland because
15 neither the law nor the facts supported the state’s desire to take these depositions. This
16 Court found as much when it denied the state’s motion to depose these witnesses.
17 Neither of these legal actions can justify the denial of a continuance when the state
18 discloses new “motive” evidence eighteen days before trial.

19 E. Arguing defense should have contacted Ms. Wantland when
20 she was incarcerated categorically proves the discovery did
21 not inform Ms. CABRERA of the new “motive” evidence

22 The state’s re-asserts that undersigned counsel’s failure to attempt to contact or
23 meet with Ms. Wantland when she was incarcerated in CCDC precludes a continuance.
24 This contention again demonstrates that the **discovery would NOT and did NOT inform**
25 Ms. CABREA’s counsel of the existence of the new “motive” evidence.

26 ///

27 ///

28 ///

///

1 Further, the factual underpinnings of this averment are absolutely false,
2 undersigned counsel never knew that Ms. Wantland was in custody at any time.¹¹
3 Additionally, during the May 14, 2014 hearing directly cited by the state, Ms. Jackson did
4 not state the date the interview with Ms. Wantland occurred and certainly never stated
5 that it occurred while Ms. Wantland was in custody in May 2014. Ms. Jackson's exact
6 statement was:

7 We recently interviewed one of the live victims and she said we were the
8 first attorneys to speak to her. I just don't understand how you can prepare
a case and not speak to the witnesses.¹²

9 Clearly, Ms. Jackson did not even name which live victim had been interviewed. Thus,
10 the state's concluding reason for denying the motion to continue that "[d]espite knowing
11 that Ms. Jackson had spoken with Ms. Wantland and that Ms. Wantland was in the
12 detention center and was willing to speak with to opposing counsel" is based upon a
13 direct misrepresentation of the existing record.

14 F. The state's failure to file the other bad act evidence when the
15 Court could have denied the 2014 and 2015 continuance
16 requests proves that the discovery did not inform any party of
the new "motive" evidence

17 Finally, the state's vehement and continual opposition to all prior requests to
18 continue the trial is clear evidence that the discovery did not inform ANY PARTY
19 regarding the facts underlying the new "motive" for the murders/attempt murders. When
20 defense continuance requests were made in April 2014 and, particularly, when made
21 orally on March 16, 2015 when trial was set to begin on May 11, 2015, there was no
22 reason to believe this Court would continue the trial on either of those occasions.

23 ///

24
25 ¹¹ As noted above, had the state complied with the Court's discovery order,
26 counsel would have investigated the status of Ms. Wantland's criminal conviction and
would potentially have learned of Ms. Wantland's incarceration.

27 ¹² May 14, 2014 p.7 lines

1 Therefore, if the discovery actually contained Ms. Wantland's "motive" evidence, the state
2 would have continued to prepare and would have filed the motion to admit this new
3 evidence before September 4, 2015.

4 **CONCLUSION**

5 For all of the foregoing reasons, it is requested that this Honorable Court find that
6 the state's has failed to sustain it's proclamation that the evidence disclosed by the State
7 on September 4, 2015 has "been in evidence since the inception" of the case at bar.
8 Therefore, it is requested the Court continue the trial so that Ms. CABRERA's federal
9 constitutional rights to due process, a fair trial, and the right to confront and cross
10 examine witnesses, as protected by the Fifth, Sixth and Fourteenth Amendments, are
11 protected.

12 DATED this 11th day September, 2015.

13 Respectfully Submitted,
14

15 /s/ Bret O. Whipple
16 Bret O. Whipple
17 Nevada Bar No. 6168
18 1100 South Tenth St.
19 Las Vegas, NV 89101
20 (702) 731-0000
21 admin@justice-law-center.com

15 /s/ Patricia M. Erickson
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Exhibit “A”

Patricia Erickson

From: Michael Staudaher <Michael.Staudaher@clarkcountyda.com>
Sent: Thursday, September 10, 2015 6:26 AM
To: Patricia Erickson; Bret Whipple; Jackson, Alzora; Clark Patrick
<cpatrick@clarkcountynv.gov>
Cc: Hetty Wong
Subject: Cabrera/Gonzales

To all counsel,

With regard to prior felonies or possible crimes of moral turpitude for Ashley Wantland and Melissa Marin we have learned the following:

Ashley Wantland – Nothing other than the local PSV case (in Odyssey and bound over on an unconditional waiver).

Melissa Marin – nothing local, but she has a misdo out of Chilress County, TX for False Info to Police; as well as three apparent felony convictions in Memphis, TX for Forgery of Financial Instruments.



Michael V. Staudaher
Chief Deputy District Attorney
Office of the District Attorney
Major Violators Unit
301 East Clark Place, 10th Floor
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Las Vegas, NV 89155-2212
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2015, I requested that a file stamped true and correct copy of the forgoing REPLY TO STATE’S OPPOSITION TO MOTION TO CONTINUE TRIAL be served through the court’s efilng service to counsel for the parties at the below email addresses:

Counsel for the State:

Michael.Staudaher@clarkcountyda.com
Hetty.Wong@clarkcountyda.com

Counsel for Co-Defendant Gonzales:

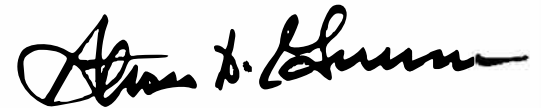
cpatrick@clarkcountynv.gov
ajackson@clarkcountynv.gov

Co-counsel:

Bret Whipple
admin@justice-law-center.com

/s/ Patricia M. Erickson

Patricia M. Erickson



CLERK OF THE COURT

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Counsel for Defendant:
YVONNE CABRERA

DISTRICT COURT

COUNTY OF CLARK, NEVADA

THE STATE OF NEVADA,	)	Case No.:	C-12-283700-1
	)	Dept. No.:	XXV
Plaintiff,)		
)		
vs.)		
)		
YVONNE CABRERA,)		
)		
Defendant.)		

**OPPOSITION TO STATE'S MOTION TO ADMIT EVIDENCE OF OTHER CRIMES,
WRONGS OR ACTS**

Hearing Date: September 14, 2015
Hearing Time: 9:00 a.m.

COMES NOW, Defendant, YVONNE CABRERA, by and through her counsel, Bret O. Whipple and Patricia M. Erickson, and opposes the state's motion to admit evidence. The new "motive" evidence, disclosed on September 4, 2015, is not admissible because it is not "proven by clear and convincing evidence."

The facts, as forth in the state's motion, do not even fulfill the basic tenets of a what a direct examination should establish: when, where, and who else was present when the "facts" supposedly occurred.

Specifically, the recitation of facts contained in the state's motion fails to identify the following:

- (1) where Wantland obtained Mr. Villegas' vehicle, property and unemployment card from;¹
- (2) what day, which friend, and to what location did Ms. CABRERA invite Wantland and Headrick to come over to;²
- (3) what date and at what location did Ms. CABRERA allegedly admit she committed a burglary of 2039 Webster #C;³
- (4) what date and at what location did Ms. CABRERA purportedly return Ms. Wantland's keys;⁴
- (5) what date and at what location did Ms. CABRERA supposedly sell Villegas' stolen tools (and which tools) to murdered "Morales";⁵
- (6) locations of the "various Walmart stores" Ms. CABRERA allegedly drove Wantland/Headrick to so that Headrick could return stolen computer games;⁶

///

¹ See Exhibit "A" p.7 lines 15-16. While the state notes that Mr. Villegas was in custody due to traffic warrants, there are six (6) separate jurisdictions in the Las Vegas area that could have issued the traffic warrants and taken Mr. Villegas into custody: Las Vegas Municipal Court, Las Vegas Justice Court, North Las Vegas Municipal Court, North Las Vegas Justice Court, Henderson Municipal Court and Henderson Justice Court. Failure to identify where Ms. Wantland obtained the noted items requires investigation at all six (6) jurisdictions.

² See Exhibit "A" p.7 lines 22 through 25

³ See Exhibit "A" p. 8 lines 5-7.

⁴ See Exhibit "A" p. 8 line 7.

⁵ See Exhibit "A" p. 8 lines 7-8.

⁶ See Exhibit "A" p.8 lines 9-12.

- 1 (7) location(s) of the Walmart(s) that Ms. CABRERA supposedly return stolen
2 computer games herself;⁷
- 3 (8) name and location of Ms. CABRERA's purported "supplier" that Headrick
4 purchased 3.5 grams of methamphetamine from;⁸ and,
- 5 (9) name and location of the "mutual friend's house" where Ms. CABRERA
6 supposedly informed Wantland that "Loca was going to get Headrick" and
7 then "demanded" Wantland/Headrick "give Villegas' unemployment card"
8 to her;⁹

9 The **absence** of the above noted crucial facts establish the state's motion is not
10 supported by "clear and convincing" evidence.

11 It is respectfully requested that this Honorable Court find that the facts set forth in
12 the state's September 4, 2015 motion are inadmissible.

13 DATED this 12th day September, 2015.

14 Respectfully Submitted,

15 /s/ Bret O. Whipple
16 Bret O. Whipple
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24 _____
25 ⁷ See Exhibit "A" p.8 lines 12-13.

26 ⁸ See Exhibit "A" p.8 lines 14-15.

27 ⁹ See Exhibit "A" p.8 lines 17-18 and 21-22.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2015, I emailed a true and correct copy of the forgoing OPPOSITION TO STATE’S MOTION TO ADMIT EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS to the prosecutors at the following email addresses:

Michael.Staudaher@clarkcountyda.com
Hetty.Wong@clarkcountyda.com

Further, I hereby certify that on the 12th day of September, 2015, I requested that a file stamped true and correct copy of the forgoing OPPOSITION TO STATE’S MOTION TO ADMIT EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS be served through the court’s efilng service to counsel for the parties at the below email addresses:

Counsel for the State:
Michael.Staudaher@clarkcountyda.com
Hetty.Wong@clarkcountyda.com

Counsel for Co-Defendant Gonzales:
cpatrick@clarkcountynv.gov
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Co-counsel:
Bret Whipple
admin@justice-law-center.com

/s/ Patricia M. Erickson

Patricia M. Erickson

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TRAN
CASE NO. C-12-283700-1
DEPT. NO. 25



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
IVONNE CABRERA,)
)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT
OF
MOTION TO CONTINUE TRIAL
250 RULE

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: MONDAY, SEPTEMBER 14, 2015

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

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APPEARANCES:

For the State: HETTY WONG, ESQ.

For the Defendant: BRET WHIPPLE, ESQ.

PATRICIA ERICKSON, ESQ.

* * * * *

1 LAS VEGAS, NEVADA; MONDAY, SEPTEMBER 14, 2015

2 P R O C E E D I N G S

3 * * * * *

4
5 THE COURT: Page 12, State vs. Cabrera.

6 I had forgotten for a moment Mr. Staudaher indicated
7 he wouldn't be here. I thought we were waiting for him.
8 Then I realized when I saw you Ms. Wong, he was not going
9 to be forthcoming.

10 I do want to note that there were some additional
11 filings from defense. Noting counsel for Ms. Cabrera and
12 Ms. Cabrera is present in custody. Mr. Whipple and Ms.
13 Erickson are present in the courtroom today.

14 There was an additional filing that was styled as an
15 addendum to the reply to the State's opposition, which
16 also included some information regarding an aka, aliases
17 of one of the witnesses.

18 Prior to that there had been a reply that had
19 referenced the fact that there was some criminal history
20 that had been disclosed with regard to some of the
21 witnesses.

22 What brought us here today for the motion to continue
23 and ties into the other matter that's on the calendar,
24 besides calendars call, of course, the other matter on the
25 calendar is State's motion to admit evidence of other bad

1 acts, really is about information regarding evidence
2 forthcoming from Ms. Watland. The defense's argument that
3 it needs more time to address what it now understands the
4 State intends to utilize or wants to utilize and ask the
5 court permission to utilize as motive evidence.

6 Let me hear, Ms. Erickson, anything else besides
7 what's already in the pleadings, you might want to
8 highlight for today's oral argument. Then I'll hear from
9 Ms. Wong.

10 MS. ERICKSON: Only that I was able to do some
11 investigation, and the information I received was
12 absolutely contrary to what Mr. Watland has said in her
13 statement.

14 THE COURT: Let me clarify there. I think --
15 again, I appreciate very much the pleadings were very
16 clear about what did happen, what arguably could have
17 happened in terms of past efforts to speak with
18 Ms. Watland.

19 I think what you're indicating, Ms. Erickson, was
20 that you had spoken at length with your own client, Ms.
21 Cabrera, and that the information that you had up to this
22 point did not necessarily reveal anything of value with
23 regard to tools and other factors. And that in that
24 respect there was no reason to tie that together until you
25 saw what the State was arguing.

1 MS. ERICKSON: Right.

2 THE COURT: The State has spoken though as
3 relates to your ability to have spoken with Ms. Watland
4 directly, as opposed to gleaning this information. The
5 State's argument in the opposition is two-fold. You could
6 have gotten it from your client. And your argument is we
7 did get information from my client. It's contrary.

8 But the other argument is you could have gotten
9 information from Ms. Watland and that there was
10 opportunities presented, had the preliminary hearing not
11 been waived. And that Mr. Jackson indicated that they had
12 spoken with Ms. Watland at some point and that that could
13 have happened.

14 I want to make sure when we're talking about the
15 prior investigation, do you want to address why you have
16 not spoken with Ms. Watland up to this point.

17 MS. ERICKSON: Yes, Judge.

18 First off, the hearing that we had where Alzora
19 Jackson stated we have spoken to one of the witnesses.
20 She did not say we have spoken to Ashley Wetland. She did
21 not say we spoke to Ashley Watland while she was in jail.
22 We have spoken to one of the witnesses, and we are the
23 first attorneys who have -- defense counsel who have
24 talked to her. So there was nothing there about where she
25 was, how she was doing. So I don't know how they figured

1 it out.

2 The state of the allegation and your discovery order
3 is to provide us with information regarding misconduct,
4 not convictions, not felony convictions, not gross
5 misdemeanors, misconduct that went to truthfulness. That
6 was filed on May 26, 2014. That required them to disclose
7 the case that Ms. Watland was in custody on. Had that been
8 disclosed pursuant to the order this court entered, I
9 would have noted that she had a case where she was -- and
10 then was revoked, and therefore, she was probably in jail.
11 I would have looked, and we would have found her.

12 We don't have the same ability to sit on a case and
13 watch the jail. I don't know how they figure that out.
14 But we didn't until September 4th. At that point I wrote
15 to the State, and they said they weren't going to
16 investigate the case for me. But I didn't have an
17 opportunity to speak with her when she was in the jail.
18 There was no identification that she was in the jail.
19 There is no identification they had spoken to her -- to
20 her. They said one of the victims. And to argue that we
21 waived the prelim, and we opposed depositions, doesn't
22 that mean that it's not in the discovery. Doesn't that
23 actually go contrarily to their argument that it was in
24 the discovery.

25 THE COURT: I think they can make arguments in

1 the alternative. From their perspective I can see why
2 they feel they would have some basis to do that. But
3 there was arguably pieces of this evidence -- I think we
4 had this discussion last week -- but there was pieces of
5 this evidence out there that could have been pulled
6 together, arguably, by the defense as it was pulled
7 together by the State. And that that is their primary
8 argument, this is not new information for obtaining a
9 continuance.

10 But the alternative argument being to the extent it
11 is arguably new, the defense had equal opportunity to
12 discover it and flush it out and build it up themselves.

13 I don't necessarily see those things as being an
14 admission that it's new, but just an alternative argument.
15 But I hear what you're saying.

16 MS. ERICKSON: Well, Judge, you denied the right
17 to do the depositions, because it was not appropriate or
18 it wasn't right under the statute. So to say that we
19 opposed it and therefore we should have to have learned it
20 when there was no statutory basis for it is a red herring.
21 And waiving a prelim, we have the right to do that. That
22 gets done many times. That's also a red herring.

23 We don't have to put on a prelim to be able to go
24 forward. But we should be informed -- and the court just
25 said we should have put it together as the State did. The

1 State didn't put it together until September 3rd, when
2 they met with Ashley Watland, and they then filed their
3 motion on the 4th. They didn't put it together from the
4 discovery themselves. It wasn't in the discovery. And
5 the State has not pointed you to a single document in
6 discovery that establishes that we should have known that
7 this evidence was all out there for us to put together.

8 Wouldn't you think they would, if it was true. But
9 they didn't. There is not a single document that they
10 quote. They just say I should have gotten it from the
11 client. I did get it from the client. The client's own
12 statement to police refutes what Ms. Watland is saying
13 about the tools.

14 I did speak with her, because it was a random -- it
15 was a random mention of an unemployment card in different
16 places. So I speak with her about it. Didn't give me any
17 reason to believe that that was the motive for this crime.
18 I don't believe that the record reveals that this should
19 have been known, because they are still seeking random and
20 motiveless as an aggravating circumstance.

21 If they knew that the discovery -- if they knew the
22 discovery disclosed that there was a motive, what does
23 that mean about their position on such an unethical way of
24 seeking the death penalty.

25 THE COURT: I guess one of the things I wanted

1 to put in perspective and then I'll turn it over to Ms.
2 Wong and we'll come back for any comment from Ms.
3 Erickson.

4 Because the State is seeking to admit prior bad acts,
5 they have to come up with justification it would be an
6 exception to the basic conclusion to that information
7 coming in. And one of those exceptions can be motive. It
8 can be intent. It can be identification. It can be any
9 number of things.

10 We know there is a very clear instruction that says
11 there doesn't have to be a motive proven in order to make
12 the case. So that there is motive being argued as a basis
13 for allowing in the prior bad acts doesn't necessarily
14 mean that there is motive evidence that is relevant to the
15 case that you should have time to investigate.

16 I don't like this emphasis on they just came up with
17 a motive and now we didn't know that they had this motive.
18 And now we get to investigate it. That's not what you're
19 trying to investigate, as I understand it.

20 What you're concerned about are the facts of the case
21 that you had talked to your client, that you had
22 understood the facts a certain way. You now have an
23 understanding that a witness is going to testify and the
24 State is going to argue about that testimony a different
25 way, different facts, that there might be percipient

1 witnesses to those facts that might be relevant.

2 Is that a fair summary of --

3 MS. ERICKSON: Fair summary, Judge. I'm so
4 sorry if I wasn't giving you a good enough summary. That
5 is the summary.

6 THE COURT: I think the way we do that, that we
7 do make it clear for the record.

8 MS. ERICKSON: And the facts I need to, you
9 know -- the State says I haven't pled the facts. Well,
10 the facts are what they left out. Which is the who, when,
11 and where that these alleged facts happened. For them to
12 say I'm not identifying what I should be investigating is
13 absurd, because they failed to give me the information.
14 Which I would think they would have gotten me that.

15 The facts are brand new. There was a burglary
16 committed. Nothing in the discovery about that. There was
17 a -- the scam, the Wal-Mart scam. Absolutely nothing in
18 the discovery. Nothing. Burglary, Wal-Mart scam,
19 nothing. So that's my position. And the court understands
20 it.

21 THE COURT: Okay.

22 Ms. Wong.

23 MS. WONG: Thank you, your Honor.

24 I want to address the allegation that supposedly it's
25 the State's fault for not disclosing certain material and

1 not investigating this case soon enough for defense.

2 We are not required to do the defense's investigation
3 for them. They have the same access to Ashley. As the
4 special public defender's office had access to Ashley. If
5 Mr. Patrick and Ms. Alzora Jackson go to CCDC and talk to
6 Ashley, so could have Ms. Cabrera's defense team.

7 THE COURT: You heard her argument that it
8 wasn't clear or understood that it was Ms. Watland who was
9 in custody on that case. And you also heard Ms.
10 Erickson's argument they had made a discovery request that
11 whatever occasioned Ms. Watland to be in custody would
12 have been something the State would have been required to
13 disclose.

14 Do you want to speak to those.

15 MS. WONG: Yes.

16 Ms. Watland was actually in custody on a probation
17 revocation on a gross misdemeanor. So it was not clear to
18 the State at that time that that was the kind of
19 misconduct that the State would have to turn over. And it
20 still really isn't the case.

21 Ms. Erickson has an obligation to investigate her own
22 case. And if the special public defender's office could
23 have located Ashley so could Ms. Erickson.

24 And now I am a little confused that Mr. Erickson is
25 claiming the defense had no idea regarding the tools, the

1 vehicle, and the unemployment card did not need further
2 investigation. I appreciate the defense trying to speak
3 on behalf of the State, but the State was absolutely aware
4 that perhaps a motive behind this murder was related to
5 the tools, the unemployment card, and the vehicle. That
6 was explicitly referenced in the discovery and in the
7 statements made by not only the Defendant herself, but
8 also by Ms. Marin, and also Ms. Watland.

9 We just didn't connect -- weren't able to connect the
10 dots because that information was not provided in details
11 by either the Defendant or the victims in this case.

12 So when we sat down and we talked to Mr. Watland we
13 asked her for the details. We asked her to explain to us
14 what is this about the vehicle, what is this about the
15 unemployment card, tell us more about that.

16 THE COURT: Your saying they could have done
17 that at any stage of the proceeds as well.

18 MS. WONG: That's correct.

19 The unemployment card actually was referenced in
20 the -- in I believe Ms. Watland's voluntary statement
21 where she said before the Defendant Gonzales actually shot
22 at them, she said he asked about the unemployment card.
23 He asked where's the unemployment card. That is as clear
24 as a motive --

25 THE COURT: Does the State have any concern

1 about the fact that there might be percipient witnesses to
2 those motive aspects, if you will -- as much as I'm trying
3 to stay away from that reference -- but motive aspects,
4 and there might be conflicting stories. There might be
5 the need to talk to other people to find out if that is
6 in fact information that is legitimate.

7 MS. WONG: From the State's perspective, we
8 don't know the identity of who these people are. I will
9 tell Ms. Erickson one of the witnesses -- or one of the
10 people whose name is mentioned by Ms. Watland is some guy
11 named Old Man Jim. I don't know who Old Man Jim is. I
12 don't have identifiers. A full name is all I know.
13 Another witness, or person present was someone named Jane.
14 That's all the information I know.

15 If Ms. Erickson wants to go and conduct further
16 investigation, that's fine. She has about a week to do
17 so.

18 And here's the thing. The State was ordered to turn
19 over Ms. Watland and Ms. Marin's telephone numbers to the
20 defense, because the State was concerned about addresses.

21 We turned over their phone numbers to Ms. Erickson
22 about a month ago. After court, so after the State filed
23 its bad acts motion, after we outlined in detail the facts
24 we learned during the pretrial conference with Ashley on
25 September 3rd, after the parties appear here in court and

1 argued on this motion to continue, Mr. Staudaher and I
2 went back to our office that afternoon and we called
3 Ashley's mother. Because that was the number that was
4 provided to us. That's the number we turned over to Ms.
5 Erickson. We asked Ashley's mother, have you gotten a
6 phone call from Ms. Erickson -- from Ms. Cabrera's defense
7 team. She said no.

8 Not in missed calls. Not in missed voice mails. So
9 Ms. Erickson hadn't even tried to reach out to Ashley,
10 knowing what her telephone number is. Yet, she's coming
11 into court saying, well, we didn't have access to Ashley.
12 We had no way of investigating this information. Well,
13 even after learning about the bad acts facts, she still
14 didn't make an effort to go to talk to Ashley. Ashley is
15 readily available to talk to her, if she wishes.

16 THE COURT: I guess my point with that is --
17 it's a point well taken. I'm sure Ms. Erickson will
18 address that when we come back to her.

19 I guess my point is, you know, obviously our goal
20 here and the goal of the prosecution has to be to do
21 justice. And to the extent we have now information coming
22 to light through Ms. Watland that perhaps clarifies some
23 things as the State would find beneficial arguably to the
24 presentation of their case, it also potentially begs some
25 questions of does that need to be flushed out. That's why

1 I asked the question.

2 Does the State perceive any need on its part to
3 further investigate. I get we don't know who Old Man Jim
4 is at this point, but, again, does the State perceive any
5 need for further investigation on its part.

6 MS. WONG: No, your Honor.

7 In reading Ms. Erickson's motion to continue she
8 lists 9 items -- or she posed 9 questions that she wants
9 the State to answer, that she wants the witnesses to
10 answer. Those are the facts she's going to investigate.

11 This information she can obtain from her client
12 herself. The only other way to actually get answers to
13 the questions that she wants is by asking Ashley. That's
14 the issue the State is having.

15 The defense hasn't even reached out to Ashley to talk
16 to her. I don't think Ashley wants to talk to defense.
17 But they haven't made that effort. Yet, they come into
18 court asking for a continuance. This case has been
19 continued 3 times. And each time the State has never
20 opposed the continuance. But we're about 3 years out now.
21 The family members here, the victims here, they deserve
22 justice as well.

23 Back in March I believe of this year, Mr. Erickson --
24 from the inception of this case, Ms. Cabrera's defense
25 team has always said we're ready, we're ready, we're

1 ready. And in March of this year the court severed the
2 co-defendant's cases, suddenly Ms. Erickson says we're not
3 ready. We need to conduct more investigation.

4 Even still at that time the State didn't oppose the
5 defense request for further investigation. But now we're
6 here a week before trial, the State has pretried all its
7 witnesses. We've located all out of the our-of-state
8 witnesses. We know we have the 2 victims that from a
9 month to month basis we don't know where our victims are.
10 We have everybody available. And now the defense is
11 requesting a continuance so they can investigate things
12 that, one, should have been investigated in the first
13 place. And, two, even if the court were to grant the
14 Defendant's motion to continue, these questions can only
15 be answered by the Defendant and Ashley.

16 Ashley is not going to talk to them, so I'm not sure
17 what the point is of continuing the case because we're
18 going to be in the exact same spot months from now.

19 THE COURT: Let me clarify one thing.

20 Comments were made about in terms of the time coming
21 to trial on this case. I do want to clarify that
22 Ms. Cabrera, until the filing of this motion to continue,
23 has been invoked and has been attempting to come to trial.
24 This was not yet a bifurcated case, and the court
25 determined there was good cause for there to be a

1 continuance based on someone else's request --
2 co-defendant's request. And then at the point when there
3 was a request to sever, to go to trial, this court
4 ultimately granted that request subsequently to allow it
5 to go.

6 So it may have been 3 years have gone by since the
7 circumstances and where we find ourselves now, but in this
8 particular circumstance with this particular Defendant,
9 from the court's perspective, there has not been any
10 unnecessary delays. I think what we have to look at here
11 is a face value look at, on the eve of trial -- the court
12 even inquired and were advised we were ready to go and
13 believed, and I believe counsel believed they were ready
14 to go not too long ago. Because we were trying to
15 schedule and figure out how our schedules were going to be
16 handled. Now we have a situation where the State has
17 brought forward a motion to admit other bad acts, on
18 frankly the eve of trial.

19 And in that State's motion to admit other bad acts is
20 information which the defense believes is relevant to its
21 case, that has not been fully investigated, and that now
22 needs time to be investigated. I think if we take it at
23 that face value review, then we really have to give it a
24 strong look to see if, in fact, we force the issue of
25 going forward to trial.

1 I appreciate the State's representations and
2 circumstances where the court has determined that it
3 was -- would not be a constitutional violation, if you
4 will, to force the trial to go forward. There were other
5 circumstances where the court determined there was a
6 constitutional violation to force the trial to go forward.

7 If you are just looking at it from the standpoint of
8 if the State had not filed that motion to admit other bad
9 acts, I don't think we would be having this discussion. I
10 think we would be going to trial. I don't know what would
11 be forthcoming as far as witness testimony and
12 cross-examination. But we do have that motion. And we do
13 have things that have been revealed. And now we're having
14 the discussion of, well, okay, wait a minute. The defense
15 coulda, shoulda, woulda done something else before now and
16 so it's really their fault, so let's not continue it.

17 I really feel compelled to put that into that
18 perspective that the court has as to what we're looking at
19 here today.

20 Ms. Wong, any last comments before I come back to Ms.
21 Erickson.

22 MS. WONG: Your Honor, the State is not saying
23 this is the defense's fault, so therefore the motion to
24 continue should be denied.

25 What the State is saying is that there is no

1 reason to continue the trial, because even if we allowed
2 Ms. Erickson to have more time their investigation
3 actually will not produce anything fruitful because in
4 order to get the answers she's looking for, she would have
5 to talk to her client, and she would have to talk to
6 Ashley.

7 THE COURT: That is the most compelling part
8 that I hear in terms of coming back is obviously I'm not
9 going to continue something if there is not a value to
10 continuing it.

11 I think that's where we are, Ms. Erickson. I do, I
12 guess, want you to start with if you have not attempted to
13 reach Ms. Watland, why not. Because it does seem even
14 though the State might have said she may not want to talk
15 to you, but out of an abundance of caution to make the
16 effort. And if that effort hasn't been made, why not.
17 And if it has been made, maybe we can clarify that for the
18 record.

19 I do need to hear and want you to specifically, in
20 final arguments, to fine tune for the court what you
21 perceive to be value to further investigation if at this
22 point if what Ms. Watland has given to the State, it
23 doesn't appear to lead to any further investigation for
24 the State.

25 MS. ERICKSON: To answer that directly, the

1 State just now gave you two names of people that have
2 information on -- that were named by Ashley Watland that
3 did not get put into their bad acts motion -- Old Man Jim
4 and Jane. Now, Old Man Jim, as I'm learning it today, I
5 should be able to ask my client if that is person. And if
6 that's a person, we may be able to find him. Jane, I'm
7 sure I know who that is. We never discussed this fact
8 with her. So therefore, they withheld information that
9 would have allowed us to do an investigation.

10 I have not reached out to Ms. Watland. My
11 investigator has. And he says they just hang up. I don't
12 know what's going on there. I have called --

13 THE COURT: Since the last time we were -- since
14 the, I guess, I'm saying the same time frame Ms. Wrong was
15 arguing. Since the time we were here and there was some
16 discussion about getting the phone numbers. And I ordered
17 them to get the phone numbers. And you got those phone
18 numbers. You obviously didn't have the phone numbers
19 before your investigator called at that point. I'm just
20 trying to put it into perspective.

21 MS. ERICKSON: Just so the record is clear. On
22 August 26th, after our hearing, it was Thursday after our
23 hearing, Mr. Staudaher called me from his office and
24 informed me that Ms. Marin was there and she was on
25 speaker phone and I could ask her any questions I

1 wanted.

2 Therefore, I said please put her off speaker phone
3 and I would like to talk to her. She got on. She
4 wouldn't speak to me. I gave her my cell number.

5 Ms. Watland has been contacted since the Thursday
6 that the information was given to us. Mr. Staudaher
7 called back and gave me the phone number, and she has been
8 attempted to be reached. She has not responded.

9 I called her on my blocked cell because I thought
10 maybe she's seeing information from an investigator and
11 won't answer. So she didn't answer that call either.

12 I don't know what's going on with that. Maybe
13 they're telling the State something. I know that we
14 haven't been able to reach them. Even though we've
15 tried.

16 The State told you -- well, first I would like to
17 state there is absolutely no evidence in the record of
18 what Ms. Watland told the special public defenders.
19 They're assuming that she told the same facts that are
20 facts today. But there's no evidence of that. Who knows
21 what she said then. That can't be a basis.

22 Then the State started out with telling you, perhaps
23 and it was vague, they could not connect the dots. So
24 they sat down with Ms. Watland and just said explain to us
25 what happened. If they can't do it before September 3rd,

1 how is that possible for us to do.

2 They alleged that the unemployment card reference is
3 in Ms. Watland's statement. It is not. I provided the
4 court with that. It was one-and-a-half pages. There is
5 not a single word in there about an unemployed card. So
6 that's inaccurate.

7 THE COURT: What would your investigation entail
8 here, if you have anything you haven't mentioned already
9 in your pleadings. In your pleadings that you have
10 questions that you want to finding out about where certain
11 things were obtained, certain locations and certain events
12 have been discussed. Is there anything you did not
13 include in here that on further review preparing for
14 today's hearing that you haven't addressed. Or is this
15 the sum total.

16 MR. WHIPPLE: Can I consult with Ms. Erickson
17 briefly on that issue.

18 THE COURT: Yes.

19 MS. ERICKSON: Mr. Whipple has just informed me
20 he met with our client last night and that she informed
21 him that there are some specific people that would have
22 been present during these allegations, and that we have
23 people to investigate. I don't think I need to -- I'm
24 giving that to the court as an officer of the court. I do
25 not need to do the State's investigation.

1 They specifically told you that after learning this
2 information and even though there is an Old Man Jim and
3 there is a Jane, that they have done nothing since then to
4 investigate further. So they're just accepting Ms.
5 Watland's statement at face value. We cannot accept that
6 at face value because, number one, Ms. Cabrera's statement
7 refutes the tool issue. Number two, I've done
8 investigation which also refutes the unemployment and the
9 car issue. We know there are specific people we need to
10 talk to about these facts and I can't do that in the next
11 week and prepare for trial. It's just that way.

12 Ms. Cabrera has a right to Sixth Amendment rights. I
13 can't tell the court I'm going to be able to take care of
14 it in this way. Not with all the information coming
15 out -- September 4th, September 10th, September 11th.

16 THE COURT: We didn't address, and I don't think
17 we need to at this point. We did not address issues with
18 regard to criminal histories being disclosed with regard
19 to individuals and/or aliases of individuals.

