

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

ROBERT BROWN, JR.,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: C-14-299234-1

Docket No: 85061

RECORD ON APPEAL VOLUME 3

ATTORNEY FOR APPELLANT
ROBERT BROWN, JR. # 6006120,
PROPER PERSON
330 S. CASINO CENTER BLVD.
LAS VEGAS, NV 89101

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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1 The day that Justice Blackmun faithfully anticipated has arrived. Our nation has evolved
2 beyond the barbaric practice of executing fellow citizens. For too long, this State has operated
3 under the delusion that imperfect human beings are capable of fairly and rationally exercising the
4 option to kill. It is time to return this awesome power to the sole discretion of the only tribunal
5 truly capable of rendering such a judgment. The decision to kill rests in the hands of a Higher
6 Authority.

7 For the reasons set forth above, Nevada's capital sentencing scheme violates the Nevada
8 and United States Constitutions. The Defendant respectfully requests that this Court strike the
9 State's Notice of Intent to Seek Death Penalty.

10
11 DATED this 26 day of October, 2015.

12
13 LAW OFFICES OF ANDREA L. LUEM

14
15 By: 
16 ANDREA L. LUEM, #8844
17 Attorney at Law
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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Counsel for Mr. Brown will bring the above and foregoing Motion on for hearing before the Court on the 10th day of November, 2015, at 9:00 a.m.

DATED this 26 day of October, 2015.

LAW OFFICES OF ANDREA L. LUEM

By: 

ANDREA L. LUEM, #8844
Attorney at Law

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of, was made this 27 day of October, 2015, by Electronic Filing to:

Colleen.Baharav, Deputy District Attorney
Email: Colleen.Baharav@clarkcountyda.com

Richard Scow, Chief Deputy District Attorney
Email: Richard.Scow@clarkcountyda.com

By: 

ANDREA L. LUEM, ESQ.
Nevada Bar No.: 008844
400 South Fourth St. Suite 280
Las Vegas, Nevada 89101
Telephone: (702) 600-8403
Email: andrea@luemlaw.com
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

DATE: November 10, 2015
TIME: 9:00 a.m.

ANDREA L. LUEM, #8844
Attorney at Law

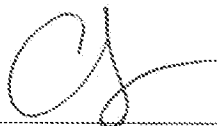
DECLARATION

ANDREA L. LUEM makes the following declaration:

I. I am an attorney duly licensed to practice law in the State of Nevada; I am the Attorney assigned to represent the Defendant in the instant matter, and the Defendant has represented the following facts and circumstances of this case.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 24 day of October, 2015.



ANDREA L. LUEM, #8844

ARGUMENT

I. The State is Required to Provide Defendant with Discovery under Nevada Statute, as well as the United States and Nevada Constitutions

A. Nevada Statutory Requirements

Under NRS 174.235, the State is required to disclose evidence relating to the prosecution of a defendant that is within the possession, custody or control of the State, including:

- written or recorded statements or confessions made by the defendant;
- written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State;
- results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case; and
- books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the State.

NRS 174.235(1)(a)-(c).

The District Court has authority to order the production of any non-privileged materials in the possession, control or custody of the State¹ under NRS 174.235 if the evidence sought is “material to the preparation of the defense”. Riddle v. State, 96 Nev. 589, 590, 613 P.2d 1031 (1980).

NRS 174.235 should be read to create an affirmative duty for the State to disclose *any* statement allegedly made by the defendant, or for which the defendant can be held vicariously liable. Courts have recognized that there is a fundamental fairness involved in “granting the accused equal access to his own words, no matter how the Government came by them.” *See, e.g., U.S. v. Caldwell*, 543 F.2d 1333, 1353 (D.D.C. 1974). This “fairness” should extend not only to oral statements, but statements for which the defendant is vicariously liable, as well. Under NRS 51.035(3)(a)(e), a defendant can be vicariously liable for a statement made by a third party. *See*

¹ The State must turn over any documents, papers, or books related to the case that are in the possession, control and custody of any government agent or agency. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (stating that exculpatory evidence “cannot be kept out of the hands of the defense just because the prosecutor does not have it”).

1 *also Fields v. State*, 220 P.3d 709 (Nev. 2009) (finding evidence of defendant's silence admissible
2 following his wife's complaint that she was in jail because his conduct constituted an adoptive
3 admission). Thus, NRS 174.235 should be construed to include within the definition of a
4 defendant's "statement," both the words actually uttered by the defendant and any statements for
5 which the defendant may be held vicariously liable.

6 7 B. Constitutional Requirements

8 The United States and Nevada constitutions require the State to provide the defense with all
9 favorable evidence in its actual or constructive possession prior to trial. See *Kyles v. Whitley*, 514
10 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83, 86 (1963); *Jimenez v. State*, 112 Nev. 610, 618
11 (1996). Failure to do so results in a violation of the Due Process clauses of the Fifth and
12 Fourteenth Amendments of the United States Constitution, and Article I, Section 8 of the Nevada
13 Constitution. This rule applies regardless of how the State has chosen to structure its overall
14 discovery process. See *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles*, 514 U.S. 419; *Brady*, 373
15 U.S. at 86; *Jimenez*, 112 Nev. at 618. The withholding of exculpatory evidence constitutes a due
16 process violation regardless of the prosecutor's motive for withholding the evidence. *Wallace v.*
17 *State*, 88 Nev. 549, 551-52, 501 P.2d 1036 (1972).

18 Under the law, the State must turn over all evidence that is (1) favorable to the accused, in
19 that it is exculpatory or impeachment evidence, and (2) within the actual or constructive
20 possession of anyone acting on behalf of the State. See *Banks v. Dretke*, 540 U.S. 668, 691
21 (2004).

22 23 **II. The State Must Turn Over All Information that is *Favorable* to the Accused, Whether 24 or Not It Is the Subject of a Specific Discovery Request**

25 The State's constitutional obligation to produce material evidence exists whether or not the
26 defendant has filed a discovery motion or made specific discovery requests. See, e.g., *Kyles v.*
27 *Whitley*, 514 U.S. 419, 434-35 (1995); *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1986); *United*
28 *States v. Bagley*, 473 U.S. at 667, 682, 685 (1985); *State v. Bennett*, 119 Nev. 589 (2003);

1 Jimenez, 112 Nev. at 618; Roberts v. State, 110 Nev. 1121 (1994). Given the important rights
2 involved and the strong potential for reversal if those rights are violated, the U.S. Supreme Court
3 has long counseled that “the prudent prosecutor will resolve doubtful questions in favor of
4 disclosure.” U.S. v. Agurs, 427 U.S. 97, 108 (1976).

5
6 A. Evidence “favorable to the accused” includes all information material to the issue of
guilt or punishment, including impeachment evidence

7
8 The Nevada Supreme Court has directly addressed what is considered “favorable to the
9 accused.” In Mazzan v. Warden, the Court stated:

10 Due process does not require simply the disclosure of “exculpatory” evidence.
11 Evidence also must be disclosed if it provides grounds for the defense to attack the
12 reliability, thoroughness, and good faith of the police investigation, to impeach the
13 credibility of the state’s witnesses, or to bolster the defense case against
14 prosecutorial attacks. Furthermore, “discovery in a criminal case is not limited to
investigative leads or reports that are admissible in evidence.” Evidence “need not
have been independently admissible to have been material.” (internal citations
omitted).

15 116 Nev. 48, 67 (2000).

16
17 See also, Strickler, 527 U.S. at 281-82 (stating that a Brady violation occurs when (1)
18 evidence is favorable to the accused because it is exculpatory or impeaching; (2) evidence was
19 suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued). In Mazzan,
20 the Supreme Court provided a non-exclusive list of the type of evidence that the State must turn
21 over:

- 22 1) Forensic testing which was ordered but not completed, or which was completed but did
23 not inculcate the defendant (e.g., fingerprint analysis that returned as “inconclusive”);
- 24 2) Criminal records or other evidence concerning State’s witnesses which might show
25 bias, motive to lie, or otherwise impeach credibility (e.g., civil litigation);
- 26 3) Evidence that the alleged victim in the instant case has claimed to be a victim in other
27 cases;
- 28 4) Leads, evidence, or investigations that law enforcement discounted or failed to pursue;

- 5) Evidence that suggests an alternate suspect, or calls into question whether a crime actually occurred;
- 6) Anything that is inconsistent with prior or present statements of a State's witness, including the initial failure to make a statement which is later made or testified to.

In addition to the specific types of evidence listed above and discussed in Mazzan, the State is obligated to turn over to Defendant any exculpatory or mitigation evidence.

1. Exculpatory Evidence

Exculpatory evidence is that which tends to favor the accused. Brady, 373 U.S. at 87. Impeachment evidence, therefore, is exculpatory evidence within the meaning of Brady. See Giglio v. United States, 405 U.S. 150, 154 (1972). In other words, the State's duty to disclose extends to evidence bearing on the credibility of its witnesses. The Nevada Supreme Court has interpreted the meaning of evidence "favorable to the accused" as evidence that "provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses" or evidence that may "bolster the defense case against prosecutorial attacks." Mazzan, 116 Nev. at 67.

To be clear, exculpatory material includes all information that would tend to affect the reliability and credibility of a witness. Thus, information within government control, which shows that a witness gave inconsistent statements, had motive to lie, tried to recant, expressed reluctance to testify against the accused, received benefits as a result of his or her accusation, or other types of information affecting credibility and reliability, is Brady material and must be disclosed.

2. Mitigation Evidence

Brady material applies not only to evidence regarding the defendant's innocence or guilt, but also to **mitigation** evidence. For example: the victim of a robbery identifies a defendant as one of two people who robbed her. The victim also tells police that this defendant actively prevented his co-defendant from hitting her during the robbery. Although the victim's statement would clearly go to establishing the defendant's guilt, it would *also* constitute Brady material because, if he is ultimately convicted, the defendant's effort to aid the victim might justify the mitigation of his sentence. Anything which could convince the court to impose less than a maximum sentence

1 or rebut alleged aggravating circumstances is relevant to punishment and, therefore, **must** be
2 produced by the State. See Jimenez, 112 Nev. at 619.

3
4 B. The State's disclosure obligation is the same regardless of the specificity of the
defendant's requests

5 The State's constitutionally-mandated Brady obligation arises regardless of whether a
6 Defendant specifically requests certain favorable evidence. See U.S. v. Bagley, 473 U.S. 667, 682
7 (1985) (plurality) (finding the prosecution's constitutional duty to disclose favorable evidence is
8 governed by the materiality standard and not limited to situations where a defendant requests
9 favorable evidence); see also, Kyles, 514 U.S. at 433 (stating that "regardless of request, favorable
10 evidence is material. . ."). The State must disclose all material evidence favorable to the defense,
11 regardless of the nature of the instant request. Additionally, as more fully addressed below, the
12 prosecutor must meet with detectives, crime scene analysts, investigators, and any other State
13 actors and potential witnesses prior to trial to determine whether they possess evidence favorable
14 to the accused. See, e.g., Strickler, 527 U.S. at 281.

15
16 **III. The State is Responsible for All Evidence in Its Actual or Constructive Possession, and**
17 **has an Affirmative Duty to Obtain Such Evidence**

18 In Kyles, the United States Supreme Court held that prosecutors have an **affirmative**
19 **obligation** to obtain Brady material and provide it to the defense, even if the prosecutor is initially
20 unaware of its existence. 514 U.S. at 433 (emphasis added). The Supreme Court noted that the
21 affirmative duty "to disclose evidence favorable to a defendant can trace its origins to early 20th
22 century strictures against misrepresentation and is of course most prominently associated with this
23 Court's decision in Brady v. Maryland, . . ." Id. at 432. As the Supreme Court made clear, this
24 obligation exists even where the defense does not make a request for such evidence. Id.

25 In finding that the State had breached its duty to Kyles, the Court discussed the
26 prosecutor's "affirmative duty" in detail:

27 This in turn means that the individual prosecutor has a **duty to learn** of any
28 favorable evidence known to the others acting on the government's behalf in the
case, **including the police** . . . Since then, the prosecutor has the means to

1 discharge the government's Brady responsibility if he will, any argument for
2 excusing a prosecutor from disclosing what he does not happen to know about
3 boils down to a plea to substitute the police for the prosecutor, and even for the
4 courts themselves, as the final arbiter's of the government's obligation to ensure
5 fair trials.

6 Kyles, 514 U.S. at 437-38 (citations and footnotes omitted) (emphasis added).

7 The Nevada Supreme Court addressed the prosecutor's affirmative duty in State v.
8 Jimenez, stating that, "It is a violation of due process for the prosecutor to withhold exculpatory
9 evidence, and his **motive for doing so is immaterial.**" 112 Nev. at 618 (emphasis added).
10 Furthermore, the affirmative obligation exists even if law enforcement personnel withhold "their
11 reports without the prosecutor's knowledge," because "the state attorney is charged with
12 **constructive knowledge and possession** of evidence withheld by other state agents, such as law
13 enforcement officers." Id. at 620. This existence of an "affirmative duty" means that individual
14 prosecutors cannot use ignorance as an excuse for failing to meet discovery obligations. A lack of
15 subjective knowledge on the part of a particular prosecutor does not excuse or assuage a discovery
16 violation because the individual prosecutor is legally *responsible* for contacting all State agents to
17 determine if they are in possession of Brady material.

18 The constructive knowledge imputed to a prosecutor applies even if the evidence is being
19 held by an out-of-jurisdiction agent that is cooperating with local law enforcement. In State v.
20 Bennett, the Nevada Supreme Court ruled, "In this case, a Utah police detective was aware of the
21 evidence. We conclude that it is appropriate to charge the State with constructive knowledge of
22 the evidence because the Utah police assisted in the investigation of this crime. . . ." 119 Nev. at
23 603. Thus, out-of-state police agencies, probation officers, welfare workers, employees of Child
24 Protective Services, jail personnel, and the like are *all* potential State agents from whom the
25 prosecution must affirmatively collect Brady material. "Exculpatory evidence cannot be kept out
26 of the hands of the defense just because the prosecutor does not have it, where an investigative
27 agency does." U.S. v. Zuno-Acre, 44 F.3d 1420, 1427 (9th Cir. 1995).

28 When prosecutors fail to uphold this affirmative obligation, they violate constitutional due
process. See U.S. Const. amend. V, XIV; Nev. Const. Art. 1, §8.

1 **IV. The State Cannot Rely on an "Open File" Policy to Satisfy the Constitutional Duty to**
2 **Obtain and Turn Over Discovery**

3 Prosecutors often respond to discovery motions by referencing their "open file policy" and
4 stating that the requested material is not in their file. The prosecutor's affirmative duty to turn
5 over Brady material, however, extends to all exculpatory and mitigation evidence in the possession
6 of *any* state agent or agency even if the evidence does not exist in the prosecutor's file. See
7 Strickler v. Greene, 527 U.S. 263 (1999); Bennett, 119 Nev. at 603. In Strickler v. Greene, the
8 United States Supreme Court explicitly held that a prosecutor's open file policy **does not** substitute
9 for or diminish the State's affirmative obligation to seek out and produce Brady material. 527 U.S.
10 at 283. Thus, despite its "open file policy," the prosecution must actively work to discover, obtain,
11 and produce Brady material, whether it is in the actual possession of the prosecutor, the police
12 department, or any other entity acting on behalf of the State.

13
14 **V. Defendant's Specific Discovery Requests**

15 The following specific requests are meant to help assist the State in its duty to find and turn
16 over the required material. The requests are not in any way intended to be a limit on, or a
17 substitute for, the duties described above. The State must produce:

- 18 1. **All records of any physical examinations done in connection with this**
19 **case²**

20 This includes any photographs, videos, or audio recordings.

21 Specifically, the Defense is requesting all medical reports of any
22 examinations done on the alleged victim(s) in connection with this case.

23 The Defense is also requesting the notes and reports from any testing
24 conducted on any items in this case.

- 25 2. **All records regarding any benefits or assistance given to any witness in**
26 **the case, as well as any other evidence of bias of State witnesses**

27
28 ² This is required under NRS 171.1965 1(b) and NRS 174.235 1(b).

1 This includes any monetary benefits received, services or favors, or
2 promises of favorable treatment. This also includes an estimate of future
3 benefits to be received during or after the trial.³

4 **3. All statements by all witnesses in the case⁴**

5 This includes any and all audio and video recordings of such interviews and
6 all documentation taken at the time of the interviews. The State must
7 produce any police reports or documents that contain information pertaining
8 to this case or any witnesses in this case, no matter what the form or title of
9 the report.

10 **4. Any evidence that any State witness was intoxicated or impaired at the
11 time of the incident about which the witness will testify⁵**

12 This includes evidence that a witness was under the influence of alcohol,
13 narcotics, or any other drug, or that the witness' faculties were impaired in
14 any way.

15 The defense is also requesting to know if any officers or detectives
16 observed any indicators that a witness was intoxicated, such as slurred
17 speech, the smell of alcohol, dilated pupils, etc.

18 **5. Any information regarding the criminal history of any material witness
19 in the case⁶**

20 This includes any juvenile record, misdemeanors, or any other information
21 that would go to the issue of credibility, veracity and bias, whether or not
22 the information is admissible by the rules of evidence.⁷ This request
23 encompasses records⁸ showing that:

24 ³ This is relevant to issues regarding possible bias, credibility, motive to lie, and impeachment.
25 See Davis v. Alaska, 415 U.S. 308 (1974).

26 ⁴ NRS 174.235; Kyles, 514 U.S. 419, Brady, 373 U.S. 83 (and their progeny).

27 ⁵ Id.

28 ⁶ NRS 174.235; Kyles, 514 U.S. 419, Brady, 373 U.S. 83 (and their progeny).

⁷ The State is usually under the mistaken impression that they must only disclose felony convictions from the last 10 years that can be used as impeachment under NRS 50.095. However, in Davis, 415 U.S. 308, the U.S. Supreme Court found that a witness can be attacked by "revealing possible biases, prejudices, or ulterior motives of the witnesses as they may relate directly to the issues or personalities on the case at hand. The partiality of a witness is...always relevant as discrediting the witness and affecting the weight of his testimony." Id. at 354. The Court found that the State's policy interest in protecting the confidentiality of a juvenile offender's record must yield to the defendant's right to cross examine as to bias. Id. at 356. See also, Lobato v. State, 120

- a a State's witness had an arrest, guilty plea, trial, or sentencing pending at the time of the incident in the present case and/or has or had one or more since that date;
- b a State's witness was on criminal parole or probation at the time of the incident in the present case and/or has been since;
- c a State's witness has, or has had, any liberty interest that the witness might believe or might have believed to be affected favorably by State action;
- d deals, promises, or inducements that have been made to any informant or State's witness in exchange for his testimony.

6. All statements of the defendant in this case

This includes *any* statement whether written, recorded, or verbal, allegedly made by the defendant, or for which the defendant can be held vicariously liable.⁹

7. All inconsistent statements made by witnesses in this case¹⁰

This includes any inconsistent statements made to any employee or representative of the District Attorney's office, the police department, or any other State actor. This request includes any new statements not previously mentioned to police or testified to at preliminary hearing. Inconsistent statements include statements that are inculpatory but have never previously been mentioned by a witness.

Nev. 512 (2004) (discussing the "nine basic modes of impeachment"). Therefore, juvenile records, misdemeanors and older criminal records may yield information relevant to many forms of impeachment other than that outlined in NRS 50.095.

⁹ With respect to this information, Defendant requests the charges, docket numbers, dates of conviction, and jurisdictions for all such cases.

¹⁰ Under NRS 51.035(3)(a)(e), a defendant can be vicariously liable for a statement made by a third party. Thus, NRS 174.235 should be construed to include within the definition of a defendant's "statement," both the words actually uttered by the Defendant and any statements for which the defendant may be held vicariously liable. See U.S. v. Caldwell, 543 F.2d 1333, 1353 (D.D.C. 1974) (finding that there is a fundamental fairness involved in "granting the accused equal access to his own words, no matter how the Government came by them").

¹¹ NRS 174.235; Kyles, 514 U.S. 419, Brady, 373 U.S. 83 (and their progeny).

1 8. Any information tending to show the unreliability of a witness in the
2 case¹¹

3 This includes information that would tend to discredit the testimony of a
4 witness or show that a witness has lied or misrepresented facts in the case.

5 9. All notes and reports of any experts in the case, to include crime scene
6 investigators¹²

7 This includes any preliminary reports and notes that were omitted from the
8 final report(s).¹³ In addition, Defendant requests disclosure of any rebuttal
9 experts the State may call in response to experts that may testify during
10 Defendant's case-in-chief.¹⁴

11 10. All updated witness contact information in the case, including the
12 witnesses' last known address and phone number¹⁵

13 11. All books, papers, documents, and tangible objects related to the
14 case¹⁶

15 This includes photographs of any and all books, papers, documents, and tangible
16 objects related to the case that the State plans to introduce at trial.

17 The Defense is requesting these materials to be turned over to the Defense pursuant
18 to NRS 174.235.

19 ¹¹ NRS 174.235; Kyles, 514 U.S. 419, Brady, 373 U.S. 83 (and their progeny).

20 ¹² NRS 174.235; Kyles, 514 U.S. 419, Brady, 373 U.S. 83 (and their progeny).

21 ¹³ NRS 174.235 2(a)(b)(c).

22 ¹⁴ In Grey v. State, the Nevada Supreme Court stated that "Once a party in a criminal case receives
23 notice of expert witnesses, the receiving party must provide reciprocal notice if that party intends
24 to present expert rebuttal witnesses." 124 Nev. 110, 178 P.3d 154 (2008). Additionally, the
25 Supreme Court noted that, in cases where the prosecution has been provided with the names,
26 curriculum vitae, and reports of all of the defense's expert witnesses, there is no reason for the
27 prosecution to be uncertain about their need for expert witnesses. Thus, the court held that the
28 prosecution must provide the names, curriculum vitae, and reports of all rebuttal experts to the
29 defense in a timely manner before trial. Id. at 161.

30 ¹⁵ NRS 174.234; 174.235.

31 ¹⁶ NRS 174.235; Kyles, 514 U.S. 419, Brady, 373 U.S. 83 (and their progeny).

12. All electronic communications in the case, as well as any reports related to those communications¹⁷

Specifically, the defense is requesting the 911 calls, CADs, 311 calls and all electronic communications between the alleged victim and law enforcement in this case.

13. All reports relating to impound and storage of the evidence in this case

Specifically, the Defense is requesting copies of the evidence impound reports in this case and copies of any loss/destruction of evidence reports that may exist. The Defense is also requesting a photocopy of the chain of custody log that is kept on the front of each package of evidence impounded by Metro.

DATED this 26 day of October, 2015.

LAW OFFICES OF ANDREA L. LUEM

By: 

ANDREA L. LUEM, #8844
Attorney at Law

¹⁷ Id.

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the Counsel for Mr. Brown will bring the above and foregoing Motion on for hearing before the Court on the 10th day of November, 2015, at 9:00 a.m.

DATED this 24 day of October, 2015.

LAW OFFICES OF ANDREA L. LUEM

By: 

ANDREA L. LUEM, #8844
Attorney at Law

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of, was made this 24 day of October, 2015, by Electronic Filing to:

Colleen.Baharav, Deputy District Attorney
EMail: Colleen.Baharav@clarkcountyda.com

Richard Scow, Chief Deputy District Attorney
Email: Richard.Scow@clarkcountyda.com

By: 

ANDREA L. LUEM, ESQ.
Nevada Bar No.: 008844
400 South Fourth St. Suite 280
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Telephone: (702) 600-8403
Email: andrea@luemlaw.com
Attorney for Defendant


CLERK OF THE COURT

1 MTN
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8 Email: andrea@luemlaw.com
9 Attorney for Defendant

10
11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,)
15)
16 Plaintiff,) CASE NO. 14-C-299234
17)
18 v.) DEPT. NO. IX
19)
20 ROBERT BROWN, JR.,) DATE: November 10, 2015
21) TIME: 9:00 a.m.
22 Defendant.)
23)
24)
25)
26)
27)
28)

29 **NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF DEFENDANT'S**
30 **DIRECT AND VICARIOUS STATEMENTS**

31 Comes now the Defendant ROBERT BROWN, JR., by and through his counsel of record,
32 and seeks from this Court an Order compelling the State to produce a report of list of Mr. Brown's
33 direct and vicarious statements. This motion is based upon the attached Memorandum of Points
34 and Authorities, the file herein, and any argument that this Court may hear in support of this
35 motion.

36 DATED this 26 day of October, 2015.

37 LAW OFFICES OF ANDREA L. LUEM

38 By: 
ANDREA L. LUEM, #8844
Attorney at Law

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MEMORANDUM OF POINTS AND AUTHORITIES

Mr. Brown, as a defendant in a criminal case, is entitled to notice of his direct and vicarious statements. In United States v. Thevis, 84 F.R.D. 47 (N.D. Ga. 1979), the Court noted that discovery under Federal Rule of Criminal Procedure 16(a)(1)(A) which is essentially similar to NRS 174.235, is mandatory and absent a motion for a protective order by the State, the defendant is entitled to discovery and inspection of his statements. See also United States v. Projansky, 44 F.R.D. 550, 552 (S.D.N.Y. 1968) and United States v. Isa, 413 F.2d 244 (7th Cir. 1969).

Pursuant to NRS 51.035(3)(a)-(e), statements of someone other than the Defendant may be imputed to him, and the Defendant is held vicariously liable therefore under certain conditions. It is, therefore, a logical application of NRS 174.235 to include within its definition of a "statement" not only those words actually uttered by the Defendant, but also those for which he can be held vicariously liable.

This rule applies as long as the receiver of the statement from the Defendant, that is, the person to whom the Defendant was speaking, intended at the time to directly or indirectly include the Defendant's utterances into a memorandum or recording, regardless of whether the receiver or listener was known to be in existence or known to be receiving the message. United States v. Lubomski, 277 F.Supp. 713 (N.D. Ill. 1967); United States v. Baker, 262 F.Supp. 657, 671-72 (D.D.C. 1966), remanded for hearing on other grounds, 401 F.2d 958 (D.D.C. 1968). See also, United States v. Bailleux, 685 F.2d 1105 (9th Cir. 1982).

The rule also contemplates the discovery and disclosure to the Defendant of any oral statement which any Defendant (or alleged co-conspirators) made to all law enforcement agents, which has been interpreted as not being limited to police officers or other investigating officers. United States v. Manetta, 551 F.2d 1352, 1356 (5th Cir. 1977) (addressing statements testified to by a prison guard). Informers and confidential sources may have been utilized as law enforcement agents, or may have been directly supervised and acting pursuant to the direction of law enforcement agents in this case. There is no good cause to exclude from disclosure any statements

1 made by the Defendant to these informers and confidential sources. The Courts have long held
2 that the government is responsible for the conduct of such persons as though they were themselves
3 law enforcement personnel. Sherman v. United States, 356 U.S. 369, 373-74 (1958); United States
4 v. Perl, 584 F.2d 1316, 1322 n.5 (4th Cir. 1978).

5 With respect to Mr. Brown's statements allegedly communicated to and received by
6 someone who was not a law enforcement agent or working in conjunction with law enforcement at
7 the time of the communication, courts have recognized that there is a fundamental fairness
8 involved in granting the accused equal access to his own words, no matter how the Government
9 came by them. United States v. Caldwell, 543 F.2d 1333, 1353 (D.D.C. 1974). Indeed, it is
10 difficult to see why a Defendant's statement to persons who are not law enforcement agents should
11 be discoverable as of right if they were tape-recorded, but not if the statements were recorded in a
12 witness's statement to a government lawyer or other investigator. See United States v. Gee, 695
13 F.2d 1165 (9th Cir. 1983).

14 CONCLUSION

15
16 For the above stated reasons, it is respectfully requested that this Court enter an order
17 requiring the prosecution to provide the following:

18 1. Any relevant written or recorded statements alleged by the State to have been made
19 by Mr. Brown, or copies thereof, within the possession, custody, or control of the State.
20 Mr. Brown further requests the substance of any oral statement allegedly made by him,
21 whether or not the State intends to offer the same into evidence at the trial, and regardless
22 of whether it intends to do so in its case-in-chief, on cross-examination of Mr. Brown or his
23 witnesses, or rebuttal.

24
25 2. So as to insure that Mr. Brown has the benefit of the guarantee of the Sixth
26 Amendment to the Constitution of the United States and the State of Nevada that he shall
27 be provided with effective assistance of counsel, any materials and/or information in the
28

1 possession of the State that shall be used by the State or shall act as the basis for the State
2 seeking introduction of any of the following at the trial in this case:

3 (a) Any statement allegedly made by Mr. Brown in his representative
4 capacity, as the same is understood within the context of NRS
5 51.035(3)(a);
6

7 (b) Any statement to which Mr. Brown allegedly manifested his
8 adoption or belief as to the truth as the same is included and
9 understood within NRS 51.035(3)(b);
10

11 (c) Any statements made by another which were purportedly authorized
12 by Mr. Brown as the same is understood within the context of NRS
13 51.035(3)(c);

14 (d) Any statement by and agent or servant of Mr. Brown concerning a
15 matter within the scope of the agency or employment and made
16 during the existence of such a relationship as the same is understood
17 within the context of NRS 51.035(3)(d);
18

19 (e) Any statement of any person whom the State claims to be Mr.
20 Brown's co-conspirator which was made by said person during the
21 course and in furtherance of the alleged conspiracy.
22

23 3. Any oral statements allegedly made by Mr. Brown to any person who elicited the
24 statements at the request of agents of the State. In this category, Mr. Brown includes any
25 telephone conversations that he may have had with another person who consented to the
26 recording of the conversation with or without Mr. Brown's permission or knowledge.
27
28

1 Mr. Brown also includes in this request any recorded telephone conversations between any
2 person the State alleges to be a co-conspirator, aider and abettor, accomplice, or joint venturer with
3 Mr. Brown in some conduct relevant to the instant case, or an agent, servant, or employee of Mr.
4 Brown at the time of the conversation, if the State will maintain that the conversation was made
5 within the scope of the agency, employment, or servant relationship and in furtherance thereof.

6 DATED this 26 day of October, 2015.

7
8 LAW OFFICES OF ANDREA L. LUEM

9
10 By: 

11 ANDREA L. LUEM, ESQ.
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13 400 South Fourth St. Suite 280
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17 Attorney for Defendant
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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Counsel for Mr. Brown will bring the above and foregoing Motion on for hearing before the Court on the 10th day of November, 2015, at 9:00 a.m.

DATED this 24 day of October, 2015.

LAW OFFICES OF ANDREA L. LUEM

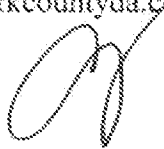
By: 
ANDREA L. LUEM, #8844
Attorney at Law

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of, was made this 24 day of October, 2015, by Electronic Filing to:

Colleen.Baharav, Deputy District Attorney
Email: Colleen.Baharav@clarkcounttyda.com

Richard Scow, Chief Deputy District Attorney
Email: Richard.Scow@clarkcounttyda.com

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9
10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,)
13)
14 Plaintiff,) CASE NO. C-14-299234-1
15 v.) DEPT. NO. IX
16)
17 ROBERT BROWN, JR.)
18)
19 Defendant.)
20)

21 REQUEST TO FILE EX PARTE ORDER UNDER SEAL

22 Upon the request of the above-named Defendant, ROBERT BROWN, JR, by and through
23 appointed Counsel, Andrea L. Luem, and good cause appearing therefor,

24 IT IS HEREBY ORDERED that upon request of this Court, that ANDREA L. LUEM,
25 Attorney at Law, may file an Ex Parte Order under seal.

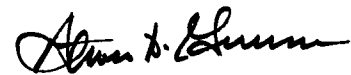
26 DATED 3rd day of November, 2015.

27 
28 DISTRICT COURT JUDGE

29 SUBMITTED By:

30 

31 ANDREA L. LUEM, #8844
32 Attorney at Law



CLERK OF THE COURT

OPPS
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ROBERT BROWN,
#6006120

Defendant.

CASE NO: C-14-299234-1

DEPT NO: IX

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DECLARE
NEVADA'S DEATH PENALTY STATUTES UNCONSTITUTIONAL**

DATE OF HEARING: November 24, 2015

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through RICHARD H. SCOW, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in opposition to Defendant's Motion to Declare Nevada's Death Penalty Statutes Unconstitutional.

This Opposition 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.

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1 **POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendant argues that Nevada's death penalty statutory scheme, NRS 200.033, is
4 unconstitutional in that it is cruel and unusual punishment prohibited by the Eighth
5 Amendment of the United States Constitution and Article I of the Nevada State Constitution,
6 and that the death penalty statutory scheme fails to sufficiently narrow the categories of
7 eligible defendants. Defendant's arguments lack merit and must be denied.

8 The Nevada Supreme Court has clearly stated that Nevada's death sentencing
9 procedure is constitutional. *See, e.g., Colwell v. State*, 112 Nev. 807, 811, 919 P.2d 403, 407-
10 08 (1996); *Nueschafer v. State*, 101 Nev. 331, 705 P.2d 609 (1985). Furthermore, a statute
11 enacted by the legislature is presumptively constitutional, and anyone attacking the validity of
12 a statute bears the burden of clearly demonstrating the statute is unconstitutional. *Sun City*
13 *Summerlin Community Ass'n v. State By and Through Dept. of Taxation*, 113 Nev. 835, 944
14 P.2d 234 (1997); *Skipper v. State*, 110 Nev. 1031, 879 P.2d 732 (1994). Therefore, Defendant
15 bears the burden of proving Nevada's death penalty statute is unconstitutional.

16 **I. NEVADA'S DEATH PENALTY IS NOT CRUEL AND UNUSUAL PUNISHMENT**

17 Defendant argues Nevada's death penalty statutory scheme, NRS 200.033, is
18 unconstitutional in that it is cruel and unusual punishment prohibited by the Eighth and
19 Fourteenth Amendments of the United States Constitution and Article I of the Nevada State
20 Constitution. In part, the Defendant cites to *Gregg v. Georgia*, 428 U.S. 153, 230-31, 96 S.
21 Ct. 2909, 2973 (1976) for that proposition.

22 In *Gregg*, one of the issues addressed was whether the imposition of the sentence of
23 death for the crime of murder violates the Eighth Amendment. *Id.* at 168, 96 S. Ct. at 2922.
24 The United States Supreme Court delineated the history of this issue in this case. *Id.* at 169-
25 70, 96 S. Ct. at 2923-24. Prior to 1900, the constitutionality of the sentence of death itself
26 was not at issue, and the criterion used to evaluate the mode of execution was similar to
27 "torture" and other "barbarous" methods. *Id.* In *Wilkerson v. Utah*, 99 U.S. 130 (1879), the
28 Court held, "[i]t is safe to affirm that punishments of torture . . . and all others in the same line
of unnecessary cruelty, are forbidden by that amendment . . ." In *In re Kemmler*, 136 U.S.

1 436, 447, 10 S. Ct. 930, 933 (1890), the Court held that “[p]unishments are cruel when they
2 involve torture or a lingering death . . .”

3 In 1910, the Court held that “the Clause forbidding cruel and unusual punishments is
4 not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened
5 by a humane justice.” Weems v. United States, 217 U.S. 349, 373, 30 S. Ct. 544, 551 (1910).
6 In that opinion, the Court determined that punishment should be proportionate to the offense
7 committed. Id. at 366-67, 30 S. Ct. at 549. In 1958, the Court reiterated its position that “the
8 Amendment must draw its meaning from the evolving standards of decency that mark the
9 progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958).

10 However, in Gregg, the Court held that public perceptions of decency are not
11 conclusive. Gregg, 428 U.S. at 173, 96 S. Ct. at 2925. A punishment may not be excessive:

12 . . . [t]he inquiry into “excessiveness” has two aspects. First, the
13 punishment must not involve the unnecessary and wanton infliction of pain.
14 [citations omitted]. Second, the punishment must not be grossly out of
15 proportion to the severity of the crime. [citations omitted]. Id.

16 In the case at bar, the death sentence is not an excessive punishment in light of the
17 circumstances. First, the death sentence in Nevada does not involve the unnecessary and
18 wanton infliction of pain. Defendants who are sentenced to death receive a lethal injection
19 that does not involve the unnecessary and wanton infliction of pain. See Id.

20 Second, the death sentence in this case is not even remotely out of proportion to the
21 severity of the crime. The Court held that “. . . when a life has been taken deliberately by the
22 offender, we cannot say that the punishment is invariably disproportionate to the crime. It is
23 an extreme sanction, suitable to the most extreme of cases.” Id. at 187, 96 S. Ct. at 2932.

24 Defendant’s argument that the death penalty constitutes cruel and unusual punishment
25 is inapposite to the case law, therefore, Defendant’s argument lacks merit.

26 **II. THE “DEATH QUALIFICATION” PROCESS USED TO SELECT JURIES IN CAPITAL CASES 27 DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.**

28 The bottom line is that the present issue raised by the defense has been squarely
analyzed and rejected under constitutional scrutiny by the Nevada Supreme Court. Leonard v.
State, 114 Nev. 1196, 969 P.2d 288 (1998).

1 The defense seems determined in these proceedings to prevent the legitimate exercise
2 of the prosecution's peremptory challenges. Historically the exercise of peremptory
3 challenges by parties to a criminal proceeding has been unfettered. Presently, it is limited only
4 by the prohibition against systematically excluding prospective jurors based solely upon race
5 or gender. See Batson v. Kentucky, 106 S. Ct. 1712, 476 U.S. 79 (1986); J.E.B. v. Alabama,
6 511 U.S. 127, 114 S. Ct. 1419 (1994); and Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997).
7 Defense attorneys are subject to the same non-discriminatory jury selection restrictions.
8 Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348 (1992)

9 The defense cites no legal authority in support of its effort to expand the list of jury
10 selection restrictions. Creating such a limitation would contradict one of the most essential
11 purposes of the jury selection process: obtaining a jury capable of following the law of the
12 State of Nevada.

13 The defense opines that the solution to their imagined dilemma would be for the court
14 to prohibit asking prospective jurors if they have conscientious scruples against the death
15 penalty. A prospective juror's attitude and predilection towards any of the punishments
16 provided by law in this State for first degree murder is highly relevant. It is certainly a factor
17 which the parties are legitimately permitted to exploit during the exercise of peremptory
18 challenges. The deck is not stacked against the defense. There may be jurors who would not
19 automatically vote for the death penalty, but who are leaning towards the death penalty in
20 premeditated murder cases the defense would be desirous of excusing pursuant to a
21 peremptory challenge. Apparently defense seeks a double standard in the jury selection
22 process whereby only the defense can profile the attitudes and predilections of prospective
23 jurors.

24 There can be no double standard in the jury selection process. While the defense is
25 entitled to challenge for cause any juror who would automatically vote for the death penalty
26 irrespective of the evidence or jury instructions, Morgan v. Illinois, 504 U.S. 719, 112 S. Ct.
27 2222 (1992), the prosecution can challenge for cause any juror who would not truly consider
28 the death penalty as an option, Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844 (1985). See
Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) (citing both Morgan and Witt). Even an
improper challenge for cause on death penalty opinion grounds will not create grounds for

1 setting aside a conviction or penalty. See Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273
2 (1988).

3 Prospective jurors whose opposition to the death penalty is strong do not constitute a
4 constitutionally cognizable group in the community. Furthermore, the United States Supreme
5 Court has emphasized that the requirement of a representative cross section of the community
6 applies only to venires and not to petit juries. Petit juries do not have to reflect the composition
7 of the community at large. See Buchanan v. Kentucky, 107 S. Ct. 2906 at 2913 (1987) and
8 Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758 (1986).

9 **III. NEVADA'S DEATH PENALTY SCHEME SUFFICIENTLY NARROWS THE CATEGORIES OF**
10 **ELIGIBLE DEFENDANTS AND IS THEREFORE CONSTITUTIONAL**

11 Defendant argues that the Nevada death penalty statutory scheme fails to narrow the
12 categories of eligible defendants, thereby failing to honor the spirit of Gregg v. Georgia, 428
13 U.S. 153, 96 S. Ct. 2909 (1976), and Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972).
14 However, the Georgia statute at issue in Gregg is identical to the Nevada death penalty statute
15 and was held to properly narrow the category of eligible defendants.

16 The Nevada Supreme Court has recognized that "Nevada's capital punishment law was
17 amended in 1977 with inconsequential revision from the death penalty statutes in Georgia and
18 Florida. Georgia and Florida statutes survived constitutional scrutiny by the United States
19 Supreme Court and satisfied the constitutional deficiencies enunciated in Furman." Greene v.
20 State, 113 Nev. 157, 167, 931 P.2d 54, 64 (1997)(citing Gregg v. Georgia, 428 U.S. 153, 196-
21 207, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 251-53, 96 S. Ct. 2960 (1976);
22 accord Ybarra v. State, 100 Nev. 167, 175, 679 P.2d 797, 802 (1984). Therefore, Nevada's
23 death penalty statute is constitutional and appropriately narrows the class of eligible
24 defendants.

