

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Mar 14 2022 10:41 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

ERIN DESHAUN WARE,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: C-15-310099-1

Docket No: 84262

RECORD ON APPEAL VOLUME 2

ATTORNEY FOR APPELLANT
ERIN WARE # 1017483,
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

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

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1 The Nevada Supreme Court reaffirmed the doctrine in State v. Shade, 111 Nev. 887,
2 900 P.2d 327 (1995). Shade was charged with possession of controlled substances, to wit
3 Methamphetamine and Cocaine. The drugs were found by officers pursuant to a vehicle stop,
4 following an investigation involving the purchase/sale of heroin by Shade and his son-in-law.
5 The trial court prohibited the prosecution from revealing to the trial jury evidence pertaining
6 to the uncharged heroin transaction. Overruling the trial court, the Nevada Supreme Court
7 held:

8 If the agents are not allowed to testify regarding their surveillance, the State
9 cannot inform the jury how Shade obtained the drugs or that officers suspected
10 Shade was participating as a lookout during the purchase of the drugs that were
11 ultimately found in the car he was driving. Without such testimony, the State
cannot effectively prosecute the transportation of illegal narcotics charges
pending against Shade.

12 . . . The charges at issue were contemporaneous to the heroin purchase, arose out
13 of the same transaction, and involved the same participants. **The excluded
14 evidence was inextricably intertwined with the charged crimes and completed
15 a story leading up to Shade's ultimate arrest.** We conclude that the State's
16 witnesses could not adequately testify about the methamphetamine and cocaine
17 charges without some reference to the heroin sale and the accompanying
surveillance activity. The district court thus abused its discretion by granting the
motion in limine. The district court should have admitted the evidence and
issued a cautionary instruction to the jury.

18 Shade, 111 Nev. at 894-95, 900 P.2d at 331 (emphasis added).

19 In the instant case, Defendant's disposal of the firearm he stole from Ms. Garn and that
20 firearm's ultimate disposition at the pawn shop is inextricably intertwined with the charged
21 crimes and are necessary to complete the story of Defendant's ultimate arrest. Ms. Garn's
22 firearm is specifically mentioned in Counts 2, 3, and 11 of the Information. Therefore, it is
23 impossible to tell the complete story of those counts without describing what ultimately

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1 happened to the weapon after the robbery. The fact that the weapon turned up in a pawn shop
2 two months after the robbery is also evidence that corroborates the fact that Defendant left the
3 Subway with the firearm.² Furthermore, Defendant's decision to dispose of the weapon
4 indicates consciousness of guilt.

5 **B.**
6 **EVIDENCE OF DEFENDANT'S FLIGHT IS ADMISSIBLE AS**
7 **EVIDENCE OF CONSCIOUSNESS OF GUILT**

8 "A jury may properly receive an instruction regarding a defendant's flight so long as it
9 is supported by the evidence...[Flight] signifies something more than a mere going away. It
10 embodies the idea of going away with a consciousness of guilt, for the purpose of avoiding
11 arrest." Weber v. State, 121 Nev. 554 (2005). In Weber, the defendant argued on appeal that
12 the flight instruction was erroneously given because the delay in his arrest was attributable to
13 police incompetence. The Court, however, found that the flight instruction was appropriately
14 given because Defendant abandoned his car at a casino parking lot on the day of the murders
15 and left Las Vegas on a bus. Then, he traveled to California, Oregon, Washington, Idaho and
16 Utah. While in Seattle he bought a mustache to disguise himself.

17 In the present case, Defendant was arrested over two months after the commission of
18 the robbery and was ultimately taken into custody in Reno. Less than a week after the robbery
19 and shooting, on June 15, 2015, police issued a media release about the robbery, including a
20 sketch of Defendant. On June 20, 2015, Defendant sent a SMS text message to a contact
21 named "Pops" saying: "Just go on Google and type in subway robbery in Las Vegas nv." The
22 reply: "Shit iz real !! you ill negga" and "I'm proud of you."³

23 Around the same time, Defendant fled to Reno. Before leaving Las Vegas, however,
24 Defendant discarded the .357 Ruger Security Six, which he stole from Ms. Garn. Then, shortly
25 after his arrest, that weapon surfaced in a pawn shop in Las Vegas. On August 27, 2015, not
26 long after Defendant's arrest, a black male adult approached Emmett Hall with the weapon

27 ² Ruth Garn testified that she never actually saw Defendant take the weapon, but realized it was missing. Jamie Nourie
28 also testified in the same manner.

³ Investigators recovered these text messages from Defendant's cell phone, pursuant to a search warrant authorized by
Judge Sciscento on August 12, 2015.

1 and offered Mr. Hall \$60 if he would pawn the gun. Mr. Hall agreed, and pawned the weapon
2 to a pawn shop on Boulder Highway, where police recovered it. Police also tracked Defendant
3 down in Reno, and executed a search warrant on the residence where he was staying.
4 Defendant attempted to flee out the back of the residence, however, he was apprehended,
5 placed under arrest, and transported back to Las Vegas.

6 In the present case, the delay in Defendant's arrest resulted from his repeated flight.
7 Initially, he fled the scene of the crime (even pushing aside a bystander who happened to be
8 in the way) to evade arrest. Likewise, once his sketch was publicized as part of the media
9 request, Defendant chose to flee again, this time going all the way to Reno. Before departing
10 for Reno, he got rid of the weapon he stole from Ruth. Finally, when discovered and cornered
11 in Reno, Defendant chose to make a final attempt at flight out the back of the residence, during
12 which he was finally arrested. This evidence establishes that Defendant went away with a
13 consciousness of guilt. As such, the State respectfully requests it be permitted to admit such
14 evidence to the jury.

15 CONCLUSION

16 Based on the foregoing, the State respectfully requests that this Motion to Permit the
17 State to Introduce Res Gestae Evidence and Evidence of Flight.

18 DATED this 4th day of February, 2016.

19 Respectfully submitted,

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

22 BY /s//KRISTINA RHOADES
23 KRISTINA RHOADES
24 Deputy District Attorney
25 Nevada Bar #012480
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27
28

1 **CERTIFICATE OF ELECTRONIC FILING**

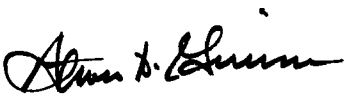
2 I hereby certify that service of State's Motion, was made this 4th day of February, 2016,
3 by Electronic Filing to:

4 JENNIFER M. WALDO, ESQ.
5 E-mail Address: jmw@gregoryandwaldo.com

6 AMANDA GREGORY, ESQ.
7 E-mail Address: asg@gregoryandwaldo.com

8 Shellie Warner
9 Secretary for the District Attorney's Office

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28 mmw/GCU


CLERK OF THE COURT

NWEW
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Nevada Bar #001565
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Nevada Bar #010681
200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ERIN DESHAUN WARE,
#2652033
Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

**SECOND SUPPLEMENTAL NOTICE OF WITNESSES
AND/OR EXPERT WITNESSES
[NRS 174.234]**

TO: ERIN DESHAUN WARE, Defendant; and
TO: JENNIFER M. WALDO, ESQ., Counsel of Record:
YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
NEVADA intends to call the following witnesses and/or expert witnesses in its case in chief.

These witnesses are in addition to those witnesses endorsed on the Information or
Indictment and any other witness for which a separate Notice of Witnesses and/or Expert
Witnesses has been filed.

The substance of each expert witness' testimony and copy of all reports made by or at
the direction of the expert witness has been provided in discovery.

A copy of each expert witness' curriculum vitae, if available, is attached hereto.

***Indicates an additional witness**

//

<u>NAME</u>	<u>ADDRESS</u>
ADAMS, DR. KIMBERLY – 9640 W. TROPICANA, #116, LVN 89147:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
AMUNDSON, MARK – HPD P#1250	
AOYAMA, KATHRYN – LVMPD P#8025 (or designee): LATENT PRINT EXAMINER -	Expert in the science and techniques of fingerprint comparison, and comparisons done in this case and any reports prepared therefrom.
ARMSTONG, DR. BRACKEN – UMC, 1800 W. CHARLESTON, LVN 89102:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
ARMSTRONG, JAMES - CCFD:	He is expected to offer testimony as an expert in the field of emergency care and treatment of trauma victims, victim assessment, as well as his direct involvement with the treatment of Ruth Garn.”
BARRETT, T. – LVMPD P#4972	
BETHARD, J. – LVMPD P#13928	
*BOOKER, JAMES – NEVADA DEPARTMENT OF CORRECTIONS	
BROWN, TARA – FBI, 2501 INVESTIGATION PKWY, QUANTICO, VA 22135:	Expert in the field of DNA extractions, comparisons, analysis, and the identification of bodily fluids and is expected to testify thereto.
BURNS, J. – LVMPD P#9805	
BURNS, MIKE - CCFD:	He is expected to offer testimony as an expert in the field of emergency care and treatment of trauma victims, victim assessment, as well as his direct involvement with the treatment of Ruth Garn.”
BUTLER, W. – LVMPD P#10054	
CAMPBELL, J. – LVMPD P#13150	
COATES, DR. JAY – UMC, 1800 W. CHARLESTON, LVN 89102:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
*COOK, DARIN – LVMPD P#5730	
CORNELL, BROOKE – LVMPD P#13576	

1 CRAANEN, PETER – FBI, RENO, NV: Expert in the area of forensic analysis of cell phone
2 contents and recovery of the same, and that they are expected to offer testimony regarding the
3 analysis of the cell phones impounded in this case belonging to Defendant and Trudy Presutti.

4 CUNNINGHAM, J. – LVMPD P#5466

5 CUSTODIAN OF RECORDS – CLARK COUNTY DETENTION CENTER

6 CUSTODIAN OF RECORDS – CLARK COUNTY FIRE DEPARTMENT

7 CUSTODIAN OF RECORDS – LVMPD COMMUNICATIONS

8 CUSTODIAN OF RECORDS – LVMPD RECORDS

9 *EGGERT, DR., JANICE – 1771 E. FLAMINGO RD., STE. 214-A, LVN 89119, She is a
10 physician expected to give testimony concerning the injuries and treatment of Ruth Garn after
11 the June 10, 2015, robbery.

12 FLETCHER, SHAWN – LVMPD P#5221

13 FLETCHER, TIMOTHY – LVMPD P#6383

14 FORD, S. – LVMPD P#9063

15 GARN, RUTH – 4126 OXNARD CIR., LVN 89121

16 GIANNONE, JOSEPH – LVMPD P#6225

17 *GONZALEZ, ALEX – LVMPD P#6188

18 HALASI, R. – LVMPD P#8783

19 *HALL, CHRIS – LVMPD P#6060

20 HALL, EMMETT – ADDRESS UNKNOWN

21 HAMMOND, Z. – LVMPD P#13917

22 HENNESY, D. – LVMPD P#6736

23 HOLSTEIN, DANIEL – LVMPD P#3861

24 HONAKER, JAMIE – DISTRICT ATTORNEY INVESTIGATOR

25 HUGHES, H. – LVMPD P#6750

26 HUNTSMAN, SHAUN - CCFD: He is expected to offer testimony as an expert in the field of
27 emergency care and treatment of trauma victims, victim assessment, as well as his direct
28 involvement with the treatment of Ruth Garn.”

1 JOBRIO, J. – LVMPD P#7299

2 JOHNSON, GAYLE – LVMPD P#10208 (or designee): LATENT PRINT EXAMINER -
3 Expert in the science and techniques of fingerprint comparison, and comparisons done in this
4 case and any reports prepared therefrom.

5 KHIABANI, DR. KAYVAN – 1707 W. CHARLESTON, STE. 190, LVN 89102: He/She is
6 a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10,
7 2015.

8 LARSON, DR. DOUGLAS – UMC, 1800 W. CHARLESTON, LVN 89102: He/She is a
9 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

10 LAYTHORPE, M. – LVMPD P#5448

11 LEIJA, ARMANDO – LVMPD P#2020

12 LOPEZ, C. – LVMPD P#6958

13 LORSON, KARL – LVMPD P#5746

14 LUKOWSKI, W. – LVMPD P#4659

15 MALKOLOSKI, B. – LVMPD P#13802

16 MARCO, RON – CCFD: He is expected to offer testimony as an expert in the field of
17 emergency care and treatment of trauma victims, victim assessment, as well as his direct
18 involvement with the treatment of Ruth Garn.”

19 MATCHKO, W. – LVMPD P#8525

20 MCPEAK, CHRISTOPHER – FBI, 787 W.LAKE MEAD, LVN 89106: Expert in the area of
21 forensic analysis of cell phone contents and recovery of the same, and that they are expected
22 to offer testimony regarding the analysis of the cell phones impounded in this case belonging
23 to Defendant and Trudy Presutti.

24 MENEZES, DR. JOHN – 1707 W. CHARLESTON, #190, LVN 89102: He/She is a physician
25 and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

26 MITCHELL, S. – LVMPD P#13765

27 *MORENO, RICHARD – LVMPD P#4922

28 //

1 MOXLEY, DR. JEFFREY – 3663 E. SUNSET, #403, LVN 89120: He/She is a physician and
2 will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

3 *MUNOZ, GABE – LVMPD P#7137

4 MUNOZ, I. – LVMPD P#9063

5 MURPHY, DANEEN – LVMPD P#5691

6 NELSON, JASON – LVMPD P#6825

7 NG, DR. MATTHEW – 3150 N. TENAYA WAY., #140, NLV 89128: He/She is a physician
8 and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

9 NOURIE, JAIME – 10347 MAURICE RIVER CT., LVN 89183

10 PEREZ, RAFAEL – 9850 BERMUDA RD., #248, LVN 89123

11 PERIMUTTER, JASON - CCFD: He is expected to offer testimony as an expert in the field
12 of emergency care and treatment of trauma victims, victim assessment, as well as his direct
13 involvement with the treatment of Ruth Garn.”

14 PORTER, MARIA – LVMPD P#8053

15 PRESUTTI, TRUDY – 3010 HACIENDA DR., RENO, NV 89503

16 RAFALOVICH, MARCO – DISTRICT ATTORNEY INVESTIGATOR

17 ROE, M. – LVMPD P#6833

18 ROSSI, A. – LVMPD P#6758

19 SANDOVAL, S. – LVMPD P#8742

20 SAXON, S. – LVMPD P#7849

21 SEDMINIK, G. – LVMPD P#5634

22 SEED, MICHAEL – LVMPD P#6724

23 *SEELY, JASON – LVMPD P#7729

24 SMINK, JEFFREY – LVMPD P#6556

25 SMITH, SEAN – LVMPD P#6038

26 SNYDER, DR. BRUCE – 2779 W. HORIZON RIDGE PKWY., #22, HEND, NV 89052:
27 He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on
28 June 10, 2015.

1 SPIOTTO, LANCE – LVMPD P#4774

2 THOMAS, DR. CASEY – UMC, 1800 W. CHARLESTON, LVN 89102: He/She is a
3 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

4 TWEITO, DR. TIMOTHY – 6980 SMOKE RANCH RD., #110, LVN 89128: He/She is a
5 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

6 WILLIAMS, WESTIN – LVMPD P#9707

7 YANNIS, C. – LVMPD P#6024

8 ZUCKER, MATTHEW – LVMPD P#5761

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

11
12 BY /s//LIZ MERCER
13 LIZ MERCER
14 Chief Deputy District Attorney
Nevada Bar #010681

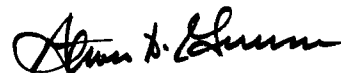
15 **CERTIFICATE OF ELECTRONIC FILING**

16 I hereby certify that service of State's Notice, was made this 10th day of February, 2016,
17 by Electronic Filing to:

18 JENNIFER M. WALDO, ESQ.
19 E-mail Address: jmw@gregoryandwaldo.com

20 Shellie Warner
21 Secretary for the District Attorney's Office
22
23
24
25
26
27

28 mmw/GCU



CLERK OF THE COURT

ORDR

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

LIZ MERCER
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERIN WARE,
#2652033,

Defendant.

Case No. C-15-310099-1

Dept No. IX

**EX PARTE MOTION AND ORDER RELEASING
ALL MEDICAL RECORDS**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, through LIZ MERCER, Chief Deputy District Attorney, and moves this Honorable Court for an Order Releasing certain evidence held in the custody of CLARK COUNTY FIRE DEPARTMENT consisting of all medical records for patient RUTH GARN, DOB: 09/10/65, admitted on or about 06/10/15, be released to a representative of the DISTRICT ATTORNEY'S OFFICE for the purpose of prosecuting the above referenced case.

Pursuant to 45CFR164.512(f), Movant represents that the information sought is relevant and material to a legitimate law enforcement inquiry; that the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and that de-identified information could not reasonably be used.

//

//

IT IS HEREBY ORDERED that the all evidence in the custody of the CLARK COUNTY FIRE DEPARTMENT, consisting of all medical records for patient: RUTH GARN, DOB: 09/10/65, be released to a representative of the DISTRICT ATTORNEY'S OFFICE.

DATED this 17 day of February, 2016.

Jennie P. Ozguc
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY

LIZ MERCER
Chief Deputy District Attorney
Nevada Bar #010681

mmw/GCU


CLERK OF THE COURT

OPPM

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DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN WARE,

Defendant.

Case No.: C-15-310099-1
Dept. No.: IX

**DEFENDANT'S OPPOSITION TO
STATE'S MOTION TO CONSOLIDATE,
OR IN THE ALTERNATIVE, MOTION
TO ADMIT EVIDENCE OF OTHER
ACTS PURSUANT TO NRS 48.045(2)**

COMES NOW the Defendant ERIN WARE, by and through his attorneys, JENNIFER M. WALDO, ESQ. and AMANDA S. GREGORY, ESQ., of GREGORY & WALDO, LLC, and hereby submits the attached Points and Authorities in Opposition to the State's Motion to Consolidate or in the Alternative, Motion to Admit Evidence of Other Acts Pursuant to NRS 48.045(2).

DEFENDANT'S OPPOSITION TO STATE'S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE, MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 1

1 This Opposition is made and based upon all the papers and pleadings on file herein, the
2 attached points and authority, and oral argument at the time set for hearing this Motion

3 DATED this 18th day of February, 2016.

4 Respectfully submitted:

5
6 By: /s/Jennifer Waldo
7 JENNIFER M. WALDO, ESQ.
8 AMANDA S. GREGORY, ESQ.
Attorneys for Defendant

9 **MEMORANDUM OF POINTS & AUTHORITIES**

10 **I.**
11 **STATEMENT OF FACTS**

12 In the current case, the State alleges that the Defendant entered a Subway restaurant located
13 at 8790 S. Maryland Parkway while alleged victims Ruth Garn and Jamie Nourie were working.
14 The State alleges that Defendant pointed a gun at the victims, threatening one, and ultimately
15 shooting Ruth Garn multiple times. Victim Jamie Nourie identified the Defendant as the suspect
16 in the robbery and shooting.
17

18 In Case Number C-16-311782-1, detectives placed a confidential informant with the
19 Defendant at the jail several months after the initial incident, and it is alleged that the Defendant
20 attempted to make a plan to have the victim who identified him in case C-15-310099-1 murdered.
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26 DEFENDANT'S OPPOSITION TO STATE'S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 2

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III.
LEGAL ARGUMENT

A. THE COURT SHOULD NOT CONSOLIDATE THIS CASE WITH CASE NUMBER C-16-311782-1 FOR JURY TRIAL SINCE THEY ARE NOT BASED ON THE SAME ACT, TRANSACTION, OR COMMON SCHEME OR PLAN.