20 At the end of the day, the court is satisfied at this
21 time and I'm going explain what I mean satisfied. Because
22 I'm entirely dissatisfied with the need to make this
23 ruling.

24 But the court is satisfied at this time that we do in
25 fact need to grant the request for motion to continues.

1 This trial in order to give the defense the opportunity to
2 investigate further the circumstances and instances that
3 ultimately form the basis for the State's motion to admit
4 other bad acts, in an effort to ensure that all of those
5 circumstances have been fully investigated.

6 I will in a moment give you some trial dates that we
7 think would be able to accommodate the trial here.

8 And what I'm dissatisfied with, there is nothing
9 other than -- this court wanted nothing other than to be
10 able to proceed with trial on the 21st of this month. And
11 went through great efforts to accommodate that believing
12 that that would be the case. And is always leery of what
13 could be sort of last minute tactics to try to avoid going
14 to trial. Especially in a trial with circumstances such
15 as this.

16 I do not perceive that that is the case here. I do
17 perceive these requests are legitimate. Yes, we could go
18 back and forth and balance on whether the State could have
19 or should have disclosed something sooner, or the State
20 could have or should have investigated something sooner
21 then disclosed something. I don't disagree at all with
22 the statement that the State is not required to conduct
23 the defense's investigation.

24 We could also go back on whether the defense could
25 have gleaned sooner that Ms. Watland was accessible, have

1 spoken with Ms. Watland. In hindsight -- I'm not even
2 going to address the idea of whether now we should look
3 back in hindsight and say it's a bad strategy to waive a
4 preliminary hearing or anything like that. That's neither
5 here nor there when it comes to this analysis.

6 But there is enough concern to go around that there
7 perhaps could have been further investigatory efforts on
8 certain pieces of the puzzle. There's also enough concern
9 to go around that perhaps more could have been disclosed
10 earlier in the process. But at the end of the day, like I
11 said, that's why I gave up the wrap up I gave a minute
12 ago. I am looking at this solely at face value. We have
13 evidence that has been asked to be presented as admitted
14 in other bad acts regarding motive that has revealed that
15 there is contradictory testimony anticipated regarding
16 what is understood to have been the case of those
17 circumstances. And what may in fact have been the case of
18 those circumstance, that there are potential witnesses to
19 those circumstances. That these are relevant potentially
20 to the case. And that the defense needs the opportunity
21 to further investigate.

22 On face value, despite the inconvenience to all
23 concerned -- that goes for defense as well who has
24 prepared for their case -- the State who has prepared for
25 their case -- and the court that has prepared to hear this

1 case and try this case -- that we need to -- especially
2 with this being a 250 case, we need to give the
3 opportunity for the defense to complete their
4 investigation under these circumstances. So for that
5 reason, I'm going to grant the motion to continue.

6 I am going to postpone the State's motion to admit
7 other bad acts. Because we're going need to complete the
8 investigation there and ultimately see how the dust
9 settles on that. There's been some argument made in the
10 reply I should just deny that or there's argument made, I
11 should say in the filings, we should go ahead and deny
12 that.

13 But the court would obviously give consideration to
14 that, based on the circumstances presented by the State
15 and would set the Petrocelli hearing at some point to
16 flesh that out, but we need to have some time before that
17 occurs. So that will be postponed.

18 At this point in time the trial dates that we have --
19 and we do need to acknowledges, for the record, that the
20 motion to continue is -- there's a waiver of the invoked
21 status of Ms. Cabrera. I hope that she understands that.

22 MS. ERICKSON: She does.

23 THE COURT: Counsel is indicating she does.

24 Ms. Cabrera is nodding she understands. She has now
25 waived her right to speedy trial. Although, again, we

1 won't have the discussion that this has been continued for
2 other reasons.

3 At this time I have February dates -- February 22nd,
4 February 29th. I also have a March date of March 7th, an
5 April date of April 25th as potential dates when this
6 trial could proceed. I'm hoping those 4 options and
7 counsel being present to have some understanding of their
8 schedule. I understand Mr. Staudaher is not here, if we
9 could understand what date he might wish to take.

10 It is this court's determination at that point that
11 that would be a firm setting and that we would go. I
12 appreciate that we have other things we have to juggle and
13 we have other capital cases that are pending in most of
14 our up coming stacks. So, you know, we'll continue with
15 our monthly status checks to ensure we are prepared and
16 that we can, in fact, go in the time frame we give.

17 What does counsel see as --

18 MS. ERICKSON: I cannot do it on the first 3
19 dates you gave. I begin a murder trial that has been
20 continued. My client is in custody. That's starting on
21 February 16th. He's been in custody almost six years.

22 THE COURT: The problem I have though -- it just
23 came to mind as I'm looking at the dates now -- is that
24 last April date just butts up against the other trial of
25 the co-defendant in this case, and I don't see how we can

1 have one completed and then do the other.

2 Obviously the State's counsel is going to be involved
3 in both of those. So that April 25th is not viable.

4 MS. ERICKSON: The February and March is not
5 viable for me. I will be in trial 2 weeks, and I won't be
6 able to jump into a capital trial.

7 THE COURT: We'll have to status check. I'll go
8 30 days out for status check to reset trial. And a status
9 check on resetting the Petrocelli hearing for the State's
10 motion to admit other bad acts. In that 30 days I
11 anticipate that the defense will have undertaken efforts
12 to begin this investigation and have a better idea when
13 that investigation might be completed.

14 I'm not at this point expecting this trial to
15 continue out to a date beyond the co-defendant's trial. I
16 am expecting it to take place prior, because I think we
17 can work out times in our schedules. We just need to
18 figure out what we can do with each other's schedules and
19 the court's schedule.

20 So 30 days for us to brainstorm how we're going to
21 fit this trial in, where we're going to fit this trial in.
22 That's our part to do to come up with other options for
23 dates for you. But your part is to have your schedules
24 ready to look at, but ultimately have begun that
25 investigation so we can know when to set the Petrocelli

1 hearing as well.

2 MS. ERICKSON: Yes, Judge.

3 MS. WONG: I believe the case on calendar next
4 week to address the defense's motion to strike the State's
5 aggravators, can we postpone that as well.

6 THE COURT: I think we should in these
7 circumstances.

8 MS. ERICKSON: Whatever the court wants.

9 THE COURT: 30 days for status check on
10 resetting all pending matters. That matter next week will
11 be vacated, as will the trial date and calendar call, as
12 will the State's motion for other bad acts be vacated.

13 They're all status checked in 30 days to reset.

14 THE CLERK: October 12th at 9:00.

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CERTIFICATE
OF
CERTIFIED COURT REPORTER

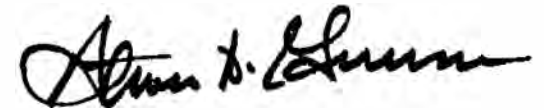
* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.

A handwritten signature in cursive script, reading "Sharon Howard", is written over a horizontal line. The signature is fluid and includes a large, circular flourish at the end.

Sharon Howard
C.C.R. #745



CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,)	Case No: C-12-283700-1
)	
vs.	)	Dept. No: 25
)	
IVONNE CABRERA,)	
)	
Defendant.)	
)	
)	

BEFORE THE HONORABLE KATHLEEN DELANEY

NOVEMBER 20, 2015, 9:30 A.M.

REPORTER'S TRANSCRIPT
OF
PETROCELLI HEARING

APPEARANCES:

(See separate page)

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

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1	I N D E X	
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3	WITNESS: Melissa Marin	PAGE
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<p>1 LAS VEGAS, CLARK COUNTY, NEVADA</p> <p>2 FRIDAY, NOVEMBER 20, 2015, 9:30 A.M.</p> <p>3 PROCEEDINGS</p> <p>4 * * *</p> <p>5 THE COURT: Calling the matter in the State of</p> <p>6 Nevada versus Ivonne Cabrera. What we have on the</p> <p>7 calendar for today's purposes is the Petrocelli hearing</p> <p>8 that was set on State's to Motion to Admit Evidence of</p> <p>9 Other Crimes, Wrongs or Acts.</p> <p>10 We have already addressed obviously the other</p> <p>11 component that was originally on this calendar which was</p> <p>12 the Motion to Continue the Trial but I think we may have</p> <p>13 some housekeeping that we need to deal with afterward.</p> <p>14 Mr. DiGiacomo, did you have anything?</p> <p>15 MR. DIGIACOMO: No, Your Honor. As you are</p> <p>16 aware, Mr. Staudaher is retired. I took over this case</p> <p>17 for Mr. Staudaher. We have two witnesses who are present</p> <p>18 outside and we are ready to call our first witness.</p> <p>19 THE COURT: Okay. I was not sure how many</p> <p>20 witnesses we had, so we know we have the two witnesses.</p> <p>21 Ms. Erickson or Mr. Whipple, anything from your</p> <p>22 side before we get started?</p> <p>23 MS. ERICKSON: Just need to know who the two</p> <p>24 witnesses are. I thought it was only Ashley Wantland.</p> <p>25 MR. DIGIACOMO: Well, we are going to put</p> <p>4</p>	<p>1 This wasn't about Melissa Marin, so I am not prepared to</p> <p>2 go forward with questioning her.</p> <p>3 THE COURT: Well, we are still going to proceed</p> <p>4 in this fashion. It sounds like Melissa Marin is going</p> <p>5 to speak solely to the vehicle issue. And certainly</p> <p>6 whether you are prepared today to cross-examine I can</p> <p>7 certainly understand why from the Motion and the way the</p> <p>8 process was addressed you would not necessarily be</p> <p>9 prepped to cross-examine.</p> <p>10 I certainly believe that you would be aware of</p> <p>11 the facts and circumstances. And it is really up to the</p> <p>12 Court to determine whether the State has met its burden</p> <p>13 to show clear and convincing evidence of certain</p> <p>14 circumstances that it's trying to admit and whether or</p> <p>15 not ultimately to admit those items on the bases that</p> <p>16 have been asserted for either motive or intent or state</p> <p>17 of mind, so I think that we can still address what we</p> <p>18 need to do but I don't see any basis upon which we would</p> <p>19 need to continue the matter based on the receipt of that</p> <p>20 limited testimony and the fact that we were really very</p> <p>21 close to and up on the eve of trial when we continued</p> <p>22 this matter previously. I would think that we can get</p> <p>23 the information covered the way we need to.</p> <p>24 MS. WONG: And, Your Honor, if I could respond.</p> <p>25 THE COURT: Yes.</p> <p>6</p>
<p>1 Melissa on and then we are going to put Ashley on. I was</p> <p>2 not sure, to be honest with you, when I read the Motion</p> <p>3 whether or not there is any dispute that the issue</p> <p>4 related to the car is coming into evidence. That is the</p> <p>5 only thing Melissa would be testifying to.</p> <p>6 When I read the Motion it wasn't clear to me</p> <p>7 whether the defense considered that a bad act because</p> <p>8 their client does not return the car that Melissa can</p> <p>9 establish was given to her by Erik.</p> <p>10 THE COURT: And in the Opposition it addressed</p> <p>11 what they perceive to be or saw to be the who, what,</p> <p>12 where, when deficiencies, if you will, of what is being</p> <p>13 asserted.</p> <p>14 Obviously, these witnesses can testify to that</p> <p>15 but there was reference to questions about asserting</p> <p>16 anything with regard to the vehicle.</p> <p>17 But what is your position, Ms. Erickson?</p> <p>18 MS. ERICKSON: Well, Judge, the entire motion</p> <p>19 from the State is Ashley Wantland disclosed blah, blah,</p> <p>20 blah, blah. And my entire Opposition was what are the</p> <p>21 surrounding facts that Ashley Wantland is saying to make</p> <p>22 this a truthful statement.</p> <p>23 I am not prepared to cross-examine Melissa Marin</p> <p>24 on anything because this is all about Ashley Wantland.</p> <p>25 This is a bad act to admit Ashley Wantland's testimony.</p> <p>5</p>	<p>1 MS. WONG: On page 9 of the State's Motion the</p> <p>2 State does in fact talk about how Ms. Marin regarding the</p> <p>3 facts of the vehicle not having been returned and in the</p> <p>4 very first sentence of the State's argument section we</p> <p>5 specifically say:</p> <p>6 "The State is seeking to admit in its</p> <p>7 case in chief evidence that just days prior to</p> <p>8 the April 26, 2012 shooting defendant and the</p> <p>9 victims had a dispute over money, drugs, tools,</p> <p>10 a vehicle and an unemployment card."</p> <p>11 So the defense should have been placed on notice</p> <p>12 that this hearing would have involved Ms. Marin's</p> <p>13 testimony as well.</p> <p>14 THE COURT: And like I said, I'm taking at face</p> <p>15 value, obviously, Ms. Erickson's representations that the</p> <p>16 way she viewed the Motion and the way she responded to</p> <p>17 the Motion clearly appears to be that she assumed that</p> <p>18 what was coming in was evidence that was going to be</p> <p>19 supported by Ms. Wantland.</p> <p>20 But at the end of the day, we are going to allow</p> <p>21 evidence to be testified to by Ms. Marin because the</p> <p>22 Court is the one that's determining at this time, again,</p> <p>23 whether the State's is going to meet it's burden for</p> <p>24 showing clear and convincing evidence and whether or not</p> <p>25 it's going to meet the prongs of Petrocelli.</p> <p>7</p>

1 MS. ERICKSON: Okay.
2 THE COURT: So, Ms. Erickson, I appreciate and
3 note your objection that your preparation might have been
4 otherwise. And certainly I appreciate from your
5 perspective, too, that the opportunity to examine a
6 witness that you know is being called is always an
7 opportunity that can be utilized to an attorney's
8 advantage.
9 I don't think anybody here given Mr. Staudaheer's
10 leaving and the changes I am not sure why you were not
11 notified of who the witnesses were going to be in
12 advanced but at this point we will still go ahead and
13 proceed as scheduled.
14 State ready to call your witness?
15 MS. WONG: The State's first witness is Melissa
16 Marin.
17
18 Whereupon,
19 MELISSA MARIN,
20 was administered the following oath by the court clerk.
21 THE CLERK: You do solemnly swear that the
22 testimony you give in this action shall be the truth, the
23 whole truth, and nothing but the truth so help you God.
24 THE WITNESS: I do.
25 THE CLERK: Please state and spell your full
8

1 name for the record.
2 THE WITNESS: Melissa Marin. M-e-l-i-s-s-a
3 M-a-r-i-n.
4 THE COURT: Thank you, Ms. Marin. Ms. Wong is
5 going to question you first.
6 Whenever you are ready, Ms. Wong.
7 MS. WONG: Thank you, Your Honor.
8
9 DIRECT EXAMINATION
10 BY MS. WONG:
11 Q Good morning, Ms. Marin.
12 A Good morning.
13 Q Do you know someone by the name of Ivonne
14 Cabrera?
15 A Yes, I do.
16 Q Do you see her here in the courtroom?
17 A Yes, I do.
18 Q Will you please point to her and describe an
19 article of clothing.
20 A Right here (indicating) in the blue pants and
21 shirt and orange sandals.
22 MS. WONG: May the record reflect the
23 identification of the defendant.
24 THE COURT: The record will so reflect. Thank
25 you.
9

1 BY MS. WONG:
2 Q Now how is it that you know the defendant?
3 A She was a friend of mine. I met her through
4 another friend.
5 Q When did you actually meet her?
6 A Couple months before. I don't know the exact
7 date but a couple months before.
8 Q And when you say "before" you mean April 26th of
9 2012?
10 A Yes.
11 Q When you met her, did you meet her as Ivonne
12 Cabrera or by some other name?
13 A Some other name.
14 Q What other name?
15 A "Chinola."
16 Q Do you know someone by the of "Smokey"?
17 A I don't know him.
18 Q Have you ever met somebody by the name of
19 Smokey?
20 A I met him once.
21 Q When did you meet him in relation to April 26th
22 of 2012?
23 A Couple days before April 26th.
24 Q And how was it that you made contact with him?
25 A Through Chinola.
10

1 Q Where were you when you actually met Smokey?
2 A I was walking and he was inside a car.
3 Q Who was he with?
4 A Chinola and his sister.
5 Q Chinola and his own sister?
6 A Yes.
7 Q Do you know his sister's name?
8 A I don't know her name but she goes by "Loca."
9 Q Now, let me ask you where were you living on
10 April 25th of 2012?
11 A In the apartment where everything happened. I
12 don't know the exact address because I was just there for
13 two days.
14 Q Was it on Webster Street?
15 A Yes.
16 Q It's actually 2039 Webster Street, Apartment C.
17 A Yes.
18 Q And when did you move into that location?
19 A Just two days before April 26th.
20 Q Did you live there by yourself?
21 A No.
22 Q Who did you live there with?
23 A With Erik and Ashley and James.
24 Q When you say Erik, is that Erik Morales?
25 A Yes.
11

1 **Q** Who was that to you?
2 **A** **He was my boyfriend.**
3 **Q** And you mentioned Ashley; is that Ashley
4 Wantland?
5 **A** Yes.
6 **Q** And you mentioned James; is that James Headrick?
7 **A** Yes.
8 **Q** And was James and Ashley already living inside
9 that apartment when you moved in?
10 **A** Yes.
11 **Q** And you moved in with Erik?
12 **A** Yes.
13 **Q** Now did you make contact with the defendant on
14 April 25th of 2012?
15 **A** Yes, I did. I just seen her. I didn't talk to
16 her but I seen her.
17 **Q** Can you tell us about that.
18 **A** She went knocking on the room window and when
19 she knocked I opened the curtain to see who it was and it
20 was her knocking and Erik got up and went to open the
21 door.
22 **Q** What time was this?
23 **A** It was early in the morning. I don't know the
24 exact time. Maybe seven.
25 **Q** Seven o'clock in the morning?

12

1 **A** Yes.
2 **Q** And you are saying the defendant knocked on the
3 window?
4 **A** Yes.
5 **Q** Your bedroom window?
6 **A** Yes.
7 **Q** And Erik walked out?
8 **A** Walked out to the living room to talk to her.
9 **Q** Okay. So the defendant actually came into the
10 apartment?
11 **A** Yes.
12 **Q** Could you hear the conversation?
13 **A** No, I didn't.
14 **Q** You did not hear the conversation?
15 **A** No.
16 **Q** So what happened?
17 **A** A little bit after he walks back in the room, he
18 gets the car key and he walks back out. And then he
19 walks back in the room and he lays back down and he tells
20 me that he had let her borrow the car.
21 **Q** All right. And do you see the car again?
22 **A** No.
23 **Q** Now what was your understanding of when the car
24 was going to be returned?
25 **MS. ERICKSON:** Objection. Hearsay.

13

1 **THE COURT:** Two things before we address the
2 objection. Ms. Marin, I was going to correct you earlier
3 and I hadn't yet, but this is an opportunity to do it.
4 If you could just pause a little bit longer to
5 make sure that the counsel has completed the question
6 because it helps two things. It really helps my reporter
7 in that it is the nature that people very much talk over
8 each other because they know what is being asked or they
9 think they know what is being asked and they respond, but
10 it is harder for the reporter to write it down.
11 The other thing, too, is you want to be sure you
12 understand the full question. And of course if an
13 objection is provided by the counsel, and it could go
14 both ways; it could be Ms. Erickson or Ms. Wong when
15 Ms. Erickson is questioning, you have to definitely wait
16 to answer until I rule on the objection before you
17 respond, okay?
18 **THE WITNESS:** Okay.
19 **THE COURT:** So the objection is as to hearsay.
20 The form of the question would not necessarily indicate
21 that she is going to be providing hearsay; however, it is
22 assumed that the response she is giving came from someone
23 else. I don't know if you want to lay a foundation of
24 how she would know this information first and then we can
25 determine whether or not it's hearsay or whether or not

14

1 there's an exception.
2 **MS. WONG:** I will rephrase, Your Honor.
3 **THE COURT:** Okay.
4 **BY MS. WONG:**
5 **Q** Now this car that Erik lent to the defendant,
6 what kind of car was it?
7 **A** It was a Ford Taurus.
8 **Q** What color?
9 **A** Gray.
10 **Q** Had you seen this car before?
11 **A** Yes.
12 **Q** And when did you actually see this car?
13 **A** Maybe three days before April 26th.
14 **Q** All right. And it was Erik's car?
15 **A** No.
16 **Q** Do you know whose car it was?
17 **A** I had seen it at my friend Christina's house.
18 **Q** Was it in Erik's possession for the past few
19 days?
20 **A** Yes.
21 **Q** Now was there a time that you wanted to then use
22 the car on April 25th?
23 **A** That I wanted to use the car?
24 **Q** Yes. That you wanted or needed to use the car?
25 **A** Yes.

15

<p>1 Q Why did you want to use the car?</p> <p>2 A I was not feeling good. I wanted to go to a</p> <p>3 hospital and get checked.</p> <p>4 Q And was the car available for your use?</p> <p>5 A No.</p> <p>6 Q Why not?</p> <p>7 A Because Chinola took it.</p> <p>8 Q So she had not brought it back by that time?</p> <p>9 A No.</p> <p>10 MS. ERICKSON: Objection. Leading.</p> <p>11 THE COURT: Sustained. Again, I know it's hard</p> <p>12 but if you had wait just an extra second really then</p> <p>13 Ms. Erickson could have posed the objection and I could</p> <p>14 have ruled. But you have already answered so that is a</p> <p>15 little tricky but I am going to sustain it as a bit</p> <p>16 leading.</p> <p>17 Ms. Wong, if you can keep your questions a</p> <p>18 little more open-ended, we would appreciate it. But the</p> <p>19 answer was already provided.</p> <p>20 MS. WONG: Okay.</p> <p>21 BY MS. WONG:</p> <p>22 Q What time did you want to use the car?</p> <p>23 A Like around 12:00.</p> <p>24 Q A.m.?</p> <p>25 A P.m.</p> <p style="text-align: right;">16</p>	<p>1 A In the text it said it was Smokey.</p> <p>2 Q At that point did you ask for the car back?</p> <p>3 A Yes.</p> <p>4 Q And did anybody return the car to you?</p> <p>5 A Not until the -- well, we never seen the car</p> <p>6 again.</p> <p>7 Q Did Smokey ever tell you when he would bring the</p> <p>8 car back?</p> <p>9 A Yes, he did. In the text message he said they</p> <p>10 would return it the next morning.</p> <p>11 Q Did they ever return it the next morning?</p> <p>12 A I never got to see the car again.</p> <p>13 Q They went to the house?</p> <p>14 A Yes.</p> <p>15 Q And what happened?</p> <p>16 A Um --</p> <p>17 Q You said they went to the house. Who went to</p> <p>18 the house?</p> <p>19 A Chinola and Smokey.</p> <p>20 Q And how did they come to your house?</p> <p>21 A I don't know how they went to the house.</p> <p>22 Q How do you know they were at your house?</p> <p>23 A Because Chinola knocked on my bedroom door</p> <p>24 saying, Open the door, it's me, Chinola.</p> <p>25 Q So you heard the defendant saying, Open the</p> <p style="text-align: right;">18</p>
<p>1 Q About 12:00 p.m. you wanted to use the car?</p> <p>2 A Yes.</p> <p>3 Q So at that point the defendant had the car for</p> <p>4 several hours?</p> <p>5 A Yes.</p> <p>6 Q Did you make any attempts to get the car back?</p> <p>7 A Yes.</p> <p>8 Q What did you do?</p> <p>9 A Erik actually was calling Chinola's phone and</p> <p>10 there was no answer, so after a couple times he called me</p> <p>11 asked me to text her phone to tell her to bring the car</p> <p>12 back.</p> <p>13 Q And what time did you actually text the</p> <p>14 defendant's phone?</p> <p>15 A I would say it was around 5:00.</p> <p>16 Q P.m.?</p> <p>17 A Yes.</p> <p>18 Q All right. Did you get any responses?</p> <p>19 A No, not right away.</p> <p>20 Q When did you actually hear from the defendant,</p> <p>21 if at all?</p> <p>22 A I received a text back.</p> <p>23 Q What time was this?</p> <p>24 A It was maybe 8:00 at night.</p> <p>25 Q And who was it that texted you back?</p> <p style="text-align: right;">17</p>	<p>1 door, it's me, Chinola?</p> <p>2 A Yes.</p> <p>3 Q And she knocked on your bedroom door?</p> <p>4 A Yes.</p> <p>5 Q What did you do at that point?</p> <p>6 A I was laying down. Erik got up and opened it.</p> <p>7 Q And what happened when Erik opened the door?</p> <p>8 A Smokey walked in and they started shooting.</p> <p>9 Q When you say "they" who do you mean?</p> <p>10 A Well, Smokey was shooting.</p> <p>11 Q And where was the defendant when Smokey was</p> <p>12 shooting?</p> <p>13 A Right there by the door where the room was.</p> <p>14 Q So was she standing next to Smokey?</p> <p>15 A Smokey walked in and she was standing right</p> <p>16 there by the door.</p> <p>17 Q By the door?</p> <p>18 A Yes.</p> <p>19 Q And was she looking at you?</p> <p>20 A I don't know.</p> <p>21 Q Did she say anything?</p> <p>22 A No.</p> <p>23 MS. WONG: No further questions.</p> <p>24 THE COURT: Ms. Erickson or Mr. Whipple,</p> <p>25 whenever you are ready.</p> <p style="text-align: right;">19</p>

1 MS. ERICKSON: Judge, can we take a short break
2 because this is a new version of what's -- I mean, this
3 is new to us, so we can talk about it for a few minutes.
4 THE COURT: We'll take a brief recess.
5 MR. DIGIACOMO: Just for the record, before they
6 walk out. The taking of the car and not returning it is
7 in her original statement, just so the record's clear. I
8 don't want the Court to think that this was something
9 that was new.
10 MS. ERICKSON: No, but there is information that
11 is new.
12 MR. DIGIACOMO: I have no objection to it. I
13 just want to be sure that the Court is not under the
14 impression, as it will be with Ashley because nobody ever
15 asked her about this sequence of events, Melissa had
16 provided this information at the time that the police
17 questioned her.
18 THE COURT: And I will note that in the record.
19 Ms. Marin, you may step down and we will call
20 you back whenever we are ready for you.
21 (Whereupon, a recess was taken.)
22 THE COURT: Ms. Marin, you understand that you
23 are still under oath?
24 THE WITNESS: Yes.
25 THE COURT: Okay. Thank you.

20

1 Ms. Erickson, whenever you are ready.
2 MS. ERICKSON: Thank you, Your Honor.
3
4 CROSS-EXAMINATION
5 BY MS. ERICKSON:
6 Q Ms. Marin, have you used other names in
7 different jurisdictions?
8 A No.
9 Q So you were never arrested and convicted of any
10 crime in Texas?
11 A No.
12 Q Okay. Are you known by any nicknames?
13 A No.
14 Q So everyone just calls you Melissa?
15 A Yes.
16 Q No shorter name, nothing else?
17 A No.
18 Q Okay. You said that you met Ivonne Cabrera
19 through another friend; who is the friend?
20 A I met through another friend, yes.
21 Q Who is the friend?
22 A Christina.
23 Q Christina?
24 A Yes.
25 Q And is that Christina Sanjuan?

21

1 A Yes.
2 Q Where did you meet Ms. Cabrera that day?
3 A The day I met her, where I met her?
4 Q Right.
5 A At my friend Christina's house.
6 Q So you never been to Sheila's house on Bassler?
7 A Sheila?
8 Q Yes. Sheila and Jan?
9 A Yes, I'd been there.
10 Q So you did not meet Ivonne there for the first
11 time?
12 A No.
13 Q And you said you only met Smokey one time?
14 A Yes.
15 Q And that is while you were walking down the
16 street?
17 A Yes.
18 Q And he was in a car?
19 A Yes.
20 Q That was a couple of days before the shootings?
21 A Yes.
22 Q Where were you walking?
23 A It was Bonanza. On Bonanza.
24 Q Going where?
25 A I was in front of -- well, the street Bonanza, I

22

1 don't know the exact address where I was but I was going
2 towards Eastern.
3 Q So you were on Bonanza toward Eastern. Where
4 were you going?
5 A I was going to another friend's house.
6 Q Who is that friend?
7 A I only know him by "Shorty."
8 Q Is it a boy or a girl?
9 A It's a girl.
10 Q A girl named Shorty?
11 A Yes.
12 Q What does she look like?
13 A Well, she's short, chubby.
14 Q Hispanic? Caucasian?
15 A Hispanic.
16 Q How long had you known her?
17 A For maybe a year.
18 Q And you were going to her apartment, house,
19 what?
20 A Yes, apartment.
21 Q And where was that located?
22 A It was on Washington and Main.
23 Q Okay. Washington and Main?
24 A Yes.
25 Q Before that turns into Civic Center?

23

1 **A** No. I think it's Washington and Main where the
2 Cashman Center is.
3 **Q** Okay.
4 **A** Yes.
5 **Q** And then when you were walking down the street a
6 car drove up. Was Smokey driving the car?
7 **A** No.
8 **Q** Who was driving the car?
9 **A** Chinola was.
10 **Q** And when you say Chinola you mean Ivonne
11 Cabrera?
12 **A** Ivonne.
13 **Q** And so we'll just call her that.
14 **A** Okay.
15 **Q** So Ivonne was driving the car. What kind of
16 car?
17 **A** I don't know.
18 **Q** What color?
19 **A** If I can remember right it was a dark color, but
20 I am not going to say a direct color because I don't
21 know. I don't remember.
22 **Q** And how did you know that the person -- where
23 was Smokey sitting?
24 **A** In the backseat.
25 **Q** And how did you know he was Smokey?

24

1 **A** Because I was -- well, they introduced him to me
2 like that.
3 **Q** Who introduced you?
4 **A** Ivonne.
5 **Q** So she looked at you and said, Hey, Melissa,
6 this is Smokey?
7 **A** Yes. Well, it was his sister in the front.
8 **Q** And how did you know it was his sister in the
9 front?
10 **A** Because she said, This is Loca and this is her
11 brother.
12 **Q** And how long did you talk to everyone?
13 **A** Not long.
14 **Q** Couple minutes?
15 **A** A minute.
16 **Q** Now you moved to the apartment on Webster two
17 days before the shooting?
18 **A** I didn't move there. Ivonne took me there. I
19 needed a place to stay.
20 **Q** Where had you been staying before that two days?
21 **A** On Cheyenne and Civic Center.
22 **Q** And who were you staying with?
23 **A** I was staying by myself.
24 **Q** Were you renting an apartment?
25 **A** It was a condominium.

25

1 **Q** What is the address?
2 **A** I don't recall the address.
3 **Q** How long had you been staying there?
4 **A** I was there for a year but then the owner lost
5 it to the bank so I had to move out.
6 **Q** So you were renting it?
7 **A** Yes.
8 **Q** Who were you renting it from?
9 **A** I don't remember his name, this is so long ago.
10 **Q** Okay. So then within the year of the shooting,
11 which is April 25th of 2012, the only place you had lived
12 was at this condominium?
13 **A** Yes.
14 **Q** And then two days before the shooting Ivonne
15 took you to the apartment on Webster?
16 **A** Yes.
17 **Q** Why did she take you to the apartment on
18 Webster?
19 **A** I needed a place to stay and she told me that
20 Ashley and James had an apartment, they were living with
21 somebody else that was in jail at the time and I can stay
22 there. She took me there with Erik.
23 **Q** And was Erik living with you at the condominium
24 the year before?
25 **A** No.

26

1 **Q** Where was he living?
2 **A** Across the street from the condominium in some
3 apartment.
4 **Q** And so when did you get into a romantic
5 relationship with Erik?
6 **A** Like a year and a half before April 26th.
7 **Q** And does Erik speak English?
8 **A** A little bit.
9 **Q** So primarily his language is Spanish?
10 **A** Yes.
11 **Q** And Ivonne speaks Spanish?
12 **A** Yes.
13 **Q** And you speak Spanish?
14 **A** Yes.
15 **Q** You write Spanish?
16 **A** Yes.
17 **Q** Turning to, you then testified on April 26th,
18 2012, Ivonne came to the apartment and knocked on your
19 room window, correct?
20 **A** On the 25th?
21 **Q** You said the 26th. I was going to clarify that.
22 MS. WONG: Objection. The witness said the
23 25th.
24 THE COURT: You can always clarify with the
25 witness. That is the Court's recollection of that

27

1 testimony as well. But we will go ahead and let you
2 rephrase, Ms. Erickson.
3 BY MS. ERICKSON:
4 Q Actually, I misheard and it was the 25th that
5 Ivonne came to the Webster apartment and knocked on your
6 window, right?
7 A Yes.
8 Q Okay. I am showing what has been marked for
9 identified as Exhibit A. Do you recognize this to be the
10 layout of the apartment that you were living in on
11 April 25th and 26th?
12 A Yes.
13 Q Which room was your room?
14 THE COURT: If you touch the screen you can make
15 a mark on it.
16 THE WITNESS: Okay. It was this one. I don't
17 know if it's writing or not.
18 THE COURT: Are you touching the screen?
19 THE WITNESS: Yes.
20 MS. ERICKSON: It's not coming out.
21 THE COURT: It never fails. There's always an
22 issue. Do you want her to mark on the a copy and then we
23 can display it again.
24 MS. ERICKSON: Sure.
25 MR. DIGIACOMO: And we'll mark it Defendant's

28

1 next in order and that way we'll have a clean one and the
2 copy.
3 MS. ERICKSON: Yes. A-1.
4 THE COURT: Thank you.
5 BY MS. ERICKSON:
6 Q So we are talking about the room where you and
7 Erik -- were you and Erik staying in the same room?
8 A Yes.
9 Q So the room that you and Erik were staying in
10 could you just mark an X up in the corner of whichever
11 bedroom it was.
12 A (Witness complies.)
13 Q So that is the room which is on the front side
14 of the apartment?
15 A Yes.
16 Q Where the people walk up and turn in?
17 A Yes.
18 THE COURT: Since right now we are showing the
19 clean copy, and that's fine, but just for the record so
20 we will have a marked copy, obviously, which will be
21 admitted, I think Defendant's next in order rather than
22 A-1 is better.
23 Defendant's next in order would be?
24 THE CLERK: D.
25 THE COURT: Can you describe for the record as

29

1 we are looking at this exhibit where she marked?
2 MS. ERICKSON: Yes.
3 BY MS. ERICKSON:
4 Q And for the record you put a blue X in the
5 southeast bedroom?
6 A Yes.
7 Q Bottom left corner.
8 THE COURT: Okay. As I'm looking at the scale
9 because we have a north directional sign on this exhibit,
10 so we are talking about the bottom right.
11 MS. ERICKSON: Yes. Southeast bedroom.
12 THE COURT: Okay. That is what I couldn't read.
13 BY MS. ERICKSON:
14 Q So that is where you were staying?
15 A Yes.
16 Q Ashley and James were staying in the room that
17 is marked as the northeast bedroom, correct?
18 A Yes.
19 Q Okay.
20 THE COURT: Are you showing the marked copy now?
21 MS. ERICKSON: I am.
22 BY MS. ERICKSON:
23 Q So your bedroom was the front -- when you walked
24 into the Webster -- it's a complex of four places, isn't
25 it?