25 **A. NRS 200.033 (1) "Under Sentence of Imprisonment" is Constitutional**

26 Defendant argues that subsection one of Nevada's death penalty statute is
27 unconstitutional because Nevada has construed the language of "under sentence of
28 imprisonment" to include defendants who are on parole or probation. Defendant argues that

1 such a construction of this subsection is overbroad. Defendant's argument however lacks
2 merit and should therefore not be considered.

3 When previously faced with this issue, the Nevada Supreme Court has held that the
4 sentence of imprisonment aggravator is proper even where a defendant is no longer physically
5 incarcerated. Nevius v. State, 101 Nev. 238, 243, 699 P.2d 1053, 1056 (1985); Jones v. State,
6 107 Nev. 632, 636, 817 P.2d 1179, 1182 (1991). "This court has upheld the 'sentence of
7 imprisonment' aggravator when a defendant commits the murder while still serving his
8 sentence for another crime even though he has been released from physical incarceration."
9 McNelson v. State, 111 Nev. 900, 900 P.2d 934 (1995), (*citing*, Geary v. State, 110 Nev. 261,
10 871 P.2d 927 (1994)). Nevada's Supreme Court has obviously determined that this subsection
11 is constitutional, therefore this Court should find accordingly.

12 B. NRS 200.033(2) is Constitutional

13 Defendant argues that Nevada has expanded the application of subsection two by
14 allowing consideration of each violent circumstance rather than consideration of only one
15 aggravating circumstance, regardless of the number of violent felonies previously committed.
16 Defendant further argues that Nevada has clearly ignored rules of statutory construction and
17 the common historic application of this aggravator. Defendant's arguments are not cogent and
18 lack support, therefore this Court should not consider them.

19 In Riley v. State, 107 Nev. 205, 216-17, 808 P.2d 551 (1991), the Court considered this
20 identical argument and determined, "there is no logic in a conclusion that an individual who
21 commits numerous violent felonies be categorized with an individual who has only committed
22 one; this rationale could subject persons with less violent character traits to a disproportionate
23 sentence, and it could undermine the goal and policy of NRS 200.033(2). Rather, the logical
24 interpretation of NRS 200.033(2), in light of its underlying purpose, shows a legislative intent
25 to allow multiple aggravating circumstances under the statute. Accordingly, if the defendant
26 can be prosecuted for each crime separately, each can be used as an aggravating circumstance.
27 *See, e.g., Bennett v. State*, 106 Nev. 135, 787 P.2d 797 (1990)."
28

1 In Bennett v. State, 106 Nev. 135, 142-43, 787 P.2d 797 (1990), the Court carefully
2 considered this identical issue and concluded, "if the legislature intended to prohibit the use
3 of multiple aggravating circumstances in this context it would have provided accordingly."
4 The Court also noted that the defendant in that case had failed to provide any "evidence of
5 legislative intent in support of [his] contention" that the legislature intended to prohibit the use
6 of multiple aggravating circumstances. Id. The Defendant in the instant case has also failed
7 to provide any evidence of legislative intent in support of his argument.

8 Additionally, Defendant's assertion that the Court has ignored the common historic
9 application of this aggravator in Nevada and elsewhere, is unsupported. Defendant does not
10 demonstrate what the common historic application of this aggravator in Nevada is. With
11 respect to the common historic application of this aggravator elsewhere, Defendant attempts
12 to mislead this Court by citing to an Arizona case (State v. Steelman, 126 Ariz. 19, 612 P.2d
13 475 (1980)), and a California case (People v. Hendricks, 43 Cal. 3d 584, 238 Cal. Rptr. 66,
14 737 P.2d 1350 (1987)). Neither of those two cases specifically held that multiple aggravating
15 circumstances should not be considered. Defendant alleges that the Arizona case decided to
16 use one aggravating circumstance even though the defendant in that case had committed nine
17 murders and five robberies. This is a complete misstatement of the Steelman holding. The
18 defendant in Steelman had California judgments of nine murders and five robberies and the
19 issue was whether those circumstances could be used if the convictions were
20 unconstitutionally obtained in California. The Arizona Court held that an unconstitutionally
21 obtained conviction could not be used as an aggravating circumstance. Steelman, 126 Ariz.
22 23-25, 612 P.2d 475, 479-81. That Court went on further to determine that because the death
23 penalty statute is not a recidivist statute which imposes additional punishment for crimes
24 committed after a prior conviction, the timeliness of the conviction would not preclude its
25 consideration. Id. The California case cited by Defendant ruled similarly regarding the
26 timeliness issue.

27 Defendant presents no persuasive authority for his argument and he miscites the
28 Arizona and California cases, therefore his argument lacks merit and should not be considered.

1 C. NRS 200.033(3) and (14) are Constitutional

2 Defendant argues that the Nevada Supreme Court's construction of NRS 200.033(3) &
3 (14) have expanded rather than limited the reach of these aggravators. However, the relevant
4 case law reveals that the Nevada Supreme Court has properly interpreted NRS 200.033(3) so
5 that it "... genuinely narrow[s] the class of death-eligible persons and thereby channel[s] the
6 jury's discretion." Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S. Ct. 546, 554 (1988).
7 Defendant argues subsection (14) in conjunction with subsection (3), so the State will use the
8 arguments and caselaw upholding 200.033(3) in support of 033(14).

9 The litany of Nevada Supreme Court cases provided by Defendant, as well as other
10 case law, supports this conclusion. In Moran v. State, 734 P.2d 712 (Nev. 1987), cert. denied,
11 Moran v. McMichael, 516 U.S. 976 (1995), the Nevada Supreme Court consolidated two
12 separate murder cases against the defendant. In the first case, the defendant entered a bar with
13 a female companion. The bartender and a patron were also present in the bar. The defendant
14 pulled out a gun and shot the bartender four times. The defendant then reached around his
15 companion and shot his remaining four rounds into the patron. Both victims died as a result
16 of their gunshot wounds.

17 Nine days later, the defendant went to the apartment of his ex-wife and fired seven
18 shots at her, five of which entered her body. At least two rounds passed through the wall and
19 entered the adjacent apartment. The defendant pled guilty to all three murders and was
20 sentenced to death on all three counts. The defendant appealed his sentences of death claiming
21 that there was insufficient evidence to support the aggravating circumstances.

22 The Nevada Supreme Court held that the NRS 200.033(3) aggravator was applicable
23 in the murders of the bartender and patron because his companion was seated next to the
24 defendant when the defendant opened fire. Id. at 715. The close proximity of the companion
25 supported a finding that the defendant "knowingly created a risk of death to more than one
26 person." Id., citing Nevius v. State, 699 P.2d 1053 (Nev.1985) (NRS 200.033(3) applicable
27 where the gunman shot and killed his victim while the victim's wife lay on the bed near the
28 line of fire).

1 However, the Nevada Supreme Court held that the NRS 200.033(3) aggravator was
2 inapplicable in the murder of the defendant's ex-wife because there was no evidence showing
3 that any neighbor was at an immediate risk of death nor was there evidence that the defendant
4 was aware that any other person was within close proximity of the crime scene. *Id.* at 714.

5 In Jimenez v. State, 775 P.2d 694 (Nev. 1989), the defendant stabbed two women to
6 death with two separate knives. The Nevada Supreme Court again found that the NRS
7 200.033(3) aggravator was inapplicable to the defendant based on the fact that a knife was not
8 a "weapon or device" that was "intrinsically hazardous to more than one life" and that such a
9 showing was a "necessary predicate to a finding under NRS 200.033(3)." *Id.* at 697.

10 In Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993), cert. denied, Hogan v.
11 McDaniel, 117 S. Ct. 334 (1996), the defendant shot and killed his female companion. The
12 victim's teenage daughter was in close proximity to her at the time she was shot. *Id.* at 714.
13 The defendant then fired five shots into the daughter. Three of the shots were fired
14 immediately after her mother told her to flee and the remaining two shots were fired when she
15 attempted to use the telephone. Hogan v. State, 732 P.2d 422, 424 (Nev. 1987), cert. denied,
16 Hogan v. Nevada, 484 U.S. 872 (1987). The jury found that NRS 200.033(3) was an
17 aggravator and sentenced the defendant to death. Hogan v. Warden, at 714. The defendant
18 appealed claiming that NRS 200.033(3) was inapplicable.

19 The Nevada Supreme Court, relying on its holding in Moran v. State, *supra*, held that
20 the close proximity of the daughter to her mother at the time that her mother was shot would
21 support a finding under NRS 200.033(3). *Id.* at 714. The Nevada Supreme then went on to
22 add that the "course of action" language of NRS 200.033(3) included "two intentional
23 shootings closely related in time and place, particularly where the second attack may have
24 been motivated by a desire to escape detection in the original shooting." *Id.*

25 Since the Nevada Supreme Court's decision in Hogan v. Warden, it has consistently
26 relied on its "course of action" interpretation to uphold the applicability of the NRS 200.033(3)
27 aggravator to only those cases where defendants were involved in multiple contemporaneous
28 murders or murders where the defendants had attempted but failed to kill someone along with

1 the murdered victim. See Evans v. State, 926 P.2d 65 (Nev. 1996), cert. denied, Evans v.
2 Nevada, 117 S. Ct. 1854 (1997)(NRS 200.033(3) applicable where defendant and others shot
3 and killed four people because commission of multiple murders by defendant within a closely
4 related time and place constituted a “course of conduct” inherently hazardous to the life of
5 more than one person); Flanagan v. State, 930 P.2d 691 (Nev. 1996), cert. denied, 118 S. Ct.
6 1534 (1997)(NRS 200.033(3) applicable where a defendant shot and killed his grandmother
7 when he knew his grandfather was upstairs, and his co-conspirator shot and killed the
8 grandfather as he was walking down the stairs); and Bennet v. State, 787 Nev. 797 (Nev.
9 1990), cert. denied, 498 U.S. 925 (1990)(NRS 200.033(3) applicable where a defendant shot
10 and killed a store employee in commission of robbery and his co-conspirator subsequently
11 shot a customer in the leg).

12 It should be noted that the Nevada Supreme Court has not been one-sided in its
13 application of Hogan v. Warden. In Lane v. State, 956 P.2d 88 (Nev. 1998), the defendant
14 went on a crime “spree,” shooting one man in the stomach, another in the hand, and then finally
15 fatally shooting another in the head. The crimes took place in a span of about an hour and
16 occurred in three different locations. The prosecution argued and the jury found that the NRS
17 200.033(3) aggravator was applicable since the shootings constituted a “course of action.” Id.
18 at 92. The Nevada Supreme Court disagreed, recognizing that the shootings did not occur in
19 close proximity of time or place as had occurred in Flanagan, *supra*. Id. at 92. See also, Leslie
20 v. State, 952 P.2d 966 (Nev. 1998) (NRS 200.033(3) inapplicable where defendant, in the
21 commission of a robbery, was unaware that others were in close proximity when he fired a
22 round above his intended victim’s head).

23 The Nevada Supreme Court has consistently held the NRS 200.033(3) aggravator to be
24 applicable in only a limited number of factual circumstances. They have included factual
25 circumstances where a defendant threatened a person’s life because of the close proximity
26 between that person and the victim at the time of the murder. They have also included factual
27 circumstances where a defendant was engaged in the commission of multiple murders within
28 a closely related time and place. Additionally, the Nevada Supreme Court has stated that the

1 use of a weapon or device which is intrinsically hazardous to more than one life is a predicate
2 to a finding of the NRS 200.033(3) aggravator. Since the Nevada Supreme Court has
3 consistently limited the application of the NRS 200.033(3) aggravator and has effectively
4 channeled the jury's discretion, the Defendant's claim should be denied.

5 D. NRS 200.033(4) and (13) are Constitutional

6 Defendant alleges that NRS 200.033(4) and (13) are unconstitutional because Nevada's
7 expansive interpretation of it results in every felony murder situation eligible for the death
8 penalty. Defendant conveniently fails to cite the numerous cases in which this Court
9 specifically addressed and firmly rejected the same argument Defendant presents.¹

10 In Bolin v. State, 114 Nev. 503, 520, 960 P.2d 784, 801 (1998), the Court stated, "The
11 aggravating circumstance contained in NRS 200.033(4) is constitutional." The Court noted
12 that this argument had been presented before and was denied, therefore the Court summarily
13 dismissed the argument.

14 In Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996), cert. denied, 117 S. Ct. 1267
15 (1997), the Court stated:

16 Atkins next argues that the aggravating circumstance enunciated in
17 NRS 200.033(4) is unconstitutional. He asserts that the statute does not
18 genuinely narrow the class of persons eligible for the death penalty. To
19 support his position, Atkins relies upon State v. Cherry, 298 N.C. 86, 257
S.E.2d 551 (1979), and State v. Middlebrooks, 840 S.W.2d 317 (Tenn.
1992). We conclude that Atkins' contention lacks merit.

20 Atkins, 112 Nev. 1122, 923 P.2d at 1127 (emphasis added).

21 In Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), the Court held:

22 [W]e note that the U.S. Supreme Court has implicitly approved the
23 use of the underlying felony in felony murder cases as a valid aggravating
24 circumstance to support the imposition of the death sentence. See Proffitt v.
Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Gregg v.
Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

25
26 Petrocelli, 101 Nev. at 53, 692 P.2d at 509. In rejecting the defendant's argument of
27 unconstitutionality, the Court further stated:

28
¹ See McConnell v. State, 120 Nev. 1043 (2004).

1 [A] defendant convicted of a felony murder will not 'automatically'
2 receive the death penalty merely because he initially faces one aggravating
3 circumstance. The jury is free to find that "any...mitigating circumstance"
4 outweighs that aggravating factor, NRS 200.035, and is not required to
automatically impose death. See Coleman v. State, 378 So.2d 640, 646-47
(Miss. 1979). We therefore reject the contention that the underlying felony
cannot be considered as an aggravating circumstance.

5 Petrocelli, 101 Nev. at 54, 692 P.2d at 509.

6 The Nevada Supreme Court also reviewed the constitutionality of NRS 200.033(4) in
7 Miranda v. State, 101 Nev. 562, 567-569, 707 P.2d 1121, 1125-1126 (1985), cert. denied, 475
8 U.S. 1031, 106 S. Ct. 1239 (1986), and Farmer v. State, 101 Nev. 419, 421, 705 P.2d 149, 150
9 (1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1999 (1986). In each of these cases, the Court
10 upheld the constitutionality of NRS 200.033(4).

11 Many defendants have challenged the constitutionality of NRS 200.033(4), and the
12 Nevada Supreme Court has repeatedly upheld the statute. Defendant's attempt to revive any
13 argument regarding the constitutionality of NRS 200.033(4) is without merit. Furthermore,
14 Defendant does not introduce any new case law or argument to justify additional review of
15 this issue. Thus, Defendant's contention regarding the constitutionality of NRS 200.033(4)
16 should be summarily rejected.

17 E. NRS 200.033(5) is Constitutional

18 Defendant argues that the application of the NRS 200.033(5) aggravator is overbroad
19 because in any situation where a defendant kills a victim who had knowledge of the crime, it
20 is assumed the killing occurred to prevent an arrest. Defendant's argument has previously
21 been raised and the Nevada Supreme Court determined the argument lacked merit.

22 In Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481 (1986), the Defendant argued
23 that a murder is not committed to avoid a lawful arrest, for purposes of the statute, unless arrest
24 is imminent and the victim was in some way involved in effectuating the arrest. The Court
25 ruled, "that, however, is not what the statute says. [Defendant's] murder clearly was
26 perpetrated to avoid arrest, and no more is required. Accord, White v. State, 403 So.2d 331
27 (Fla.1981), cert. denied, 463 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983); Riley v.
28

1 State, 366 So.2d 19 (Fla.1978), cert. denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294
2 (1982).” The Court further held that the statute was unambiguous. Id. at 486.

3 Defendant argues that the truly bizarre nature of this aggravator can be found in Canape
4 v. State, 109 Nev. 864, 859 P.2d 1023 (1993). However, there is nothing unusual about the
5 application of the aggravator in the Canape case. The Court made a detailed finding regarding
6 the facts of the robbery and murder at issue and concluded that the Defendant murdered the
7 victim to avoid any future identification that may lead to an arrest. Id. at 875, 859 P.2d at
8 1030.

9 The Nevada Supreme Court has considered Defendant’s argument previously and
10 determined that the argument lacks merit. Absent any evidence to the contrary, the argument
11 should not be considered.

12 F. NRS 200.033(6) is Constitutional

13 Defendant argues that Nevada’s application of this aggravator is overbroad because
14 Nevada commonly applies it in murder for hire cases. Defendant contends that in such cases
15 this aggravator should have no application because the hirer was neither the shooter nor
16 present at the time of the murder. Nevada however, has adopted the same type of rationale in
17 analyzing this aggravating circumstance, as have Courts in all jurisdictions who include this
18 aggravating circumstance as part of their death penalty statutes.

19 In Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983), the Nevada Supreme Court
20 approved the use of this aggravating circumstance against his Defendant who hired three
21 others to kill the intended victim. Defendant Wilson had made arrangements with an
22 undercover officer posing as a drug purchaser for the sale of \$16,000.00 worth of cocaine.
23 Wilson hired three (3) associates to kill the victim while relieving him of the \$16,000.00 in
24 cash at the time the drug deal was to be consummated. While Wilson negotiated with the
25 undercover officer posing as a drug purchaser, the three (3) associates approached the victim
26 from behind and stabbed him repeatedly, causing his death. Wilson challenged the fact that
27 both the robbery aggravating circumstance and the monetary gain aggravating circumstance
28 were imposed against him, claiming that the monetary gain aggravating circumstance only

1 applied in "hired gun" situations. Id. at 376. The Court determined that Wilson's hiring of
2 the killers in fact constituted a "hired gun" situation for which the application of the monetary
3 gain aggravating circumstance was appropriate. Id. at 377. The Court therefore approved the
4 use of the monetary gain aggravating circumstance in a "hired gun" situation for the person
5 actually hiring the killers. The purpose of this aggravating circumstance is to punish for a
6 killing that is prompted by a motive of monetary gain. In Guy v. State, 108 Nev. 770, 839
7 p.2d 578 (1992), the Nevada Supreme Court upheld the use of the monetary gain aggravating
8 circumstance set forth in NRS 200.033(6) in a set of circumstances where the Defendant did
9 not actually commit the murder. The defendant in the Guy case drove his co-defendant to an
10 encounter with the victim, who took them both to a location where they purchased cocaine.
11 While the co-defendant stepped out of the car for a brief period of time after the drug
12 transaction had been completed, the defendant tried to drive off while leaving the victim
13 outside of the vehicle. As the victim tried to cling to the vehicle, the co-defendant shot the
14 victim three times. The Nevada Supreme Court, in upholding the application of the monetary
15 gain aggravating circumstance against the defendant, stated as follows:

16 The evidence also shows that they murdered [the victim] to obtain cocaine,
17 which has monetary value.

18 Id. at 781.

19 Therefore, the aggravating circumstance set forth in 200.033(6) does not only apply in
20 "hired gun" situations, but also in situations where the motive for the murder is monetary gain
21 or the acquisition of property having monetary value.

22 Similarly, other jurisdictions have interpreted their monetary or pecuniary gain
23 aggravating circumstances in like fashion.

24 In Arizona, the pecuniary gain aggravating circumstance is appropriate if the
25 expectation of pecuniary gain is a motive, cause or impetus for the murder, and not merely a
26 result of it. State v. Hyde, 921 P.2d 655 (Ariz. 1996); State v. McKinney, 917 P.2d 1214
27 (Ariz. 1996); State v. Jones, 917 P.2d 200 (Ariz. 1996).

1 In California, the financial gain special circumstance only applies when the victim's
2 death is the consideration for, or an essential pre-requisite to, the financial gain sought by the
3 Defendant. People v. Bigelow, 691 P.2d 994, 1006 (Cal. 1984). In a case similar to the instant
4 case, the California Court held that the hirer of a paid killer is not directly subject to the
5 financial gain special circumstance unless he was motivated by financial gain in hiring the
6 killer. People v. Padilla, 906 P.2d 388, 413 (Cal. 1995). Similarly, California Courts have
7 applied the financial gain aggravator to a defendant who was involved in the murder of his
8 wife for the purpose of avoiding past child support arrearages. People v. Edelbacher, 766 P.2d
9 1 (Cal. 1989).

10 Other jurisdictions have followed the clear purpose of the monetary gain aggravating
11 circumstance in applying it to circumstances where the motive for the killing was direct
12 monetary gain. Plantz v. State, 876 P.2d 268, 281 (Okla.), cert. denied, 115 S.Ct. 1130 (1994),
13 (aggravating circumstance applied to defendant hiring a killer to murder the victim for
14 insurance proceeds); State v. Rust, 250 N.W. 2d 867, 874 (Neb. 1977) (the pecuniary gain
15 aggravating circumstance applies to the "hired gun", the hirers of the gun and those
16 committing murder which is motivated by desire for pecuniary gain).

17 Defendant has failed to present any evidence that would show that applying the NRS
18 200.033(6) aggravator to hired murder cases is inconsistent with the statute's construction.
19 Therefore, Defendant's argument lacks merit and should be denied.

20 G. NRS 200.033(7) is Constitutional

21 Defendant has failed to present any argument regarding this aggravator, therefore this
22 issue should not be considered.

23 H. NRS 200.033(8) is Constitutional

24 Defendant argues that the aggravating circumstance of NRS 200.033(8) is
25 unconstitutionally vague as applied by the Nevada Supreme Court. This argument has
26 previously been brought before the Nevada Supreme Court and was found to be constitutional.
27 Therefore, Defendant's argument lacks merit.
28

1 The United States Supreme Court has held that to avoid “the arbitrary and capricious
2 infliction of the death penalty,’ a state ‘must channel the sentencer’s discretion’ by ‘clear and
3 objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally
4 reviewable the process for imposing a sentence of death.’” Godfrey v. Georgia, 446 U.S. 420,
5 428, 100 S. Ct. 1759, 1764-65 (1980). In Godfrey, the Court reversed the petitioner’s death
6 sentence because an aggravating circumstance based upon the “depravity of mind” of the
7 defendant had not been sufficiently narrowed by the instructions that were issued to the jury.
8 Id. at 432, at 1767.

9 In Deutscher v. Whitley, 884 F.2d 1152, 1162 (9th Cir. 1989) the Ninth Circuit,
10 followed Godfrey and held that a death sentence based upon “depravity of mind” (pursuant to
11 NRS 200.033(8)) was unconstitutional because it was not coupled with a sufficient narrowing
12 instruction. Consequently, in Robins v. State, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990),
13 this Court held that instructions issued pursuant to the “depravity of mind” aggravating
14 circumstance, delineated in NRS 200.033(8), must be accompanied by an additional narrowing
15 instruction that requires “torture, mutilation or other serious and depraved physical abuse
16 beyond the act of killing itself, as a qualifying requirement to an aggravating circumstance
17 based in part upon depravity of mind.” Id.

18 Since this opinion, the torture/mutilation aggravating circumstance has been challenged
19 as unconstitutionally vague on numerous occasions. *See, e.g.,* Browne v. State, 113 Nev. 305,
20 933 P.2d 187 (1997); Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996); Pertgen v. State,
21 110 Nev. 554, 875 P.2d 361 (1994). However, where the district court has issued instructions
22 that specifically define the applicable terms for the jury, the Nevada Supreme Court has found
23 that NRS 200.033(8) is constitutional. *See* Browne v. State, 113 Nev. 305, 933 P.2d 187
24 (1997)(jury instructed regarding definition of “mutilate”); Parker v. State, 109 Nev. 383, 849
25 P.2d 1062 (1993)(Jury instructed regarding definitions of “mutilate” and “depravity of mind”);
26 Robins v. State, 106 Nev. 611, 798 P.2d 558, (1990)(jury instructed regarding the definitions
27 of “torture” and “depravity of mind”); Rogers v. State, 101 Nev. 457, 467, 705 P.2d 664, 671
28 (1985)(court held that statute provided adequate guidance to the jury when the district court

1 defined the terms "torture," "depravity of mind," and "mutilate"); cf. Pertgen v. State, 110
2 Nev. 554, 561, 875 P.2d 361, 365 (1994)(court held that failure to define "torture" for jury did
3 not satisfy the Godfrey requirements). As such, it is clear that when the jury is issued specific
4 instructions on the applicable terms of the aggravating circumstance, the jurors' discretion is
5 sufficiently limited so as to be within the High Court's directive in Godfrey.

6 Defendant's argument therefore, lacks merit and should be denied.

7 I. NRS 200.033(9) is Constitutional

8 Defendant argues that this aggravator is unconstitutional because it fails to narrow the
9 categories of defendants eligible for the death penalty and instead allows for the death penalty
10 against all individuals accused of first degree murder. Defendant's argument however, has
11 been previously upheld as constitutional when brought before the Nevada Supreme Court.

12 In Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 64 (1997), the Court found that it
13 had "upheld the constitutionality of NRS 200.033(9), as applied, on numerous occasions. *See*,
14 *e.g.*, Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994); Paine v. State, 110 Nev. 609, 877
15 P.2d 1025 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 291 (1995);
16 Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987); Ford v. State, 102 Nev. 126, 717 P.2d 27
17 (1986)." Accord Calambro v. State, 114 Nev. 106, 110, 952 P.2d 946, 950 (1998). The Court
18 further noted that NRS 200.033(9) is constitutional as long as it was not applied in an arbitrary
19 and capricious manner. The Court then decided that in the Greene case, the aggravator had
20 not been applied in an arbitrary and capricious manner, therefore it was constitutionally
21 applied. Id.

22 J. NRS 200.033(10) is Constitutional

23 Defendant argues that NRS 200.033(10) is unconstitutionally vague as applied by the
24 Nevada Supreme Court because it allows an individual to be sentenced to death for committing
25 an unintentional murder. The aggravator enunciated in NRS 200.033(10) applies in
26 circumstances where a person under fourteen years of age is the subject of a murder.
27 Defendant argues that because Nevada's child abuse statute does not require deliberation and
28

1 wilfulness, a defendant can be subjected to a death sentence in cases where the murder of a
2 child was accidental. Defendant's argument is misplaced.

3 Nevada's child abuse statute, NRS 200.508, was enacted by the legislature and
4 therefore is presumed to be constitutional. Sun City Summerlin Community Ass'n v. State
5 By and Through Dept. of Taxation, 113 Nev. 835, 944 P.2d 234 (1997); Skipper v. State, 110
6 Nev. 1031, 879 P.2d 732 (1994). No evidence has been shown that such a child abuse statute
7 is unconstitutional. Children are generally a silent voice in need of special safeguards to insure
8 their ultimate well-being. As such, a statute such as NRS 200.508 protects those interests of
9 children. Therefore, if a murder results from child abuse, the logical conclusion is that the
10 aggravator may apply.

11 K. NRS 200.033(11) and (15) are Constitutional

12 The Defendant argues that NRS 200.033(11) & (15) are unconstitutional because these
13 aggravators afford unlimited and highly arbitrary power to prosecutors to decide when to
14 pursue the death penalty.

15 The aggravator outlined in NRS 200.033(11) declares that the death penalty can be
16 imposed when a murder is committed "upon a person because of the actual or perceived race,
17 color, religion, national origin, physical or mental disability or sexual orientation of that
18 person." Under NRS 200.033(15), makes a criminal defendant eligible for the death penalty
19 if he or she commits a murder with the intent to commit, cause, aid, further or conceal an act
20 of terrorism." Terrorism is defined in the statute as acts of or the attempted use of sabotage,
21 coercion or violence which is intended to "(a) cause great bodily harm or death to the general
22 population; or (b) cause substantial destruction, contamination or impairment of: (1) any
23 building or infrastructure, communications, transportation, utilities or services; or (2) any
24 natural resource or the environment." NRS 202.4415.

25 These aggravators sufficiently narrow the categories of eligible defendants for the death
26 penalty and comply with Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976), and Furman
27 v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). Any aggravator gives the prosecution the
28 discretion on whether to seek the death penalty. These particular aggravators provide no

1 greater discretion to prosecutors than any other enumerated aggravator, which have been
2 upheld by the Nevada Supreme Court. Moreover, the State cannot fathom any aggravators
3 that are more relevant to the ideology of American culture than the protection afforded by (11)
4 and (15). Because these aggravators sufficiently narrow the categories of eligible defendants
5 for the death penalty, they will be upheld by the Nevada Supreme court as constitutional.

6 **CONCLUSION**

7 Based on the foregoing, the State respectfully requests the Court deny the Defendant's
8 Motion to Declare Nevada's Death Penalty Statutes Unconstitutional.

9 DATED this 5th day of November, 2015.

10 Respectfully submitted,

11 STEVEN B. WOLFSON
12 Clark County District Attorney
Nevada Bar #1565

13 BY /s/ Richard H. Scow
14 RICHARD H. SCOW
15 Chief Deputy District Attorney
Nevada Bar #009182

16
17
18 **CERTIFICATE OF FACSIMILE TRANSMISSION**

19 I hereby certify that service of the above and foregoing, was made this 5th day of
20 November, 2015, by facsimile transmission to:

21 ANDREA LUEM, ESQ.
22 702-778-5007

23
24 BY: /s/ D. Jason
Secretary for the District Attorney's Office

25
26
27
28 12F19975X/rhs/djj/L5

MEMORY TRANSMISSION REPORT

TIME : 11-05-'15 13:18
FAX NO.1 :
NAME : DISTRICT ATTORNEY

FILE NO. : 786
DATE : 11.05 13:13
TO : 87027785007
DOCUMENT PAGES : 19
START TIME : 11.05 13:13
END TIME : 11.05 13:17
PAGES SENT : 19
STATUS : OK

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OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
RICHARD H. SCOW
Chief Deputy District Attorney
Nevada Bar #009182
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ROBERT BROWN,
#6006120

Defendant.

CASE NO: C-14-299234-1
DEPT NO: IX

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DECLARE
NEVADA'S DEATH PENALTY STATUTES UNCONSTITUTIONAL**

DATE OF HEARING: November 24, 2015

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through RICHARD H. SCOW, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in opposition to Defendant's Motion to Declare Nevada's Death Penalty Statutes Unconstitutional.

This Opposition 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.

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ROBERT BROWN, JR.,

Defendant.

CASE NO. C299234

DEPT. NO. IX

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

THURSDAY, APRIL 9, 2015

RECORDER'S TRANSCRIPT RE:
DEFENDANT'S PRO SE MOTION TO DISMISS COUNSEL AND APPOINTMENT
OF ALTERNATIVE COUNSEL

APPEARANCES:

For the Plaintiff:

COLLEEN R. BAHARAV
Deputy District Attorney

For the Defendant:

JOSHUA L. TOMSHECK, ESQ.
PETER S. CHRISTIANSEN, ESQ.

RECORDED BY: YVETTE SISON, COURT RECORDER

1 LAS VEGAS, NEVADA, THURSDAY, APRIL 09, 2015, 10:29 A.M.

2 * * * * *

3 THE COURT: Okay. This is C299234-1, Defendant's pro se motion.
4 Did you have – I had an opportunity to review your motion as well.

5 MR. CHRISTIANSEN: I went and met with him, Judge. Mr. Tomscheck
6 attempted to. There was problem at the jail, but I spoke to Mr. Brown, told him what
7 I was filing. He's on the same page, understands that. I know the Court's sort of
8 regimen for these things, but wanted to put in writing my position as well so you
9 knew it wasn't just a defendant trying to manipulate the system.

10 THE COURT: Okay. I'm kind of –

11 MR. TOMSHECK: I'm rowing in the same –

12 THE COURT: – at a loss at where you are in this.

13 MR. TOMSHECK: I'm rowing in the same boat. Based on some of
14 what he –

15 THE COURT: Your name isn't even mentioned in here.

16 MR. TOMSHECK: He filed a separate one as to me.

17 THE COURT: Oh yeah.

18 MR. TOMSHECK: I wasn't served with it. I wasn't aware of it until Mr.
19 Christiansen's office asked me about it. He filed them both on the same day.

20 MR. CHRISTIANSEN: And there's pending bar complaints against both
21 of us, Judge, is my understanding –

22 MR. TOMSHECK: Which would –

23 MR. CHRISTIANSEN: – as well.

24 THE COURT: Which is not grounds, but –

25 MR. CHRISTIANSEN: I'm just telling –

1 THE COURT: – I appreciate it.

2 MR. CHRISTIANSEN: – so you know.

3 THE COURT: Right.

4 Well, you can file bar complaints all day long, that's not going to get
5 your lawyers off the case, Mr. Brown.

6 But based upon their – so you're telling me you believe your
7 relationship is irretrievably broken as well? Is that what you're saying?

8 MR. TOMSHECK: I do, and I can put it in writing if Your Honor would
9 like, but, otherwise, yes, I'm moving to withdraw.

10 THE COURT: So you're joining – just let the record reflect an oral
11 joinder by Mr. Tomscheck to the motion to withdraw.

12 Okay, based upon your motions to withdraw, they're granted.

13 MR. CHRISTIANSEN: Thank you, Your Honor.

14 THE COURT: The matter's continued.

15 Well, first of all, the – I have to vacate the trial dates, Mr. Brown, most
16 likely. So I am going to notify the Office of Indigent Counsel to have new counsel
17 present next week, but you can expect that your trial date is going to be vacated.
18 It's not plausible that new counsel would be ready to go. By the time they get the
19 file and meet with you they're looking at 30 days maybe, and that's probably not
20 going to be enough, but I'll leave it alone for now until you have an attorney present.
21 Do you have any questions?

22 THE DEFENDANT: No.

23 THE COURT: Okay. So can you submit an order?

24 MR. CHRISTIANSEN: Did you want us – one of us to call Mr.
25 Christensen and – or –

1 THE COURT: Sure, that might be helpful.

2 MR. CHRISTIANSEN: Maybe we could help him understand sort of
3 the –

4 THE COURT: Sure, if you don't mind.

5 MR. CHRISTIANSEN: I will. I'll do it this morning.

6 THE COURT: I mean, there might be – that might assist him in who he
7 chooses.

8 MR. CHRISTIANSEN: That's right.

9 THE COURT: I don't know. But is there anything else that needs to
10 be –

11 MR. CHRISTIANSEN: Just –

12 THE COURT: I just need an order.

13 MR. CHRISTIANSEN: I'll submit an order. And do you want to give me
14 a status check date and I'll give – tell Mr. – I'll tell Drew?

15 THE COURT: Yes, one week.

16 THE CLERK: April 16th at 9 a.m.

17 MR. CHRISTIANSEN: Thank you, Judge.

18 THE COURT: So that's the motion to withdraw and the joinder by Mr.
19 Tomscheck in the motion to withdraw. Thank you.

20 MR. CHRISTIANSEN: And I'll submit an order today. Thank you, Your
21 Honor.

22 THE COURT: Thanks.

23 MR. TOMSHECK: Thank you, Your Honor.

24 PROCEEDING CONCLUDED AT 10:33 A.M.

25 * * * * *

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3 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-
4 video recording of this proceeding in the above-entitled case.

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6 LARA CORCORAN
7 Court Recorder/Transcriber
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CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
COLLEEN R. BAHARAV
Deputy District Attorney
Nevada Bar #011777
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT BROWN, JR.,
#6006120

Defendant.

CASE NO: C-14-299234-1

DEPT NO: IX

STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF
DEFENDANT'S DIRECT AND VICARIOUS STATEMENTS AND STATE'S REQUEST
FOR RECIPROCAL DISCOVERY

DATE OF HEARING: NOVEMBER 24, 2015
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through COLLEEN R. BAHARAV, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Motion to Compel Production of Defendant's Direct and Vicarious Statements and the State's Request for Reciprocal Discovery.

This Response 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.

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//

1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 COLLEEN R. BAHARAV
6 Deputy District Attorney
7 Nevada Bar #011777
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
11 Plaintiff,

11 -vs-

12 ROBERT BROWN, JR.,
13 #6006120

14 Defendant.

CASE NO: C-14-299234-1

DEPT NO: IX

15 STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF
16 DEFENDANT'S DIRECT AND VICARIOUS STATEMENTS AND STATE'S REQUEST
17 FOR RECIPROCAL DISCOVERY

18 DATE OF HEARING: NOVEMBER 24, 2015
19 TIME OF HEARING: 9:00 A.M.

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through COLLEEN R. BAHARAV, Deputy District Attorney, and hereby
22 submits the attached Points and Authorities in Response to Defendant's Motion to Compel
23 Production of Defendant's Direct and Vicarious Statements and the State's Request for
24 Reciprocal Discovery.

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

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1 The State filed an Information on July 17, 2014, charging Defendant with: Count I –
2 Invasion of the Home While in Possession of a Deadly Weapon (Category B Felony – NRS
3 205.067); Count II – Burglary While in Possession of a Deadly Weapon (Category B Felony
4 – NRS 205.060); Count III – Murder with Use of a Deadly Weapon (Category A Felony –
5 NRS 200.010, 200.030, 193.165); Counts IV and V – Attempt Murder with Use of a Deadly
6 Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count VI –
7 Possession of Firearm by Ex-Felon (Category B Felony – NRS 202.360); Counts VII-XIV –
8 Discharge of Firearm From or Within a Structure (Category B Felony – NRS 202.287); and
9 Count XV – Child Abuse, Neglect, or Endangerment with Use of a Deadly Weapon (Category
10 B Felony – NRS 200.508(1); 193.165). Defendant was arraigned on July 21, 2014. He pled
11 not guilty and invoked his right to a trial within 60 days. Defendant's trial was set for
12 September 2, 2014.

13 The State filed a Notice of Intent to Seek Death Penalty on August 8, 2014. In support
14 of its intent to seek the death penalty, the State alleged the following aggravating
15 circumstances: (1) the murder was committed by a person who had been convicted of a felony
16 involving the use or threat of violence to the person of another (NRS 200.033(2)) – based upon
17 Defendant's 1998 felony conviction out of California for Carjacking; (2) the murder was
18 committed by a person who had been convicted of a felony involving the use or threat of
19 violence to the person of another (NRS 200.033(2)) – based upon Defendant's 1998 felony
20 conviction out of California for Corporal Injury to Spouse; (3) the murder was committed by
21 a person who had been convicted of a felony involving the use or threat of violence to the
22 person of another (NRS 200.033(2)) – based upon Defendant's potential conviction for the
23 Attempt Murder of Esther Maestas in the instant case; (4) the murder was committed by a
24 person who had been convicted of a felony involving the use or threat of violence to the person
25 of another (NRS 200.033(2)) – based upon Defendant's potential conviction for the Attempt
26 Murder of K.H.; (5) the murder was committed by a person who knowingly created a great
27 risk of death to more than one person by means of a weapon, device or course of action which
28 would normally be hazardous to the lives of more than one person (NRS 200.033(3)); and (6)

1 the murder was committed while the person was engaged, alone or with others, in the
2 commission of, or an attempt to commit or flight after committing or attempting to commit
3 invasion of the home or burglary, and the person charged killed or attempted to kill the person
4 murdered (NRS 200.033(4)). The State filed its Notice of Evidence in Support of Aggravating
5 Circumstances on August 19, 2014.

6 At Defendant's calendar call on August 21, 2014, defendant's counsel indicated that
7 they would not be prepared to proceed given that the State filed a Notice of Intent to Seek
8 Death Penalty as well as the fact that Defendant's trial was set within thirty (30) days of his
9 initial arraignment in District Court. Upon inquiry by the Court, Defendant refused to waive
10 his right to have a trial within 60 days, so the Court ordered that the trial date of September 2,
11 2014, stand unless the parties could agree otherwise. Defendant's counsel subsequently met
12 with Defendant and on September 2, 2014, Defendant agreed to waive his right to a trial within
13 60 days and continue the trial. After Defendant expressed concerns regarding his counsel, the
14 Court set a status check on Defendant's concerns and on resetting the trial. Defendant's trial
15 was ultimately reset for June 8, 2015.

16 The preliminary hearing transcripts in this case were filed on September 11, 2014.
17 Defendant filed a Petition for Writ of Habeas Corpus on October 10, 2014. The State's Return
18 to Writ was filed on October 27, 2014. On October 30, 2014, the Court determined that there
19 was adequate evidence to support the charges and denied Defendant's petition.

20 On April 9, 2015, Defendant's counsel was permitted to withdraw. New counsel was
21 appointed on April 16, 2015. Defendant's trial was ultimately reset to August 19, 2016.

22 Defendant filed the instant motion on October 27, 2015. The State's response is as
23 follows.

24 ARGUMENT

25 Defendant requests the production of any statements made by him or statements that
26 could be imputed to him. The State has no objection to this request and has provided the
27 statements that could be attributed to the Defendant on or about August 3, 2015.

28 //

1 Should any additional statements arise, the State will provide them upon receipt. The
2 State understands that its obligation to Defendant in this and every other case is to provide
3 discovery pursuant to the provisions of NRS 174.235 et seq., together with any exculpatory
4 material pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and its progeny.