This Court should not order consolidation of the present case with Case Number C-16-311782-1 because they are not based on the same act, transaction, common scheme, or plan, and such consolidation would result in an unfair prejudice to the Defendant. The State cites to NRS 174.155 and NRS 173.115 to support its argument. NRS 174.155 states the following:

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Additionally, NRS 173.115 states:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:

1. Based on the same act or transaction; or
2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Even if charges could otherwise be properly joined, severance may still be mandated where joinder would result in unfair prejudice to the defendant. *Weber v. State*, 119 P.3d 107, 121 Nev. 554 (2005). In addition, prejudice from joinder of charges requiring reversal is more likely in a close case because it may prevent jurors from making a reliable judgment about guilt. *Id.*

The universal rule is that the exercise of the power to consolidate is one which lies in the trial court's discretion. *United States v. Fancher*, 195 F.Supp. 634 (D. Conn., 1960). The exercise of that discretion should be determined by the resolution of two sometimes conflicting

DEFENDANT'S OPPOSITION TO STATE'S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE, MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 3

1 policies; the promotion of economy and efficiency in judicial administration by the avoidance of
2 needless multiplicity of trials, and the protection of criminal defendants from undue prejudice often
3 caused by the consolidation of indictments and mass trials. *Id.* A constitutional violation occurs
4 where simultaneous trial of more than one offense renders the trial fundamentally unfair, and
5 thereby violates due process. *Featherstone v. Estelle*, 948 f.2d 1497 (9th Cir. 1991). Prejudice
6 exists if the joinder has a substantial and injurious effect or influence in determining the verdict.
7 *Bean v. Calderon*, 163 F. 3d 1073, 1086 (9th Cir. 1998).

9 **1. The two cases the State is attempting to consolidate are not based on the same act**
10 **or transaction.**

11 In this case, the allegations from each case are separate and distinct incidents. The current
12 case involves an armed robbery that occurred in a Subway on June 10, 2015. Case Number C-16-
13 311782-1 involves an alleged murder for hire scheme that occurred on or around November 30,
14 2015. While the cases certainly involve a similar victim, it is a far stretch to argue that they are
15 part of the same transaction or occurrence. These two cases occurred over 5 months apart in time,
16 and are completely separate charges.

17 Nevada currently has no controlling case law defining the phrase “same act or transaction.”
18 As such, this Honorable Court may look to definitions utilized by other States as persuasive
19 authority. The State of Oregon, when defining what constituted the “same act or transaction” for
20 purposes of joinder and consolidation held that two offenses arise out of the “same act or
21 transaction” if they are connected so closely “in time, place and circumstance that a complete
22 account of one charge cannot be related without relating details of the other charge.” *State v.*
23 *Fitzgerald*, 267 Or. 266, 273, 516 P.2d 1280, 1284 (1973). Oregon further expanded on this
24 definition in *State v. Boyd* and held that the phrase same transaction was synonymous with “same
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DEFENDANT’S OPPOSITION TO STATE’S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 4

1 criminal episode.” *State v. Boyd*, 271 Or. 558, 565–66, 533 P.2d 795, 799 (1975). Although the
2 Court adopted this definition, it also suggested that a case by case analysis must be done in
3 determining if two separate crimes fall under the “same act or transaction” test.

4 The State of Virginia, in *Woodfin v. Commonwealth*, adopted this definition and held that
5 “The language is synonymous with “same criminal episode.” *Woodfin v. Com.*, 372 S.E.2d 377,
6 379 (Va. 1988). The Virginia Court quoted *State v. Fitzgerald* and ruled that two crimes must be
7 so close “that a complete account of one charge cannot be related without relating the details of
8 the other charge.” *Id.*

10 In this case, the Defense submits that this Honorable Court should utilize the definition
11 used by Oregon and adopted by Virginia. Under this standard, the allegations in the two separate
12 cases fail the “same act or transaction” test as they are not close in time or circumstance and the
13 charges in this case can be related without relating any details of the allegations from case C-16-
14 311782-1. While Defendant will submit that the fact that a victim in the present case implicated
15 Defendant in a robbery will be admissible in Case C-16-311782-1, the same is not conversely true.
16 As such, the cases cannot be consolidated.

18 In attempting to prove the robbery and attempt murder in the present case, the allegations
19 can easily be relayed to a jury without mentioning the murder for hire in case C-16-311782-1. The
20 two are completely unrelated and happen far apart in time. The two cases are separate and distinct
21 incidents which fail the “same act or transaction” test.

23 **2. The allegations made in the two separate cases are not part of the same “common**
24 **scheme or plan”.**

25 In *Weber*, the Nevada Supreme Court defined “common scheme” and “plan.” 119 P.3d at
26 119-20. The court defined scheme as a “design or plan formed to accomplish some purpose; a
DEFENDANT’S OPPOSITION TO STATE’S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 5

1 system” and defined plan as a “method of design or action, procedure, or arrangement for
2 accomplishment of particular act or object; Method of putting into effect intention or proposal.”

3 *Id.* In determining whether the charges constitute a common scheme or plan, the Court wrote:

4 Thus *purposeful design is central to a scheme or plan*, though this
5 does not mean every scheme or plan must exhibit rigid consistency
6 or coherency . . . a person who forms and follows a scheme or plan
7 may have to contend with contingencies, and therefore a scheme or
8 plan can in practice reflect some flexibility and variation but still fall
9 within overall intended design.” *Id.* (emphasis added).

9 The existence of a common plan or scheme does not turn on commonalities among offenses
10 but on whether those offenses tend to establish a preconceived plan. *Richmond v. State*, 118 Nev.
11 924, 933, 59 P.3d 1249, 1255 (2002).

12 The Nevada Supreme Court in *Ledbetter* expanded upon their explanation of what
13 constitutes a common scheme or plan, writing that the acts must constitute “an integral part of an
14 *overarching plan explicitly conceived and executed* by the defendant.” 122 Nev. 252 (emphasis
15 added). The Court went on to explain in the *Ledbetter* case that although the incidents in that case
16 had “numerous similarities” including the fact that all were young female family members of the
17 defendant and that “the initial abuse all occurred at night while they were asleep, and performed
18 many of the same types of acts, employing similar methods” these similarities did *not* demonstrate
19 a common scheme or plan. The Court wrote that the State needed to demonstrate that the abuse
20 was part of “an overarching and explicitly preconceived plan” rather than just random
21 opportunities in which the defendant had access to the victims. *Id.*

22 In this case, the State cannot meet this high burden. There is absolutely no evidence that
23 any incidents that allegedly occurred with the solicitation for murder charge in case C-16-311782-
24 1 were somehow part of an explicitly preconceived plan involving the robbery/attempt murder in
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26
DEFENDANT’S OPPOSITION TO STATE’S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 6

1 the present case. The armed robbery occurred in June 2015. The solicitation for murder occurred
2 several months later, in November 2015. The original armed robbery is a completely separate
3 plan, scheme, and occurrence from the solicitation for murder charge. These are completely
4 different plans and transactions that can and did occur separately of one another. Again, while the
5 State might be able to admit evidence that Defendant was implicated in a robbery by the victim in
6 Case Number C-16-311782-1 as to prove why Defendant would potentially have attempted to have
7 her murdered, the same is not true of the originally robbery. The two events are completely
8 separate, especially in relation to the robbery in the present case.

10 **B. THIS COURT SHOULD NOT CONSOLIDATE THE CASES BECAUSE THE**
11 **EVIDENCE IS NOT CROSS ADMISSIBLE AS EVIDENCE OF OTHER ACTS**
12 **PURSUANT TO NRS 48.045(2).**

13 “[F]or two charged crimes to be ‘connected together’ under NRS 173.115(2), a court must
14 determine that evidence of either crime would be admissible in a separate trial regarding the other
15 crime.” *Weber*, 121 Nev. at 573, 119 P.3d at 120. The prosecution cannot use evidence of collateral
16 offenses to show criminal propensity. *Middleton v. State*, 968 P.2d at 309 (citing *Keeney v. State*,
17 850 P.2d 311, 316 (Nev. 1993)). While evidence of other crimes, wrongs or acts is not admissible
18 to prove the character of a person in order to show that the person acted in conformity therewith,
19 such evidence may be admissible to prove “motive, opportunity, intent, preparation, plan,
20 knowledge, identity, or absence of mistake or accident.” NRS 48.045(2). Before such evidence
21 becomes admissible, the district court must first determine that the bad act is relevant to the crime
22 charged, proven by clear and convincing evidence, and that the probative value of the act is not
23 substantially outweighed by unfair prejudice. *Fields v. State*, 125 Nev. 785, 790, 220 P.3d 709,
24 713 (2009).

26
DEFENDANT’S OPPOSITION TO STATE’S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 7

1 The trial court should begin with the presumption that these charges are not cross-
2 admissible because “a presumption of inadmissibility attaches to all prior bad acts evidence.”
3 *Rosky v. State*, 111 P.3d 690, 697 (Nev. 2005).

4 **i. Modus Operandi and Identity**

5 The modus operandi exception is generally proper in “situations where a positive
6 identification of the perpetrator has not been made, and the offered evidence establishes a signature
7 crime so clear as to establish the identity of the person on trial.” *Ledbetter v. State*, 122 Nev. 252,
8 260, 129 P.3d 671, 677 (2006). In this case, the victim in Case C-16-311782-1 made a positive
9 identification of the Defendant in the present case, thus identity does not need to be established
10 and there is no need to present evidence of a “signature crime.” The allegations are not cross-
11 admissible to prove identity or modus operandi.
12
13

14 **ii. Intent or Absence of Mistake or Accident**

15 The exception for “absence of mistake or accident” does not apply in this case because Mr.
16 Ware has denied all the charges and has not raised a theory of mistake or accident, thus rendering
17 this exception inapplicable. Evidence of intent is only relevant if intent is an issue in controversy
18 in the case. Where the issue is not even being disputed or litigated, joining counts in order to “prove”
19 intent is simply a thinly veiled attempt to impregnate the case with improper character evidence in
20 direct violation of NRS 48.045.
21

22 In *Ledbetter v. State*, the Nevada Supreme court affirmed this principle when it rejected
23 the State’s arguments that evidence of prior bad acts were being introduced for various reasons
24 that were not in issue in the case. The Court wrote, “Whether Ledbetter's actions were the result
25 of an accident, mistake or unintentional conduct also do not appear at issue in this case, and we
26

DEFENDANT’S OPPOSITION TO STATE’S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 8

1 also reject the State's reliance upon these exceptions as a basis for admission.” *Ledbetter v. State*,
2 122 Nev. 252, 260, 129 P.3d 671, 677 (2006). Thus, there must actually be a controversy or defense
3 challenge under one of the categories before the State can assert that they to join charges in order
4 to “prove” the category. In this case, the Defense has no intention of challenging the element of
5 intent or claiming that the Defendant “accidentally” committed these offenses.
6

7 **iii. Opportunity and Knowledge**

8 Similarly, opportunity and knowledge are not relevant in the present case. The subsequent
9 acts in Case C-16-311782-1 will in no way assist the State in proving opportunity or knowledge
10 in the present case.

11 **iv. Preparation and Common Scheme or Plan**

12 The Defense references the argument made above for why the charges cannot be joined in
13 order to show common scheme or plan.
14

15 **v. Motive**

16 In the present case, motive is not at issue. While motive is potentially at issue in Case C-
17 16-311782-1, it certainly is not at issue in this case. The court will likely be inclined to admit
18 certain bad acts from the present case in case C-16-311782-1, but as stated above, the converse is
19 not true.
20

21 **C. CONSOLIDATING THE TWO CASES WILL RESULT IN UNFAIR PREJUDICE TO MR. WARE.**

22 Misjoinder requires reversal if the error has a substantial and injurious effect on the jury’s
23 verdict. *Mitchell v. State*, 782 P.2d 1340 (citing *United States v. Lane*, 474 U.S. 438, 449-50
24 (1950)). The Courts will reverse a conviction if the Defendant can show that the prejudice suffered
25 by the joinder constituted a denial of his right to a fair trial. *United States v. Martinez*, 48 F.2d 12,
26

DEFENDANT’S OPPOSITION TO STATE’S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 9

22 (5th Cir. 1973). The Nevada Supreme Court has found prejudice where a simultaneous trial rendered the process fundamentally unfair and a violation of due process. *Honeycutt v. State*, 56 P.3d 362 (Nev. 2002) (overruled on other grounds by *Carter v. State* 121 P.3d 592 (Nev. 2005)).

In this case, the solicitation for murder charge in Case C-16-311782-1 has no bearing on relation to the charges in the current robbery case. That case happened several months after the initial act, and evidence of the murder for hire is not necessary or relevant in proving the present case. If consolidation of these cases occurs, if the jury hears evidence of the facts in Case C-16-311782-1 during the trial in this present case, it will only have the effect of prejudicing the Defendant and making the jury believe he must have committed the robbery if he attempted to have the victim murdered after the fact. The facts from the subsequent case have no relevance in proving whether or not the Defendant committed the initial armed robbery. If the State were to be able to prove the facts in Case C-16-311782-1, all this would show is that the Defendant attempted to have someone murdered who implicated him in a robbery, not that he in fact committed that robbery. The jury will not be able to differentiate the two, however, and allowing facts of case C-16-311782-1 to be heard during the present case will only prejudice the Defendant and make it impossible for him to have a fair trial in this present robbery case.

The Nevada Supreme Court has previously explained that prejudice created by a District Court's failure to sever charges is more likely to warrant reversal in a close case because it may "prevent the jury from making a reliable judgment about guilt or innocence." *Tabish*, 119 Nev. 293, 72 P.3d at 591–92. These two cases are clearly "close", since the second one would not have occurred if not for the first one, and as such, not keeping the trial separate will potentially warrant reversal in the case if Ware is found guilty at trial.

DEFENDANT'S OPPOSITION TO STATE'S MOTION TO CONSOLIDATE, OR IN THE ALTERNATIVE,
MOTION TO ADMIT EVIDENCE OF OTHER ACTS PURSUANT TO NRS 48.045(2) - 10

1 The Defense submits to the Court that consolidating these two cases will result in a
2 fundamentally unfair trial and violate Mr. Ware's Due Process rights. Allowing facts from the
3 second case to be heard during this present case will absolutely prevent the jury from making a
4 reliable judgment about guilt or innocence.

5
6 **IV.**

7 **CONCLUSION**

8 Based upon the foregoing, it is respectfully requested that this Honorable Court deny the
9 State's Motion to Consolidate, or in the Alternative, Motion to Admit Evidence of Other Acts
10 Pursuant to NRS 48.045(2).

11 DATED this 18th day of February, 2016.

12 GREGORY & WALDO, LLC

13
14 /s/Jennifer Waldo

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16 Nevada Bar No.:11107

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CLERK OF THE COURT

OPPM

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DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN WARE,

Defendant.

Case No.: C-15-310099-1
Dept. No.: IX

**DEFENDANT'S OPPOSITION TO
STATE'S MOTION TO PERMIT THE
STATE TO INTRODUCE RES GESTAE
EVIDENCE AND EVIDENCE OF FLIGHT**

COMES NOW the Defendant ERIN WARE, by and through his attorneys, JENNIFER M. WALDO, ESQ. and AMANDA S. GREGORY, ESQ., of GREGORY & WALDO, LLC, and hereby submits the attached Points and Authorities in Opposition to the State's Motion to Permit the State to Introduce Res Gestae Evidence and Evidence of Flight.

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DEFENDANT'S OPPOSITION TO STATE'S MOTION TO PERMIT THE STATE TO INTRODUCE RES GESTAE EVIDENCE AND EVIDENCE OF FLIGHT - 1

1 This Opposition is made and based upon all the papers and pleadings on file herein, the
2 attached points and authority, and oral argument at the time set for hearing this Motion

3 DATED this 22nd day of February, 2016.

4 Respectfully submitted:

5
6 By: /s/Jennifer Waldo
7 JENNIFER M. WALDO, ESQ.
8 AMANDA S. GREGORY, ESQ.
Attorneys for Defendant

9 **MEMORANDUM OF POINTS & AUTHORITIES**

10 **I.**
11 **STATEMENT OF FACTS**

12 The State alleges that the Defendant entered a Subway restaurant located at 8790 S.
13 Maryland Parkway while alleged victims Ruth Garn and Jamie Nourie were working. The State
14 alleges that Defendant pointed a gun at the victims, threatening one, and ultimately shooting Ruth
15 Garn multiple times. Ms. Garn's gun was allegedly stolen during the commission of the robbery,
16 and later located at a pawn shop.

17
18 **II.**
19 **LEGAL ARGUMENT**

20 **A. THE COURT SHOULD NOT ALLOW THE STATE TO ADMIT EVIDENCE**
21 **RELATED TO THE DISPOSAL OF MS. GARN'S WEAPON AT TRIAL.**

22 The State is attempting to introduce evidence related to the disposal of the victim's gun in
23 this case in an attempt to complete the story, however, the evidence in question is inadmissible
24 under this theory. The complete story doctrine is to be construed in the narrowest terms and the
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DEFENDANT'S OPPOSITION TO STATE'S MOTION TO PERMIT THE STATE TO INTRODUCE RES
GESTAE EVIDENCE AND EVIDENCE OF FLIGHT - 2

1 evidence must be such that it is impossible for the State's witnesses to tell the story of the crime
2 without referring to the evidence. As the court stated in *Bellon v. State*, 121 Nev. 436, 444 (2005):

3
4 The State may present a full and accurate account of the crime, and such evidence is
5 admissible even if it implicates the defendant in the commission of other uncharged
6 acts. However, the "complete story of the crime" doctrine must be construed
7 narrowly. Accordingly, we have stated that "the crime must be so interconnected to
8 the act in question that a witness cannot describe the act in controversy without
9 referring to the other crime." We now reiterate that admission of evidence under
10 NRS 48.035(3) is limited to the statute's express provisions. Under the statute, a
11 witness may only testify to another uncharged act or crime if it is so closely related
12 to the act in controversy that the witness cannot describe the act without referring to
13 the other uncharged act or crime. (footnotes omitted).

14 Here, it is clear that the witnesses can testify to the acts that defendant is charged with
15 without referring to where the gun ultimately ended up. The State argues that it is necessary to
16 admit this evidence, since the gun is referenced in the Information. However, the gun is mentioned
17 as what item the Defendant stole during the commission of the robbery. There is video surveillance
18 that shows the suspect stealing the gun. Evidence that the gun later ended up at a pawn shop will
19 do nothing to prove any of the elements of the charged crimes. There is no dispute that Ms. Garn
20 had a firearm that was taken. It makes no sense to argue that it is "impossible to tell the complete
21 story" without telling the jury what ultimately happened to the gun. The complete story of this
22 crime is clearly viewable on video surveillance, and anything that occurred afterwards is irrelevant.