30

1 A Yes.
2 Q And this Apartment Number C -- that you don't
3 know but it's noted as Number C -- is next door and
4 connected to another apartment that is pretty much the
5 same as far as you know, correct?
6 A Yes.
7 Q And there is two other apartments that are just
8 past the apartment that you were living in?
9 A Yes.
10 Q So there was a walkway from the street that went
11 in front of the two apartments including yours and it
12 went back and it crossed the apartments that were
13 perpendicular to yours?
14 A Yes.
15 Q Okay. So your bedroom is located in the front
16 side of the apartment. We'll call it front because that
17 is the walkway area, correct?
18 A Yes.
19 Q And there was a window there?
20 A Yes.
21 Q So your testimony is that Chinola walked up and
22 knocked on the window?
23 A Yes.
24 Q And then you were laying down. Were both you
25 and Eric lying down?

31

1 **A Yes.**
2 **Q** But Erik got up and went outside?
3 **A Yes.**
4 **Q** And the front door is in the area right next to
5 the wall of your room, correct?
6 **A Yes.**
7 **Q** Okay.
8 THE COURT: Any objection to the admission of
9 these exhibits?
10 MR. DIGIACOMO: No. All of her exhibits we have
11 no objection to.
12 THE COURT: So Exhibits A and B have been
13 displayed. Those are admitted. And then we will also
14 because there's no objection admit B and C just for the
15 record.
16 (Whereupon, Defendant's Exhibit A, B and C
17 were admitted into evidence.)
18 THE COURT: Anything further?
19 BY MS. ERICKSON:
20 **Q** Erik went out and came back. And what did you
21 see him do in the room when he came back?
22 **A Get the car keys.**
23 **Q** And what did the car keys look like? Were they
24 on a ring? Were they a single key?
25 **A Yeah, it was like on a ring and then it's the**
32

1 key.
2 **Q** Just the single key?
3 **A I think there was another key on there like a**
4 **house key.**
5 **Q** So two keys?
6 **A Yes.**
7 **Q** A house key and a car key?
8 **A Yes.**
9 **Q** So you believe that the house key was for the
10 apartment that you guys were living in?
11 **A No.**
12 **Q** Okay. What apartment was it?
13 **A I don't know. The keys were not his, so I don't**
14 **know whose key goes to what.**
15 **Q** Okay. That makes sense. So he came back in
16 grabbed the key, went back outside, came back in and
17 didn't have the keys anymore?
18 **A Yes.**
19 **Q** So then you testified that he loaned the car to
20 Chinola. How do you know that?
21 **A When he walked back in the room I asked him what**
22 **she was there for and he told me, Oh, I let her borrow**
23 **the car.**
24 **Q** And did you know that Erik just the day before
25 had borrowed Chinola's car?
33

1 **A Yes.**
2 **Q** So Erik had borrowed Chinola's car the day
3 before, correct?
4 **A Yes.**
5 **Q** And Erik had been driving the car and had been
6 in an accident?
7 **A Yes.**
8 **Q** Erik was the driver of the car?
9 **A I don't know if he was the driver or not. I did**
10 **not see him go in that car until after everything**
11 **happened when he returned back to the apartment that's**
12 **when he told me he was driving a car, but he did not say**
13 **he was driving a car. He said there was an accident.**
14 **Q** Did he say he had to go to the hospital?
15 **A No.**
16 **Q** Did he say he ran away from the police?
17 **A No.**
18 **Q** His status in the United States was what?
19 MS. WONG: Objection, Your Honor. Relevance.
20 THE COURT: Ms. Erickson.
21 MS. ERICKSON: Well, I am trying to determine
22 the relationship to the case itself. I mean, obviously,
23 I need --
24 THE COURT: I am going to sustain for this
25 witness for the purpose that we are hearing from this
34

1 witness.
2 MS. ERICKSON: Okay. That's fine.
3 BY MS. ERICKSON:
4 **Q** But you knew that he had borrowed Chinola's car?
5 **A I didn't know it was Chinola's car. I knew that**
6 **he had a car, that there was a car, and he told me that**
7 **he was in an accident.**
8 **Q** Did he tell you who he was with when he was in
9 the accident?
10 **A Yes. With another guy. I think his name is**
11 **"Trigger."**
12 **Q** Okay.
13 **A Or they call him Trigger or something.**
14 **Q** So the car that Erik lent to Chinola that you
15 testify was not his car, he did not own that car?
16 **A The car that Chinola borrowed?**
17 **Q** Yes.
18 **A No, it wasn't his.**
19 **Q** Back to the accident. Did he say what happened
20 to the car? Did he indicate what was broken on the car
21 or anything like that to you?
22 **A No. I actually seen the car. The tow truck**
23 **came in front of the apartment, on Webster, and then the**
24 **guy that was driving the tow truck let him take out some**
25 **stuff out of the back of the car.**
35

<p>1 Q What did the car look like?</p> <p>2 A I think it was a gray or silver car.</p> <p>3 Q Did you see damage on it?</p> <p>4 A No. I didn't get nowhere near the car when the</p> <p>5 tow truck came. I just seen it pull up and that's it.</p> <p>6 Q So the car that he lent to Chinola the next day,</p> <p>7 this is after you saw the car go by on the tow truck,</p> <p>8 correct?</p> <p>9 A (No audible answer.)</p> <p>10 Q Erik lent Chinola the car the day after he had</p> <p>11 been in an accident?</p> <p>12 A Erik had a car --</p> <p>13 Q Right.</p> <p>14 A But it wasn't his.</p> <p>15 Q Right. And the car he lent to Chinola on the</p> <p>16 25th --</p> <p>17 A Okay.</p> <p>18 Q So it was not his and you saw it at your friend</p> <p>19 Christina's house?</p> <p>20 A Yes.</p> <p>21 Q And that was the same Christina that had</p> <p>22 introduced you to Ivonne about a month earlier?</p> <p>23 A Not a month. A couple months.</p> <p>24 Q Oh, a couple months. Okay. But it is the same</p> <p>25 one?</p> <p style="text-align: right;">36</p>	<p>1 with him anymore. And then one day Chinola just -- I was</p> <p>2 inside a trailer on Bonanza and she goes in there and she</p> <p>3 tells me, Let's go somewhere. We leave. I go inside the</p> <p>4 car in the backseat and when I go in the car I see Erik</p> <p>5 driving. And Chinola sat in the front. And then she's</p> <p>6 like, Oh, just talk to him. You guys gotta talk.</p> <p>7 MS. ERICKSON: Okay. So --</p> <p>8 THE COURT: Ms. Erickson, hold on just one</p> <p>9 second. It was very faint and I apologize to Ms. Wong.</p> <p>10 She did impose an objection regarding the foundation of</p> <p>11 the question but I went ahead and let the witness</p> <p>12 continue to answer because she I think clarified what she</p> <p>13 knows and how she knew it and why.</p> <p>14 But I think maybe the best way to do it is if we</p> <p>15 are going to do an objection go ahead and stand because</p> <p>16 that will be the visual to the witness that an objection</p> <p>17 is being imposed and hopefully she can wait to answer</p> <p>18 until the objection is made and the Court rules on it.</p> <p>19 MS. ERICKSON: And so the witness made a</p> <p>20 sufficient --</p> <p>21 THE COURT: I will let the answer stand.</p> <p>22 BY MS. ERICKSON:</p> <p>23 Q All right. So you testified that close in time</p> <p>24 to April 26th. How many days before? A week before that</p> <p>25 you broke up with Erik?</p> <p style="text-align: right;">38</p>
<p>1 A Yes.</p> <p>2 Q And you saw it at Christina's house before he</p> <p>3 got it?</p> <p>4 A Yes.</p> <p>5 Q How long had Christina had it?</p> <p>6 A I don't know. I wasn't there when Christina</p> <p>7 lent Erik the car. I just seen Erik pull up in the car.</p> <p>8 Q How many times had you seen it at Christina's</p> <p>9 house before Erik pulled up in it?</p> <p>10 A Like three or four times.</p> <p>11 Q In what time period? You've know her for years.</p> <p>12 A For five years. I've known Christina for five</p> <p>13 years.</p> <p>14 Q Okay. So the three or four times you had seen</p> <p>15 it when was that in relationship -- when was that when he</p> <p>16 drove up with it on the date that he drove up with it?</p> <p>17 A In the five years that I'd known her I'd seen</p> <p>18 the car there three or four times.</p> <p>19 Q Okay. I am not asking that question very well.</p> <p>20 I apologize. And how did Erik know Chinola?</p> <p>21 A I don't know how he met her --</p> <p>22 MS. WONG: Objection. Foundation.</p> <p>23 THE WITNESS: -- or where he met her but a</p> <p>24 couple of days before everything happened I got away from</p> <p>25 Erik. I wanted to be away from him. I didn't want to be</p> <p style="text-align: right;">37</p>	<p>1 A Like a week and a half before.</p> <p>2 Q And you said that you were staying at a trailer;</p> <p>3 is that correct?</p> <p>4 A I was not staying there. I was there.</p> <p>5 Q So where were you staying the week and a half</p> <p>6 that you were broken up with Erik?</p> <p>7 A I was going to my friend Shorty's house. I</p> <p>8 would stay the night there and you know just like that.</p> <p>9 Q So when did you get back with Erik?</p> <p>10 A The day that Ivonne drove up with him.</p> <p>11 Q Okay. So that would be the day before the</p> <p>12 shooting?</p> <p>13 A No. It would be a couple days before.</p> <p>14 Q Okay. And where were you when Ivonne drove up</p> <p>15 with Erik in a car? Where were you located? Was it the</p> <p>16 trailer?</p> <p>17 A Yes. I was in the trailer.</p> <p>18 Q Where is that trailer located?</p> <p>19 A On Bonanza. I don't know the exact address.</p> <p>20 Q Between what streets?</p> <p>21 A I think it's Main. Bonanza and Eastern.</p> <p>22 Q Okay.</p> <p>23 A Yeah, Bonanza, Main and Eastern.</p> <p>24 Q Between Main and --</p> <p>25 A It's on Bonanza between -- yes.</p> <p style="text-align: right;">39</p>

<p>1 Q And who lived at that trailer?</p> <p>2 A A friend of Chinola's.</p> <p>3 Q Who?</p> <p>4 A I don't know his name.</p> <p>5 Q What did he look like?</p> <p>6 A He was a guy with long hair, like kind of curly.</p> <p>7 Would put it up in a ponytail.</p> <p>8 Q Was it Patrick Robles?</p> <p>9 A Yes. Patrick was his name.</p> <p>10 Q So you didn't know Patrick other than being</p> <p>11 there at the trailer that day?</p> <p>12 A I didn't know him until Ivonne took me there.</p> <p>13 Q When did she take you there?</p> <p>14 A It was a while before everything happened.</p> <p>15 Q So you had known Patrick for some time before</p> <p>16 the shooting on April 26th?</p> <p>17 A Yes.</p> <p>18 Q You met him sometime before?</p> <p>19 A Yes.</p> <p>20 Q And you met him at the trailer?</p> <p>21 A Yes.</p> <p>22 Q And Ivonne introduced you?</p> <p>23 A Yes.</p> <p>24 Q So how would you describe your relationship with</p> <p>25 Patrick?</p> <p style="text-align: right;">40</p>	<p>1 THE COURT: I have no problem and there's been a</p> <p>2 lot of leeway given here I think certainly by the Court</p> <p>3 and am happy to do that and understand why that's</p> <p>4 necessary and I think the State has allowed some leeway</p> <p>5 to be given as well.</p> <p>6 But at this point we are not inquiring with</p> <p>7 regard to the testimony that is relevant to the car and</p> <p>8 that is what the testimony of this witness is being</p> <p>9 proffered for today.</p> <p>10 BY MS. ERICKSON:</p> <p>11 Q You then testified that you wanted to go to the</p> <p>12 hospital and that is why you -- you needed to go to the</p> <p>13 hospital, correct?</p> <p>14 A Yes.</p> <p>15 Q And Erik made phone calls to the number you</p> <p>16 thought was Chinola's, correct?</p> <p>17 A Yes.</p> <p>18 Q How do you know that?</p> <p>19 A Because I seen him calling and calling. He was</p> <p>20 already mad.</p> <p>21 Q Okay. What number was he calling?</p> <p>22 A I don't know the number. It was in his cell</p> <p>23 phone. It was his cell phone that he was calling.</p> <p>24 Q Okay. And you said you texted for him?</p> <p>25 A Yes.</p> <p style="text-align: right;">42</p>
<p>1 MS. WONG: Your Honor, I am going to object at</p> <p>2 this point. The point of this is cross-examination. It</p> <p>3 is not to utilize it as a discovery mechanism. I mean we</p> <p>4 kind of let it go on for a little bit but this is way</p> <p>5 beyond the scope of the Petrocelli hearing.</p> <p>6 THE COURT: I understand the reason for the</p> <p>7 objection, Ms. Wong, and you can just make a brief</p> <p>8 objection. That's fine. It is not at all uncommon for</p> <p>9 counsel to inquire. I will not interfere with that</p> <p>10 process but your objection is noted and sustained.</p> <p>11 Ms. Erickson, the relevancy for this testimony</p> <p>12 for purposes of the Petrocelli hearing is with regard to</p> <p>13 the car not the entire scope of the knowledge this</p> <p>14 witness may have about any facts related to this case.</p> <p>15 And I have another issue of concern which is the</p> <p>16 time circumstances for today's hearing. We have all the</p> <p>17 time in the world but I cannot take this hearing through</p> <p>18 the lunch hour. So one of my expectations is that we</p> <p>19 will keep to the witness's circumstances and information</p> <p>20 needed for why the State is proffering the witness at</p> <p>21 this time.</p> <p>22 Objection is sustained.</p> <p>23 MS. ERICKSON: Thank you, Judge. Given that I</p> <p>24 just prepared for this cross-examination this morning</p> <p>25 while it was going on.</p> <p style="text-align: right;">41</p>	<p>1 Q You texted in English?</p> <p>2 A Yes.</p> <p>3 Q Even though Ivonne reads Spanish?</p> <p>4 A I texted in English, yes.</p> <p>5 Q So you don't know who texted you back other than</p> <p>6 this is Smokey?</p> <p>7 A Yes.</p> <p>8 Q And I believe you previously said that Smokey</p> <p>9 said Chinola was sleeping?</p> <p>10 A Yes.</p> <p>11 Q On the day April 26th of the shootings, you</p> <p>12 testified that you heard Chinola knock on the door and</p> <p>13 say, Open the door, this is me, Chinola, right?</p> <p>14 A Yes.</p> <p>15 Q You hadn't heard any shooting before?</p> <p>16 A That.</p> <p>17 Q So that was the first thing you heard that</p> <p>18 morning?</p> <p>19 A Yes.</p> <p>20 Q You didn't hear anything coming from the</p> <p>21 bathroom?</p> <p>22 A No. We were asleep until she knocked on the</p> <p>23 door.</p> <p>24 Q But if there had been shooting before she</p> <p>25 knocked on the door you would have heard that?</p> <p style="text-align: right;">43</p>

<p>1 A Yes.</p> <p>2 Q I'm sorry. Just to clarify, why did you want to</p> <p>3 go to the hospital?</p> <p>4 A I wasn't feeling good.</p> <p>5 Q How were you not feeling good? What was going</p> <p>6 on with you?</p> <p>7 A I was throwing up a lot. I was feeling really</p> <p>8 weak.</p> <p>9 Q So now back to the shooting itself. Chinola</p> <p>10 knocked on the door and said, Open the door, this is me,</p> <p>11 Chinola, correct?</p> <p>12 A Yes.</p> <p>13 Q All right. I am showing you what has been</p> <p>14 marked and admitted as Exhibit B. This is -- does this</p> <p>15 look like the room you were staying in on the day of</p> <p>16 April 26th?</p> <p>17 A Yes.</p> <p>18 Q And is the door right next to where that Number</p> <p>19 8 is?</p> <p>20 A Yes.</p> <p>21 Q So now looking at Exhibit A. How does the door</p> <p>22 open? Does it come in to open?</p> <p>23 A Yes.</p> <p>24 Q And were you on the bed?</p> <p>25 A Yes.</p> <p style="text-align: right;">44</p>	<p>1 Q So looking at Exhibit A, I will get a second</p> <p>2 one, D. I will use D now. And could you mark on Exhibit</p> <p>3 D exactly where Chinola was standing. If this is the</p> <p>4 entrance door.</p> <p>5 THE COURT: Ms. Erickson, Ms. Wong is going to</p> <p>6 join you at the witness stand so she can see as well.</p> <p>7 MS. ERICKSON: Okay.</p> <p>8 BY MS. ERICKSON:</p> <p>9 Q Could you mark exactly where Chinola was</p> <p>10 standing when you saw her?</p> <p>11 A Well, this is the door, right?</p> <p>12 Q That's the door.</p> <p>13 A Open?</p> <p>14 Q No. Well, it opens this way (indicating), so</p> <p>15 it's not open itself.</p> <p>16 A Like -- I don't know.</p> <p>17 Q Let's say it's open all the way to the wall;</p> <p>18 where did you see her?</p> <p>19 A She was at the door.</p> <p>20 Q Okay. So this is the wall of the room. This is</p> <p>21 the door opening. She was in the doorway?</p> <p>22 A Yes.</p> <p>23 Q Okay. Why don't we mark an X --</p> <p>24 MS. WONG: Can we use a zero because we already</p> <p>25 have an X?</p> <p style="text-align: right;">46</p>
<p>1 Q And then you stated that after Chinola said that</p> <p>2 Erik opened the door?</p> <p>3 A Yes.</p> <p>4 Q So he was standing at the door and he opened it</p> <p>5 this way (indicating)?</p> <p>6 A No. He didn't open it; he unlocked it.</p> <p>7 Q Okay. How did the door open?</p> <p>8 A Like this.</p> <p>9 Q He just unlocked it?</p> <p>10 A Yes because we were laying down sleeping so he</p> <p>11 was not all the way dressed so he just unlocked it and</p> <p>12 came back and sat right here on the bed.</p> <p>13 Q All right. I did not understand that. Thank</p> <p>14 you for clarifying.</p> <p>15 So then the door opened toward your bed. If</p> <p>16 someone was coming in it would be opening toward your bed</p> <p>17 and onto the wall?</p> <p>18 A Like --</p> <p>19 Q The door opens in and back to the wall of your</p> <p>20 bedroom?</p> <p>21 A Yes.</p> <p>22 Q And you said that Smokey walked into your room?</p> <p>23 A Yes.</p> <p>24 Q He was the only one that was inside the room?</p> <p>25 A That walked all the way in the room, yes.</p> <p style="text-align: right;">45</p>	<p>1 MS. ERICKSON: Okay. A zero is fine.</p> <p>2 THE WITNESS: (Witness complies.)</p> <p>3 BY MS. ERICKSON:</p> <p>4 Q So that is where Chinola was standing where you</p> <p>5 wrote a blue circle?</p> <p>6 A Yes.</p> <p>7 Q Okay. So Smokey walked into the room. And how</p> <p>8 close did he get to your bed?</p> <p>9 A At the foot of the bed.</p> <p>10 Q So he walks all the way in to the foot of the</p> <p>11 bed?</p> <p>12 A Yes.</p> <p>13 Q Did you see him with a gun?</p> <p>14 A Yes.</p> <p>15 Q What kind of gun was it?</p> <p>16 A Everything happened so fast I was not trying to</p> <p>17 see what kind of gun it was or what color it was.</p> <p>18 Q Okay.</p> <p>19 A All I know is that he walked in and he got shot.</p> <p>20 Q And you saw Chinola standing at the door in the</p> <p>21 doorway?</p> <p>22 A Yes.</p> <p>23 Q She didn't say anything?</p> <p>24 A No. When he was already there, no, she didn't</p> <p>25 say anything.</p> <p style="text-align: right;">47</p>

1 Q So the only thing she said was, Open the door,
2 this is me, Chinola?
3 A Yes.
4 Q During the entire time that this all went on?
5 A Yes.
6 Q Now when you moved into the apartment on Webster
7 were there a bunch of tools there?
8 A The room was clean.
9 Q What about in the house itself, anywhere in the
10 public area?
11 A I didn't go open closets or nothing else.
12 Q No. I'm just saying in the open area of the
13 kitchen, the living room, your bedroom?
14 A Not that I seen, no.
15 Q Nothing like a sander or a saw or hammers or
16 anything construction?
17 A Not that I noticed, no.
18 Q Do you remember that Erik was going to buy --
19 that Ivonne was going to sell some tools to Erik?
20 A No. I do not know none of that.
21 Q At some point in time did you ever meet Miguel
22 Villegas?
23 A Yes, I did.
24 Q And you knew he had a truck?
25 A No. I didn't know really much about him. I

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1 seen him one time. Hi, bye. That's it.
2 Q When you were at the apartment that we now know
3 you were there just two or three days -- or just two?
4 A It was a couple days before.
5 Q So did you see a black truck there?
6 A There was a lot of cars parked outside.
7 Q So you don't know anything about what was
8 outside, automobiles?
9 A No.
10 Q Okay. And during the shooting did you hear
11 Smokey say anything out in the hallway or to anyone else
12 other than what he said to you -- what did he say to you?
13 A Nothing.
14 Q Nothing?
15 A Nothing.
16 Q So he just walked in, pulled the gun out and
17 started shooting you?
18 A He walked in. He had the gun in his hand. I
19 was scared, terrified. All I remember is next thing you
20 know I was laid back on the bed. Erik was laying next to
21 me. And after that I don't remember anything. I don't
22 know what happened after that. I don't know if I passed
23 out or what happened. But I just -- I don't know. It
24 was so fast.
25 Q So basically, really, the only thing that you

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1 heard happen before the shooting was Chinola at the door
2 saying, Open it?
3 A Yes.
4 Q You did not hear a male voice before?
5 A No.
6 Q You did not hear any of the shots?
7 A No.
8 Q To your knowledge did Ashley Wantland ever lose
9 her keys to the apartment?
10 A I don't know.
11 MS. ERICKSON: That's all. Thank you so much.
12 THE COURT: Ms. Wong, anything further?
13 MS. WONG: No further questions, Your Honor.
14 THE COURT: Ms. Marin, thank you. You are
15 excused.
16 THE WITNESS: Okay. Thank you.
17 THE COURT: State's next witness.
18 MR. DIGIACOMO: Call Ashley Wantland.
19
20 Whereupon,
21 ASHLEY FAYE WANTLAND,
22 was administered the following oath by the court clerk.
23 THE CLERK: You do solemnly swear that the
24 testimony you give in this action shall be the truth, the
25 whole truth, and nothing but the truth so help you God.

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1 THE WITNESS: I do.
2 THE CLERK: Please state and spell your full
3 name for the record.
4 THE WITNESS: Ashley Faye Wantland. A-s-h-l-e-y
5 F-a-y-e, W-a-n-t-l-a-n-d.
6 THE COURT: Thank you.
7 Mr. Digiacomo, whenever you are ready.
8 MR. DIGIACOMO: Thank you.
9
10 DIRECT EXAMINATION
11 BY MR. DIGIACOMO:
12 Q Ms. Wantland, I am going to ask you some
13 questions stemming around April of 2012, maybe a little
14 bit before that, okay?
15 A That's fine.
16 Q Let me start with were you living in the
17 apartment on Webster with your boyfriend James in April
18 of 2012?
19 A Yes, I was.
20 Q Who's apartment was it?
21 A It was our friend Miguel Villegas.
22 Q And if the shooting happened on April 26th where
23 was Miguel on April 26th?
24 A He was in jail.
25 Q About how long prior to April 26th had Miguel

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<p>1 gone to jail?</p> <p>2 A I believe it was April 16th that he went to</p> <p>3 jail. Ten days before.</p> <p>4 Q So Mr. Villegas is in jail. While Mr. Villegas</p> <p>5 is in jail do you have any contact with him?</p> <p>6 A I talked to him like once or twice over the</p> <p>7 phone.</p> <p>8 Q Now on behalf of him did you go and collect any</p> <p>9 items of his?</p> <p>10 A Yes. He released his property to me a couple</p> <p>11 days after he went to jail.</p> <p>12 Q And on his property was there anything of value?</p> <p>13 A No. It was his wallet, his unemployment card</p> <p>14 and his ID.</p> <p>15 Q Let's talk about the unemployment card.</p> <p>16 Describe for the Court what an unemployment card is.</p> <p>17 A He was previously employed and I don't know if</p> <p>18 he got laid off or what happened, but he was able to</p> <p>19 collect a monthly benefit from the State.</p> <p>20 Q So was it like a debit card, like a credit card?</p> <p>21 A Yes.</p> <p>22 Q And it would get automatically filled with money</p> <p>23 over a period of time?</p> <p>24 A Yes.</p> <p>25 Q Were you supposed to do something with that</p> <p style="text-align: right;">52</p>	<p>1 and introduced us to her.</p> <p>2 Q Do you see Chinola here in court?</p> <p>3 A Yes.</p> <p>4 Q Could you point her out and describe something</p> <p>5 she is wearing?</p> <p>6 A She is over there (indicating) and she is</p> <p>7 wearing glasses.</p> <p>8 MR. DIGIACOMO: May the record reflect the</p> <p>9 identification of the defendant.</p> <p>10 THE COURT: Well, actually all three people at</p> <p>11 the table are wearing glasses. Is she in the blue?</p> <p>12 THE WITNESS: Yes.</p> <p>13 THE COURT: The record will so reflect the</p> <p>14 identification of the defendant.</p> <p>15 BY MR. DIGIACOMO:</p> <p>16 Q Now you said that when Miguel went to jail it</p> <p>17 was just you, Miguel and James that was living in that</p> <p>18 apartment; is that correct?</p> <p>19 A Correct.</p> <p>20 Q Which room was Miguel's room?</p> <p>21 A Miguel's room was the first bedroom when you</p> <p>22 come to when you are in the hallway.</p> <p>23 Q Is that the room Erik and Melissa winded up</p> <p>24 living in until the time of the homicide?</p> <p>25 A Yes.</p> <p style="text-align: right;">54</p>
<p>1 debit card on behalf of Mr. Villegas with the money that</p> <p>2 was on it?</p> <p>3 A Yes. He wanted me to pull the money off every</p> <p>4 week to give to his landlord to keep his rent paid up.</p> <p>5 Q So you are living in Miguel's apartment and you</p> <p>6 have the unemployment card in order to maintain that</p> <p>7 particular apartment; is that right?</p> <p>8 A Yes.</p> <p>9 Q And was there anybody else that lived inside</p> <p>10 that apartment other than Miguel, obviously, you and</p> <p>11 James?</p> <p>12 A After he went to jail for like a couple days</p> <p>13 later, yes, that's when Chinola and Erik and Melissa</p> <p>14 moved in.</p> <p>15 Q So a couple days after Mr. Villegas goes to jail</p> <p>16 Chinola, Erik and Melissa you said moved in. Did Chinola</p> <p>17 actually sleep at that residence?</p> <p>18 A I think for maybe like a day or two, if that.</p> <p>19 Q And then she left?</p> <p>20 A Yes, she did.</p> <p>21 Q And Melissa and Erik stayed?</p> <p>22 A Yes.</p> <p>23 Q So how did you know Chinola?</p> <p>24 A I met her through Miguel maybe a month or two</p> <p>25 before we moved into his apartment. He brought her over</p> <p style="text-align: right;">53</p>	<p>1 Q When Miguel went to jail did you have any</p> <p>2 knowledge about Miguel and Chinola's relationship?</p> <p>3 A Not too much, no. The only thing that Miguel</p> <p>4 had mentioned to me was something about her living with</p> <p>5 him before. I don't know how long before. And something</p> <p>6 came up between them two, a problem or whatever, and she</p> <p>7 ended up moving out. That is all he told me.</p> <p>8 Q But based upon your conversation with Miguel did</p> <p>9 you instruct James anything about telling Chinola about</p> <p>10 Miguel going to jail?</p> <p>11 A I told James not to tell Chinola that he was in</p> <p>12 jail because based on what he had told me about whatever</p> <p>13 problems that they had I didn't want her or anyone else</p> <p>14 to come in the apartment and take anything out of the</p> <p>15 apartment or rob the apartment.</p> <p>16 Q So does there come a period of time when you</p> <p>17 wind up being with Chinola prior to Miguel's apartment</p> <p>18 being cleaned out and Erik and Chinola and Melissa moving</p> <p>19 in?</p> <p>20 A Yes. There was a time where we were with her</p> <p>21 before all that.</p> <p>22 Q How long prior to the homicide are we talking</p> <p>23 about?</p> <p>24 A That I was with Chinola?</p> <p>25 Q Yes. After Miguel goes to jail and you are with</p> <p style="text-align: right;">55</p>

1 Chinola?
2 **A Probably three or four days.**
3 **Q** So if he went to jail on the 16th we are talking
4 the 19th, that time period?
5 **A Yeah, around there. The 19th, 20th, something**
6 **like that.**
7 **Q** And why are you with Chinola?
8 **A James had told me that her and Loca were going**
9 **to give us a ride to Walmart to do whatever he was going**
10 **to do.**
11 **Q** Now you just mentioned Loca; who is Loca?
12 **A As far as I know it's Smokey's sister. That's**
13 **all I know about her.**
14 **Q** Had you ever met Loca before this time you are
15 with James and Chinola?
16 **A No.**
17 **Q** Who's car are you in?
18 **A To my knowledge Chinola's, I believe.**
19 **Q** Who is driving?
20 **A Chinola.**
21 **Q** Chinola is driving the car?
22 **A Yes.**
23 **Q** Loca is in the car?
24 **A Yes. In the passenger seat.**
25 **Q** James is with you?