5 NRS 174.235 states:

6 1. Except as otherwise provided in NRS 174.233 to NRS 174.295
7 inclusive, at the request of a defendant, the prosecuting attorney
8 shall permit Defendant to inspect and to copy or photograph any:

9 (a) Written or recorded statements or confessions made by
10 Defendant, or any written or recorded statements made by a
11 witness the prosecuting attorney intends to call during the case in
12 chief of the state, or copies thereof, within the possession, custody
13 or control of the state, the existence of which is known, or by the
14 exercise of due diligence may become known, to the prosecuting
15 attorney;

16 (b) Results or reports of physical or mental examinations,
17 scientific tests or scientific experiments made in connection with
18 the particular case, or copies thereof, within the possession,
19 custody or control of the state, the existence of which is known, or
20 by the exercise of due diligence may become known, to the
21 prosecuting attorney; and

22 (c) Books, papers, documents, tangible objects, or copies thereof,
23 which the prosecuting attorney intends to introduce during the
24 case in chief of the state and which are within the possession,
25 custody or control of the state, the existence of which is known, or
26 by the exercise of due diligence may become known, to the
27 prosecuting attorney.

28 2. Defendant is not entitled, pursuant to the provisions of this
section, to the discovery or inspection of:

 (a) An internal report, document or memorandum that is prepared
by or on behalf of the prosecuting attorney in connection with the
investigation or prosecution of the case.

 (b) A statement, report, book, paper, document, tangible object or
any other type of item or information that is privileged or protected
from disclosure or inspection pursuant to the constitution or laws
of this state or the Constitution of the United States.

 3. The provisions of this section are not intended to affect any
obligation placed upon the prosecuting attorney by the
constitution of this state or the Constitution of the United States to
disclose exculpatory evidence to Defendant.

 The State will conform with the mandates of NRS 174.235.

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1 CONCLUSION

2 The State will comply with Brady, its progeny, the Nevada Revised Statutes, and the
3 Nevada and United States Constitutions. Based upon the foregoing, this Honorable Court
4 should GRANT Defendant's motion.

5 DATED this 18th day of November, 2015.

6 Respectfully submitted,

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

10 BY 

11 COLLEEN R. BAHARAV
12 Deputy District Attorney
13 Nevada Bar #011777

14 CERTIFICATE OF ELECTRONIC FILING

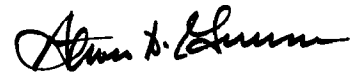
15 I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S MOTION
16 TO COMPEL PRODUCTION OF DEFENDANT'S DIRECT AND VICARIOUS
17 STATEMENTS AND STATE'S REQUEST FOR RECIPROCAL DISCOVERY, was made
18 this 18th day of November, 2015, by Electronic Filing to:

19 ANDREA LUEM, ESQ.
20 ATTORNEY FOR DEFENDANT
21 EMAIL: andrea@luemlaw.com;

22 BY: 

23 P. Manis
24 Employee of the District Attorney's Office
25
26
27
28

CB/pm/L-2



CLERK OF THE COURT

1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 COLLEEN R. BAHARAV
6 Deputy District Attorney
7 Nevada Bar #011777
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 ROBERT BROWN, JR.,
13 #6006120

14 Defendant.

CASE NO: C-14-299234-1

DEPT NO: IX

15 STATE'S RESPONSE TO DEFENDANT'S MOTION FOR JURY QUESTIONNAIRE

16 DATE OF HEARING: NOVEMBER 24, 2015
17 TIME OF HEARING: 9:00 A.M.

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
19 District Attorney, through COLLEEN R. BAHARAV, Deputy District Attorney, and hereby
20 submits the attached Points and Authorities in Response to Defendant's Motion for Jury
21 Questionnaire.

22 This Response 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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26 //

27 //

28 //

STATEMENT OF THE CASE

On December 11, 2012, Robert Brown, Jr. (hereinafter "Defendant") was charged by way of Criminal Complaint with: Count I – Invasion of the Home While in Possession of a Deadly Weapon (Category B Felony – NRS 205.067); Count II – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Count III – Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165); Counts IV and V – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); and Count 6 – Possession of Firearm by Ex-Felon (Category B Felony – NRS 202.360). A warrant of arrest issued for Defendant on December 11, 2012, as Defendant was believed to have fled the jurisdiction.

Defendant was not booked on the warrant until April 11, 2014. He appeared in court on April 17, 2014, and counsel was appointed for him. Defendant's preliminary hearing was set for June 10, 2014.

On April 28, 2014, the State filed an Amended Criminal Complaint adding Counts VII-XIV – Discharge of Firearm From or Within a Structure (Category B Felony – NRS 202.287) and Count XV – Child Abuse, Neglect, or Endangerment with Use of a Deadly Weapon (Category B Felony – NRS 200.508(1); 193.165). Defendant's preliminary hearing was ultimately reset to July 1, 2014, as new counsel needed to be appointed.

Prior to Defendant's preliminary hearing on July 1, 2014, the State filed a Second Amended Criminal Complaint amending the theory of prosecution under Count III and altering the underlying felony supporting Count VI. Following the presentation of evidence, Count V was also amended by interlineation to allege a different theory of prosecution based upon the evidence presented at the preliminary hearing. The Court ultimately held Defendant to answer on Counts I – XIV as alleged in the Second Amended Criminal Complaint and continued its decision on Count XV to review case law provided by the defense, Clay v. State, 129 Nev. Adv. Op. 48, 305 P.3d 898 (2013). On July 3, 2014, after reviewing the case law provided by the defense and hearing arguments from both parties, the Court held Defendant to answer on Count XV as well.

1 The State filed an Information on July 17, 2014, charging Defendant with: Count I –
2 Invasion of the Home While in Possession of a Deadly Weapon (Category B Felony – NRS
3 205.067); Count II – Burglary While in Possession of a Deadly Weapon (Category B Felony
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6 Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count VI –
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9 Count XV – Child Abuse, Neglect, or Endangerment with Use of a Deadly Weapon (Category
10 B Felony – NRS 200.508(1); 193.165). Defendant was arraigned on July 21, 2014. He pled
11 not guilty and invoked his right to a trial within 60 days. Defendant's trial was set for
12 September 2, 2014.

13 The State filed a Notice of Intent to Seek Death Penalty on August 8, 2014. In support
14 of its intent to seek the death penalty, the State alleged the following aggravating
15 circumstances: (1) the murder was committed by a person who had been convicted of a felony
16 involving the use or threat of violence to the person of another (NRS 200.033(2)) – based upon
17 Defendant's 1998 felony conviction out of California for Carjacking; (2) the murder was
18 committed by a person who had been convicted of a felony involving the use or threat of
19 violence to the person of another (NRS 200.033(2)) – based upon Defendant's 1998 felony
20 conviction out of California for Corporal Injury to Spouse; (3) the murder was committed by
21 a person who had been convicted of a felony involving the use or threat of violence to the
22 person of another (NRS 200.033(2)) – based upon Defendant's potential conviction for the
23 Attempt Murder of Esther Maestas in the instant case; (4) the murder was committed by a
24 person who had been convicted of a felony involving the use or threat of violence to the person
25 of another (NRS 200.033(2)) – based upon Defendant's potential conviction for the Attempt
26 Murder of K.H.; (5) the murder was committed by a person who knowingly created a great
27 risk of death to more than one person by means of a weapon, device or course of action which
28 would normally be hazardous to the lives of more than one person (NRS 200.033(3)); and (6)

1 the murder was committed while the person was engaged, alone or with others, in the
2 commission of, or an attempt to commit or flight after committing or attempting to commit
3 invasion of the home or burglary, and the person charged killed or attempted to kill the person
4 murdered (NRS 200.033(4)). The State filed its Notice of Evidence in Support of Aggravating
5 Circumstances on August 19, 2014.

6 At Defendant's calendar call on August 21, 2014, defendant's counsel indicated that
7 they would not be prepared to proceed given that the State filed a Notice of Intent to Seek
8 Death Penalty as well as the fact that Defendant's trial was set within thirty (30) days of his
9 initial arraignment in District Court. Upon inquiry by the Court, Defendant refused to waive
10 his right to have a trial within 60 days, so the Court ordered that the trial date of September 2,
11 2014, stand unless the parties could agree otherwise. Defendant's counsel subsequently met
12 with Defendant and on September 2, 2014, Defendant agreed to waive his right to a trial within
13 60 days and continue the trial. After Defendant expressed concerns regarding his counsel, the
14 Court set a status check on Defendant's concerns and on resetting the trial. Defendant's trial
15 was ultimately reset for June 8, 2015.

16 The preliminary hearing transcripts in this case were filed on September 11, 2014.
17 Defendant filed a Petition for Writ of Habeas Corpus on October 10, 2014. The State's Return
18 to Writ was filed on October 27, 2014. On October 30, 2014, the Court determined that there
19 was adequate evidence to support the charges and denied Defendant's petition.

20 On April 9, 2015, Defendant's counsel was permitted to withdraw. New counsel was
21 appointed on April 16, 2015. Defendant's trial was ultimately reset to August 19, 2016.

22 Defendant filed the instant motion on October 27, 2015. The State's response is as
23 follows.

24 **STATEMENT OF FACTS**

25 During the first week of December 2012, Esther Maestas (hereinafter "Maestas")
26 returned to Las Vegas from Wyoming to visit her daughter Nichole Nick (hereinafter "Nick").
27 Reporter's Transcript of Preliminary Hearing ("PHT"), July 1, 2014, at pp 5-8. Maestas stayed
28 at Nick's apartment at 5421 East Harmon Avenue, Apartment E-13, Las Vegas, Clark County,

1 Nevada during this time. PHT at pp 7-8. Although Nick maintained that address as her
2 primary residence, she had been staying with her boyfriend, the Defendant, in an apartment
3 nearby in the same complex. PHT at pp 8. Accordingly, Nick's apartment was empty and
4 available for Maestas to use when she was in town visiting. PHT at pp 8. Maestas'
5 granddaughter, three-year old K.H., also asked to stay at Nick's apartment during this time.
6 PHT at pp 16-17. K.H.'s mother is Nick's sister Kathleen Maestas. PHT at pp 17.

7 Prior to December 2012, Maestas had met Defendant multiple times in person and
8 several times over Skype. PHT at 6-7. Maestas met Defendant in person prior to leaving Las
9 Vegas to move to Wyoming, PHT at pp 7, Skyped with Defendant and Nick multiple times
10 when she was in Wyoming, PHT at pp, received the keys for Nick's apartment from Defendant
11 when she first arrived in Las Vegas, PHT at pp 8-9, and had dinner with Defendant and Nick
12 two days before Defendant killed Nick. PHT at pp 7. Maestas knew that Defendant often
13 went by the name "Ariyl." PHT at 12. Thus, Maestas was able to identify Defendant as Nick's
14 boyfriend and the man who ultimately murdered Nick on December 7, 2012. PHT at pp 6.

15 By December 7, 2012, Defendant and Nick were having problems in their relationship.
16 PHT at 9. In fact, on the night before Defendant murdered Nick, Nick stayed with Maestas in
17 Nick's own apartment as she had been kicked out of Defendant's apartment. PHT at 9-10.
18 After Nick returned from work around 7:30 p.m. on December 7, 2012, she again went to her
19 own apartment rather than Defendant's apartment. PHT at pp 10. She, Maestas, and K.H.
20 went to their storage unit to find a part for Nick's telephone as the telephone in Nick's
21 apartment appeared to not be working correctly. PHT at pp 11; 16. On the way back to Nick's
22 apartment from the storage unit, Defendant sent a text message to Nick informing Nick that
23 all of her belongings were on her balcony. PHT at pp 11-12. Nick appeared surprised by this
24 as Defendant had never thrown her out before; generally he allowed her to come back to his
25 apartment after their disagreements. PHT at pp 13. Nonetheless, when Nick and Maestas
26 returned to Nick's apartment later that night, they observed Nick's belongings on the balcony
27 just as Defendant said they would be. PHT at pp 13-14.

28 //

1 Throughout that night, Nick and Defendant communicated through text-message and
2 spoke over the telephone. PHT at pp 14. Defendant appeared to be upset with Nick over the
3 rent money Nick apparently “owed” Defendant even though she maintained her own
4 apartment. PHT at pp 15. After Nick finally got off the telephone with Defendant around
5 9:30 p.m., she, Maestas, and K.H. watched Pocahontas. PHT at pp 16. Nick and K.H. were
6 tired after the movie so Maestas made up their beds in the only bedroom in the apartment and
7 tucked Nick and K.H. into sleep. PHT at pp 16. Maestas then went back to the living room
8 to watch another movie. PHT at pp 19.

9 Maestas did not even get to start watching the movie before she heard a bang on the
10 front door. PHT at pp 19-20. This bang was followed by another loud bang “like somebody
11 was trying to break in” or kick in the door. PHT at pp 20; 48. Maestas got scared by the
12 banging and she stood up. PHT at pp 20. Suddenly, the front window next to the door
13 shattered and Defendant jumped through the window with a gun in his hand. PHT at pp 20.
14 Defendant was wearing all black, had a black hat or a “beanie” on, and was wearing dark
15 gloves. PHT at pp 21.

16 While Maestas was not able to give a step-by-step chronological explanation of
17 Defendant’s attack on her, Nick, and K.H., Maestas did testify with particularity regarding
18 what she saw during this ordeal. After Defendant jumped through the window, Maestas
19 recalled screaming that Defendant had a gun and she heard Nick from the bedroom tell
20 Maestas to call the police. PHT at pp 20. Nick subsequently came into the living room and
21 Maestas heard Defendant say, “oh, yeah, bitch” before Defendant pointed the gun at her and
22 shot her. PHT at pp 22.

23 Maestas also believed that Defendant shot Nick in the living room. PHT at pp 22. At
24 some point, Maestas indicated that she may have blacked out because she moved from the
25 living room to the door of the bedroom and she was not sure how she got there. PHT at pp
26 23; 53. What she next remembers is that she was laying down by the door of the bedroom and
27 heard gunshots. PHT at pp 23. Maestas did not realize that she had been shot until she tried
28 to get up and move her arm and her arm was dangling. PHT at pp 23.

1 While laying by the door of the bedroom, Maestas could see what was happening inside.
2 PHT at pp 24. Maestas indicated that at one point she observed Defendant standing over Nick
3 while Nick was in the bedroom. PHT at pp 24. Nick was telling Defendant that he was hurting
4 her. PHT at pp 24. Defendant responded by telling Nick, “[d]o you think you are going to
5 disrespect me and make a fool out of me?” PHT at pp 24. Maestas could not tell what
6 Defendant was doing to Nick at this time, though the Nick ultimately suffered several stabs
7 wounds during this incident. PHT at pp 24; 70-71; 95.

8 At some point, K.H. woke up in the toddler bed that she was sleeping in. PHT at pp
9 24. K.H. sat up and started crying while Defendant was in the room attacking Nick. PHT at
10 pp 24. As soon as she started crying, or making her presence known, Defendant immediately
11 pointed the gun at K.H. PHT at pp 24; 64. Nick and Maestas shouted “no, not the baby” and
12 Nick jumped towards Defendant. PHT at pp 25; 64. Maestas heard more gunshots when
13 Defendant was pointing the gun at K.H., then she, Nick, and Kayla “went down.” PHT at pp
14 25; 65. Maestas thought Nick and K.H. had been shot as neither was moving. PHT at pp 25.
15 K.H. later indicated that she had ducked when Defendant pointed the gun at her. PHT at pp
16 33-34. Shot and injured, Maestas laid in the doorway to the bedroom and watched as
17 Defendant came towards her. PHT at pp 26. Defendant climbed over Maestas to get to the
18 living room, turned around, and fired approximately four more shots into Maestas. PHT at pp
19 26. Defendant then fled the scene.

20 Maestas knew ,she needed to get help so she crawled out of the apartment’ to a
21 neighbor’s home and begged them to call the police. PHT at pp 27. Maestas subsequently
22 crawled back into Nick’s apartment and tried to get back into the bedroom, back to K.H. and
23 Nick. PHT at pp 27. Maestas failed to get back into Nick’s bedroom as she collapsed on the
24 living room floor. PHT at pp 27. She was found shortly thereafter by security and the first-
25 responding officers from the Las Vegas Metropolitan Police Department (“LVMPD”). PHT
26 at pp 27. She asked them to check on Nick and K.H. in the bedroom and told them that the
27 Defendant had shot them. PHT at pp 27-28.

28 //

1 It appeared at the scene and to Maestas that Defendant had shot Maestas in the upper
2 right thigh, the groin area, the leg, her left arm, her side, and her stomach. PHT at pp 28-30.
3 She was rushed to the hospital where she underwent immediate emergency surgery. PHT at
4 pp 30. She almost did not make it through surgery and the doctors ordered that she not be told
5 the status of Nick because she was fighting for her life. PHT at pp 30-31. Ultimately, officers
6 learned that Maestas had in fact been shot what appeared to be three times and the six bullet
7 holes in her body were entry and exit wounds. PHT at pp 92; 94. Following the shooting,
8 K.H. started defecating in her pants again, though she had been fully potty-trained, and also
9 began hiding in closets. PHT at pp 31-32. Maestas also testified that K.H. believed Defendant
10 was shooting at her, that K.H. knew Defendant killed Nick, and that K.H. thought Defendant
11 had killed Maestas as well until K.H. saw Maestas in the hospital. PHT at pp 33-34.

12 While Maestas survived, Nick did not. PHT at pp 70-71. Nick was pronounced dead
13 shortly after LVMPD arrived at the scene and an autopsy performed by Clark County Medical
14 Examiner Dr. Alane Olson on December 9, 2012. PHT at pp 70-71. The autopsy showed
15 two, potentially three gunshot wounds to Nick's body, specifically her chest, her thigh, and
16 potentially her head. PHT at pp 70-71. Nick also suffered a stab wound to her left upper chest,
17 left axilla, her neck including a transection of the right carotid artery, her lateral left upper
18 back, and her left arm. PHT at pp 70-71. The cause of Nick's death was determined to be a
19 gunshot wound to the chest with other significant conditions including sharp force injuries.
20 PHT at pp 70-71. The manner of Nick's death was determined to be homicide. PHT at pp 70-
21 71.

22 Nick's apartment consisted of a living room with a small kitchen attached, then a
23 bedroom and bathroom. PHT at pp 17. In the bedroom, there was a small toddler bed on the
24 left-hand wall and a larger bed directly across on the next wall. PHT at pp 18. In the living
25 room there was a television next to the front door with a window behind it. PHT at pp 17.
26 There was a Christmas tree near the front door with lights and the window had Christmas
27 lights as well. PHT at pp 21. When LVMPD Homicide Detective Dean Raetz arrived on
28 scene, he observed glass shards on both the outside and inside of the living room window.

1 PHT at pp 76. In the bedroom, Detective Raetz observed a bullet hole to the bed that K.H.
2 had been sitting on when Defendant pointed the firearm at K.H. PHT at pp 80. He also
3 observed eight cartridge casings in the bedroom. PHT at pp 81. The firearm that was used
4 during this incident was found just southeast of the apartment complex on Jimmy Durante
5 Boulevard. PHT at pp 88.

6 ARGUMENT

7 The method suggested by counsel for Defendant in selecting a jury in the case at bar is
8 not necessary to ensure a fair trial for the Defendant and is not in the interest of judicial
9 economy.

10 NRS 175.031 governs the examination of trial jurors in the Nevada courts. It provides,
11 "The court shall conduct the initial examination of prospective jurors and defendant or his
12 attorney and the district attorney are entitled to supplement the examination by such further
13 inquiry as the Court deems proper. Any supplemental examination must not be unreasonably
14 restricted."

15 The Eighth Judicial District Courts have set forth a procedure to implement the
16 aforementioned statute. Rule 7.70 provides:

17 "The judge shall conduct the voir dire examination of the
18 jurors. Proposed voir dire questions by the parties or their
19 attorneys must be submitted to the court in chambers not later than
20 4:00 p.m. on the judicial day before the day the trial begins. Upon
21 request of counsel, the trial judge may permit such counsel to
22 supplement the judge's examination by oral and direct questioning
23 of any of the prospective jurors. The scope of such additional
24 questions or supplemental examination shall be within reasonable
25 limits prescribed by the trial judge in his sound discretion."

26 The State submits that the method as set forth in the above statutes is an adequate method of
27 selecting a fair and impartial jury in the case at bar.

28 Counsel for Defendant states that the jury questionnaire saves time by eliminating the
need to repeat routine background questions. However, this has not been the case when such
a questionnaire has been utilized. The jury spends half a day filling it out, and counsel spend
a great deal of time repeating the questions set out in these questionnaires. The procedure

1 requested by counsel for Defendant does anything but save time in the selection of a fair and
2 impartial jury.

3 In Summers v. State, 102 Nev. 195, 718 P.2d 676 (1986) the Nevada Supreme Court
4 ruled that the scope and method of voir dire examination is subject to the sound discretion of
5 the trial court. A number of other state courts have ruled on this issue. For the most part, in
6 cases in which there hasn't been a great deal of pre-trial publicity, the courts have ruled that it
7 was not error for the trial court to deny the defendant's motion for individual voir dire. While
8 this case initially had a fair amount of publicity, it has not been in the media since early 2013.

9 The State submits that this is not a case where the court will preclude the Defendant
10 from submitting or asking questions of the jurors. The District Court Rules give the Defendant
11 the opportunity to submit questions to the court. It is the State's position that by utilizing the
12 statutory procedure in selecting a jury in the case at bar a fair and impartial jury will be
13 selected. Nevertheless, should this Court determine that a jury questionnaire is appropriate,
14 the State respectfully requests that the parties agree upon the questions to be sent to the
15 prospective jurors prior to any questions being sent to the prospective jurors.

16 **CONCLUSION**

17 Wherefore, the State respectfully asks that the defense Motion to Allow Jury
18 Questionnaire be denied.

19 DATED this 18th day of November, 2015.

20 Respectfully submitted,

21 STEVEN B. WOLFSON
22 Clark County District Attorney
23 Nevada Bar #001565

24 BY

25 COLLEEN R. BAHARAV
26 Deputy District Attorney
27 Nevada Bar #011777
28

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S MOTION
FOR JURY QUESTIONNAIRE, was made this 18th day of November, 2015, by

Electronic Filing to:

ANDREA LUEM, ESQ.
ATTORNEY FOR DEFENDANT
EMAIL: andrea@luemlaw.com;

BY: P. Manis
P. Manis
Employee of the District Attorney's Office

CB/pm//L-2


CLERK OF THE COURT

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STEVEN B. WOLFSON
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT BROWN, JR.,
#6006120

Defendant.

CASE NO: C-14-299234-1

DEPT NO: IX

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR DISCOVERY

DATE OF HEARING: NOVEMBER 24, 2015
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through COLLEEN R. BAHARAV, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Motion for Discovery.

This Response 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.

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21 a person who had been convicted of a felony involving the use or threat of violence to the
22 person of another (NRS 200.033(2)) – based upon Defendant's potential conviction for the
23 Attempt Murder of Esther Maestas in the instant case; (4) the murder was committed by a
24 person who had been convicted of a felony involving the use or threat of violence to the person
25 of another (NRS 200.033(2)) – based upon Defendant's potential conviction for the Attempt
26 Murder of K.H.; (5) the murder was committed by a person who knowingly created a great
27 risk of death to more than one person by means of a weapon, device or course of action which
28 would normally be hazardous to the lives of more than one person (NRS 200.033(3)); and (6)

1 the murder was committed while the person was engaged, alone or with others, in the
2 commission of, or an attempt to commit or flight after committing or attempting to commit
3 invasion of the home or burglary, and the person charged killed or attempted to kill the person
4 murdered (NRS 200.033(4)). The State filed its Notice of Evidence in Support of Aggravating
5 Circumstances on August 19, 2014.

6 At Defendant's calendar call on August 21, 2014, defendant's counsel indicated that
7 they would not be prepared to proceed given that the State filed a Notice of Intent to Seek
8 Death Penalty as well as the fact that Defendant's trial was set within thirty (30) days of his
9 initial arraignment in District Court. Upon inquiry by the Court, Defendant refused to waive
10 his right to have a trial within 60 days, so the Court ordered that the trial date of September 2,
11 2014, stand unless the parties could agree otherwise. Defendant's counsel subsequently met
12 with Defendant and on September 2, 2014, Defendant agreed to waive his right to a trial within
13 60 days and continue the trial. After Defendant expressed concerns regarding his counsel, the
14 Court set a status check on Defendant's concerns and on resetting the trial. Defendant's trial
15 was ultimately reset for June 8, 2015.

16 The preliminary hearing transcripts in this case were filed on September 11, 2014.
17 Defendant filed a Petition for Writ of Habeas Corpus on October 10, 2014. The State's Return
18 to Writ was filed on October 27, 2014. On October 30, 2014, the Court determined that there
19 was adequate evidence to support the charges and denied Defendant's petition.

20 On April 9, 2015, Defendant's counsel was permitted to withdraw. New counsel was
21 appointed on April 16, 2015. Defendant's trial was ultimately reset to August 19, 2016.

22 Defendant filed the instant motion on October 27, 2015. The State's response is as
23 follows.

24 ARGUMENT

25 I. BRADY AND ITS PROGENY IN NEVADA

26 The State understands that its obligation to Defendant in this and every other case is to
27 provide discovery pursuant to the provisions of NRS 174.235 et seq., together with any
28 //

1 exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and
2 its progeny.

3 NRS 174.235 states:

4 1. Except as otherwise provided in NRS 174.233 to NRS 174.295
5 inclusive, at the request of a defendant, the prosecuting attorney
6 shall permit Defendant to inspect and to copy or photograph any:

7 (a) Written or recorded statements or confessions made by
8 Defendant, or any written or recorded statements made by a
9 witness the prosecuting attorney intends to call during the case in
10 chief of the state, or copies thereof, within the possession, custody
11 or control of the state, the existence of which is known, or by the
12 exercise of due diligence may become known, to the prosecuting
13 attorney;

14 (b) Results or reports of physical or mental examinations,
15 scientific tests or scientific experiments made in connection with
16 the particular case, or copies thereof, within the possession,
17 custody or control of the state, the existence of which is known, or
18 by the exercise of due diligence may become known, to the
19 prosecuting attorney; and

20 (c) Books, papers, documents, tangible objects, or copies thereof,
21 which the prosecuting attorney intends to introduce during the
22 case in chief of the state and which are within the possession,
23 custody or control of the state, the existence of which is known, or
24 by the exercise of due diligence may become known, to the
25 prosecuting attorney.

26 2. Defendant is not entitled, pursuant to the provisions of this
27 section, to the discovery or inspection of:

28 (a) An internal report, document or memorandum that is prepared
by or on behalf of the prosecuting attorney in connection with the
investigation or prosecution of the case.

(b) A statement, report, book, paper, document, tangible object or
any other type of item or information that is privileged or protected
from disclosure or inspection pursuant to the constitution or laws
of this state or the Constitution of the United States.

3. The provisions of this section are not intended to affect any
obligation placed upon the prosecuting attorney by the
constitution of this state or the Constitution of the United States to
disclose exculpatory evidence to Defendant.

22 In the case of Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980) the Nevada Supreme
23 Court reaffirmed the strictures of the provisions of Nevada's discovery statutes by making the
24 following statement:

25 The trial court is vested with the authority to order the discovery
26 and inspection of materials in the possession of the State. The
27 exercise of the court's discretion however is predicated on a
28 showing that the evidence sought is material to the presentation of
the defense and the existence of the evidence is known or, by the
exercise of due diligence may become known to the District
Attorney. Id. at 390.

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1 The Nevada Supreme Court further addressed what items must be disclosed in Mazzan
2 v. Warden, 116 Nev. 48, 993 P.2d 25 (2000). “Brady and its progeny require a prosecutor to
3 disclose evidence favorable to the defense when that evidence is *material* either to guilt or to
4 punishment.” Id. (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996))
5 (emphasis added). “In other words, evidence is material if there is a reasonable probability
6 that the result would have been different if the evidence had been disclosed. Mazzan, 116
7 Nev. at 66, 993 P.2d at 36. A reasonable probability is shown when the nondisclosure
8 undermines confidence in the outcome of the trial. Id.

9 In determining its materiality, the undisclosed evidence must be considered
10 collectively, not item by item. Kyles v. Whitley, 514 U.S. at 436, 115 S.Ct. 1555. “[T]he
11 character of a piece of evidence as favorable will often turn on the context of the existing or
12 potential evidentiary record.” Id. at 439, at 1555. “In sum, there are three components to a
13 Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld
14 by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was
15 *material*.” Mazzan, 116 Nev. at 67, 993 P.2d at 37; See also Strickler v. Greene, 527 U.S.
16 263, 119 S.Ct. 1936, 1948, (1999) (emphasis added).

17 **II. BRADY DOES NOT REQUIRE THE STATE TO PREPARE AND SUPPLY** 18 **THE DEFENDANT WITH A DEFENSE**

19 The State notes that neither Brady nor any of its progeny require disclosure of evidence
20 that defense through their own efforts could obtain. If the defendant requests documents or
21 evidence from the State which is obtainable through his own efforts, the State has no obligation
22 to disclose them. Defense counsel is required to utilize his or her ability and resources to
23 obtain necessary information and evidence to prepare a defense and not simply rely upon the
24 disclosures of the State. The State has no obligation to disclose “reasonably available”
25 evidence to the defense. Steese v State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998); see
26 Browning v. State, 120 Nev. 347, 370, 91 P.3d 39, 55 (2004). The Nevada Supreme Court
27 has repeatedly held that, “The State is under no obligation to accommodate a defendant’s

28 //

1 desire to flail about in a fishing expedition” Matter of Halverson, 123 Nev. 493, 169 P.3d 1161
2 (2007) (quoting Sonner v. State, 112 Nev. 1328, 1340-41, 930 P.2d 707, 715 (1996)).

3 III. DEFENDANT’S REQUESTS

4 Defendant makes thirteen (13) specific requests for discovery without providing any
5 explanation as to why this information is relevant and material and/or whether it is even in the
6 custody and control of the State. Prior to addressing Defendant’s requests the State notes that
7 without first making a showing of materiality for each of the items requested, there is no
8 obligation for the State to disclose them. Defendant fails to identify why the requested items
9 would be material and exculpatory and thus the State technically at this point has no obligation
10 to disclose such items. “A defendant must advance some factual predicate which makes it
11 reasonably likely the requested file will bear information material to his or her defense. A bare
12 assertion that a document ‘might’ bear such fruit is insufficient.” See Matter of Halverson,
13 123 Nev. 493, 169 P.3d 1161 (2007). Nonetheless, the State will address each of Defendant’s
14 bare requests for purposes of efficiency.

15 For the sake of expediency, the State has no objection to the following requests for
16 discovery and the State provided the requested information on or before about August 3, 2015:

- 17 1 – All records of any physical examinations done in connection
18 with this case¹;
19 3 – All statements by all witnesses in this case;
20 6 – All statements of the defendant;
21 9 – All notes and reports of any experts in the case, to include
22 crime scene investigators;
23 11 – All books, papers, documents, and tangible objects related to
24 the case;
25 12 – All electronic communications in the case, as well as any
26 reports related to those communications; and
27 13 – All reports relating to impound and storage of the evidence
28 in this case.

Should additional statements or other items of evidence listed above come-to-light, the State
will provide those upon receipt as well.

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¹ The State sent the medical records for Esther Maestas to be copied for the defense on November 12, 2015.

1 In addition, the State has no objection to the following request and, if the information
2 exists, the State will provide it as soon as it is received:

3 7 – Any inconsistent statements made by the witnesses in this case.
4 The State's response to the remainder of Defendant's requests follows below.

5 **2. Information regarding any benefits or assistance given to any witness in the**
6 **case, as well as any other evidence of bias of State witnesses**

7 The State has not made any promises or provided any benefits to the witnesses in this
8 case in exchange for cooperation in the prosecution of this case aside from the statutory fees
9 paid to the witnesses present at the preliminary hearing. The State has requested any funding
10 information from the Victim Witness department and will provide it upon receipt.

11 To the extent that Defendant wants to know what benefits witnesses believe they are
12 getting, the State cannot speculate as to any benefit a witness believes they may be getting for
13 their cooperation.

14 **4. Any evidence that any State witness was intoxicated or impaired at the time**
15 **of the incident about which the witness will testify.**

16 The State objects to this request as it is overbroad. This information could easily be
17 ascertained by a defense investigator speaking to the witnesses in this case. Defense counsel
18 is required to utilize his or her ability and resources to obtain necessary information and
19 evidence to prepare a defense and not simply rely upon the disclosures of the State. The State
20 has no obligation to disclose "reasonably available" evidence to the defense. Steese, 114 Nev.
21 at 495, 960 P.2d at 331; see Browning, 120 Nev. at 370, 91 P.3d at 55. Moreover, Defendant's
22 request is nothing more than a fishing expedition for potential impeachment material. The
23 Nevada Supreme Court has repeatedly held that, "The State is under no obligation to
24 accommodate a defendant's desire to flail about in a fishing expedition" Matter of Halverson,
25 123 Nev. 493, 169 P.3d 1161 (2007) (quoting Sonner v. State, 112 Nev. 1328, 1340-41, 930
26 P.2d 707, 715 (1996)). As the State is not required to conduct an investigation or to engage
27 in a fishing expedition for the defense, this request should be denied. See Matter of Halverson,
28 123 Nev. 48, 169 P.3d 1161 (2007).

1 **5. Any information regarding the criminal history of any material witness in**
2 **the case**

3 The State objects to this request in so far as it is outside of Nevada Law. Defendant
4 requests the criminal history of all witnesses, whether or not the information is admissible by
5 the rules of evidence, including: (a) juvenile records; (b) misdemeanors; (c) any other
6 information that would go to the issue of credibility, veracity and bias; (d) whether any State
7 witness had an arrest, guilty plea, trial, or sentencing pending at the time of the incident, or
8 has or had one or more since that date; (e) a State's witness was on criminal parole or probation
9 at the time of this incident or has been since; (f) A State's witness had a liberty interest that
10 the witness might believe or might have believed to be affected favorably by State action; and
11 (g) deals, promises or inducements that have been made to any informant or State witness in
12 exchange for his testimony.

13 Defendant's request is extremely overbroad and amounts to requiring that the State
14 conduct an investigation for him so that he can conduct a smear campaign upon the victim.
15 Contrary to Defendant's belief, the State is not required to go on a fishing expedition to help
16 Defendant develop a "self-defense argument" or to blacken the character of the victim. Sonner
17 v. State, 112 Nev. 1328, 1340-41, 930 P.2d 707, 715 (1996); NRS 50.095; Jones v. State, 93
18 Nev. 287, 564 P.2d 605 (1977). The defense is entitled to felony convictions within the last
19 ten years as well as any crimes involving moral turpitude. NRS 50.095. The State has already
20 provided, or is in the process of providing any felonies that fall within that range.

21 The State will also provide information it has regarding convictions for crimes
22 involving moral turpitude.

23 Pursuant to NRS 50.085, evidence of a witness's character is admissible only if it goes
24 to truthfulness or untruthfulness. Moreover, extrinsic evidence, other than a prior criminal
25 conviction, may not be used for the purpose of attacking the credibility of a witness. NRS
26 50.095 addresses the issue of impeachment by evidence of conviction of a crime as follows:

- 27 1. For the purpose of attacking the credibility of a witness,
28 evidence that the witness has been convicted of a crime is
 admissible but only if the crime was punishable by death or

1 imprisonment for more than 1 year under the law under which the
2 witness was convicted.

3 2. Evidence of a conviction is inadmissible under this section if a
4 period of more than 10 years has elapsed since:

5 (a) The date of the release of the witness from confinement; or

6 (b) The expiration of the period of the witness's parole, probation
7 or sentence, whichever is the later date.

8 3. Evidence of a conviction is inadmissible under this section if
9 the conviction has been the subject of a pardon.

10 **4. Evidence of juvenile adjudications is inadmissible under
11 this section.**

12 5. The pendency of an appeal therefrom does not render evidence
13 of a conviction inadmissible. Evidence of the pendency of an
14 appeal is admissible.

15 6. A certified copy of a conviction is prima facie evidence of the
16 conviction.

17 (emphasis added).

18 The State opposes the release of any and all criminal history of the State's witnesses
19 that is outside the mandates of the Nevada Revised Statutes. It is clear that Nevada's discovery
20 statutes are to be strictly construed and adhered to since no Common Law right of discovery
21 exists in Nevada. The rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), which
22 requires the State to disclose to the Defendant any exculpatory evidence, is founded on the
23 constitutional requirement of a fair trial. Brady is not a rule of discovery, however, as the
24 Supreme Court held in Weatherford v. Bursy, 429 U.S. 545, 559, 97 S.Ct. 837, 846 (1977):

25 There is no generally constitutional right to discovery in a criminal
26 case, and Brady did not create one [. . .] 'the Due Process Clause
27 has little to say regarding the amount of discovery which the
28 parties must be afforded [. . .]' Wardius v. Oregon, 412 U.S. 470,
474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973).

Thus, non-exculpatory evidence, such as the existence of any criminal record of a prosecution
witness and documents or papers within the possession of the State, is obtainable in advance
of trial only by virtue of discovery statutes. United States v. Kaplan, 554 F.2d 544 (3rd Cir.
1977).

In the case of Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980), the Nevada Supreme
Court reaffirmed the structures of the provisions of NRS 174.234, et. seq. by making the
following statement:

1 The trial court is vested with the authority to order the discovery
2 and inspection of materials in the possession of the state. The
3 exercise of the court's discretion, however, is predicated on the
4 showing that the evidence sought is material to the preparation of
5 the defense and the existence of the evidence is known or, by the
6 exercise of due diligence, may become known to the district
7 attorney.

8 Riddle, 96 Nev. at 590, 613 P.2d at 1032 (citing NRS 174.235, 174.245). In Riddle, the
9 defendant was charged with the offense of murder and filed a motion for discovery requesting
10 evidence pertaining to the decedent's character. The trial court denied the motion and the
11 Supreme Court in affirming said denial stated, after citing the relevant provisions of NRS
12 174.235 and 174.245 that "evidence of the decedent's predisposition for violence would only
13 be material if appellant had known of it at the time of the incident." Id. at 590, 613 P.3d at
14 1032-33. The Court held that since the defendant's knowledge was not alleged in her motion
15 for discovery, the denial of the motion was not an abuse of discretion. Id.

16 In addition, several Federal cases have interpreted Federal Rule of Criminal Procedure
17 16(c), from which the Nevada statute at issue was adopted. While these cases are not binding
18 on Nevada courts, they illustrate the uniform approach the federal courts have taken with
19 discovery issues. In general, the criminal records of government witnesses are not
20 discoverable under federal discovery rules absent a claim of materiality. United States v.
21 Rodgers, 549 F.2d 490 (8th Cir. 1976).

22 In United States v. Conder, 423 F.2d 904 (6th Cir. 1970), the Sixth Circuit held that the
23 required showing of materiality is not satisfied by mere conclusory allegations that the
24 requested information is material to the preparation of the defense. Likewise, the Fifth Circuit
25 in United States v. Ross, 511 F.2d 757, 762 (5th Cir. 1975), held that materiality means more
26 than an abstract logical relationship to the issues of a case. In that case, defendant's conviction
27 would not have enabled the defendant to alter the quantum of proof in his favor.

28 Defendant's motion lacks an assertion that his discovery request is reasonable.
29 Moreover, he is not entitled to the juvenile records he seeks. Davis v. Alaska, 415 U.S. 308,

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1 94 S.Ct. 1105 (1974). Should Defendant seek to locate any juvenile records outside of the
2 State he is just as capable of requesting a court order to unseal those records as the State is.

3 As to Defendant's blanket request for arrests or misdemeanor convictions, "mere
4 arrests and convictions for misdemeanors may not ordinarily be admitted even for the limited
5 purpose of attacking a witness's credibility." Sheriff, Washoe County v. Hawkins, 104 Nev.
6 70, 76, 752 P.2d 769, 773 (1988); see also Azbill v. State, 88 Nev. 240, 246-47, 495 P.2d 1064,
7 1068 (1064). Defendant is not entitled to the information he is seeking. Accordingly, his
8 request should be denied.

9 The State is not required to engage in a fishing expedition for the defense. See Matter
10 of Halverson, 123 Nev. 48, 169 P.3d 1161 (2007). For example, in United States v. Flores,
11 540 F.2d 432 (9th Cir. 1976), the defendants moved prior to trial to compel the government to
12 disclose the criminal history of the names and numbers of prior cases in which an informant-
13 witness had testified on behalf of the government. The purpose of this evidence was to
14 impeach the credibility of the informant. The Ninth Circuit affirmed the trial court's denial of
15 that motion by holding that the defendant had made no showing of reasonableness. The Court
16 stated, "[t]heir request was tantamount to asking the government to fish throughout public
17 records and collate information which was equally available to the defense." Id. at 437.

18 In the instant case, Defendant requests discovery of all criminal histories of any
19 material witnesses. As in Flores, such a shotgun request is inherently unreasonable as the
20 State cannot be expected to go on a fishing expedition for all the documents requests.
21 Moreover, Defendant has failed to provide how the requested information related to any and
22 all criminal history of the State's witnesses is reasonable.

23 As noted above, Defendant is only entitled to felony convictions within the last ten (10)
24 years as well as convictions for crimes involving moral turpitude. Anything else is outside the
25 scope of information the State is required to provide. Should the defense wish to know more
26 about any of the witnesses in this case than the State of Nevada is legally obligated to provide,
27 the defense should conduct an investigation of their own.