23 Additionally, the State has evidence that someone approached Mr. Hall *after* the Defendant
24 was arrested and asked him to pawn it. It is clear that it was not the Defendant who pawned the
25 gun, or asked Mr. Hall to pawn the gun, as the Defendant was in custody at that time. The State
26 has no evidence that the Defendant had anything to do with the pawning or disposal of the firearm.

DEFENDANT'S OPPOSITION TO STATE'S MOTION TO PERMIT THE STATE TO INTRODUCE RES
GESTAE EVIDENCE AND EVIDENCE OF FLIGHT - 3

1 To argue that the witnesses in this case cannot describe the acts that occurred without
2 referring to the other uncharged act (the pawning of the firearm), is disingenuous. One has nothing
3 to do with the other. The pawning of the firearm cannot even be traced back to the Defendant as
4 there is no evidence to do so. There is video surveillance and witness testimony regarding the
5 crimes charged. Testimony regarding what occurred with the gun after the fact, which there is no
6 evidence that it relates to the Defendant, is not admissible. As such, the evidence in question is
7 clearly not admissible under the complete story or res gestae doctrine, and the State's motion
8 should be denied.
9

10 **B. THIS COURT SHOULD NOT ALLOW THE STATE TO INTRODUCE**
11 **EVIDENCE OF FLIGHT AS EVIDENCE OF CONSCIOUSNESS OF GUILTY AT**
12 **DEFENDANT'S TRIAL.**

13 The Court should not allow the State to introduce evidence that defendant took flight as
14 consciousness of guilty. In order for the State to present evidence of flight, and presumably have
15 the jury instructed on such evidence, the evidence must actually show flight and a corresponding
16 consciousness of guilt. Flight itself only assumes relevance at a trial when it is evidence of
17 consciousness of guilt of a defendant. A jury may properly receive an instruction regarding a
18 defendant's flight so long as it is supported by the evidence. *Weber v. State*, 119 P.3d 107, 121
19 Nev. 554 (2005). Flight "signifies something more than a mere going away. It embodies the idea
20 of going away with a consciousness of guilt, for the purpose of avoiding arrest." *Id.* Because of
21 the possibility of undue influence by such an instruction, this court carefully scrutinizes the record
22 to determine if the evidence actually warranted the instruction. *Id.*
23

24 Here, there is evidence that the Defendant was located in Reno, Nevada, when he was taken
25 into custody. However, the Defendant's girlfriend resides in Reno, and Defendant's primary
26

1 residence for several years prior to this incident was Reno, Nevada. Defendant's presence in Reno
2 is not evidence that he took flight, but is simply evidence that he returned to his hometown.

3 The fact that the defendant was in Reno, Nevada, with his girlfriend, and where he had
4 spent several years prior, would seem to negate any inference that he was trying to flee, that he
5 had a plan to flee or that he took steps to flee. One would think that if Defendant was fleeing, he
6 would not have simply returned to his hometown with his girlfriend where he could easily be
7 located. As such, this court should deny the State's Motion.
8

9 **III.**

10 **CONCLUSION**

11 Based upon the foregoing, it is respectfully requested that this Honorable Court deny the
12 State's Motion to Permit the State to Introduce Res Gestae Evidence and Evidence of Flight.
13

14 DATED this 22nd day of February, 2016.

15 GREGORY & WALDO, LLC

16 /s/Jennifer Waldo

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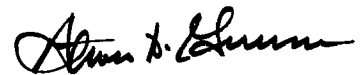
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CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA

vs.

Case No.

C-310099

ERIN WARE

Dept. No.

IX

DECISION AND ORDER

This Court, having reviewed the State's Motion to Consolidate or in the Alternative Motion to Admit Evidence of Other Acts Pursuant to NRS 48.045(2), the Defendant's Opposition, and the arguments of counsel, FINDS the Motion should be granted.

Defendant currently faces charges in case numbers C311782 and C310099, the instant case. The State seeks to consolidate the two cases so that they may be tried together, which the State argues should be allowed because the evidence in the two cases is cross admissible and the cases involve two or more acts "connected together." The Defendant argues that consolidation is inappropriate because the cases are based on separate acts and because consolidation would result in prejudice to the Defendant.

I. Facts

A. Case C310099: Robbery and Shooting

The State alleges the following: On June 10, 2015, Ruth Garn and Jamie Nourie were working at a Subway restaurant on Maryland Parkway. Defendant entered the Subway and purchased a cup of water, which he drank and discarded before leaving. Defendant later returned and asked store owner Ruth Garn if he could stay inside the restaurant while he waited for a ride. Defendant was the only customer to purchase a water cup that day.

Jamie and Ruth walked into the back of the restaurant, and Defendant approached them, held a gun to Ruth's head, and demanded money. Defendant then turned the gun on Jamie. As he did so, Ruth removed her own handgun from her purse, as she feared for her safety, pointed it at Defendant.

1 and told him to drop the weapon. Defendant then shot Ruth three times, once in the face, once in the
2 stomach, and once in the chest. Jamie witnessed the shooting. Defendant then forced Jamie at
3 gunpoint to open the cash register, which she did. Defendant then fled.

4 Ruth survived the shooting, but suffered a myriad of injuries, including severe damage to her
5 vision and hearing. As a result, Ruth was unable to identify the Defendant. However, Jamie did
6 positively identify the Defendant as the perpetrator. Defendant was further identified via DNA
7 testing of the water cup that Defendant had purchased and used before the shooting.

8 **B. Case C311782: Solicitation**

9 While in custody at CCDC, Defendant disclosed information about the Subway robbery to
10 another inmate, including the fact that Jamie was the only witness who could identify him.
11 Defendant told the inmate he could have a family member pay someone to kill Jamie. The inmate
12 then contacted LVMPD. Detectives Moreno and Spiotto visited the inmate at CCDC, and the
13 inmate showed them a letter from Defendant that stated, "I heard you a clean up man, I need some
14 garbage taken out. Handle it and I got five stacks for you." The inmate wore a wire the next day,
15 and the Defendant discussed the solicitation with him further. An undercover officer posing as a
16 family member of the inmate then visited Defendant. During the visit, which was videotaped,
17 Defendant told the officer that he wanted Jamie gone "forever," provided her name, address and
18 description, offered \$5,000, and indicated that he needed her killed before December 17, 2015, as
19 that was his next court date. The undercover officer met with Defendant again on December 14,
20 2015, and that meeting was also videotaped. The officer told Defendant he had done his
21 "homework" on Jamie, and held up photos of her, and the Defendant confirmed she was the person
22 to be killed. Defendant was then re-booked for solicitation.

23 **II. Analysis**

24 EDCR 3.10 allows case consolidation, stating that "criminal cases... may be consolidated or
25 reassigned to any criminal department for trial, settlement or other resolution." Further, the Nevada
26 Supreme Court has held that if evidence of one charge is cross-admissible in a separate trial on
27 another charge, then both charges may be tried together. Middleton v. State, 114 Nev. 1089 (1998).
28

1 The State argues that the evidence in both cases is cross-admissible, as the evidence in the robbery
2 case (C310099) would be admissible in the solicitation case (C311782) as evidence of consciousness
3 of guilt, and the evidence of the solicitation case would be admissible in the robbery case to show
4 motive. The State contends the cases may therefore be consolidated.

5 Defendant opposes consolidation on the grounds that the two acts are not based on the same
6 act, transaction, or common scheme or plan pursuant to NRS 173.115, which states that two or more
7 offenses may be charged together if the offenses are "[b]ased on the same act or transaction" or are
8 "based on two or more acts or transactions connected together or constituting parts of a common
9 scheme or plan." Defendant argues that the two cases are not based on the same act or transaction,
10 as the two cases occurred five months apart and are separate charges, and therefore cannot be
11 considered part of the "same act or transaction." Further, Defendant alleges that consolidation will
12 result in unfair prejudice to him, as a jury will not be able to differentiate the two cases, making it
13 impossible for Defendant to have a fair trial.

14 The two cases may be properly consolidated pursuant to EDCR 3.10. Further, consolidation
15 is appropriate under Middleton, as evidence of the cases is cross-admissible. NRS 48.045(2) states
16 that evidence of other crimes, wrongs or acts is admissible to show "proof of motive, opportunity,
17 intent, preparation, plan, knowledge, identity, absence or mistake or accident." Additionally,
18 evidence of other acts is admissible to prove consciousness of guilt. Weber v. State, 121 Nev. 554
19 (2005). First, evidence of the solicitation would be highly relevant in the robbery case to show
20 Defendant's identity and consciousness of guilt pursuant to Weber. The fact that the Defendant told
21 an undercover officer whom he believed to be a hitman details about Jamie, including her name,
22 address, and description, and the inference that he would pay \$5000 for her murder because she was
23 a witness, show Defendant's consciousness of his guilt of the robbery because she was the only
24 victim who could identify him. Further, evidence of the robbery case would be highly relevant in
25 the solicitation case to show a motive for the solicitation pursuant to NRS 48.045(2). The State
26 alleges that Defendant solicited Jamie's murder because she was a witness to the robbery. The
27 robbery was therefore a motive for the solicitation.


28 Here, the State alleges repeated video evidence of the solicitation as well as evidence written

1 by the Defendant. While a probable cause finding regarding the solicitation has already occurred,
2 the video evidence of Defendant's statements provides more than clear and convincing evidence that
3 the crime of solicitation had occurred.¹

4 Here, Defendant's two cases are clearly connected together. Further, evidence of either
5 crime would be cross-admissible in the other pursuant to Weber v. State and NRS 48.045(2).
6 Consolidation is therefore appropriate.

7 THEREFORE, for the reasons stated herein, this Court ORDERS the State's Motion to
8 Consolidate is GRANTED.

9
10 DATED this 11th of May, 2016.

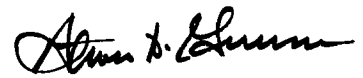
11 
12 JENNIFER P. TOGLIATTI
13 DISTRICT COURT JUDGE

14
15
16
17 I hereby certify that on the date filed, a copy of this
18 Order was electronically served through the Eighth
19 Judicial District Court EFP system, or, if no e-mail
20 was provided, mailed or placed in the Clerk's Office
21 attorney folder for:

22 Amanda Gregory, Esq. (Gregory & Waldo)
23 Kristina Rhoades, Esq. (DA - Criminal)

24 
25 DIANE SANZO, Judicial Assistant

26
27 ¹ This Court takes judicial notice of the video evidence presented to the grand jury January 5, 2016 in grand jury exhibits
28 3 and 4 and discussed by Detective Moreno in his sworn testimony before the grand jury.



CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA

vs.

ERIN WARE

Case No.

C-310099

Dept. No.

IX

DECISION AND ORDER

This Court, having reviewed the State's Motion to Permit the State to Introduce Res Gestae Evidence and Evidence of Flight, the Defendant's Opposition, and the arguments of counsel, FINDS the Motion should be granted in part and denied in part.

Defendant currently faces charges in case numbers C311782 and C310099, the instant case. The State seeks to consolidate the two cases so that they may be tried together, which the State argues should be allowed because the evidence in the two cases is cross admissible to the extent that the two cases are "connected together" in a single case. The Defendant argues that consolidation is inappropriate because the cases are based on separate acts and because consolidation would result in prejudice to the Defendant.

I. Facts

The State alleges the following: On June 10, 2015, Ruth Garn and Jamie Nourie were working at a Subway restaurant on Maryland Parkway. Defendant entered the Subway and purchased a cup of water, which he drank and discarded before leaving. Defendant later returned and asked store owner Ruth Garn if he could stay inside the restaurant while he waited for a ride. Defendant was the only customer to purchase a water cup that day.

Jamie and Ruth walked into the back of the restaurant, and Defendant approached them, held a gun to Ruth's head, and demanded money. Defendant then turned the gun on Jamie. As he did so,

JENNIFER TOGLIATTI
DISTRICT JUDGE
DEPARTMENT IX

1 Ruth removed her own handgun from her purse, as she feared for her safety, pointed it at Defendant,
2 and told him to drop the weapon. Defendant then shot Ruth three times, once in the face, once in the
3 stomach, and once in the chest. Ruth's handgun had fallen to the floor, and Defendant picked it up.
4 Defendant then forced Jamie at gunpoint to open the cash register, which she did. Defendant then
5 fled.

6 On June 15, 2015, police issued a media release, including a sketch of Defendant, in an effort
7 to locate him. Around that time, Defendant contacted his girlfriend, Trudy, and indicated he wanted
8 to go to Reno and that he wished to bring a gun with him. Trudy advised that he could not take a
9 gun. Defendant then told her he would sell it, as he needed money. He then fled to Reno, where he
10 was apprehended.

11 One August 27, 2015, a black male approached Emmet Hall, and offered him \$60 to pawn
12 Ruth's gun. Hall agreed and pawned it at a shop in Las Vegas, where police recovered it.

13
14 **II. Analysis**

15 The State argues that evidence of Defendant's disposal of Ruth's gun is admissible pursuant to
16 the doctrine of res gestae, and that evidence of Defendant's flight to Reno is admissible to show
17 consciousness of guilt. Defendant disputes the admissibility of the disposal of the gun, arguing that
18 video surveillance of the incident shows Defendant taking Ruth's gun, and that anything that
19 occurred after that is irrelevant. Further, Defendant notes there is insufficient evidence showing the
20 Defendant had anything to do with Hall pawning the gun. Defendant also disputes the admissibility
21 of Defendant's flight to Reno, claiming that he returned to Reno because it is his hometown and his
22 girlfriend lived there, not because he was fleeing apprehension in Las Vegas.

23 Pursuant to res gestae, or the "complete story" doctrine, all facts necessary to prove a crime,
24 if "linked to the chain of events which support that crime, are admissible," and the State "is entitled
25 to present a full and accurate account of the circumstances of the commission of the crime." Dutton
26 v. State, 94 Nev. 461 (1978). Further, evidence that is "inextricably intertwined with the charged
27 crimes" should be admitted. State v. Shade, 111 Nev. 887 (1995). When overruling the trial court's
28 grant of a motion in limine that excluded res gestae evidence, the Nevada Supreme Court also held

1 that a cautionary jury instruction should have been issued. Shade, Id.

2 The State argues that it would be impossible to tell the "complete story" without mentioning
3 the theft of Ruth's gun and its disposition at the pawn shop, as it tells the story of Defendant's arrest,
4 and the gun is mentioned in Counts 2, 3, and 11 of the Information.¹ However, evidence of the
5 gun's whereabouts after the robbery would be more prejudicial than probative. The State's motion
6 is therefore denied as to this res gestae evidence.

7 Next, evidence of Defendant's flight from Las Vegas to Reno is admissible because it is
8 evidence of his consciousness of guilt. Evidence of flight is admissible when the flight is
9 "something more than a mere going away," and is an embodiment of "going away with a
10 consciousness of guilt, for the purpose of avoiding arrest." Weber v. State, 121 Nev. 554 (2005).
11 The Subway robbery occurred on June 10, 2015, and LVMPD issued a press release seeking the
12 Defendant's whereabouts on June 15, 2015.² Around that same time, Defendant went to Reno.
13 Defendant alleges that this does not constitute "flight" because he was in Reno to see his girlfriend
14 and to return to his hometown. However, the State notes that before Defendant was apprehended by
15 police in Reno, he attempted to flee through the back of a residence, showing that he was conscious
16 of his guilt. Evidence that the Defendant travelled to Reno after the robbery was committed and
17 after the LVMPD press release regarding the robbery, together with the fact that Defendant fled
18 from a home when he was apprehended by police in Reno supports a finding that Defendant's
19 "going away" was done with consciousness of guilt in order to evade arrest pursuant to Weber.

20
21 /
22 /
23 /
24 /

25
26 ¹ The Court notes the Second Amended Information charges Defendant with Robbery with Use of a Deadly Weapon
27 (Counts 2-3) and Ownership or Possession of Firearm by Prohibited Person (Count 11).
28

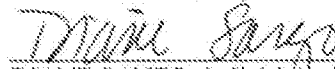
1 Overall, the Court FINDS the State's Motion to introduce evidence of flight GRANTED.
2 However, the State's Motion to introduce res gestae evidence regarding the handgun is DENIED.
3 THEREFORE, for the reasons stated herein, this Court ORDERS the State's Motion GRANTED IN
4 PART AND DENIED IN PART.

5 DATED this 12th of May, 2016.

6
7 
8 JENNIFER P. TOGLIATTI
9 DISTRICT COURT JUDGE

10
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14
15
16
17 I hereby certify that on the date filed, a copy of this
18 Order was electronically served through the Eighth
19 Judicial District Court EFP system, or, if no e-mail
was provided, mailed or placed in the Clerk's Office
attorney folder for:

20 Amanda Gregory, Esq. (Gregory & Waldo)
21 Kristina Rhoades, Esq. (DA - Criminal)

22 
DIANE SANZO, Judicial Assistant

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28
JENNIFER TOGLIATTI
DISTRICT JUDGE
DEPARTMENT IX


CLERK OF THE COURT

MOT

AMANDA S. GREGORY, ESQ.
Nevada Bar No. 11107
JENNIFER M. WALDO, ESQ.
Nevada Bar No. 11900
GREGORY & WALDO, LLC
324 S. 3rd Street, Suite 2
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Email: asg@gregoryandwaldo.com
Attorneys for Defendant
ERIN WARE

DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN WARE,

Defendant.

Case No.: C-15-310099-1

Dept. No.: IX

**DEFENDANT'S MOTION FOR BAIL
REDUCTION**

COMES NOW the Defendant ERIN WARE, by and through his attorneys, JENNIFER M. WALDO, ESQ. and AMANDA S. GREGORY, ESQ., of GREGORY & WALDO, LLC, and hereby submits the foregoing Motion for Bail Reduction.

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DEFENDANT'S MOTION FOR BAIL REDUCTION - 1

1 This Motion is made and based upon all the papers and pleadings on file herein, the
2 attached points and authority, and oral argument at the time set for hearing this Motion

3 DATED this 27th day of June, 2016.

4 Respectfully submitted:

5
6 By: /s/Jennifer Waldo
7 JENNIFER M. WALDO, ESQ.
8 AMANDA S. GREGORY, ESQ.
9 Attorneys for Defendant

10 **NOTICE OF MOTION**

11 TO: STATE OF NEVADA, Plaintiff; and

12 TO: DISTRICT ATTORNEY, its attorney:

13 PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion for Own
14 Recognizance Release, or in the Alternative, for Bail Reduction hearing in Department 9 of the
15 above-entitled Court, on the 30 day of June, 2016, at the hour of
16 9 : 00 A.m., or as soon thereafter as counsel may be heard.