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1 **A Yes.**
2 **Q** And what are you guys going to go do?
3 **A He was going to -- he was going to go into**
4 **Walmart. He would steal computer games and he would have**
5 **people with ID return them for store credit.**
6 **Q** So James had a scam where he would rip off
7 Walmart and then people would return the item that he
8 ripped off and get store credit and that is the scam that
9 James would run?
10 **A Yeah.**
11 **Q** Were you assisting in this scam?
12 **A Yes, I was.**
13 **Q** You were one of the returners?
14 **A I had been at one point, yes.**
15 **Q** On this particular day was Chinola and Loca a
16 part of this scam?
17 **A Well, they were driving us around to two or**
18 **three different Walmart's that we had went to that day.**
19 **Q** Was there any discussion about Chinola and Loca
20 getting paid for their assistance?
21 **A Not until later. But, yes, there was discussion**
22 **between I think it was between her and James. They**
23 **didn't really mention too much in the beginning what they**
24 **were going to pay her.**
25 **Q** At some point in time do you become aware that

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1 Chinola and Loca get paid?
2 **A After we get back and after we get everything we**
3 **are supposed to get he told me that he paid her because I**
4 **was not involved in all that.**
5 **Q** So during this time period that you are out with
6 Loca and Chinola and James is there a period of time when
7 Chinola and Loca leave yours and James' presence?
8 **A Yes, there was.**
9 **Q** Where were you?
10 **A I was at her friend Jan's house where she was**
11 **supposedly staying.**
12 **Q** Where Chinola says she's living now?
13 **A Well, at the time, yeah.**
14 **Q** Where she was living at the time?
15 **A Yes.**
16 **Q** And this is before the whole move into Miguel's
17 place?
18 **A Yes.**
19 **Q** So you are at Jan's house, James is at Jan's
20 house. Does there come a point in time when Ivonne tells
21 you she has to leave?
22 **A Yes, there was.**
23 **Q** Describe for the Court what happens.
24 **A She told us to stay there, that she would be**
25 **back in whatever amount of time. I go out and I look --**

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1 **I go to retrieve I think it was my purse and my keys and**
2 **I realize I did not have my house keys or I couldn't find**
3 **them. We looked for them or whatever. And then I think**
4 **it was me and James ended up leaving.**
5 **Q** Jan's?
6 **A Jan's house, yeah.**
7 **Q** Going where?
8 **A Back to our apartment?**
9 **Q** The Webster apartment?
10 **A Yes. And when we got there our apartment was**
11 **ransacked pretty much. Everything -- there was stuff**
12 **taken. Everything messed up.**
13 **Q** Everything is cleared out of the house. How
14 much of your stuff was touched?
15 **A At the time nothing of mine and James I don't**
16 **believe was touched at the time. It was just Miguel's.**
17 **Q** It was Miguel's items that are taken out of this
18 residence?
19 **A Right.**
20 **Q** Do you ever -- well, let me ask you this. Was
21 there any evidence of a forced entry into the apartment?
22 **A No, I don't believe so.**
23 **Q** At some point in time do you have a conversation
24 with the defendant about that situation?
25 **A Yes. It was like the next day. I believe I**

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<p>1 told her that James was going to call the cops or</p> <p>2 whatever and she told me to tell him not to do that or</p> <p>3 whatever because it was her that went in the apartment.</p> <p>4 Q So she tells you, Hey, I'm the one that cleaned</p> <p>5 out Miguel's stuff in the apartment?</p> <p>6 A Right.</p> <p>7 Q And is that about the same time period she</p> <p>8 brings over Melissa and Erik and they are staying in that</p> <p>9 apartment?</p> <p>10 A Shortly after. Maybe the next day I think.</p> <p>11 Q I am going to sort of fast forward a little bit.</p> <p>12 Well, let me back up. At any point in time is</p> <p>13 there some discussion with Chinola, and I'm not talking</p> <p>14 about the day before the homicide, any discussion about</p> <p>15 James not paying enough for the help that she gave him to</p> <p>16 do all these Walmart things?</p> <p>17 A No. Not until the day before. But any time</p> <p>18 before that or whatever there was not.</p> <p>19 Q So let's jump to the day before. Do you see</p> <p>20 Chinola the day before the homicide?</p> <p>21 A Yes, I do.</p> <p>22 Q Where was that at?</p> <p>23 A It was at one of my friends, Old Man Jim's</p> <p>24 house. That's what they call him.</p> <p>25 Q Was that "Old Man Jim"?</p> <p>60</p>	<p>1 MS. ERICKSON: No objection.</p> <p>2 THE COURT: Exhibit 2 will be admitted. Did you</p> <p>3 put in 1?</p> <p>4 MR. DIGIACOMO: It is going to come in shortly.</p> <p>5 I had it previously marked.</p> <p>6 THE COURT: Oh, okay. Exhibit 2 is admitted.</p> <p>7 (Whereupon, State's Exhibit 2 was</p> <p>8 admitted into evidence.)</p> <p>9 BY MR. DIGIACOMO:</p> <p>10 Q Ma'am, I put Exhibit 2 up there. Do you see</p> <p>11 Chinola -- and I forgot, what location was that at?</p> <p>12 A Old Man Jim's house.</p> <p>13 Q Old Man Jim's house. And approximately what</p> <p>14 time of day was this?</p> <p>15 A I think it was around like probably 5:00 in the</p> <p>16 afternoon. Something like that.</p> <p>17 Q Do you remember who else was present inside the</p> <p>18 residence besides Chinola and you obviously?</p> <p>19 A It was me, Chinola, Old Man Jim. I believe Jan</p> <p>20 and Trigger I think were over there as well.</p> <p>21 Q Jan and Trigger were inside the residence as</p> <p>22 well?</p> <p>23 A Yes.</p> <p>24 Q And, Chinola, what kind of mood is she in?</p> <p>25 A Angry.</p> <p>62</p>
<p>1 A Yeah. That's what they call him.</p> <p>2 Q When you arrived there is Chinola in possession</p> <p>3 of a vehicle?</p> <p>4 A Yes, she was.</p> <p>5 Q And what vehicle was it?</p> <p>6 A To my knowledge at the time it was Erik's.</p> <p>7 Q Now, you say to your knowledge at the time it</p> <p>8 was Erik's. Had you seen Erik with this vehicle</p> <p>9 previously?</p> <p>10 A Not exactly because I had not even known Erik</p> <p>11 long at all but he had mentioned that she had his car so</p> <p>12 I figured it was his car.</p> <p>13 Q Okay. Well, I'm going to show you what has been</p> <p>14 marked as State's Proposed Exhibit No. 2. Do you</p> <p>15 recognize the vehicle that is depicted in that</p> <p>16 photograph?</p> <p>17 A Yes.</p> <p>18 Q Is that the car that Chinola was in possession</p> <p>19 of?</p> <p>20 A Yes.</p> <p>21 Q Or at least appears to be?</p> <p>22 A Yes.</p> <p>23 MR. DIGIACOMO: I move to admit Exhibit 2,</p> <p>24 Judge.</p> <p>25 THE COURT: Any objection?</p> <p>61</p>	<p>1 Q She is angry. And what is she talking about?</p> <p>2 A How Loca was going to get James, that she didn't</p> <p>3 get paid -- or her and Loca got ripped off for like</p> <p>4 driving us around but she didn't get paid enough.</p> <p>5 And then I remember her saying something about</p> <p>6 selling Erik tools and not getting paid for them, that he</p> <p>7 hadn't paid her for them.</p> <p>8 Q She is complaining about not getting paid enough</p> <p>9 for the Walmart trips?</p> <p>10 A Yes.</p> <p>11 Q And did she mention at all how she got paid?</p> <p>12 A In drugs, obviously.</p> <p>13 Q What kind of drugs?</p> <p>14 A Meth.</p> <p>15 Q Methamphetamine?</p> <p>16 A Yes.</p> <p>17 Q And she thought that she and Loca were entitled</p> <p>18 to more drugs than she got from James?</p> <p>19 A Yes.</p> <p>20 Q You said she mentioned something about Erik</p> <p>21 getting some tools from her and not having them paid for?</p> <p>22 A Yes.</p> <p>23 Q And she was upset about that?</p> <p>24 A Yes.</p> <p>25 Q She mentioned something about Loca -- what did</p> <p>63</p>

1 you say, Loca was going to get who?
2 **A Get James.**
3 **Q** Get James. Did she mention anybody getting
4 Erik?
5 **A I don't recall. I don't believe so. The only**
6 **other thing that she had mentioned that she had asked me**
7 **about was the unemployment card.**
8 **Q** So she is angry and complaining about Erik and
9 she asks you about the unemployment card. What does she
10 ask you?
11 **A She asked me if I had it. I told her, No, that**
12 **James had had it. And then she told me that I needed to**
13 **get it to her as soon as possible, pretty much.**
14 **Q** This discussion that you are having with Chinola
15 -- well, what was your reaction to what she was saying to
16 you?
17 **A I pretty much just told her that I couldn't**
18 **control James' actions or what he was doing or what he**
19 **did because I didn't know exactly what, you know, made**
20 **her angry. That's pretty much all I told her, that I**
21 **didn't have any part of what James was doing. I couldn't**
22 **control him.**
23 **Q** She is mad at James and Erik. I guess my
24 question was she directing any of her anger at you?
25 **A She did not directly threaten me but James was**
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1 pretty much the person that she had threatened and I took
2 that as a threat to myself because I was with James.
3 **Q** How do you wind up leaving this residence or
4 does Chinola leave first?
5 **A Chinola left first.**
6 **Q** And she left in that vehicle?
7 **A Yes.**
8 **Q** Do you go home that night?
9 **A Yes, I do.**
10 **Q** Are you with James?
11 **A When I get back to the apartment, yes, I'm with**
12 **James.**
13 **Q** James is there?
14 **A Yes.**
15 **Q** You said you did not really know Erik and
16 Melissa that well, correct?
17 **A Correct.**
18 **Q** Did you talk to Erik or Melissa about what
19 Chinola was doing?
20 **A Yes. When I got back to the apartment I told**
21 **them -- I told James, Erik and Melissa what had happened,**
22 **like everything that she had said.**
23 **Q** And were you aware -- is that at the point in
24 time where Erik starts talking about the car and trying
25 to get the vehicle back?
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1 **A Yes.**
2 **Q** You go to sleep that night?
3 **A Yes.**
4 **Q** And are you in the other bedroom, the back
5 bedroom by the bathroom?
6 **A Yes.**
7 **Q** With James?
8 **A Yes.**
9 **Q** How is it that you wind up waking up the next
10 morning?
11 **A I woke up the next morning to James had said**
12 **that Erik's car must be back. I don't know what he**
13 **heard. He heard something. He got up and he answered**
14 **the door. He said that someone was knocking on the door**
15 **and he answered the door.**
16 **Q** Answered the door to the bedroom?
17 **A Yes, to the bedroom.**
18 **Q** So as the door to the bedroom opens describe
19 what you see.
20 **A When the bedroom door opens I see Smokey walk in**
21 **and he asked James about the unemployment card, like if**
22 **he'd had it.**
23 **Q** Smokey walks in the room and asked James about
24 the unemployment card. And what's James' reaction?
25 **A James, he got about halfway through his**
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1 sentence. Pretty much he started to say that he didn't
2 have it. And that he like cut it up or something but he
3 didn't get to finish.
4 **Q** What happened?
5 **A Smokey shot him.**
6 **Q** So when Smokey first walked in the room did he
7 have a weapon that you could see?
8 **A No. When he first came in, no, he didn't have**
9 **it out that I could see.**
10 **Q** And after he asked about the unemployment card
11 and James goes to respond, is that when he draws the
12 weapon?
13 **A Yes.**
14 **Q** And the shooting occurs during this time period
15 that Smokey walks into the bedroom, starts shooting you.
16 Do you ever see the defendant Chinola at the apartment?
17 **A During the time that he was asking James about**
18 **the unemployment card, like right before he pulled a gun**
19 **out, I see her like step into the bedroom, like, just**
20 **enough where I could see her face and then she steps out.**
21 **Q** So she briefly steps in and steps out and which
22 direction was she heading when she left the bedroom, did
23 you see?
24 **A I did not see. I just seen her step in and then**
25 **I just seen her step out and that was it.**
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1 **Q** Then your next memory is the shooting that this
2 happened?
3 **A** Right.
4 **Q** You are injured. Can you describe for the Court
5 where your injuries are.
6 **A** I have three gunshot wounds on my chest. I had
7 a gunshot wound under here (indicating) and it got stuck
8 on my tongue. And then I had two underneath here
9 (indicating). One punctured my lung and then the other
10 one went through and broke some of my ribs.
11 And then I had one go through my arm which
12 shattered my arm. And then an exit wound right here
13 (indicating). And then one right here (indicating). And
14 then one right here (indicating) and it's still in there.
15 THE COURT: Just for the record, and I certainly
16 don't want to make you go back over this, but I want to
17 note for the record that you were mainly pointing first
18 when you said "here" to under your chin --
19 THE WITNESS: Yes.
20 THE COURT: -- and then into your right arm and
21 your right side.
22 THE WITNESS: My right side and pretty much on
23 my boob.
24 THE COURT: Your right breast area.
25 THE WITNESS: Yes.

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1 THE COURT: Okay. Thank you.
2 MR. DIGIACOMO: And I was going to clarify that.
3 BY MR. DIGIACOMO:
4 **Q** So you have multiple gunshots to your upper
5 torso and head area essentially?
6 **A** Yes.
7 **Q** You go to the hospital, I'm assuming?
8 **A** Yes, I do.
9 **Q** And there is some pretty intensive treatment
10 that you had to go through?
11 **A** Yes.
12 **Q** During this time period that you are in the
13 hospital do the police come and speak to you about the
14 circumstances underlying the shooting that you recall?
15 **A** Yes. A detective came and talked to me.
16 MR. DIGIACOMO: May I approach?
17 THE COURT: Yes.
18 BY MR. DIGIACOMO:
19 **Q** Ma'am, I am showing you what has marked as
20 State's Proposed Exhibit No. 1, and ask if you can just
21 briefly look at that and ask you if that appears to be
22 the transcription of the brief interview that you were
23 able to give the police?
24 **A** That is it pretty much, yes.
25 MR. DIGIACOMO: I move to admit 1.

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1 MS. ERICKSON: No objection.
2 THE COURT: State's Exhibit 1 will be admitted
3 and you may publish.
4 MR. DIGIACOMO: Thank you.
5 (Whereupon, State's Exhibit 1 was
6 admitted into evidence.)
7 BY MR. DIGIACOMO:
8 **Q** Ma'am, I just want to briefly go over this. I
9 know it's quite short. I will just go through a couple
10 of questions for you. But essentially after the lead in
11 there is a question asked of you, What do you remember,
12 okay? And then you give an answer related to the
13 homicide, correct?
14 **A** Correct.
15 **Q** And then if you were to go through the rest of
16 these questions there is one paragraph of what happened
17 that morning and then ultimately a couple questions as to
18 sort of who did what; would that be fair?
19 **A** Yes.
20 **Q** In reviewing this transcript nobody ever asked
21 you about the background circumstances you knew about
22 Chinola, Smokey or why there would be a problem and why
23 they were inside your apartment; would that be fair?
24 **A** Yes.
25 MR. DIGIACOMO: I pass the witness, Judge.

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1 THE COURT: All right. Thank you.
2 Ms. Erickson, just out of curiosity for
3 scheduling purposes and my apologies that we started
4 later than expected, as you said you had time to prepare
5 for this witness. Any estimates that you might have for
6 how long your exam might be?
7 MS. ERICKSON: How long did I go with the last
8 witness?
9 THE COURT: I'm not sure.
10 MS. ERICKSON: I had no written notes for her
11 and I took that long. I have no idea. I have six pages
12 of notes.
13 THE COURT: The only reason I ask -- couple of
14 reasons, of course, I would say the same request that the
15 discussion be relevant to the purposes of Ms. Wantland
16 testifying today.
17 And from the notes that I created I have seven
18 bullet points of information that the State is seeking to
19 have admitted and related to and I will kind of summarize
20 them as we've just heard the testimony with the
21 circumstances with regard to this automobile, knowledge
22 of Mr. Villegas being in jail and what happened with that
23 circumstance, with the Walmart circumstance.
24 I, again, appreciate that you may have other
25 areas you wish to inquire but these are really the areas

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<p>1 that are relevant for the Court to determine whether the 2 State met its burden to show that it's relevant for trial 3 purposes the clear and convincing evidence and then 4 ultimately for the Court to determine prejudice versus 5 relevancy and that balance.</p> <p>6 So if we are going to be inquiring of the things 7 related to what Mr. DiGiacomo inquired of and related to 8 the Petrocelli hearing, I'm not sure where we have seven 9 pages of notes.</p> <p>10 MS. ERICKSON: I took them directly from 11 questions from what these facts are in the pleading. 12 They are all related to what's in this pleading. It's 13 all clarifying for purposes of showing whether it's clear 14 and convincing evidence what her memory is. I think that 15 is absolutely relevant to how does the Court decide 16 whether this is clear and convincing evidence.</p> <p>17 THE COURT: This is the difficulty that I have 18 then. I have a commitment, the Court has a commitment 19 from 12:00 to 1:30. I can potentially push that back but 20 I would need to take a brief break now in order to make 21 the communication to do that. It's an event that I 22 assured folks I would attend. I did not think that there 23 would be any difficulty in conflict.</p> <p>24 Obviously, if I had my druthers we would break 25 now and return after 1:30 but I don't want to do that to</p> <p style="text-align: right;">72</p>	<p>1 THE COURT: Well, I am not going to make my 2 obligation and that's why I'm taking the recess now to 3 get someone else to cover my obligation.</p> <p>4 MS. ERICKSON: Whatever the Court -- 5 THE COURT: State's preference? 6 MR. DIGIACOMO: Whatever the Court wants to do. 7 I am not sure -- I am certainly going to be objecting 8 more than Ms. Wong did if we start asking questions about 9 all kinds of stuff, but, obviously, the Court's pleasure. 10 Whatever the Court wants to do.</p> <p>11 THE COURT: I am going to give some leeway for 12 Ms. Erickson to have inquires surrounding the information 13 that is relevant to the Petrocelli hearing as well, but I 14 think where Ms. Wong objected before in the prior 15 witness' testimony and about other individuals and their 16 relationships of those individuals, certainly that is 17 outside the scope.</p> <p>18 But let me take a brief recess. If I can make 19 it less than ten minutes I'll do it. I just don't know 20 how long it will take me to reach people and do that, so 21 why don't we just plan on a ten-minute break and if 22 everybody is still close by we will get started sooner 23 rather than later.</p> <p>24 So we'll take a ten-minute break and resume 25 then.</p> <p style="text-align: right;">74</p>
<p>1 everybody because we have quite a few folks that are here 2 and I don't want to do that to Ms. Wantland or 3 Ms. Cabrera or anybody since you have not necessarily 4 been able to estimate.</p> <p>5 If we thought we were going to finish somewhere 6 around 12:15, 30 minutes, 45 minutes from now then I 7 would say let's just go forward. If not I have to take 8 about a ten-minute recess and then we'll just have to go 9 through the lunch hour, which, again, is not what I had 10 hoped to do but I would have to find ways to cover my 11 obligation.</p> <p>12 MS. ERICKSON: And I appreciate all that. And 13 when I spoke with your clerk this morning not knowing 14 there was going to be two witnesses I told her that I 15 thought we would be done by noon for sure. But I thought 16 that would all be covered but we had a new witness that I 17 didn't know anything about, so that is the reason that I 18 went outside my parameters of what I thought would 19 happen.</p> <p>20 THE COURT: I am not blaming anybody. I am just 21 trying to understand when we might complete.</p> <p>22 MS. ERICKSON: Well, Judge, I think probably the 23 best way to deal with it is to take a ten-minute recess 24 and then stay until it's done. We will be done before 25 1:30.</p> <p style="text-align: right;">73</p>	<p>1 (Whereupon, a recess was taken.) 2 THE COURT: May we have Ms. Wantland back on the 3 stand. 4 If you can just please acknowledge for the 5 record that you understand that you are still under oath? 6 THE WITNESS: Yes. 7 THE COURT: Thank you. And, of course, as 8 Ms. Erickson is asking the questions and we did not have 9 too much difficulty with this but just please make sure 10 that she has completed the question and make sure that 11 you listen to hear if there is any objection coming form 12 the other side, let me rule on that objection before you 13 answer. 14 If there is no objection obviously go ahead and 15 answer to the best of your ability, but let's try to keep 16 to at minimum talking over each other, okay? 17 THE WITNESS: Okay. 18 THE COURT: Ms. Erickson, whenever you are 19 ready. 20 MS. ERICKSON: Thank you. 21 22 CROSS-EXAMINATION 23 BY MS. ERICKSON: 24 Q Good afternoon, Ms. Wantland. 25 A Good afternoon.</p> <p style="text-align: right;">75</p>

1 **Q** I represent Ivonne Cabrera. Do you know Ivonne
2 as Ivonne or do you know her be her nickname?
3 **A** I know her by Chinola not Ivonne.
4 **Q** Chinola?
5 **A** Yes.
6 **Q** So we will refer to her as Chinola because that
7 is the name you know her by.
8 **A** Okay.
9 **Q** You began your testimony by testifying that you
10 were living in Miguel's apartment?
11 **A** Correct.
12 **Q** When did you start living there?
13 **A** I don't exactly recall the month. I was only
14 there maybe for I think at the most two months maybe.
15 **Q** So taking the day that you got shot, April 26th,
16 backwards, you figure it was about two months?
17 **A** Yeah, about.
18 **Q** About.
19 **A** Yes.
20 **Q** I am not going to tie you down.
21 And how long had you known Miguel?
22 **A** I had known Miguel for about maybe two months
23 before that. Not too long.
24 **Q** So two months before moving in, so about four
25 months before the shooting?

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1 **A** Correct.
2 **Q** When we talk about you living at the apartment
3 that means you and James or did you live there without
4 James at any point?
5 **A** It was me and James to start with.
6 **Q** Then you testified that Miguel was arrested
7 probably around April 16th, give or take?
8 **A** Correct.
9 **Q** How did you learn Miguel had been arrested?
10 **A** Miguel called me like when he was getting --
11 because he got pulled over -- he called me before he had
12 actually got arrested and went to jail because he wanted
13 me to come in and pick up his truck. He was literally
14 right down the street I think right past Lake Mead, so I
15 walked down there and got his truck, but that's how I
16 found out he was going to jail.
17 **Q** So he called you on a cell phone?
18 **A** Yes.
19 **Q** What cell phone was it?
20 **A** He called me on his cell phone and I can't
21 exactly remember what phone that I was on that he had
22 contacted me on.
23 **Q** You had a phone in your possession?
24 **A** I believe so, yes. I don't think he called me
25 on any other phone. I had to have talked to him somehow

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1 on somebody's phone.
2 **Q** And you walked down because you went there and
3 you picked up his truck?
4 **A** Correct.
5 **Q** And you drove the truck back to the apartment?
6 **A** Correct.
7 **Q** And it stays there for how long?
8 **A** About two days and then his parents came to pick
9 it up.
10 **Q** Okay. And then you testified that you talked to
11 Miguel once or twice while he was in the jail?
12 **A** Correct.
13 **Q** And the jail that he was in was CCDC?
14 **A** It was North Las Vegas.
15 **Q** Oh, North Las Vegas. And then he released his
16 property to you?
17 **A** Correct.
18 **Q** And that contained his wallet with the
19 unemployment card?
20 **A** Right.
21 **Q** And then you testified that you pulled money off
22 the unemployment card every week to give to the landlord
23 to keep the apartment?
24 **A** Correct.
25 **Q** How much was the monthly rent for the apartment?

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1 **A** At the time he had some kind of deal with the
2 landlord but the landlord had mentioned to me that he
3 needed I think 250 just to up keep it or whatever, and I
4 only had 180.
5 **Q** Was there enough money on Miguel's card every
6 month or the month that he was gone to pay?
7 **A** I don't believe that the landlord accepted the
8 180 at the time. He really didn't tell me why or
9 anything. He just didn't say anything really. He just
10 didn't accept the 180. He did not tell us we had to go
11 or anything. I don't know if he was planning on letting
12 him stay there or not.
13 **Q** And just to clarify, you tried to pay him 180
14 from the card?
15 **A** Correct.
16 **Q** Then you testified that Erik, Melissa and
17 Chinola moved into the apartment and this was before
18 Miguel was arrested?
19 **A** No. It was not before Miguel was arrested.
20 **Q** So after Miguel was arrested then Erik and
21 Melissa moved in?
22 **A** No. It was Erik, Melissa and Chinola all at
23 once when they did move in Chinola brought Erik and
24 Melissa. They did not come on their own.
25 **Q** And Miguel's old bedroom was the same one that

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1 Erik and Melissa was living in?
2 **A Correct.**
3 **Q** And you testified that Miguel had told you that
4 he had had a problem with Chinola before he went to jail?
5 **A Before he went to jail he had mentioned to me**
6 **that she had lived with him in the past. I don't know**
7 **how long before or whatever and he didn't tell me what**
8 **kind of problem he had or what happened. He just**
9 **mentioned that they had a problem and she ended up moving**
10 **out. That's all he told me though.**
11 **Q** Okay.
12 MS. ERICKSON: May I approach the witness,
13 Judge?
14 THE COURT: You may.
15 BY MS. ERICKSON:
16 **Q** I am showing you what has been marked as
17 Defendant's Exhibit E. Have you ever seen -- this was in
18 the middle of a motion. Have you ever seen those pages
19 that start with "Facts leading up to shooting"?
20 MR. DIGIACOMO: I object to Ms. Erickson showing
21 a motion in this department to the witness and asking her
22 to read it.
23 MS. ERICKSON: I did not ask her to read it. I
24 asked her if she had ever seen it. I am trying to find
25 out if she adopted these words in the motion or not.

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1 THE WITNESS: Starting from where?
2 THE COURT: Hold on a second. Let's figure out
3 what we're doing. This is the State's motion. We
4 certainly would know whether or not they would have shown
5 it to her or not, but I really think that your questions,
6 Ms. Erickson, can go to these facts, but this seems to me
7 to be not very beneficial. I'm not sure what the goal of
8 it is ultimately.
9 MS. ERICKSON: There were some facts that were
10 testified to today that are in there but there are some
11 facts that are in there that are left out today, so I am
12 just trying to find out where this is coming from and
13 what we're dealing with.
14 MR. DIGIACOMO: Well, probably because the
15 motion was written by Mr. Staudaher, but either way we
16 don't show witnesses our motion. I cannot imagine the
17 witness was ever shown the Motion that was drafted up and
18 it's improper for her to now be showing the witness the
19 Motion and saying she can ask questions later.
20 THE COURT: Ms. Erickson, I am going to sustain
21 the objection. We know for a fact that it would have
22 been highly unusual if Mr. Staudaher or Ms. Wong would
23 have shown the witness at this time the Motion as
24 drafted. I am not suggesting that they wouldn't have
25 discussed these facts and circumstances with her but

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1 since certain testimony was elicited today but there's
2 certain information in the Motion that had not been
3 elicited today, it's up to you whether you go further to
4 inquire of those things and elicit that testimony I think
5 or not.
6 It is potentially fair game if it's in the
7 motion. But the Court is here to determine whether or
8 not anything that has been asserted have been proven by
9 clear and convincing evidence. If they didn't inquire of
10 it and I don't have an affidavit then I don't see how we
11 are finding those things by clear and convincing
12 evidence.
13 MS. ERICKSON: No. As you began your statement,
14 It would be highly unusual for the witness to have been
15 shown it. All I'm asking is if she was shown it.
16 THE COURT: I know but that is not all you did.
17 You didn't ask her and put it up on the Elmo with the
18 caption page. You are showing the actual facts and
19 asking her to read them.
20 MS. ERICKSON: No. I never said read, Judge. I
21 said, Have you ever been shown this? That's all I said.
22 I didn't say read it.
23 THE COURT: Regardless of however you asked it.
24 I am not trying to find fault here. Ms. Wantland was
25 reading it and I think Mr. Digiacomo's objection was a

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1 fair one.
2 Ms. Wantland, just to clear up the record if
3 there's any confusion; did you have an occasion to read
4 the Motion that the State filed prior to its being filed
5 or after it was filed, frankly. Have you had a chance to
6 actually read the Motion the State submitted?
7 THE WITNESS: I have never seen that information
8 on that paper.
9 MS. ERICKSON: That is all I was asking.
10 THE COURT: Okay. Again, I think the question
11 appeared to be to the Court broader and could have taken
12 us down a road that we just didn't need to go.
13 Again, Ms. Erickson, to the extent that you want
14 to inquire of any information that's in the Motion that
15 has not been elicited in terms of sworn testimony for the
16 witness today, you are certainly welcome to do that but
17 the Court has been taking notes and following that
18 testimony as well.
19 MS. ERICKSON: Okay.
20 BY MS. ERICKSON:
21 **Q** So I think you testified, and I'm not sure, my
22 notes say that you may have testified that -- did James
23 tell Ivonne that Miguel was in jail?
24 **A Yes, he did.**
25 **Q** When did that happen?

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1 **A Probably about a day or two after he went to**
2 **jail.**
3 **Q** And where did that occur?
4 **A Over the phone I believe.**
5 **Q** So it was a verbal statement?
6 **A I believe so. I mean I wasn't present at the**
7 **time he said anything but he told me that he had talked**
8 **to her over the phone.**
9 **Q** When did he tell you he talked to her over the
10 phone?
11 MR. DIGIACOMO: Objection. Hearsay. I know we
12 have all been somewhat lax on this but this is not the
13 discovery motion. Objection. Hearsay.
14 THE COURT: Well, okay. We did allow some
15 testimony to be elicited of what folks have said. We
16 certainly could hear if there's a hearsay exception.
17 Do you have an exception that you wanted to
18 assert, Ms. Erickson?
19 MS. ERICKSON: The question was what day because
20 the same day other things occurred. I am just trying to
21 identify --
22 THE COURT: But you did ask her to say what he
23 said. And I am just wondering do you want to rephrase
24 the question or do you have a hearsay exception you want
25 to proffer.

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1 MS. ERICKSON: No. I do believe I asked what
2 did he say or what day did he say.
3 THE COURT: I will allow you to rephrase or
4 reask.
5 BY MS. ERICKSON:
6 **Q** When did James tell you that he told Ivonne that
7 Miguel was in jail?
8 MR. DIGIACOMO: Objection. Now we are assuming
9 a ton of facts not in evidence because the hearsay
10 objection was sustained.
11 THE COURT: Sustained.
12 BY MS. ERICKSON:
13 **Q** You said that James told you that he a
14 conversation with Ivonne?
15 **A Yes.**
16 **Q** What date was that?
17 **A I can't recall exactly what date it was. It**
18 **couldn't have been no more than Miguel had went to jail.**
19 **Q** So around the same time frame?
20 **A Like maybe the 18th or 19th.**
21 **Q** Which was around the same time frame that you
22 testified James involved Loca and Ivonne in the Walmart
23 scam, right?
24 **A Correct.**
25 **Q** Same time frame, okay. The day that you learned

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1 that James had had the conversation with Ivonne did you
2 -- where were you when you learned this?
3 **A I believe I was at the apartment.**
4 **Q** Later that day did you go to a friend's house?
5 **A The same day that he told me that he talked to**
6 **Chinola?**
7 **Q** Correct.
8 **A I don't believe so.**
9 **Q** Okay. So the taking of the keys -- well, the
10 going over to -- where were your keys and where were you
11 when you noticed them missing?
12 **A I was at Jan's house where James had brought it.**
13 **Q** That was not the same day?
14 **A No. I don't believe so.**
15 MR. DIGIACOMO: I'm sorry. Not the same day as
16 what?
17 MS. ERICKSON: Not the same day that James told
18 her that he had a conversation with Chinola was my
19 question.
20 MR. DIGIACOMO: But it is the same day as the
21 Walmart, right? I'm sorry. I'm just very confused at
22 this moment.
23 THE COURT: We are in a line of questioning and
24 it is understood that question related to certain things
25 but if we could just be more precise for the record. I

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1 have no problem with those clarifications obviously.
2 BY MS. ERICKSON:
3 **Q** Just to clarify, James told you he talked to
4 Chinola during the time frame that this occurred
5 somewhere between April 19th or 20th the same time as the
6 Walmart scam?
7 **A Correct.**
8 **Q** And then becoming involved, correct?
9 **A Correct.**
10 **Q** So same time frame. And the day that James
11 informed you of this was not the day that you were over
12 at Jan's when your keys were supposedly missing?
13 **A No. It was not the same day because the same**
14 **day that James had informed me it was before we went to**
15 **the Walmart and the day that we went to the Walmart was**
16 **the day that we ended up going over to Jan's house.**
17 **Q** Now you testified about the Walmart issue. You
18 stated that James involved Chinola and Loca?
19 **A Correct.**
20 **Q** Were you present when he got them involved?
21 **A No, I was not.**
22 **Q** So how did you know they became involved?
23 **A I'm pretty sure that he did it, like I said,**
24 **over the phone when he told her that Miguel was in jail.**
25 **I'm pretty sure he arranged getting a ride and everything**

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1 that same time. I'm not exactly sure.
2 Q And then so he arranged Chinola to pick him up?
3 A Yes.
4 Q And then she came and picked up you and James?
5 A Correct.
6 Q And who was in the car with Chinola?
7 A It was Chinola and Loca.
8 Q Who is Chinola?
9 A Who is Chinola? The one sitting right there.
10 Q I'm sorry. Who was the other person in the car?
11 A As far as I know it was Smokey's sister. That's
12 all I know about her.
13 Q Smokey's sister?
14 A Yes.
15 Q And her name was?
16 A Loca.
17 Q How long had James been involved in this dealing
18 of computer of computer games and returning them?
19 A This started before he met Miguel and he had
20 been doing it for a while.
21 Q And your testimony was the way that the scam
22 worked was James stole the computer games and then he had
23 other people return them --
24 A For store credit.
25 Q -- with IDs?

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1 A Correct.
2 Q And you said you did this once?
3 A Yes.
4 Q In all the entire time that James was doing this
5 you did it once?
6 A Correct because you are only allowed a certain
7 amount of returns on your ID every so many months or
8 whatever.
9 Q And the day that James and you and Chinola were
10 in the car and went to the Walmart, which Walmart?
11 A There was like three different Walmart's that we
12 went to. I can't exactly recall the cross streets on
13 them. I want to say that there was one on Rainbow maybe
14 and 215, but I'm not sure which ones we went to, how far
15 out we went.
16 Q You went to three, maybe one at Rainbow and 215.
17 Any idea of where the other two? Northwest? Southwest?
18 Downtown?
19 A I really don't remember. There is only so many
20 Super Walmart's. It was a Super Walmart, I know that
21 much. It was not a small one. None of them were.
22 Q Would that be the one at 215 or was that a
23 different one?
24 A We went to about two or three of them. I don't
25 remember which ones but they were Super Walmart's not

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1 little Walmart's.
2 Q So all were Super Walmart's?
3 A Yes.
4 Q Now you said that Chinola returned a game that
5 day?
6 A I can't remember if they actually returned
7 anything or if she was just driving with Loca. I want to
8 say that one of them made a return but I don't know. I
9 don't remember.
10 Q One of them. You mean one of the two between
11 Loca and Chinola?
12 A Yes.
13 Q But you don't know for sure?
14 A I can't remember.
15 Q So other than you believing that Chinola might
16 have returned a game and she drove the car to the three
17 different places, did she do anything else with regard to
18 this scam anytime that day?
19 A The only other thing was involved that same day
20 was when -- actually, you know what, there really wasn't
21 anything else. She was just the driver of the Walmart's
22 pretty much.
23 Q And later this day that she was driving you
24 around to the Walmart, did James purchase 3.5 grams of
25 methamphetamine?