28 //

1 To the extent that the defense is requesting additional information to support their
2 defense claim, the defense is perfectly capable of conducting their own investigation.

3 **8. Any information tending to show the unreliability of a witness in the case.**

4 The State objects to this request as it is overbroad. This information could easily be
5 ascertained by a defense investigator speaking to the witnesses in this case. Defense counsel
6 is required to utilize his or her ability and resources to obtain necessary information and
7 evidence to prepare a defense and not simply rely upon the disclosures of the State. The State
8 has no obligation to disclose "reasonably available" evidence to the defense. Steese, 114 Nev.
9 at 495, 960 P.2d at 331; see Browning, 120 Nev. at 370, 91 P.3d at 55. Moreover, Defendant's
10 request is nothing more than a fishing expedition for potential impeachment material. The
11 Nevada Supreme Court has repeatedly held that, "The State is under no obligation to
12 accommodate a defendant's desire to flail about in a fishing expedition" Matter of Halverson,
13 123 Nev. 493, 169 P.3d 1161 (2007) (quoting Sonner v. State, 112 Nev. 1328, 1340-41, 930
14 P.2d 707, 715 (1996)). As the State is not required to conduct an investigation or to engage
15 in a fishing expedition for the defense, this request should be denied. See Matter of Halverson,
16 123 Nev. 48, 169 P.3d 1161 (2007).

17 **9. Witness Contact Information**

18 The State has already disclosed the contact information for its witnesses to the defense.
19 Should the State become aware of new contact information, the State will provide it upon
20 receipt. To the extent that Defendant is requesting the telephone numbers of the State's
21 witnesses, the State objects to this request. NRS 174.234(4) only requires that the State
22 provide the last known addresses of its witnesses, not their telephone numbers. Since the State
23 has already provided the required disclosure, this request should be denied.

24 **IV. RECIPROCAL DISCOVERY**

25 The State is entitled to reciprocal discovery under NRS 174.245. The United States
26 Supreme Court has observed that: "Discovery, like cross-examination, minimizes the risk that
27 a judgment will be predicated on incomplete, misleading, or even deliberately fabricated
28 testimony. The 'State's interest in protecting itself against an eleventh-hour defense' is merely

1 one component of the broader public interest in a full and truthful disclosure of critical facts.”
2 Taylor v. Illinois, 484 U.S. 400, 411-412, 108 S.Ct. 646, 654 (1988). Justice Traynor of the
3 California Supreme Court once noted: “absent the privilege against self-incrimination or other
4 privileges provided by law, the defendant in a criminal case has no valid interest in denying
5 the prosecution access to evidence that can throw light on issues in the case.” Jones v. Superior
6 Court, 58 Cal.2d 56, 59, 22 Cal.Rptr. 879, 372 P.2d 919 (1962). The State hereby moves for
7 an order that Defendant comply with his reciprocal discovery obligations under NRS 174.245,
8 and otherwise be barred from introducing any covered material at trial should he not comply
9 with those obligations.

10 NRS 174.245 governing “Disclosure by defendant of evidence relating to defense;
11 limitations,” provides in pertinent part:

12 1. Except as otherwise provided in NRS 174.233 to 174.295,
13 inclusive, at the request of the prosecuting attorney, the defendant
14 shall permit the prosecuting attorney to inspect and to copy or
photograph any:

15 (a) Written or recorded statements made by a witness the
16 defendant intends to call during the case in chief of the
17 defendant, or copies thereof, within the possession, custody or
18 control of the defendant, the existence of which is known, or
19 by the exercise of due diligence may become known, to the
20 defendant;

21 (b) Results or reports of physical or mental examinations,
22 scientific tests or scientific experiments that the defendant
23 intends to introduce in evidence during the case in chief of the
24 defendant, or copies thereof, within the possession, custody or
25 control of the defendant, the existence of which is known, or
26 by the exercise of due diligence may become known, to the
27 defendant; and

28 (c) Books, papers, documents or tangible objects that the
defendant intends to introduce in evidence during the case in
chief of the defendant, or copies thereof, within the possession,
custody or control of the defendant, the existence of which is
known, or by the exercise of due diligence may become
known, to the defendant.

29 Thus, the Court should order Defendant and his counsel to comply with these statutory
30 obligations prior to trial, particularly in the event Defendant plans to testify at trial or introduce
31 evidence in his case-in-chief, such as percipient or expert witnesses, including testimony of
32 individuals who will attempt to sponsor facts or evidence that Defendant did not commit the
33 instant crimes. Because the State will have no recourse to an appeal should Defendant be

1 acquitted in whole or part by withholding information he is obliged to turn over, only an order
2 barring him from introducing late or never-disclosed evidence will ensure his compliance with
3 his statutory obligations.

4 In particular, the State emphasizes that NRS 174.245 requires Defendant to turn over
5 any witness statements or other statements by Defendant should Defendant's own testimony
6 or witness testimony be presented during the trial. This extends to any notes the defense
7 investigator may have obtained in the course of interviewing witnesses if the investigator or
8 those witnesses will be testifying at trial. Neither the Fifth Amendment nor attorney-
9 client/work product privilege shields such material from production. U.S. v. Nobles, 422 U.S.
10 225, 95 S.Ct. 2160 (1975) (where defense counsel sought to impeach credibility of key
11 prosecution witnesses by testimony of defense investigator regarding statements previously
12 obtained from witnesses by the investigator, investigator's contemporaneous report might
13 provide critical insight into the issues of credibility that investigator's testimony would raise,
14 and court had inherent power to require production of the report without Fifth Amendment or
15 work product privilege being implicated); accord Izazaga v. Superior Court, 54 Cal.3d 356,
16 815 P.2d 304 (Cal. 1991).

17 Likewise, should Defendant's investigator or witnesses produce material bearing on the
18 credibility of witnesses testifying at trial for Defendant, including himself, that material must
19 be turned over to the State. Should Defendant fail to comply with the Court's order, exclusion
20 of his evidence is an appropriate remedy. Taylor v. Illinois, 484 U.S. at 412-418, 108 S.Ct. at
21 654-658 (recognizing that exclusion rather than granting the prosecution a continuance is a
22 permissible remedy where a defendant fails to comply with his discovery obligations).

23 The State requests that the defense comply with the statute and provide the State with
24 any and all evidence they intend to admit at trial.

25 //

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1 CONCLUSION

2 The State will comply with Brady, its progeny, the Nevada Revised Statutes, and the
3 Nevada and United States Constitutions. Based upon the foregoing, this Honorable Court
4 should GRANT in part and DENY in part Defendant's motion per the State's response.

5 DATED this 18th day of November, 2015.

6 Respectfully submitted,

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

10 BY 

11 COLLEEN R. BAHARAV
12 Deputy District Attorney
13 Nevada Bar #011777

14 CERTIFICATE OF ELECTRONIC FILING

15 I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S MOTION
16 FOR DISCOVERY, was made this 18th day of November, 2015, by Electronic Filing to:

17 ANDREA LUEM, ESQ.
18 ATTORNEY FOR DEFENDANT
19 EMAIL: andrea@luemlaw.com;

20 BY: 

21 P. Manis
22 Employee of the District Attorney's Office
23
24
25
26
27

28 CB/pm /L-2


CLERK OF THE COURT

1 RTRAN
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3
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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

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9 THE STATE OF NEVADA,
10

11 Plaintiff,

12 vs.

13 ROBERT BROWN, JR.,
14

15 Defendant.
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CASE NO.: C-14-299234-1

DEPT. IX

TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE JENNIFER P. TOGLIATTI,
18

DISTRICT COURT JUDGE

19 TUESDAY, NOVEMBER 24, 2015

20 RECORDER'S TRANSCRIPT RE:

STATUS CHECK: TRIAL READINESS/ALL PENDING MOTIONS

21 APPEARANCES:

22 For the State:

COLLEEN BAHARAV, ESQ.
RICHARD SCOW, ESQ.
Deputy District Attorneys

23
24 For the Defendant:

AMANDA GREGORY, ESQ.

25 RECORDED BY: YVETTE SISON, COURT RECORDER

1 LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 24, 2015, 9:27 A.M.

2
3 THE COURT: Robert Brown, C299234-1. The record should reflect Mr.
4 Brown is present in custody. We got a call that Ms. Luem is stuck in Wyoming, was
5 the message I got and – on another case, and asked to continue the one, two, three,
6 four motions and the status check trial readiness, correct?

7 MS. BAHARAV: Yes, Your Honor.

8 MS. GREGORY: Yes, Your Honor. Can we get two weeks?

9 THE COURT: How about December 15th?

10 MS. BAHARAV: That's perfect, Your Honor.

11 MR. SCOW: That works, Judge.

12 THE COURT: Okay December – right? Is that a Tuesday? Yeah, that's a
13 Tuesday yes? December 15th at 9 a.m.

14 MS. BAHARAV: And for the record, Richard Scow and Colleen Baharav on
15 behalf of the State.

16 MS. GREGORY: Amanda Gregory on behalf of Mr. Brown who is present in
17 custody.

18 THE COURT: Thank you.

19 MS. BAHARAV: Thank you.

20 [Proceedings concluded at 9:29 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Yvette G. Sison
Court Recorder/Transcriber


CLERK OF THE COURT

1 RTRAN
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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8
9 THE STATE OF NEVADA,
10

11 Plaintiff,

12 vs.

13 ROBERT BROWN, JR.,
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15 Defendant.
16

CASE NO.: C-14-299234-1

DEPT. IX

TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE JENNIFER P. TOGLIATTI,
18

DISTRICT COURT JUDGE

19 THURSDAY, JANUARY 21, 2016

20 RECORDER'S TRANSCRIPT RE:

STATUS CHECK: ADDRESS TRIAL READINESS

21 APPEARANCES:

22 For the State:

MICHAEL GILES, ESQ.
Deputy District Attorney

23 For the Defendant:

24 AMANDA GREGORY, ESQ.
ANDREA LUEM, ESQ.

25 RECORDED BY: YVETTE SISON, COURT RECORDER

1 LAS VEGAS, NEVADA, THURSDAY, JANUARY 21, 2016 at 9:08 A.M.

2
3 THE COURT: Robert Brown, C299234-1. He's present in custody. This is a
4 status check trial readiness. Counsel can you state your appearances for the
5 record?

6 MR. GILES: Michael Giles for the State.

7 MS. GREGORY: Amanda Gregory and Andrea Leum on behalf of Robert
8 Brown, who is present in custody.

9 THE COURT: Okay. I have motions on this case set for February 23rd, status
10 check jury questionnaire, March 15th, and then the jury trial set in August. Have you
11 had a file review with the State?

12 MS. LUEM: Judge I'm sorry to interrupt but, it's my understanding that the
13 Court put this matter on calendar because there was a conflict with the current trial
14 date. It's not on for a status check trial readiness. We got an email from the clerk
15 earlier this week.

16 THE COURT: Hold on one second. Yes, well the person that was in custody
17 was the reason that put this on calendar because his case is old as dirt compared to
18 yours, has since taken an October date.

19 MS. LUEM: Oh, okay.

20 THE COURT: So, I thought there was going to be a problem with Mr. Biggs,
21 but there is no problem with Mr. Biggs. He's the one and only show on October 31st
22 now. So you're good.

23 MS. LUEM: Okay.

24 THE COURT: August 29th. I apologize, but I was looking for a place to put a
25 case that had the information in arraignment in 2011.

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MS. LUEM: Okay.

THE COURT: So –

MS. LUEM: So forget about it.

THE COURT: You're good.

MS. LUEM: Okay. Thank you, and we'll be back –

THE COURT: Are you going to be ready on August 29th?

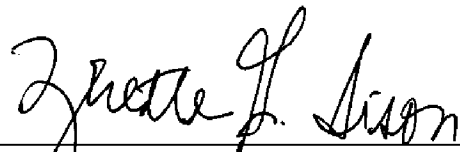
MS. LUEM: I hope so Judge; we'll keep it on track.

THE COURT: Okay. Thank you.

MS. LUEM: Thank you.

[Proceedings concluded at 9:10 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Yvette G. Sison
Court Recorder/Transcriber

PP
DA
AOR
MC

DISTRICT COURT
CLARK COUNTY, NEVADA

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Andrea Luem

Andrea L. Luem

CLERK OF THE COURT

STATE OF NEVADA,

Plaintiff

CASE NO. 14-C-299234

DEPT NO. IX

ROBERT BROWN,

DEFENDANT

8-2-16 @ 9:00am

"MOTION TO DISMISS COUNSEL"

COMES NOW, THE DEFENDANT, ROBERT BROWN, BY WAY
AND IN PROSE, HEREBY BRINGS FORTH BEFORE THIS HONORABLE
COURT THIS "MOTION TO DISMISS COUNSEL" IN ACCORDANCE WITH
LAW THAT APPLY, AND FACTS OUTLINED IN FORTHCOMING ACTION;
DEFENDANT, MR. BROWN, HEREBY MOVES THIS COURT TO DISMISS
THE REPRESENTATION OF AMANDA S. GREGORY & ANDREA L. LUEM,
AND HER OFFICES FOR THERE IS A CONFLICT BETWEEN THE
REPRESENTATION OF HER SERVICES HAVE PROVEN TO BE INEFFECTIVE
AS PER THE 6TH AMENDMENT (SEE STRICKLAND V. WASHINGTON).
FURTHERMORE, THE DISMISSAL OF SAID REPRESENTATION, DOES
FALL WITHIN THE SPECTRUM OF CRITERIA TO DISMISS SAID
SERVICES FOR SERVICES HAVE FALLEN BEYOND ANY
REASONABLE STANDARD OF EFFECTIVENESS BASED ON THE
FOLLOWING: - FAILURE TO COMMUNICATE WITH DEFENDANT;
- FAILURE TO APPRISE DEFENDANT OF TACTICS OR
STRATEGY -> OR FAILURE TO INVESTIGATE;
- FAILURE TO VISIT, RECEIVE CALLS, OR FILE MOTIONS
AND/OR MAKE ARGUMENTS ON BEHALF OF DEFENDANT.

(SEE: DEATH-PENALTY STANDARD FOR COUNSEL: ROMPILLA V. BEARD, 125 S.C.245)

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CLERK OF THE COURT

1 - FOR IT IS APPARENT THAT THE REPRESENTATION
2 OF BOTH ATTORNEYS DOES NOT HAVE THE BEST INTERESTS,
3 OF DEFENDANT AND SHOULD BE DISMISSED.

4 THE DEFENDANT HAS TRIED TO RECONCILE ANY
5 MISGIVINGS, TO NO AVAIL, AND FURTHER FACTS IN SUPPORT
6 OF DEFENDANTS MOTION...

7
8 FACTS IN SUPPORT...

9 ADKT

10 *STANDARD 4-1: ROLE OF DEFENSE COUNSEL

11 (a) THE PARAMOUNT OBLIGATION OF CRIMINAL DEFENSE
12 COUNSEL IS TO PROVIDE ZEALOUS AND COMPETENT REPRESENTATION
13 TO THEIR CLIENTS AT ALL STAGES OF THE CRIMINAL PROCESS.

14
15 *STANDARD 4.2: EDUCATION, TRAINING, AND
16 EXPERIENCE OF DEFENSE COUNSEL

17 (a) TO PROVIDE COMPETENT REPRESENTATION, COUNSEL
18 MUST BE FAMILIAR WITH THE SUBSTANTIVE CRIMINAL LAW AND
19 THE LAW OF CRIMINAL PROCEDURE AND ITS APPLICATION IN THE
20 COURTS OF NEVADA.

21 (b) PRIOR TO HANDLING A CRIMINAL MATTER, COUNSEL
22 SHOULD HAVE SUFFICIENT EXPERIENCE OR TRAINING TO PROVIDE
23 COMPETENT REPRESENTATION AND SHOULD MOVE TO BE RELIEVED
24 AS COUNSEL SHOULD COUNSEL DETERMINE AT A LATER POINT THAT
25 HE OR SHE DOES NOT POSSESS SUFFICIENT EXPERIENCE OR TRAINING TO
26 HANDLE THE CASE ASSIGNED.

27 *STANDARD 4.3: ADEQUATE TIME AND RESOURCES
28 COUNSEL HAS AN OBLIGATION TO MAKE AVAILABLE

SUFFICIENT TIME, RESOURCES, KNOWLEDGE, AND EXPERIENCE TO
AFFORD COMPETENT REPRESENTATION OF A CLIENT IN A PARTICULAR
MATTER BEFORE AGREEING TO ACT AS COUNSEL OR ACCEPTING
APPOINTMENT. AND MUST MAINTAIN A SYSTEM FOR RECEIVING
COLLECT TELEPHONE CALLS FROM INCARCERATED CLIENTS.

*STANDARD 4-4: INITIAL CLIENT INTERVIEW

(a) PREPARING FOR INITIAL INTERVIEW: PRIOR TO
CONDUCTING THE INITIAL INTERVIEW, THE ATTORNEY SHOULD:
- OBTAIN COPIES OF RELEVANT DOCUMENTS AND LAW ENFORCE-
MENT REPORTS.

(b) TIMING OF THE INITIAL INTERVIEW: WHEN THE
CLIENT IS IN CUSTODY, COUNSEL SHOULD ATTEMPT TO CONDUCT THE
INTERVIEW NO LATER THAN 72 HOURS AFTER APPOINTMENT TO THE
CASE.

(c) CONTENTS OF THE INITIAL INTERVIEW: TO ACQUIRE
INFORMATION FROM THE CLIENT CONCERNING PRETRIAL RELEASE.
COUNSEL SHOULD ENSURE AT THIS AND ALL SUCCESSIVE INTERVIEWS
AND PROCEEDINGS THAT BARRIERS TO COMMUNICATION, SUCH AS
DIFFERENCES IN LANGUAGE OR LITERACY ARE OVERCOME.
INFORMATION THAT COUNSEL SHOULD CONSIDER ACQUIRING FROM
THE CLIENT INCLUDES, BUT IS NOT LIMITED TO:

(d) THE FOLLOWING INFORMATION SHOULD BE PROVIDED
TO THE CLIENT IN THE INITIAL INTERVIEW:

- A GENERAL PROCEDURAL OVERVIEW OF THE PROGRESSION OF THE CASE;
- HOW AND WHEN COUNSEL CAN BE REACHED;
- REALISTIC ANSWERS, TO THE CLIENT'S MOST URGENT QUESTIONS.

*STANDARD 4-6: PRELIMINARY HEARINGS

(b) IN PREPARING FOR THE PRELIMINARY HEARING, THE ATTORNEY

1 SHOULD CONSIDER:

2 - THE FACTUAL INFORMATION THAT IS AVAILABLE
3 CONCERNING PROBABLE CAUSE;

4 - THE TACTICS OF CALLING WITNESSES OR CALLING THE
5 CLIENT AS A WITNESS AND THE POTENTIAL FOR LATER USE OF THE
6 TESTIMONY.

7 *STANDARD 4-7: CASE PREPARATION AND INVESTIGATION

8 (a) COUNSEL SHOULD CONDUCT, OR SECURE THE
9 THE RESOURCES TO CONDUCT, A PROMPT INVESTIGATION OF THE
10 CIRCUMSTANCES OF THE CASE AND EXPLORE ALL AVENUES LEADING
11 TO FACTS RELEVANT TO THE MERITS OF THE CASE. THE DUTY TO INVESTIGATE
12 EXISTS REGARDLESS OF THE CLIENT'S ADMISSIONS OR STATEMENTS
13 TO DEFENSE COUNSEL OF FACTS CONSTITUTING GUILT.

14 (b) COUNSEL SHOULD:

15 - OBTAIN AND EXAMINE ALL CHARGING DOCUMENTS,
16 PLEADINGS, AND DISCOVERY; DEFECTS IN THE PROSECUTION AND
17 AVAILABLE DEFENSES AND REQUIRED NOTICES OF THOSE DEFENSES;

18 - CONDUCT AN IN-DEPTH INTERVIEW OF THE CLIENT TO ASSIST
19 IN SHAPING THE INVESTIGATION;

20 - ATTEMPT TO LOCATE ALL POTENTIAL WITNESSES AND HAVE THEM
21 INTERVIEWED;

22 - REQUEST AND SECURE DISCOVERY INCLUDING EXCULPATORY/
23 IMPEACHING INFORMATION; ALL PAPERS, TAPES, OR ELECTRONIC RECORDINGS
24 RELEVANT TO THE CASE; EXPERT REPORTS AND DATA UPON WHICH THEY
25 ARE BASED, AN INSPECTION OF PHYSICAL EVIDENCE, ALL DOCUMENTS
26 RELEVANT TO ANY SEARCHES CONDUCTED, MENTAL HEALTH, DRUG
27 TREATMENT, OR OTHER RECORDS OF THE CLIENT, VICTIM, OR
28 WITNESSES AND RECORDS OF POLICE OFFICERS AS APPROPRIATE;

- INSPECT THE SCENE OF THE OFFENSE AS APPROPRIATE, AND
- OBTAIN THE ASSISTANCE OF SUCH EXPERTS.

* STANDARD 4-8: PRETRIAL MOTIONS AND WRITS

(b) THE DECISION TO FILE PRETRIAL MOTIONS SHOULD BE MADE AFTER INVESTIGATION; AMONG THE ISSUES THAT COUNSEL SHOULD CONSIDER ADDRESSING IN A PRETRIAL MOTION ARE:

- THE CONSTITUTIONALITY OF THE IMPLICATED STATUTE(S);
- ANY DEFECTS IN THE CHARGING PROCESS OR THE CHARGING DOCUMENT;
- DISCOVERY ISSUES;
- SUPPRESSION OF EVIDENCE OR STATEMENTS;
- SPEEDY TRIAL ISSUES; AND
- EVIDENTIARY ISSUES.

(c) COUNSEL SHOULD DETERMINE WHETHER A PRETRIAL WRIT SHOULD BE FILED CHALLENGING THE DETERMINATION THAT PROBABLE CAUSE EXISTS.

- MOTIONS SHOULD BE FILED IN A TIMELY MANNER AND WITH AN AWARENESS OF THE EFFECT OF FILING THE MOTION ON THE CLIENT'S SPEEDY TRIAL RIGHTS. WHEN AN EVIDENTIARY HEARING IS SCHEDULED ON A MOTION, COUNSEL'S PREPARATION FOR THE HEARING SHOULD INCLUDE:

- SUBPOENING OF ALL HELPFUL EVIDENCE AND WITNESSES; AND
- FULL UNDERSTANDING OF THE BURDENS OF PROOF, EVIDENTIARY PRINCIPLES, INCLUDING THE BENEFITS AND COSTS OF HAVING THE CLIENT TESTIFY.

* STANDARD 4-10: TRIAL PREPARATION

- COUNSEL SHOULD DISCUSS THE RELEVANT STRATEGIC

1 CONSIDERATIONS OF THIS DECISION WITH THE CLIENT.

2 - OUTLINE OR DRAFT OF OPENING STATEMENT;

3 - CROSS-EXAMINATION PLANS FOR ALL PROSPECTIVE

4 PROSECUTION WITNESSES;

5 - DIRECT EXAMINATION PLANS FOR ALL PROSPECTIVE

6 DEFENSE WITNESSES;

7 - COPIES OF ALL RELEVANT STATUTES OR CASES; AND

8 - OUTLINE OR DRAFT OF CLOSING ARGUMENT.

9 * STANDARD 4-12: DEFENSE STRATEGY

10 - COUNSEL SHOULD DEVELOP, IN CONSULTATION WITH

11 THE CLIENT, AN OVERALL DEFENSE STRATEGY. IN DECIDING ON

12 DEFENSE STRATEGY, COUNSEL SHOULD CONSIDER WHETHER THE

13 CLIENT'S INTERESTS ARE BEST SERVED BY NOT PUTTING ON A

14 DEFENSE CASE AND INSTEAD RELYING ON THE PROSECUTION'S

15 FAILURE TO MEET ITS CONSTITUTIONAL BURDEN OF PROVING

16 EACH ELEMENT BEYOND REASONABLE DOUBT.

17 CONCLUSION

18
19
20 IN CLOSING, IT IS APPARENT AND EVIDENT THAT

21 COUNSEL'S REPRESENTATION HAS "FALLEN OUT-OF-SCOPE" OF WHAT

22 IS REQUIRED, AS PERTAINED TO DEFENSE OF ROBERT BROWN.

23 WHEREAS, THE DEFENDANT ROBERT BROWN, HEREBY

24 RESPECTFULLY REQUESTS THIS COURT FOR ORDER GRANTING

25 THIS MOTION AND ORDER DISMISSAL OF SERVICES OF

26 AMANDA S GREGORY; ANDREA L. LUEM, AND ALLOW MR. BROWN

27 TO PROCEED IN PRO SE. FURTHERMORE, MS. GREGORY

28 IS ORDERED TO TURN OVER CASE FILE TO THE

VERIFICATION...

I, ROBERT BROWN, DO SOLEMNLY SWEAR, UNDER
PENALTY OF PERJURY, THAT THIS "MOTION TO DISMISS
COUNSEL", IS TRUE, CORRECT, AND ACCURATE TO THE BEST
OF MY KNOWLEDGE, NRS 20B.165

RESPECTFULLY SUBMITTED-

x ~~_____~~ ^{86A}
ROBERT BROWN

DATED THIS ^{5th} DAY OF July, 2016

1 DEFENDANT, CONSISTENT WITH THE ORDER OF THIS
2 COURT PLEASE, THE DEFENDANT RESPECTFULLY
3 REQUEST TO FILE SUPPLEMENTAL MOTION TO PROCEED
4 IN 'PRO-SE' AND APPOINT STAND-IN-COUNSEL, PURSUANT
5 TO THIS COURT'S GRANTING OF THIS MOTION, AS WELL,
6 PLEASE. -THANK YOU-

7
8 RESPECTFULLY-

9
10 DEFENDANT x ROBERT BROWN
11 ROBERT BROWN

12
13
14
15
16 DATED THIS 5th DAY OF JULY, 2016.

DISTRICT COURT
CLARK COUNTY, NEVADA

PP
DA
ADR: Andrea Luern
MC

Andrea Luern
CLERK OF THE COURT

1 STATE OF NEVADA
2 Plaintiff
3
4 V.
5 ROBERT BROWN
6 DEFENDANT
7

CASE NO. 14-C-299234
DEPT NO. IX
8-2-16 @ 9:00 am

"MOTION TO PROCEED IN 'PRO-SE'
AND APPOINT 'STAND-IN-COUNSEL'"

11 COMES NOW, THE DEFENDANT, ROBERT BROWN, HERE BY
12 WAY AND IN PRO-SE, HEREBY MOVES THIS HONORABLE
13 COURT IN THIS "MOTION TO PROCEED IN 'PRO-SE' AND APPOINT
14 "STAND-IN-COUNSEL" TO BETTER ASSIST MR. BROWN IN
15 PREPARATION FOR TRIAL. IT IS THE CHOICE, AND DECISION
16 OF THE DEFENDANT TO PROCEED IN PRO-SE TO TRIAL,
17 AND MR. BROWN REALIZES SUCH RIGHTS HE IS GIVING
18 UP BY PROCEEDING TO TRIAL "ON HIS OWN" TO DEFEND
19 HIMSELF W/ THE AID OF STAND-IN-COUNSEL TO BE THERE
20 TO FILE MOTIONS OR ARGUE DEFENDANTS LITIGATION - MOTIONS.
21 IT IS THE DECISION OF MR. BROWN TO APPOINT, AS
22 STAND-IN-COUNSEL, COUNSEL OF MR. BROWN'S CHOOSING
23 NAMELY COURT-APPOINTED TRIAL "PRO-BONO"
24 COUNSEL, PLEASE. - THANK YOU -

CONCLUSION

WHEREAS, THE DEFENDANT, ROBERT BROWN, HEREBY
RESPECTFULLY REQUEST THIS HONORABLE COURT TO GRANT

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JUL 08 2016
CLERK OF THE COURT

VERIFICATION.

I, ROBERT BROWN, DO SOLEMNLY SWEAR,
UNDER PENALTY OF PERJURY, THAT THIS "MOTION TO PROCEED
IN 'DRO-SE' AND APPOINT "STAND-IN-COUNSEL" IS TRUE,
CORRECT, AND ACCURATE TO THE BEST OF MY KNOWLEDGE.
NRS 208.165

RESPECTFULLY SUBMITTED-

x ROBERT BROWN
ROBERT BROWN

DATED THIS 5th DAY OF July, 2016.

1 THIS MOTION AND ORDER MR. BROWN TO PROCEED IN
2 PRO-SE AND HAVE COURT-APPOINTED 'PRO-BONO' COUNSEL
3 APPOINTED AS "STAND-IN-COUNSEL" TO HELP PREPARE
4 FILINGS, MOTIONS, ARGUMENTS, ETC., IN PREPARATION FOR
5 TRIAL, PLEASE.

6 THANK YOU -

7
8 RESPECTFULLY -

9
10 x ~~ROBERT BROWN~~
11 ROBERT BROWN

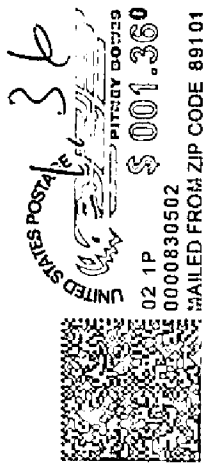
12
13
14
15 DATED THIS 5th DAY OF July, 2016.

Robert Brown 6006120
330 S. Casino Center Blvd.
Las Vegas, NV 89101

SENT FROM --



Clerk of the Court
200 Lewis Ave. 3rd Floor
Las Vegas, Nevada 89155



LEGAL
MAIL

PP
DA
AOR: Andrea Luem
MC

DISTRICT COURT
CLARK COUNTY, NEVADA

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Alvin A. Johnson
CLERK OF THE COURT

1 STATE OF NEVADA,
2 Plaintiff

3 V.

4
5 ROBERT BROWN,
6 DEFENDANT

CASE NO. 14-C-299234

DEPT NO. IX

7
8 "NOTICE OF MOTION"

9 DATE OF HEARING: 7/1/2016

10 TIME OF HEARING: : AM/PM

11 ORAL ARGUMENT REQUESTED: YES

12
13 YOU WILL PLEASE TAKE NOTICE, THAT THE ABOVE MENTIONED
14 DEFENDANT, ROBERT BROWN, WILL COME ON FOR HEARING
15 IN THE FORTHCOMING "MOTION TO DISMISS COUNSEL" ON THE

16 2 DAY OF Aug., 20¹⁶, @ TIME SET FORTH 9:00 AM/PM,
17 DEPT NO. IX

18 *COURT CLERK TO SET SPECIFICS; TO ADVISE PARTIES OF INTEREST
19 AS SUCH*

20 RESPECTFULLY -

21 x *R. B. Brown*
22 ROBERT BROWN

RECEIVED
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CLERK OF THE COURT
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JUL 08 2016
CLERK OF THE COURT

23
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26
27 DATED THIS ^{5th} DAY OF JULY, 20¹⁶
28

DISTRICT COURT
CLARK COUNTY, NEVADA

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Alvin D. Schuman
CLERK OF THE COURT

CLERK OF THE COURT

STATE OF NEVADA,
Plaintiff

V.

ROBERT BROWN
DEFENDANT

CASE NO. 14-C-299234
DEPT NO. IX

"NOTICE OF MOTION"

DATE OF HEARING: 7/20/16

TIME OF HEARING : AM/PM

ORAL ARGUMENT REQUESTED: YES

YOU WILL PLEASE TAKE NOTICE, THAT THE ABOVE
MENTIONED DEFENDANT, ROBERT BROWN, WILL COME ON FOR
HEARING IN THE FORTHCOMING "MOTION TO PROCEED IN 'PRO-SE'
AND APPOINT "STAND-IN-COUNSEL" ON THE 2 DAY OF Aug.
20¹⁶; @ TIME SET FORTH 9:00 AM/PM, DEPT NO. IX
*COURT CLERK TO ADVISE PARTIES OF INTEREST; TO SET COURT SPECIFICS

RESPECTFULLY-

x *Robert Brown*
ROBERT BROWN

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JUL 11 2016

CLERK OF THE COURT

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JUL 08 2016

CLERK OF THE COURT

AND THIS 5TH DAY OF July, 2016


CLERK OF THE COURT

MTN
LAW OFFICES OF ANDREA L. LUEM
ANDREA L. LUEM, ESQ.
Nevada Bar No.: 008844
400 S. Fourth Street, Suite 280
Las Vegas, NV 89101
Phone: (702) 600-8403
Email: andrea@luemlaw.com
AMANDA S. GREGORY, ESQ.
Nevada Bar No. 11107
GREGORY AND WALDO, LLC
324 S. Third Street #2
Las Vegas, NV 89101
Phone: (702) 830-7925
Email: asg@gregoryandwaldo.com
Attorneys for Defendant, ROBERT BROWN, JR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,	)	CASE NO. 14-C-299234
	)	DEPT. NO. IX
Plaintiff,)	
)	
vs.)	
)	
ROBERT BROWN, JR.,)	
)	
Defendant.	)	HEARING DATE: August 18, 2016
	)	HEARING TIME: 9:00 a.m.

**DEFENDANT'S MOTION FOR THE COURT TO DISCLOSE ITS VIEWS
REGARDING THE IMPOSITION OF CAPITAL PUNISHMENT OR, IN
THE ALTERNATIVE, FOR THE STATE TO STIPULATE TO LIFE
WITHOUT PAROLE IN THE EVENT OF A HUNG PENALTY JURY**

COMES NOW, the Defendant, ROBERT BROWN, JR., by and through his attorneys, ANDREA L. LUEM, ESQ., and AMANDA S. GREGORY, ESQ., and hereby respectfully moves this Honorable Court for Disclosure of the Court's Views Regarding the Imposition of Capital Punishment Death Penalty.

This Motion is made and based upon the attached Points and Authorities, the pleadings, exhibits and papers on file herein, and any oral argument deemed necessary by this Court.

///

1 DATED this 18 day of July, 2016.

2 Respectfully Submitted by:

3
4 By: /s/ Andrea Luem

ANDREA L. LUEM, ESQ.

5 Nevada Bar No.: 008844

6 400 S. Fourth Street, Suite 280

7 Las Vegas, NV 89101

8 Phone: (702) 600-8403

9 Email: andrea@luemlaw.com

10 By: /s/ Amanda Gregory

AMANDA S. GREGORY, ESQ.

11 Nevada Bar No. 11107

12 GREGORY AND WALDO, LLC

13 324 S. Third Street #2

14 Las Vegas, NV 89101

15 Phone: (702) 830-7925

16 Email: asg@gregoryandwaldo.com

17 Attorneys for Defendant, ROBERT BROWN, JR.,

18 ///

19 ///

20 ///

1 **NOTICE OF MOTION**

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: STEVEN B. WOLFSON, ESQ., Clark County District Attorney, Attorney for Plaintiff;

4 TO: COLLEEN BAHARAV, Deputy District Attorney,

5 Email: Colleen.Baharav@clarkcountyda.com

6 TO: RICHARD SCOW, Chief Deputy District Attorney

7 Email: Richard.Scow@clarkcountyda.com

8 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and
9 foregoing Motion for hearing before the court on 18th day of August 2016 at 9:00 a.m. in the
10 District Court, Department 9, or as soon thereafter as this matter may be heard.

11
12 DATED this 18 day of July, 2016.

13 Respectfully Submitted by:

14
15 By: /s/ Andrea Luem

16 **ANDREA L. LUEM, ESQ.**

17 Nevada Bar No.: 008844

18 400 S. Fourth Street, Suite 280

19 Las Vegas, NV 89101

20 Phone: (702) 600-8403

21 Email: andrea@luemlaw.com

22 By: /s/ Amanda Gregory

23 **AMANDA S. GREGORY, ESQ.**

24 Nevada Bar No. 11107

25 GREGORY AND WALDO, LLC

26 324 S. Third Street #2

27 Las Vegas, NV 89101

28 Phone: (702) 830-7925

Email: asg@gregoryandwaldo.com

Attorneys for Defendant, ROBERT BROWN, JR.

26 ///

27 ///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF FACTS**

3 The Defendant, ROBERT BROWN, JR. (hereinafter “Mr. Brown”), is charged by way of
4 Grand Jury Indictment with Murder with Use of a Deadly Weapon, Invasion of the Home while in
5 Possession of a Deadly Weapon, Burglary While in Possession of a Firearm, Attempted Murder
6 with Use of a Deadly Weapon (two counts), Child Abuse, Neglect or Endangerment with Use of
7 a Deadly Weapon, Discharge of a Firearm from or Within a Structure (eight counts) and Possession
8 of a Firearm by an Ex-Felon. The State alleges that Mr. Brown entered the apartment home of
9 Esther Maestas by breaking through a window, that while inside the home, Mr. Brown stabbed
10 and shot Nichole Nick to death. That Mr. Brown also shot Esther Maestas several times and that
11 the shooting and stabbing occurred in close proximity to a three-year-old child, Kayla Higgins.

12 Mr. Brown is charged with First-Degree Murder and, if convicted, the State intends to
13 argue that he be sentenced to death.

14 The instant motion follows.

15 **II. ARGUMENT**

16 This case requires greater assurance that Mr. Brown is tried in a manner that does not
17 violate his constitutionally guaranteed rights, ensures that the verdict is certain, and that the penalty
18 is imposed in a manner that is neither discriminatory, capricious, nor cruel, because the State is
19 seeking a death sentence. *Furman vs. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972); *Woodson vs.*
20 *North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1976); *Lockett vs. Ohio*, 438 U.S. 586, 98 S.Ct. 2954
21 (1978).

22 **A. NRS 175.556(1) IS CONSTITUTIONALLY INVALID BECAUSE IT**
23 **PERMITS UNFETTERED JUDICIAL DISCRETION.**

24 NRS 175.556(1) is unconstitutional. It provides:

25 In a case in which the death penalty is sought, if a jury is unable to
26 reach a unanimous verdict upon the sentence to be imposed, the
27 district judge who conducted the trial or accepted the plea of guilty
28 shall sentence the defendant to life imprisonment without the
possibility of parole or empanel a new jury to determine a sentence.

1 The statute provides no guidance whatsoever in permitting a Court to either impose a life
2 sentence, or empanel a new jury when a penalty phase jury hangs in a capital murder case. Further,
3 the statute, as it has been applied in Clark County, fails to provide for the narrowing of defendants
4 who face capital punishment.

5 NRS 175.556(1) renders Nevada's capital sentencing scheme invalid on its face and as
6 currently applied, in violation of the Eighth and Fourteenth Amendments. The trial Court's
7 unfettered discretion to impose a sentence less than death or to allow another penalty hearing in
8 which a death sentence may be imposed makes any death sentence that is imposed in the second
9 penalty hearing necessarily arbitrary and unconstitutional under the Eighth and Fourteenth
10 Amendments.

11 This statute provides no objective standards to guide the district court in exercising its
12 discretion to impose a sentence less than death when the penalty jury hangs, or to expose the
13 defendant to another penalty jury that may impose a death sentence. This unfettered power injects
14 an entirely arbitrary and capricious element into the capital sentencing scheme, which renders any
15 death sentence invalid if it is imposed as a result of that exercise of unfettered discretion. Unless
16 the statute is overturned, any judge presiding over a death penalty case must be required to disclose
17 his or her views on the death penalty in order for the Defendant to be able to ascertain the judge's
18 potential bias. The unfettered discretion permitted under NRS 175.556(1) essentially subjects
19 criminal defendants to the judge's personal views as to whether the death sentence is a socially
20 appropriate sentence.

21 This provision giving the trial court unfettered discretion to expose the defendant to the
22 death sentence or to end that exposure by imposing a lesser sentence itself, is unique. As far as
23 the counsel for the Defendant can determine, no other jurisdiction offers such a provision. The
24 only remotely similar provision is NRS 177.055(3), which, as interpreted by the Nevada Supreme
25 Court, allows the Supreme Court to choose, also in its unfettered discretion, to impose a lesser
26 sentence when it reverses a death sentence on appeal. *Johnson v. State*, 118 Nev. at 787-788, 59
27 F.3d at 451(en banc). The very eccentricity of these provisions suggests that they do not comport
28 with due process of law under the federal constitution. *See Schad v. Arizona*, 501 U.S. 624, 640

1 (1991)(“a freakish definition of the elements of a crime that finds no analogue in history or in the
2 criminal law of other jurisdictions will lighten the defendant’s burden of showing due process
3 violation”).

4 Similarly, the paucity of constitutional precedents addressing such a scheme does not
5 suggest that it is valid: to the contrary, it suggests that the eccentric provision is impermissible. In
6 *United States v. Lanier*, 520 U.S. 259 (1997), a state judge was convicted of criminal violations of
7 the federal civil rights act, based on his sexual assaults on staff and litigants in his official
8 chambers. The judge claimed that the statute in question did not provide fair warnings under the
9 due process clause that his conduct would be viewed as unconstitutional violations of the victims’
10 civil rights. The Supreme Court held that the absence of any precedent holding the very action in
11 question . . . unlawful did not result in a violation of the requirement of adequate notice. In some
12 instances, a general unconstitutional rule . . . may apply with obvious clarity to the specific conduct
13 at issue. *Id.* at 271.