17 DATED this 27th day of June, 2016.

18
19 GREGORY & WALDO, LLC

20
21 JENNIFER M. WALDO, ESQ.
22 Nevada Bar No.: 11900
23 Attorney for Defendant
24
25
26

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I.**

3 **PROCEDURAL HISTORY**

4 The Defendant, ERIN WARE, has been charged by way of Information as follows: one
5 (1) count Burglary While in Possession of a Deadly Weapon, one (1) Battery with Intent to Commit
6 a Crime, one (2) counts Robbery with Use of a Deadly Weapon, and one (1) count Battery with
7 Use of a Deadly Weapon Resulting in Substantial Bodily Harm, one (1) count Attempt Murder
8 with Use of a Deadly Weapon, one (1) count Assault with Use of a Deadly Weapon, three (3)
9 counts Discharge Firearm from or within a Structure of Vehicle, one (1) count Ownership or
10 Possession of Firearm by Prohibited Person, and one (1) count Solicitation to Commit Murder.
11 Mr. Ware is set for trial to begin on August 22, 2016. Initially, Mr. Ware was set for two separate
12 trials stemming out of two separate events. Both cases were set for bail at \$500,000 each.
13 However, the cases were recently consolidated.
14
15
16

17 **II.**

18 **STATEMENT OF FACTS**

19 In the current case, the State alleges that the Defendant entered a Subway restaurant located
20 at 8790 S. Maryland Parkway while alleged victims Ruth Garn and Jamie Nourie were working.
21 The State alleges that Defendant pointed a gun at the victims, threatening one, and ultimately
22 shooting Ruth Garn multiple times. Victim Jamie Nourie identified the Defendant as the suspect
23 in the robbery and shooting.
24
25
26

1 In Case Number C-16-311782-1, detectives placed a confidential informant with the
2 Defendant at the jail several months after the initial incident, and it is alleged that the Defendant
3 attempted to make a plan to have the victim who identified him in case C-15-310099-1 murdered.
4

5 III.

6 LEGAL ARGUMENT

7 The United States Constitution and the Constitution of the State of Nevada both provide
8 prohibitions against excessive bail. Article 1, section 7 of the Nevada Constitution provides that
9 “[a]ll persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders
10 punishable by life imprisonment without the possibility of parole when the proof is evident or the
11 presumption great.” Moreover, the Court in *In re Knast*, 96 Nev. 597, 614 P.2d 2 (1980) held that
12 “punishment should follow conviction, not precede it. The right to bail is consonant with the
13 presumption of innocence that attaches to all defendants prior to conviction. Our constitution
14 admits of but one exception to the right, a capital case where proof is evident and the presumption
15 is great.” *Id.* at 598, 614 P.2d at 3 (citations omitted). Based upon the above provided facts, it
16 cannot be argued that the proof is either strong or evident. Accordingly, the appropriate
17 presumption here is the presumption of innocence.
18
19
20

21 The Nevada Revised Statutes set forth certain factors this Court should consider when
22 considering bail. N.R.S. 178.4853, provides for release of persons without bail based upon the
23 following factors:

24 In deciding whether there is good cause to release a person without
25 bail, the court as a minimum shall consider the following facts
26 concerning the person:

1. The length of his residence in the community;

2. The status and history of his employment;
3. His relationships with his spouse and children, parents or other members of his family and with his close friends;
4. His reputation, character and mental condition;
5. His prior criminal record, including any record of his appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who could vouch for the defendant's reliability;
7. The nature of the offense with which he is charged, the apparent probability of conviction and the likely sentence, in so far as these factors relate to the risk of his not appearing;
8. The nature and seriousness of the danger to any person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after he is released; and
10. Any other factors concerning his ties to the community or hearing on the risk that he may willfully fail to appear. (1981, p. 1584; 1985, p. 809).

N.R.S. 178.498 establishes the factors that should be considered when setting bail:

If the defendant is admitted to bail, the bail must be set at an amount which in the judgment of the magistrate will reasonably ensure the appearance of the defendant and the safety of other persons and of the community, having regard to:

1. The nature and circumstances of the offense charged;
2. The financial ability of the defendant to give bail;
3. The character of the defendant; and
4. The factors listed in NRS 178.4853 (1967, p. 1452; 1985, p. 809).

1 Mr. Ware understands that the allegations made against him are serious and have life
2 changing consequences. That said, Mr. Ware enjoys the presumption of innocence until proven
3 guilty.

4 Mr. Ware is not a flight risk. He is currently suffering from the end stages of kidney failure.
5 He receives dialysis with the jail 3 times per week. Mr. Ware requires a kidney transplant in order
6 to ever be off dialysis and be healthy again. As such, Mr. Ware is in no condition to be able to
7 flee if he were to bail out of custody. His main concern is to get out of jail to receive the appropriate
8 medical care.
9

10 As such, Mr. Ware respectfully requests that this Court reduce his bail to a reasonable
11 amount. \$1,000,000 is an excessively high bail.

12 **IV.**

13 **CONCLUSION**

14
15 Based upon the foregoing Motion, it is respectfully requested that this Honorable Court
16 grant Defendant's Motion for Bail Reduction.

17 DATED this 27th day of June, 2016.

18 GREGORY & WALDO, LLC

19 /s/ Amanda Gregory

20 AMANDA S. GREGORY, ESQ.

21 Nevada Bar No.:11107

22 JENNIFER M. WALDO, ESQ.

23 Nevada Bar No. 11900

24 GREGORY & WALDO, LLC

25 324 S. 3rd Street, Suite 2

26 Las Vegas, NV 89101

Attorneys for Defendant

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Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

An Employee of Gregory & Waldo


CLERK OF THE COURT

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ELIZABETH MERCER
Chief Deputy District Attorney
Nevada Bar #10689
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-0968
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,)
)
-vs-)
)
ERIN WARE,)
#2652033)
)
Defendant.)
_____)

Case No. C-15-310099-1

Dept No. IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO REDUCE BAIL

DATE OF HEARING: 06/30/16

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, by and through ELIZABETH MERCER, Chief Deputy District Attorney, and files this Opposition to Defendant's Motion to Reduce Bail. This motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES
STATEMENTS OF THE CASES

A warrant was issued for the arrest of Defendant Erin Ware (hereinafter “Defendant”) on or about July 23, 2015. Defendant was arrested on August 11, 2015. He was arraigned in Justice Court on August 18, 2015; and, at that time a preliminary hearing was scheduled for September 1, 2015. The Public Defender’s office filed a motion to withdraw due to conflict which was heard on August 24, 2015. That motion was granted and the preliminary hearing was reset to September 9, 2015.

At the time set for the preliminary hearing on September 9, 2015, defense counsel requested to continue and the State did not oppose that request. The preliminary hearing was rescheduled to October 15, 2015. On October 15, 2015, the preliminary hearing was held during which witnesses Ruth Garn, Jamie Nourie, and Detective Lance Spiotto testified. Following the hearing, Defendant was bound over to the District Court on all charges. During that hearing, witness Jamie Nourie was the only witness who was able to identify Defendant as the perpetrator of the crimes charged.

He was arraigned in District Court on November 16, 2015. At that time, he invoked his right to a trial within sixty (60) days and his jury trial was scheduled for January 4, 2016. At the calendar call on December 17, 2015, defense counsel requested a brief continuance. The matter was reset to March 28, 2016.

Four (4) days after the December 17th calendar call, Defendant was rebooked on one count of Solicitation to Commit Murder. On December 23, 2015, he was charged *via* Criminal Complaint with soliciting the murder of Jamie Nourie, the only witness who is able to identify him in Case No. C310099. That case was assigned Case No. 15F18958X. The following day he was arraigned and the preliminary hearing was scheduled for January 7, 2016. Prior to the preliminary hearing, the State sought and obtained an Indictment. The Indictment was filed in District Court Case No. C311782 on January 6, 2016. Defendant

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//

1 was arraigned in District Court on January 13, 2016 at which time he entered a plea of not
2 guilty and waived his right to a trial within 60 days. His Jury Trial was scheduled for July 25,
3 2016.

4 By this Motion, the State respectfully requests the consolidation of that case (C311782) into
5 this case (C310099).

6 **STATEMENT OF FACTS**

7 On June 10, 2015, at approximately 2:30 p.m., Ruth Garn and Jamie Nourie were
8 working at the Subway located at 8790 S. Maryland Parkway, Las Vegas, Nevada.
9 Preliminary Hearing Transcripts, 7-8, 39.¹ While working, the defendant entered the store and
10 loitered around for a bit. PH, 39-41. Eventually, he asked for a cup for water. PH, 9, 42.
11 Jamie charged him 25 cents for the cup. PH, 9, 42. Defendant filled up the water cup, drank
12 the water for a minute then walked outside. PH, 42. Five (5) to ten (10) minutes later, he
13 walked back inside and asked if he could use the restroom. PH, 10, 42. He set his water cup
14 on the table, went to the restroom and walked back out. PH, 42. When Defendant came out
15 of the restroom, he asked if he could wait for his ride inside the restaurant for a bit. Ruth and
16 Jamie allowed him to wait inside. PH, 10, 43. Defendant waited near the drink fountain and
17 continued to drink water. PH, 44, 49, 60. Defendant was the only customer that day that asked
18 for a water cup. PH, 49.

19 Jamie and Ruth walked to the back where they began to put dishes away and do prep
20 work. PH, 44-45. There were no other customers in the store at that point. PH, 44-45. While
21 in the back, Ruth walked into the fridge. PH, 45. As Ruth began to walk back out of the
22 fridge, Defendant approached Jamie and stuck a gun in her face. PH, 45-46. Jamie said, "Oh
23 my God" at which point Ruth turned around and saw Defendant holding a gun to Ruth's head.
24 PH, 11. Defendant told Ruth, "Give me all the fucking money." PH, 12. Ruth put her hands
25 in the air and told him that he didn't have to do that, and that they didn't have any money in
26 the back. PH, 12. Defendant pushed her into the desk and told her, "I guess we're just going
27

28 ¹ Hereinafter abbreviated, "PH."

1 to have to get it out of your fucking purses.” PH, 12. After he pushed Ruth into the desk,
2 Defendant went behind Ruth and grabbed Jamie and put the gun to her neck and said he was
3 going to kill her. PH, 12. At that point, Ruth went into her purse and removed her .357 Ruger
4 Security Six revolver, for which she possessed a concealed carry permit. PH, 12. Ruth
5 removed the gun because she was in fear for Jamie’s safety. Ruth turned toward Defendant,
6 pointed the gun at him and told him to drop his weapon. PH, 13.

7 Defendant fired his weapon at Ruth and shot her in the face. PH, 13. The bullet entered
8 just below her left eye, traveled under her nose, under her cheekbone and exited the right side
9 of her face just above her ear. PH, 13. Ruth fell to the ground onto her right side. PH, 14.
10 Defendant stepped over her and with Jamie and had his gun to Jamie’s neck. PH, 14. Ruth
11 tried to get up, at which time Defendant shot her again. PH, 14. That bullet went through her
12 arm and into her stomach. PH, 15. Ruth told Defendant to quit shooting her and put her arm
13 up to block the bullets. PH, 16. He shot her a third time and the bullet entered her chest and
14 bounced off of her sternum and exited right back out. PH, 18.

15 While Defendant was initially focused on Ruth, he ordered Jamie to lay down on the
16 ground and put her face down. PH, 46. Jamie heard Defendant say something to Ruth about
17 getting money out of her purse. PH, 46. After that, Jamie heard a gunshot. PH, 46. She lifted
18 her head to see what was happening and saw Defendant and Ruth struggling over something
19 near the prep table. PH, 46. Defendant ordered her to put her head back down, and then Jamie
20 heard another shot. PH, 46. At that point, Defendant ordered Jamie to get up and go open the
21 safe in the front. PH, 46. Jamie got up and walked past Ruth, who was laying on the flooring
22 bleeding. PH, 47. As she walked past Ruth, she noticed that Ruth had her gun on the floor
23 next to her. PH, 49, 57. Defendant still had his gun in his hand. PH, 57. Per the surveillance
24 video of the incident, Defendant picked Ruth’s gun up off of the floor and shot her two more
25 times. PH, 57. As Jamie walked to the front, she heard two more gunshots. PH, 47. Jamie
26 was afraid that Ruth was going to die, and that Defendant was going to shoot her as well. PH,
27 47.

28 //

1 Once Jamie got near the register, she knelt to try and unlock the safe. At that point,
2 Defendant walked up behind her and put the gun to her neck. PH, 48. Jamie tried to enter the
3 combination to the safe but was shaking so badly that she couldn't get it to open. PH, 48.
4 Jamie told Defendant she could not get it open at which point he ordered her to open the
5 register. PH, 48. Jamie removed the whole drawer from the register and tried to hand it to
6 Defendant, but he just looked at it and ran out. PH, 48. Jamie went back to Ruth and dialed
7 911. PH, 49. Ruth's gun was no longer present. PH, 50.

8 Ruth was transported to the hospital where she remained for four (4) days. PH, 22. For
9 the first two days she was sedated. PH, 22. She suffered a brain bleed and a myriad of other
10 injuries. PH, 23. While hospitalized she had to undergo surgery to remove the bullet from
11 her stomach. PH, 24. After being released from the hospital, she had to have both orbital
12 floors replaced because they were blown out by the bullet to her face. PH, 26. She had double
13 vision, blurred vision, and can't focus her eyes. PH, 26. She has permanent damage to her
14 right pupil and her left tear duct was ruined. PH, 26, 28. In addition, she can't smell or taste,
15 her left eardrum was perforated from the blast and she sustained inner ear damage and
16 deafness. PH, 26. Additionally, several tendons in her arm were damaged. PH, 27. As a
17 result she can't use her thumb and her pointer finger, middle finger and pinky on her left hand
18 are numb. PH, 27. In addition, she has to use a walker to move around because of issues with
19 her balance caused by damage from the bullets. PH, 28. Ruth was unable to identify
20 Defendant because of damage to her eyesight. PH, 22-23.

21 Jamie met with a sketch artist on June 14, 2015 and assisted them in doing a sketch of
22 Defendant. PH, 67. Then, on July 22, 2015, Jamie viewed a six pack photographic line-up
23 and positively identified Defendant as the individual who robbed them, and shot Ruth multiple
24 times. PH, 63-64.

25 The plastic cup used by Defendant for drinking water on the day of the robbery was
26 swabbed for DNA. Subsequent testing revealed that Defendant's DNA was on that cup. Once
27 Erin Ware was identified as the robber, officers began to attempt to locate Defendant to arrest
28 him. Members of the Criminal Apprehension Team located him in Reno, Nevada, where he

1 fled following the robbery of Jamie Nourie and Ruth Garn. When Detectives attempted to
2 arrest him at the home of his girlfriend, Defendant attempted to elude them by fleeing out of
3 the back door.

4 Ultimately, he was taken into custody. After his arrest, he was interviewed. Post-
5 *Miranda* warnings, Defendant denied ever being inside of that Subway.

6 Thereafter, on November 30, 2015, Det. Lance Spiotto received a voicemail message
7 that an inmate at the Clark County Detention Center had information that Defendant Erin Ware
8 was attempting to solicit the murder of Jamie Nourie. After receiving the message, Detective
9 Spiotto went to the Detention Center and interviewed the inmate that same day. The following
10 day, Det. Spiotto and Det. Moreno met with the inmate again. During that interview, the
11 inmate informed the detectives that Ware provided him with a great number of details
12 concerning the incident on June 10, 2015 at Subway. The inmate provided those details to the
13 detectives, including the fact that Jamie Nourie was the only witness who could identify
14 Defendant at the preliminary hearing. Defendant told the inmate that he could have his “Pops”
15 or his “broad” pay the person who was willing to kill Jamie. The inmate was able to give the
16 detectives Jamie’s home address which Defendant provided to him. The inmate expressed to
17 detectives that he felt he needed to let them know because he was concerned due to the
18 violence used in the robbery, and because he believed Defendant was capable of hiring
19 someone to murder Jamie. The inmate advised detectives that he told Defendant to expect a
20 visit from a family member of his named “Check” who would assist Defendant.

21 On December 7, 2015, when Det. Moreno went to visit with the inmate about
22 potentially wearing a wire, the inmate showed Det. Moreno a letter that Defendant provided
23 to the inmate in which he stated, “I heard you a clean up [*sic*] man and I need some garbage
24 to be taking out. Handle it and I got 5 stacks for you.” The inmate advised detectives that he
25 needed to return with the letter so that Defendant could finish it. At that point, Det. Moreno
26 photographed the letter and gave it to the inmate.

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1 The next day, the inmate wore a wire. While the inmate was wearing the wire,
2 Defendant read the letter to the inmate. In addition, they discussed the solicitation in more
3 detail.

4 Then, on December 9, 2015, an undercover detective conducted a videotaped visit with
5 Defendant. Erin Ware believed that the UC was the inmate's family member who went by the
6 name "Check." During that visit, Defendant confirmed that he wanted Jamie Nourie gone
7 "not for a minute" but "forever." He also held up a letter for the UC which contained Nourie's
8 name, address and description and confirmed that he would pay the UC five (5) stacks (\$5,000)
9 for taking care of it. In addition, he held up the Information from Case No. C-15-310099-1
10 and showed the UC the charges that he was facing, along with the list of witnesses attached to
11 the Information. Defendant advised the UC that he needed it done by the 17th of December
12 because that was the day that he was supposed to go to Court and see if everyone is ready for
13 trial. That list contained the name and address of Jamie Nourie. At the conclusion of the visit,
14 it was agreed that the UC would visit Defendant in a few days to follow-up.

15 On December 10, 2015, Det. Moreno was contacted by Alex Gonzalez at the Detention
16 Center who advised that the inmate gave two letters to him from Defendant to forward to Det.
17 Moreno. One of those letters was the letter that Defendant held up during the videotaped visit
18 and described Jamie Nourie, the amount to be paid for her murder, and her work and home
19 addresses. Defendant believed that the inmate was going to mail the letters to his girlfriend to
20 give to "Check"/the UC.

21 The UC met with Defendant again on December 14, 2015. Again, it was a videotaped
22 visit over the video visitation system at the jail. During the second meeting, Defendant
23 reiterated his desire to have Nourie murdered. Additionally, the UC advised Defendant that
24 he'd done his "homework" on Jamie, and held up two photographs of her so that Defendant
25 could confirm whether that was the correct individual. Defendant confirmed that was the
26 Jamie Nourie he was talking about.

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1 After detectives completed their investigation with regard to whether there really was
2 anybody trying to assist Ware in paying for the murder of Jamie Nourie, Defendant was
3 rebooked.

4 **DEFENDANT'S BAIL SHOULD NOT BE REDUCED.**

5 NRS 178.498 provides as follows:

6 If the defendant is admitted to bail, the bail must be set at an amount which in
7 the judgment of the magistrate will reasonably ensure the appearance of the
8 defendant and the safety of other persons and of the community, having regard
9 to:

1. The nature and circumstances of the offense charged;
2. The financial ability of the defendant to give bail;
3. The character of the defendant; and
4. The factors listed in NRS 178.4853.