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1 A Yes, he did. I believe that was the only other
2 thing that we went to go do right after that, that she
3 drove to and that was it.
4 Q And you said that we went to go do after that.
5 So was it all four people in the car?
6 A Chinola, Loca, me and James, correct.
7 Q Where did you go to?
8 A We went to honestly pick up the 3.5 grams. It
9 was like behind -- whatever person it was, I don't know
10 who it was, we met him behind a random store. Wherever
11 the location where they decided, Loca and whoever she was
12 talking to decided. I don't know who that person was
13 that she was talking to.
14 Q So Loca set up the buy?
15 A Correct.
16 Q She made the phone call to the person?
17 A Correct.
18 Q It was not Ivonne?
19 A No.
20 Q So the dealer was one of Loca's people?
21 A Correct.
22 Q So everyone that was in the car was present when
23 the drugs got picked up?
24 A Correct.
25 Q Turning to the theft of Miguel's tools. That

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1 day that you came home from Jan's house and the place was
2 ransacked, everything was missing or it was turned upside
3 down or what was it?
4 **A It was turned upside down. Like everything was**
5 **misplaced besides our room but all the tools and**
6 **everything was pretty much gone. Everything was out of**
7 **place. You can tell somebody went through it.**
8 **Q** And when you say all the tools were gone, where
9 had the tools been located?
10 **A They were sitting in -- they were all sitting in**
11 **the closet in the hallway between the two bedrooms.**
12 **Q** Showing you what has been marked and admitted as
13 Exhibit A. If you look on Exhibit A is the closet that
14 is in between the northeast and southeast room or in the
15 closet on the other side closer to the bathroom?
16 **A The one that is directly on the same side and in**
17 **between the two bedrooms.**
18 **Q** So that is where all the tools were?
19 **A Correct.**
20 **Q** And your bedroom was the northeast bedroom?
21 **A Correct.**
22 **Q** Behind your bedroom was sort of a dirt yard
23 area?
24 **A Correct. It was like a back whatever. It was**
25 **like a walkway that went all the way through from the**

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1 **front to the back of the apartment building.**
2 **Q** And then behind where your bedroom window was
3 there was no walkway?
4 **A There was not like a concrete walkway but it was**
5 **wide enough where somebody could walk.**
6 **Q** So there was a fence somewhat out from your
7 apartment that divided that property from the next
8 apartment building?
9 **A Correct.**
10 **Q** And the walkway, the area behind the wall of
11 your apartment and that fence was enough for a person to
12 walk through?
13 **A Correct.**
14 **Q** So the Walmart and the drug obtaining day was
15 that the same day that you went to Jan's apartment?
16 **A That we were at Jan's that same day -- we had**
17 **been to Jan's I think like twice but we were at Jan's**
18 **that same day, yes, as the Walmart day and the pickup.**
19 **Q** So we have Jan's house on to Walmart on to drug
20 pickup back to Jan's house?
21 **A Correct. I believe that is how it went.**
22 **Q** So how much time in between that day and being
23 at Old Man Jim's house, how much time in between those
24 two incidents?
25 **A Probably like three or four days.**

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1 **Q** So the Walmart -- well, Old Man Jim's was the
2 night before the shooting?
3 **A Correct.**
4 **Q** So progress is Walmart and then Jan's, Old Man
5 Jim's house and then the day of the shooting?
6 **A For the most part, yes.**
7 **Q** Where was Old Man Jim's house located at?
8 **A The main streets were off of North Fifth and**
9 **Lake Mead.**
10 **Q** And it was at Old Man Jim's house that -- who
11 was there when you were there?
12 **A When I walked in it was obviously me and Chinola**
13 **was sitting there with Jan and Trigger and Old Man Jim.**
14 **Q** And James came with you?
15 **A No, he did not. He was at the apartment.**
16 **Q** How did you get there?
17 **A I rode my bike.**
18 **Q** And you testified that Chinola told you Loca was
19 going to get James?
20 **A Right.**
21 **Q** She didn't say Loca and I are going to get
22 James?
23 **A She said Loca was going to get James.**
24 **Q** And did Chinola say why she was saying that Loca
25 was going to get James?

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1 **A She had mentioned that when she and Loca drove**
2 **us around to like the different Walmart's she was**
3 **mentioning how hot it was outside and how long it took,**
4 **it took a couple of hours, and that her and Loca deserved**
5 **more than what they got out of the 3.5 grams. And I**
6 **think it was over -- well, the unemployment card**
7 **obviously.**
8 **Q** So she said Loca was going to get James. She
9 didn't say James and I but you said she was complaining
10 about how much she and Loca received that day for the
11 driving around?
12 **A I believe it was what she received because I**
13 **believe she was the one who made the exchange with James,**
14 **like out of the 3.5 grams. At the very end of her**
15 **payment I believe it was just her. I don't think Loca**
16 **was there.**
17 **Q** Going back to the Walmart day, we have it down
18 that you were at Jan's then you went to Walmart, then you
19 picked up the drugs and you went back to Jan's?
20 **A Yes. I believe that is how it went.**
21 **Q** Did you happen to go to Loca's apartment instead
22 of Jan's maybe?
23 **A No.**
24 **Q** And then during the conversation about Loca
25 going to get James, the unemployment card and -- did

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<p>1 Chinola also complain that she had not received money</p> <p>2 from James for tools she had sold him?</p> <p>3 A Not from James. I had heard her mention that</p> <p>4 but that was about Erik.</p> <p>5 Q So what tools was she selling to Erik?</p> <p>6 A I assumed it was the tools she had gotten out of</p> <p>7 the apartment but she didn't say that. She was just</p> <p>8 complaining about Erik not paying her for the tools that</p> <p>9 she gave him.</p> <p>10 Q Do you know how much Erik was supposed to pay</p> <p>11 for the tools?</p> <p>12 A No, I do not.</p> <p>13 Q Now you are aware that Erik borrowed a car from</p> <p>14 Chinola?</p> <p>15 MR. DIGIACOMO: Objection. Foundation.</p> <p>16 MS. ERICKSON: Well, are you aware -- and if she</p> <p>17 says no then there is no foundation --</p> <p>18 THE WITNESS: That Erik borrowed the car or that</p> <p>19 Chinola borrowed the car from Erik?</p> <p>20 MS. ERICKSON: Okay. We'll do it the opposite</p> <p>21 way.</p> <p>22 BY MS. ERICKSON:</p> <p>23 Q Are you aware that Chinola borrowed a car from</p> <p>24 Erik?</p> <p>25 A Yes.</p> <p>96</p>	<p>1 Q Did you know or believe that Erik, that that car</p> <p>2 that he lent Chinola was his car?</p> <p>3 A No, I didn't know.</p> <p>4 THE COURT: You didn't know or you didn't</p> <p>5 believe it was because it was asked both ways.</p> <p>6 THE WITNESS: As far as what he told me he said</p> <p>7 it was his car but I don't know for a fact like if it was</p> <p>8 registered as his car.</p> <p>9 THE COURT: Understood.</p> <p>10 BY MS. ERICKSON:</p> <p>11 Q And when did you see Erik the first time with</p> <p>12 this car?</p> <p>13 A The first day that him and Melissa came to the</p> <p>14 house I seen the car sitting outside but that's about it.</p> <p>15 Q And how long were Erik and Melissa staying at</p> <p>16 the apartment before the shooting?</p> <p>17 A Probably two or three days. Not very long at</p> <p>18 all.</p> <p>19 Q With regard to the shooting you said that James</p> <p>20 told you that Erik's car must have come back because he</p> <p>21 had heard something?</p> <p>22 A Correct. The morning of the shooting that's</p> <p>23 when he woke up and said, Erik's car must be back. That</p> <p>24 is exactly what came out of his mouth -- or he said</p> <p>25 Smiley not Erik.</p> <p>98</p>
<p>1 Q Do you know why she borrowed it?</p> <p>2 A No, I do not. The reason was not given to me.</p> <p>3 I just know that she borrowed it from Erik.</p> <p>4 Q So you weren't present when Erik and Chinola</p> <p>5 talked about her borrowing his car?</p> <p>6 A No.</p> <p>7 Q And you were not aware that that was not his</p> <p>8 car?</p> <p>9 MR. DIGIACOMO: Well, objection. Assumes facts</p> <p>10 not in evidence.</p> <p>11 THE COURT: Overruled. I think the question</p> <p>12 could be more clear though.</p> <p>13 You are stating a question with a fact that we</p> <p>14 have not had put forward but I think what you are trying</p> <p>15 to get at is what she knew about who owned the car or</p> <p>16 whether or not Erik owned the car.</p> <p>17 Go ahead.</p> <p>18 BY MS. ERICKSON:</p> <p>19 Q You know Erik let Chinola borrow a car?</p> <p>20 A Yes.</p> <p>21 Q Do you know -- and you don't know why?</p> <p>22 A No, I don't.</p> <p>23 Q Were you present during the conversation between</p> <p>24 Erik and Chinola about the car?</p> <p>25 A No.</p> <p>97</p>	<p>1 Q And then the next thing you testified is James</p> <p>2 said he heard a knock on the door, the front door?</p> <p>3 A No, no. It was the bedroom door because we were</p> <p>4 sleeping still.</p> <p>5 Q Right.</p> <p>6 A He didn't say that he heard a knock on the door</p> <p>7 and he got up and answered the door.</p> <p>8 Q So when you are saying answered the door you are</p> <p>9 talking about your bedroom door?</p> <p>10 A The bedroom door, yes.</p> <p>11 Q Because nobody went out in the living room to</p> <p>12 answer the front door?</p> <p>13 A No.</p> <p>14 Q Did not go to the front door?</p> <p>15 A No.</p> <p>16 Q So he got up to open the door?</p> <p>17 A Correct.</p> <p>18 Q And he opened it?</p> <p>19 A Correct.</p> <p>20 Q Your door opens -- well, showing you what has</p> <p>21 been admitted as Defense C. Does this look like a</p> <p>22 diagram of the room that you were staying in while you</p> <p>23 were at Miguel's apartment?</p> <p>24 A It does.</p> <p>25 Q And would you say that it does depict that this</p> <p>99</p>

<p>1 is the bedroom door, that half circle there? Would that 2 be where the bedroom door was located? 3 A Correct. 4 Q And would the square be located where your bed 5 was? 6 A Correct. 7 Q So your door did it open inward? So if I was 8 standing outside your bedroom door, would I open the 9 bedroom door in and if you on the inside you would open 10 it in? 11 A Correct. 12 Q So James went to the door. Had you heard any 13 shooting before this? 14 A No. 15 Q So the only thing you heard was James getting up 16 to the door? 17 A Correct. 18 Q Because you did not hear a knock? 19 A I did not. 20 Q And you did not hear anyone saying anything? 21 A No. 22 Q Nobody said, Open the door, it's me? 23 A Not that I can remember, no. 24 Q Because you were sleeping? 25 A Correct.</p> <p style="text-align: right;">100</p>	<p>1 A Yes. 2 Q Then you said you saw Chinola. Where was 3 Chinola located on that diagram? 4 A Here (indicating). 5 Q So your testimony is that she was in the middle 6 of the doorway approximately? 7 A Correct. I seen like this much from here 8 (indicating) the front of her face. 9 Q All right. So when you say "this much" does 10 that cover the chin, the nose, the forehead? 11 A I just seen the front of her face. Like I know 12 who it was. 13 Q You saw a part of her face? 14 A Right. 15 Q And that part goes forward from the ear and 16 cheek area? 17 A Right. 18 Q Was Chinola facing the wall when you saw her? 19 A She was facing the same way Smokey was, which 20 was if you were to walk in the doorway it was facing the 21 opposite wall. 22 Q So she was facing the wall? 23 A Correct. 24 Q And then Smokey had to turn and face you in the 25 bed because he shot you?</p> <p style="text-align: right;">102</p>
<p>1 Q And you woke up and you woke up because James 2 was getting out of bed? 3 A Correct. 4 Q And then the door opened inward, you were still 5 in the bed? 6 A Correct. 7 Q Which side of the bed do you sleep on? 8 A I was next to the wall. 9 Q And then Smokey came in? 10 A Correct. When the door opened Smokey came in. 11 Q Okay. So he walks in. Where did he -- well, 12 let me bring it up. If you are looking at the room and 13 Smokey walks in you see the 5 and the 6; where was he 14 standing when he came in? 15 A He was standing pretty much in front of the door 16 but maybe, like, half a foot in, or he took only a couple 17 steps inside the door. He was not like closer to my bed 18 or anything. He was in line with the bedroom door but he 19 took a couple steps in. 20 MS. ERICKSON: May I approach, Judge? 21 THE COURT: You may. 22 BY MS. ERICKSON: 23 Q I am using Exhibit C. Could you use the blue 24 pen and mark an X where Smokey was when he came in your 25 room. Did he stay at that place?</p> <p style="text-align: right;">101</p>	<p>1 A Yeah -- well, he was facing James first and then 2 after he shot James he was facing me. 3 Q Then I guess I need to find out where James was 4 when Smokey was in the room at the X. Can you put a J 5 where he was. 6 A (Witness complies.) 7 Q Could you put your initials on the bed where you 8 were. 9 A (Witness complies.) 10 Q Put AW and then make the J "JH" for clarity. 11 A (Witness complies.) 12 Q Thank you very much. 13 A Uh-huh. 14 Q Just so the record is clear, Smokey came into 15 the room to about the point where you put the X? 16 A Correct. 17 Q Chinola was standing in basically the door area 18 and you saw half of her face? 19 A Correct. 20 Q James was standing over where the JH is? 21 A Correct. 22 Q Smokey turned and looked -- when Smokey first 23 walked in he was looking at the wall and he turned and 24 looked at James? 25 A Correct.</p> <p style="text-align: right;">103</p>

<p>1 Q And Chinola never looked anywhere but at the</p> <p>2 wall because you only saw her for a second?</p> <p>3 A Correct.</p> <p>4 Q Now this is occurring at like about 5:00, 5:55</p> <p>5 in the morning. Were there lights on? Was it dark in</p> <p>6 the room? What was the lighting?</p> <p>7 A There were no lights on in the room. But I mean</p> <p>8 there was daylight coming in through the window because</p> <p>9 the window was not shut.</p> <p>10 Q And I think your testimony was that Chinola</p> <p>11 stepped into the room and I think we have that marked on</p> <p>12 C. And then you said she stepped in the room and stepped</p> <p>13 out?</p> <p>14 A Yes.</p> <p>15 Q And this all occurred before the shooting?</p> <p>16 A Directly before the shooting.</p> <p>17 Q But she was back out when the shooting occurred?</p> <p>18 A Right.</p> <p>19 Q And you said you didn't hear any other shooting</p> <p>20 before this?</p> <p>21 A Correct.</p> <p>22 Q Did you hear any noise in your bathroom?</p> <p>23 A No.</p> <p>24 Q Did you hear any speaking or knocks anywhere</p> <p>25 else?</p> <p style="text-align: right;">104</p>	<p>1 with two police people, a detective and a woman?</p> <p>2 A I believe so. Honestly, when I first got to the</p> <p>3 hospital I can't remember.</p> <p>4 Q But you may have been spoken to by a woman?</p> <p>5 A May have, yes.</p> <p>6 Q And then you did speak with a detective when you</p> <p>7 were in the hospital?</p> <p>8 A Correct.</p> <p>9 Q And the State's document was all the questions</p> <p>10 you were asked and answered?</p> <p>11 A Yes. Correct.</p> <p>12 Q Very short, correct?</p> <p>13 A Correct.</p> <p>14 Q Did you meet with anyone from the police</p> <p>15 department anytime between April 26th and September 3rd?</p> <p>16 Did you meet with anyone or speak to anyone on the phone</p> <p>17 about this incident?</p> <p>18 A Anybody else other than like the DA or --</p> <p>19 Q Well, I will clarify. I'm just asking the</p> <p>20 general question. Did you speak to anybody about the</p> <p>21 shooting between the detective when you made that short</p> <p>22 statement and September 3rd?</p> <p>23 A Yes.</p> <p>24 Q Who did you speak to?</p> <p>25 A I spoke to the DA. I spoke to the detective.</p> <p style="text-align: right;">106</p>
<p>1 A No.</p> <p>2 Q And you heard Smokey say, Where is the</p> <p>3 unemployment card?</p> <p>4 A His exact words were, You got the unemployment</p> <p>5 card, is what he said exactly.</p> <p>6 Q And James responded?</p> <p>7 A He responded. He said, No. And then I believe</p> <p>8 he started to say, I cut it up, but he only got about</p> <p>9 half way through that part of the sentence and that is</p> <p>10 when Smokey shot him.</p> <p>11 Q And Smokey shot him and then shot you?</p> <p>12 A Correct.</p> <p>13 Q And Chinola was not in the room when the</p> <p>14 shooting occurred?</p> <p>15 MR. DIGIACOMO: Objection. Asked and answered</p> <p>16 seven times.</p> <p>17 THE WITNESS: I did not see Chinola in the room.</p> <p>18 THE COURT: Hold on, Ms. Wantland. As I</p> <p>19 mentioned earlier that if there is an objection I need to</p> <p>20 rule on it.</p> <p>21 It has been asked and answered, Ms. Erickson. I</p> <p>22 will go ahead and sustain the objection.</p> <p>23 MS. ERICKSON: Okay. That's fine.</p> <p>24 BY MS. ERICKSON:</p> <p>25 Q When you were at the hospital you saw and spoke</p> <p style="text-align: right;">105</p>	<p>1 The FBI actually called my brother's house one time. And</p> <p>2 then I talked to the new DA that took over the case.</p> <p>3 Q So the DA that you first met then would be</p> <p>4 Michael Staudaher?</p> <p>5 A Yes.</p> <p>6 Q And in comparison to September 3rd, going</p> <p>7 backwards do you know -- well, how many conversations did</p> <p>8 you have with him, and I'm talking about the facts, like</p> <p>9 how this occurred and what do you remember?</p> <p>10 A For the most part I believe the only time that</p> <p>11 he really questioned me on facts is the day at the</p> <p>12 hospital when I gave him my oral statement.</p> <p>13 Q The police officer?</p> <p>14 A The detective.</p> <p>15 Q And then what about the DA, Mike Staudaher?</p> <p>16 A Mike Staudaher, I met with him I think once and</p> <p>17 I explained to him the situation of what had happened and</p> <p>18 that was it.</p> <p>19 Q But do you remember that to be September 3rd?</p> <p>20 A No. I don't remember exactly what date that</p> <p>21 was.</p> <p>22 Q Was it close in time to when we were getting</p> <p>23 ready for trial? Were you told that the trial was going</p> <p>24 forward at that time that you met with him?</p> <p>25 A It had to have been around the same time frame.</p> <p style="text-align: right;">107</p>

1 Usually when they subpoena me they subpoena me through my
2 e-mail, so I don't know exactly when it was that I met
3 with him or how close it was to the time of the trial.
4 Q Okay. And when you met with Mr. Staudaher and
5 talked to him about the facts who else was present?
6 A I believe it was just him and that was it.
7 Q Only person in the room was you and him?
8 A I can't exactly remember. But I know it was him
9 and there might have been somebody else. I'm not sure.
10 Q How long do you think you met with him?
11 A How long after the shooting?
12 Q No. During that meeting where you talked about
13 the facts; how long did the meeting last?
14 A Maybe about an hour.
15 Q Was there a recorder? Did you see an audio
16 recorder there?
17 A I didn't see anything like that, no.
18 Q What about a video recorder?
19 A I don't believe so.
20 Q On April 26th the day of the shooting, did you
21 have a cellular phone?
22 A I don't believe I did.
23 Q Did James have one?
24 A I don't believe so. Honestly, I can't remember
25 if either one of us did.

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1 Q What about Erik, did he have one that you knew
2 of?
3 A I really don't know.
4 Q I assume that you don't know about Ashley
5 either?
6 A You mean Melissa?
7 Q I mean Melissa.
8 A No, I don't.
9 Q And then the date of the Walmart incident where
10 you picked up the drugs from Loca's source and then went
11 to Jan's, did you guys smoke it that day?
12 A At Jan's, yes.
13 Q Who was there?
14 A I believe that was the night that I met -- that
15 Chinola brought Smokey over to Jan's house because that
16 is when we were all smoking, I'm pretty sure.
17 Q I'm sorry. I missed who brought Smokey over?
18 A Chinola.
19 Q Chinola.
20 MS. ERICKSON: That is all I have. Thank you so
21 much.
22 THE COURT: Mr. Digiacomo.
23 MR. DIGIACOMO: One point of clarification.
24 ///
25 ///

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REDIRECT EXAMINATION

1 BY MR. DIGIACOMO:
2 Q After your keys go missing you go home, Miguel's
3 apartment had been cleaned out and you have a
4 conversation with Chinola about the fact that she cleaned
5 it out. Did you ever get your keys back?
6 A You know what, I really don't believe I did
7 after that.
8 Q So you don't remember getting your keys back?
9 A I don't remember getting my keys back, no.
10 MR. DIGIACOMO: Nothing further, Judge.
11 THE COURT: Anything further?
12 MS. ERICKSON: One question.
13
14
15 style="text-align: center;">RECROSS-EXAMINATION

16 BY MS. ERICKSON:
17 Q When you got to the house, who opened the door
18 to the apartment?
19 A I can't -- I'm pretty sure it was James. I'm
20 not exactly sure.
21 MS. ERICKSON: Okay. Thank you.
22 THE COURT: That is all, Ms. Wantland. You may
23 step down.
24 THE WITNESS: Okay.
25 THE COURT: Mr. Digiacomo, did you want to make

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1 any final arguments for the Court?
2 MR. DIGIACOMO: Yes. And I also have -- and why
3 don't we just call this an offer of proof.
4 THE COURT: Okay.
5 MR. DIGIACOMO: Miguel Villegas is the person
6 that was identified as being the owner of this particular
7 apartment. He was arrested on April 16th of 2012 and did
8 remain in jail through the time period of the homicide,
9 so the Court is aware that that fact is in fact
10 corroborated.
11 Additionally, the cell phone, the only cell
12 phone that is in this house, you just heard questions
13 about, was located and plugged into a charger next to
14 Erik's body.
15 We believe that to be the cell phone that
16 Melissa and Erik used to communicate with the defendant.
17 Yesterday I called the Metro CFL Lab because apparently
18 that had never been downloaded for a full physical
19 analysis of the information on it and we are having that
20 done at this point in time.
21 As it relates to this being a bad acts motion,
22 this would be the strangest bad acts motion of my career
23 only in this fact: For the most part the State would not
24 necessarily want to prove up the individual acts that
25 occurred because they make this witness look bad;

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1 however, what is not a bad act, which is just solely
2 evidence because she's charged with on or about August
3 26th premeditating, deliberating and then killing two
4 individuals this defendant makes a threat against the two
5 deceased individuals and she says Loca is going to get
6 James and Erik ripped me off because he didn't pay for
7 the tools, you need to give me the unemployment card.
8 All of these statements, those threats are all coming in.
9 The question for the Court I think on the Motion
10 is whether or not you are going to admit the testimony
11 about what is relevant or what do those facts mean.
12 Obviously, the threats are going to come in
13 against the witnesses because that is just evidence of
14 the crime itself or against the victims. That's evidence
15 of the crime itself. The witness testified to the
16 Walmart scam, the drugs being used, the reason, kind of
17 the explanation for why that threat is.
18 And I will tell the Court that this is a
19 two-edged sword for the State. Once this evidence comes
20 in we'll be striking Aggravator 7 for both these
21 defendants because now we sort of understand that this
22 isn't a motiveless crime. There is an ongoing dispute
23 between the parties involving both the car, the drugs,
24 the unemployment card and the tools as it relates to
25 Erik.

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1 We provided the motive for why Chinola and
2 Smokey decided that they are going to kill four people on
3 the morning of August 26th. Not a great motive for us
4 but obviously this makes much more sense than just two
5 people randomly killing four individuals.
6 It is obviously relevant. It is highly
7 probative and it is certainly not more prejudicial than
8 probative for this reason, which is we worry about
9 prejudice because they ripped off Walmart you might
10 believe that they might rip off Walmart again, as opposed
11 to because they ripped off Walmart they decided they were
12 going to execute four people the next morning.
13 Obviously, this is the least of the allegations.
14 Certainly, not prejudicial in any sense that there may be
15 drugs involved in this situation, of course there is.
16 But there may be some scams related to drugs, of course
17 there is.
18 But certainly nothing about the allegations are
19 going to prejudice them in a quadruple -- or a double
20 homicide plus two attempt murders.
21 And then as it relates to clear and convincing
22 evidence. Well, everything seems to match up with that.
23 The fact that there's the car. The defendant even
24 acknowledges the entire car situation. There is the fact
25 that the defendant acknowledges the Smokey-Loca sort of

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1 relationship. And then everything that Ashley says is
2 corroborated by everything we know that Smokey walked in
3 and asked for the unemployment card.
4 I think the problem here is that she was so
5 injured that the detective who took her statement was
6 only able to ask her about six questions.
7 Smokey walked in. He asked for the unemployment
8 card. James said he didn't have it and he shot James and
9 Chinola was with him. That is pretty much the extent of
10 what she was able to provide to the police.
11 Mr. Staudaheer when he pretrials her finds out
12 this information. We disclose it to the defense. And
13 so, obviously, it should ultimately be admitted.
14 I will submit it.
15 THE COURT: Thank you.
16 Mr. Whipple, were you going to make closing
17 arguments?
18 MR. WHIPPLE: Yes, Your Honor.
19 You know it has been three and a half years and
20 now, finally, we got the information that we wanted right
21 after this incident occurred. I am glad that we have
22 this information. The key now is what do we do with it
23 and that is why we are before this court. It's a prior
24 bad act. I think we need to identify what are the prior
25 bad acts.

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1 I do agree with Mr. DiGiacomo, most of this
2 documentation, most of this is evidentiary that is going
3 to go both ways for both parties.
4 What is the prior bad that the State is bringing
5 before this court: One, the Walmart scam; two, the drugs
6 that were bought and utilized.
7 Those are the two prior bad acts that I've
8 identified as being subject to the 48.045 measuring the
9 fact that this court has to take. And --
10 THE COURT: You left out the --
11 MR. WHIPPLE: The drugs?
12 THE COURT: The burglary tools.
13 MR. WHIPPLE: The tools, that is all kind of --
14 so that is why I want to get to this very issue of what
15 we're doing here. The burglary, the vandalism of some
16 tools. And then there is an allegation regarding this
17 unemployment card. I mean there is no allegation that
18 the unemployment card was stolen.
19 THE COURT: Let me do this and sorry to
20 interrupt you. Don't lose your train of thought, of
21 course, because I want to let you finish whatever
22 argument you had.
23 This is sort of how the Court approaches this
24 type of thing. Yes, the Motion is styled as admitting
25 prior bad acts. And what the Court is viewing this

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1 particular scenario, and I think Mr. DiGiacomo said it
2 perfectly; this one is odd, right. This is not a I had
3 this prior non-conviction for X and I want to be able to
4 still elicit it because I think it has whatever relevancy
5 and provides whatever purpose.
6 This is a situation where we have the event
7 leading up to the time of the murder and the testimony
8 that these two witnesses would give regarding those
9 events are kind of peppered with things that are
10 essentially uncharged.
11 But the issue from the Court's perspective,
12 right or wrong and I'll stand corrected if you want to
13 talk about that, is sort of will these witnesses be
14 allowed to proffer and give this testimony sort of in its
15 entirety not just, okay, they can talk about the Walmart
16 scam or they can talk about the burglary tools or they
17 can talk about the drugs and what they got out of the
18 drugs that they believe they should have or not. It's
19 sort of the testimony as a whole.
20 And at this point in time, I think in terms of
21 sort of the facts, if you want to call them that for this
22 discussion, leading up to the shooting and there being
23 offered and asked to having these witnesses allowed to
24 testify at the time of trial, I believe that there has
25 been clear and convincing evidence of those facts

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1 provided through these two witnesses.
2 And I think the issue becomes the relevancy of
3 them and whether or not it's outweighed by the prejudice
4 of them. But I am a little concerned about the way you
5 sort of framed this up from your perspective that it
6 needs to be just what are these specific acts and that
7 somehow if we say okay to admission of those specific
8 acts that is not going to necessarily mean that the
9 entire testimony or dialogue can occur. I am looking at
10 it maybe from a bigger picture perspective.
11 MR. WHIPPLE: And, honestly, I am not
12 disagreeing.
13 THE COURT: Okay.
14 MR. WHIPPLE: I am just trying to categorize
15 where we're at and what we're doing and what kind of
16 argument before this Court is.
17 I agree with the Court's summary. I do agree
18 with what you have to view. And I want to sit down
19 because I think you've heard evidence from both sides. I
20 do not think I need to argue one side or another. I
21 think you have identified the specific issues. You heard
22 the testimony and I think that there is information that
23 could be utilized on both sides.
24 THE COURT: So you are not necessarily at this
25 point making a strenuous argument that the prejudice of

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1 this totality of this testimony outweighs its relevance
2 because you perceive and can see, again, facts,
3 statements that could be utilized to the defense's
4 benefit as well as the State's benefit; is that fair?
5 MR. WHIPPLE: Here's how I see it and I agree
6 with the Court. The issue with regard to Walmart and the
7 scheme that they had, I am going to submit it.
8 The issue with regard to the drugs and then
9 while using drugs because of the following out, I am
10 going to submit it.
11 The issue that I want to discuss just briefly is
12 the allegation that my client broke into this building
13 that she apparently may or may not have a key to and may
14 or may not have had access to stole construction tools.
15 I mean, I think that is an issue that I do not want to
16 submit.
17 I don't know if there is enough evidence to show
18 clear and convincing. If this Court has already ruled on
19 that I will accept that. On the other hand that is
20 something that is overly prejudicial and I would argue
21 that it would be overly prejudicial and not probative and
22 with all these other issues I really don't think it does
23 have really much effect on happened the next morning or
24 within the next day or two. And I don't think it has
25 really been proven. It has to be clear and convincing.

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1 But I was just trying to break down the specific
2 issues before this Court and do it in a way that
3 protected the record and made sure that I understood what
4 we were doing.
5 But that is the one issue that I see as not
6 being proven here for what the Court has to do. But I
7 also anticipate that my client is going to testify and I
8 anticipate that she is going to have a different version
9 with regard to those events as well, so something may be
10 opened -- if this Court denied it, it might be open to
11 when my client took the stand, so I will submit it on
12 that.
13 THE COURT: All right. I will address one thing
14 back to you and then I want to go to Mr. DiGiacomo
15 briefly. When it comes to the issue of the burglary in
16 which the tools disappear or the fact that there is
17 testimony that there were tools and then there were not
18 tools and the way it sort of put it in motion, and I
19 think it was a little less flushed out here today than
20 maybe I anticipated, but that Ms. Cabrera invited
21 Ms. Wantland and Mr. Headrick over to the house, to a
22 friend's house, and then Ms. Cabrera left and then later
23 when they get back to the apartment things had been
24 ransacked, taken, whatever, so that is sort of that
25 circumstantial evidence.