14 Under *Furman v. Georgia*, 408 U.S. 238 (1972), a sentencing scheme in a capital case must
15 channel the discretion of the sentencing body, comport with contemporary standards of decency
16 and allow the sentencer to make an individualized sentencing determination. See *Lewis v. Jeffers*,
17 497 U.S. 764, 775 (1990); *Barclay v. Florida*, 463 U.S. 939, 960 (1983); *Zant v. Stephens*, 462
18 U.S. at 862, 876; *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Franze v. Lockhart*, 700 F.Supp.
19 1005, 1017 (E.D.Ark. 1988). NRS 175.556 is a part of Nevada’s capital sentencing scheme
20 because this statute places this Court in the role of a sentencer if the penalty jury cannot reach a
21 unanimous verdict. However, it fails to comport with *Furman*’s constitutional principles: it does
22 not contain any applicable standards to guide the discretion of the sentencer.

23 **B. NRS 175.556(1) IS CONSTITUTIONALLY INVALID BECAUSE IT**
24 **VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.**

25 NRS 175.556(1) also violates the Eighth and Fourteenth Amendments because it allows
26 this Court unfettered discretion to sentence the defendant to life imprisonment or to empanel a new
27 sentencing jury and allow the state to seek another death sentence. It is a fundamental principle of
28 Eighth Amendment jurisprudence that a capital sentence scheme cannot permit the sentencer

unfettered discretion to determine who is eligible to receive a death sentence. In *Furman v. Georgia*, 408 U.S. 238 (1972), the court invalidated the existing death penalty scheme under the Eighth Amendment precisely because of the unfettered discretion to impose or not impose a death sentence that the unconstitutional system gave juries. *Id.* at 256-257 (Douglas, J., concurring) (“these discretionary statutes are unconstitutional in their operation. They are replete with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on cruel and unusual punishments”) *Id.* at 294-295; (Stewart, J., concurring) (“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”)(footnote omitted); *Id.* at 313-314.

Subsequent cases upholding capital punishment schemes rely on mechanisms that ensure that “discretion must be suitably directed and limited so as to minimize the risk of unduly arbitrary and capricious action.” *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). These mechanisms must include a rational process to “narrow the class of murders subject to capital punishment.” *Id.* at 196; *Id.* at 222-223 (White, J., concurring); see also *Zant v. Stephens*, 462 U.S. 862, 876-877 (1983); *Stringer v. Black*, 503 U.S. 222, 235-266 (1992)(“use of unconstitutionally vague aggravating factor in weighing fails to channel the sentencer’s discretion” and creates “possibility not only of randomness but also of bias in favor of the death penalty”); *Buchanan v. Angelone*, 522 U.S. 269, 275-276 (1998); *Tuilaepa v. California*, 512 U.S. 967, 973 (1994); see *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1287-1291(W.D. Wash. 1994)(lack of standards for administering appellate court’s state-mandated proportionality review in capital cases violates due process); cf. *FW/PBS, Inc., DBA Paris Adult Bookstore II v. City of Dallas*, 493 U.S. 215, 223 (1990)(Unbridled discretion in the decision making is a violation of the First Amendment).

C. UNTIL THE STATUTE IS OVERTURNED, THE COURT MUST DISCLOSE ITS VIEWS ON THE DEATH PENALTY.

Nevada Code of Judicial Conduct (hereinafter “NCJC”) Canon 2 provides that a “judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” The Commentary to Canon 2A states, in part, that the “test for appearance of impropriety is whether

1 the conduct would create in reasonable minds a perception that the judge's ability to carry out
2 judicial responsibilities with integrity, impartiality and competence is impaired."

3 NCJC Canon 3 provides, "[a] judge shall perform the duties of judicial office impartially
4 and diligently." NCJC Section 3E (1) discusses disqualification and provides that:

5 (1) a judge shall disqualify himself or herself in a proceeding in
6 which the judge's impartiality might reasonably be questioned,
7 including but not limited to instances where:

8 (a) The judge has a personal bias or prejudice
9 concerning a party or a party's lawyer, or personal
10 knowledge of disputed evidentiary facts concerning the
11 proceeding;

12 (d) The judge or the judge's spouse, or a person within the
13 third degree of relationship to either of them, or the spouse
14 of such a person:... (iii) is known by the judge to have a more
15 than de minimis interest that could be substantially affected
16 by the proceeding.

17 The Commentary to Section 3E(1) states that a "judge should disclose on the record
18 information that the judge believes the parties or their lawyers might reasonably consider relevant
19 to the question of disqualification, even if the judge believes there is no real basis for
20 disqualification." The above commentary makes clear that the test for whether a judge's
21 impartiality might reasonably be questioned is objective, whether a judge is actually impartial is
22 immaterial.

23 Due to the unusual provisions of NRS 175.556, any other course of action is a violation of
24 the NCJC which requires judges to recuse themselves in instances when the judge has a personal
25 bias or "more than a de minimis interest" in the proceeding which could be substantially affected.
26 Clearly, judges with strong "pro death penalty" leanings may present the appearance of
27 impropriety as their ability to use their discretion to impose a life sentence if there is a hung penalty
28 jury.

Therefore, requiring a judge to disclose his views on the death penalty would protect Mr.
Brown's due process and fair trial rights by permitting him to move for disqualification or recusal
of a judge whose support of the death penalty subjects Mr. Brown to unfair bias.

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DATED this 18th day of July, 2016.

By: /s/ Andrea Luem
ANDREA L. LUEM, ESQ.
 Nevada Bar No.: 008844
 400 S. Fourth Street, Suite 280
 Las Vegas, NV 89101
 Phone: (702) 600-8403
 Email: andrea@luemlaw.com

Attorneys for Defendant, ROBERT BROWN, JR.

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, hereby certify that a true and correct copy of Defendant's foregoing
3 **DEFENDANT'S MOTION FOR THE COURT TO DISCLOSE ITS VIEWS REGARDING**
4 **THE IMPOSITION OF CAPITAL PUNISHMENT OR IN THE ALTERNATIVE FOR**
5 **THE STATE TO STIPULATE TO LIFE WITHOUT PAROLE IN THE EVENT OF A**
6 **HUNG PENALTY JURY** will be served or was served on the appropriate parties hereto in the
7 manner(s) stated below:
8

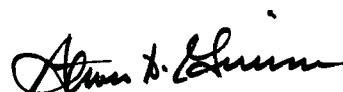
9 TO BE SERVED BY THE COURT VIA ELECTRONIC FILING: The foregoing document will
10 be served by the court's electronic filing system, Odyssey File & Serve, via courtesy copy and
11 hyperlink to the document. On July 18, 2016, the foregoing document was submitted for electronic
12 filing with the court and the following persons are on the courtesy copy list to receive an electronic
13 notice of the transmission at the email addresses stated below:

14 TO: Clark County District Attorney's Office
15 Email: Motions@clarkcountyda.com
16 TO: COLLEEN BAHARAV, Deputy District Attorney,
17 Email: Colleen.Baharav@clarkcountyda.com
18 TO: RICHARD SCOW, Chief Deputy District Attorney
19 Email: Richard.Scow@clarkcountyda.com
20

21 SERVED BY UNITED STATES MAIL: On July 18, 2016, I served the following persons and/or
22 entities at the last known addresses by placing a true and correct copy thereof in a sealed envelope
23 in the United States Postal Service, First-Class, prepaid postage affixed thereto, and addressed as
24 follows:

25 Robert Brown, Jr.
26 Clark County Detention Center
330 S. Casino Center Blvd.
Las Vegas, Nevada 89101

27 By: /s/ Andrea Luem
28 An Employee of The Law Offices of
Andrea L. Luem, Esq.



CLERK OF THE COURT

MTN
LAW OFFICES OF ANDREA L. LUEM
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Phone: (702) 830-7925
Email: asg@gregoryandwaldo.com
Attorneys for Defendant, ROBERT BROWN, JR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

ROBERT BROWN, JR.,

Defendant.

) CASE NO. 14-C-299234

) DEPT. NO. IX

) HEARING DATE: August 18, 2016

) HEARING TIME: 9:00 a.m.

**MOTION FOR AN ORDER PERMITTING DISCOVERY OF
RECORDS PERTAINING TO FAMILY LIFE OF VICTIM**

COMES NOW, the Defendant, ROBERT BROWN, JR., by and through his attorneys, ANDREA L. LUEM, ESQ. and AMANDA S. GREGORY, ESQ., and hereby respectfully moves this Honorable Court for an Order permitting discovery of any and all records pertaining to the family life of the victim.

This Motion is made and based upon the attached Points and Authorities, all pleadings and papers on file herein, and any oral argument this court may deem necessary.

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///

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1 DATED this 18th day of July, 2016.

2 Respectfully Submitted by:

3
4 By: /s/ Andrea Luem
ANDREA L. LUEM, ESQ.
5 Nevada Bar No.: 008844
400 S. Fourth Street, Suite 280
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7 Phone: (702) 600-8403
Email: andrea@luemlaw.com

8
9 By: /s/ Amanda Gregory
AMANDA S. GREGORY, ESQ.
10 Nevada Bar No. 11107
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12 Phone: (702) 830-7925
13 Email: asg@gregoryandwaldo.com

14 Attorneys for Defendant, ROBERT BROWN, JR.
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1 **NOTICE OF MOTION**

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: STEVEN B. WOLFSON, ESQ., Clark County District Attorney, Attorney for Plaintiff;

4 TO: COLLEEN BAHARAV, Deputy District Attorney,

5 Email: Colleen.Baharav@clarkcountyda.com

6 TO: RICHARD SCOW, Chief Deputy District Attorney

7 Email: Richard.Scow@clarkcountyda.com

8 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and
9 foregoing Motion for hearing before the court on the 18th day of August 2016, at 9:00 a.m. in the
10 District Court, Department 9, or as soon thereafter as this matter may be heard.

11 DATED this 18th day of July, 2016.

12 Respectfully Submitted by:

13
14 By: /s/ Andrea Luem
ANDREA L. LUEM, ESQ.
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16 400 S. Fourth Street, Suite 280
17 Las Vegas, NV 89102
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19 Email: andrea@luemlaw.com

20 By: /s/ Amanda Gregory
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21 Nevada Bar No. 11107
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25 Phone: (702) 830-7925
26 Email: asg@gregoryandwaldo.com

27 Attorneys for Defendant, ROBERT BROWN, JR.

28 ///

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. STATEMENT OF FACTS**

4 The Defendant, ROBERT BROWN, JR. (hereinafter “Mr. Brown”), is charged by way of
5 Grand Jury Indictment with Murder with Use of a Deadly Weapon, Invasion of the Home while in
6 Possession of a Deadly Weapon, Burglary While in Possession of a Firearm, Attempted Murder
7 with Use of a Deadly Weapon (two counts), Child Abuse, Neglect or Endangerment with Use of
8 a Deadly Weapon, Discharge of a Firearm from or Within a Structure (eight counts) and Possession
9 of a Firearm by an Ex-Felon.

10 The State alleges that Mr. Brown entered the apartment home of Esther Maestas by
11 breaking through a window, that while inside the home, Mr. Brown stabbed and shot Nichole Nick
12 to death. That Mr. Brown also shot Esther Maestas several times and that the shooting and stabbing
13 occurred in close proximity to a three-year-old child, Kayla Higgins.

14 Mr. Brown is charged with First-Degree Murder and, if convicted, the State intends to
15 argue that he be sentenced to death.

16 The instant motion follows.

17
18 **II. ARGUMENT**

19 The Defendant herein is charged with First-Degree Murder with Use of a Deadly Weapon.
20 At the potential penalty hearing of this matter, it is anticipated that some relative(s) of the victim
21 will be called by the prosecution in order to testify at the penalty phase about the victim’s life in
22 the event that there is a penalty hearing in this case pursuant to Payne v. Tennessee, 501 U.S. 808,
23 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991). Should the State call any of the victim’s relatives to
24 testify regarding the victim’s life at the penalty hearing, counsel must have access to and be able
25 to review any documentation regarding the life of the victim in order to effectively represent the
26 accused in the case at bar, guarantee her Sixth Amendment rights are protected, and to present the
27 jury with sufficient information to apprise it of any biases or improper motivations on the part of
28 the family witnesses.

1 The right of cross-examination is derived from the Sixth Amendment of the United States
2 Constitution, which guarantees the right of the accused to confront the witnesses against him.
3 Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973); U.S. CONST
4 amends. VI, XIV. The Court of Appeals for the Ninth Circuit has acknowledged that the
5 confrontation clause guarantees that the prosecution's case will be subject to the "rigorous
6 adversarial testing that is the norm of Anglo-American criminal proceedings." United States v.
7 Vargas, 933 F.2d 701, 709 (9th Cir. 1991). Exposing any bias or improper motivation on the part
8 of a witness in testifying is a proper and important function of the protected right of
9 cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S. Ct. 1431, 1435, 89
10 L.Ed.2d 674 (1986).

11 The Nevada Supreme Court has specifically recognized that:

12 The confrontation clause of the Sixth and Fourteenth Amendments
13 to the United States Constitution guarantees a criminal defendant the
14 right to confront his accusers and the opportunity to demonstrate the
15 existence of a possible bias or prejudice of a witness in support of
16 the defendant's theory of the case. This also includes a right to
17 introduce evidence challenging a victim's credibility, in order to
18 dispel an inference which the jury might otherwise draw from the
19 circumstances.

20 Cox v. State, 102 Nev. 253, 256, 721 P.2d 358, 360 (1986).

21 A trial court retains wide latitude where the Confrontation Clause is concerned with regard
22 to the imposition of reasonable limits on cross-examination. Delaware v. Van Arsdall, 475 U.S.
23 at 678, 106 S. Ct. at 1435. The trial court's ability to impose restrictions upon cross-examination
24 is based upon concerns regarding harassment, prejudice, confusion of the issues, the witness;
25 safety or that the examination is repetitive or only marginally relevant. Id.

26 Should the State call the victim's relatives to testify at the penalty hearing regarding his
27 life, in order to effectively represent the defendant in the case at bar, guarantee his Sixth
28 Amendment rights are protected, and present the jury with sufficient information to appraise it of
the biases and motivations of the parental witnesses, defense counsel must have access to and be
able to review all documentation regarding the victim's life. Defense counsel must be permitted
access to all documentation in order to make a valid challenge to what evidence should be

1 presented to the jury.

2 The Ninth Circuit acknowledged:

3 Trial attorneys attune themselves to the jury's response to a
4 witness's [sic] live testimony, and the art of cross-examination
5 depends on an attorney's sixth sense of both the jury, the witness,
6 and the dynamic between them . . . After spending days studying the
7 jury that will decide a client's fate, experienced trial attorneys may
8 well adjust their questioning to the nuances of the jurors' reactions.
9 Blank looks counsel caution; one grimace can end a line of inquiry.
10 Trial attorneys cannot prepare their cross-examination entirely in
11 advance. As our system or trial procedure has evolved, the
12 opportunity for effective cross-examination depends on attorneys'
13 ability to adjust their questioning as they constantly reassess the
14 jurors' reactions to the witness and the previous questions.
15 *United States v. Vargas*, 933 F.2d at 709.

16 Therefore, Mr. Brown requests this Honorable Court to enter an Order to provide his
17 counsel access to all records regarding the victims and their family lives, which includes but is not
18 limited to: any counseling records, regarding the victim's family, maintained by any educational
19 institution, any division of juvenile court; any family support services records; any investigation
20 reports maintained by the juvenile or family court records. If this matter does proceed to penalty
21 phase, this documentation would be necessary to adequately cross-examine family witnesses and
22 to demonstrate the potential bias or prejudice of those witnesses. These documents are therefore
23 vital to the Defendant's Constitutional right to confront the witnesses against her during both trial
24 and penalty phase.

25 III. CONCLUSION

26 WHEREFORE, the Defendant, ROBERT BROWN, JR., respectfully requests that this
27 Honorable Court enter an Order permitting defense counsel to access any and all documentation
28 that relates to the victim's family life of those witnesses that will be called by the State.

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1 DATED this 18th day of July, 2016.

2 Respectfully Submitted by:

3
4 By: /s/ Andrea Luem

ANDREA L. LUEM, ESQ.

5 Nevada Bar No.: 008844

6 400 S. Fourth Street, Suite 280

7 Las Vegas, NV 89101

8 Phone: (702) 600-8403

9 Email: andrea@luemlaw.com

10 By: /s/ Amanda Gregory

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18 Attorneys for Defendant, ROBERT BROWN, JR.
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CLERK OF THE COURT

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Email: asg@gregoryandwaldo.com
Attorneys for Defendant, ROBERT BROWN, JR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,	)	CASE NO. 14-C-299234
	)	DEPT. NO. IX
Plaintiff,)	
)	
vs.)	
)	
ROBERT BROWN, JR.,)	
Defendant.)	
	)	HEARING DATE: August 18, 2016
	)	HEARING TIME:

**MOTION TO PROHIBIT EVIDENCE AND ARGUMENT CONCERNING
MITIGATING CIRCUMSTANCES NOT RAISED BY THE DEFENDANT**

COMES NOW, the Defendant, ROBERT BROWN, JR., by and through his attorneys, ANDREA L. LUEM, ESQ., and AMANDA S. GREGORY, ESQ., and hereby respectfully requests, this Honorable Court to enter an Order prohibiting the State from introducing evidence and argument concerning mitigating circumstances not raised by Mr. Brown.

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1 This Motion is made and based upon the attached Points and Authorities, the pleadings,
2 exhibits, and papers on file herein, and any oral argument deemed necessary by this Court.

3 DATED this 18th day of July, 2016.

4 Respectfully Submitted by:

5
6 By: /s/ Andrea Luem
ANDREA L. LUEM, ESQ.
7 Nevada Bar No.: 008844
8 400 S. Fourth Street, Suite 280
9 Las Vegas, NV 89102
10 Phone: (702) 600-8403
11 Email: andrea@luemlaw.com

12 By: /s/ Amanda Gregory
AMANDA S. GREGORY, ESQ.
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17 Phone: (702) 830-7925
18 Email: asg@gregoryandwaldo.com

19 Attorneys for Defendant, ROBERT BROWN, JR.

20 ///

21 ///

22 ///

1
2 **NOTICE OF MOTION**

3 TO: THE STATE OF NEVADA, Plaintiff; and

4 TO: STEVEN B. WOLFSON, ESQ., Clark County District Attorney, Attorney for Plaintiff;

5 TO: COLLEEN BAHARAV, Deputy District Attorney,

6 Email: Colleen.Baharav@clarkcountyda.com

7 TO: RICHARD SCOW, Chief Deputy District Attorney

8 Email: Richard.Scow@clarkcountyda.com

9 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and
10 foregoing Motion for hearing before the court on the 18th day of August, 2016 at 9:00 a.m. in the
11 District Court, Department 9, or as soon thereafter as this matter may be heard.

12
13 DATED this 18th day of July, 2016.

14 Respectfully Submitted by:

15 By: /s/ Andrea Luem
16 **ANDREA L. LUEM, ESQ.**
17 Nevada Bar No.: 008844
18 400 S. Fourth Street, Suite 280
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22 By: /s/ Amanda Gregory
23 **AMANDA S. GREGORY, ESQ.**
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Attorneys for Defendant, ROBERT BROWN, JR.

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2 **I. STATEMENT OF FACTS**

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5 Possession of a Deadly Weapon, Burglary While in Possession of a Firearm, Attempted Murder
6 with Use of a Deadly Weapon (two counts), Child Abuse, Neglect or Endangerment with Use of
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8 of a Firearm by an Ex-Felon.

9 The State alleges that Mr. Brown entered the apartment home of Esther Maestas by
10 breaking through a window, that while inside the home, Mr. Brown stabbed and shot Nichole Nick
11 to death. That Mr. Brown also shot Esther Maestas several times and that the shooting and stabbing
12 occurred in close proximity to a three-year-old child, Kayla Higgins.

13 Mr. Brown is charged with First-Degree Murder and, if convicted, the State intends to
14 argue that he be sentenced to death.

15 **II. ARGUMENT**

16 This motion is based upon the state and federal constitutional guarantees of due process,
17 equal protection, right to be free from cruel and unusual punishment, and right to a reliable
18 sentence. U.S. Const. Amendments V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8, Art IV,
19 Sec. 21. Based on history and experience, defense counsel for Mr. Brown are aware that in other
20 capital cases, prosecutors in Clark County have made extensive argument concerning the lack or
21 absence of statutory mitigating circumstances identified in NRS 200.035.

22 NRS 200.033 and 200.035 set forth the precise formula and procedure for weighing
23 aggravating circumstances and mitigating circumstances. NRS 200.035 lists a total of seven (7)
24 statutory circumstances that shall be considered as mitigation if evidence is presented to support
25 them at trial. It is highly improper for the prosecutor to argue and for the district court to instruct
26 the jury that there are seven (7) mitigating circumstances that could be considered, where no
27 evidence had been introduced to support a finding of all seven (7) of these circumstances. Doing
28 so would permit the jury to improperly consider the lack of proof on these circumstances as

1 aggravating circumstances as facts to be found against a defendant. Such actions would subvert
2 the intended operation of these circumstances as mitigation and would convert their function to
3 one of aggravation. The prosecution must be precluded from making these types of argument and
4 the jury must not be instructed on statutory mitigating circumstances that have no relevance to this
5 case.

6 In Maqqard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059 (1981), the
7 Florida Supreme Court held that the trial court erred in allowing the State to present evidence of
8 past criminal activity (not falling within the definition of any statutory aggravating circumstance)
9 to rebut the existence of the mitigating factor of lack of prior criminal record because the defense
10 had not presented evidence on that mitigating factor. The error was found to be of such magnitude
11 that the sentence of death was vacated with directions to hold a new sentencing hearing with a new
12 jury:

13 Mitigating circumstances are for the defendant's benefit, and
14 the State should not be allowed to present damaging
15 evidence against the defendant to rebut a mitigating
16 circumstance that the defendant expressly concedes does not
exist.

17 Id. at 978; see also, Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986) (state may not present
18 evidence to rebut mitigating circumstances before such evidence is offered by the defendant);
19 Randolph v. State, 562 So.2d 331 (Fla. 1990) (state limited to introducing evidence that proves
20 aggravating circumstances or rebuts mitigating factor evidence offered by the defendant).

21 Similarly, in State v. DePew, 528 N.E.2d 542 (Ohio 1985), the Ohio Supreme Court
22 condemned the manner of instruction and argument often made in this district. The Court
23 concluded that when the trial court instructs the jury about mitigating factors "the far better practice
24 is certainly to refrain from even referring to mitigating factors not raised by the defense." Id. at
25 557-58.

26 There is no Nevada authority permitting the district court to instruct the jury about
27 inapplicable mitigating circumstances or permitting the prosecutor to argue about the absence of
28 inapplicable mitigating circumstances. In fact, NRS 175.554(1) expressly directs that the jury not

1 be instructed in such a manner. The statute provides the following:

2 The court shall instruct the jury at the end of the penalty
3 hearing, and shall include in its instructions the aggravating
4 circumstances alleged by the prosecution upon which
5 evidence has been presented during the trial or at the hearing.
6 The court shall also instruct the jury as to the mitigating
7 circumstances alleged by the defense upon which evidence
8 has been presented during the trial or at the hearing.
9 NRS 175.554 (1).

10 By permitting the prosecutor to argue the absence of statutory mitigating circumstances,
11 the court would change the focus of the mitigation hearing from a qualitative analysis of the
12 evidence to a quantitative analysis. In other words, the importance in the hearing would no longer
13 rest with the quality of the evidence presented by the defense, but with the quantity presented and
14 proved. This approach would undermine the goal of the mitigation hearing and eliminated the
15 possibility of deciding the appropriate punishment. In State v. Wood, 648 P.2d 71 (Utah 1982),
16 the Utah Supreme Court discussed the impropriety of applying a numerical approach in
17 determining the sentence to be imposed in a capital case. Utah provides the same standard for its
18 sentencing as Nevada: the aggravating circumstances must outweigh the mitigating circumstances
19 beyond a reasonable doubt before a death sentence may be imposed. In making a determination
20 under this standard, the Utah Supreme Court held that a sentencing body must “[c]ompare the
21 totality of the mitigating against the totality of the aggravating circumstances, not in terms of the
22 relative numbers of the aggravating and mitigating circumstances, but in terms of their respective
23 substantiality and persuasiveness. Id. at 83.

24 The reference to all NRS 200.035 circumstances by the prosecutors, and the instruction by
25 the court on all of the circumstances, in the absence of presentation of evidence by the defense,
26 would ensure an improper weighing process. The focus would be on the number of mitigating
27 circumstances presented and proved rather than with the weight of the mitigating evidence
28 presented. Moreover, the instruction and argument would allow non-statutory and unproven
29 aggravating circumstances to enter into the sentencing determination.

30 In this case, the State must not be permitted to offer evidence or make argument concerning

1 mitigating circumstances that have no relevance to Mr. Brown and which are irrelevant to this
2 proceeding. The defense also requests that the jury not be instructed as to mitigating circumstances
3 that are not asserted to exist by counsel for Mr. Brown

4 Accordingly, in order to protect the defendant's rights to a fair trial and penalty hearing,
5 rights of due process and equal protection, and right to be free from cruel and unusual punishment
6 under the state and federal constitutions, Mr. Brown respectfully submits that the State must not
7 be permitted to introduce evidence or make argument regarding mitigating circumstances not
8 alleged to exist by their counsel.

9 **III. CONCLUSION**

10 WHEREFORE, the Defendant ROBERT BROWN, JR., prays that this Honorable Court
11 enter an Order prohibiting the State from introducing evidence and argument concerning
12 mitigating circumstances not raised by Mr. Brown.

13 DATED this 18th day of July, 2016.

14 Respectfully Submitted by:

15
16 By: /s/ Andrea Luem
ANDREA L. LUEM, ESQ.
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21 By: /s/ Amanda Gregory
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26 Attorneys for Defendant, ROBERT BROWN, JR.

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TO BE SERVED BY THE COURT VIA ELECTRONIC FILING: The foregoing document will be served by the court's electronic filing system, Odyssey File & Serve, via courtesy copy and hyperlink to the document. On July 18, 2016, the foregoing document was submitted for electronic filing with the court and the following persons are on the courtesy copy list to receive an electronic notice of the transmission at the email addresses stated below:

Email: Motions@clarkcountyda.com

Email: Colleen.Baharav@clarkcountydade.com

Email: Richard.Scow@clarkcountydade.com

Robert Brown, Jr.
Clark County Detention Center
330 S. Casino Center Blvd.
Las Vegas, Nevada 89101

-8-


CLERK OF THE COURT

MTN
LAW OFFICES OF ANDREA L. LUEM
ANDREA L. LUEM, ESQ.
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Email: asg@gregoryandwaldo.com
Attorneys for Defendant, ROBERT BROWN, JR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,	)	CASE NO. 14-C-299234
	)	DEPT. NO. IX
Plaintiff,)	
)	
vs.)	
)	
ROBERT BROWN, JR.,)	
)	
Defendant.	)	HEARING DATE: August 18, 2016
	)	HEARING TIME: 9:00 a.m.

**MOTION FOR COURT TO ALLOW PRESENTATION OF EVIDENCE
TO THE JURY OF THE DISPROPORTIONALITY AND ARBITRARINESS
AND UNFAIRNESS OF A DEATH SENTENCE**

COMES NOW, the Defendant, ROBERT BROWN, JR., by and through his attorneys, ANDREA L. LUEM, ESQ., and AMANDA S. GREGORY, ESQ., and each of them respectfully requests this Honorable Court to enter an Order allowing him to present evidence to the jury regarding the disproportionality, and the arbitrariness and unfairness of imposing a death sentence in this case.

This Motion is made and based upon the attached Points and Authorities, the pleadings, and papers on file herein, and any oral argument deemed necessary by this Court.

///

///

1 DATED this 18th day of July, 2016.

2
3 By: /s/ Andrea Luem
4 **ANDREA L. LUEM, ESQ.**
5 Nevada Bar No.: 008844
6 400 S. Fourth Street, Suite 280
7 Las Vegas, NV 89102
8 Phone: (702) 600-8403
9 Email: andrea@luemlaw.com

10 By: /s/ Amanda Gregory
11 **AMANDA S. GREGORY, ESQ.**
12 Nevada Bar No. 11107
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18 Attorneys for Defendant, ROBERT BROWN, JR.
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TO: STEVEN B. WOLFSON, ESQ., Clark County District Attorney, Attorney for Plaintiff;

Email: Colleen.Baharav@clarkcountyda.com

Email: Richard.Scow@clarkcountyda.com

DATED this 18th day of July, 2016.

By: /s/ Amanda Gregory
AMANDA S. GREGORY, ESQ.
 Nevada Bar No. 11107
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 324 S. Third Street #2
 Las Vegas, NV 89102
 Phone: (702) 830-7925
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Attorneys for Defendant, ROBERT BROWN, JR.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. ARGUMENT**

3 The Defendant, ROBERT BROWN, JR., respectfully submits that he should be permitted
4 to present evidence to the jury regarding the proportionality, and the arbitrariness and unfairness
5 of imposing a death sentence in this case.

6 This motion is based upon the state and federal constitutional rights of Due Process, Equal
7 Protection and the right to be from cruel and unusual punishments. It is morally and
8 philosophically appropriate for the capital jurors to have the benefit of proportionality data when
9 deciding whether or not to impose a death sentence. The jurors cannot act as the conscience of the
10 community as to whether the accused should be sentenced to death unless they know of the other
11 actions of the community in similar cases. *Gregg v. Georgia*, 428 U.S. 153, 181, 96 S. Ct. 2909,
12 2929, 49 L.Ed.2d 859 (1976)(The jurors are entitled to know what the community has done in
13 other cases).

14 An individual juror's decision in a penalty phase is a "profoundly moral evaluation."
15 *Satterwhite v. Texas*, 486 U.S. 249, 261, 108 S. Ct. 1792, 1800, 100 L.Ed.2d 284 (1988) (Marshall,
16 J., concurring). Information about resolution of similar homicide cases in Nevada is critical to a
17 juror's moral evaluation about whether she or he is right to put Mr. Brown to death. Further, it is
18 constitutionally mandated that a juror be able to consider all relevant mitigation. *See, e.g., Boyde*
19 *v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990); *Lockett v. Ohio*, 438 U.S.
20 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978). The fact that the rest of society does not consider
21 many other offenses, equally or much more serious than that at issue here to be appropriate for the
22 death penalty, is objective evidence that this case is not aggravated enough to justify killing Mr.
23 Brown.

24 Under federal and state constitutions, proportionality evidence constitutes mitigation,
25 because it demonstrates that Mr. Brown should not be killed, and that society and the government
26 do not consider such crimes as he is charged with to be deserving of the death penalty. Further,
27 the Eighth Amendment's protections against cruel and unusual punishment require that the jurors
28 be allowed to hear all reasons why the death penalty should not be imposed. The Eighth

1 Amendment provides that:

2
3 Excessive bail shall not be required, not excessive fines imposed,
4 nor cruel and unusual punishment inflicted. The provision is
5 applicable to the States through the Fourteenth Amendment...[T]he
6 Eighth Amendment guarantees individuals the right not to be
7 subjected to excessive sanctions. The right flows from the basic
8 “precept of justice that punishment for crime should be graduated
9 and proportioned to the offense.” By protecting even those
10 convicted of heinous crimes, the Eighth Amendment reaffirms the
11 duty of the government to respect the dignity of all persons. *Roper*
12 *v. Simmons*, 543 U.S. 551, 560 (2005) (quoting *Atkins v. Virginia*,
13 536 U.S. 304 311 (2002)) (citations and internal quotations omitted).

14 In *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L.Ed.2d 29 (1984), the United States
15 Supreme Court held that a state appellate court was not required to conduct a proportionality
16 review in order to affirm a judgment of conviction. Likewise, proportionality review is not
17 required of the Nevada Supreme Court. *Dennis v. State*, 116 Nev. 1075, 1084, 13 P.3d 434, 440
18 (2000). Neither the United States Supreme Court nor the Nevada Supreme Court has held that
19 proportionality issues may not be presented as mitigation.

20 It is up to the jurors to determine what weight to give such mitigation. Only by allowing
21 the jurors to consider proportionality evidence can the extreme danger of the arbitrary and
22 capricious imposition of the death penalty be minimized. If the jurors are acquainted with the
23 community’s record regarding the imposition of the death penalty, it is much less likely that the
24 jurors will impose the sentence in an aberrant fashion. Further, allowing the jurors to consider
25 such proportionality evidence will help negate the inevitably arbitrary and capricious actions of
26 the state in seeking the death penalty.

27 Further, in order that the jurors be able to intelligently determine whether the state has
28 proven to them, the “conscience of the community,” beyond a reasonable doubt that Mr. Brown
must be killed rather than spend the rest of his life in prison, the jurors must be allowed to hear
evidence as to why the death penalty is sought by the state in this case, and as to why the state has
not sought the death penalty in other cases which are arguably more or at least as aggravated.

Therefore, Mr. Brown must be allowed to present mitigation evidence as to why death

1 would be a disproportionate sentence as applied to him based on this community's standards,
2 which includes this community's record on other death sentences imposed.

3
4 **II. CONCLUSION**

5 WHEREFORE, the Defendant, ROBERT BROWN, JR., respectfully requests that this
6 Court order that he be allowed to present evidence to the jury regarding the disproportionality, and
7 the arbitrariness and unfairness of imposing a death sentence in this case.

8 DATED this 18th day of July, 2016.

9 Respectfully Submitted by:

10
11 By: /s/ Andrea Luem
12 **ANDREA L. LUEM, ESQ.**
13 Nevada Bar No.: 008844
14 400 S. Fourth Street, Suite 280
15 Las Vegas, NV 89102
16 Phone: (702) 600-8403
17 Email: andrea@luemlaw.com

18 By: /s/ Amanda Gregory
19 **AMANDA S. GREGORY, ESQ.**
20 Nevada Bar No. 11107
21 GREGORY AND WALDO, LLC
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23 Las Vegas, NV 89102
24 Phone: (702) 830-7925
25 Email: asg@gregoryandwaldo.com

26 Attorneys for Defendant, ROBERT BROWN, JR.
27
28

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, hereby certify that a true and correct copy of Defendant's foregoing
3 **MOTION FOR COURT TO ALLOW PRESENTATION OF EVIDENCE TO THE JURY**
4 **OF THE DISPROPORTIONALITY AND ARBITRARINESS AND UNFAIRNESS OF A**
5 **DEATH SENTENCE** will be served or was served on the appropriate parties hereto in the
6 manner(s) stated below:

7 **TO BE SERVED BY THE COURT VIA ELECTRONIC FILING:** The foregoing document will
8 be served by the court's electronic filing system, Odyssey File & Serve, via courtesy copy and
9 hyperlink to the document. On July 18, 2016, the foregoing document was submitted for electronic
10 filing with the court and the following persons are on the courtesy copy list to receive an electronic
11 notice of the transmission at the email addresses stated below:

12 TO: Clark County District Attorney's Office

13 Email: Motions@clarkcountyda.com

14 TO: COLLEEN BAHARAV, Deputy District Attorney,

15 Email: Colleen.Baharav@clarkcountyda.com

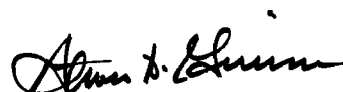
16 TO: RICHARD SCOW, Chief Deputy District Attorney

17 Email: Richard.Scow@clarkcountyda.com

18
19 **SERVED BY UNITED STATES MAIL:** On July 18, 2016, I served the following persons and/or
20 entities at the last known addresses by placing a true and correct copy thereof in a sealed envelope
21 in the United States Postal Service, First-Class, prepaid postage affixed thereto, and addressed as
22 follows:

23 Robert Brown, Jr.
24 Clark County Detention Center
25 330 S. Casino Center Blvd.
26 Las Vegas, Nevada 89101

27 By: /s/ Andrea Luem
28 An Employee of The Law Offices of Andrea L.
Luem, Esq.



CLERK OF THE COURT

MTN

LAW OFFICES OF ANDREA L. LUEM

ANDREA L. LUEM, ESQ.

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Phone: (702) 830-7925

Email: asg@gregoryandwaldo.com

Attorneys for Defendant, ROBERT BROWN, JR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

ROBERT BROWN, JR.,

Defendant.

CASE NO. 14-C-299234

DEPT. NO. IX

HEARING DATE: August 18, 2016

HEARING TIME: 9:00 a.m.

**MOTION TO PRECLUDE THE COURT FROM PARTICIPATING IN
REHABILITATION OF POTENTIAL JURORS**

COMES NOW, the Defendant, ROBERT BROWN, JR., by and through his attorneys, ANDREA L. LUEM, ESQ. and AMANDA S. GREGORY, ESQ., and each of them respectfully requests this Honorable Court to refrain from or participate in the rehabilitation of potential jurors.

This Motion is made and based upon the attached Points and Authorities, the pleadings, and papers on file herein, and any oral argument deemed necessary by this Court.

///

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///

///

1 DATED this 18th day of July, 2016.

2 Respectfully Submitted by:

3
4 By: /s/ Andrea Luem
5 **ANDREA L. LUEM, ESQ.**
6 Nevada Bar No.: 008844
7 400 S. Fourth Street, Suite 280
8 Las Vegas, NV 89101
9 Phone: (702) 600-8403
10 Email: andrea@luemlaw.com

11 By: /s/ Amanda Gregory
12 **AMANDA S. GREGORY, ESQ.**
13 Nevada Bar No. 11107
14 GREGORY AND WALDO, LLC
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19 Attorneys for Defendant, ROBERT BROWN, JR.
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1 **NOTICE OF MOTION**

2
3 TO: THE STATE OF NEVADA, Plaintiff; and
4 TO: STEVEN B. WOLFSON, ESQ., Clark County District Attorney, Attorney for Plaintiff;
5 TO: COLLEEN BAHARAV, Deputy District Attorney,
6 Email: Colleen.Baharav@clarkcountyda.com
7 TO: RICHARD SCOW, Chief Deputy District Attorney
8 Email: Richard.Scow@clarkcountyda.com
9

10 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and
11 foregoing Motion for hearing before the court on the 18th day of August, 2016, at 9:00 a.m. in the
12 District Court, Department 9, or as soon thereafter as this matter may be heard.
13

14 DATED this 18th day of July, 2016.

15 Respectfully Submitted by:

16
17 By: /s/ Andrea Luem
18 **ANDREA L. LUEM, ESQ.**
19 Nevada Bar No.: 008844
20 400 S. Fourth Street, Suite 280
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24 By: /s/ Amanda Gregory
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Attorneys for Defendant, ROBERT BROWN, JR.

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. STATEMENT OF FACTS**

4 The Defendant, ROBERT BROWN, JR. (hereinafter “Mr. Brown”), is charged by way of
5 Grand Jury Indictment with Murder with Use of a Deadly Weapon, Invasion of the Home while in
6 Possession of a Deadly Weapon, Burglary While in Possession of a Firearm, Attempted Murder
7 with Use of a Deadly Weapon (two counts), Child Abuse, Neglect or Endangerment with Use of
8 a Deadly Weapon, Discharge of a Firearm from or Within a Structure (eight counts) and Possession
9 of a Firearm by an Ex-Felon.

10 The State alleges that Mr. Brown entered the apartment home of Esther Maestas by
11 breaking through a window, that while inside the home, Mr. Brown stabbed and shot Nichole Nick
12 to death. That Mr. Brown also shot Esther Maestas several times and that the shooting and stabbing
13 occurred in close proximity to a three-year-old child, Kayla Higgins.

14 Mr. Brown is charged with First-Degree Murder and, if convicted, the State intends to
15 argue that he be sentenced to death.

16 The instant motion follows.

17 **II. ARGUMENT**

18 Pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution,
19 Mr. Brown respectfully request that this Court refrain from rehabilitating potential jurors during
20 voir dire. The purpose of voir dire is “to facilitate the identification and removal from the venire
21 of individuals who, because of bias or prejudice, cannot serve as fair and impartial jurors.” Silver
22 State Disposal Co. v. Shelley, 105 Nev. 309, 312, 774 P.2d 1044, 1046 (1989). “Voir dire provides
23 a means of discovering actual implied bias and a firmer basis upon which the parties may exercise
24 their peremptory challenges intelligently.” J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

25 Voir dire will not be accomplished if the trial judge rehabilitates potential jurors, especially
26 through the use of leading questions. The trial judge holds a unique position and stature in the
27 mind of the venire person. Randolph v. State, 117 Nev. 970, 984-85, 36 P.3d 424, 434 (2001). A
28 juror is more likely to give an answer in response to a question from a judge that indicates he or

1 she could and will follow the law. Additionally, the trial judge must rule and make decisions with
2 regard to the parties' challenges for cause. The trial judge's role in the voir dire process precludes
3 him from taking a partisan position in the questioning of jurors. Kinna v. State, 84 Nev. 642, 647,
4 447 P.2d 32, 35 (1968). The impartial position of the trial judge will be compromised if the judge
5 rehabilitates potential jurors, especially through the use of leading questions. Although such
6 questions may work in favor of Mr. Brown at times, that does not remedy the prejudice to her
7 caused by this general type and line of questioning by the trial judge. Mr. Brown will be prejudiced
8 if potential jurors are not candid and honest about their viewpoint because of any possible desire
9 by a potential juror to please the trial judge with the most socially and politically correct response.
10 Questioning and rehabilitation of potential jurors must and can be adequately addressed by the
11 parties' respective attorneys. The defendant has an obligation to examine jurors on voir dire and
12 discover facts that affect an individual's qualifications to serve on the jury. Whitlock v. Salmon,
13 104 Nev. 24, 27-28, 752 P.2d 210, 212 (1988).