11 NRS 178.4853 provides as follows:

12 In deciding whether there is good cause to release a person without bail, the
13 court as a minimum shall consider the following factors concerning the person:

1. The length of his residence in the community;
2. The status and history of his employment;
3. His relationship with his spouse and children, parents or other
members of his family and with his close friends;
4. His reputation, character and mental condition;
5. His prior criminal record, including any record of his appearing
or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who
would vouch for the defendant's reliability;
7. The **nature of the offense with which he is charged**, the apparent
probability of conviction and the **likely sentence**, insofar as these
facts relate to the risk of his not appearing;
8. The nature and seriousness of the danger to any person or the
community that would be posed by the person's release;
9. The **likelihood of more criminal activity** by the person after he is
released; and
10. Any other factors concerning his ties to the community or
bearing on the **risk that he may willfully fail to appear**.

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1 The primary purpose of bail is to assure the accused's presence at trial. *However, it*
2 *also serves to protect the community by ensuring that a defendant does not engage in further*
3 *criminal activity while released.* The State submits that the Defendant's bail in this case
4 should not be modified.

5 Defense counsel asks this Court to reduce the 1 million dollar bail setting and claims
6 that her client should be released from custody so that he can obtain a kidney transplant. The
7 State objects for numerous reasons, including his criminal history, his failure to comply with
8 Court and law enforcement directives, the fact that he continued to engage in criminal conduct
9 after being booked into the Clark County Detention Center, and his flight while on probation
10 and in the immediate case.

11 Initially, the State points out that Defendant's bail was originally set at \$500,000. That
12 bail amount pertained only to the counts related to the Robbery of Jamie Nourie and Ruth
13 Garn. However, while in custody of the Clark County Detention Center, Defendant continued
14 to engage in criminal conduct. More specifically, he solicited the murder of Jamie Nourie, the
15 only witness to the robbery in this case who is capable of personally identifying him.

16 Moreover, Defendant's criminal record indicates, very clearly, that Defendant is and
17 will continue to be a danger to the community. His alleged health issues have not slowed him
18 down. In 2007, at the young age of 17, Defendant committed robberies with a firearm at two
19 separate locations, one at Weinerschnitzel and one at Desert Food Mart. At the time he
20 committed the robbery at the Weinderschnitzel, he had his girlfriend's five (5) year old
21 daughter in the vehicle. When officers responded to the scene, he led them on a high speed
22 chase. The child was still in the car. He was certified as an adult and charged in C240973.
23 His original charges included 3 Counts of Robbery with Use of a Deadly Weapon, 2 Counts
24 of Burglary While in Possession of a Deadly Weapon, Child Abuse and Neglect, Conspiracy
25 to Commit Robbery and Felony Evading. He pled guilty to 1 Count of Robbery and 1 Count
26 of Felony Evading. He was sentenced to a total of 24-60 months.

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1 Then, in 2011, Defendant was arrested when he attempted to secure a loan at Payday
2 Loan using falsified documents. He ultimately entered a plea to Attempt Burglary and was
3 granted probation. On March 27, 2012, Defendant was reinstated following his arrest for
4 various probation violations which appear to have included his leaving the State without
5 permission from his probation officer. Within 9 months, another warrant was issued for his
6 failure to comply with the terms of his probation, including failing to check-in with his
7 probation officer. *Of note is that a hearing was held on February 28, 2013 at which time*
8 *Defendant claimed that he should be reinstated or granted a dishonorable discharge because*
9 *he was No. 10 on the transplant list and in need of dialysis.* The matter was continued to
10 March 7, 2013, at which time his probation officer informed the Court that she was able to
11 confirm that Defendant was NOT on the transplant list. At that time, his probation was
12 revoked and he was sent to prison to serve his sentence of 19-48 months.

13 In the present case, the Defendant committed an extremely violent armed robbery in
14 which he shot Ruth Garn multiple times. After shooting Ruth Garn multiple times, he took
15 her gun and fled the scene. Then, within a short period of time of committing the robbery, he
16 fled the jurisdiction to Reno, Nevada where he was ultimately arrested by members of the
17 Criminal Apprehension Team. Text messages from the defendant's phone indicate that at the
18 time he fled, he knew that he was a suspect in the robbery of Ruth Garn. Furthermore, at the
19 time the Criminal Apprehension Team detectives approached the home of his girlfriend, where
20 he was staying, Defendant attempted to elude them by escaping out of the back.

21 In addition to the robbery that he is charged with in this case, he is a suspect in another
22 robbery that occurred at a different Subway on June 5, 2015. Also, LVMPD received a
23 notification of a CODIS hit to Erin Ware for another robbery at the 25 Club, a bar across the
24 street from Nellis Air Force base. In that case, which occurred three (3) days prior to the
25 robbery in the instant case, he robbed an 80 year old man and a 56 year old woman at gunpoint.
26 Interestingly, one of the items stolen in that robbery was a revolver belonging to

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1 the 80 year old man. Police suspect that the revolver he stole is the one he used to shoot Ruth
2 Garn in the present case. Once the forensic lab confirms the DNA match, Defendant will be
3 rebooked on that robbery.

4 Aside from the violence he has repeatedly exhibited, Defendant represents an enormous
5 flight risk. In the present case, he fled from Las Vegas after this crime and attempted to flee
6 from the detectives once again when detectives located him at his girlfriend's house.
7 Furthermore, in Defendant's prior robbery case, he engaged police in a high speed chase. And,
8 in his 2011 case, he repeatedly failed to check in with his probation officers and left the state
9 without permission. Ultimately, warrants were issued for him two separate times as a result
10 of his absconding. Given the significant amount of time Defendant is currently facing and the
11 strength of the evidence against him, Defendant has every reason to flee the jurisdiction.

12 CONCLUSION

13 In light of the foregoing, the State respectfully requests that this Honorable Court
14 DENY Defendant's Motion to Reduce Bail.

15 DATED this 29th day of June, 2016.

16 STEVEN B. WOLFSON
17 Clark County District Attorney
Nevada Bar #001565

18
19 BY /s//LIZ MERCER

20 LIZ MERCER
Chief Deputy District Attorney
21 Nevada Bar #10689
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Opposition, was made this 29th day of June, 2016,
by Electronic Filing to:

JENNIFER M. WALDO, ESQ.
E-mail Address: jmw@gregoryandwaldo.com

AMANDA GREGORY, ESQ.
E-mail Address: asg@gregoryandwaldo.com

Shellie Ortega
Secretary for the District Attorney's Office

mmo/GCU

Exhibit “1”



Arrest / Detective Report

Administrative

Location **4531 N Las Vegas Blvd Las Vegas, NV 89115** Sector / Beat **F4**
Occurred On (Date / Time) **Sunday 6/7/2015 10:30:00 PM** Or Between (Date / Time) **Sunday 6/7/2015 10:54:00 PM**
Reporting Officer **14318 - Moore, Bryan G** Reported On **6/7/2015**
Entered By **14318 - Moore, Bryan G** Entered On **6/8/2015 12:03:27 AM**
Supervisor **07415 - Stovall, Timothy D** Follow Up Pro Squad **NE 13** Follow Up
Jurisdiction **Clark County** Report Type **Supplemental-Changes to Original** Disposition **Active**
Route To: Related Cases **LLV150607003996, LLV150607004416**
Connecting Reports: **Connecting Reports**
Voluntary Statement
Victim Information Guide

Assisting Officers:
13475 - Artis, Brian E Officer
06214 - Roundy, Kevin V Officer
06826 - Cardenas, Elias Detective
08427 - Felabom, Adam M Crime Scene Analyst

Offenses

Robbery, E/DW(F)-NRS 200.380
Completed **Yes** Hate/Bias **None (No Bias)** Domestic Violence **No**
Entry Premises Entered Type Security Tools
Weapons **Handgun** Location Type **Bar/Night Club**
Criminal Activities

Kidnapping, 1st Degree, E/DW(F)-NRS 200.310.1
Completed **Yes** Hate/Bias **None (No Bias)** Domestic Violence **No**
Entry Premises Entered Type Security Tools
Weapons **Handgun** Location Type **Bar/Night Club**
Criminal Activities

Grand Larceny Of Gun(F)-NRS 205.226.2
Completed **Yes** Hate/Bias **None (No Bias)** Domestic Violence **No**
Entry Premises Entered Type Security Tools
Weapons Location Type **Bar/Night Club**
Criminal Activities

Victims

Name: **The 25 Club**

Victim Type **Business** Written Statement Can ID Suspect
Victim of **50138 - Robbery, E/DW(F)-NRS 200.380** Domestic Battery
SSN DOB Age Sex Eye Color Race Ethnicity
Height Weight Hair Color Eye Color
Employer/School Work Schedule
Occupation/Grade DL Country
DLN DL State Tourist Departure Date
Resident Injury Weapons
Injury

Addresses
Business 4531 N Las Vegas Blvd Las Vegas, NV 89115

Phones
Business/Work

Email

Offender Relationships
Domestic Violence Information
Relationship to Suspect Primary Aggressor Determined
Intimate Relationship Drug/Alcohol Involvement
Voluntary Statement DV Information Provided
Injury Severity Medical Attention
Photos Taken

Notes:

Name: Foley, Sherri Ann

Victim Type	Individual	Written Statement	Yes	Can ID Suspect	Yes
Victim of	50055 - Kidnapping, 1st Degree, E/DW(F)-NRS 200.310.1			Domestic Battery	No
	50138 - Robbery, E/DW(F)-NRS 200.380				
SSN	DOB	Age	56	Sex	Female
				Race	White
				Ethnicity	Not Hispanic or Latino
Height	5' 2"	Weight	180	Hair Color	Blond
				Eye Color	Blue
Employer/School	The 25 Club				
Occupation/Grade	Bartender			Work Schedule	
DLN	DL State			DL Country	
Resident	Resident			Tourist Departure Date	
Injury	None Observed			Injury Weapons	Handgun

Addresses

Business
Residence

Phones

Cellular

Email

Offender Relationships

S - Unknown **Victim Was Stranger**

Domestic Violence Information

Relationship to Suspect	Primary Aggressor	Determined
Intimate Relationship	Drug/Alcohol Involvement	
Voluntary Statement	DV Information Provided	
Injury Severity	Medical Attention	
Photos Taken		

Notes:

Name: Jones, Burdett

Victim Type	Individual	Written Statement	Yes	Can ID Suspect	No
Victim of	50055 - Kidnapping, 1st Degree, E/DW(F)-NRS 200.310.1			Domestic Battery	No
	50138 - Robbery, E/DW(F)-NRS 200.380				
	50526 - Grand Larceny Of Gun(F)-NRS 205.226.2				
SSN	DOB	Age	80	Sex	Male
				Race	White
				Ethnicity	Not Hispanic or Latino
Height	5' 10"	Weight	140	Hair Color	Gray
				Eye Color	Blue
Employer/School	The 25 Club				
Occupation/Grade	Owner			Work Schedule	
DLN	DL State	Nevada		DL Country	USA
Resident	Resident			Tourist Departure Date	
Injury	None Observed			Injury Weapons	Handgun

Addresses

Business

Phones

Home/Residence
Business/Work

Email

Offender Relationships

S - Unknown **Victim Was Stranger**

Domestic Violence Information

Relationship to Suspect	Primary Aggressor	Determined
Intimate Relationship	Drug/Alcohol Involvement	
Voluntary Statement	DV Information Provided	
Injury Severity	Medical Attention	
Photos Taken		

Notes:

Jones lives in the back office of the 25 Club.

Suspects

Name: **Unknown**

Written Stmt. **No** Alerts Non-English **No** Language

Aliases
Moniker

Scope ID DOB Age **20-25** SSN
Race **Black or African American** Ethnicity **Not Hispanic or Latino** Build **Thin** Handedness
Sex **Male** Height **5' 5" - 6' 0"** Weight **135 - 160** Hair Color **Black** Eye Color **Brown**

Employer/School Occupation/Grade

Hair Length Hair Style Eyes
Complexion Facial hair Teeth

Appearance **Ragged/Transient Ski Mask** Injury/Condition

Speech manner Speech Characteristics

DLN DL State DL Country Place of Birth

Resident **Unknown** Tourist Departure
Habitual Offender Status MO Factors
**Ate/drank On Premises
Forced Victim to Ground or Floor
Suspect Armed
Suspect Posed As Needing Water/Bathroom/Phone
Wore Mask
Victim Had to Perform Specific Actions**

Primary Means of Attack/Weapon **Handgun** Weapon Features
Employer/School Occupation/Grade

Scars, Marks and Tattoos
Addresses

Phones

Domestic Violence Information

TPO in Effect Drug/Alcohol Involvement Voluntary Statement
Injury Severity Medical Attention DV Info provided
Photos Taken Suspect Demeanor

Notes:

Arrestees

Witnesses

Witness Name: **Germano, Douglas**

Written Statement **Yes** Can ID Suspect **Yes** Testify
SSN DOB Age **65** Race **White** Ethnicity **Not Hispanic or Latino**
Sex **Male** Height **6' 3"** Weight **198** Hair Color **Blond** Eye Color **Blue**

Addresses
Residence

Phones
Cellular

Notes:

Other Entities

Name: **Person of Interest Unknown**

Written Statement **No** Can ID Suspect
SSN DOB Age **20** Race **Black or African** Ethnicity Not Hispanic or Latino

Sex **Female** Height **5' 8"** Weight **160** American Hair Color **Black** Eye Color **Brown**
Employer/School Occupation/Grade
Tourist **Unknown** Departure Date
DLN DL State DL Country

Addresses

Phones

Missing Person / Runaway

Physical Appearance	Physical Build	Headwear Color
Skin Complexion	Eye Description	Teeth Description
Hair Length	Hair Style	Facial Hair
Speech Characteristics	Speech Manner	Dominate Hand
Injury or Condition	Distinctive Jewelry	
Medical Info		Blood Type
Headwear Color	Probable Destination	
Disappearance Type	Missing Before	How long at present address
Responsible Adult	Relationship to MP	POB
Last seen by	Last seen where	Last seen Date/Time
Last seen wearing		Fingerprints Available
Footprints Available	X-rays Available	Dental Available
Photo Attached	Corrected Vision	Circumcised

Scars, Marks, Tattoos:

Dead Body Report Information

Coroner/Physician	Coroner/Physician Name
Coroner Case #	Coroner Seal #
Case of Death	Date/Time Pronounced
Public Administrator	Hospital/Mortuary
Facility Name	Attendant Name
Photos Taken	

Synopsis

Investigation

Scene

Body

Evidence at Scene

Notes:

Female appeared ~6 months pregnant and was wearing a peach and gray striped ankle-length dress.

Properties

Type: Firearms, Explosives (Weapons)

Status	Stolen	Quantity	1	Value	400.00	Color	Black
Description	revolver						
Manufacturer	Ruger	Model	LCR	Serial No./VIN	54302067		
Vehicle Year		Body Type					
Lic Plate		Lic Plate State		Lic Plate Exp			
#							
Insurance Company							
Owner	V - Jones, Burdett						

Notes: **I called Teletypes for entry into NCIC but was told only a Firearms or Gangs Detective, Sergeant, or Teletype supervisor was able to call in a firearm for entry unless the stolen firearm was from a gun store or an officer's personal firearm. Per Dispatch, Firearms has been disbanded and gangs will only take gang related firearms. I advised Sgt. Stovall, 767, who stated he would have it entered.**

F/A ENTERED INTO NCIC - REG LOCATED IN ONBASE. L9132W 06/08/2015

Detailed Property Information

Length	Width	Height
Horse Power	Propulsion Serial #	
Caliber	0.38	Barrel Length 2"
Features		

Recovered Property Information

Recovered Date	Recovered Value
Recovered Location	Recovered Reason
Recovered By	Recovered Stock #
Owner Type	Released To
Insurance Rep.	Tow Company

Type: **Currency, Coins, Securities, Cash**

Status	Stolen	Quantity	1	Value	484.00	Color
Description	U.S. Currency					
Manufacturer		Model		Serial No./VIN		
Vehicle Year		Body Type				
Lic Plate #		Lic Plate State		Lic Plate Exp		
Insurance Company						
Owner	V - The 25 Club					
Notes:	Approximately \$250 from the drinks/food register (1x \$100, the rest mix of bills) and approximately \$243 from the gaming register.					

Detailed Property Information

Length	Width	Height
Horse Power	Propulsion Serial #	
Caliber	Barrel Length	
Features		

Recovered Property Information

Recovered Date	Recovered Value
Recovered Location	Recovered Reason
Recovered By	Recovered Stock #
Owner Type	Released To
Insurance Rep.	Tow Company

Type: **Currency, Coins, Securities, Cash**

Status	Stolen	Quantity	1	Value	100.00	Color
Description	U.S. Currency					
Manufacturer		Model		Serial No./VIN		
Vehicle Year		Body Type				
Lic Plate #		Lic Plate State		Lic Plate Exp		
Insurance Company						
Owner	V - Jones, Burdett					
Notes:	mix \$20s, \$5s, and \$1s.					

Detailed Property Information

Length	Width	Height
Horse Power	Propulsion Serial #	
Caliber	Barrel Length	
Features		

Recovered Property Information

Recovered Date	Recovered Value
Recovered Location	Recovered Reason
Recovered By	Recovered Stock #
Owner Type	Released To
Insurance Rep.	Tow Company

Type: **Currency, Coins, Securities, Cash**

Status	Stolen	Quantity	1	Value	40.00	Color
Description	U.S. Currency					
Manufacturer		Model		Serial No./VIN		
Vehicle Year		Body Type				
Lic Plate #		Lic Plate State		Lic Plate Exp		
Insurance Company						
Owner	V - Foley, Sherri Ann					
Notes:						

Detailed Property Information

Length	Width	Height
Horse Power	Propulsion Serial #	
Caliber	Barrel Length	
Features		

Recovered Property Information

Recovered Date	Recovered Value
Recovered Location	Recovered Reason
Recovered By	Recovered Stock #
Owner Type	Released To
Insurance Rep.	Tow Company

Solvability

Criminalistics Work Was Performed
Stolen Property is Traceable, (Identifiable)
Suspect Can Be Described
Witness Present
Witness Present - Other
Significant MO is Present

Modus Operandi

MO General			
Occupied?	Yes	Surrounding Area	Middle of Block
General Premise	Bar/Lounge	Specific Premise	Room
MO Against Property			
Entry Point	Exit Point		Entry Location
Entry/Attempt Method	Entry Tool		Vehicle Entry
Safe Entry	Suspect Actions		Additional Factors
Victim Location	Electronic Locks		Video Surveillance
Maid	Inspectress		Yes
MO Against People			
Victim-Suspect Relationship		Pre-Incident Contact	Other
Victim Condition	Over 60	Suspect Solicited/Offered	
Suspect Pretended to Be	Customer	Suspect Actions	Had Victim Lie Down
			Moved Victim's Location
			Suspect's Face Concealed
Sexual Acts		Vehicle Involvement	

Narrative

On 6/7/15 at approximately 2255 hours Officers Roundy P# 6214 (614A), Artis P# 13475 (1F4), and I, Officer Moore (1F44), were dispatched to a robbery call at The 25 Club at 4531 N. Las Vegas Blvd. Las Vegas, NV 89115. The details of the call stated that a black male adult in dark clothing and a black ski mask had robbed the PR and his daughter at gun point before leaving in an unknown direction.