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<p>1 But there was discussion that Ms. Wantland said 2 and testified that Ms. Cabrera did admit that she did it 3 and there was a threat to call the police. That is 4 potentially what elicited that admission that she did it 5 and so there is information there that does seem to 6 corroborate -- well, there is information that 7 Ms. Wantland is providing that goes beyond just sort of 8 this something happened in the apartment and we don't 9 know who did it and it does implicate potential in terms 10 of what has been asked for by the State to be considered 11 as to motive, intent or state of mind in that there was a 12 threat to call the police. 13 So do you want to speak to that as the Court 14 heard the testimony from today and then I'll throw it 15 back to Mr. DiGiacomo. 16 MR. WHIPPLE: Honestly, Your Honor, I think that 17 is the only remaining issue and I appreciate that we are 18 identifying that. And I'll just point out that that has 19 not been corroborated by anybody other than Ms. Wantland. 20 So it really comes down to her credibility and 21 then you can measure the probative value of that. 22 THE COURT: All right. 23 Mr. DiGiacomo, did you want to address that any 24 further or did you have anything else you wanted to say? 25 MR. DIGIACOMO: Just a little bit, Judge.</p> <p style="text-align: right;">120</p>	<p>1 she is really mad at James because James did not give her 2 enough drugs for having her drive all around to Walmart 3 and she is really mad at Erik because essentially she 4 moved him into an apartment and gave him some tools and 5 he didn't pay for them and she thinks she is entitled to 6 Miguel's unemployment card. 7 To me, this entire thing is a 48.045. It's 8 48.035 to me. There is really no way to explain the 9 anger, the threats and the conversation she is having 10 without discussing the sequence of events that occurred 11 and how it is that Melissa and Erik moved into a 12 apartment by Chinola that Chinola shouldn't be in in the 13 first place because Miguel doesn't want her inside that 14 apartment. 15 It is not so much that we're accusing her of 16 stealing tools and then selling tools and not getting 17 paid for them. I think that was probably a little over 18 the top by Mr. Staudaher in his Motion, so that's why I 19 don't really even see that as much of an act at all other 20 than she went back there and goes to clean it out and 21 won't clean it out. 22 But now, guess what, Erik and Melissa have keys 23 to this apartment. How did she get those. Well, she 24 took them from Ashley. That's how they got keys to the 25 apartment. So ultimately all of this is going to come in</p> <p style="text-align: right;">122</p>
<p>1 Mr. Staudaher's Motion is a little more clear 2 than it is factually at least than in evidentiary 3 standpoint. 4 THE COURT: Sure. 5 MR. DIGIACOMO: You could have asked the witness 6 what do you think happened. But when it comes down to 7 evidence the evidence is that Miguel goes to jail and 8 Ashley doesn't want to tell the defendant that he went to 9 jail because there is some problem between them. 10 And this witness is not going to be testifying 11 to what Miguel told her is the problem between her and 12 Chinola. I know we let that go a little far today just 13 because of the way the answers were going. 14 But either way, she says that James despite her 15 admonition tells Chinola that Miguel is in jail. Next 16 thing you know Chinola, Loca, Ashley and James are out 17 committing this Walmart scam. They are buying dope. And 18 the next thing you know Chinola goes and cleans out the 19 apartment. 20 I think Mr. Staudaher's Motion is sort of like, 21 Well, then she sold the tools back to Erik. I think that 22 is the implication of this but there is no direct 23 evidence of that. 24 But what else does she do. She moves Melissa 25 and Erik into this apartment and then a few days later</p> <p style="text-align: right;">121</p>	<p>1 as sort of the whole story of what's going on that week. 2 THE COURT: Well, it actually did strike the 3 Court as I was refreshing on the Motions for today's 4 purposes that a lot of this seemed to be more res gestae 5 than the sort of prior bad act but we do have the 6 circumstances of this testimony leading up to the time of 7 the shooting that does, again, as I said a minute ago, I 8 think I used the words peppered with accusations of what 9 would be prior bad acts. 10 Here is how the Court comes down on it. As I 11 said, as far as the Walmart scheme, the drugs, the 12 unemployment card aspect of this the Court does find that 13 there is clear and convincing evidence of these bad acts 14 having been committed. 15 And the other finding that the Court needs to 16 make related to Petrocelli hearing and what needs to be 17 done in order for any bad acts to be admitted that they 18 would be relevant. I think that they are relevant. I 19 think they are relevant for res gestae purposes to tell 20 the whole story of the circumstances of the involvement 21 amongst these people that led up to the day of the 22 shooting. 23 But I also think that they are relevant as 24 stated to show, again, some of them overlap with facts 25 leading directly to the crimes charged and others are</p> <p style="text-align: right;">123</p>

1 relevant to, again, motive and intent and state of mind
2 as have been argued.
3 The probative value I also believe in these
4 circumstances is not substantially outweighed by the
5 danger of unfair prejudice not only by the fact that they
6 kind of cut both ways as to these individuals and what
7 they were doing and how they were living, if you want to
8 say it that way, but I certainly don't think just in the
9 purest of analyses that there is any unfair prejudice
10 substantial or otherwise that outweighs the probative
11 value of this information.
12 But the real issue, and I think Mr. Whipple was
13 correct in pointing that out, is in the circumstances of
14 what occurred when the tools disappeared from the
15 apartment, the apartment was ransacked and the
16 circumstances regarding Mr. Villegas' desire of not
17 having Ms. Cabrera know that he was not there and what
18 these circumstances were.
19 I don't necessarily view this as bad acts,
20 again, because and I think Mr. DiGiacomo is correct,
21 there is certainly not clear and convincing evidence that
22 Ms. Cabrera stole these tools.
23 But what we have is a situation where the whole
24 development of the circumstances of how Ashley and James
25 were there, how Melissa and Erik were there more

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1 specifically, and what occurred and what could have
2 potentially been the motive related to the nonpayment for
3 the tools as well as the other things that we have talked
4 about. I don't have any legal basis I believe to
5 preclude, so to speak, the State from being able to
6 address each of these facts and circumstances leading up
7 to the shooting that they have asserted in their Motion.
8 I know that is not the standard and I'm going to
9 confuse things by saying it that way. The Court is
10 finding that the items submitted in the Motion in their
11 entirety are relevant, that they have been proven by
12 clear and convincing evidence short of any allegation,
13 which it doesn't sound like the State is going to attempt
14 to proffer anyway, but short of any allegation of
15 Ms. Cabrera actually went in herself, ransacked and stole
16 those tools. I don't think we have clear and convincing
17 evidence of that.
18 But I will allow the surrounding circumstances
19 of Mr. Villegas going to jail. The Court can take
20 judicial notice of his arrest date and his incarceration
21 dates and that these discussions with regard to the
22 desire of them not knowing that he was away and, again,
23 what led up to getting these people in the home and the
24 access to the apartment, all of that is relevant. And I
25 think we probably should and we could consider this to be

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1 to some degree a combination of, like you said, 48.035
2 and 48.085 in terms of how we allow this to come in.
3 But the net result is I am not going to preclude
4 the State from inquiring into any of the facts and
5 circumstances leading up to the shooting that had been
6 identified in the Motion.
7 So the Motion is granted. I will ask the State
8 to prepare the motion with the findings. Please let
9 Mr. Whipple and Ms. Erickson see that. And to the extent
10 that you need to or want to be specific about how you are
11 utilizing these items, if you could do so, that would be
12 helpful.
13 But the Motion is granted based on those
14 findings and we are going to be back together I think on
15 the 9th to deal with the Motion to Strike the Aggravating
16 Circumstances.
17 You indicated today --
18 MS. ERICKSON: He already conceded that --
19 THE COURT: I haven't seen the motion in its
20 entirety, so I didn't know if you have seen it yet.
21 MR. DIGIACOMO: I have not seen the Motion. I
22 wasn't aware the Motion was filed. Is it solely on Count
23 7?
24 MS. ERICKSON: Yes. And it is because it is no
25 longer random or motiveless.

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1 MR. DIGIACOMO: Yes. We will not be proceeding
2 on Count 7. Not that we will file an amendment but
3 certainly when we submit this to the jury we will not
4 submit --
5 THE COURT: Why don't you put in the order from
6 today the agreement that the parties stipulate to -- why
7 don't you put in there that in closings the State is not
8 going to oppose the subsequent motion and then once we
9 sign off on it we'll go ahead and vacate that hearing on
10 the 9th.
11 Again, I had not looked at it recently so I was
12 not sure if that was the only aggravating circumstance
13 that was to be addressed.
14 MS. ERICKSON: I believe I have a copy of it
15 with me and I can show it to you.
16 THE COURT: Also within that Motion, however,
17 the objection to the State's Amended Notice of Intent to
18 Seek the Death Penalty, so I don't know if we would still
19 have anything to hear on the 9th.
20 MS. ERICKSON: I'm sorry, Judge, what was the
21 other part you said.
22 THE COURT: The styling of the Motion that was
23 actually on the calendar on December 9th is Defendant's
24 Notice of Motion and Second Motion to Strike Aggravating
25 Circumstance -- which it sounds like has been stipulated

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1 to today -- and Objection to State's Amended Notice of
2 Intent to Seek Death Penalty, and I don't know that we
3 have addressed that.
4 MS. ERICKSON: We had the first initial motion
5 that covered the vast majority of the aggravating
6 circumstances that the Court found were going to be
7 allowed.
8 THE COURT: Right.
9 MS. ERICKSON: The next motion was after the bad
10 acts motion was filed because my position was it's not
11 random and motiveless now. There are reasons why it
12 could have occurred.
13 THE COURT: Just do me a favor that we will have
14 in the order that the concession that this is not now
15 random or motiveless and that would effect the Motion
16 with regard to the aggravating circumstances.
17 Why don't you then, Ms. Erickson, take a look at
18 the Motion and see if you wish to withdraw the Motion at
19 this time based on what will be in that order or if
20 there's still something from that Motion to proceed with
21 and you'll let the department know and we won't take it
22 off calendar unless and until we see something from the
23 parties that indicate they want to take it off.
24 MR. DIGIACOMO: I did not realize Mr. Staudaher
25 filed an amended; I only looked at the original. So
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1 maybe it is just better if I filed a second amended and
2 strike Number 7.
3 If there is any objection of Ms. Erickson that I
4 believe is appropriate I will strike that from the Second
5 Amended --
6 THE COURT: Okay.
7 MR. DIGIACOMO: -- and then we'll just take this
8 motion off calendar in the order and then she can re-file
9 it.
10 MS. ERICKSON: I can file it again depending on
11 what the Second Amendment says.
12 MR. DIGIACOMO: Because I'm going to have to
13 re-file it because it involves this case now too.
14 THE COURT: So with that discussion of the
15 parties the hearing that is currently set on December 9th
16 on the Motion that the Court mentioned is vacated, but of
17 course without any prejudice to Ms. Erickson if there is
18 still anything to file to address those or other matters
19 you can still do so.
20 But that hearing on December 9th will be
21 vacated. You will address these few additional points in
22 the order that the State drafts, Mr. DiGiacomo, and then
23 run it by them and we'll sign off on it when we see it.
24 MR. DIGIACOMO: We need a trial date though.
25 THE COURT: Yes, we do. Thank you. That's the
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1 other piece of the puzzle and I didn't know if because I
2 was thinking in my mind that we were going to be back on
3 the 9th but now that we're not going to be back on the
4 9th we need to try to work that out.
5 Remind me again, because I know we had discussed
6 it before, how many weeks we thought this trial might
7 take.
8 MS. ERICKSON: I thought we set it for two.
9 THE COURT: That is that what I thought as well
10 and so I just wanted to be reminded. Okay. Our next
11 stack is February but we already have a capital case in
12 February and I am not quite certain how the timing is
13 going to go there, so I wasn't sure of what you all were
14 thinking.
15 MS. ERICKSON: February I am unavailable and
16 Mr. DiGiacomo if he keeps the case that I'm on is also
17 unavailable.
18 THE COURT: I think we were trying to put it on
19 in April when we looked at it before because I think we
20 have Mr. Gonzales going in May.
21 MR. DIGIACOMO: You do. May 16th.
22 MS. ERICKSON: And the problem with April is I
23 am going to Boston with my mother, who is 73 and will be
24 74 then, for the World Championship Ice Skating. We will
25 be gone for March 29th and we will be returning on
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1 April 4th, but my Mother will be here until April 8th and
2 that is very important to me and I have bought tickets.
3 We have airline tickets. We've got the \$4400 seats that
4 we have paid for.
5 MR. WHIPPLE: Well, I have another murder case.
6 THE COURT: I just know that there is going to
7 be a whole hullabaloo if this case gets set after the
8 Gonzales trial.
9 MR. DIGIACOMO: What do you mean there's going
10 to be a hullabaloo? The defense attorneys get to --
11 THE COURT: I didn't say it was going to affect
12 anything. I am just envisioning right now Ms. Jackson
13 and the response that is going to occur when we find out
14 that this trial is now going to go after that. That's
15 all I'm saying.
16 MS. ERICKSON: The other thing that I was going
17 to say, Judge, about that issue, I would assume that you
18 are going to have a motion to continue based upon if we
19 have this trial in April they will not have time to
20 absorb the testimony that has been given about this
21 trial.
22 THE COURT: I wouldn't doubt that that would
23 occur as well.
24 MS. ERICKSON: So I don't think they are going
25 to go in May.
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1 THE COURT: Well, they don't necessarily get to
2 go after this one. At the end of the day, after they
3 were together for a while we ultimately did bifurcate.
4 And the basis for the bifurcation was --
5 MS. ERICKSON: My client's statement that
6 implicated the codefendant.
7 THE COURT: Wanting to move forward and go and
8 now of course things have evolved and we are not there.
9 MR. DIGIACOMO: Can we set them back on the 16th
10 and I'll agree not to use Ms. Cabrera's statement. Done.
11 MS. ERICKSON: I am not available on the 16th.
12 MR. DIGIACOMO: May 16th.
13 MS. ERICKSON: May 16th?
14 THE COURT: Do you want to put them back
15 together?
16 MR. DIGIACOMO: Yeah. I do not have a problem
17 with that.
18 THE COURT: I think the easiest thing to do,
19 let's do it this way. What do your schedules permit for
20 scheduling next year and then we'll deal with the other
21 circumstances.
22 If you all at some point get together and work
23 it out that you want to consolidate these matters again,
24 by all means --
25 MS. ERICKSON: I'm sure they don't want to

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1 consolidate.
2 THE COURT: Or timing them together, shall we
3 say, in some fashion that would create some efficiencies,
4 I am open to hearing whatever discussion you want to have
5 in that regard. I could put you in the May stack and try
6 to time them together.
7 MS. ERICKSON: Well, we got rid of December 9th.
8 Why don't we discuss -- I mean, I think maybe the Court
9 needs to hear from all parties including Mr. Gonzales.
10 THE COURT: Do we have anything for Mr. Gonzales
11 coming up? I don't think we do. I think the only thing
12 we had pending was the December 9th motion that we just
13 vacated. We don't really have any hearing dates. I mean
14 I can set a status check. What about a status check on
15 trial readiness, haven't I been doing those?
16 MS. ERICKSON: Yes.
17 THE COURT: And I know they kind of fell off
18 because we were going to be going to trial.
19 MS. ERICKSON: I believe that's what happened.
20 THE COURT: Why don't we set it as a status
21 check on trial readiness and trial setting. We could do
22 it after the holidays.
23 THE CLERK: Judge, it looks like Mr. Gonzales is
24 on the 9th.
25 THE COURT: Oh, we have Mr. Gonzales on the 9th.

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1 A status check.
2 MR. DIGIACOMO: Let's just leave the 9th.
3 THE COURT: We'll vacate the motion but the
4 other -- I didn't see it on the calendar today that's why
5 I was confused. There appears to be a status check on
6 December 9th on trial readiness and we will just go ahead
7 and set a status check on trial setting on that date.
8 Everybody will be present and we'll figure it out.
9 MS. ERICKSON: I will let Ms. Jackson know that
10 is about their trial date too.
11 THE COURT: They'll know coming in. We are
12 going to figure it out.
13 MS. ERICKSON: All right. Thank you very much.
14 THE COURT: Thank you all.
15 (Proceedings were concluded.)
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1 REPORTER'S CERTIFICATE
2
3 STATE OF NEVADA)
4) ss.
5 COUNTY OF CLARK)
6
7 I, BRENDA SCHROEDER, a certified court reporter
8 in and for the State of Nevada, do hereby certify that
9 the foregoing and attached pages 1-148, inclusive,
10 comprise a true, and accurate transcript of the
11 proceedings reported by me in the matter of THE STATE OF
12 NEVADA, Plaintiff, versus IVONNE CABRERA, Defendant, Case
13 No. C283700, on November 20, 2015.
14
15
16 Dated this 25th day of November, 2015.
17
18 /s/ Brenda Schroeder
19 BRENDA SCHROEDER, CCR NO. 867
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TRAN
CASE NO. C-12-283700-1
DEPT. NO. 25



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)	
)	
Plaintiff,)	
	)	REPORTER'S TRANSCRIPT
	)	OF
vs.	)	STATUS CHECK ON TRIAL READINESS
	)	250 RULE
)	
IVONNE CABRERA,)	
)	
)	
Defendant.)	
_____)	

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: WEDNESDAY, DECEMBER 9, 2015

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

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APPEARANCES:

For the State: MARC DIGIACOMO, ESQ.

For the Defendant: PATRICIA ERICKSON, ESQ.

CLARK PATRICK, ESQ.

ALZORA JACKSON, ESQ.

* * * * *

1 LAS VEGAS, NEVADA; WEDNESDAY, DECEMBER 9, 2015

2 P R O C E E D I N G S

3 * * * * *

4
5 THE COURT: Page 2, State of Nevada vs. Ivonne
6 Cabrera and Jose Gonzales.

7 Let's get appearances.

8 MR. DIGIACOMO: Marc DiGiacomo for the State.

9 MR. PARTICK: Good morning, your Honor. Clark
10 Patrick and Alzora Jackson for Mr. Gonzales.

11 THE COURT: I see that Ms. Erickson -- I don't
12 know where she came from, but she came from somewhere.

13 MS. ERICKSON: I came from the jury box.

14 THE COURT: I can't even see folks over there.

15 MS. ERICKSON: Good morning. I'm appearing for
16 both myself -- on behalf of myself and Mr. Whipple.

17 THE COURT: On behalf of Ms. Cabrera.

18 Now, we had to reset the trial date, obviously, for
19 Ms. Cabrera. Then this is the regular status check date
20 we have on trial readiness for Mr. Gonzales. I think
21 we've been in a posture up to this point with the
22 expectation that Ms. Cabrera's case would go first. Then
23 we had circumstances that prevented that from occurring.

24 Then we have Mr. Gonzales scheduled. I think we had
25 come up with some dates we thought would work potentially

1 for the trial to sort of not go together, mind you, in
2 terms of being reconsolidated, but go contemporaneous with
3 each other or back to back with each other so we could
4 create some efficiencies. But I don't know if anything
5 has changed there.

6 And of course we had the chance to have counsel for
7 Mr. Gonzales present during those discussions.

8 MR. DIGIACOMO: May I be heard, Judge.

9 THE COURT: Yes, please, Mr. DiGiacomo.

10 Then of course we know there's been --

11 MR. DIGIACOMO: A change.

12 A couple of things. After the hearing we held with
13 Ms. Cabrera, it came to my attention that there were two
14 cell phones in evidence. One of which was Ms. Cabrera's.
15 One of which apparently belonged to the victim -- or one
16 of the victims. Those were downloaded, and I provided
17 those this morning to the defense.

18 I can tell the court on Ms. Cabrera's phone the
19 information that those witnesses' testified to are
20 corroborated by the text messages that are contained on
21 Ms. Cabrera's phone.

22 At the same time, I caused a motion to consolidate
23 these two cases, because I don't believe we'll need Ms.
24 Cabrera's statement to prosecute this case, to be sent to
25 my secretary for filing. I thought it was filed. I just

1 confirmed with my secretary that somehow that didn't
2 actually get filed.

3 Because I knew we were going to be addressing the
4 trial dates, I was going to suggest to the court that we
5 allow that to be filed. I talk to Ms. Erickson about the
6 language of the amended notice of intent to seek
7 indictment, but I was going to wait to see if the court
8 would grant the motion to consolidated, in which case it's
9 one notice of intent to seek death as opposed to two, if
10 it continues to be severed.

11 I don't know what the court's pleasure is going
12 forward now, but we have a trial date and I conveyed an
13 offer actually to both Defendants. I just conveyed Mr.
14 Gonzales' this morning. I had conveyed Ms. Cabrera's two
15 weeks ago. So maybe if we pass this off two weeks we'll
16 have some time to discuss offers as well as potential
17 trial date with all counsel.

18 THE COURT: Mr. Gonzales is shaking his head.
19 And Ms. Erickson necessarily have a look on her face that
20 leaves me optimistic those are happening.

21 As you were talking Mr. DiGiacomo the idea of giving
22 a little bit of time for the dust to settle on the offer
23 or consideration of the offer being made -- no defendant
24 ever has to take an offer, obviously, but they should at
25 least give it some due consideration.

1 And as I sit here today, in truthfulness, I know that
2 we had a tortured history in terms of how this case became
3 bifurcated, but I don't independently recollect whether it
4 was more out of sheer necessity because of the readiness
5 of each one and the desire because Ms. Burke had been
6 invoked to go forward or if it was other factors. I know
7 when you mentioned the passing idea of reconsolidating
8 that that was not met with much enthusiasm. But I didn't
9 have counsel present.

10 Ms. Jackson, what would you like to note today. As
11 you have stepped forward, I want to hear from you.

12 MS. JACKSON: Yes, your Honor. Mr. Patrick, the
13 lead attorney on this matter, had assigned me to draft and
14 argue the motion to sever, which I did. It was certainly
15 not just the statements it was, because I'm surprised by
16 this discussion of consolidation. I'm not prepared to
17 reargue that.

18 I would indicate to the court that everything
19 Mr. Patrick and Mr. Gonzales and I have done since the
20 motion to sever was granted was based upon relying upon
21 the court's ruling. And we -- our trial readiness, based
22 upon the trial date that this court gave us, we have been
23 steadfast and adhering to what our obligations and what
24 our duties are. If we're talking about revisiting issues
25 that this court has already resolved that were thoroughly

1 briefed and argued, and with our capital case load and our
2 non-capital case load, that is putting everything back to
3 essentially square one.

4 I have to go back -- and I have a trial that starts
5 Monday -- it's not capital -- but I have to go back. Look
6 at the motion to sever. We have the transcripts. It's
7 just something that is going to undo all of the efforts
8 and the good work we have done to get these matters to
9 trial in a timely fashion, where counsel is in fact
10 prepared.

11 THE COURT: Let me hear from Ms. Erickson. I'll
12 give you my thoughts.

13 MS. ERICKSON: Mr. DiGiacomo did just inform the
14 court that 4 years later we have now new discovery. It
15 seems to be an ongoing issue with this case. We have
16 been told over and over again we have everything, then
17 something new pops up again.

18 I have no idea what's on here. I have no idea other
19 than what Mr. DiGiacomo is saying that's it's
20 incriminating. I'm going to have to review and
21 investigate this kind of work and have my own expert
22 review it.

23 THE COURT: This has come up before, so I don't
24 mean to be interrupting you. But again your client should
25 know what's on her cell phone. The fact that we have

1 already had these folks come in and testify to these
2 things. I don't disagree. You do need to get up to speed
3 with what is now being provided. I don't think this is
4 shockingly new information to anyone except for maybe
5 you.

6 At the end of the day, I'm not excusing the fact that
7 we just found out cell phones are in evidence. That's not
8 good. But we also know that we're looking at a trial date
9 that's going to happen in either April or May. More
10 likely April to be ahead of the trial date we have set for
11 Mr. Gonzales.

12 So I understand that you are just getting this. But
13 I also understand that we anticipated that we were going
14 to reset this trial, and I don't see anything that would
15 impact our ability to reset this trial.

16 MS. ERICKSON: I agree, Judge.

17 Given the fact that I'm not sure either of these is
18 Ms. Cabrera's phone necessarily, that is why I'm -- what I
19 know from my client does not coincide with what
20 Mr. DiGaicomio said. So I have spoken to my client about
21 the cell phone of course, when I went over and viewed it
22 and spent time reviewing all of the physical evidence in
23 this case. I spoke to my client about it when I got back.
24 Nothing that I know coincides with what Mr. DiGicomio is
25 saying. It's the only reason I'm bringing this up.

1 Other than that, I have informed the court I will be
2 out of the jurisdiction for the first week-and-a-half of
3 April. I would not be available to begin the case until
4 the third week. I don't know that that work with this
5 court's schedule. That's my calendaring issue.

6 Mr. Whipple has a retrial of murder case that was
7 remanded by the Nevada Supreme Court set for April 11th in
8 District Court 9. And then has another murder case
9 scheduled May 9th in District Court 6. I'm not sure about
10 April for him.

11 I don't know the prospects of the April 11th, going
12 on that date. I don't know who the prosecutor is. It
13 does seem like it is a retrial after a reversal.

14 THE COURT: Remind me again -- we were right up
15 on it. I don't remember what we estimated time for trial
16 to be.

17 MS. ERICKSON: 2 weeks.

18 THE COURT: That's what I thought.

19 We have an April 18th date. There is another trial
20 potentially in there, but I don't know that that is going
21 go. That would be one that is a retrial as well resulting
22 from a mistrial. That would give us the time if we do
23 have a shorter week the following week because of the
24 Judicial Conference.

25 Does that April 18th dated work. What I'm inclined

1 to do now, I don't have a motion to consolidate before me.
2 I appreciate Mr. DiGiacomo indicating that that's what the
3 State would like to ask for. There could be some
4 potential efficiencies there. My recollection, as I said
5 was not specific, but I knew there was a component of just
6 the trial readiness of Ms. Cabrera versus the trial
7 readiness of Mr. Gonzales, but I did recall there were
8 likely to be other matters.

9 Ms. Jackson's reminder there were other matters. I'm
10 not inclined to reconsolidate now, absent some good case
11 to be shown and a motion to be considered. Which I would
12 consider in the normal course with any motion that gets
13 filed.

14 But at this point we are better served to go ahead
15 and set the trial date for Ms. Cabrera. Leave in tact
16 trial date for Mr. Gonzales. And hear any final remarks
17 that Mr. Gonzales' counsel may have.

18 MS. JACKSON: That's fine with us.

19 THE COURT: Ms. Erickson.

20 MS. ERICKSON: Other than Mr. Whipple being
21 scheduled for trial April 11th, I don't know the status of
22 that. And given the consideration with regard to the new
23 discovery, I would say that that is available for my
24 schedule and hopefully Mr. Whipple's.

25 THE COURT: Let's set it.

1 MR. DIGIACOMO: May I suggest to the court that
2 Mr. Whipple and I have a very large, firm setting April
3 18th in Johnson and Cohcie (ph) in front of Judge Scotti's
4 the 18th of April.

5 THE COURT: That's firm on the 18th.

6 MS. ERICKSON: Sorry.

7 MR. DIGIACOMO: The State will always be ready.
8 We will find somebody to staff this case. It's not so
9 complex that I can't find somebody else. I'm happy to set
10 it. It don't want to set it on top of something
11 Mr. Whipple has.

12 MS. ERICKSON: I didn't know that was a firm
13 schedule.

14 THE COURT: Let me hear from counsel for Mr.
15 Gonzales as far as trial readiness.

16 What we need to do is -- because I also indicated I
17 want to give a little time for consideration or the offer
18 from the State.

19 Mr. Patrick.

20 MR. PATRICK: Thank you, your Honor.

21 The court is well aware of the problem we had last
22 time we asked for a continuance. What I can tell the
23 court is that a good portion of that problem has been
24 solved. We are moving towards our May date at this
25 time.

1 As we stand here today, we should be ready for May.
2 There may be some other issues that may resolve themselves
3 by then that we're not prepared to say is going to impact
4 our May trial at this time. As far as our mitigation work
5 we told the court we needed to do, we've made great
6 strides in getting that completed.

7 THE COURT: Anything else from the State's
8 perspective or have you covered everything.

9 MR. DIGIACOMO: You can set the trial date
10 whenever the trial date is set. We filed the motion to
11 consolidate. We have addressed the fluid nature of a
12 severance versus consolidation. So pick any date the
13 court wants and we'll be ready.

14 THE COURT: I have already set Mr. Gonzales on
15 May 9th trial date with a May 2nd calendar call. At the
16 moment the only dates I can see to put Ms. Cabrera's trial
17 are potentially not available. We need to have a check
18 back in on another date here shortly. Say a week from
19 today, if that fits with folks' schedules, to find out if
20 we are going to have negotiations -- which it doesn't
21 sound like we are. But the offer was made. We can check
22 in on that status. The State may or may not leave that
23 offer open. We can take representations at that time.

24 See if Mr. Whipple does have that trial on the 18th.
25 My preference would be to put it on the 18th, but it

1 doesn't seem like we are able to confirm that now. That
2 gives some time to look.

3 I'd like to check back in on resetting of trial for
4 Ms. Cabrera next Wednesday.

5 MS. ERICKSON: I'm leaving tomorrow. My mother
6 was involved in a -- was injured in a serious car accident
7 on the 21st of November. I'm basically in California most
8 of December.

9 THE COURT: Can Mr. Whipple be present since
10 it's more regarding his schedule.

11 MS. ERICKSON: If the court can do it with just
12 him, I won't be able to be here.

13 THE COURT: Give him information about your
14 schedule. We'll nail down the trial date. I appreciate
15 the State's representation. We just need to nail down a
16 trial doesn't for Ms. Cabrera. Doesn't have to be that
17 April 18th, but we can get creative when to have that.
18 Right now they stay separated. We've confirmed trial
19 readiness at this point with Mr. Gonzales.

20 MR. PATRICK: Your Honor, will you put Mr.
21 Gonzales on that date too, please.

22 THE COURT: Yes. Both parties for status check
23 setting of trial, as these matters are still bifurcated.
24 We'll check in with each other on each case.

25 MR. PATRICK: Thank you.

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THE CLERK: December 16th, at 9:00.

* * * * *

CERTIFICATE
OF
CERTIFIED COURT REPORTER

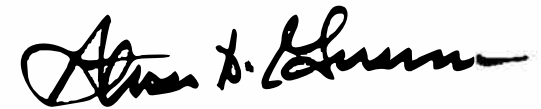
* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.

A handwritten signature in cursive script, reading "Sharon Howard", is written over a horizontal line. The signature is fluid and includes a large loop at the end.

Sharon Howard
C.C.R. #745



CLERK OF THE COURT

1 **NOTC**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MARC DIGIACOMO
6 Chief Deputy District Attorney
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 IVONNE CABRERA, aka
13 Yvonne Cabrera, #1617623
14 JOSE GONZALES, aka
Jose Alejandro Gonzales, #2636822

CASE NO: C-12-283700-1
C-12-283700-2

DEPT NO: XXV

15 Defendants.

16 **SECOND AMENDED NOTICE OF INTENT**
17 **TO SEEK DEATH PENALTY**

18 COMES NOW, the State of Nevada, through STEVEN B. WOLFSON, Clark County
19 District Attorney, by and through MICHAEL V. STAUDAHER, Chief Deputy District
20 Attorney, pursuant to Supreme Court Rule 250, NRS 175.552 and NRS 200.033, and declares
21 its intention to seek the death penalty at penalty hearing for a conviction on COUNT 3 and/or
22 COUNT 5. Furthermore, the State of Nevada discloses¹ that it will present evidence of the
23 following aggravating circumstances:

- 24 ***1. The defendant has, in the immediate proceeding, been convicted of more than one***
25 ***offense of murder in the first or second degree.***

26 That on or about April 26, 2012, Defendants IVONNE CABRERA, aka, Yvonne
27 Cabrera and JOSE GONZALES, aka, Jose Alejandro Gonzales did then and there wilfully,
28

1 feloniously, without authority of law, and with premeditation and deliberation, and with malice
2 aforethought, kill JAMES HEADRICK, a human being, by shooting at the said JAMES
3 HEADRICK multiple times, with a deadly weapon, to-wit: firearm; Defendant JOSE
4 GONZALES, aka, Jose Alejandro Gonzales directly committing said crime, Defendant
5 IVONNE CABRERA, aka, Yvonne Cabrera aiding or abetting by counsel and encouragement
6 and by accompanying Defendant JOSE GONZALES, aka, Jose Alejandro Gonzales to
7 JAMES HEADRICK'S residence and knocking on doors to and within JAMES
8 HEADRICK'S apartment to allow Defendant JOSE GONZALEZ, aka, Jose Alejandro
9 Gonzales to gain access to JAMES HEADRICK to facilitate shooting him, Defendant
10 IVONNE CABRERA, aka, Yvonne Cabrera also being criminally liable as a co-conspirator
11 vicariously in that said crime was a foreseeable act of the conspiracy. (See Count 3 of the
12 Instant Information)

13 That on or about April 26, 2012, Defendants IVONNE CABRERA, aka, Yvonne
14 Cabrera and JOSE GONZALES, aka, Jose Alejandro Gonzales did then and there wilfully,
15 feloniously, without authority of law, and with premeditation and deliberation, and with malice
16 aforethought, kill ERIK QUEZADA MORALES, a human being, by shooting at the said ERIK
17 QUEZADA MORALES multiple times, with a deadly weapon, to-wit: firearm; Defendant
18 JOSE GONZALES, aka, Jose Alejandro Gonzales directly committing said crime, Defendant
19 IVONNE CABRERA, aka, Yvonne Cabrera aiding or abetting by counsel and encouragement
20 and by accompanying Defendant JOSE GONZALES, aka, Jose Alejandro Gonzales to ERIK
21 QUEZADA MORALES'S residence and knocking on doors to and within ERIK QUEZADA
22 MORALES'S apartment to allow Defendant JOSE GONZALEZ, aka, Jose Alejandro
23 Gonzales to gain access to ERIK QUEZADA MORALES to facilitate shooting him,
24 Defendant IVONNE CABRERA, aka, Yvonne Cabrera also being criminally liable as a co-
25 conspirator vicariously in that said crime was a foreseeable act of the conspiracy. (See Count
26 5 of the Instant Information)

27 That on or about September 9, 2012, Defendants were charged by way of an
28 Information in the Eighth Judicial District Court, Case Number C283700, in both COUNTS

1 3 and 5 with MURDER WITH USE OF A DEADLY WEAPON. The State anticipates that
2 both defendants may be convicted of both charges prior to any penalty hearing in the instant
3 case. If such convictions occur for First or Second Degree Murder on both charges, the
4 convictions would qualify as an aggravating circumstance under NRS 200.033(12). If such
5 conviction occurs for any lesser offense, the conviction would qualify as an aggravating
6 circumstance under NRS 200.033(2)(b).

7 The evidence upon which the State will rely is the testimony of the witnesses, the
8 pleadings, transcripts, judgment of conviction, court minutes in Case Number C283700, as
9 well as the police reports, statements, photographs, and/or physical evidence from North Las
10 Vegas Police Department Event Number 120426007466.