14 Finally, Mr. Brown makes this general objection to the Court presenting general questions
15 to a potential juror during individual voir dire and then allowing counsel to examine jurors in
16 accordance with previously submitted questions. Voir dire will be most effective if trial counsel
17 is allowed to ask initial questions of the potential jurors, and if the court finds that counsel has not
18 adequately covered or accomplished the purpose of voir dire, the judge could follow up with any
19 non-leading questions he might have. For the reasons mentioned above, this proposed method and
20 sequence of any questioning will more effectively produce candid and honest responses from
21 potential jurors.

22 III. CONCLUSION

23 WHEREFORE, the Defendant, ROBERT BROWN, JR., moves for an Order from this
24 Honorable Court to refrain from or participate in the rehabilitation of potential jurors during jury
25 selection.

26 ///

27 ///

1 DATED this 18th day of July, 2016.
2

3 Respectfully Submitted by:
4

5 By: /s/ Andrea Luem
6 **ANDREA L. LUEM, ESQ.**
7 Nevada Bar No.: 008844
8 400 S. Fourth Street, Suite 280
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11 Email: andrea@luemlaw.com

12 By: /s/ Amanda Gregory
13 **AMANDA S. GREGORY, ESQ.**
14 Nevada Bar No. 11107
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19 Email: asg@gregoryandwaldo.com

20 Attorneys for Defendant, ROBERT BROWN, JR.
21
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1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, hereby certify that a true copy of **MOTION TO PRECLUDE THE**
3 **COURT FROM PARTICIPATING IN REHABILITATION OF POTENTIAL JURORS**
4 was served upon interested parties by way of facsimile transmission as follows.

5
6 TO BE SERVED BY THE COURT VIA ELECTRONIC FILING: The foregoing document will
7 be served by the court's electronic filing system, Odyssey File & Serve, via courtesy copy and
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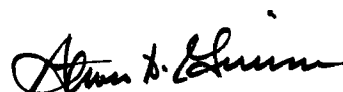
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24 Clark County Detention Center
25 330 S. Casino Center Blvd.
26 Las Vegas, Nevada 89101

27 By: /s/ Andrea Luem
28 An Employee of The Law Offices of Andrea L. Luem, Esq.



CLERK OF THE COURT

MTN
LAW OFFICES OF ANDREA L. LUEM
ANDREA L. LUEM, ESQ.
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Phone: (702) 830-7925
Email: asg@gregoryandwaldo.com
Attorneys for Defendant, ROBERT BROWN, JR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,	)	CASE NO. 14-C-299234
	)	DEPT. NO. IX
Plaintiff,)	
)	
vs.)	
)	
ROBERT BROWN, JR.,)	
)	
Defendant.	)	HEARING DATE: August 18, 2016
	)	HEARING TIME: 9:00 a.m.

**MOTION TO BAR THE ADMISSION OF CUMULATIVE VICTIM IMPACT
EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE**

COMES NOW, the Defendant, ROBERT BROWN, JR., by and through his attorneys,
ANDREA L. LUEM, ESQ. and AMANDA S. GREGORY, ESQ., hereby moves this Honorable
Court for an order barring the admission of cumulative victim impact evidence.

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1 This motion is based on the following points and authorities, and any argument at the time
2 set for hearing on the Motion.

3 DATED this 18th day of July, 2016.

4 Respectfully Submitted by:

5
6 By: _____
7 **ANDREA L. LUEM, ESQ.**
8 Nevada Bar No.: 008844
9 400 S. Fourth Street, Suite 280
10 Las Vegas, NV 89101
11 Phone: (702) 600-8403
12 Email: andrea@luemlaw.com

13 By: _____
14 **AMANDA S. GREGORY, ESQ.**
15 Nevada Bar No. 11107
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17 324 S. Third Street #2
18 Las Vegas, NV 89101
19 Phone: (702) 830-7925
20 Email: asg@gregoryandwaldo.com

21 Attorneys for Defendant, ROBERT BROWN, JR.

22 ///

23 ///

24 ///

1 **NOTICE OF MOTION**

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: STEVEN B. WOLFSON, ESQ., Clark County District Attorney, Attorney for Plaintiff;

4 TO: COLLEEN BAHARAV, Deputy District Attorney,

5 Email: Colleen.Baharav@clarkcountyda.com

6 TO: RICHARD SCOW, Chief Deputy District Attorney

7 Email: Richard.Scow@clarkcountyda.com

8 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and
9 foregoing Motion for hearing before the court on the 18th day of August, 2016, at 9:00 a.m. in
10 the District Court, Department 9, or as soon thereafter as this matter may be heard.

11 DATED this 18th day of July, 2016.

12 Respectfully Submitted by:

13
14 By: /s/ Andrea Luem

ANDREA L. LUEM, ESQ.

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18 By: /s/ Amanda Gregory

AMANDA S. GREGORY, ESQ.

19 Nevada Bar No. 11107

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23 Attorneys for Defendant, ROBERT BROWN, JR.

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1 U.S. 367, 397, 108 S.Ct 1860, 100 L.Ed.2d 384, (1988)(Rehnquist, C.J. dissenting). The reason
2 for that was because:

3 [V]ictim impact evidence must be excluded because it would be difficult, if not
4 impossible, for the defendant to rebut such evidence without shifting the focus of
5 the sentencing hearing away from the defendant, thus creating a “ ‘mini-trial’ on
6 the victim's character.” *Booth, supra*, 482 U.S., at 506–507, 107 S.Ct. at 2534–
7 2535. In many cases the evidence relating to the victim is already before the jury at
8 least in part because of its relevance at the guilt phase of the trial. But even as to
9 additional evidence admitted at the sentencing phase, the mere fact that for tactical
10 reasons it might not be prudent for the defense to rebut victim impact evidence
11 makes the case no different than others in which a party is faced with this sort of a
12 dilemma. As we explained in rejecting the contention that expert testimony on
13 future dangerousness should be excluded from capital trials, “the rules of evidence
14 generally extant at the federal and state levels anticipate that relevant, unprivileged
15 evidence should be admitted and its weight left to the factfinder, who would have
16 the benefit of cross-examination and contrary evidence by the opposing party.”
17 *Barefoot v. Estelle*, 463 U.S. 880, 898, 103 S.Ct. 3383, 3397, 77 L.Ed.2d 1090
18 (1983).

19 *Payne v. Tennessee*, 501 U.S. 808, 823, 111 S. Ct. 2597, 2607, 115 L. Ed. 2d 720
20 (1991).

21 The introduction of such cumulative, redundant and oppressive victim impact evidence is
22 so unduly prejudicial as to violate the principles of fundamental fairness and the constitutional
23 requirements of the Federal Due Process Clause of the Fourteenth Amendment of the United States
24 Constitution and Nevada Constitutional Declaration of Article I, section 8 of the Nevada State Due
25 Process Clause.

26 For these reasons and any others that may be raised at the time of the hearing on this
27 motion, the Defendant’s motion to bar the admission of victim’s impact evidence should be
28 granted.

29 III. CONCLUSION

30 For the foregoing reasons, the Defendant, ROBERT BROWN, JR., respectfully requests
31 that this Honorable Court enter an Order barring the admission of cumulative victim impact
32 evidence.

33 ///

34 ///

1 DATED this 18th day of July, 2016.

2 Respectfully Submitted by:

3
4 By: /s/ Andrea Luem

ANDREA L. LUEM, ESQ.

Nevada Bar No.: 008844

400 S. Fourth Street, Suite 280

Las Vegas, NV 89101

Phone: (702) 600-8403

Email: andrea@luemlaw.com

8 By: /s/ Amanda Gregory

AMANDA S. GREGORY, ESQ.

Nevada Bar No. 11107

GREGORY AND WALDO, LLC

324 S. Third Street #2

Las Vegas, NV 89101

Phone: (702) 830-7925

Email: asg@gregoryandwaldo.com

13 Attorneys for Defendant, ROBERT BROWN, JR.

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, hereby certify that a true and correct copy of Defendant's foregoing
3 **MOTION TO BAR THE ADMISSION OF COMULATIVE VICTIM IMPACT EVIDENCE**
4 **IN VIOLATION OF THE DUE PROCESS CLAUSE** will be served or was served on the
5 appropriate parties hereto in the manner(s) stated below:
6

7 **TO BE SERVED BY THE COURT VIA ELECTRONIC FILING:** The foregoing document will
8 be served by the court's electronic filing system, Odyssey File & Serve, via courtesy copy and
9 hyperlink to the document. On July 18, 2016, the foregoing document was submitted for electronic
10 filing with the court and the following persons are on the courtesy copy list to receive an electronic
11 notice of the transmission at the email addresses stated below:
12

13 TO: Clark County District Attorney's Office
14 Email: Motions@clarkcountyda.com
15 TO: COLLEEN BAHARAV, Deputy District Attorney,
16 Email: Colleen.Baharav@clarkcountyda.com
17 TO: RICHARD SCOW, Chief Deputy District Attorney
18 Email: Richard.Scow@clarkcountyda.com
19

20 **SERVED BY UNITED STATES MAIL:** On July 18, 2016, I served the following persons and/or
21 entities at the last known addresses by placing a true and correct copy thereof in a sealed envelope
22 in the United States Postal Service, First-Class, prepaid postage affixed thereto, and addressed as
23 follows:

24 Robert Brown, Jr.
25 Clark County Detention Center
26 330 S. Casino Center Blvd.
Las Vegas, Nevada 89101

27 By: /s/ Andrea Luem
28 An Employee of The Law Offices of
Andrea L. Luem, ESQ.


CLERK OF THE COURT

MTN
LAW OFFICES OF ANDREA L. LUEM
ANDREA L. LUEM, ESQ.
Nevada Bar No.: 008844
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324 S. Third Street #2
Las Vegas, Nevada 89101
Phone: (702) 830-7925
Email: asg@gregoryandwaldo.com
Attorneys for Defendant, ROBERT BROWN, JR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,	)	CASE NO. 14-C-299234
	)	DEPT. NO. IX
Plaintiff,)	
)	
vs.)	
)	
ROBERT BROWN, JR.,)	
)	
Defendant.	)	HEARING DATE: August 18, 2016
	)	HEARING TIME: 9:00 a.m.

MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

COMES NOW, the Defendant, ROBERT BROWN, JR., by and through his attorneys, ANDREA L. LUEM, ESQ. and AMANDA S. GREGORY, ESQ., and hereby moves this Court to allow individual sequestered *voir dire* of prospective jurors at the upcoming trial in this matter.

This Motion is made and based upon the attached Points and Authorities, the pleadings, exhibits and papers on file herein, and any oral argument deemed necessary by this Court.

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///

///

1 DATED this 18th day of July, 2016.

2
3 Respectfully Submitted by:

4 By: /s/ Andrea Luem

5 **ANDREA L. LUEM, ESQ.**

6 Nevada Bar No.: 008844

7 Email: andrea@luemlaw.com

8 By: /s/ Amanda Gregory

9 **AMANDA S. GREGORY, ESQ.**

10 Nevada Bar No. 11107

11 Attorneys for Defendant, ROBERT BROWN, JR.

1 **NOTICE OF MOTION**

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: STEVEN B. WOLFSON, ESQ., Clark County District Attorney, Attorney for Plaintiff;

4 TO: COLLEEN BAHARAV, Deputy District Attorney,

5 Email: Colleen.Baharav@clarkcountyda.com

6 TO: RICHARD SCOW, Chief Deputy District Attorney

7 Email: Richard.Scow@clarkcountyda.com

8 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and
9 foregoing Motion for hearing before the court on the 18th day of August, 2016, at 9:00 a.m. in the
10 District Court, Department 9, or as soon thereafter as this matter may be heard.

11 DATED this 18th day of July, 2016.

12 Respectfully Submitted by:

13
14 By: /s/ Andrea Luem

ANDREA L. LUEM, ESQ.

15 Nevada Bar No.: 008844

16 400 S. Fourth Street, Suite 280

17 Las Vegas, NV 89101

18 Phone: (702) 600-8403

19 Email: andrea@luemlaw.com

20 By: /s/ Amanda Gregory

AMANDA S. GREGORY, ESQ.

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26 Email: asg@gregoryandwaldo.com

27 Attorneys for Defendant, ROBERT BROWN, JR.

28 ///

///

///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF FACTS**

3 The Defendant, ROBERT BROWN, JR. (hereinafter “Mr. Brown”), is charged by way of
4 Grand Jury Indictment with Murder with Use of a Deadly Weapon, Invasion of the Home while in
5 Possession of a Deadly Weapon, Burglary While in Possession of a Firearm, Attempted Murder
6 with Use of a Deadly Weapon (two counts), Child Abuse, Neglect or Endangerment with Use of
7 a Deadly Weapon, Discharge of a Firearm from or Within a Structure (eight counts) and Possession
8 of a Firearm by an Ex-Felon.

9 The State alleges that Mr. Brown entered the apartment home of Esther Maestas by breaking
10 through a window, that while inside the home, Mr. Brown stabbed and shot Nichole Nick to death.
11 That Mr. Brown also shot Esther Maestas several times and that the shooting and stabbing occurred
12 in close proximity to a three-year-old child, Kayla Higgins.

13 Mr. Brown is charged with First-Degree Murder and, if convicted, the State intends to argue
14 that he be sentenced to death.

15 The instant motion follows.

16 **II. ARGUMENT**

17 It is well-settled that the Sixth and Fourteenth Amendments to the United States
18 Constitution and Article 1 of the Nevada Constitution guarantee a capital defendant the right to an
19 impartial jury. Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2237, 101 L.Ed.2d 80 (1988);
20 Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985); Irvin v. Dowd, 366 U.S.
21 717, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961). *Voir dire* plays a critical function in protecting that
22 constitutional right. Rosales-Lopez v. United States, 451 U.S. 182, 188, 101 S. Ct. 1629, 1634, 68
23 L.Ed.2d 22 (1981) (Without an adequate *voir dire*, the trial judge cannot fulfill his responsibility
24 to remove prospective jurors who will not be able to impartially follow the court’s instructions and
25 evaluate the evidence); Connors v. United States, 158 U.S. 408, 413, 15 S. Ct. 951, 953, 39 L.Ed.2d
26 258 (1976) (Recognizing that the lack of adequate *voir dire* impairs an accused’s right to exercise
27 peremptory challenges).

28 Where there is a significant possibility of prejudice, particularly in cases where the accused

1 has encountered highly unfavorable media pretrial coverage, the trial court must ensure that *voir*
2 *dire* is sufficient to unearth potential prejudice in the jury pool. Patton v. Yount, 467 U.S. 1025,
3 1034- 1036, and n.10, 104 S. Ct. 2885, 2890-2891, 81 L.Ed.2d 847 (1984); See also, Coleman v.
4 Kemp, 778 F.2d 1487 (11th Cir. 1985); Berryhill v. Zant, 858 F.2d 633, 639-643 (11th Cir. 1988)
5 (Clark, J., concurring).

6 In Nevada, “The court shall conduct the initial examination of prospective jurors, and
7 defendant or the defendant’s attorney and the district attorney are entitled to supplement the
8 examination by such further inquiry as the court deems proper. Any supplemental examination
9 must not be unreasonably restricted.” NRS 175.031. As a threshold matter, it is within the
10 discretion of this Court to determine the scope of *voir dire* and the method by which *voir dire* is
11 pursued. Summers v. State, 102 Nev. 195, 718 P.2d 676 (1986). Additionally, the Nevada
12 Supreme Court has suggested to the Nevada trial courts that jurors be admonished to exercise
13 restraint in not exposing themselves to media accounts concerning the case in which they are
14 empaneled. Pacheco v. State, 82 Nev. 172, 44 P.2d 100 (1966). The legislature subsequently
15 amended NRS 175.401(2) to address this concern and require the trial court to admonish the jury
16 it is their duty to refrain from watching or listening to any news medium covering the case.

17 One difficulty with panel *voir dire* of jurors regarding, for example, their knowledge of
18 publicity about a given case is that the knowledge of one juror will soon become the knowledge
19 of all. Sequestered *voir dire* concerning publicity will eliminate this problem. A sequestered *voir*
20 *dire* encourages forthrightness and insulates prospective jurors from each other’s answers and
21 opinions. In State v. Libby, 109 Nev. 905; 859 P.2d 1050 (1993), the Defendant contended that
22 the district court erred in refusing to permit individual *voir dire* to determine the extent of juror
23 exposure to publicity. Though ultimately affirming the verdict in that matter, the Court did say
24 that the district court should have allowed defense counsel to question the other jurors individually
25 concerning their potential exposure to publicity.

26 Finally, as a pre-condition to appellate review, there must be a showing in the record that
27 a member of the jury has been exposed to news media, and has been influenced by it. United
28 States v. Heffler, 270 F.Supp. 79, (E.D. Pa. 1967); United States v. Heffler, 402 F.2d 924 (3rd Cir.

1 1968); cert. denied, 394 U.S. 946. The primary question is whether there has been an effect on the
2 substantial rights of the accused. NRS 177.255. Because it may be difficult for the trial court to
3 measure prejudice, the court ruled in Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968) that the
4 issue is not whether the trial judge views an article as prejudicial, but rather, whether the article
5 tends to have a prejudicial effect on the jurors' minds. In instances of doubt, the jury must be
6 examined.

7 In this case, defense counsel requests sequestered individual *voir dire* of the prospective
8 jury members prior to their hearing this case to ensure fundamental fairness in these proceedings
9 to Mr. Brown. The proposed method of examination is commonly used, and is the most efficient
10 method of empaneling a fair and impartial jury in light of the potential for juror prejudice in the
11 typically media-intensive capital case.

12 In a capital case such as this, the only way to ensure Mr. Brown a fair and impartial jury is
13 to conduct *voir dire* with each individual outside the presence of other jurors. This selection
14 process may be slightly more time consuming than other methods of jury selection. When an
15 individual's life hangs in the balance, a modest increase in the time required for *voir dire* should
16 not be a controlling factor. In Ham v. South Carolina, 409 U.S. 524, 534 (1973), the United States
17 Supreme Court stated that permitting slightly more extensive *voir dire* may place some "additional
18 burden on the administration of justice... 'it would be far more injurious to permit it to be thought
19 that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquires
20 designed to elicit the fact of disqualification were barred.'" (Marshall, J., concurring and dissenting
21 in part) (quoting Aldridge v. United States, 283 U.S. 308, 315 (1931) (Hughes, J., concurring)). A
22 slightly longer *voir dire* is a small price to pay for achieving the optimum method of ensuring the
23 selection of a fair and impartial jury.

24 **A. VOIR DIRE IN THE PRESENCE OF ALL PROSPECTIVE JURORS MAY**
25 **INHIBIT FULL DISCLOSURE OF JUROR PREJUDICE.**

26 It is well-recognized that many aspects of large group *voir dire* prevent jurors from giving
27 frank and open responses to the questions asked. *Voir dire* is functionally an interview for jury
28 service. Accordingly, the quality of information obtained is controlled by the conditions under

1 which the interview is conducted. There are a number of factors that inhibit the honest expression
2 of opinion when *voir dire* is conducted in the courtroom in the presence of a large group.

3 First, the courtroom is an intimidating place for most prospective jurors. They are often
4 unaccustomed to and uncomfortable speaking in front of large groups as they must during panel
5 *voir dire*. Jurors are fully aware that they will be included or excluded from the jury based upon
6 their answers to the questions asked. A large panel setting is likely to inhibit even the most
7 conscientious jurors from responding frankly and openly.

8 Second, juror responses during *voir dire* are significantly influenced by what the juror
9 believes the trial judge expects and wishes to hear. As is often the case, individuals avoid
10 contradicting or displeasing an interviewer who is perceived as having higher status than the
11 subject. In the courtroom, the judge is the most highly respected authority figure, and
12 consequently, jurors attempt to give responses that they believe will please the judge. In short,
13 large group *voir dire* allows prospective jurors the opportunity to review other jurors' responses
14 to judicial and attorney questions, and to thereby discern relevant judicial attitudes and tailor their
15 responses accordingly. When people are questioned by an authority figure such as the trial judge
16 in a courtroom, they become less open, less candid and are more likely to withhold information.

17 Third, the expressed attitudes of prospective jurors are affected by what they learn about
18 the beliefs of other jurors. It is well documented that jurors will attempt to respond during *voir*
19 *dire* in a socially appropriate manner instead of simply speaking truthfully. This tendency is
20 reinforced by the unfamiliar and highly formal atmosphere that a courtroom presents to most
21 prospective jurors. Under such conditions of unfamiliarity and uncertainty, the tendency to
22 conform as closely as possible to the behavior of others is undeniably strong. This tendency will
23 be even greater in the instant matter as the jurors will likely be confronted with local and national
24 television media in the courtroom. Consequently, the successive *voir dire* of individuals in the
25 presence of a large group, with television cameras present, effectively taints the responses of jurors
26 questioned later by permitting them to listen to answers given earlier.

27 Fourth, *voir dire* frequently focuses on very personal issues about which jurors are
28 sometimes hesitant to speak publicly. Potential jurors tend to respond by minimizing the

1 information disclosed when subjected to public scrutiny in the presence of a large and unfamiliar
2 audience. In addition, jurors will often adjust or disguise their responses to match those of other
3 individuals in the group or to obtain the approval of the Court. In this case, it is likely that there
4 will be questions posed to prospective jurors concerning very sensitive subjects. There is a great
5 chance that potential jurors will be too embarrassed to give forthright answers if other jurors are
6 present. The protection of the venireperson is an important right that must be secured. Press
7 Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

8 Sequestered individual *voir dire* eliminates or minimizes each of these drawbacks by
9 providing for individual questioning outside the presence of all other jurors. The process of
10 identifying juror bias is made more efficient and more effective by eliminating the inhibiting effect
11 of a large audience and the tendency for potential jurors to incorporate the *voir dire* testimony of
12 others into their own. The procedure proposed by Mr. Brown, therefore, significantly enhances
13 the prospect that he will be tried by a fair and impartial jury.

14 0

15 **B. THE ACCUSED IS ENTITLED TO ATTORNEY-CONDUCTED,**
16 **SEQUESTERED INDIVIDUAL VOIR DIRE TO MINIMIZE THE**
17 **PREJUDICIAL EFFECT OF THE DEATH QUALIFICATION PROCESS.**

18 The Sixth Amendment guarantee of a fair and impartial jury precludes potential jurors from
19 being excluded from the jury in a capital case based upon general objections to the death penalty
20 or conscientious or religious scruples against its infliction. Witherspoon v. Illinois, 391 U.S. 510,
21 522; 88 S.Ct. 1770; 20 L.Ed.2d 776 (1968). The objective of the Witherspoon-Witt inquiry during
22 *voir dire* is not to furnish a vehicle for the exclusion of jurors, but to insure against the exclusion
23 of qualified objectors to the death penalty. Adams v. Texas, 448 U.S. 38, 45; 100 S.Ct. 2521; 65
24 L.Ed.2d 581 (1980). Hence, a prospective juror may be excluded for cause only if his views
25 regarding the death penalty “would prevent or substantially impair the performance of his duties
26 as a juror in accordance with his instructions and his oath.” Id. The death-qualification process
27 seeks to determine if any prospective jurors would vote against the death penalty without regard
28 to the evidence produced at trial because of opposition to the death penalty. People v. Clark, 50
Cal.3d 583, 268 Cal.Rptr. 399, 408 (1990) (citing People v. Adcox, 47 Cal.3d 207, 250, 253

1 Cal.Rptr. 55 (1988); Wainwright v. Witt, 469 U.S. at 416. See also, People v. Mattson, 268
2 Cal.Rptr. 802, 815 (1990).

3 In our neighboring State of California, in Hovey v. Superior Court, the California Supreme
4 Court, acting pursuant to its supervisory power over California criminal procedure, held that death-
5 qualifying *voir dire* should be sequestered in order to “minimize each juror’s exposure to the death-
6 qualifying *voir dire* of others.” Hovey v. Superior Court, 28 Cal.3d 1, 80 – 81, 168 Cal.Rptr. 128
7 (1980). The Hovey decision was premised upon the potential prejudicial effects associated with
8 death-qualifying *voir dire* in open Court with the entire jury panel present. Specifically, the Court
9 determined that a reduction in the pre-trial emphasis on penalty should minimize the tendency of
10 a death-qualified jury to presume guilt and expect conviction. Id. at 80. While individual and
11 sequestered death-qualifying *voir dire* is not constitutionally required, it is less susceptible to error,
12 and remains the most effective means of minimizing the deleterious effects of exposing each juror
13 to the death-qualifying *voir dire* of others. Trujillo v. Sullivan, 851 F.2d 597, 606 (10th Cir. 1987),
14 McCorquodale v. Balkcom, 721 F.2d 1493, 1498 (11th Cir. 1983); People v. Anderson, 240
15 Cal.Rptr. 585; 43 Cal.2d 1134, 1136 (1987); McCorquodale, 721 F.2d at 1498. Given the frailty
16 of human institutions and the enormity of the jury’s decisions to take or spare a life, trial courts
17 must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which
18 society has entrusted the ultimate responsibility for life or death. Hovey, 28 Cal.3d at 81.

19 Notwithstanding the fact that California has re-legislated their juror *voir dire* procedures,
20 the reasoning in Hovey is still sound. The Superior Courts in California still have great discretion
21 in their jury selection procedures. The Defendant contends that *voir dire* conducted in open court
22 is not constitutionally sufficient in light of the circumstances of this case. The potential for
23 prejudice, which was the underlying rationale of Hovey, is clearly present in this case because the
24 Witherspoon-Witt determination will necessarily involve discussion of the fact that the prosecution
25 seeks the death penalty for the Defendant. The Defendant’s attorneys must be permitted to inquire
26 about the prospective jurors attitudes toward imposing a death verdict and their willingness to
27 follow instructions regarding mitigation.

28 Moreover, death-qualifying *voir dire* of the entire jury panel in open Court is unlikely to

1 elicit sufficient information to determine whether any individual juror excused for cause is actually
2 unable to set aside his or her opposition to the death penalty. Such a procedure would place counsel
3 for the Defendant in an impossible position. Counsel might have reason to believe certain excluded
4 jurors were actually qualified, but could not prove it without further questions designed to elicit a
5 clear and unambiguous response, and would have serious disincentives to pose such questions in
6 open Court. Hence, death-qualifying *voir dire* of the entire venire is impracticable because it will
7 furnish the prosecution with a vehicle for the exclusion of jurors on a broader basis than permitted
8 by Adams v. Texas and Witherspoon.

9 Finally, with respect to high-profile cases, the Ninth Circuit Court of Appeals has said:

10 [W]hen pretrial publicity is great, the trial judge must exercise
11 correspondingly great care in all aspects of the case relating to
12 publicity which might tend to defeat or impair the rights of an
13 accused. The judge must insure that the *voir dire* examination of
14 the jurors affords a fair determination that no prejudice has been
15 fostered. . . . He must determine whether “the nature and strength
of the opinion formed are such as in law necessarily raised the
presumption of partiality.” Reynolds v. United States, 98 U.S. 145,
156, 25 L.Ed. 244 (1878).

16 Individual questioning is designed to keep other potential members of the jury from being
17 exposed to publicity of which they may not be aware. This procedure of individual questioning is
18 recommended by the American Bar Association in its Standards Relating to Fair Trial and Free
19 Press § 3.4 (1968). Thus, this Court should allow the defense to conduct individually sequestered
20 *voir dire* at the upcoming trial of this matter to ensure that the Defendant’s Fifth, Sixth, and
21 Fourteenth Amendment rights under the U.S. Constitution are met.

22 III. CONCLUSION

23 For the foregoing reasons, the Defendant, ROBERY BROWN, JR., respectfully requests
24 that this Court enter an Order allowing the defense to conduct individual sequestered *voir dire* of
25 prospective jurors at the upcoming trial of this matter.

26 ///

27 ///

28 ///

1 DATED this 18th day of July, 2016.

2 Respectfully Submitted by:

3
4 By: /s/ Andrea Luem

ANDREA L. LUEM, ESQ.

5 Nevada Bar No.: 008844

6 400 S. Fourth Street, Suite 280

7 Las Vegas, NV 89101

8 Phone: (702) 600-8403

9 Email: andrea@luemlaw.com

10 By: /s/ Amanda Gregory

AMANDA S. GREGORY, ESQ.

11 Nevada Bar No. 11107

12 GREGORY AND WALDO, LLC

13 324 S. Third Street #2

14 Las Vegas, Nevada 89101

15 Phone: (702) 830-7925

16 Email: asg@gregoryandwaldo.com

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, hereby certify that a true and correct copy of Defendant's foregoing
3 **MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE** will be served or was served on
4 the appropriate parties hereto in the manner(s) stated below:

5
6 TO BE SERVED BY THE COURT VIA ELECTRONIC FILING: The foregoing document will
7 be served by the court's electronic filing system, Odyssey File & Serve, via courtesy copy and
8 hyperlink to the document. On July 18th, 2016, the foregoing document was submitted for
9 electronic filing with the court and the following persons are on the courtesy copy list to receive
10 an electronic notice of the transmission at the e-mail addresses stated below:

11 TO: Clark County District Attorney's Office

12 Email: Motions@clarkcountyda.com

13 TO: COLLEEN BAHARAV, Deputy District Attorney,

14 Email: Colleen.Baharav@clarkcountyda.com

15 TO: RICHARD SCOW, Chief Deputy District Attorney

16 Email: Richard.Scow@clarkcountyda.com

17
18 SERVED BY UNITED STATES MAIL: On July 18, 2016, I served the following persons and/or
19 entities at the last known addresses by placing a true and correct copy thereof in a sealed envelope
20 in the United States Postal Service, First-Class, prepaid postage affixed thereto, and addressed as
21 follows:

22 Robert Brown, Jr.
23 Clark County Detention Center
24 330 S. Casino Center Blvd.
25 Las Vegas, Nevada 89101

26 By: /s/ Andrea Luem

27 An Employee of The Law Offices of
28 Andrea L. Luem, Esq.

EIGHTH JUDICIAL DISTRICT COURT CLARK COUNTY, NEVADA

State of Nevada

PLAINTIFF

-VS-

Robert Brown

DEFENDANT

CASE NO: C-299234

DEPT. NO: 9

MEDIA REQUEST AND ORDER ALLOWING
CAMERA ACCESS TO COURT PROCEEDINGS*Please fax to (702) 671-4548 to ensure that
the request will be processed as quickly as possible.

CLERK OF THE COURT

Gregory Klein

(name), of

MY Entertainment

(media organization)

hereby requests permission to broadcast, record, photograph or televise proceedings in the above-entitled case in

Dept. No. 9, the Honorable Judge Togliatti Presiding, on the 25th day of
October, 2016

I hereby certify that I am familiar with, and will comply with Supreme Court Rules 229-246, inclusive. If this request is being submitted less than twenty-four (24) hours before the above-described proceedings commence, the following facts provide good cause for the Court to grant the request on such short notice:

It is further understood that any media camera pooling arrangements shall be the sole responsibility of the media and must be arranged prior to coverage, without asking for the Court to mediate disputes.

Dated this 18th day of October, 2016SIGNATURE: PHONE: 646.267.2107

***** IT IS HEREBY ORDERED THAT:

☐ The media request is denied because it was submitted less than 24 hours before the scheduled proceeding was to commence, and no "good cause" has been shown to justify granting the request on shorter notice.

☐ The media request is denied for the following reasons: _____

☒ The media request is granted. The requested media access remains in effect for each and every hearing in the above-entitled case, at the discretion of the Court, and unless otherwise notified. This order is made in accordance with Supreme Court Rules 229-246, inclusive, at the discretion of the judge, and is subject to reconsideration upon motion of any party to the action. Media access may be revoked if it is shown that access is distracting the participants, impairing the dignity of the Court, or otherwise materially interfering with the administration of justice.

☐ OTHER: _____

IT IS FURTHER ORDERED that this document shall be made a part of the record of the proceedings in this case.

Dated this 19th day of October, 2016

Jennifer P. Togliatti
DISTRICT COURT JUDGE, 12

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

State of Nevada

PLAINTIFF

-VS-

Robert Brown

DEFENDANT

CASE NO: C-14-299234-1

DEPT. NO: 9

NOTIFICATION OF
MEDIA REQUEST

TO: COUNSEL OF RECORD IN THE ABOVE-CAPTIONED CASE:

You are hereby notified pursuant to Supreme Court Rules 229-246, inclusive, that media representatives from MY Entertainment have requested to obtain permission to broadcast, televise, record or take photographs of all hearings in this case. Any objection should be filed at least 24 hours prior to the subject hearing.

DATED this 19th day of October, 2016.

Uickie Warren

Eighth Judicial District Court

CERTIFICATE OF SERVICE BY FACSIMILE TRANSMISSION

I hereby certify that on the 19th day of October, 2016, service of the foregoing was made by facsimile transmission only, pursuant to Nevada Supreme Court Rules 229-246, inclusive, this date by faxing a true and correct copy of the same to each Attorney of Record addressed as follows:

Plaintiff

District Attorney

(702) 455-2294

Defendant

Public Defender

(702) 455-5112

Uickie Warren

Eighth Judicial District Court

mc
DA 1.
PP
AOR- 2.
Gregory 3.

DISTRICT COURT
CLARK COUNTY, NEVADA

4. STATE OF NEVADA } Case No.: 14-C-299234
5. Plaintiff, } Dept. No.: IX
6. vs. } Docket No. Electronically Filed
7. ROBERT BROWN, JR., Accused, by } Date: 01/30/2017 11:22:59 AM
8. Yahshua Ariyl Ha-Kohen, In Pro Personam } Time: *Allen D. Blum*
9. } CLERK OF THE COURT

10. DATE: 2/22/17 TIME: 9AM

11. MOTION FOR A BILL OF PARTICULARS

12. NRCF 7(F); ECR 12-1 (b)(3)

13.
14. COMES, the accused in the above-entitled action, ROBERT
15. BROWN, and:

16. 1. Demands an exact Complaint, which reflects every ELEMENT
17. (Actual, Constructive, or Otherwise) of every charge. This includes,
18. but is not limited to:

- 19. (A) The ACTOR(s)
- 20. (B) The VICTIM(s)
- 21. (C) The PLACE(s)
- 22. (D) The State or the State
- 23. (E) Every Presumption, which is heretofore used, relied upon,
24. or otherwise intended to supply any proof or evidence
25. by or for the State's prosecutor(s).

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JAN 19 2017
CLERK OF THE COURT

1. The accused ROBERT BROWN is unable to properly prepare any
2. Motions to Dismiss, or a Writ of Prohibition, until this
3. court informs the accused of what is included in the charges,
4. and how and why any omitted elements intended to be used.

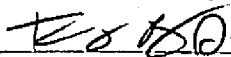
5.
6. See Memorandum of Law, attached hereto.

7.
8. WHEREFORE, accused ROBERT BROWN moves this Court to
9. provide and clarify the issues herein; or in the ALTERNATIVE, allow
10. the accused to submit one (1) copy of this Motion for a Bill of
11. Particulars to each juror in this case during opening remarks.

12.
13. The accused Respectfully submits this Motion without any
14. fault against due course of law; and thus humbly requests, that
15. this Court will, BY LEAVE OF COURT, and in the interest of justice
16. and Fairness, hear this Motion, since previous counsels failed the
17. accused's written request to do so.

18.
19. Date: January 15, 2017 (C.E.)

20. Respectfully submitted,

21. 

22. ROBERT BROWN JR., by

23. Yahshua Ariyl Ha-Kohen (In Pro Persona)

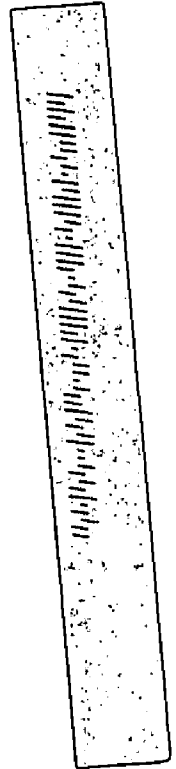
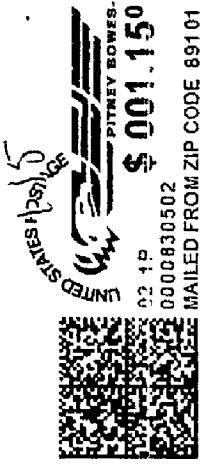
24.

25.

Robert Brown 6006120
Clark County Dtn. Ctr. - ZN-04
330 S. Casino Ctr. Blvd.
Las Vegas, NV 89101

Clerk of the Court
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

LEGAL



SENT FROM CCDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Alan K. Johnson
CLERK OF THE COURT

mc
DA 1.
PP
AOR- 2.
Gregory 3.

4. STATE OF NEVADA,) Case No.
5. Plaintiff) Dept. No.
6. vs.)
7. ROBERT BROWN, JR., Accused, by)
8. Yahshua Ariyl Ha-Kohen, In Pro Persona)
9.)
10.)
11.)

"NOTICE OF MOTION"

DATE OF HEARING 2 / 22 / 2017

TIME OF HEARING 9 : 00 AM/PM

16. You will please take notice that the above mentioned Accused,
17. ROBERT BROWN, will come on for hearing in the forthcoming
18. Motion for a Bill of Particulars on the
19. 22 Day of FEBRUARY, 2017; @ time set forth 9:00 AM/PM,
20. Dept. No. IX

21. * Court Clerk to set specifics; To advise parties of interest as such.

22. Respectfully submitted,

23. Date: January 15, 2017 (c.e.)

TEIXA

24. ROBERT BROWN JR, by

25. Yahshua Ariyl Ha-Kohen, In Pro Persona

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CLERK OF THE COURT

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ROR-
Gregory

DISTRICT COURT
CLARK COUNTY, NEVADA

Alvin L. Blum
CLERK OF THE COURT

3.

4.

STATE OF NEVADA

Case No.: C-14-299234

5.

Plaintiff

Dept. No.: IX

6.

vs.

Docket No.:

7.

ROBERT BROWN, JR., Accused, by

Date:

8.

Yahshua Ariyl Ha-kohen, In Pro Persona

Time:

9.

10.

11.

MEMORANDUM OF LAW IN SUPPORT OF

12.

MOTION FOR A BILL OF PARTICULARS

13.

14.

ARGUMENT

15.

16.

1. Nevada's statutes are incompletely defined. For example, Nevada's murder statute does not mention the Actor.

17.

18.

NRS 200.010: "Murder" defined. Murder is the unlawful killing of a human being:

19.

20.

1. with malice aforethought, either express or implied.

21.

22.

The State's Complaint does nothing to supply an actual element regarding the Actor of said statute.

23.

24.

25.

EX PARTE SCHULTZ, 42 Nev. 254 (1918) "The complaint lacks essential elements of the crime charged. These cannot

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1. be supplied by intendment or implication. "[Citations omitted]
2. See STATE v. JAVIER, 289 P.3d 1194 (2012); and ANDERSON v.
3. STATE, 95 Nev. 625 (1979)

4.

5. Different words are used for the Actor in a murder statute,
6. depending on the district. Examples include:

7. 1. Anyone
8. 2. Whoever
9. 3. Whosoever
10. 4. Person
11. 5. Human

12.

13. This is no trivial matter, since INHERENT QUALITIES may
14. attach to some and not others. Likewise, some LEGAL QUALITIES may
15. attach to some and not others. For example, a "HUMAN" may
16. be presumed to have an inherently evil nature, since this
17. generation is in fact an evil generation. Whereas, a "PERSON"
18. may be defined by statute to be an IDEAL person. And obviously,
19. this may be expressly, or impliedly done without clarification.

20.

21. Furthermore, there may be QUALIFYING TERMS attached
22. to some and not others. For example, a "PERSON" in law, may be
23. Qualified by the term "Reasonable," so as to constitute a Standard,
24. by which the law will hold a person to, under some, if not all
25. circumstances. And again, this may be expressly, or impliedly

1. done without clarification.

2.

3. In FINGER v. NEVADA, 117 Nev. 548 (2001), the accused

4. successfully argued that the Nevada legislature had unlawfully

5. passed an act that disregarded the INHERENT "WRONGFULNESS"

6. in the INTENT with which the law was concerned, which effect

7. was to treat every crime like that of a Strict Liability offense.

8.

9. In MORISSETTE v. UNITED STATES, 342 U.S. 246 (1952), the accused

10. successfully argued that, because the legislature had in fact OMITTED

11. an element of the offense charged, this by no means relieved

12. the prosecution from proving that element. Such a presumption

13. violated Due Process. Cf. HOLLIS v. NEVADA (1980) (presumption of Element ERROR)

14.