Upon my arrival, I contacted the victims Burdett Jones and his daughter Sherri Foley, and a witness identified as Douglas Germano. Jones is the owner of The 25 Club and lives in the back office. Foley works as a bartender/waitress. Germano is a friend of Jones and Foley who helps around the bar.

Foley stated that shortly have 2200 hours the suspect, whose she described as a black male in his 20s, about 5'5"-5'8" wearing a black beanie like hat, blue t-shirt with a yellow logo, and camouflage shorts entered the bar and asked her several questions including "How late the kitchen be open?", "How long would it take to cook some fried shrimp?" The suspect then asked Foley where the restroom was. Foley pointed the suspect to it and the suspect went into the restroom for a couple minutes then exited the bar without ordering.

Foley stated that approximately 2-5 minutes later a black female adult in her 20s, approximately 5'8" in height and who appeared about 6 months pregnant, wearing a peach and gray striped ankle-length dress entered the bar. Foley stated that the female asked the same series of questions reference how late the kitchen would be open and how long to cook some shrimp. Foley stated that she also gave the female a menu. The female then exited the bar without ordering.

Approximately 10 minutes later, the male subject re-entered the bar holding a menu. Foley stated that the male appeared very nervous and kept looking around the bar and towards the door. Foley continued as said the male ordered some fried shrimp and fries but exited and re-entered the bar several times stating that he was "waiting for [his] brother." The male eventually sat down at a table near the front door which is where Foley gave him a glass of water and a straw. However, Foley stated she was worried about the male's behavior so she went into the back by the kitchen and office to tell Jones about the male.

As Foley entered the back and began to tell Jones about the male, the male also entered the back area now wearing a black ski mask and with 2 black handguns, one in either hand. Jones and Foley both stated that the male pointed the guns at their heads and ordered them to the floor just inside the back office (where the camera system is located and Jones' bedroom) and threatened to kill them if they didn't comply.

The suspect then ordered Jones and Foley to stand up with their hands over their heads and forced them, to go back into the main bar area behind the bar next to the cash register used for the food and drink transactions. Jones stated that the suspect then told him not to move or he would "blow his [Jones'] head off. The suspect then "frisked" Jones, taking out Jones' wallet and removing approximately \$100 from it. The suspect then located and took Jones' firearm from Jones' person. Jones' firearm was a .38 caliber Ruger LCR revolver, black in color

with a 2" barrel bearing the serial number of "54302067." The suspect also took several pairs of keys out of Jones' pockets and threw them on the floor behind the bar. The suspect ordered Foley to get her wallet out of the purse (located next to the entrance to the kitchen area) and give the suspect her money. Foley retrieved approximately \$40.00 from her wallet and gave it to the suspect. Foley was then ordered to open the cash register and give the money to the suspect. Foley complied and gave the suspect an additional approximately \$250 including a \$100 bill.

The suspect then ordered Jones to his feet and forced Jones and Foley under threat of being shot, towards the second cash register closer to the front door of the bar. This register is used for gaming transactions. Jones was again ordered to the floor and Foley was ordered to open the register and hand the suspect the money out of the register (~\$243). After Foley gave him the money, the suspect ordered Foley to the ground next to Jones and ordered them to count to 100 and not move. The suspect said that if they got up before 100, he would kill them. Jones waited until he was sure the suspect was gone then locked the doors on the bar and called 911.

When I entered the bar, I saw the glass of water with a straw in it at the table where Foley indicated the suspect had been sitting as well as the still open cash draw on the gaming register. I located Jones' missing keys next to the bar in front of the food/drinks register.

Germano arrived shortly after the officers and attempted to help retrieving the surveillance video without success. Germano did state that he was present when the male suspect first entered to ask about the food and use the restroom. Germano described him as a black male with a small build, approximately 5'7" wearing a black shirt with yellow letters, black pants, and a black sock hat. Germano left shortly after the male exited the first time and did not see the male or female as he was leaving.

CSA Felabom P#8427 responded, processed the scene for fingerprints, and impounded the straw from the suspect's drink for possible recovery of DNA. Robbery Detective Cardenas P# 6826 responded to the scene and spoke to Germano, Jones, and Foley. Det. Cardenas completed an interview with Foley and all the witnesses completed voluntary statements.

Patrol Follow-Up

Officer Artis spoke to the employees of the Nellis Suites (at 4555 N. Las Vegas Blvd which is located directly behind The 25 Club in the same parking lot) who stated that a black male with the same description as our suspect attempted to rob one of their clerks earlier that night at approximately 2140 hours (LLV150607003996). This suspect was described as a black male 5'10" wearing a black shirt with california sign and yellow caution tape, blue shorts, and holding his waistband. A report was taken for 407z under event LLV150607004416). The clerk stated that the suspect asked him if he knew anything about The 25 Club or Siegel Slots (located at 5011 E. Craig).

Officer Roundy spoke to security at Siegel Slots who stated that a male matching the suspect's description was at their property at approx. 1730-1830 hours (6/7/15) and signed up for a players card. Det. Cardenas will be following up at all three locations.

Exhibit “2”

Las Vegas Metropolitan Police Department Forensic Laboratory CODIS Hit Notification Report Biology/DNA Forensic Casework		Distribution Date: March 23, 2016 Agency: LVMPD Location: Robbery/Homicide Bureau Primary Case #: 150607-4234 Incident: Robbery WDW Requester: Elias Cardenas Lab Case #: 15-08238.2
Subject(s):	None Listed	

The Biology/DNA Detail of the Las Vegas Metropolitan Police Department Forensic Laboratory reports the following:

During a search of the Local DNA Index System (CODIS) a match occurred between a Nevada Arrestee and evidence from event #150607-4234, Item 1, a full DNA profile obtained from a clear plastic straw.

The CODIS match has been confirmed to:

DNA Database ID: 2015-014303
 Name - Ware, Erin DeShaun
 DNA Qualifying Offense - Burglary with a weapon
 DOB - 2/16/1990
 SSN - 602-34-2454
 NVSID # - NV04255028
 LVMPD CS # - 2652033

This hit constitutes an investigative lead in your case(s). A new reference buccal swab must now be obtained from this individual in order to confirm this hit and complete the case(s). The DNA sample currently on file, which was collected in accordance with Nevada Law (NRS 176.09123), will not suffice for the confirmation process.

The information provided in this report can be used to obtain a Search Warrant for a reference buccal swab from the above person.

When a reference buccal swab is obtained, please submit a request to the Biology/DNA Detail of the Forensic Lab so the swab(s) can be processed. It is necessary that you provide the Hit Notification Detail information regarding the status of this hit notification within 30 days of the distribution date of this report. A form will be emailed to you from the Hit Notification Detail and you are required to complete the form and email it back at the following email address: HitNotificationDetail@lvmpd.com.



Beata Vida, #14279
 Forensic Scientist II

- END OF REPORT -


CLERK OF THE COURT

AINF
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
LIZ MERCER
Chief Deputy District Attorney
Nevada Bar #010681
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-

ERIN DESHAUN WARE,
#2652033

Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

**THIRD AMENDED
INFORMATION**

STATE OF NEVADA }
COUNTY OF CLARK } ss.

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ERIN DESHAUN WARE, the Defendant(s) above named, having committed the crimes of **BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060 - NOC 50426); BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony - NRS 200.400.2 - NOC 50151); ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 200.481 - NOC 50226); ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010,**

1 **200.030, 193.330, 193.165 - NOC 50031); DISCHARGE OF FIREARM FROM OR**
2 **WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287 - NOC**
3 **51445); OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON**
4 **(Category B Felony - NRS 202.360 - NOC 51460) and SOLICITATION TO COMMIT**
5 **MURDER (Category B Felony – NRS 199.500.2 – NOC 50037),** on or between the 10th
6 day of June, 2015, and the 14th day of December, 2015, within the County of Clark, State of
7 Nevada, contrary to the form, force and effect of statutes in such cases made and provided,
8 and against the peace and dignity of the State of Nevada,

9 COUNT 1 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

10 did, on or about the 10th day of June, 2015, willfully, unlawfully, and feloniously enter,
11 with intent to commit robbery, that certain business occupied by SUBWAY, located at 8790
12 South Maryland Parkway, Las Vegas, Clark County, Nevada, while possessing and/or gaining
13 possession of, handgun, a deadly weapon, during the commission of the crime and/or before
14 leaving the structure.

15 COUNT 2 - ROBBERY WITH USE OF A DEADLY WEAPON

16 did, on or about the 10th day of June, 2015, willfully, unlawfully, and feloniously take
17 personal property, to-wit: a handgun, from the person of RUTH GARN, or in her presence, by
18 means of force or violence, or fear of injury to, and without the consent and against the will of
19 RUTH GARN, with use of a deadly weapon, to-wit: a handgun.

20 COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON

21 did, on or about the 10th day of June, 2015, willfully, unlawfully, and feloniously take
22 personal property, to-wit: a handgun, from the person of JAIME NOURIE, or in his presence,
23 by means of force or violence, or fear of injury to, and without the consent and against the will
24 of JAIME NOURIE, with use of a deadly weapon, to-wit: a handgun.

25 COUNT 4 - BATTERY WITH INTENT TO COMMIT A CRIME

26 did, on or about the 10th day of June, 2015, then and there willfully, unlawfully, and
27 feloniously use force or violence upon the person of another, to-wit: RUTH GARN, with intent
28 to commit robbery by punching and/or pushing and/or striking the said RUTH GARN.

1 COUNT 5 – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
2 SUBSTANTIAL BODILY HARM

3 did, on or about the 10th day of June, 2015, willfully, unlawfully, and feloniously use
4 force or violence upon the person of another, to-wit: RUTH GARN, with use of a deadly
5 weapon, to-wit: a handgun, by shooting the said RUTH GARN several times, resulting in
6 substantial bodily harm to RUTH GARN.

7 COUNT 6 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

8 did, on or about the 10th day of June, 2015, willfully, unlawfully, feloniously and with
9 malice aforethought attempt to kill RUTH GARN, a human being, with use of a deadly
10 weapon, to-wit: a handgun, by shooting at and into the body of the said RUTH GARN.

11 COUNT 7 – ASSAULT WITH USE OF A DEADLY WEAPON

12 did, on or about the 10th day of June, 2015, willfully, unlawfully, feloniously and
13 intentionally place another person in reasonable apprehension of immediate bodily harm
14 and/or did willfully and unlawfully attempt to use physical force against another person, to-
15 wit: JAMIE NOURIE, with use of a deadly weapon, to-wit: a handgun, by pointing a firearm
16 at the said JAMIE NOURIE and/or otherwise threatening her with said firearm

17 COUNT 8 - DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR
18 VEHICLE

19 did, on or about the 10th day of June, 2015, willfully, unlawfully, maliciously, and
20 feloniously, while in, on or under a structure, located at 8790 S. Maryland Parkway, Clark
21 County, Nevada, discharge a firearm within or from the structure, while being within an area
22 designated by a City or County Ordinance as a populated area for the purpose of prohibiting
23 the discharge of weapons.

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1 COUNT 9 - DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR
2 VEHICLE

3 did, on or about the 10th day of June, 2015, willfully, unlawfully, maliciously, and
4 feloniously, while in, on or under a structure, located at 8790 S. Maryland Parkway, Clark
5 County, Nevada, discharge a firearm within or from the structure, while being within an area
6 designated by a City or County Ordinance as a populated area for the purpose of prohibiting
7 the discharge of weapons.

8 COUNT 10 – DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR
9 VEHICLE

10 did, on or about the 10th day of June, 2015, willfully, unlawfully, maliciously, and
11 feloniously, while in, on or under a structure, located at 8790 S. Maryland Parkway, Clark
12 County, Nevada, discharge a firearm within or from the structure, while being within an area
13 designated by a City or County Ordinance as a populated area for the purpose of prohibiting
14 the discharge of weapons.

15 COUNT 11 - OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON

16 did, on or about the 10th day of June, 2015, willfully, unlawfully, and feloniously own,
17 or have in his possession and/or under his custody or control, a firearm, to-wit: a .357 Ruger
18 belonging to Ruth Garn and/or the firearm that he carried into the business with him to commit
19 the crime, the defendant being a convicted felon, having in 2008, been convicted of Robbery
20 and Stop Required on Signal of Police Officer, in Case No. C240973, in the Eighth Judicial
21 District Court, Clark County, a felony under the laws of the State of Nevada and/or, having in
22 2011, been convicted of Attempt Burglary, in Case No. C274352-1, in the Eighth Judicial
23 District Court, Clark County, a felony under the laws of the State of Nevada.

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COUNT 12 – SOLICITATION TO COMMIT MURDER

did, on or between the 9th day of December, 2015, and the 14th day of December, 2015, wilfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit another, to-wit: an UNDERCOVER OFFICER, to commit the murder of JAMIE NOURIE.

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

BY /s//LIZ MERCER
LIZ MERCER
Chief Deputy District Attorney
Nevada Bar #010681

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME

ADDRESS

CUSTODIAN OF RECORDS – CLARK COUNTY DETENTION CENTER

CUSTODIAN OF RECORDS – LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS – LVMPD RECORDS

FLETCHER, SHAWN – LVMPD P#5221

GARN, RUTH – 4126 OXNARD CIR., LVN 89121

HOLSTEIN, DANIEL – LVMPD P#3861

HONAKER, JAMIE – DISTRICT ATTORNEY INVESTIGATOR

NELSON, JASON – LVMPD P#6825

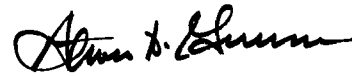
NOURIE, JAIME – 10347 MAURICE RIVER CT., LVN 89183

PEREZ, RAFAEL – 9850 BERMUDA RD., #248, LVN 89123

RAFALOVICH, MARCO – DISTRICT ATTORNEY INVESTIGATOR

SPIOTTO, LANCE – LVMPD P#4774

15F10849X/mmw/GCU
LVMPD EV#1506102629
(TK2)



CLERK OF THE COURT

MOT

AMANDA S. GREGORY, ESQ.
Nevada Bar No. 11107
JENNIFER M. WALDO, ESQ.
Nevada Bar No. 11900
GREGORY & WALDO, LLC
324 S. 3rd Street, Suite 2
Las Vegas, NV 89101
Telephone: (702) 830-7925
Facsimile: (702) 294-0231
Email: asg@gregoryandwaldo.com
Attorneys for Defendant
ERIN WARE

DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

Case No.: C-15-310099-1
Dept. No.: IX

vs.

MOTION TO CONTINUE TRIAL

ERIN WARE,

Defendant.

COMES NOW the Defendant ERIN WARE, by and through his attorneys, JENNIFER M. WALDO, ESQ. and AMANDA S. GREGORY, ESQ., of GREGORY & WALDO, LLC, and hereby submits the foregoing Motion to Continue Trial.

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MOTION TO CONTINUE TRIAL - 1

1 This Motion is made and based upon all the papers and pleadings on file herein, the
2 attached points and authority, and oral argument at the time set for hearing this Motion

3 DATED this 4th day of August, 2016.

4 Respectfully submitted:

5
6 By: /s/Jennifer Waldo

7 JENNIFER M. WALDO, ESQ.

8 AMANDA S. GREGORY, ESQ.

9 Attorneys for Defendant

10 **NOTICE OF MOTION**

11 TO: STATE OF NEVADA, Plaintiff; and

12 TO: DISTRICT ATTORNEY, its attorney:

13 PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to
14 Continue Trial for hearing in Department 9 of the above-entitled Court, on the 16 day of
15 August, 2016, at the hour of 9:00 a.m., or as soon thereafter as counsel
16 may be heard.

17 DATED this 4th day of August, 2016.

18
19 GREGORY & WALDO, LLC

20 /s/ Jennifer Waldo

21 JENNIFER M. WALDO, ESQ.

22 Nevada Bar No.: 11900

23 Attorney for Defendant
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JENNIFER M. WALDO, ESQ., being first duly sworn according to law, deposes and states as follows:

2. That your affiant is the court appointed attorney in the matter of the *State of Nevada*
v. *Erin Ware*, Case No.: C-15-310099-1;

4. That on October 19, 2015, Mr. Ware was arraigned in case number C-15-310099- entered a not guilty plea to charges related to an armed robbery;

6. That on May 12, 2016, this honorable Court issued an Order consolidating case number C-15-31009-1 with case number C-16-311782-1;

8. That your Affiant has been diligently investigating and preparing the defense in 15-31009-1 since the time of her appointment. This case involved far more serious charges

318

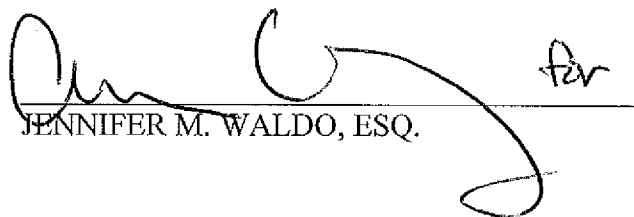
1 then the second case. Your Affiant has also been diligently investigating and preparing case C-
2 16-311782-1, however, that investigation and defense has now been altered since the cases have
3 been consolidated;

4 9. That over the past month, counsel has learned new information regarding case C-
5 16-311782-1, through independent investigation, that is imperative to fully investigate prior to
6 going to trial on case number C-15-31009-1. The facts of the Solicitation case can greatly impair
7 the defense of the armed robbery case. The new information obtained by counsel is very important
8 to fully investigate before going to trial on both cases.


10 10. That the undersigned is in the process of serving several subpoenas in relation to
11 the newly discovered information;

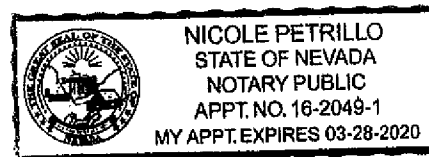
12 11. That this request to continue the trial is brought for the reasons stated above and
13 not for the purpose of harassment or to cause undue delay.

14 FURTHER AFFIANT SAYETH NAUGHT.

16
17 
18 JENNIFER M. WALDO, ESQ.

19
20 SUBSCRIBED AND SWORN to before me
21 this 4th day of August, 2016 .

22 
23 NOTARY PUBLIC in and for
24 said County and State.