- 11 2. *The murder was committed by a person who, at any time before a penalty hearing is*
12 *conducted for the murder pursuant to NRS 175.552, is or has been convicted of:*
13 (a) *Another murder and the provisions of subsection 12 do not otherwise apply to*
14 *that other murder; or*
15 (b) *A felony involving the use or threat of violence to the person of another and*
16 *the provisions of subsection 4 do not otherwise apply to that felony.*

17 That on or about April 26, 2012, Defendants IVONNE CABRERA, aka, Yvonne
18 Cabrera and JOSE GONZALES, aka, Jose Alejandro Gonzales did then and there, without
19 authority of law, and malice aforethought, willfully and feloniously attempt to kill ASHLEY
20 WANTLAND, a human being, by shooting at the said ASHLEY WANTLAND multiple
21 times, with a deadly weapon, to-wit: a firearm; Defendant JOSE GONZALES, aka, Jose
22 Alejandro Gonzales directly committing said crime, Defendant IVONNE CABRERA, aka,
23 Yvonne Cabrera aiding or abetting by counsel and encouragement and by accompanying
24 Defendant JOSE GONZALES, aka, Jose Alejandro Gonzales to ASHLEY WANTLAND'S
25 residence and knocking on doors to and within ASHLEY WANTLAND'S apartment to allow
26 Defendant JOSE GONZALEZ, aka, Jose Alejandro Gonzales to gain access to ASHLEY
27 WANTLAND to facilitate shooting her, Defendant IVONNE CABRERA, aka, Yvonne
28 Cabrera also being criminally liable as a co-conspirator vicariously in that said crime was a
foreseeable act of the conspiracy.

//

1 That on or about September 9, 2012, Defendants were charged by way of an
2 Information in the Eighth Judicial District Court, Case Number C283700, in **COUNT 4** with
3 **ATTEMPT MURDER WITH USE OF A DEADLY WEAPON**. The State anticipates that
4 both defendants may be convicted of such charge prior to any penalty hearing in the instant
5 case. If such conviction occurs for Attempt Murder with Use of a Deadly Weapon or any
6 lesser offense, the conviction would qualify as an aggravating circumstance under NRS
7 200.033(2)(b).

8 The evidence upon which the State will rely is the testimony of the witnesses, the
9 pleadings, transcripts, judgment of conviction, court minutes in Case Number C283700, as
10 well as the police reports, statements, photographs, and/or physical evidence from North Las
11 Vegas Police Department Event Number 120426007466.

- 12 **3. *The murder was committed by a person who, at any time before a penalty hearing is***
13 ***conducted for the murder pursuant to NRS 175.552, is or has been convicted of:***
14 ***(c) Another murder and the provisions of subsection 12 do not otherwise apply to***
15 ***that other murder; or***
16 ***(d) A felony involving the use or threat of violence to the person of another and***
17 ***the provisions of subsection 4 do not otherwise apply to that felony.***

18 That on or about April 26, 2012, Defendants IVONNE CABRERA and JOSE
19 GONZALES did then and there, without authority of law, and malice aforethought, willfully
20 and feloniously attempt to kill MELISSA MARIN, a human being, by shooting at the said
21 MELISSA MARIN twice, with a deadly weapon, to-wit: a firearm; Defendant JOSE
22 GONZALES, aka, Jose Alejandro Gonzales directly committing said crime, Defendant
23 IVONNE CABRERA, aka, Yvonne Cabrera aiding or abetting by counsel and encouragement
24 and by accompanying Defendant JOSE GONZALES, aka, Jose Alejandro Gonzales to
25 MELISSA MARIN'S residence and knocking on doors to and within MELISSA MARIN'S
26 apartment to allow Defendant JOSE GONZALEZ, aka, Jose Alejandro Gonzales to gain
27 access to MELISSA MARIN to facilitate shooting him, Defendant IVONNE CABRERA, aka,
28 Yvonne Cabrera also being criminally liable as a co-conspirator vicariously in that said crime
was a foreseeable act of the conspiracy.

//

1 That on or about September 9, 2012, Defendants were charged by way of an
2 Information in the Eighth Judicial District Court, Case Number C283700, in **COUNT 6** with
3 **ATTEMPT MURDER WITH USE OF A DEADLY WEAPON**. The State anticipates that
4 both defendants may be convicted of such charge prior to any penalty hearing in the instant
5 case. If such conviction occurs for Attempt Murder with Use of a Deadly Weapon or any
6 lesser offense, the conviction would qualify as an aggravating circumstance under NRS
7 200.033(2)(b).

8 The evidence upon which the State will rely is the testimony of the witnesses, the
9 pleadings, transcripts, judgment of conviction, court minutes in Case Number C283700, as
10 well as the police reports, statements, photographs, and/or physical evidence from North Las
11 Vegas Police Department Event Number 120426007466.

12 **4. The murder was committed by a person who knowingly created a great risk of death**
13 **to more than one person by means of a weapon, device or course of action which**
would normally be hazardous to the lives of more than one person.

14 On the date of this double homicide, April 26, 2012, the location where the shooting
15 took place was occupied by four (4) individuals who were sleeping in their beds. After
16 breaking into the victims' home, the defendants (Defendant GONZALES directly and
17 Defendant CABRERA thru vicarious liability) shot at and into the bodies of all four (4)
18 occupants, killing two (2) and severely injuring two (2) others. The defendants fired at least
19 nine (9) rounds from the weapon at these victims and struck each victim multiple times.

20 **5. The murder was committed while the person was engaged, alone or with others, in**
21 **the commission of, or an attempt to commit or flight after committing or attempting to**
22 **commit, any robbery, arson in the first degree, burglary, invasion of the home or**
23 **kidnapping in the first degree, and the person charged:**

(a) **Killed or attempted to kill the person murdered; or**

(b) **Knew or had reason to know that life would be taken or lethal force used.**

24 On the date of this double homicide, April 26, 2012, the location where the shooting
25 took place was occupied by four (4) individuals who were sleeping in their beds. The
26 defendants not only broke into the victims' home, but they also forcibly entered each of the
27 victims' bedrooms. This entry was made while in possession of a firearm and for the express
28


1 purpose of shooting and killing the victims residing therein. The defendants knew that life
2 would be taken and that lethal force would be used after entering the bedrooms of the victims.

3
4 DATED this 9th day of December, 2015.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY


10 MARC DIGIACOMO
11 Chief Deputy District Attorney
12 Nevada Bar #006955

13
14 CERTIFICATE OF SERVICE

15 I hereby certify that service of State's Second Amended Notice of Intent to Seek the
16 Death Penalty, was made this 10th day of December, 2015, by e-mail to:

17 BRET O. WHIPPLE, Esq.
18 admin@justice-law-center.com

19 PATRICIA M. ERICKSON, Esq.
20 pme@pmericksonlaw.com

21 ALZORA JACKSON, Esq.
22 ajackson@clarkcountynv.gov
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24 DAVID SCHIECK, Esq.
25 dschieck@clarkcountynv.gov

26 BY:


27 Secretary for the District Attorney's Office

28 tgd/MVU

DISTRICT COURT
CLARK COUNTY, NEVADA


CLERK OF THE COURT

THE STATE OF NEVADA,)
)
Plaintiff,) Case No: C-12-283700-1
)
vs.) Dept. No: 25
)
IVONNE CABRERA,)
)
Defendant.)
)
_____)

BEFORE THE HONORABLE KATHLEEN DELANEY

DECEMBER 16, 2015, 9:00 A.M.

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

APPEARANCES:

(See separate page)

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

1 APPEARANCES:

2 For the Plaintiff:

3 MARC DIGIACOMO, ESQ.
4 Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

5 HETTY WONG, ESQ.
6 Chief Deputy District Attorney
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8 For Defendant JOSE GONZALES:

9 CLARK W. PATRICK, ESQ.
10 Deputy Special Public Defender
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11 Las Vegas, Nevada 89155

12 ALZORA B. JACKSON, ESQ.
13 Deputy Special Public Defender
330 S. Third Street, Suite 800
14 Las Vegas, Nevada 89155

15 For Defendant IVONNE CABRERA:

16 BRETT O. WHIPPLE, ESQ.
17 JUSTICE LAW CENTER
1100 S. Tenth Street
18 Las Vegas, Nevada 89104

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LAS VEGAS, CLARK COUNTY, NEVADA

WEDNESDAY, DECEMBER 16, 2015, 9:00 A.M.

PROCEEDINGS

* * *

THE COURT: Calling the matters in the State of Nevada versus Ivonne Cabrera and the State of Nevada versus Jose Gonzales.

Go ahead and state your appearances.

MR. DIGIACOMO: Marc DiGiacomo and Hetty Wong for the State.

MR. WHIPPLE: Brett Whipple for Mr. Gonzales.

MR. PATRICK: Good morning, Your Honor. Clark Patrick and Alzora Jackson for Mr. Gonzales.

THE COURT: Thank you. And I do see both the defendants present in custody.

We have had obviously a status check on the calendar regarding negotiations and resetting of trial. I wasn't necessarily optimistic that there would be any other resolution of this matter based on the conversation the last time we were present, but that did remain technically on the calendar.

And then, ultimately, we had the State's motion to consolidate the cases, which Mr. DiGiacomo indicated was going to be filed based on the discussions and where we are at now just in the evolution of these trials.

1 So does anybody have any update with regard to
2 the status check first that they wanted to provide?

3 MR. PATRICK: Your Honor, we still have a trial
4 date.

5 MR. DIGIACOMO: We have heard nothing since I
6 conveyed offers for both counsel for both defendants. We
7 received no responses and no further negotiations, so at
8 this point we need to just proceed on the case.

9 THE COURT: All right. I just wanted to clear
10 up that status check because it was on the calendar.
11 That is what I anticipated occurring.

12 We still technically need to set the trial in
13 Ms. Cabrera's matter but I could be wrong. It's not
14 showing on the calendar that we gave a date.

15 MR. WHIPPLE: We did not.

16 THE COURT: We talked about a few days. I think
17 the concern was Ms. Erickson was here and couldn't
18 necessarily speak to your schedule and your availability,
19 Mr. Whipple, and we knew we were going to kind of do a
20 flip-flop where you would be here today and she wouldn't
21 be present but hopefully we have enough information to be
22 able to set that trial.

23 But we do have the trial date obviously standing
24 at this time for Mr. Gonzales.

25 Does the State though want to make a record in

1 terms of whether those offers remain available or --

2 MR. DIGIACOMO: Considering the nature of the
3 offer, certainly, as it relates to them, I'm not at this
4 point going to withdraw them because they are the type of
5 offers that may take some time for them to think about
6 and I'm sure they will be further discussed between the
7 parties, so I am not revoking the offers that I conveyed
8 the nature of those offers as such it doesn't get much
9 worse than that for the defense.

10 THE COURT: Okay. Let's move to the State's
11 Motion to Consolidate. Do you have anything you want to
12 add to your briefings, Mr. DiGiacomo?

13 MR. DIGIACOMO: Only that in review of the
14 transcript it appears that there is a number of issues
15 that came up. And to the extent that there is the issue
16 with Ms. Cabrera's statement, well, that shouldn't be an
17 issue now that I have reviewed the case and I don't
18 believe that I will be utilizing Ms. Cabrera's statement,
19 so if that was the basis for the Court. Ms. Jackson
20 brought up --

21 THE COURT: It was simply one of the things the
22 Court considered. It was by no means the only thing upon
23 which the Court made its decision.

24 MR. DIGIACOMO: But in reviewing everything else
25 I couldn't find, you know, other than some of the timing

1 issues and those type of things, what piece of evidence
2 was going to be admitted in a separate trial that
3 couldn't be admitted in a joint trial, which is sort of
4 what the standard in *Chartier* is. In *Chartier* suggests
5 that if there is a change in circumstances you should
6 always readdress severance, so I assume that means you
7 should always readdress consolidation.

8 And to a certain extent for judicial economy if
9 the Court does not want to combine two cases then the
10 Court doesn't need to. Both these cases are such that
11 they are independently so overwhelmingly present the
12 guilt of the defendant that trying them twice doesn't
13 really actually bother me. But it seems to me like we
14 are wasting Court's resources by trying this case twice
15 if I'm not going to use that statement.

16 Ms. Jackson mentioned at the last hearing that
17 everything she's done is preparing for a separate trial.
18 I don't even know what that means. What changes in the
19 evidence, what changes in the facts whether they are
20 combined or severed, and the answer is absolutely
21 nothing.

22 So I suggested that I filed this more for the
23 Court in the sense that if the bases was severance based
24 on the belief that the State was going to use the
25 statement then the Court should consolidate the cases

1 because we won't be. If the Court has other grounds that
2 I'm just not seeing from the record or from my limited
3 review of the underlying discovery, then the Court should
4 leave the cases severed and set us a trial date.

5 I don't believe there is a legal basis to
6 require one defendant to go first before the other. And
7 right now Mr. Whipple, I believe is unavailable
8 April 18th because of the Cochi (phonetic) matter and
9 thus the only other trial date available is Mr. Gonzales'
10 trial, so I don't see why it is we shouldn't just set
11 Ms. Cabrera's trial when it's available and go forward on
12 Mr. Gonzales' trial. I do not see a legal basis for
13 there to be a decision as to which one goes first. And I
14 will submit it to the Court.

15 THE COURT: Just a couple responses to that as I
16 turn it over then to the defense to respond. I cannot as
17 I sit here today honestly remember the details of what
18 was argued previously as the mutually antagonistic
19 defenses, but that was certainly discussed at length and
20 I did go back over and look at the transcript that was
21 provided, but I don't know.

22 I seem to remember my thought process involving
23 initially the Court was not inclined to sever in any way.
24 Things evolved, severance occurred and now the question
25 becomes as the cases go forward have things changed to

1 warrant it remaining severed. And I think it is a fair
2 question to ask and I don't fault the State for bringing
3 it up.

4 Certainly, judicial economy is something that
5 has to be weighed but it is not going to override
6 whatever these other concerns were and at this point it
7 probably is beneficial to hear again some specifics as to
8 those concerns.

9 As far as that last point that you made in terms
10 of which order the cases go, the only thing from my
11 perspective that was driving the train that Ms. Cabrera's
12 case was going to go first was that she was basically
13 very reluctantly dragged along to not being in an invoked
14 status because she had sought to invoke from the
15 beginning and to get the case set it was always
16 understood that her case would go first.

17 But we are now at the point where it needs to
18 get set wherever it needs to get said and I don't
19 disagree with that assessment as all.

20 Let me, perhaps, start with Mr. Patrick or
21 Ms. Jackson, whoever is going to make that argument,
22 because the overwhelming feeling I have from rereading
23 the transcript and revisiting this issue was that it was
24 those assertions of antagonistic defenses more so from
25 your camp that persuaded this Court that severance would

1 make sense but it was also a trial timing thing. So if
2 we are really just talking about timing then maybe we
3 need to consider.

4 Mr. Patrick.

5 MR. PATRICK: Thank you, Your Honor. And I
6 think the Court is exactly right because Ms. Cabrera
7 previously filed a motion to sever that was not granted.
8 Mr. Gonzales re-filed our motion that was granted and
9 there was some *Bruton* issues that whether or not
10 Mr. DiGiacomo is going to use Ms. Cabrera's statement or
11 not, if any part of it comes in we still have the *Bruton*
12 issues. There's no way to clean that up. There's no way
13 to redact that to make it anything different than what it
14 is.

15 And I went back and read the transcripts from
16 when we were severed and I provided them to the Court
17 again and while the Court did mention the *Bruton* issues
18 it wasn't the Court's overriding consideration. The
19 overriding consideration was exactly that; it was the
20 antagonistic defenses.

21 And Ms. Cabrera has stood here for two years and
22 has claimed that she had no part in this. Mr. Gonzales
23 kidnapped her at gunpoint; forced her over to this
24 apartment and that she had no idea what was going on.

25 Well, as we have seen through the discovery and

1 even more importantly through the Petrocelli hearing that
2 Ms. Cabrera had that is absolutely not going to hold
3 water. And we stated that that since the beginning of
4 this trial that this is all because of Ms. Cabrera and
5 her actions that this whole thing started. It was her
6 relationship to the victims. It was her relationship to
7 what was going on and she is the one that drug
8 Mr. Gonzales into this.

9 He has no independent attachment or relationship
10 to these victims without her. So she is going to sit
11 here and say, Well, it was all him, he drug me into this.
12 And visa versa. Our whole defense revolves around the
13 fact that he had no idea who these people were and would
14 not have even been there if it wasn't for her.

15 And so what we have now is you have Mr. Whipple
16 and Ms. Erickson pointing their finger at us along with
17 the State and you are going to have us pointing the
18 finger at Ms. Cabrera along with the State and there's no
19 way -- it is going to be almost a three-way triangle of
20 pointing fingers and there's no way that either
21 Mr. Gonzales or Ms. Cabrera can get anything close to a
22 fair trial when there is that much fighting between the
23 two defendants plus the State.

24 And I think that was the overriding
25 consideration that the Court had when she severed these

1 trials. And since the time of severance that
2 antagonistic defenses hasn't grown weaker it's actually
3 grown stronger with the results of the Petrocelli hearing
4 that was heard here.

5 And I think with that and with the other issues
6 that we have, spillover effects and everything into
7 consideration, and as they said in *Chartier* it is a
8 cumulative effect of all of the issues. It's not just
9 *Bruton*, it's not just the antagonistic defenses, it's not
10 just spillover but it's putting them all together, there
11 is no possible way that these two defendants can have a
12 fair trial if they are rejoined.

13 THE COURT: Mr. Whipple, do you want to add
14 anything on this argument?

15 MR. WHIPPLE: Yes, Your Honor. I listened to
16 Mr. DiGiacomo's recitation of the facts and it's 180
17 degrees different than what we anticipated bringing
18 before this court. I could not imagine a more
19 antagonistic environment than what we have here before
20 us.

21 I find myself responding about all these
22 horrible things of Mr. Patrick's client, and that goes
23 exactly to the intent of why this cannot be together
24 because all I am going to do is attack his client and I
25 don't take pleasure in attacking his client and throwing

1 all these reasons as to why it's an antagonistic defense.

2 I just hope this Court can understand as I sit
3 here I differ from their recitation of the facts, but
4 here I am going after their client and that's exactly
5 what would happen in a court. And I don't even want to
6 do that because I don't think I should be forced to
7 disclose our defense, all the details and all the
8 specifics. But --

9 THE COURT: I don't think anybody is forcing you
10 to disclose your defense with all of the details and all
11 the specifics. But I think Mr. Patrick did a very good
12 job of highlighting what would be the potential
13 antagonistic approach.

14 And, certainly, the Court is aware having had
15 the Petrocelli hearing of what the statements are likely
16 to be of exactly what occurred that day and how that
17 would play into that. Is there anything else you would
18 like to add?

19 MR. WHIPPLE: No. I would submit it, Your
20 Honor.

21 THE COURT: Before I come back to the State I do
22 need to address -- and I want to get input from all the
23 counsel, so let me let the counsel finish with
24 Mr. Gonzales.

25 I just want to address the timing aspect of the

1 trial before we get back to Mr. DiGiacomo. If we do not
2 consolidate them, if we leave them separate we currently
3 have a situation where we have Mr. Gonzales set to go on
4 May 9th.

5 MS. JACKSON: That is correct.

6 THE COURT: And try to figure out where we have
7 many other murder trials in that same stack, frankly. I
8 am not quite sure how we are going to juggle these
9 because I do not think any of them will be overflow
10 eligible and so we have a situation even absent counsels'
11 schedule we have an issue with the Court's schedule here.
12 But what is the position on when the trial would go?

13 MS. JACKSON: Your Honor, we had a chance to
14 speak with Mr. Gonzales numerous times at the jail and
15 again this morning. As much as he was in favor of
16 proceeding first, we have done our due diligence as much
17 as was we can.

18 Mr. Patrick and I have worked long and hard in
19 preparing this matter for trial and if Mr. Gonzales had
20 to choose he wants to go to trial May 9th; is that
21 correct, Mr. Gonzales?

22 THE DEFENDANT: Right now I'm not in agreement
23 with some of the things that are being said. I would
24 like to speak to my lawyers if I can.

25 THE COURT: Go ahead and speak with him,

1 Ms. Jackson, and I will speak with Mr. Whipple while you
2 are speaking with Mr. Gonzales.

3 Mr. Whipple, what is your schedule and what is
4 Ms. Erickson's schedule?

5 MR. WHIPPLE: Ms. Erickson discussed with you
6 that she was --

7 MR. DIGIACOMO: She wasn't available on April
8 18th --

9 THE COURT: Yes. She was traveling.

10 MR. DIGIACOMO: -- and she thought you would
11 have the Cochi matter.

12 MR. WHIPPLE: Yes, that is the Cochi matter.

13 MR. DIGIACOMO: And I thought your client and
14 Judge Scotty would be very disturbed if you had capital
15 case set on April 18th.

16 THE COURT: She had very little availability in
17 light of some travel circumstances, something having to
18 do with her mother and her own trial schedule. And my
19 recollection was the only time frame that we thought it
20 could be heard and be enough in advance of the Gonzales
21 trial that it would not impact the State's ability to do
22 what they need to do, we would almost effectively put
23 them back to back.

24 And we confirmed that we are still looking at
25 perhaps a two-week estimate and that is how we could

1 proceed but we would have to go on that date because
2 anything later --

3 MR. WHIPPLE: That's fine, Your Honor. I'll
4 make it work.

5 MR. DIGIACOMO: So you want to go on April 18th?

6 MR. WHIPPLE: No. I thought it was back to
7 back.

8 THE COURT: The April 18th date is the back to
9 back date. Maybe the 25th would technically be back to
10 back if we can get it done because -- I do not have an
11 actual calendar in front of me but the week of the
12 25th --

13 MR. DIGIACOMO: The Cochi trial should take
14 three to four weeks.

15 THE COURT: So we could do it potentially and
16 still give you the week of April 25th but you are in this
17 other trial.

18 MR. WHIPPLE: Yes, Mr. DiGiacomo is correct; we
19 have a trial together on April 18th, which is going to be
20 a long trial unfortunately.

21 THE COURT: Well, again, it's not just counsels'
22 problem either. It's the Court's problem and its
23 schedule and where it can fit things but I've got my
24 February stack there's just no room in that whatsoever
25 and with cases even older than this one. And then I have

1 my civil stack which I can't give away again.

2 MR. WHIPPLE: We will follow this trial set for
3 May 9th whenever the Court has availability.

4 THE COURT: All right.

5 MR. DIGIACOMO: I think Ms. Erickson was
6 available May 9th and after. It was only a question of
7 whether Mr. Gonzales was going forward on May 9th or
8 Ms. Cabrera on May 9th.

9 I would like to address the mutually exclusive
10 -- well, when Ms. Jackson, I guess, is done with her
11 client.

12 THE COURT: Absolutely. We're going to let you
13 come back and talk about the consolidation request.

14 Just still in talking about scheduling, how long
15 do we estimate the Gonzales trial to take?

16 MR. DIGIACOMO: I would say both cases are two
17 weeks trailing into a third week depending on jury
18 selection.

19 THE COURT: Would you agree with that
20 assessment?

21 MS. JACKSON: Yes, Your Honor.

22 MR. PATRICK: Yes, Your Honor.

23 MS. JACKSON: And, Your Honor, for the record we
24 cannot confirm on behalf of Mr. Gonzales this morning for
25 the trial date. Can we set this over even for tomorrow?

1 THE COURT: I do not have a criminal calendar
2 tomorrow; I have my foreclosure mediation calendar. We
3 could come back next week.

4 MS. JACKSON: I can't come back next week, I
5 have plans -- unless it's Monday.

6 THE COURT: I have a calendar on Monday.

7 MS. JACKSON: Monday would be fine.

8 MR. DIGIACOMO: So come back on the 21st as it
9 relates to the trial dates.

10 THE COURT: Yes. The 21st as it relates to
11 trial dates, that's fine. I do not have a problem doing
12 that.

13 And you may not have heard, Ms. Jackson, just so
14 you know, Mr. Whipple has indicated at this point it is
15 likely that we will have the other matter go after your
16 matter if we keep the trial date for your matter because
17 he does have conflict with his trial schedule that will
18 not permit it to be heard prior to your trial.

19 Now, I appreciate you still want to talk to your
20 client and I'm sure your client appreciates that this is
21 not his choice necessarily as to when we go to trial. We
22 have a trial date and I would have to hear some pretty
23 compelling reasons as to why we would not go to trial on
24 that date before we make any changes but we can resolve
25 all the trial scheduling on Monday. I am happy to do

1 that.

2 MS. JACKSON: Thank you, Your Honor.

3 THE COURT: We need to wrap up the consolidation
4 request now and I think we can do that today. And I will
5 hear from Mr. DiGiacomo.

6 MR. DIGIACOMO: I recognize that when people use
7 the term, Well, it's antagonistic, I'm going to be
8 pointing to them and I'm going to pointing to them. The
9 standard is mutually exclusive antagonistic and the word
10 defense is in there as well.

11 So in this case Ms. Cabrera can say it's
12 Mr. Gonzales' fault and Mr. Gonzales can say it's
13 Ms. Cabrera's fault. That's antagonistic but neither one
14 of them is a defense. I did not hear in here that
15 Mr. Gonzales is going to say Ms. Cabrera had the gun and
16 was shooting a bunch of people. And then Ms. Cabrera is
17 going to say Mr. Gonzales had the gun and was shooting a
18 bunch of people and the other person wasn't present.
19 That would be a mutually exclusive antagonistic defense.

20 They haven't presented a defense let alone one
21 that is mutually exclusive. It is just it's his fault,
22 it's her fault. That's not the standard in the Court
23 which *Marshall* says is not the standard for the Court.

24 The standard must be in order to believe one
25 person's defense or both defenses they must reject both

1 defenses because both defenses can't be true.

2 For example, if Mr. Gonzales said Ms. Cabrera
3 was present by herself and committed the murder, and
4 Ms. Cabrera said Mr. Gonzales was present by himself and
5 committed the murder and I wasn't there, and if both
6 present that in front of a jury they would both be
7 rejected as ridiculous because of the nature of them
8 fighting against each other.

9 The defense of Mr. Gonzales is the shooter and I
10 was just under duress, well, that might be antagonistic
11 to Mr. Gonzales but unless Mr. Gonzales is going to say
12 Ms. Cabrera is the shooter and I was under duress it's
13 not a mutually exclusive defense.

14 And so while I recognize they don't like the
15 idea of pointing to each other this is still a
16 truth-finding function and if the truth-finding function
17 is a dispute over whose fault it is that is not a defense
18 and that is not something the Court should be wasting
19 judicial resources on by having two trials. And I would
20 submit it to the Court.

21 MS. JACKSON: Your Honor, if I may.

22 THE COURT: If you would like to, Ms. Jackson.

23 MS. JACKSON: Briefly, Your Honor.

24 Our client is charged with a quadruple shooting,
25 a double homicide. Ever since *State versus Gardner* where

1 death is different they are seeking to execute a citizen,
2 first of all, we would be ineffective to preview our
3 defense. That's not what the law requires us to do even
4 when there is a motion to sever or a motion to
5 reconsolidate after the Court has thoroughly reviewed
6 briefs and ruled on this motion times two because they
7 were done separately by both sides.

8 In a capital trial to have us defend
9 Mr. Gonzales where he is accused of kidnapping and
10 holding a gun on another person, that type of prior bad
11 acts would render his trial constitutionally unsound. It
12 would be a waist of time and effort in futility for us to
13 have a trial.

14 And I dare say that Mr. DiGiacomo may be able to
15 control some defense attorneys, I don't think he will be
16 able to control Mr. Whipple or Ms. Erickson; therefore,
17 the Court was correct in its initial assessment that
18 there is no legal way possible that Mr. Gonzales can have
19 a fair trial given those allegations. Just the prior bad
20 acts alone.

21 THE COURT: Well, again, I appreciate that we
22 are not asking for and the counsel are not going to
23 preview their entire defenses.

24 I do appreciate Mr. DiGiacomo talking about
25 *Marshall* and sort of what we really need to see there to

1 exist. But on the totality of the circumstances that I
2 have here, we have not addressed separately other than
3 Mr. Patrick bringing up the *Bruton* issues, some of the
4 other factors, but it is apparent to me that even any
5 fair reading of *Marshall*, any fair reading of *Chartier*
6 that we have a situation here where we have the necessary
7 mutually exclusive and antagonistic defenses, or at least
8 the indicia of them, and the Court is even more privy now
9 to the arguments that are likely to be made and the
10 evidence that is likely to be deduced, I do think that,
11 although, I am very cognizant of judicial efficiency in
12 these matters that we must try these matters separately
13 in order to ensure a fair trial to both.

14 And we are going to on that basis and on, again,
15 what I think is a fair reading of *Marshall* and I am
16 taking into account sort of the tortured history of how
17 we got here to be severed. I may be perhaps applying
18 this to a situation of needing to sort of overcome that
19 to reconsolidate versus just a straight up look of
20 whether we sever or remain together.

21 But at the end of the day, I did look at
22 *Marshall*; I did look at *Chartier*; I did do another
23 assessment and the arguments here today have not
24 persuaded me that this matter needs to be reconsolidated.

25 The only thing I would be looking at in the

1 circumstances would be judicial efficiency and that
2 cannot and should not override what do appear to be
3 mutually exclusive antagonistic defenses that are going
4 to be proffered, *Bruton* issues and other matters.

5 So in that respect I am going to deny the
6 State's Motion to Consolidate and we will resolve
7 actually when trial takes place for each of these folks
8 on Monday, keeping in mind that right now I have not
9 heard anything that would incline me to believe that the
10 Gonzales trial date needs to be changed and it would be
11 more a matter of when are we going to plug in Cabrera.

12 And my goal would be, if at all possible, to try
13 to run them back to back so that we have at least those
14 efficiencies for the counsel.

15 MR. WHIPPLE: Thank you, Your Honor.

16 MR. DIGIACOMO: Thank you, Your Honor.

17 THE COURT: Thank you.

18 THE CLERK: December 21st at 9:00 a.m.

19 (Proceedings were adjourned.)
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TRAN
CASE NO. C-12-283700-1-2
DEPT. NO. 25



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
IVONNE CABRERA,)
JOSE GONZALES,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT
OF
STATUS CHECK TRIAL DATE
250 RULE

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: MONDAY, DECEMBER 21, 2015

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

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APPEARANCES:

For the State: HETTY WONG, ESQ.

For the Defendant: CLARK PATRICK, ESQ.

ALZORA JACKSON, ESQ.

BRET WHIPPLE, ESQ.

* * * * *

1 LAS VEGAS, NEVADA; MONDAY, DECEMBER 21, 2015

2 P R O C E E D I N G S

3 * * * * *

4
5 THE COURT: Page 2, do we need to wait for
6 everybody.

7 MS. JACKSON: Good morning, your Honor. Thank
8 you so much for calling the matter. Alzora Jackson.

9 THE COURT: Ms. Cabrera and Mr. Gonzales are
10 with us present in custody.

11 MS. JACKSON: Yes, your Honor. Alzora Jackson
12 and Clark Patrick with the office of the Special Public
13 Defender on behalf of Mr. Gonzales.

14 We discussed with Ms. Wong the possibility of us just
15 confirming our trial date and the court sending us on our
16 way. Mr. Gonzales would advise the court that we met with
17 him last week and everything is resolved; is that
18 correct.

19 THE DEFENDANT: That's correct.

20 THE COURT: That was one of the open issues with
21 regard to Mr. Gonzales. And we'll retain then his
22 calendar call date of May 2nd, and his jury trial date of
23 May 9. Those -- technically right now those start times
24 are, I believe, 9:30 and 10:30 respectively, with the 9:30
25 calendar call that a you know we'll take it on calendar at

1 whatever point we can take it.

2 As far as the other matter, when Ms. Cabrera's trial
3 is to go. We can let you all know I think we have
4 Ms. Erickson sent over scheduling, and I didn't know if
5 that also meant she was intending to come or if that was
6 just the information she was providing or someone from
7 Mr. Whipple's office would appear.

8 Otherwise, have you had any contact ms. Wong.

9 MS. WONG: I haven't had any contact with Mr.
10 Whipple or Ms. Erickson. I imagine Mr. Whipple would be
11 here today. I'm willing to wait.

12 THE COURT: Let me let you all go ahead and go
13 about your business. We've confirmed Mr. Gonzaleses'
14 trial date. Just for what it's worth based on the
15 communication from Ms. Erickson, which it looks like she
16 copied on co-counsel and the State but had not yet copied
17 on counsel for Mr. Gonzales. It does appear that she is
18 available for trial April 18th. My recollection was Mr.
19 Whipple when he was here last time indicated that he could
20 not do that because of the other trial, but then I thought
21 he said something like he thought he could make it work.

22 So I'm waiting here for Mr. Whipple, but if he says
23 he can make it work on that other case, then I'm going to
24 set it on the 18th.

25 MR. PATRICK: Very good, your Honor.

1 MS. JACKSON: I know the court has done at least
2 one other capital case. Are there any instructions,
3 special, in regards to jury selection that this court can
4 share with us as quickly as possible. Because after the
5 first of the year we start to tailor our efforts,
6 especially with regard to voir dire. We have another
7 extensive motion that we file and we have certain
8 requests. If the court has any preliminary instructions,
9 that may be helpful.

10 THE COURT: I don't. The only thing we found
11 that worked well, the court does a great deal of the
12 canvass itself, then turns it over to counsel to ensure --

13 What I did in those other circumstances, and it
14 worked quite well, was to do the death qualification up
15 front and make sure we had that asked of the panel. And
16 we took them in batches, if you will, of 20 people per.
17 Even though we had the extensive questionnaire and we
18 narrowed it down.