15. In MULLANEY v. WILBUR, 421 U.S. 684 (1975), the Court there,

16. made clear that the Beyond a Reasonable Doubt standard announced

17. in IN RE WINSHIP is not limited to ELEMENTS, but to EVERY FACT

18. which a prosecutor must prove.

19.

20. ULSTER COUNTY v. ALLEN, 442 U.S. 140 (1979) (announcing a

21. presumption Unconstitutional when it has "sweeping effect" of

22. others)

23.

24. TURNER v. U.S., 396 U.S. 398 (1970) (stating congress can create

25. crimes and define elements, but not relieve prosecution from proving elements)

1. It is known to the state of Nevada that the accused is known
2. as a member of Clergy, and is likewise known by his Spiritual
3. Name, "ARIEL" (Yahshua Ariyl Ha-Kohen), a Hebrew Israylite. See
4. CSI pictures of the accused's apartment, and Witness State-
5. ments:

6.
7. Mark Robertson: P. 50, Ln. 7-9
8. Esther Maestas: P. 21, Ln. 17-20
9. Angela Maestas: P. 5, Ln. 5-20
10. Kathleen Maestas: P. 5, Ln. 10-15

11.
12. The fact that the accused has entered into Religion, being
13. what is called "Jewish", affords him certain RIGHTS, which
14. not just "anyone" or "everyone" or every "person", etc., can be pre-
15. sumed to have by law. Therefore, Nevada law needs to clarify
16. what Actor is intended in the charges, as well as any other
17. element that is not plainly expressed, or is otherwise omitted.
18. from its VAGUE Complaint.

19.
20. For the Supreme Court has said: in LANZETTA v. N.J.,
21. 306 U.S. 451 (1939), that "[n]o one may be required at peril of life,
22. liberty or property to speculate as to the meaning of penal
23. statutes. All are entitled to be informed as to what the
24. State commands or forbids."

25.

1. It may be that this court depends upon the erroneous
2. presumption that the accused, being a Spiritual Man, KNOWS
3. or UNDERSTANDS this law. However, in BRENT v. STATE, 43
4. Ala. 297 (1869), it was ruled that the presumption of knowledge
5. of law did not extend to presuming that a person knew
6. how the courts would construe a statute, and whether it
7. was constitutional or unconstitutional.

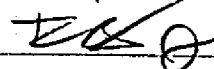
8. Nevada law cannot use a Specific term (e.g., "defendant"), nor
9. an Individual's Specific Name to supplant any omitted Element,
10. since its criminal laws speak of its Subjects in GENERAL TERMS.

11. CHADBOURNE v. HANCHETT, 35 Nev. 319 (1912) "The law knows
12. no person, it is not made for the individual man but for men."

13.
14.
15. WHEREFORE, the accused ROBERT BROWN moves
16. this court to provide the information requested, or in
17. the Alternative, allow the accused to submit one (1) copy of
18. this Motion for a Bill of Particulars to each juror in this
19. case during opening remarks.

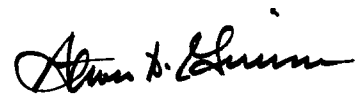
20.
21. Date: January 15, 2017 (C.E.)

22. Respectfully submitted,

23. 

24. ROBERT BROWN, by

25. Yahshua Ariyl Ha-Kohen, In Pro Persona



CLERK OF THE COURT

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
COLLEEN R. BAHARAV
Chief Deputy District Attorney
Nevada Bar #11777
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT BROWN,
#6006120

Defendant.

CASE NO: C-14-299234-1

DEPT NO: IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

DATE OF HEARING: FEBRUARY 22, 2017
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through COLLEEN R. BAHARAV, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for a Bill Of Particulars.

This Opposition 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.

//

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STATEMENT OF THE CASE

On December 11, 2012, Robert Brown, Jr. (hereinafter “Defendant”) was charged by way of Criminal Complaint with: Count I – Invasion of the Home While in Possession of a Deadly Weapon (Category B Felony – NRS 205.067); Count II – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Count III – Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165); Counts IV and V – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); and Count 6 – Possession of Firearm by Ex-Felon (Category B Felony – NRS 202.360). A warrant of arrest issued for Defendant on December 11, 2012, as Defendant was believed to have fled the jurisdiction.

Defendant was not booked on the warrant until April 11, 2014. He appeared in court on April 17, 2014, and counsel was appointed for him. Defendant’s preliminary hearing was set for June 10, 2014.

On April 28, 2014, the State filed an Amended Criminal Complaint adding Counts VII-XIV – Discharge of Firearm From or Within a Structure (Category B Felony – NRS 202.287) and Count XV – Child Abuse, Neglect, or Endangerment with Use of a Deadly Weapon (Category B Felony – NRS 200.508(1); 193.165). Defendant’s preliminary hearing was ultimately reset to July 1, 2014, as new counsel needed to be appointed.

Prior to Defendant’s preliminary hearing on July 1, 2014, the State filed a Second Amended Criminal Complaint amending the theory of prosecution under Count III and altering the underlying felony supporting Count VI. Following the presentation of evidence, Count V was also amended by interlineation to allege a different theory of prosecution based upon the evidence presented at the preliminary hearing. The Court ultimately held Defendant to answer on Counts I – XIV as alleged in the Second Amended Criminal Complaint and continued its decision on Count XV to review case law provided by the defense, Clay v. State, 129 Nev. Adv. Op. 48, 305 P.3d 898 (2013). On July 3, 2014, after reviewing the case law provided by the defense and hearing arguments from both parties, the Court held Defendant to answer on Count XV as well.

1 The State filed an Information on July 17, 2014, charging Defendant with: Count I –
2 Invasion of the Home While in Possession of a Deadly Weapon (Category B Felony – NRS
3 205.067); Count II – Burglary While in Possession of a Deadly Weapon (Category B Felony
4 – NRS 205.060); Count III – Murder with Use of a Deadly Weapon (Category A Felony –
5 NRS 200.010, 200.030, 193.165); Counts IV and V – Attempt Murder with Use of a Deadly
6 Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count VI –
7 Possession of Firearm by Ex-Felon (Category B Felony – NRS 202.360); Counts VII-XIV –
8 Discharge of Firearm From or Within a Structure (Category B Felony – NRS 202.287); and
9 Count XV – Child Abuse, Neglect, or Endangerment with Use of a Deadly Weapon (Category
10 B Felony – NRS 200.508(1); 193.165). Defendant was arraigned on July 21, 2014. He pled
11 not guilty and invoked his right to a trial within 60 days. Defendant’s trial was set for
12 September 2, 2014.

13 The State filed a Notice of Intent to Seek Death Penalty on August 8, 2014. In support
14 of its intent to seek the death penalty, the State alleged the following aggravating
15 circumstances: (1) the murder was committed by a person who had been convicted of a felony
16 involving the use or threat of violence to the person of another (NRS 200.033(2)) – based upon
17 Defendant’s 1998 felony conviction out of California for Carjacking; (2) the murder was
18 committed by a person who had been convicted of a felony involving the use or threat of
19 violence to the person of another (NRS 200.033(2)) – based upon Defendant’s 1998 felony
20 conviction out of California for Corporal Injury to Spouse; (3) the murder was committed by
21 a person who had been convicted of a felony involving the use or threat of violence to the
22 person of another (NRS 200.033(2)) – based upon Defendant’s potential conviction for the
23 Attempt Murder of Esther Maestas in the instant case; (4) the murder was committed by a
24 person who had been convicted of a felony involving the use or threat of violence to the person
25 of another (NRS 200.033(2)) – based upon Defendant’s potential conviction for the Attempt
26 Murder of K.H.; (5) the murder was committed by a person who knowingly created a great
27 risk of death to more than one person by means of a weapon, device or course of action which
28 would normally be hazardous to the lives of more than one person (NRS 200.033(3)); and (6)

1 the murder was committed while the person was engaged, alone or with others, in the
2 commission of, or an attempt to commit or flight after committing or attempting to commit
3 invasion of the home or burglary, and the person charged killed or attempted to kill the person
4 murdered (NRS 200.033(4)). The State filed its Notice of Evidence in Support of Aggravating
5 Circumstances on August 19, 2014.

6 At Defendant's calendar call on August 21, 2014, Defendant's counsel indicated that
7 they would not be prepared to proceed given that the State filed a Notice of Intent to Seek
8 Death Penalty as well as the fact that Defendant's trial was set within thirty (30) days of his
9 initial arraignment in District Court. Upon inquiry by the Court, Defendant refused to waive
10 his right to have a trial within 60 days, so the Court ordered that the trial date of September 2,
11 2014, stand unless the parties could agree otherwise. Defendant's counsel subsequently met
12 with Defendant and on September 2, 2014, Defendant agreed to waive his right to a trial within
13 60 days and continue the trial. After Defendant expressed concerns regarding his counsel, the
14 Court set a status check on Defendant's concerns and on resetting the trial. Defendant's trial
15 was ultimately reset for June 8, 2015.

16 The preliminary hearing transcripts in this case were filed on September 11, 2014.
17 Defendant filed a Petition for Writ of Habeas Corpus on October 10, 2014. The State's Return
18 to Writ was filed on October 27, 2014. The Court held a hearing on Defendant's petition on
19 October 30, 2014. Following the arguments of counsel, the court denied Defendant's Petition
20 for Writ of Habeas Corpus. The Order denying Defendant's petition was filed on November
21 25, 2014.

22 On March 3, 2015, Defendant filed a Motion to Dismiss Counsel and Appointment of
23 Alternative Counsel. Defendant subsequently filed complaints with the Nevada State Bar
24 against his counsel. On April 9, 2015, the Court granted Pete Christiansen and Joshua
25 Tomscheck's motions to withdraw as counsel and set the case for appointment of alternate
26 counsel. Andrea Luem confirmed as counsel on April 16, 2015. Defendant's trial setting was
27 vacated and the case was set for a hearing to determine a new trial date.

28 ///

1 At a status check on trial setting on June 11, 2015, Defendant's trial was reset to August
2 19, 2016. Per counsel, the timing was due to the need to hire a mitigation expert, conduct
3 further investigation, and file motions. On October 27, 2015, counsel filed several motions
4 including: 1) Motion to Declare Nevada's Death Penalty Statutes Unconstitutional; 2) Motion
5 for Discovery; 3) Motion for Jury Questionnaire; and 4) Motion to Compel Production of
6 Defendant's Direct and Vicarious Statements. The State filed its opposition to Defendant's
7 Motion to Declare Nevada's Death Penalty Statutes Unconstitutional on November 5, 2015,
8 and filed oppositions to the remainder of Defendant's motions on November 18, 2015.

9 The Court held a hearing on Defendant's motions on December 15, 2015. The Court
10 granted Defendant's request for a jury questionnaire, most of Defendant's discovery requests,
11 and Defendant's request for his statements. The Court continued Defendant's motion
12 regarding the constitutionality of the death penalty statute to February 23, 2016.

13 At a status check on trial readiness on January 21, 2016, the defense indicated they
14 were on track to be ready for the trial setting in August. On March 15, 2016, counsel requested
15 that their motion to declare the death penalty unconstitutional be taken off calendar so that
16 they could file additional motions. The Court granted that request. The Court also set a status
17 check on the jury questionnaire for July 21, 2016.

18 On July 11, 2016, Defendant filed a Motion to Dismiss Counsel as well as a Motion to
19 Proceed "Pro-Se" and Appoint "Stand-in-Counsel." His attorneys, meanwhile, filed the
20 following motions on July 18, 2016: 1) Motion for an Order Permitting Discovery of Records
21 Pertaining to Family Life of Victim; 2) Motion for the Court to Disclose its Views Regarding
22 the Imposition of Capital Punishment; 3) Motion to Prohibit Evidence and Argument
23 Concerning Mitigating Circumstances not Raised by Defendant; 4) Motion for Court to Allow
24 Presentation of Evidence to the Jury of the Disproportionality and Arbitrariness and
25 Unfairness of a Death Sentence; 5) Motion to Preclude the Court from Participating in
26 Rehabilitation of Potential Jurors; 6) Motion to Bar the Admission of Cumulative Victim
27 Impact Evidence in Violation of the Due Process Clause; and 7) Motion for Individual
28 Sequestered Voir Dire.

1 On July 21, 2016, counsel announced not ready for the August trial setting as they were
2 trying to locate additional witnesses. The State had no objection to continuing the trial. The
3 Court ordered Defendant and his counsel to meet, however, prior to addressing Defendant's
4 Motion to Dismiss Counsel. Defendant's counsel indicated Defendant refused to meet with
5 them so the Court ordered Defendant to meet with his counsel. The Court then set a status
6 check on August 2, 2016, to readdress the issue. At that date, the Court had a discussion with
7 Defendant regarding self-representation and continued the case to have a hearing outside of
8 the State's presence on August 5, 2016.

9 Ultimately, the Court had Defendant evaluated to determine whether or not he
10 understood the proceedings. He was found competent. Accordingly, on September 15, 2016,
11 the Court conducted a Faretta Canvass on the Defendant. The Court found that Defendant was
12 competent to represent himself, that he understood the nature of the charges and the
13 ramifications of representing himself. At that time, Defendant requested that all of the motions
14 pending be withdrawn. The Court granted Defendant's request. The Court also ordered the
15 State to produce a hard copy of its discovery for Defendant and to provide it to him in open
16 court on September 22, 2016. On September 22, 2016, Defendant was handed the entire file
17 of his prior counsel Ms. Luem including their mitigation file, with the exception of 1200 pages
18 of medical records. The State also prepared and provided its discovery, absent any audio discs,
19 to Defendant. The Court appointed an investigator and set the case for a status check on
20 October 6, 2016.

21 On October 6, 2016, the Court noted that Defendant had chosen to represent himself
22 but the Court would have standby counsel. The Court also informed the parties that it would
23 have hearings outside of the presence of the district attorney if necessary to help the case
24 proceed. Defendant's investigator Alberto Fuentes was present and able to ask any questions
25 he deemed appropriate at that time.

26 At the next status check date on October 25, 2016, the Court excused the State from the
27 courtroom and held a hearing with Defendant. Once the State was allowed back into the
28 courtroom, the Court informed the parties that it was going to decline to appoint a different

standby lawyer other than Ms. Amanda Gregory or her partner Jennifer Waldo. Upon inquiry by the Court, the State advised that it would provide any witnesses addresses to Mr. Fuentes, but requested that these addresses remain confidential from Defendant. Defendant's trial was then reset to its current setting of March 20, 2017.

Defendant filed the instant motion on January 30, 2017. The State's opposition is as follows.

ARGUMENT

Defendant appears to be claiming that the Information is not sufficiently specific because it fails to identify an "actor" in the charges. See Defendant's Motion for a Bill of Particulars, pp 6:1-18. He appears to also believe that since the State has not charged him by a name he chooses to use, the State has failed to identify an actor in this case. Id. Defendant's claim is without merit and his request for a bill of particulars should be denied.

NRS 173.075 provides:

1. The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged.
2. ...It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.

NRS 173.075 (2013).

It is well established that Nevada is a notice-pleading jurisdiction and not a common law pleading jurisdiction, where factually detailed pleadings are required. State v. McKiernan, 17 Nev. 224, 227, 30 Pac. 831 (1882); Garnick v. First Judicial District Court, 81 Nev. 531, 535, 407 P.2d 163 (1965). Thus, in accordance with the notice pleading standard, it is evident that the purpose of a charging document is "solely to put the defendant on formal written notice of the charge he must defend." Sanders v. Sheriff, 85 Nev. 179, 182, 451 P.2d 718, 720 (1969). "The complaint is a written statement of the essential facts constituting the public offense charged." NRS 171.102 (2013). The primary inquiry is not into whether the charging document could have been more artfully drafted, but whether the defendant was given

adequate notice of the crime charged. Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 234 (1979).

To require the State to provide a bill of particulars, there must be some prima facie showing the charging document is so vague or indefinite Defendant is left without any notice of what the State intends to prove at the time of trial. Moreover, the purpose of a bill of particulars is to enable Defendant to prepare an adequate defense at the time of trial, and not to enter the trial without any idea of what will be presented to the jury.

For example, in United States v. Ayers, 924 F.2d 1468 (1991), the defendant was charged in an indictment which contained five different theories of the government's case, along with fifteen separate instances of conduct supporting those theories. Defendant requested a bill of particulars, arguing he had no notice of how the government was going to present its case, and therefore could not adequately prepare a defense. Id. at 1483-84. The defendant's request was denied by the trial court, and he appealed. Id. In ruling the trial court did not err in denying the defendant's request, the Ninth Circuit Court of Appeals recognized that a bill of particulars serves three functions:

[T]o inform the defendant of the nature of the charges against him with sufficient precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague, and indefinite for such purposes.


Id. (quoting United States v. Giese, 597 F.2d 1170, 1180 (9th Cir. 1979) (internal citations omitted). The Court went on to note the defendant was not entitled to a bill of particulars, regardless of the multiple theories alleged in the indictment because the indictment contained notice of the charges, was sufficiently specific enough, and moreover, the defendant had been provided with a substantial amount of discovery by the government to assist him in preparing a defense. Id.

The State has alleged in an Information the following:

That ROBERT BROWN JR., the Defendant(s) above named, having committed the crimes of INVASION OF THE HOME WHILE IN POSSESSION OF A DEADLY WEAPON (Category

1 B Felony – NRS 205.067 – NOC 50437); BURGLARY WHILE
2 IN POSSESSION OF A DEADLY WEAPON (Category B
3 Felony – NRS 205.060 – NOC 50426); MURDER WITH USE OF
4 A DEADLY WEAPON (Category A Felony – NRS 200.010,
5 200.030, 193.165 – NOC 50001); ATTEMPT MURDER WITH
6 USE OF A DEADLY WEAPON (Category B Felony – NRS
7 200.010, 200.030, 193.330, 193.165 – NOC 50031);
8 POSSESSION OF FIREARM BY EX-FELON (Category B
9 Felony – NRS 202.360 – NOC 51460); DISCHARGE OF
10 FIREARM FROM OR WITHIN A STRUCTURE (Category B
11 Felony – NRS 202.287 – NOC 51445) and CHILD ABUSE,
12 NEGLECT, OR ENDANGERMENT WITH USE OF A
13 DEADLY WEAPON (Category B Felony – NRS 200.508(1);
14 193.165 – NOC 55228), on or about the 7th day of December,
15 2012, within the County of Clark, State of Nevada, contrary to the
16 form, force and effect of statutes in such cases made and provided,
17 and against the peace and dignity of the State of Nevada, [...]

18 The State then went on to list all of the charges in detail it alleged the Defendant committed
19 and how he committed those offenses. While his name is not listed in each charge, the State
20 alleged that he committed all of the crimes charged. Accordingly, Defendant's claim that the
21 Information does not identify an "actor" is incorrect.

22 To the extent that Defendant is claiming that the State must address him by his chosen
23 name of "Yahshua Ariyl Ha-kohen," the State is not in the business of addressing defendants
24 by other than their legal names. Defendant's August 22, 2012, Nevada Seasonal Resident ID
25 issued by the Nevada Department of Motor Vehicles lists Defendant's name as Robert Brown
26 Jr. It was signed by Defendant as .¹

27 Clearly, had Defendant intended his legal name to be "Yahshua Ariyl Ha-kohen" Defendant
28 should have legally changed his name. Unless and until that happens, the State will continue
referring to Defendant by his legal name.

¹ To preserve Defendant's privacy and the privacy of any family members located at the address listed on Defendant's Seasonal Resident ID, the State is declining to attach a copy of this ID to this motion. The State will have a copy present in Court, however, so that the Court may review it.

1 Defendant has not demonstrated how he has been given inadequate notice of the
2 charges against him. It also bears noting that in this case, a preliminary hearing was already
3 held, and thus Defendant was put on notice that he was being accused of the charges the State
4 was proceeding on. Defendant has not been deprived of notice to prepare a defense for trial,
5 and thus, his request should be denied in its entirety.

6 **CONCLUSION**

7 Based upon the foregoing, the State respectfully requests that Defendant's motion be
8 denied.

9 DATED this 10th day of February, 2017.

10 Respectfully submitted,

11 STEVEN B. WOLFSON
12 Clark County District Attorney
Nevada Bar #1565

13
14 BY /s/ Colleen R. Baharav
15 COLLEEN R. BAHARAV
16 Chief Deputy District Attorney
17 Nevada Bar #11777
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 13th day of February, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROBERT BROWN, #6006120
CCDC
330 S. Casino Center Blvd.
Las Vegas, Nevada 89101

BY: /s/ J. Georges
Secretary for the District Attorney's Office

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 10th day of February, 2017, by electronic transmission to:

ALBERTO FUENTES, Investigator
E-mail Address: manitopi@yahoo.com

BY: /s/ J. Georges
Secretary for the District Attorney's Office

CB/cb/VCU(DVU)

Heather Hemin
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

4. STATE OF NEVADA, } Case No.: C-14-299234
5. Plaintiff } Dept. No.: IX
6. vs. }
7. ROBERT BROWN, JR., Accused, by }
8. Yahshua Ariyl Ha-Kohen, In Pro Persona }
9. }

11. MOTION FOR CONTINUANCE OF TRIAL

12. NRCP 7.30

MC

14. The accused, ROBERT BROWN, is charged with Nevada's crimes
15. against murder, home invasion, child neglect, burglary, inter alia. Nevada
16. is seeking the death penalty.

17. The accused has been through three (3) court-appointed attorneys
18. who had done next to nothing for this case over a period of two
19. (2) years. In fact, only one (1) motion had been filed for discovery.

20. Since the accused has been acting In Pro Se, a series of
21. setbacks have ensued:

22. (1) On or about 11-10-2016, officers of CCDC jail ran-sacked
23. the entire discovery and workbooks of the accused, throwing them
24. into disarray. See CRB # 16-155.

25. (2) On or about 11-21-2016, the accused was transported to UMC
26. hospital for an emergency surgery to have his gall bladder removed.

27. (3) On or about 2-17-17, an attempt was made by the accused
28. to retrieve his property (discovery, etc.), which was placed in

(1.)

PP
AOR
Amended
DA

CLERK OF THE COURT

MAR 06 2017

RECEIVED

1. CCDC's property room, due to the aforementioned hospitalization.
2. Officer Garrett, P#14954, who attempted to retrieve the property
3. for the accused, returned from the property room, and informed
4. the accused that "all of the property is gone!" See, I/M
5. Grievance filed immediately thereafter, dated 2-17-17.

6. (4) This court is aware that an expert witness (Dr. Chambers)

7. has been recently retained by the state for the accused,

8. but whose report and services are not yet complete.

9. (5) Other expert witnesses are needed by the accused,

10. whose services have not yet been authorized and paid for

11. by this state.

12. (6) Several Subpoenas Duces Tecum, which have already

13. been delivered to this court by the accused for review,

14. have not yet been answered by their respective recipients.

15. (7) A Motion for a Bill of Particulars currently filed

16. by the accused, has not yet been heard by this court. And

17. the decision of such is necessary, before the accused can

18. make an intelligent plan on how to proceed.

19. (8) Notwithstanding all the progress accomplished by the

20. accused and heretofore remains to be accomplished thereby,

21. there is a certain confidence in the rationale that, even

22. the most judicious hard-liner would, Sua Sponte, move

23. this trial setting forward in the interest of fairness.

24. See, e.g., SPARKS v. STATE, 96 Nev. 26 (1980) (holding that

25. even without a formal written oral motion by a party, it

26. is within the district court's discretion to sua sponte

27. continue a hearing based on the absence of a witness,

28. if it finds that good cause exists). Such fairness, moreover

1. ought to be expected, especially by the fact that the accused,
2. as a "Pro Se defendant," has gained such progress that exceeds
3. that of all previous "court-appointed attorneys" combined. It
4. has been by no fault of the accused, by which this court
5. can justifiably place any "legal" burden upon the accused
6. to show cause. Therefore, the accused files this Motion,
7. merely as a matter for the record to reflect how this
8. system has continued to stifle the interests and progress
9. of the accused. A "granting" of this Motion, therefore, is
10. taken by the accused to reflect an acquiescence on the
11. part of this court, that it must *Sua Sponte* move this
12. trial setting forward, for the detrimental position that this
13. system alone has thrown the accused in.

14. (9) The accused has yet to gather caselaw to move this court!
15. to remove Amanda Gregory, whom this court has forced
16. upon the accused as a "stand-by for stand-by counsel"
17. (whatever that means). The record reflects that the
18. accused asked for NEW stand-by counsel of his choosing,
19. which Motion was said to have been "granted" by this
20. court. Instead, this court re-assigned Amanda Gregory,
21. who was one of the attorneys in conflict. Moreover, this
22. attorney is not even 250 qualified; yet she, like this
23. court, has somehow found it to be a show of competence,
24. that she remain in silence of this fact, as a "qualified"
25. [in]effective counsel for a capital case. Needless to say,
26. Amanda Gregory has done nothing to "assist" the accused, since
27. acting in Pro Se, which accounts as this court's contribution
28. to stifling the interests and progress of the accused.

(3.)

1. WHEREFORE, the accused ROBERT BROWN moves
2. this court to move the trial setting forward to a time
3. that is thought appropriate by this court. Due to the
4. repeated interferences, and projected persistence that
5. this system will not relent from, the accused will not
6. endeavor to "Suppose" when to fix a time of readiness.

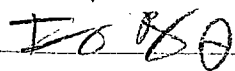
7.
8. (a.) As an obligation for readiness on the part of
9. the accused, it is necessary that this court order CCDC
10. to locate, or report its findings regarding the loss of
11. the discovery and work product, which has been cited
12. in item (3) above. Otherwise, a re-issuance of discovery
13. is necessary, and which will likewise affect any projection
14. for a time of readiness.

15. (b.) Transcripts are also needed (i.e., those from the
16. time of the accused's Motion to Proceed Pro Se). This
17. includes ex parte transcripts.

18. (c.) The accused needs an allowance to repurchase law books
19. lost by CCDC. See item (3) above.

20.
21.
22. Dated: March 6, 2017 (C.E.)

23.
24. Respectfully submitted,

25. 

26. ROBERT BROWN, by

27. Yahshua Ariyl Ha-Kohen, In Pro Persona

Heaven & Hemin
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff

vs.

ROBERT BROWN, JR., Accused, by

Yahshua Ariyl Ha-Kohen, In Pro Persona

Case No.: C-14-299234

Dept. No.: IX

"NOTICE OF MOTION"

You will please take notice, that the above mentioned
ACCUSED, ROBERT BROWN, will come on for hearing in
the forthcoming "MOTION FOR CONTINUANCE OF TRIAL" on
the 28 Day of March, 2017 @ time set forth 9:00 AM/PM,
Dept. No. IX **MC**

* Court Clerk to set specifics; To advise parties of interest
as such *

Respectfully,

RC

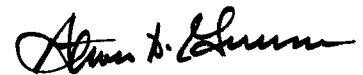
ROBERT BROWN, by

Yahshua Ariyl Ha-Kohen, In Pro Persona

Dated this 6th Day of March, 2017

RP
ADJ
AMANDA
DA

RECEIVED
MAR 06 2017
CLERK OF THE COURT



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

ROBERT BROWN, JR., ,

Defendant.

CASE NO. C-14-299234-1

DEPT. IX

CERTIFICATE OF SERVICE

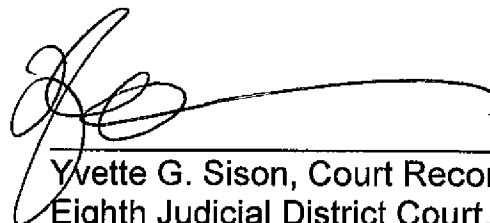
I hereby certify that I am an employee of the Eighth Judicial District Court, Department IX, and that on this day I served copies of the following transcripts: April 16, 2015; May 14, 2015; March 24, 2015; April 9, 2015; November 24, 2015; January 21, 2016 by mailing, electronic mail, or placing a copy in the Clerk's Office attorney folder for:

Richard Scow, Esq. - (DA Criminal)

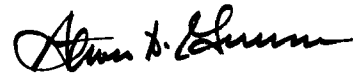
Robert Brown, #6006 120 - Defendant
CCDC
330 S. Casino Center Boulevard
Las Vegas, Nevada 89101

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DATED this 15th Day of March, 2017



Yvette G. Sison, Court Recorder
Eighth Judicial District Court, Dept. IX
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-4391



CLERK OF THE COURT

1 **ROC**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 COLLEEN R. BAHARAV
6 Chief Deputy District Attorney
7 Nevada Bar #11777
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-14-299234-1

12 ROBERT BROWN, JR.,
13 #6006120

DEPT NO: IX

14 Defendant.

15 **RECEIPT OF COPY**

16 The State hereby provides the following items of discovery for Defendant on three
17 discs.¹

18 **DISC 1:**

19 ***Bates Numbered Documents***

- 20 1. BROWN 0000001-0000005 – 1997 California Police Report
21 2. BROWN 0000006-0000009 – 1997 California Police Report
22 3. BROWN 0000010-0000021 – 1998 JOC
23 4. BROWN 0000022-0000035 – 1998 PSI
24 5. BROWN 0000036-0000045 – 121207-4412 Jimmy Durante #232 Search Warrant
25 6. BROWN 0000046-0000053 – 121207-4412 5421 E Harmon #E-13 Search Warrant
26 7. BROWN 0000054-0000070 – 121207-4412 Autopsy Report
27 8. BROWN 0000071-0000072 – 121207-4412 Autopsy Scene Report and Evidence
28 Impound
9. BROWN 0000073-0000074 – 121207-4412 Ballistics Report

¹ Please note, some of these documents, photographs and audio files may be duplicates.

- 1 10. BROWN 0000075 – 121207-4412 Canyon Pointe Apts Complex Map
- 2 11. BROWN 0000076 – 121207-4412 Consent to Search Apt #E-12
- 3 12. BROWN 0000077-0000080 – Declaration of Warrant Summons
- 4 13. BROWN 0000081-0000083 – 121207-4412 DNA Report
- 5 14. BROWN 0000084-0000086 – Esther Maestas Follow Up Scene Report
- 6 15. BROWN 0000087 – 121207-4412 Fingerprint Report
- 7 16. BROWN 0000088-0000090 – 121207-4412 Hospital Scene Report and Evidence
- 8 Impound
- 9 17. BROWN 0000091-0000102 – 121207-4412 Nissan Search Warrant
- 10 18. BROWN 0000103-0000104 – 121207-4412 Scene Diagram
- 11 19. BROWN 0000105-0000118 – 121207-4412 Scene Report and Evidence Impound
- 12 20. BROWN 0000119-0000122 – 121207-4412 Susp Veh Processing and Impound
- 13 21. BROWN 0000123-0000130 – 121207-4412 Unit Log
- 14 22. BROWN 0000131 – 121208-1038 Death of Original Owner (Firearm)
- 15 23. BROWN 0000132 – 121208-1038 Firearm Trace Results
- 16 24. BROWN 0000133-0000136 – 121208-1038 Gun Recovery Scene Report & Evidence
- 17 Impound
- 18 25. BROWN 0000137-0000147 – AMR Records
- 19 26. BROWN 0000148-0000151 – Arrest and Search Warrants
- 20 27. BROWN 0000152-0000155 – Arrest Warrant
- 21 28. BROWN 0000156 – Booking Photo of Defendant
- 22 29. BROWN 0000157 – Buccal Swab Consent
- 23 30. BROWN 0000158 – CA Booking Photo on LV Warrant
- 24 31. BROWN 0000159 – CA DMV
- 25 32. BROWN 0000160-0000181 – CAD and UNIT LOG
- 26 33. BROWN 0000182-0000232 – CCDC Records August 2014 Part 2
- 27 34. BROWN 0000231-0000274 – CCDC Records August 2014
- 28 35. BROWN 0000275-0000303 – CCDC Records June 2015
36. BROWN 0000304 – COR CCW Records
37. BROWN 0000305 – COR Gun Registration
38. BROWN 0000306-0000322 – Coroner's Records
39. BROWN 0000323-0000342 – Fire Department Records
40. BROWN 0000343-0000345 – LAPD Nissan SW Return
41. BROWN 0000346-0000348 – Lease Agreement – Suspect Apt
42. BROWN 0000349-0000351 – Lease Agreement – Victim Apt #E-13
43. BROWN 0000352 – Letter from CA DOC
44. BROWN 0000353 – Letter of Notification from CA Governor's Office

1 45.BROWN 0000354-0000419 – LVMPD CSA Records and Report from Gun Retrieval
2 46.BROWN 0000420 – Nichole Nick – Death Certificate
3 47.BROWN 0000421 – NV DMV ID
4 48.BROWN 0000422 – NV DMV
5 49.BROWN 0000423-0000556 – Preliminary Hearing Transcript
6 50.BROWN 0000557 – Photo of Robert Brown Passport
7 51.BROWN 0000558 – Teletype from LAPD Requesting Governor's Warrant
8 52.BROWN 0000559 – Brocius, John Handwritten Statement
9 53.BROWN 0000560-0000572 – Brocius, John – VS_Redacted
10 54.BROWN 0000573-0000575 – Joel Albert – CSA Notes
11 55.BROWN 0000576-0000577 – Joel Albert – CSA Report
12 56.BROWN 0000578-0000579 – Robbie Dahn – CSA Notes
13 57.BROWN 0000580-0000582 – Robbie Dahn – CSA Report
14 58.BROWN 0000583-0000584 – Shandra Lynch – Crime Scene Diagram
15 59.BROWN 0000585-0000586 – Shandra Lynch – Crime Scene Diagrams
16 60.BROWN 0000587-0000589 – Shandra Lynch – CSA Notes
17 61.BROWN 0000590-0000592 – Terry Martin – CSA Notes
18 62.BROWN 0000593-0000597 – Terry Martin – CSA Report
19 63.BROWN 0000598-0000608 – Amy Nemcik – CSA Notes
20 64.BROWN 0000609-0000614 – Amy Nemcik – CSA Report
21 65.BROWN 0000615-0000618 – Alan Petersen – CSA Notes
22 66.BROWN 0000619-0000621 – Alan Petersen – CSA Report
23 67.BROWN 0000622-0000624 – Vincent Roberts – CSA Notes
24 68.BROWN 0000625-0000626 – Vincent Roberts – CSA Report
25 69.BROWN 0000627-0000634 – William Speas – CSA Report
26 70.BROWN 0000635 – Nick, Nichole – DMV w Photo
27 71.BROWN 0000636-0000637 – Nick, Nichole – DMV
28 72.BROWN 0000638 – Brown Certification
73.BROWN 0000639-0000733 – Brown Med Records CCDC
74.BROWN 0000734-0000737 – 121207-4412 ICR – Annette Darr_Redacted
75.BROWN 0000738-0000741 – 121207-4412 Declaration of Warrant Summons
76.BROWN 0000742-0000761 – 121207-4412 Officer's Report
77.BROWN 0000762 – 121207-4412 Vehicle Impound
78.BROWN 0000763-0000765 – Taylor, Kimberly – DNA Report
79.BROWN 0000766 – Gouldthorpe, Heather – Fingerprint Report
80.BROWN 0000767-0000768 – Kyrlo, James – Ballistics Report
81.BROWN 0000769-0000770 – Robert Brown custody info at LAPD

82. BROWN 0000771 – Subpoena Return – LA PD
83. BROWN 0000772-0000799 – Maestas, Angela – VS_Redacted
84. BROWN 0000800-0000802 – Photo Lineup – Maestas, Angela_Redacted
85. BROWN 0000803-0000819 – Maestas, Kathleen VS_Redacted
86. BROWN 0000820-0000822 – Photo Lineup – Maestas, Kathleen_Redacted
87. BROWN 0000823-0000826 – 121207-4412 Susp Veh Processing and Impound
88. BROWN 0000827 – 121207-4412 Vehicle Impound
89. BROWN 0000828-0000830 – LAPD Nissan SW Return
90. BROWN 0000831-0000848 – LAPD Search Warrant for Nissan
91. BROWN 0000849 – NCIC Hit on Nissan
92. BROWN 0000850 – Nissan CA Registration
93. BROWN 0000851-0000857 – Nissan Pathfinder Records
94. BROWN 0000858-0000864 – O'Brien, John – VS_Redacted
95. BROWN 0000865-0000878 – Officer M. Kehrli – VS
96. BROWN 0000879-0000892 – Officer Kehrli – VS
97. BROWN 0000893-0000899 – CA DOC Abstract of Judgment (2)
98. BROWN 0000900-0000906 – CA DOC Abstract of Judgment
99. BROWN 0000907-0000925 – Defendants California JOC
100. BROWN 0000926-0000983 – LA Preliminary Hearing Transcript 1997
101. BROWN 0000984-0001032 – LA Police Reports 1997
102. BROWN 0001033-0001043 – LAPD Records on Attempt Murder Case
103. BROWN 0001044 – Records Request Letter to CA Department of Corrections
104. BROWN 0001045-0001099 – Robertson, Mark – VS_Redacted
105. Sprint Records
 - a. BROWN 0001100 – 2014-202746-663887
 - b. BROWN 0001101-0001103 – 2014-202746-663888
 - c. BROWN 0001104-0001105 – 2014-202746-663891
 - d. BROWN 0001106-0001109 – Sprint Letter re Subpoena
 - e. BROWN 0001110-0001120 – Sprint Subscriber History for 818-220-9097
 - f. BROWN 0001121-0001122 – 2012-369280-0002
 - g. BROWN 0001123-0001131 – Copy of 2012-369280-0001
106. BROWN 0001132 – 121207-4412 Stanlake, Cody Handwritten Statement
107. BROWN 0001133-0001143 – Stanlake, Cody – VS_Redacted
108. BROWN 0001144-0001146 – 121204-4412 Maestas, Esther_Redacted
109. BROWN 0001147-0001168 – Esther Maestas VS_Redacted
110. BROWN 0001169-0001171 – Maestas, Esther – DMV
111. BROWN 0001172-0001208 – 121207-4412 Higgins, Kayla 12-08-2012

CAC(2)

- 112. BROWN 0001209-0001245 – 121207-4412 Higgins, Kayla 12-08-2012 CAC
- 113. BROWN 0001246-0001271 – Flowers, Tia – VS_Redacted
- 114. DNA Lab Case File

a. Original

i. Case Communications

- 1. BROWN 0001433 – DNA 13-00480 com.log
- 2. BROWN 0001434-0001436 – DNA 13-00480 email from det.
- 3. BROWN 0001437-0001438 – DNA 13-00480 email from det.

ii. Forensic Laboratory Examination Requests

- 1. BROWN 0001439-0001440 – RFLE 1
- 2. BROWN 0001441-0001442 – RFLE 2

iii. Worksheets

- 1. BROWN 0001443-0001450 – Worksheet (1) KDD
- 2. BROWN 0001451-0001463 – Worksheet (2) KDD
- 3. BROWN 0001464-0001469 – Worksheet (3) KDD

iv. BROWN 0001272-0001402 – Case File

v. BROWN 0001403-0001429 – Full Case Report

vi. BROWN 0001430-0001432 – Report of Examination

b. Supplemental (stat update)

i. BROWN 0001470-0001485 – Notice of Amendment of the FBI's STR

ii. BROWN 0001486-0001494 – Supplemental Case File

iii. BROWN 0001495-0001497 – Supplemental Report of Examination

iv. BROWN 0001498-0001500 – Supplemental Review Documentation

v. BROWN 0001501-0001505 – Supplemental Worksheet

vi. BROWN 0001506-0001512 – Supplemental Case Record

115. LP – Lab Case File

a. BROWN 0001513-0001519 – Case Notes

b. BROWN 0001520 – Report of Examination

116. FATM – Lab Case File

a. BROWN 0001521-0001543 – Report of Examination

Audio Files

- 117. 121207-4412 Brocius, John – VS
- 118. 121207-4412 Flowers, Tia – VS
- 119. 121207-4412 Higgins, Kayla – VS CAC
- 120. 121207-4412 Maestas, Angela – VS

- 1 121. 121207-4412 Maestas, Esther – VS
2 122. 121207-4412 Maestas, Kathleen – VS
3 123. 121207-4412 Obrien, John – VS
4 124. 121207-4412 Officer M. Kehrli – VS
5 125. 121207-4412 Robertson, Mark – VS
6 126. 121207-4412 Stanlake, Cody – VS
7 127. 121207-4412 911
8 128. 121208-1038 911
9 129. 121207004412 – 420 5421 E Harmon Ave – Calls
10 130. 121207004412 – 420 5421 E Harmon Ave – SE Radio
11 131. 121207004412 – 420 5421 E Harmon Ave – Timed Admin
12 132. 533 jail calls from April 14, 2014-June 8, 2015

13 ***Photo Files***

- 14 133. Map of Crime Scene and Location of Gun
15 134. Robert Brown Birth Certificate Photo
16 135. Robert Brown CA DL and SS Card Photo
17 136. Robert Brown NV DMV Photo
18 137. Search Warrant 4475 Jimmy Durante
19 138. Search Warrant 5421 E Harmon
20 139. Search Warrant Close-Up 5421 E Harmon
21 140. 182 Autopsy Photos
22 141. Nick, Nichol – DMV Photo
23 142. DNA Lab Case File
24 a. 6 Images
25 143. FATM – Lab Case File
26 a. 56 total files in Images, 24 jpegs
27 144. 2006 Nissan Pathfinder
28 145. Maestas, Esther – DMV Photo

29 ***Other Files***

- 30 146. ATL

31 **DISC 2:**

- 32 147. 121207-4412
33 a. 766 Images

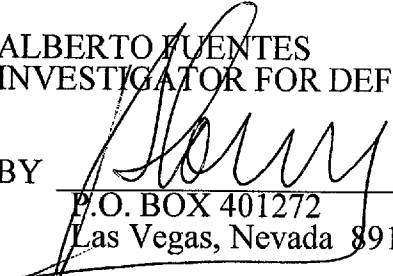
DISC 3:

- 148. 121208-1038
 - a. 27 Images
- 149. Autopsy Photos
 - a. 180 Images
- 150. Crime Scene and Autopsy Photographs
 - a. Autopsy CSA Photos
 - i. 143 Images
 - b. Crime Scene
 - i. 411 Images
 - c. Esther Maestas
 - i. 83 Images
 - d. Gun Recovery
 - i. 27 Images
 - e. Impounded Evidence
 - i. 43 Images
 - f. SW Defendants Apartment
 - i. 66 Images
 - g. SW Defendants Vehicle
 - i. 20 Images
- 151. 2006 Nissan Pathfinder
- 152. Google Earth Image of Apartments
- 153. Search Warrant 4475 Jimmy Durante
- 154. Search Warrant 5421 E Harmon
- 155. Search Warrant Close Up 5421 E Harmon

RECEIPT OF COPY of the above and foregoing discovery is hereby acknowledged
this 23rd day of March, 2017.