25
26 MOTION TO CONTINUE TRIAL - 4

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I.**

3 **PROCEDURAL HISTORY**

4 The Defendant, ERIN WARE, has been charged by way of Information as follows: one
5
6 (1) count Burglary While in Possession of a Deadly Weapon, one (1) Battery with Intent to Commit
7 a Crime, one (2) counts Robbery with Use of a Deadly Weapon, and one (1) count Battery with
8 Use of a Deadly Weapon Resulting in Substantial Bodily Harm, one (1) count Attempt Murder
9 with Use of a Deadly Weapon, one (1) count Assault with Use of a Deadly Weapon, three (3)
10 counts Discharge Firearm from or within a Structure of Vehicle, one (1) count Ownership or
11 Possession of Firearm by Prohibited Person, and one (1) count Solicitation to Commit Murder .
12
13 Mr. Ware is set for trial to begin on August 22, 2016. Initially, Mr. Ware was set for two separate
14 trials stemming out of two separate events. Both cases were set for bail at \$500,000 each.
15 However, the cases were recently consolidated. Due to the need to continue and investigate the
16 allegations made in this case, Counsel is requesting a continuance of this Trial.

17
18 **II.**

19 **ARGUMENT**

20
21 Based on all representations stated in the above Affidavit of Counsel, counsel is requesting
22 that trial in these matters be continued. It is crucial to have additional time to investigate new
23 information discovered by counsel. Defendant is facing many serious charges that can result in a
24 very serious prison sentence. As such, it is imperative that the case be handled properly and all
25 avenues of defense explored.
26

MOTION TO CONTINUE TRIAL - 5

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III.

CONCLUSION

Based upon the foregoing Motion, it is respectfully requested that this Honorable Court grant Defendant's Motion to Continue Trial.

DATED this 4th day of August, 2016.

GREGORY & WALDO, LLC

/s/ Jennifer Waldo

AMANDA S. GREGORY, ESQ.

Nevada Bar No.:11107

JENNIFER M. WALDO, ESQ.

Nevada Bar No. 11900

GREGORY & WALDO, LLC

324 S. 3rd Street, Suite 2

Las Vegas, NV 89101

Attorneys for Defendant

CERTIFICATE OF MAILING

I, do hereby certify that on the 4th day of August, 2016, I did serve a true and correct copy of the foregoing Defendant's MOTION TO CONTINUE TRIAL by placing in the United States mail, first-class postage fully prepaid, addressed as follows:

Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

/s/ Nicole Petrillo

An Employee of Gregory & Waldo


CLERK OF THE COURT

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KRISTINA RHOADES
Deputy District Attorney
Nevada Bar #
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-

ERIN DESHAUN WARE,
#2652033

Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO CONTINUE TRIAL

DATE OF HEARING: 08/16/16
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KRISTINA RHOADES, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Continue Trial.

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 **STATEMENT OF THE CASE**

3 On October 27, 2015, the State filed a Second Amended Information charging
4 Defendant Erin Ware (“Defendant”) with one (1) count of Burglary While in Possession of a
5 Deadly Weapon (Category B Felony); two (2) counts of Robbery With Use of a Deadly
6 Weapon (Category B Felony); one (1) count of Battery With Intent to Commit a Crime
7 (Category B Felony); one (1) count of Battery With Use of a Deadly Weapon Resulting in
8 Substantial Bodily Harm (Category B Felony); one (1) count of Attempt Murder With Use of
9 a Deadly Weapon (Category B Felony); one (1) count of Assault With Use of a Deadly
10 Weapon (Category B Felony); three (3) counts of Discharge of Firearm From or Within a
11 Structure or Vehicle (Category B Felony); and one (1) count of Ownership or Possession of
12 Firearm by Prohibited Person (Category B Felony).

13 On October 27, 2015, Defendant was arraigned on the charges, invoked his right to a
14 speedy trial, and his trial was set for January 4, 2016, with a calendar call date of December
15 17, 2015.

16 On December 17, 2015, defense made their **first request** to continue trial. The
17 December 17, 2015 minutes in Odyssey note that the request was done orally, and the defense
18 advised the Court that there was additional discovery and additional investigation that had to
19 be done. The State advised the Court that it was ready to proceed with trial and further noted
20 that all forensic testing was done prior to the October 15, 2015 preliminary hearing. However,
21 the State did not oppose the request to continue and requested the continuance be short.
22 Defendant waived his right to a speedy trial and the Court granted Defendant’s first motion to
23 continue trial, resetting the trial to March 28, 2016, with a calendar call date of March 17,
24 2016.

25 Four (4) days after the December 17 calendar call, Defendant was rebooked on one
26 count of Solicitation to Commit Murder. On December 23, 2015, he was charged by way of
27 Criminal Complaint with soliciting the murder of Jamie Nourie, the only witness who is able
28 to identify him in Case No. C310099. That case was assigned Case No. 15F18958X. The

1 following day he was arraigned and the preliminary hearing was scheduled for January 7,
2 2016. Prior to the preliminary hearing, the State sought and obtained an Indictment. On
3 January 6, 2016 the Indictment was filed in District Court Case No. C311782. Defendant was
4 arraigned in District Court on that case on January 13, 2016 at which time he entered a plea of
5 not guilty and waived his right to a trial within 60 days. His Jury Trial was scheduled for July
6 25, 2016.

7 On **January 25, 2016**, the State emailed counsel for Defendant with a link to a drop
8 box account containing the discovery in the Solicitation to Commit Murder case. The State
9 further noted that the link would be missing one audio file of an interview done with the
10 confidential informant, and that it would send to defense upon the State's receipt.

11 On February 1, 2016, the State filed a Motion to Consolidate, or in the Alternative,
12 Motion to Admit Evidence of Other Acts Pursuant to NRS 48.045(2). On February 19, 2016,
13 Defendant filed his opposition to the motion. The motion was set for February 25, 2016, and
14 on that date, the defense made their **second request** to continue trial. The Court granted this
15 second request to continue trial, and continued the matter the March 1, 2016 for argument on
16 the motion and to reset the trial date.

17 On March 1, 2016, the Court took the motion to consolidate under advisement, and
18 reset Defendant's trial to August 22, 2016, with a calendar call date of August 11, 2016.

19 On March 22, 2016, the State made the audio file of the interview referenced in the
20 State's January 25, 2016 email available for defense counsel, and they picked up the audio file
21 on **April 19, 2016**.

22 On May 11, 2016, the Court filed its Decision and Order granting the State's motion to
23 consolidate. On July 6, 2016, the State filed a Third Amended Information adding the
24 Solicitation to Commit Murder charge as Count 12 of the Information. On July 27, 2016,
25 defense counsel conducted a file review of the State's file. On August 4, 2016, defense counsel
26 conducted an evidence vault review.

27 On August 4, 2016, Defendant filed a motion to continue trial, his third request to
28 continue the trial, over four (4) months after discovery on the solicitation to commit murder

1 charge has been provided, and over three (3) months after the Court ordered the consolidation
2 of the cases. The State responds as follows.

3 **ARGUMENT**

4 **I. Standard for Continuance of Trial Setting**

5 NRS 174.515(1) governing in part, “Postponement: When and how ordered”

6
7 When an action is called for trial, or at any time previous thereto, the court may,
8 upon sufficient cause shown by either party by affidavit, direct the trial to be
9 postponed to another day. In all cases where a continuance is granted upon the
10 application of either party the court may require, as a condition of granting such
11 continuance, that the party applying therefor consent to taking, forthwith, or at
any time to be fixed by the court, of the deposition of any witness summoned by
the opposite party whose deposition has not previously been taken.

12 Further, EDCR 7.30(a) provides, “Any party may, for good cause, move the court for an order
13 continuing the day set for trial of any cause.” The decision to grant or deny a trial continuance
14 is within sound discretion of trial court and will not be disturbed absent clear abuse of
15 discretion. Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996); Batson v. State, 113 Nev.
16 669, 941 P.2d 478 (1997).

17 **II. Ware Fails to Establish Good Cause for Continuing the August 22nd Trial** 18 **Setting**

19 Defendant’s motion fails to establish good cause for continuing his trial, and it is clear
20 that he wants to delay his prosecution and avoid being held accountable for his actions.
21 Defendant claims that the investigation and defense have “now been altered since the cases
22 have been consolidated,” Motion, p. 4. However, the cases have been consolidated since May
23 11, 2016. Defense further claims that they have “learned new information” about the
24 solicitation to commit murder charge and that they must fully investigate this “new
25 information” before going to trial. The State finds this difficult to believe considering the fact
26 that counsel has had discovery in this case since April 19, 2016. It is now August, and days
27 before Defendant’s third trial date. Should the Court grant Defendant’s third motion to
28

1 continue his trial, it should only be after hearing from defense counsel in camera as to the
2 specific substance of these compelling issues to be investigated.

3 Defendant has consistently terrorized the victims in this case – both by his violent
4 actions on the date of the horrific robbery, and by thereafter soliciting the murder of the one
5 witness that could identify him. Jamie, the victim of both the robbery and the solicitation
6 charge, lives in terror and is very concerned for her safety. Both of the victims have been
7 repeatedly subpoenaed and their lives disrupted by the pendency of this case. They should not
8 be further inconvenienced and essentially re-victimized by a frivolous, meritless continuance
9 request.

10 CONCLUSION

11 Based upon the foregoing, the State respectfully requests that the Court deny
12 Defendant's motion to continue trial.

13 DATED this 5th day of August, 2016.

14 Respectfully submitted,

15 STEVEN B. WOLFSON
16 Clark County District Attorney
Nevada Bar #001565

17 BY /s//KRISTINA RHOADES
18 KRISTINA RHOADES
19 Deputy District Attorney
Nevada Bar #
20

21 CERTIFICATE OF ELECTRONIC FILING

22 I hereby certify that service of State's Opposition, was made this 5th day of August,
23 2016, by Electronic Filing to:

24 JENNIFER M. WALDO, ESQ.
25 E-mail Address: jmw@gregoryandwaldo.com

26 Shellie Ortega
27 Secretary for the District Attorney's Office

28 mmo/GCU


CLERK OF THE COURT

MOT

AMANDA S. GREGORY, ESQ.
Nevada Bar No. 11107
JENNIFER M. WALDO, ESQ.
Nevada Bar No. 11900
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ERIN WARE

DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN WARE,

Defendant.

Case No.: C-15-310099-1

Dept. No.: IX

MOTION FOR DISCOVERY

COMES NOW Defendant ERIN WARE, by and through his attorney of record JENNIFER M. WALDO, ESQ. and AMANDA S. GREGORY, ESQ. of GREGORY & WALDO, LLC, and pursuant to the Due Process Clause of the United States and Nevada Constitutions and Nevada Supreme Court Rule 179(4) and NRS 174.245 asks this Honorable Court for an Order requiring the Clark County District Attorney's Office to turn over all discovery to the Defendant.

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MOTION FOR DISCOVERY - 1

1 This Motion is made and based upon all the papers and pleadings on file herein, the
2 attached points and authority, and oral argument at the time set for hearing this Motion

3 DATED this 12th day of August, 2016.

4 Respectfully submitted:

5
6 By: /s/Jennifer Waldo
7 JENNIFER M. WALDO, ESQ.
8 AMANDA S. GREGORY, ESQ.
9 Attorneys for Defendant

10 **NOTICE OF MOTION**

11 TO: STATE OF NEVADA, Plaintiff; and

12 TO: DISTRICT ATTORNEY, its attorney:

13 PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to
14 Continue Trial for hearing in Department 9 of the above-entitled Court, on the 23 day of
15 Aug ., 2016, at the hour of 9:00 a.m., or as soon thereafter as counsel
16 may be heard.

17 DATED this 12th day of August, 2016.

18
19 GREGORY & WALDO, LLC

20
21 /s/Jennifer Waldo
22 JENNIFER M. WALDO, ESQ.
23 Nevada Bar No.: 11900
24 Attorney for Defendant
25
26

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I.**

3 **PROCEDURAL HISTORY**

4 The Defendant, ERIN WARE, has been charged by way of Information as follows: one
5 (1) count Burglary While in Possession of a Deadly Weapon, one (1) Battery with Intent to Commit
6 a Crime, one (2) counts Robbery with Use of a Deadly Weapon, and one (1) count Battery with
7 Use of a Deadly Weapon Resulting in Substantial Bodily Harm, one (1) count Attempt Murder
8 with Use of a Deadly Weapon, one (1) count Assault with Use of a Deadly Weapon, three (3)
9 counts Discharge Firearm from or within a Structure of Vehicle, one (1) count Ownership or
10 Possession of Firearm by Prohibited Person, and one (1) count Solicitation to Commit Murder.
11 Initially, Mr. Ware was set for two separate trials stemming out of two separate events. Both cases
12 were set for bail at \$500,000 each. However, the cases were recently consolidated.
13
14

15 **II.**

16 **ARGUMENT**

17
18 Prior to trial, the State must provide to the defense any and all exculpatory evidence in its
19 actual or constructive possession. Failure to do so violates the Due Process Clauses of the Fifth
20 and Fourteenth Amendments to the United States Constitution. *Brady v. Maryland*, 373 U.S. 83,
21 83 S.Ct. 1194 (1963); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). Hereinafter this type
22 of exculpatory evidence will be referred to as “*Brady* material.” The State’s duty to provide *Brady*
23 material to the defense applies regardless of how the State has chosen to structure its overall
24 discovery process. *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (1999).
25
26

1 *Brady* material is evidence which is (1) material, (2) relevant to guilt or punishment, (3)
2 favorable to the accused, and (4) within the actual or constructive possession of anyone acting on
3 behalf of the State. *Brady*, supra.

4 **A. Materiality**

5 When the defense makes a specific request for *Brady* material and the State does not
6 provide such material, the Nevada Supreme Court has held that there are grounds for reversal of a
7 conviction "...if there exists a reasonable possibility that the claimed evidence would have affected
8 the judgment of the trier of fact." *Roberts v. State*, 110 Nev. 1121 (1994); *Jiminez v. State*, 112
9 Nev. 610 (1996); *State v. Bennett*, 119 Nev. 589 (2003).

11 Even if a specific request has not been made, reversal is warranted "...if there exists a
12 reasonable probability that, had the evidence been disclosed, the result of the proceeding would
13 have been different." *U.S. v. Bagley*, 473 U.S. 667 (1985), *Pennsylvania v. Ritchie*, 480 U.S. 39
14 (1986). A "reasonable probability" is a probability sufficient to undermine confidence in the
15 outcome of the proceeding. *Bagley*, at 682.

17 Therefore, where, as here, a specific request for certain evidence is made, the evidence is
18 considered "material" if there is a reasonable possibility that it could affect the fact finder's
19 judgment.

20 **B. Relevancy to Guilt or Punishment**

21 *Brady* material encompasses not only evidence which might affect the defendant's guilt,
22 but also includes evidence which could serve to mitigate a defendant's sentence upon conviction.
23 *Jiminez v. State*, 112 Nev. 610 (1996).

25 An example of this kind of evidence might be where the victim of a robbery who identified
26 the defendant as one of two people who robbed him, also indicated that the defendant tried to keep

1 the co-defendant from further injuring him. Although the victim's statements would actually help
2 establish the defendant's guilt for the charged offense, they would also be *Brady* material, since
3 they could help mitigate the defendant's sentence. Essentially, anything which could convince the
4 Court to impose something less than a maximum sentence, or rebut alleged aggravating
5 circumstances, would be relevant to punishment, and must be provided to the defense pursuant to
6 *Brady v. Maryland*.

8 C. Favorability to the Accused

9 The Nevada Supreme Court has defined what evidence is considered "favorable to the
10 accused" and therefore proper *Brady* material. In *Mazzan v. Warden*, 116 Nev. 48 (2000), the
11 Court stated:

12 Due process does not require simply the disclosure of "exculpatory" evidence.
13 Evidence also must be disclosed if it provides grounds for the defense to attack
14 the reliability, thoroughness, and good faith of the police investigation, to
15 impeach the credibility of the state's witnesses, or to bolster the defense case
16 against prosecutorial attacks. Furthermore, "discovery in a criminal case is
17 not limited to investigative leads or reports that are admissible in evidence."
18 Evidence "need not have been independently admissible to have been material."
19 *Mazzan*, at 67. [Citations omitted].

20 Therefore, *Brady* material under this standard, would include, but not be limited to, the
21 following examples: forensic testing which was ordered, but not done, or which was completed
22 but did not inculcate the defendant; criminal records or other evidence concerning State's
23 witnesses which might show their bias (*e.g.*, civil litigation), or otherwise impeach their credibility;
24 evidence that the alleged victim has been the alleged victim of an unusual number of crimes;
25 investigative leads or ordinarily appropriate investigation which were not followed-up on or
26 completed by law enforcement; and, of course, anything which is inconsistent with any prior or
present statements of a State's witness, including the failure to previously make a statement which
is later made or testified to. Of course, traditionally exculpatory evidence such as that which could
MOTION FOR DISCOVERY - 5

1 show that someone else committed the charged crime or that no crime occurred, would also be
2 included as *Brady* material.

3 **D. Actual or Constructive Possession of the State**

4 It is anticipated that the prosecution may assert that it has an “open file” policy, and that if
5 the requested material is not available in its file, the State is under no obligation to produce it. This
6 argument is unavailing. In *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (1999), the United
7 States Supreme Court explicitly held that a prosecutor’s open file policy does not in any way
8 substitute for or diminish the State’s obligation to turn over *Brady* material. The Nevada Supreme
9 Court is in accord. “It is a violation of due process for the prosecutor to withhold exculpatory
10 evidence, and his motive for doing so is immaterial.” *Jimenez v. State*, 112 Nev. 610, 618 (1996).

11 Furthermore, “...even if the detectives withheld their reports without the prosecutor’s
12 knowledge, ‘the state attorney is charged with constructive knowledge and possession of evidence
13 withheld by other state agents, such as law enforcement officers.’” *Id.*, 112 Nev. at 620. [Citation
14 omitted] (Emphasis added). Defendant would submit that other state agents, such as probation and
15 parole officers, welfare workers, employees of Child Protective Services, jail personnel, and
16 similar agents of the State are also State agents from whom the prosecution must affirmatively
17 collect *Brady* material.

18 In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), the United States Supreme Court
19 made it clear that the prosecutor has an affirmative obligation to obtain *Brady* material and provide
20 it to the defense, even if the prosecutor is initially unaware of its existence. In so finding, the
21 Supreme Court noted that “[t]he prosecution’s affirmative duty to disclose evidence favorable to
22 a defendant can trace its origins to early 20th century strictures against misrepresentation and is of
23 course most prominently associated with this Court’s decision in *Brady v. Maryland*. . .” *Id.* at

1 432. The *Kyles* Court also made clear that this obligation exists even where the defense does not
2 make a request for such evidence. *Id.*

3 The *Kyles* Court additionally made the following observations in finding that the State had
4 breached its duty to *Kyles* and discussing the prosecutor's obligations.

5 This in turn means that the individual prosecutor has a duty to learn of any
6 favorable evidence known to the others acting on the government's behalf
7 in the case, including the police. But whether the prosecutor succeeds
8 or fails in meeting this obligation (whether, that is, a failure to disclose is
9 in good faith or bad faith), the prosecution's responsibility for failing to
disclose known, favorable evidence rising to a material level of importance
is inescapable.