19 We took batches of 20, because there was some
20 publicity related to that case. There has been some
21 publicity previously in this matter. We obviously wanted
22 to make sure that if somebody were to say something we
23 didn't lose a larger panel, we'd potentially lose a
24 smaller panel. I'm not quite sure we've had as much
25 publicity here.

1 What we ended up doing was I found someone else to
2 take my calendars on the first two mornings. I then
3 devoted the entire day to the jury selection. And we were
4 able to complete the selection in essentially what was two
5 days, by the time we went through each panel.

6 Now, I'd be open again because of publicity concerns
7 to maybe larger panels. But that is my inclination of how
8 to handle it so we're focused on the jury selection, we're
9 not trying to cram it in in afternoon pieces. Then we can
10 get started.

11 But in terms of the questions, concerns, specific
12 issues you may have as to what you want to inquire of the
13 jury, we can deal with that when we get a little closer,
14 but I don't have any particular dictates other than I do
15 the qualification up front.

16 MS. JACKSON: That's excellent. We actually did
17 the smaller panels in a September capital trial that I had
18 in front of Judge Herndon. That worked -- that was the
19 first time a judge had been willing to do the smaller
20 panels in a capital case that I'd been a party to. It
21 worked much better, because you're not contaminating the
22 entire panel. So I'm very grateful to the court.

23 THE COURT: It seemed to work well with panels
24 of 20. It only took us 3 panels to get the group number
25 we needed qualified. We also had selected an additional

1 number of alternates because of the length of time and,
2 again, the publicity concerns. I don't know that we
3 necessarily have those issues that we'd want to decide on
4 a final number of alternates. But at the end of the day,
5 we were able to get almost half a panel in the first
6 inquiry, then we got the remainder of the panel out of the
7 next two panels -- remainder of the venire we needed to
8 qualify. So it went well. So that would be my
9 inclination.

10 And there is Mr. Whipple. We were going to call it
11 again later, because we were just confirming Mr.
12 Gonzaleses' trial date.

13 Mr. Whipple, I did get an e-mail from Ms. Erickson
14 with regard to her dates. My recollection last time you
15 were here was that you had that trial with Mr. DiGiacomo,
16 maybe Ms. Wong as well, but that wasn't going to work in
17 terms of that April date. But we did get confirmed for
18 Ms. Erikson that April 18th would work, through and
19 including several months after that.

20 What's your schedule look like.

21 MR. WHIPPLE: Again, April 18th I'm in trial
22 with Mr. DiGiacomo. I will force the time after that.
23 What works was the court.

24 MS. WONG: Your Honor, what day is available
25 immediately after the Gonzales trial.

1 THE COURT: We have -- one second. I have a
2 partial list and my clerk has the remainder of the list.

3 Are we estimating, did we say two weeks.

4 MR. WHIPPLE: Yes, your Honor.

5 THE COURT: I've got June 27th.

6 MR. WHIPPLE: That's fine.

7 THE COURT: I have a murder trial -- well,
8 perhaps the 20th. It looks like I have the 20th would be
9 better.

10 MR. WHIPPLE: That's fine, your Honor.

11 THE COURT: That's the last week of our civil.
12 I have them backwards. It is the 27th or I have the 11th
13 of July. The 11th of July I have no competing trials for
14 a 2 week span. On the 27th I come up against another
15 murder trial, but it's not as old as this one and this
16 would have propriety.

17 MS. WONG: Mr. DiGiacomo's calendar, he already
18 has a trial set July 11th.

19 THE COURT: Looks like the 27th would be the one
20 too. Also Ms. Erickson indicates she's good through and
21 including that first week of July, but maybe not after.
22 So it looks like the June 27th date is the date we'll be
23 able to get you in.

24 MS. WONG: Mr. DiGiacomo has two trials set for
25 June 27th.

1 THE COURT: I have a hunch that Mr. DiGiacomo is
2 going to have a whole lot of trials because he's taking
3 over Mr. Staudaher's calendar as well. There's going to
4 have to be some juggling.

5 Are those capital cases. At some point our cases
6 will take propriety. I'm willing to juggle, but in terms
7 of their age, these are also older.

8 MS. WONG: Just pick a date and if this doesn't
9 work for Mr. DiGiacomo we'll put it back on calendar.

10 MS. JACKSON: May a just say one thing before
11 the court assigns the date for Ms. Cabrera. It was our
12 desire, Mr. Gonzaleses' desire that the Cabrera matter go
13 first. We discussed, Mr. Patrick and I, at length, where
14 things were heading because it was obvious to us some time
15 ago. He has determined he would like to go to trial in
16 May, even though it was his desire the co-defendant go
17 first. As much as that is not going to happen, it is
18 still his desire to go to trial in May.

19 THE COURT: Yes. I appreciate that
20 confirmation. That had been that sort of final loop to
21 close from the last time you were in court. I'm going to
22 set this on the 27th of June. I don't see we have other
23 alternatives, hoping that Mr. DiGiacomo has ample time to
24 reconfigure his calendar cases. If they are not capital
25 cases and/or older than this one, this would take

1 propriety. But I'd be happy to discuss it with the other
2 judge or judges if need be. We had to do that for our
3 case in October, and that's sometimes just the way it goes
4 if we can't work it out among ourselves.

5 THE CLERK: Calendar call June 20th at 9:30,
6 jury trial June 27th at 10:30.

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CERTIFICATE
OF
CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.

A handwritten signature in cursive script, reading "Sharon Howard", is written over a horizontal line. The signature is fluid and includes a large, circular flourish at the end.

Sharon Howard
C.C.R. #745



CLERK OF THE COURT

1 **ORDR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MARC DIGIACOMO
6 Chief Deputy District Attorney
7 Nevada Bar #06955
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 IVONNE CABRERA, aka Yvonne Cabrera,
14 #1617623

15 Defendant.

CASE NO: C-12-283700-1

DEPT NO: XXV

16 ORDER GRANTING STATE'S MOTION TO ADMIT EVIDENCE OF OTHER
17 CRIMES, WRONGS OR ACTS

18 DATE OF HEARING: 11/20/15
19 TIME OF HEARING: 9:30 A.M.

20 THIS MATTER having come on for hearing before the above entitled Court on the
21 20th day of November, 2015, the Defendant being present, represented by PATRICIA
22 ERICKSON, ESQ., the Plaintiff being represented by STEVEN B. WOLFSON, District
23 Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and the Court
24 having heard the arguments of counsel and good cause appearing therefor,

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1 IT IS HEREBY ORDERED that the State's Motion to Admit Evidence of Other
2 Crimes, Wrongs or Acts, shall be, and it is Granted. The Court's findings are as follows:

3 COURT FINDS, as to the scam, drugs, and unemployment card that evidence has been
4 provided, there is clear and convincing evidence of these bad acts having been committed;
5 and the probative value is not substantially outweighed by the danger of prejudice. COURT
6 FURTHER FINDS, the real issue is what occurred when the tools disappeared from the home,
7 the apartment was ransacked; and this Court does not see these as bad acts; additionally, there
8 is no clear and convincing evidence that Defendant stole the tools, however, the development
9 of how the people were there, what occurred, and what could have been the motive related to
10 the non-payment for the tools. COURT FURTHER FINDS, there is no legal basis to preclude
11 the State from addressing each of these facts and circumstances; the items in the motion are
12 relevant, and have been proven by clear and convincing evidence; therefore, COURT
13 ORDERED, motion GRANTED, the Court will allow the surrounding circumstances, and
14 that the discussions in knowing that Mr. Villegas was away, as it is all relevant.

15
16 DATED this 24th day of December, 2015.

17
18 
DISTRICT JUDGE

19 STEVEN B. WOLFSON
20 Clark County District Attorney
Nevada Bar #001565

21
22 BY 
23 MARC DIGIACOMO
Chief Deputy District Attorney
24 Nevada Bar #06955

25
26
27
28 tgd/MVU



CLERK OF THE COURT

Bret O. Whipple, Esq.
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Counsel for Defendant:
IVONNE CABRERA

DISTRICT COURT

COUNTY OF CLARK, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

IVONNE CABRERA,

Defendant.

Case No.: C-12-283700-1
Dept. No.: XXV

**NOTICE OF MOTION AND MOTION FOR THE JURY TO BE TAKEN TO THE
SCENE OF THE CRIMES ALLEGED IN THE INFORMATION**

Hearing Date: June 22, 2016
Hearing Time: 9:00 a.m.

COMES NOW, Defendant, IVONNE CABRERA, by and through her counsel, Bret O. Whipple and Patricia M. Erickson, and requests this Honorable Court enter an order that, at some point during Ms. CABRERA's trial, the jury shall be transported to 2039 Webster, Unit C, Las Vegas, Nevada - where the crimes alleged to have been committed by Ms. CABRERA occurred - to view the street, the residential area which contains 2 duplex one floor residences and the outside of Unit C.

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1 This motion is made and based upon Ms. Cabrera's right to due process of law and
2 a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments. Additionally,
3 this motion is based upon all of the documents filed in the case at bar, the attached
4 Memorandum of Points and Authorities, and the oral argument presented regarding the
5 motion to the this Honorable Court.

6 DATED this 12th day June, 2016.

7 Respectfully Submitted,
8

9 /s/ Bret O. Whipple
10 Bret O. Whipple
11 Nevada Bar No. 6168
12 1100 South Tenth St.
Las Vegas, NV 89101
(702) 731-0000
admin@justice-law-center.com

/s/ Patricia M. Erickson
Patricia M. Erickson, Esq.
Nevada Bar No. 3506
601 South Tenth St., Suite 108
Las Vegas, NV 89101
(702) 388-1055
pme@pmericksonlaw.com

13 NOTICE OF MOTION

14 TO: STATE OF NEVADA,

15 TO: Chief Deputy District Attorneys Marc DiGiacomo and Hetty O. Wong:

16 YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned
17 will bring the foregoing Motion on for hearing before the Honorable Kathleen Delaney on
18 the 22nd day of June, 2016, at the hour of 9:00 a.m., in Department XXV, or as soon
19 thereafter as counsel may be heard.

20 DATED this 12th day of June, 2016.

21 Respectfully Submitted,

22 /s/ Patricia M. Erickson
23 Patricia M. Erickson, Esq.
24 Nevada Bar No. 3506
25 601 South Tenth Street, Suite 108
26 Las Vegas, Nevada 89101
pme@pmericksonlaw.com
Counsel for Defendant:
Ivonne Cabrera

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The Nevada Supreme Court has recognized that a jury may be taken to the scene of a crime because the viewing may "assist the jury in comprehending the evidence before it."¹ While our Supreme Court has not further examined this issue, at least twenty-seven other state appellate courts have addressed whether a trial court abused its discretion in granting ² or in denying the request for a jury view of an important scene.³

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² In addition to the decisions specified in the pleading, other cases which have upheld a trial court's order for a jury view are: State v. McKinney, 637 So. 2d 1120, 1128 29 (La. Ct. App. 1994); State v. Drummond, 854 N.E.2d 1038, 1056 (Ohio 2006); State v. Stoudamire, 30 Wash. App. 41, 46, 631 P.2d 1028, 1031-32 (Wash. App. 1981).

State v. Avila, 686 P.2d 1295, 1300 (Az. Ct. App. 1984); People v. Moon, 117 P.3d 591, 603 (Cal. App. 2005); State v. Oden, 684 A.2d 1195, 1197 (Conn. App. 1996); McHaney v. State, 513 So. 2d 252, 254 (Fla. Dist. Ct. App. 1987); Jordan v. State, 276 S.E.2d 224, 239 (Ga. 1981); Mears v. State, 455 N.E.2d 603, 604-05 (Ind. 1983); State v. Kolbet, 638 N.W.2d 653, 663 (Iowa 2001); State v. Engelhardt, 119 P.3d 1148, 1157-58 (Kan. 2005); Buzbee v. State, 473 A.2d 1315, 1324 (Md. App. 1984); People v. King, 534 N.W.2d 534, 538 (Mich. App. 1995); State v. Stewart, 360 N.W.2d 430, 432 (Minn. Ct. App. 1985); State v. Cathey, 590 S.E.2d 408, 411 (N.C. App. 2004) overruled on other grounds by State v. Campbell, 772 S.E.2d 440 (N.C. 2015); State v. Romero, 830 N.W.2d 586, 589 90 (N.D. 2013); State v. Didion, 877 N.E.2d 725, 729-31 (Ohio App. 2007); Givens v. State, 705 P.2d 1139, 1142 (Ok. 1985) Com. v. Davis, 635 A.2d 1062, 1063 (Pa. 1993); State v. Brown, 697 S.E.2d 622, 625 (S.C. Ct. App. 2010); State v. Cayer, 814 P.2d 604, 613 (Utah Ct. App. 1991); Lansing v. State, 669 P.2d 923, 926 (Wyo. 1983).

1 The Colorado Supreme Court affirmed a trial court's order for a jury view because
2 the judge determined "viewing would be helpful to the jury in assisting it to determine what
3 the eyewitnesses to the crime saw and heard."⁴ The Delaware Supreme Court upheld
4 the trial judge's grant of the State's request for the jury to see the crime scene "in order
5 to have a better understanding of the area's dimensions."⁵ The Michigan Supreme Court
6 sustained a jury view because "it properly helped the jurors to better understand the
7 distances involved and to weigh the evidence admitted at trial, especially the credibility
8 of the eyewitness."⁶ The Rhode Island Supreme Court sustained the trial court's order
9 permitting "a view of certain locations in the Town of Barrington that might enable the
10 jurors to better understand the evidence when submitted" as requested by the
11 prosecution.⁷ Moreover, the Virginia Supreme Court approved a jury view because
12 admitted photos, video and the jury "view could have assisted the jury in understanding
13 the crime scene and in determining the distance between the two men when Swann shot
14 Richter."⁸

15 In the case at bar, Ms. Cabrera's guilt phase defense is specifically based upon
16 Gonzalez' coercion and duress which: (1) lead to Ms. Cabrera driving Gonzalez to the
17 Webster street residence and (2) required her to enter the residence and knock on at
18 least one bedroom door. It is anticipated that the state will contend that while Gonzalez
19 was climbing through the bathroom window, Ms. Cabrera was alone, had time to get away
20 and was, therefore, a voluntary participant in Gonzalez' acts.

21 ///

22
23 ⁴ People v. Postell, 217 A.D.2d 669, 670 (Colo. 1995).

24 ⁵ Guy v. State, 913 A.2d 558, 566 (Del. 2006).

25 ⁶ People v. Mallory, 365 N.W.2d 673, 680-81 (Mich. 1984).

26 ⁷ State v. Hightower, 661 A.2d 948, 957 (RI. 1995).

27 ⁸ Swann v. Com., 441 S.E.2d 195, 204 (Va. 1994).

1 A view of the street, duplex area and the outside of unit C is of the greatest importance
2 to Ms. Cabrera's defense and to her ability to refute any argument that she was a willing
3 participant.

4 As a jury view is essential to Ms. Cabrera's defense, it is respectfully submitted that
5 her Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial
6 necessitate an order that the trial jury shall be transported to 2039 Webster, Unit C, Las
7 Vegas, Nevada to view the street, the residential area which contains 2 one floor duplex
8 residences and the outside of Unit C.

9 Dated this 12th day of June, 2016.

10 Respectfully Submitted,

11
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2016, I requested that a file stamped true and correct copy of the forgoing NOTICE OF MOTION AND MOTION FOR THE JURY TO BE TAKEN TO THE SCENE OF THE CRIMES ALLEGED IN THE INFORMATION be served through the court's efilng service to counsel for the parties at the below email addresses:


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Hetty.Wong@clarkcountyda.com

Co-counsel:

Bret Whipple
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/s/ Patricia M. Erickson
Patricia M. Erickson



CLERK OF THE COURT

1 **OPPS**
2 STEVEN B. WOLFSON
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5 MARC DIGIACOMO
6 Chief Deputy District Attorney
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 IVONNE CABRERA, aka
13 Yvonne Cabrera, #1617623

14 Defendant.

CASE NO: C-12-283700-1

DEPT NO: XXV

15 **STATE'S RESPONSE TO DEFENDANT'S MOTION FOR A**
16 **JURY VIEW AND MOTION IN LIMINE TO PRECLUDE DURESS**
17 **AS A DEFENSE TO MURDER**

18 DATE OF HEARING: 6/20/16
19 TIME OF HEARING: 9:00 AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and hereby
22 submits the attached Points and Authorities in Opposition to Defendant's Motion for a Jury
23 View and Motion in Limine to Preclude Duress as a Defense to Murder.

24 This Opposition is made and based upon all the papers and pleadings on file herein, the
25 attached points and authorities in support hereof, and oral argument at the time of hearing, if
26 deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

The question of whether or not to allow a view of the crime scene is a discretionary decision of the trial court. *See Spillers v. State*, 84 Nev. 23, 28-29, 436 P.2d 18, 21 (1968) (this court reviews request for a jury view for an abuse of discretion), (*overruled in part on other grounds by Bean v. State*, 86 Nev. 80, 89-90, 465 P.2d 133, 139 (1970)); *see also Bundy v. Dugger*, 850 F.2d 1402, 1422 (11th Cir. 1988) (right to fair trial not violated by denial of request for jury view where, among other things, photographs of crime scene admitted and cross-examination of witnesses allowed). Defendant's request to conduct a jury view is premised upon a single purpose; to support a duress defense. However, the entire premise of defendant's motion is faulty, as duress is not a defense to murder. *See* NRS 194.010(8).

In *U.S. v. LaFleur*, 971 F.2d 200 (9th Cir. 1991), the Defendant argued that the trial court erred by not instructing the jury that duress can reduce the crime of murder to voluntary manslaughter. LaFleur argued that he was forced to shoot the victim at gunpoint by his co-defendant. In addressing the issue, the Court noted that most states had adopted the common law "choice of evils" rule that negates duress as a defense in any murder case. The *LaFleur* court also noted that some states have adopted statutes that disallow the duress defense for any crime punishable by death, namely California, Nevada, Idaho, Illinois, and Montana. After careful analysis, the Court ruled that LaFleur was not entitled to a jury instruction that murder could be reduced to manslaughter based on an argument of duress.

In *People v Anderson*, 50 P.3d 368 (Cal. 2002), the California Supreme Court addressed the issue of duress as a complete defense in a murder case and noted:

Over two centuries ago, William Blackstone, the great commentator on the common law, said that duress is no excuse for killing an innocent person: "And, therefore, though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent." (2 Jones's Blackstone (1916) p. 2197.) . . . We conclude that, as in Blackstone's England, so today in California: fear for one's own life does not justify killing an innocent person. Duress is not a defense to murder.

Id. at 369. The Court then went on to interpret California Penal Code section 26 which is almost identical to NRS 194.010(8) and reads in pertinent part:

1 All persons are capable of committing crimes except those belonging to the
2 following classes:

3 ...
4 Six--Persons (unless the crime be punishable with death) who committed the act
5 or made the omission charged under threats or menaces sufficient to show that
6 they had reasonable cause to and did believe their lives would be endangered if
7 they refused.

8 Anderson argued that since his case was not a death penalty case, CPC § 26 mandated
9 that he be allowed to use duress as a viable defense. The Court conducted an extensive analysis
10 which included the common law, the history of CPC § 26 and its original enactment in the
11 1872. The Court noted that at the time of the origination of the code, all murder was punishable
12 by death. As such, the Court ruled, "duress is not a defense to any form of murder". Id. at
13 780.

14 In coming to its ruling, the Court addressed Defendant's contention that duress should
15 be allowed as a defense in murder case except those where the death penalty is sought and
16 noted the practical concerns and effects of such a ruling. The court noted:

17 Defendant's interpretation would also force prosecutors to charge special
18 circumstances to prevent duress from becoming a defense. As the Court of
19 Appeal said in this case, "a rule making the availability of the duress defense
20 turn on the manner in which prosecutorial discretion is exercised is potentially
21 pernicious, and may do an unnecessary disservice to criminal defendants. The
22 decision of whether to seek the death penalty ... should not be encumbered by
23 tactical considerations, such as blocking anticipated defenses. The charging
24 decision must be governed by more sagacious considerations than whether the
25 punishment charged will deprive a defendant of a defense to the crime."

26 Id. at 775.

27 NRS 194.010 is almost identical to CPC § 26 and reads in pertinent part:

28 All persons are liable to punishment except those belonging to the following
classes:

29 ...
30 (7) Persons, unless the crime is punishable with death, who committed the act
31 or made the omission charged under threats or menaces sufficient to show that
32 they had reasonable cause to believe, and did believe, their lives would be
33 endangered if they refused, or that they would suffer great bodily harm.

34 Like the California code, it was originally enacted long ago in 1911 at a time when all
35 murder was punishable by death. Like Nevada and California, Illinois has a very similar
36 statute concerning duress. The Illinois Criminal Code of 1961 states:

37 //

1 "(a) A person is not guilty of an offense, other than an offense punishable with
2 death, by reason of conduct which he performs under the compulsion of threat
3 or menace of the imminent infliction of death or great bodily harm, if he
 reasonably believes death or great bodily harm will be inflicted upon him if he
 does not perform such conduct."

4 In People v. Haynie, 807 N.E.2d 987 (Ill. App. 2004) the Court ruled that duress is
5 not a legal defense to murder even though pursuant to statute the defendant as a sixteen year
6 old boy was not eligible for a death sentence. In doing so, the Court ruled:

7 The defendant, based on his age, is not eligible for the death penalty; however,
8 he is not entitled to use the compulsion defense because he is charged with
9 offenses punishable by death. As noted in Gleckler, the legislative intent to
 permit the discretionary imposition of the death penalty does not demonstrate a
 legislative intent to allow the defense of compulsion in any murder case.

10 Id. at 655-656.

11 Of the five states noted in LaFleur that adopted the charges punishable by death stance
12 to duress as a defense, only California and Illinois have directly addressed the issue. Both of
13 those states have ruled that duress is not a defense to murder regardless of whether or not the
14 defendant is facing the death penalty. These rulings goes to the heart of the common law
15 regarding duress and coercion defenses in that one must choose the lesser of two evils. The
16 Anderson court stated it clearly that, "when confronted with an apparent kill-an-innocent-
17 person-or-be-killed situation, a person can always choose to resist. As a practical matter,
18 death will rarely, if ever, inevitably result from a choice not to kill. The law should require
19 people to choose to resist rather than kill an innocent person."

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1 CONCLUSION


2 Defendant is facing a capital case. However, even if it was a non-capital case,
3 Defendant cannot present duress as a defense to murder. As that is her only basis upon which
4 to view the crime scene, Defendant's motion should be denied. Moreover, Defendant's
5 request to present duress as a defense to the murder charges should likewise be precluded.

6 DATED this 14th day of June, 2016.

7 Respectfully submitted,

8 STEVEN B. WOLFSON
9 Clark County District Attorney
Nevada Bar #001565

10 BY


11 MARC DIGIACOMO
12 Chief Deputy District Attorney
Nevada Bar #006955

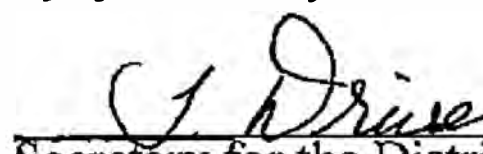
13
14
15 CERTIFICATE OF SERVICE

16 I hereby certify that service of State's Opposition, was made this 13th day of June, 2016,
17 by email to:

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25
26 
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28 MD/tgd/MVU



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Counsel for Defendant:
IVONNE CABRERA

DISTRICT COURT

COUNTY OF CLARK, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

IVONNE CABRERA,

Defendant.

Case No.: C-12-283700-1
Dept. No.: XXV

**OPPOSITION TO STATE'S MOTION IN LIMINE TO PRECLUDE DURESS AS A
DEFENSE TO MURDER**

Hearing Date: June 22, 2016
Hearing Time: 9:00 a.m.

COMES NOW, Defendant, IVONNE CABRERA, by and through her counsel, Bret O. Whipple and Patricia M. Erickson, and requests this Honorable Court enter an order denying the state's motion to preclude duress as a defense to murder.

This Opposition is made and based upon Ms. CABRERA's federal constitutional right to present a complete defense as protected by the Sixth and Due Process Clause of the Fourteenth Amendment of the United States Constitution.

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1 Additionally, this opposition is based upon all of the documents filed in the case
2 at bar, the attached Memorandum of Points and Authorities and the oral argument
3 entertained by this Court on June 22, 2016.

4 DATED this 21st day June, 2016.

5 Respectfully Submitted,

6
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12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 On June 14, 2016, approximately three years and eight months after counsel for
14 Ms. CABRERA specifically informed the state that duress/coercion would be the defense
15 proffered to all of the crimes allegedly committed by Ms. Cabrera, the state filed a motion
16 in limine to preclude Ms. CABRERA from relying on duress/coercion to the murders she
17 alleged aided and abetted or conspired to commit with co-defendant Gonzales to
18 commit.¹ The prosecution's motion is based solely on NRS 194.010(8) which states:

19 All persons are liable to punishment except those belonging to the following
20 classes ... [p]ersons, unless the crime is punishable with death, **who**
21 **committed the act** or made the omission charged under threats or
22 menaces sufficient to show that they had reasonable cause to believe, and
23 did believe, their lives would be endangered if they refused, or that they
24 would suffer great bodily harm.

25 ///

26 ///

27 ¹ See pp.3-7 of the October 1, 2012 transcript which is incorporated by reference.
28 Ms. CABRERA also incorporates all of the facts from her Motion to Continue Trial which was
provided to the Court and counsel for the state on June 20, 2016. The motion to continue will be
filed in open court on June 22, 2016.

1 It is respectfully submitted that the state's analysis is flawed and preclusion of Ms.
2 CABRERA's evidence of duress/coercion would be unconstitutional pursuant to the Sixth
3 and Due Process clause of the Fourteenth Amendment rights to present a full defense
4 to the criminal charges alleged.

5 First, NRS 194.010(8) is a state evidentiary/procedural rule which the prosecution
6 argues precludes Ms. CABRERA from presenting a duress/coercion defense to the two
7 murder charges. The United States Supreme Court has addressed the scope of the
8 constitutional right to present a defense in a trio of cases: Washington v. Texas,²
9 Chambers v. Mississippi,³ and Rock v Arkansas.⁴ Each involved a situation, like Ms.
10 CABRERA's, where the state relied on evidentiary/procedural rules as a basis for
11 excluding crucial defense evidence.

12 For example, in Washington the Court held that state evidentiary rules could not
13 permissibly be used to prevent the testimony of an accomplice who would have testified
14 that he fired the fatal shot as the petitioner was attempting to leave the premises.⁵
15 Similarly, in Chambers the Court held that state hearsay rules could not be used to
16 exclude the intermittent confessions of another person - - one McDonald - - where the
17 petitioner's defense to murder charges was that McDonald had performed the killing.⁶
18 Likewise, in Rock, the United States Supreme Court held that Arkansas' *per se* prohibition
19 on hypnotically-refreshed testimony infringed impermissibly on a criminal defendant's right
20 to present a full and complete defense.⁷

22 ² 388 U.S. 14, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967).

23 ³ 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

24 ⁴ 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

25 ⁵ Washington v. Texas, 388 U.S. at 19-23.

26 ⁶ Chambers v. Mississippi, 410 U.S. at 301-05.

27 ⁷ Rock v. Arkansas, 483 U.S. at 61-62.

1 The principles from Washington, Chambers and Rock control disposition of the
2 state's request to preclude IVONNE CABRERA from presenting her full and complete
3 defense based solely upon NRS 194.010(8) - - an evidentiary/procedural state statute.
4 Each of these cases enunciates a Sixth and Fourteenth Amendment analysis which
5 overruled reliance upon a state evidentiary/statutory rule, like NRS 194.010(8), which
6 denied the right to present critical testimony and evidence to establish a defense which
7 is "a fundament element of due process of law."⁸ Therefore, it is respectfully requested
8 that this Honorable Court deny the state's motion in limine to preclude duress/coercion
9 as a defense.⁹

10 Next, each of the cases relied upon by the state to support its premise that
11 duress/coercion cannot be a defense when the defendant is charged with a capital crime
12 are distinguishable on the facts and law. In each case, unlike Ms. CABRERA, directly
13 caused the death of the person. In U.S. v. LaFleur, the appellant and his co-defendant
14 each had a gun and it was "undisputed that both men shot Bloomquist."¹⁰ In People v.
15 Anderson, the "defendant dropped a small boulder onto her head."¹¹ Finally, in People
16 v. Haynie, the defendant "who was directly across the street, pulled a gun and began
17 firing... [T]he medical examiner concluded that both (victims) died from gunshot wounds
18 to the back."¹²

20 ⁸ Washington, 388 U.S. at 19. See also, Green v. Georgia, 442 U.S. 95, 97, 99
21 S.Ct. 2150, 2151, 60 L.Ed.2d 738 (1979) ("Regardless of whether the proffered testimony comes
22 within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of
the Due Process Clause of the Fourteenth Amendment."); Crane v. Kentucky, 476 U.S. 683, 690,
106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (holding that the defendant's right to present a
defense was denied by the exclusion of evidence).

23 ⁹ This constitutional analysis is also applicable to any state motion to strike Dr.
24 Bradley as a guilt phase witness.

25 ¹⁰ 971 F.2d 200, 203 (9th Cir. 1991).

26 ¹¹ 50 P.3d 368, 370 (Cal. 2002).

27 ¹² 807 N.E.2d 987, 989 (Ill. App. 2004).

1 In the case at bar, Ms. CABRERA is charged with committing murder as an
2 aider/abettor and/or as a conspirator with co-defendant. There is no evidence that she
3 possessed the gun which killed the victims or that she shot any of the victims. Therefore,
4 LaFleur, Anderson, and Haynie cannot control the determination of whether Ms.
5 CABRERA can present her defense of coercion/duress.

6 Additionally, in each case relied upon by the prosecution, the appellate courts
7 interpreted and applied state law to determine that the persons charged with murder
8 cannot rely upon a coercion/duress defense. Not one of those courts analyzed or even
9 mentioned the Sixth and Due Process Clause of the Fourteenth Amendment right to
10 present a defense. Therefore, as Ms. CABRERA is challenging the application of NRS
11 194.010(8) as violating her Sixth and Fourteenth Amendment rights, LaFleur, Anderson,
12 and Haynie cannot control the determination of whether Ms. CABRERA can present her
13 defense of coercion/duress.

14 The policy, relied upon in each case which was first enunciated by Blackstone, that
15 it is better to suffer death than to kill an innocent third party actually supports Ms.
16 CABRERA's right to rely upon a duress/coercion defense. Again, she did not actually kill
17 anyone. Thus, the choice of evils rationale is based upon the fact that when the
18 defendant, herself, "commits murder under duress, the resulting harm - i.e. the death of
19 an innocent person - is at least as great as the threatened harm - ie. the death of the
20 defendant. For this reason, the common law rejected duress as a defense to murder.¹³
21 This policy cannot apply to the person who does not directly and actually kill an innocent
22 party because the death of that person is not as great as the resulting harm. How can a
23 person who does not actually kill be required to give up her life when she never intended
24 that anyone be killed? Ms. CABRERA cannot lose her Sixth and Fourteenth Amendment
25 right to present a defense as she did not kill either of the victims.

26
27 ¹³ LaFleur 971 at 205.

1 Finally, while not noted by the state, but contained within the Anderson case is the
2 court's conclusion that,

3 duress can, in effect, provide a defense to murder on a felony murder theory...If
4 one is not guilty of the underlying felony due to duress, one cannot be guilty of
felony murder based on that felony.¹⁴

5 This same analysis applies to the person charged as an aider/abettor or conspirator in a
6 murder.

7 The law requires the aider/abettor to have the same specific intent of the murderer
8 while conspiracy law requires a person to have a meeting of the minds, an agreement,
9 to commit the crime of murder. The coercion/duress defense can be mounted to all four
10 of the other crimes Ms. CABRERA allegedly committed on April 26, 2012 ie. conspiracy
11 to commit murder, burglary while in possession of a deadly weapon and two counts of
12 attempt murder with a deadly weapon. Therefore, if acquitted on all of those charges, it
13 cannot be said that Ms. CABRERA is guilty of murder under any theory of criminal liability.

14 Given the forgoing, it is respectfully requested that this Honorable Court deny the
15 state's motion in limine because the Sixth and Fourteenth Amendment protect Ms.
16 CABRERA's right to present a complete defense to the charges which is based on
17 coercion/duress.

18 DATED this 21st day June, 2016.

19
20 Respectfully Submitted,

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Counsel for Defendant:
IVONNE CABRERA

27 ¹⁴ Anderson, 50 P.3d at 379.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2016, I emailed a true and correct copy of the forgoing OPPOSITION TO STATE'S MOTION IN LIMINE TO PRECLUDE DURESS AS A DEFENSE TO MURDER to the prosecutors at the following email addresses:

Marc.DiGiacomo@clarkcountyda.com
Hetty.Wong@clarkcountyda.com

Further, I hereby certify that on the 22nd of June, 2016, I requested that a file stamped true and correct copy of the forgoing OPPOSITION TO STATE'S MOTION IN LIMINE TO PRECLUDE DURESS AS A DEFENSE TO MURDER be served through the court's efilng service to counsel for the parties at the below email addresses:

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/s/ Patricia M. Erickson
Patricia M. Erickson

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