ALBERTO FUENTES
INVESTIGATOR FOR DEFENDANT

BY


P.O. BOX 401272
Las Vegas, Nevada 89140

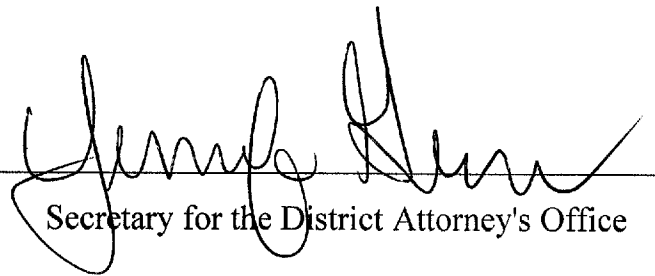
cb/vcu

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 24th day of March, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROBERT BROWN JR
ID# 6006120
CLARK COUNTY DETENTION CENTER
330 South Casino Center Blvd.
Las Vegas, NV, 89101

BY



Secretary for the District Attorney's Office


CLERK OF THE COURT

1 **ORDR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 RICHARD H. SCOW
6 Chief Deputy District Attorney
7 Nevada Bar #09182
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 ROBERT BROWN, JR.,
16 #6006120

17 Defendant.

CASE NO: C-14-299234-1

DEPT NO: IX

ORDER DENYING DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

DATE OF HEARING: March 15, 2017

TIME OF HEARING: 9:00 A.M.

18
19 THIS MATTER having come on for hearing before the above entitled Court on the
20 9th day of March, 2017, the Defendant not being present, IN PROPER PERSON, the Plaintiff
21 being represented by STEVEN B. WOLFSON, District Attorney, through RICHARD H.
22 SCOW, Chief Deputy District Attorney, without argument, based on the pleadings and good
23 cause appearing therefor,

24 ///

25 ///

26 ///

27 ///

28 ///

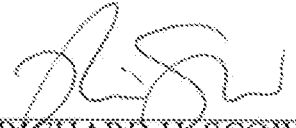
1 IT IS HEREBY ORDERED that the Defendant's Motion for a Bill of Particulars, shall
2 be, and it is DENIED.

3 DATED this 28th day of March, 2017.

4
5 
DISTRICT JUDGE 18

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

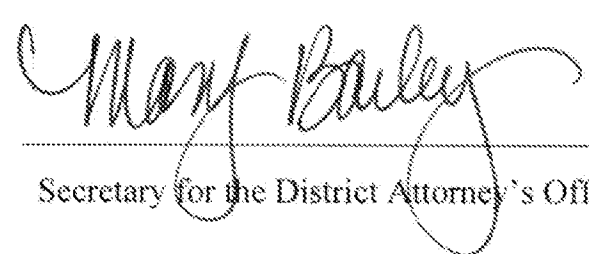
9 BY


10 RICHARD H. SCOW
11 Chief Deputy District Attorney
12 Nevada Bar #09182
13
14

15 CERTIFICATE OF SERVICE

16 I certify that on the 4th day of April, 2017, I mailed a copy of the foregoing
17 Order to: ROBERT BROWN JR., #6006120, Clark County Detention Center, 330 So. Casino
18 Center Blvd., Las Vegas, Nevada 89101.

19
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21 BY


22 Secretary for the District Attorney's Office
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1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
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9 THE STATE OF NEVADA,
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11 Plaintiff,
12 vs.
13 ROBERT BROWN, JR.,
14 Defendant.
15

CASE NO.: C-14-299234-1

DEPT. IX

TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE JENNIFER P. TOGLIATTI,
17 DISTRICT COURT JUDGE
18 TUESDAY, DECEMBER 15, 2015
19 RECORDER'S TRANSCRIPT RE:

20 **STATUS CHECK: TRIAL READINESS/ALL PENDING MOTIONS**

21 APPEARANCES:

22 For the State:

RICHARD SCOW, ESQ.
Deputy District Attorney

23 For the Defendant:

24 AMANDA GREGORY, ESQ.
25 ANDREA LUEM, ESQ.

RECORDED BY: YVETTE SISON, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, December 15, 2015 at 9:24 a.m.

2
3 THE COURT: Robert Brown, C299234-1. The record should reflect the
4 presence of the Defendant. This is the time set for status check trial readiness, a
5 motion for jury questionnaire, and several other motions. Counsel, can you state
6 your appearance?

7 MR. SCOW: Richard Scow for the State.

8 MS. LUEM: Andrea Luem and Amanda Gregory on behalf of Mr. Brown
9 who's present Judge. Could we approach for a moment?

10 THE COURT: I can't record it if you approach.

11 MS. LUEM: That's fine.

12 THE COURT: You sure?

13 MS. LUEM: Yes.

14 THE COURT: On a 250 case?

15 MS. LUEM: Yes.

16 THE COURT: Okay, at your request.

17 [Bench Conference]

18 THE COURT: Okay, Mr. Brown, your lawyer advises me at the bench that
19 she's asking me to continue one motion to discuss it with you further. So, the
20 Defendant's motion to declare Nevada's death penalty statutes unconstitutional will
21 be continued to February –

22 THE CLERK: February 23rd at 9 a.m.

23 THE COURT: Okay, we have several other motions to address at this time,
24 which include – well let's talk about the status check trial readiness. I have the
25 same things I cover every time; has the DA's office done a detective file review?

1 MR. SCOW: We have in the past, but we will do another one.

2 THE COURT: Okay. Have you – so do you know – can you let me know
3 when you could do that.

4 MR. SCOW: Ummm –

5 THE COURT: By the end of January? Middle of January?

6 MR. SCOW: By the middle end of January.

7 THE COURT: Okay, have we had a DA file review?

8 MS. LUEM: Yes, Judge, but we'll probably need to do another one.

9 THE COURT: Okay. Have you had production of all forensic reports and
10 results of examination or any – what's the status of that?

11 MR. SCOW: There's – any reports that have been done or requested, I think
12 we've received and have turned over. I don't expect to receive any more, but we'll –

13 THE COURT: Can you list off what that would include?

14 MR. SCOW: There was a gun examination, and there was some DNA done
15 on that. There's – I don't think there's anything else in this case.

16 THE COURT: Okay. What about transcripts of statements? Either the
17 Defendant's or anybody else? You know, you have transcripts and then you have
18 the actual statements themselves. Have you given over both? I don't know enough
19 about this case to know if there was a Defendant's statement, but I'm just saying;
20 any statements of any human being in this case that would've been recorded.

21 MR. SCOW: We've given all transcripts for sure. Do you have audios?

22 MS. LUEM: I think the only transcripts that we don't have are 911 calls, and I
23 don't know that the State is intending to transcribe those, and if not we can always
24 do that.

25 THE COURT: Okay, but you do have the actual – the CADS and the 911's

1 have been turned over?

2 MR. SCOW: Yes.

3 THE COURT: Okay. You don't have to do transcripts; I'm just asking if you
4 have them, will you turn them over?

5 MR. SCOW: Yes.

6 THE COURT: Okay. And so – and what about a review of physical evidence?

7 MR. SCOW: We have not done that yet.

8 THE COURT: Okay, so you'll do that sometime after the holidays?

9 MR. SCOW: Yes.

10 THE COURT: Make an appointment and go over together.

11 MR. SCOW: Yes.

12 THE COURT: Okay, so I have a – do you want to go through the motion for
13 discovery since we're kind of talking about discovery right now?

14 MR. SCOW: Yes, Judge.

15 THE COURT: Okay, the first request was all physical examinations including
16 video, audio. There was no objection by the State, and you believe you've handed
17 over everything, and if not, if there's something in the detectives file that you get,
18 you will turn it over, yes?

19 MR. SCOW: Correct.

20 THE COURT: Okay. Records regarding benefits and assistance given to any
21 witnesses. And so, my question to you, has any victim of crime been paid any
22 money to your knowledge?

23 MR. SCOW: Probably, but I don't know for sure.

24 THE COURT: Okay. Well, you have to find out.

25 MR. SCOW: Okay.

1 THE COURT: So if it's been paid through the victim of crime fund at your
2 office, administers and seeks to have kept secret on some occasion –

3 MR. SCOW: Oh I don't think that's ever – intended to keep secret at all,
4 Judge.

5 THE COURT: Some of it. Some of it, that it's – current investigations or
6 whatever, whatever, whatever. I'm not saying it's a bad motive, I'm saying that you
7 have your reasoning why some information hasn't been given, whether it's the name
8 or the – whatever, it's widely reported. You have a position related to it, which is,
9 not that I'm criticizing it, I'm simply saying that in this particular case, if there's been
10 any money paid to any victim of crime through that fund, I'm requiring it be produced
11 in this death penalty murder case.

12 MR. SCOW: Okay.

13 MR. RUTLEDGE: Just to be clear, Your Honor –

14 THE COURT: Sure.

15 MR. RUTLEDGE: Victims of crime is a separate entity. It's not run by our
16 office. It was not subject of those newspaper articles.

17 THE COURT: Okay. So money – but there –

18 MR. RUTLEDGE: It's a totally different thing.

19 THE COURT: It's a different thing, but there is victims of crime –

20 MR. RUTLEDGE: Which we have not – which is not –

21 THE COURT: -- assistant center at your office –

22 MR. SCOW: That's not our office there's a –

23 THE COURT: VWAC.

24 MR. SCOW: -- victim witness –

25 MR. RUTLEDGE: That's different – those –

1 THE COURT: Yes. VWAC.

2 MR. RUTLEDGE -- they are similarly named, but totally different.

3 THE COURT: Right. I'm talking about what your office controls.

4 MR. RUTLEDGE: Correct.

5 MR. SCOW: That I agree with.

6 THE COURT: Okay. If your office has paid a \$25 witness fee, just let them

7 know. I'm just asking what -- you to let them know whatever you spent on them.

8 MR. SCOW: On the same page now, Judge.

9 THE COURT: Okay. That's what I'm talking about. Victim Witness

10 Assistance Center in your office for which you have control.

11 Anything else that's -- that's run by anybody else is subject to a

12 subpoena and not your problem; and if the Defense wants it, they can get it via

13 subpoena; but I think that if it's run by your office, I don't want them subpoenaing

14 your office, and then you coming in on a motion to quash over things that are

15 nominal at best. Just hand them over.

16 There are requests about; I'm not quite sure what. Information from

17 officers regarding observation that a witness was intoxicated, and I -- I guess the

18 question would be there was nothing originally in a detective file that you saw?

19 MR. SCOW: No, Your Honor.

20 THE COURT: And do --

21 MR. SCOW: There are medical records that I believe we've turned over for

22 the one surviving witness; that would indicate whether there was blood alcohol or

23 anything else, so we've turned those over and if --

24 THE COURT: You have medical records?

25 MR. SCOW: -- they don't --

1 MS. LUEM: There's medical records, Judge, but I think that this specifically
2 deals with observations of the officers, to the first responders who interacted and
3 encountered her. If there's any observation separate and apart from any potential
4 blood results, then we're requesting that those be turned over.

5 THE COURT: But I mean you've been given everything – everything in
6 writing. I guess what I'm saying is I'm not going to require them to subpoena every
7 witness to their office to ask them a question. You can – I think the way this would
8 be handled is that you are free to speak to any witness you so choose, and if they
9 refuse to speak to you, then at that point, at the time maybe we have some options
10 as far as listening to their testimony outside the presence of the jury to address that
11 issue, that they refuse to talk to you, but I don't think – if it's – you've turned over
12 written report and document?

13 MR. SCOW: Correct.

14 THE COURT: So, I'm not going to make them interview every single witness
15 to ask them defense questions. It's your investigator's job; and if there's a detective
16 a police officer who refuses to cooperate, then perhaps we'll have an evidentiary
17 hearing outside the presence of the jury, so we can get those questions answered;
18 or maybe the DA, and to avoid that evidentiary hearing, will just ask him when he's
19 prepping the case, or her.

20 MR. SCOW: The witness was shot several times, so it may be hard to tell if
21 she's under the influence or just shot multiple times so.

22 THE COURT: Understood. NCIC on lay witnesses is what you're asking for.
23 How many people are we talking about?

24 MS. LUEM: It's really I think probably maybe one or two. There's the
25 surviving victim, who I am confident has a criminal record, none of which has been

1 provided to the Defense this point.

2 THE COURT: Okay.

3 MR. SCOW: Well they were provided to Josh Tomsheck at the time of the
4 preliminary hearing, because she testified at the preliminary hearing, and I don't
5 know if it was lost in transition, but that was provided.

6 THE COURT: What was provided? The -- like --

7 MR. SCOW: Criminal record of the witness that she's referring to.

8 THE COURT: But in what form? A list?

9 MR. SCOW: Judgments of conviction.

10 THE COURT: Okay. Do you have another copy?

11 MR. SCOW: Yeah we can get other copies.

12 THE COURT: So you don't have that, is what you're saying?

13 MS. LUEM: Not -- no Judge not that I'm aware of. I did receive a copy of
14 Mr. Tomsheck's file from him. I don't know what he included and what he didn't
15 include so as far as I know --

16 THE COURT: Could you look?

17 MS. LUEM: -- I didn't realize that was turned over to him because it was not
18 subsequently turned over to me. So I just ask that we skip the middle man and give
19 it straight to me.

20 THE COURT: Would you mind making another copy please? How many are
21 we talking about?

22 MR. SCOW: I think there was two, maybe three.

23 THE COURT: Okay, it's not the District Attorney's obligation to get juvenile
24 records for anyone. If you want to submit an order to me and make an ex parte
25 request, you're -- you know, I've reviewed those, and I consider then all the time,

1 but that's not the DA's job, so if you want those, you can you know, petition me and I
2 will consider issuing an order. And we're talking about the one person again?

3 MS. LUEM: Judge, I don't know, I'd have to look again, but probably that
4 same person, although she's a lot older so I don't know if there's any juvenile
5 records like this.

6 THE COURT: Is there any other person that it could apply to, to your
7 knowledge?

8 MS. LUEM: Potentially some of the witnesses that are in the apartment
9 complex that were interviewed, but I can make a list and look at it a little closer and
10 talk to Mr. Scow about that.

11 THE COURT: Okay. So normally State, what I asked the District Attorney to
12 do is I asked the District Attorney to run NCIC on lay witnesses. I require that
13 names be provided. I don't require that be any metro employee, or personnel, or
14 detective, or first responder, or fireman, and that you bring it to court, and you
15 advise us of what it says, and I look over your shoulder and say yeah that's what it
16 says, and you take it back with you to your office.

17 MR. SCOW: Okay.

18 THE COURT: But there's only a couple people I guess so is it in – I'm sorry, I
19 don't have that page handy. That was on page – do you have names in the motion?
20 Because I – I'm not going to –

21 MS. LUEM: Judge I can send a list to Mr. Scow.

22 THE COURT: Okay. If you would send a list – my intention is to just ask you
23 to do it for lay people.

24 MR. SCOW: Okay.

25 THE COURT: If you have a dispute, don't do it, and then I'll resolve it

1 between you.

2 MR. SCOW: Okay.

3 THE COURT: No objection to Statements of the Defendant. No objections to
4 inconsistent statements. If the information exists, the State says they'll provide it, so
5 any information tending to show unreliability of a witness. I'm not quite sure – if you
6 have something specific – I mean it's right up there with inconsistent statement, isn't
7 it?

8 MS. LUEM: Well, to an extent, it has to do with criminal history as well as
9 substantive to the issues of that nature which we kind of I think addressed as well.

10 THE COURT: Okay. Well I find that any information tending to show
11 unreliability of witness in a case is vague, and if there's something you wanted
12 specifically more than that, I'd be happy to discuss it. I don't – I'm not going to
13 require them to go off and ask every witness if they have a drug problem. You have
14 an investigator, and if you don't, I'd be happy to give you one.

15 MS. LUEM: I have one, Thank you.

16 THE COURT: Okay. All notes, reports of experts in the case. No objection,
17 and that's ordered. All updated witnesses contact. State says they've already given
18 you this information, and they – as they're required to do under NRS 174.2344.

19 MS. LUEM: I know that one of the witnesses, Judge, has moved multiple
20 times though and is somewhat transient, so I think that –

21 THE COURT: Do you know who she's talking about State?

22 MR. SCOW: Yes.

23 THE COURT: Okay. And would you update that information.

24 MR. SCOW: Yeah. I think –

25 THE COURT: To the extent you have it.

1 MR. SCOW: Yeah. And if they want contact information, they can contact us,
2 and we can help facilitate that.

3 THE COURT: Okay. There's no objection to books, papers, documents,
4 tangible objects related to the case including photos. Do you -- have you -- turned
5 over photos I take it?

6 MR. SCOW: Yes.

7 THE COURT: Okay. We already talked about the CADs, 311, 911. You had
8 no objection, and you have turned that over.

9 MR. SCOW: Yes.

10 THE COURT: Impound reports and physical evidence reports, and copies of
11 loss destruction of evidence reports, and chain of custody log. That's one of those
12 things that I would assume you have to go to the evidence vault to review --

13 MR. SCOW: Right.

14 THE COURT: -- so there's no objection by the State to an evidence review
15 where you can get that information.

16 MR. SCOW: Correct.

17 THE COURT: Okay anything else on the motion?

18 MS. LUEM: No Judge. The subsequent motion regarding the direct and
19 vicarious statements of Mr. Brown, I filed that in addition to the discovery motion
20 because Judge Hulett [phonetics] arrested out-of-state and was in the custody of
21 California officials for some time before he was brought back. So I don't -- I am not
22 aware of any statements that were made by Mr. Brown to California officials, but in
23 the event that those are going to be presented, I would request that the State
24 provide those.

25 THE COURT: According to your response, you're not aware of any either, but

1 should you become aware of any, you'll provide them immediately?

2 MR. SCOW: Exactly.

3 THE COURT: Okay. So that motion is granted. I'm compelling production of
4 statements in the event they become – any become known to the State.

5 MR. SCOW: Yes, Your Honor.

6 THE COURT: Okay. Motion for jury questionnaire. You know, here's the
7 thing, there's reasons we would do this in some cases and not do it in other cases
8 unless you have something to add to your motions in response, I'm prepared to rule.

9 MS. LUEM: And Judge, in speaking with Mr. Scow this morning, it sounds
10 like although their opposition – well, their response appears to oppose the
11 questionnaire, they are not actually opposing one; and the reason I didn't attach a
12 proposed questionnaire is because my intention was to, if the Court grants it, to
13 meet, with me and Mr. Scow discuss the questionnaire and come up with a joint one
14 to present to the Court, and I think considering it's a death penalty case, Judge, it's
15 important for us to identify issues with people concerning the death penalty.

16 THE COURT: Okay, so if you would just –

17 MS. LUEM: I don't need an exhaustive questionnaire, but that is what I'm
18 asking for.

19 THE COURT: Okay, so I was going to say that I was going to say that I was
20 going to grant the request for the questionnaire. I'll set a status check on
21 questionnaire in March. So status check – I expect the parties to submit something
22 to me, and you can highlight for me what you're disputing, and I'll make the decision.
23 You know, I don't grant these on every case, but I will grant them on a death case
24 for obvious reasons, not the least of which is the – you know emotionally charged
25 topic of penalty.

1 MR. SCOW: Correct.

2 THE COURT: So, and I also appreciate that your standard position of your
3 office, and I don't hold it against you, and I don't always disagree. Sometimes I
4 agree, but in this case, I'm gonna give it.

5 MR. SCOW: Okay.

6 THE COURT: Anything else?

7 THE CLERK: March 15th at 9 a.m.

8 THE COURT: Anything else?

9 MR. SCOW: Not by the State.

10 MS. LUEM: No, Your Honor.

11 THE COURT: Okay. So, I will see you on the next status check trial
12 readiness, February 23rd with that motion and any other motion you want to file.
13 Okay.

14 MS. LUEM: Thank you, Judge.

15 THE COURT: Thanks.

16 [Proceedings concluded at 9:41 a.m.]

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20 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video
proceedings in the above-entitled case to the best of my ability.

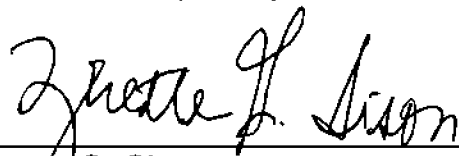
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Yvette G. Sison
Court Recorder/Transcriber



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
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9 THE STATE OF NEVADA,
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11 Plaintiff,
12 vs.
13 ROBERT BROWN, JR.,
14 Defendant.
15

CASE NO.: C-14-299234-1

DEPT. IX

TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE
17 TUESDAY, MARCH 15, 2016

18 RECORDER'S TRANSCRIPT RE:

19 **STATUS CHECK: JURY QUESTIONNAIRE/STATUS CHECK: TRIAL**
20 **READINESS/DEFENDANT'S MOTION TO DECLARE NEVADA'S DEATH**
21 **PENALTY STATUTES UNCONSTITUTIONAL**

22 APPEARANCES:

23 For the State:

RICHARD SCOW, ESQ.
Deputy District Attorney

24 For the Defendant:

AMANDA GREGORY, ESQ.
ANDREA LUEM, ESQ.

25 RECORDED BY: YVETTE SISON, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, March 15, 2016 at 9:10 a.m.

2
3 THE COURT: State versus Robert Brown, C299234-1. Good morning.

4 MR. SCOW: Good morning, Your Honor.

5 MS. LUEM: Judge, Andrea Luem on behalf of Mr. Brown, who's present in
6 custody.

7 MR. SCOW: Richard Scow for the State.

8 THE COURT: I had a note from law clerk that you were going to ask for a
9 continuance. Is that hopefully true?

10 MS. LUEM: Judge, just on the issue of the motion that was pending, I think it
11 was on today for status check on a jury questionnaire. I attached that to an email
12 yesterday, to the Court's clerk, and I have a hard copy as well.

13 THE COURT: Yes, but I mean as far as the motion to declare Nevada's
14 death penalty statutes unconstitutional, that's being continued, correct?

15 MS. LUEM: Right Judge. And I anticipate that there's a number of other
16 death penalty related motions that I will be filing, so I'm just going to request that
17 that be heard at the same time as those are placed on calendar.

18 THE COURT: Okay. Well, so there's one of two ways to handle this. I reset
19 it now and you make sure that the other motions get set for that date. I take it off
20 calendar, and you re-notice it with the other cases that are set when you file them. I
21 mean it's hard for me to anticipatorily set it on the same day.

22 MS. LUEM: Right. No I appreciate that Judge. Let's just – I'll just re-notice it
23 when I file the other motions.

24 THE COURT: Okay. The record should reflect defense counsel has asked to
25 have this matter off calendar for now, to be re-noticed at a later date with any other

1 supplements and what not that you choose.

2 MS. LUEM: Thank you.

3 THE COURT: Now about the questionnaire. The Court is going to set a
4 status check jury questionnaire one month – let's do – I mean obviously I can't order
5 the jury questionnaire – from the jury commissioner now because it's too soon, but I
6 will do status check jury questionnaire July 21st. It's my understanding that the State
7 has reviewed the questionnaire and has no objection. Is that correct?

8 MR. SCOW: Yes, Your Honor.

9 THE COURT: To the content of the questionnaire?

10 MR. SCOW: That's correct, Judge.

11 MS. LUEM: And Judge there were some modifications that I made at the
12 request of the State, so it was my proposed questionnaire. They requested some
13 changes. I changed it, and I think we're not all in agreement with the current form.

14 THE COURT: Okay. So the status check – status check jury questionnaire to
15 jury commissioner that's what it should say, will be July – did I say 21st?

16 THE CLERK: Uhuh.

17 THE COURT: At 9 a.m. The death penalty motion is off calendar, to be re-
18 noticed at your convenience. Anything else?

19 MS. LUEM: Not at this time.

20 MR. SCOW: Not from the State, Judge.

21 THE COURT: Okay. Thanks.


22 MR. SCOW: Thank you.

23 MS. LUEM: Thank you.

24 [Proceedings concluded at 9:14 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Yvette G. Sison
Court Recorder/Transcriber



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
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9 THE STATE OF NEVADA,
10
11 Plaintiff,
12 vs.
13 ROBERT BROWN, JR.,
14 Defendant.
15

CASE NO.: C-14-299234-1

DEPT. IX

TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE

17 FRIDAY, SEPTEMBER 2, 2016
18 RECORDER'S TRANSCRIPT RE:

STATUS CHECK: COMPETENCY/ALL PENDING MOTIONS

19 APPEARANCES:

20 For the State:

RICHARD SCOW, ESQ.
Deputy District Attorney

21 For the Defendant:

22 AMANDA GREGORY, ESQ.
ANDREA LUEM, ESQ.

23 Also Present:

24 CHRISTINA GREENE
Specialty Courts – Administration

25 RECORDED BY: YVETTE SISON, COURT RECORDER

1 Las Vegas, Nevada, Friday, September 2, 2016 at 9:03 a.m.

2
3 THE COURT: Robert Brown, page 1, C299234-1. Did you get a chance to
4 speak to Defense Counsel about the email I got the other day?

5 MS. GREENE: Yes, and then I believe they coordinated everything. We got
6 the updated report yesterday afternoon.

7 THE COURT: Okay.

8 MS. LUEM: And Judge, just for the record, Andrea Luem and Amanda
9 Gregory on behalf of Mr. Brown. The day we left court last time and the Court
10 realized that the other doctor didn't have the medical records. I sent those to Ms.
11 Greene that same day. And I spoke to Dr. Lenkeit, is that how you pronounce it?

12 THE COURT: Lenkeit.

13 MS. LUEM: Okay, yesterday. I saw his supplemental report. I noticed that
14 the records were not in there, but I know they were provided.

15 THE COURT: So we know he –

16 MS. GREENE: I believe it's in the last paragraph that references something
17 that he reviewed X, Y, and Z records.

18 MS. LUEM: And when I was talking to him on the phone, I asked him about
19 that, and he went and looked, and he said oh I see them here, there's a set of Olive
20 View Record, and records from other providers. So I don't know why they weren't
21 incorporated into his findings.

22 THE COURT: Okay. Well I think the salient points of Perlotto's evaluation is;
23 he possessed the ability to assist his attorney in the preparation of his defense but
24 might not – but might choose not to for his personality reasons and not mental
25 health reasons.

1 So, I find the Defendant competent to proceed pursuant to NRS
2 178.420. The matter is continued to next Thursday at 9 a.m.

3 MS. LUEM: Is that for the Faretta Judge?

4 THE COURT: Yes, that's for the Faretta and anything else that is appropriate
5 to handle at that time. All the motions that are calendar today will be continued to
6 that day, and then I'll make a determination on what's going to happen on that day.
7 So it should be Faretta and then every single motion you see here, can you put on
8 that day.

9 MR. SCOW: Will it be a status check on those and then setting a briefing
10 schedule for whatever counsel is determined by the Court at that time?

11 THE COURT: Yes.

12 MR. SCOW: Okay

13 THE CLERK: September 9th, 9 a.m.

14 THE COURT: So if I recall correctly, these motions that are listed on the
15 calendar call, Defendant's motion for the Court disclosure views, all these are
16 attorney motions. Do you know which one of these, Mr. Brown, if not all of them
17 you're going to want to go forward on if the Court allows you to represent yourself?

18 THE DEFENDANT: [unintelligible]

19 THE COURT: Pardon me?

20 THE DEFENDANT: I won't be going forward with any of them.

21 THE COURT: Okay, can we go through the list really quick, and then you can
22 just make – I don't want to just say it like in a general vague term. Let's go through
23 each one and you can say yes or no, by title please.

24 THE DEFENDANT: Sure.

25 THE COURT: So, Defendant's motion for the Court disclose views regarding

1 the imposition of capital punishment or the alternative for the State to stipulate to life
2 without parole in the event of a hung penalty jury. Do you wish to withdraw that
3 motion?

4 THE DEFENDANT: Yes.

5 THE COURT: Okay. I'm not going to withdraw it yet, because we haven't
6 done the Faretta canvas. I just won't to put it in the record that that's what you're
7 going to expect if and when you are representing yourself.

8 Defendant's motion for an order permitting discovery of records
9 pertaining to family life of victim. Are you going to wish to withdraw that?

10 THE DEFENDANT: Yes.

11 THE COURT: Defendant's motion to prohibit evidence and argument
12 concerning mitigating circumstances not raised by the Defendant. Is that something
13 you're going to want to go forward with if you're representing yourself?

14 THE DEFENDANT: No.

15 THE COURT: What about Defendant's motion for court to allow evidence to
16 the jury of the disproportionality and arbitrariness and unfairness of a death
17 sentence?

18 THE DEFENDANT: It won't be going forward.

19 THE COURT: Okay. What about Defendant's motion to preclude the Court
20 from participating in rehabilitation of potential jurors?

21 THE DEFENDANT: No.

22 THE COURT: What about Defendant's motion to bar the admission of
23 cumulative victim impact evidence in violation of the due process clause?

24 THE DEFENDANT: No.

25 THE COURT: And what about motion for individual sequestered voir dire?

1 THE DEFENDANT: No.

2 THE COURT: Okay. So State, I don't know – it appears that the Defendant's
3 plan will be not to proceed with those particular motions in the event that he's
4 representing himself after the Faretta canvass which is highly likely in light of the
5 competency finding, but the actual canvass itself will happen on Thursday at 9
6 o'clock.

7 MR. SCOW: Yes, Your Honor.

8 THE COURT: Okay. So I'm just leaving these status check withdraw of
9 motions because I – unless he changes his mind, they'll be withdrawn on that day
10 okay. I'll see you Thursday. Thank you.

11 MR. SCOW: Thank you, Your Honor.

12 MS. LUEM: Judge – I'm sorry, just a supplement. There was one other
13 motion that we took off calendar previously. That was the motion to declare
14 Nevada's death penalty statute unconstitutional, and so that one has not been ruled
15 on by the Court. It's still not calendared, but it is – it is out there, and I don't know if
16 Mr. Brown wanted to withdraw that motion.

17 THE COURT: Mr. Brown, what about the – what's your intention with regard
18 to the Defendant's motion to declare the death penalty statutory scheme
19 unconstitutional?

20 THE DEFENDANT: Withdraw.

21 THE COURT: Okay. He plans to ask to have that withdrawn.

22 MS. LUEM: Okay.


23 THE COURT: Okay. Thursday morning, 9 o'clock. Thank you very much.

24 [Proceedings concluded at 9:09 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Yvette G. Sison
Court Recorder/Transcriber



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
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9 THE STATE OF NEVADA,
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11 Plaintiff,
12 vs.
13 ROBERT BROWN, JR.,
14 Defendant.
15

CASE NO.: C-14-299234-1

DEPT. IX

TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE
17 THURSDAY, OCTOBER 6, 2016

18 RECORDER'S TRANSCRIPT RE:
19 **STATUS CHECK: APPOINTMENT OF INVESTIGATOR - (D. CHRISTENSEN)**

20 APPEARANCES:

21 For the State:

RICHARD SCOW, ESQ.
Deputy District Attorney

22 For the Defendant:

PRO SE/AMANDA GREGORY, ESQ.
(Standby Counsel)

23 Also Present:

ALBERTO FUENTES
Investigator for the Defendant

24 RECORDED BY: YVETTE SISON, COURT RECORDER
25

1 Las Vegas, Nevada, Thursday, October 6, 2016 at 9:06 a.m.

2
3 THE COURT: State versus Robert Brown, C299234-1. Where's Mr. Brown?
4 He is present in custody. Do I have Alberto Fuentes present? I need to – I believe
5 that Mr. Christensen appointed a private investigator to this case –

6 THE MARSHAL: Yeah, he was just here.

7 THE COURT: He checked in, so can you give me a minute –

8 MR. SCOW: Sure.

9 THE COURT: -- so can – all right, Mr. Brown, I'm going to – hello are you
10 Alberto Fuentes?

11 MR. FUENTES: Yes, Your Honor. I'm sorry I stepped outside for a second.

12 THE COURT: Okay. Mr. Brown is present in custody. Have you had an
13 opportunity to – you're just getting appointed to this case –

14 MR. FUENTES: Yes ma'am.

15 THE COURT: -- because you were sent over by the Office of Indigent
16 Counsel. Mr. Brown this is Mr. Fuentes. Mr. Fuentes, this is Mr. Brown.

17 MR. FUENTES: I had an opportunity to speak to Mr. Brown, and I informed
18 him as soon as I was cleared by the jail, I would go over and see him.

19 THE COURT: Okay. So here's where we are. The Defendant has chosen to,
20 after a lengthy Faretta canvas and numerous hearings with the Court to represent
21 himself at the last court date and the court dates that preceded that, he declined to
22 accept the Court's offer of standby counsel. Is that –

23 THE DEFENDANT: I didn't say that I deny standby counsel.

24 THE COURT: Oh you won't standby counsel?

25 THE DEFENDANT: Yes.

1 THE COURT: Okay. I'll have standby counsel from – because I had already
2 asked Mr. Christensen actually yesterday to have standby counsel waiting in the
3 wings in case you change your mind. So, now you're going to have to have a
4 conversation with standby counsel about what standby means, and then we'll go
5 from there, but I have to get that person here. So here was my suggestion to Mr.
6 Brown, to the State of Nevada, and to you.

7 I was going to continue this to have a meeting with him, discuss
8 whatever investigation that he's going to request of you, then have you come back,
9 have a hearing outside the presence of the District Attorney as far as the estimated
10 number of hours that you think – I know it's hard to do, but you know, just a
11 generalized ballpark; then I would bring the District Attorney back in – because
12 you're in a bad situation right, so he could send you on all kinds of errands, and they
13 may not have anything to do with the case. So I'm going to be the arbiter of your
14 time, which is a different issue than how long he tells me he needs to get ready to
15 go to trial. I will address that in the presence of the District Attorney.

16 So, I'm not suggesting he'll send you on a wild goose chase. I've done
17 this, oh I don't know pro per Defendants many, many times with investigators, and
18 you're not in a position to tell him yes or no, but I am. So, if all of the requests are
19 reasonably calculated to lead to the possible – any kind of evidence, then you know,
20 I'm going to say do it.

21 In the meantime, how long do you think you need to go over and meet
22 with him – my guess is with discover – I don't know what he's going to ask you to do
23 but with the discovery in the case and everything, you probably need a few weeks.

24 MR. FUENTES: We'll have a meeting, Your Honor. Andrea Luem I believe
25 was the last attorney in his case. I'm going to meet with her on Tuesday. She's

1 going to give me all the discovery, and she's going to have the investigator that was
2 working with her on the case present that day so he can tell me how far he's gotten.

3 I have handled several pro se cases. I'm from Miami. I'm new in town.
4 This is actually my first court-appointed case here, but I know what I'm dealing with,
5 and I'm more than happy that you're going to get involved to tell me what I want
6 approved or not.

7 I have had this conversation with Drew Christensen. He suggested a
8 certain amount of funds for it, and I said well that's fine, whatever you want to
9 allocate to the case that's fine. I will be in complete contact with you, and he asked
10 me to be constantly be in contact with him because of the – this particular case,
11 because of this position that we're in.

12 So I will be more than happy to do whatever the Court wants me to do.
13 If you want I can go into chambers and tell you where I'm at. If you don't want me to
14 come in open court –

15 THE COURT: No, I would only do it with him here.

16 MR. FUENTES: Okay.

17 THE COURT: So what we're gonna do is when we have our meetings, we're
18 going to have sealed hearings –

19 MR. FUENTES: Okay.

20 THE COURT: The District Attorney will not be present. No one else will be
21 present.

22 MR. FUENTES: Okay.

23 THE COURT: It'll be me, him, and you.

24 MR. FUENTES: Okay.

25 THE COURT: I won't engage in any conversations about this case with

1 anyone outside of the courtroom except for Drew about funding –

2 MR. FUENTES: Right.

3 THE COURT: -- but – you know, I'm not – I'm not tied to a number. That's
4 not how – it's – for me it's not going to work that way. I understand you have to
5 navigate both.

6 MR. FUENTES: Right.

7 THE COURT: For me it's going to be, is this a reasonable request by the
8 Defendant to defend his capital murder case –

9 MR. FUENTES: Exactly.

10 THE COURT: -- and if so, I'm going to approve it. So, I would caution you on
11 one thing, I think it's very prudent for you to meet with everyone that you can that
12 worked on the case previously, so you know where they're at.

13 MR. FUENTES: Okay.

14 THE COURT: I will suggest to you that Mr. Brown has a different vision than
15 the lawyers and the investigator previously, otherwise, we wouldn't – he wouldn't be
16 representing himself.

17 MR. FUENTES: Exactly.

18 THE COURT: So what they tell you, you know, is important; you can just
19 have that in your mind, but he has – I don't know what his vision is, but it's different,
20 and so be mindful that what they were doing is not necessarily – he asked to have
21 all their motions withdraw; whatever they were doing was not necessarily what he
22 was – I don't know all or some, interested in doing, so that's something you're going
23 to have to talk about. But, in the meantime – how – so you meet with them
24 Tuesday. You probably need a couple meetings with him before I see you again –

25 MR. FUENTES: Right.

1 THE COURT: -- and he can tell me how long he needs to get ready for trial.

2 MR. FUENTES: Okay.

3 THE COURT: So -- how many -- you think two weeks, three weeks?

4 MR. FUENTES: Your Honor, you know, until I -- even though that you may
5 have a different reflection as to what he wants from me, compared to what his other
6 attorney wants from me, I would feel that I wouldn't be doing my job if I didn't at least
7 review what they've done before --

8 THE COURT: Sure.

9 MR. FUENTES: So that him and I can discuss it --

10 THE COURT: Sure.

11 MR. FUENTES: -- at length, and then that way we can decide if any of their --
12 any of their things are gonna be re-hashed or if we're going to start from the
13 beginning.

14 THE COURT: Okay.

15 MR. FUENTES: So once I do that, I would say yeah I mean no more than
16 three weeks.

17 THE COURT: Okay.

18 MR. FUENTES: I can't see it taking any longer than that.

19 THE COURT: Okay. Do you agree?

20 THE DEFENDANT: That's fine.

21 THE COURT: Okay. Three weeks. The matter is passed three weeks. Ms.
22 Gregory -- I'm going to -- because she has knowledge of this case, she's going to --
23 will you consider being standby counsel for now and then we can see how he
24 wishes to go forward.

25 MS. GREGORY: Your Honor, can we approach?

1 THE COURT: Sure.

2 MS. GREGORY: Thank you.

3 [Bench Conference]

4 MR. FUENTES: Thank you very much, appreciate it.

5 THE COURT: So Mr. Brown, here's how this works. When you come back in

6 three weeks and we do the hearing outside the presence of the District Attorney,

7 we'll discuss standby counsel and their role, and I'll answer any questions or

8 address any comments you may have at that time. I would prefer not to do that in

9 the presence of the District Attorney, and so let's just get going on your investigation

10 first, then we'll address standby counsel, and then we'll go from there; and you can

11 tell me when you can be ready. Do you have anything that you wish to say?

12 THE DEFENDANT: No.

13 THE COURT: Okay. I'll see you in three weeks.

14 THE DEFENDANT: Yes.

15 MR. FUENTES: Thank you, Your Honor.

16 MS. GREGORY: And Your Honor is three weeks when the standby counsel

17 issue is going to be addressed?

18 THE COURT: Yes, I need you to come.

19 MS. GREGORY: That's fine, Your Honor.

20 MR. FUENTES: What is the exact date, Your Honor, if you don't mind?

21 THE CLERK: October 25th at 9 a.m.

22 MS. GREGORY: Thank you.


23 MR. FUENTES: October 25th. Thank you very much.

24 [Proceedings concluded at 9:16 a.m.]

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