10 The State of Louisiana would prefer an even more lenient rule. It pleads
11 that some of the favorable evidence in issue here was not disclosed even
12 to the prosecutor until after trial, and it suggested below that it should not
13 be held accountable under *Bagley* and *Brady* for evidence known only to
14 police investigators and not to the prosecutor. To accommodate the State in
this manner would, however, amount to a serious change of course from the
Brady line of cases. In the State's favor it may be said that no one doubts
that police investigators sometimes fail to inform a prosecutor of all they know.

15 But neither is there any serious doubt that "procedures and regulations can
16 be established to carry [the prosecutor's] burden and to insure communication
of all relevant information on each case to every lawyer who deals with it."
17 Since then, the prosecutor has the means to discharge the government's
18 *Brady* responsibility if he will, any argument for excusing a prosecutor from
disclosing what he does not happen to know about boils down to a plea to
19 substitute the police for the prosecutor, and even for the courts themselves,
as the final arbiter's of the government's obligation to ensure fair trials.
20 *Kyles*, at 437-438. [Citations omitted].

21 There can be little question, therefore, that despite its "open file policy," the prosecution
22 has an affirmative duty to seek out the previously discussed *Brady* material, regardless of whether
23 such material is in the hands of the prosecutor or in the hands of some other entity acting on behalf
24 of the State.

1 **E. Brady Requests**

2 Based on the foregoing law and analysis, the Defendant requests that the following *Brady*
3 material be produced by the State of Nevada:

- 4 1. Any and all notes and records of any physical or scientific examinations
5 done in connection with this case. This includes any photographs, videos,
6 or audio recordings. It also includes all documents recording what physical
7 evidence was taken in the case, where it was stored, and any related chain
8 of custody documents.
- 9 a) All relevant reports of chain of custody. All reports of any
10 destruction of evidence or failure to collect and/or preserve
11 evidence in the case.
- 12 b) Any and all notes and reports of any experts in the case, including
13 crime scene investigators. This request also includes any
14 preliminary reports or notes that were omitted from the expert's
15 final report(s).
- 16 c) Any and all photographs taken by law enforcement agents during
17 execution of any search warrant.
- 18 d) Any and all notes and records of any physical exam done on the
19 victim in connection with this case. This includes any photographs,
20 videos, or recordings taken in conjunction with such exam. This
21 includes all documents recording what evidence was taken in the
22 case, where it was stored, and any related chain of custody
23 documents.
- 24 e) Any and all documentation of forensic testing ordered, but not
25 completed.
- 26 f) Requests for and/or results of any and all crime scene analysis
 and/or testing performed on any of the physical evidence in this
 case. Including, but not limited to, the results of any forensic or
 medical testing of the victim.
- g) Any documentation related to the analysis of any and all evidence
 seized / impounded in connection with this case.
- h) Any photographic lineups and photographic lineup instructions of
 the defendants that were presented to any potential witnesses by
 law enforcement agents.

- 1 2. Any and all notes of interviews of any witnesses and any potential witnesses
2 in the case, including any and all audio and video recordings of such
3 interviews and any notes of interviews that were not later recorded, such as
4 notes of patrol officers, notes of phone calls made to potential witnesses, or
5 attempts to contact such witnesses. The State must produce any police
6 reports, notes, or other documents that contain information pertaining to
7 this case or any witnesses in this case, no matter what the form or title of
8 the report. This particularly includes notes regarding witnesses the State
9 **does not intend to call**, which often provides the most relevant and
10 discoverable information under the law.
11
12 a) Any notes of any statements by the defendant, to include any notes
13 of patrol officers or other agents of the State who have had contact
14 with the defendants.
15
16 b) Any and all photographs, audio, video, notes, reports, or other
17 documentation taken during law enforcement's investigation of
18 the defendants.
19
20 c) Disclosures of any and all written or recorded communications
21 between law enforcement agents in this case.
22
23 d) Any and all 911 calls, or other recorded calls made to law
24 enforcement.
25
26 e) Disclosures of any and all written or recorded communications
between police dispatch and any State employee in this case,
including but not limited to any radio traffic, CAD reports, Event
Search reports or other communications.

 f) Photocopies or other reproduction of any and all handwritten
notes or otherwise memorialized records kept by the investigating
law enforcement agents in this case, regardless of the form in
which such notes/records are maintained by the State/Agency.
3. Any and all records and notes regarding any benefits or assistance given to
any witness related to the case. This includes any monetary benefits
received, services or favors, or promises of favorable treatment. This is to
include the names of any and all agencies and workers or other referrals
that were given to any family member, relative or guardian in connection

1 with this case, or relevant to this case. This also includes an estimate of
2 future benefits to be received during or after the trial.¹

3 a) Audio and/or transcripts of any co-defendants who have
4 participated in a proffer session(s) with any law enforcement
agency pertaining to any aspect of this case.

- 5 4. Any information on any criminal history of any material witness in the case,
6 to include any juvenile record, misdemeanors, or any other information that
7 would go to the issue of credibility and bias, whether or not the information
is admissible by the rules of evidence.
- 8 5. Any and all information that shows that the defendants did not commit the
9 crimes alleged or which show the possibility of another perpetrator.²
- 10 6. Any and all inconsistent statements made by any material witness in this
11 case. This includes any and all inconsistent statements made to any
employee or representative of the District Attorney's office or any law
12 enforcement agency.³
- 13 7. All updated witness contact information, to include last known address and
phone number.
- 14 8. Any information tending to establish prosecutorial input into the manner in
15 which the search and interrogation were conducted in this case, including,
16 but not limited to, any requests for a search warrant authorized or denied
by any employee of the prosecuting agency.
- 17 9. Cooperation agreements and benefits. This includes any and all records
18 and notes regarding any benefits or assistance given to any witness related
19 to the case. This includes any monetary benefits received, travel expenses
20 paid, services offered/conveyed, favors, or promises of favorable treatment.
This also includes an estimate of future benefits to be received during or
21 after the trial. Impeachment evidence includes any/all cooperation
agreement(s) between a government witness and prosecutors. Giglio v.
U.S., 405 U.S. 150, 154 (1972) (requiring disclosure of cooperation

22
23
24 ¹ This is relevant to issues regarding possible bias, credibility, motive to lie, and impeachment.
See Davis v. Alaska, 415 U.S. 308 (1974) and footnote 7.

25 ² *See Holmes v. South Carolina*, 547 U.S. 319 (2006), which holds that preventing a defendant
26 from presenting evidence of third party guilt deprives him of a meaningful right to present a
complete defense under the 14th and 6th Amendment of the US Constitution.

³ *See Brady, et al*, in brief.

1 agreement between government witness and prosecutors). It also includes
2 benefits provided to a state witness, regardless of whether an explicit deal
3 is outlined. Browning v. State, 120 Nev. 347, 369 (2004). It is the witness'
4 own anticipation of reward, not the intent of the prosecutor, which gives
5 rise to the required disclosure. Moore v. Kemp, 809 F.2d 702, 726, 729-30
6 (11th Cir. 1987), cert. denied, 481 U.S. 1054 (1987); Duggan v. State, 778
7 S.W.2d 465, 468 (Tex. Crim. App. 1989) (Agreements need not be express
8 or formal arrangements, and understanding merely implied, suggested,
9 insinuated, or inferred to be of possible benefit to witness constitutes proper
10 material for impeachment). And 'benefits' are not limited to agreement
11 made in relation to the specific case at issue. Jimenez v. State, 112 Nev.
12 610, 622-23 (1996). For example, prosecutors must disclose evidence that
13 a witness acted as a paid informant on one or more occasions. State v.
14 Bennett, 119 Nev. 589, 603 (2003). Finally, 'benefits' can include, but are
15 not necessarily limited to, travel and/or lodging benefits, as well as
16 counseling, treatment, or other assistance, including immigration assistance
17 of any kind, whether actual or anticipatory. This is relevant to issues
18 regarding possible bias, credibility, and motive to lie, all of which constitute
19 impeachment evidence. See Davis v. Alaska, 415 U.S. 308 (1974).

- 20 10. The enumeration of the specific requests above in no way is intended to
21 diminish, nor does it diminish, the State's ongoing obligation to
22 affirmatively seek out and immediately disclose any other exculpatory
23 information not specifically delineated.

24 III.

25 CONCLUSION

26 Based on the above, the Defendant requests that this Court grant this motion and order the
State to produce the discovery as requested.

DATED this 12th day of August, 2016.

GREGORY & WALDO, LLC

/s/ Jennifer Waldo

AMANDA S. GREGORY, ESQ.

Nevada Bar No.: 11107

JENNIFER M. WALDO, ESQ.

Nevada Bar No. 11900

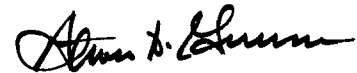
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Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

An Employee of Gregory & Waldo



CLERK OF THE COURT

ORDR

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

LIZ MERCER
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERIN WARE,
#2652033

Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

ORDER RELEASING MEDICAL RECORDS

Upon the ex parte application and representations of STEVEN B. WOLFSON, District Attorney, through LIZ MERCER, Chief Deputy District Attorney, that certain records containing protected health information are necessary for the prosecution of the above-captioned criminal case are being held in the custody of the Clark County Fire Department; that said information is relevant and material to a legitimate law enforcement inquiry; that the application was specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and that de-identified information could not reasonably be used:

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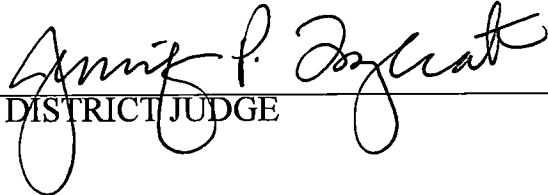
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1 NOW THEREFORE, pursuant to 45 CFR 164.512(e), and GOOD CAUSE
2 APPEARING, Clark County Fire Department, shall release to a representative of the
3 DISTRICT ATTORNEY'S OFFICE, any and all medical records concerning diagnosis,
4 prognosis, and/or treatment of RUTH CARN, located at or about 8790 S. Maryland Parkway,
5 Clark County, Nevada, on the 10th day of June, 2015.


6 Further, that Clark County Fire Department personnel shall be authorized to appear for
7 pre-trial discussions and pursuant to subpoena to testify regarding their treatment of those
8 parties identified above..

9 DATED this 10th day of August, 2016.

10
11 
DISTRICT JUDGE

12 STEVEN B. WOLFSON
13 Clark County District Attorney
Nevada Bar #001565

14
15 BY


16 LIZ MERCER
17 Chief Deputy District Attorney
18 Nevada Bar #010681
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28 mmo/GCU


CLERK OF THE COURT

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ELIZABETH MERCER
Chief Deputy District Attorney
Nevada Bar #010681
200 Lewis Avenue
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State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERIN WARE,
#2652033

Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY

DATE OF HEARING: 08/22/16

TIME OF HEARING: 9:00 A.M.

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

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 **ARGUMENT**

2 I.

3 **THE STATE IS AWARE OF ITS STATUTORY AND CONSTITUTIONAL**
4 **DISCOVERY OBLIGATIONS**

5 Defendant has made a number of general and specific discovery requests which are
6 purportedly based upon case law within and without the State of Nevada. The State intends
7 to comply with all the requests that are within the ambit of either the discovery statutes of
8 Nevada and/or the constitutional requirements imposed by Brady and its progeny. The State
9 does not intend to comply; and, furthermore, the State objects to all requests that fall outside
10 of those legal requirements.

11 A.

12 **DISCOVERY REQUIRED BY STATUTE.**

13 The State has no objection to a strict compliance with the provisions and requirements
14 outlined in the criminal discovery statutes. See, NRS 174.233, et seq.

15 B.

16 **DISCLOSURE REQUIRED BY BRADY V. MARYLAND.**

17 The State recognizes, and readily accepts, its continuing disclosure obligations as
18 defined in Brady v. Maryland, 83 S. Ct. 1194 (1963), and its interpretive progeny. Pursuant
19 to Brady, the State is required to disclose evidence that is favorable to the defense if it is
20 material either to guilt or punishment. Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262
21 (2000). The State's failure to do so violates the Defendant's due process rights, regardless of
22 the State's motive. Id. Following a specific discovery request, evidence is deemed material
23 if there is a reasonable possibility that the evidence would have affected the outcome, i.e. it
24 undermines the confidence of the outcome in the proceeding. Id.

25 "The character of a piece of evidence as favorable will often turn on the context of the
26 existing or potential evidentiary record." Id. Furthermore, it is the prosecutor's responsibility
27 to determine whether evidence is material and should be disclosed. Id. (citing Kyles v.
28 Whitley, 514 U.S. 419, 439-440, 115 S.Ct. 1555 (1995)). As such, a prosecutor who is

1 “anxious about tacking too close to the wind will disclose a favorable piece of evidence.” Id.
2 And, this is as it should be because such disclosure serves to justify trust in the prosecutor as
3 “the representative of a sovereignty...whose interest...in a criminal prosecution is not that it
4 shall win a case, but that justice shall be done.” Id. However, Brady does not impose upon
5 the State an obligation “to disclose evidence which is available to the defendant from other
6 sources, including diligent investigation by the defense.” Steese v. State, 114 Nev. 479, 495,
7 960 P.2d 321, 331 (1998).

8 In addition, the State acknowledges that its Brady obligations not only apply to
9 materials in its possession, but also extends to materials in the hands of its agents.
10 Nevertheless, the State maintains that rather than being accountable for all evidence in the
11 hands of all State agencies, it is only accountable for that evidence in the hands of State
12 agencies who are actually acting on its behalf in the investigation and prosecution of the case.
13 See, Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567 (1995)(“This in turn means
14 that the individual prosecutor has a duty to learn of any favorable evidence known to the others
15 *acting on the government’s behalf in the case, including the police.*”); Carriger v. Stewart, 132
16 F.3d 463, 479 (9th Cir. 1997)(“[T]he prosecution has a duty to learn of any exculpatory
17 evidence known to others *acting on the government’s behalf.*”). Moreover, “[w]hile the
18 prosecution must disclose any information within the possession or control of law enforcement
19 personnel,...it has no duty to volunteer information that it does not possess or of which it is
20 unaware.” United State v. Hsieh Hui Mei Chen, 754 F.2d 817, 824 (9th Cir. 1985).
21 Additionally, the State has no “duty to compile information or pursue an investigative lead
22 simply because it could conceivably develop evidence helpful to the defense...” Evans v.
23 State, 117 Nev. 609, 627, 28 P.3d 498, 511 (2001).

24 Furthermore, while the State acknowledges its discovery obligations under Brady and
25 the applicable rules of discovery, the State submits that its obligations under Brady and the
26 rules of discovery are not without limitation. See, e.g., Weatherford v. Bursey, 429 U.S., 545,
27 559, 97 S.Ct. 837, at 845-846 (1977)(There is no general constitutional right to discovery in a
28 criminal case and Brady did not create one;...‘the Due Process Clause has little to say

1 regarding the amount of discovery which the parties must be afforded...'). In addition, courts
2 are limited in their authority to order the disclosure of evidence beyond what is statutorily
3 mandated. See, Franklin v. District Court, 85 Nev. 401, 402-403, 455 P.2d 919, 920-
4 921(1969)("The new criminal code [deals] with criminal discovery...and those provisions
5 represent the legislative intent with respect to the scope of allowable pre-trial discovery and
6 are not lightly to be disregarded.").

7 More specifically, in the case of Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (Nev.
8 1980) the Nevada Supreme Court reaffirmed the strictures of the provisions of our discovery
9 statutes by making the following statement:

10 The trial court is vested with the authority to order the discovery and inspection
11 of materials in the possession of the State. The exercise of the court's discretion
12 however is **predicated on a showing that the evidence sought is material to
13 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.**

14 Id. at 390 (emphasis added).

15 In Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000), the Nevada Supreme Court
16 stated:

17 Brady and its progeny require a prosecutor to disclose evidence favorable to the
18 defense when that evidence is **material** either to guilt or to punishment. See
Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996).
19 In other words, evidence is material if there is a reasonable probability that the
result would have been different if the evidence had been disclosed. Id.

20 Id. at 66, 36 (emphasis added).

21 In determining its materiality, the undisclosed evidence must be considered
22 collectively, not item by item. Kyles v. Whitley, 514 U.S. at 436, 115 S.Ct. 1555.
23 "[T]he character of a piece of evidence as favorable will often turn on the context
of the existing or potential evidentiary record." Id. at 439, 1555.

24 Id. at 66-67, 36.

25 In sum, there are three components to a Brady violation: the evidence at issue is
26 favorable to the accused; the evidence was withheld by the state, either
intentionally or inadvertently; and prejudice ensued, i.e., the evidence was
27 material. Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 1948, (1999).

28 Id. at 67, 37 (emphasis added).

1 Based upon the foregoing, this Court is respectfully requested to continue to adhere to
2 the clear legislative scheme regarding criminal discovery embodied in Nevada's statutes, the
3 interpretation thereof by the Supreme Court of this State, and the opinions of the United States
4 Supreme Court in this area.

5 **C.**

6 **Defense Counsel May Review the State's File but the State DOES NOT have an open
7 file policy.**

8 On February 18, 2016, the Nevada Court of Appeals, in Quisano v. State, considered
9 "whether, *under the facts of the present case*, the State maintained an open-file policy"
10 (emphasis added). In a 2-1 opinion, the Court held that "the State's discovery policy constituted
11 an open-file policy."

12 The Clark County District Attorney's Office **does not** have an "open-file" policy. Upon
13 request, however, a defense attorney may be permitted to review the case file of the deputy
14 district attorney assigned the prosecution. **A file review in this case was conducted on
15 Wednesday, July 27, 2016. Defense counsel had almost all the discovery in the case, but
16 was provided what little information she did not already have.** Furthermore, a review of
17 physical evidence was conducted on August 2, 2016.

18 The invitation for a "case file review" is not a promise to disclose the entirety of the
19 State's case file and does not extend to anything more than discovery required by statute and
20 Brady. Expressly excluded from the case file is any attorney work product or other privileged
21 material not otherwise discoverable under Brady. The invitation for a "case file review" shall
22 not be construed as a representation that the deputy district attorney is in possession of all
23 material in possession of law enforcement. Finally, the invitation for a "case file review" does
24 not relieve defense counsel of its obligation to discover material which is available to the
25 defense from other sources, including diligent investigation by the defense.

26 **D.**

27 **Defendant should subpoena LVMPD for that agency's records.**

28 The Clark County District Attorney's Office does not represent any police agency,
including the Las Vegas Metropolitan Police Department ("LVMPD"). However, in an effort

1 to facilitate the acquisition of material from LVMPD, the Clark County District Attorney's
2 Office provides the following procedure for informational purposes only and, where
3 applicable, will comply with the procedure outlined below:

4 As a general rule, upon receipt of a defense subpoena, LVMPD will contact the deputy
5 district attorney assigned the case to determine if the requested material already has been
6 provided to the State. If so, the State will be asked to provide the material to the defense.

7 A valid defense subpoena to LVMPD must include the trial date or an evidentiary
8 hearing date (this is true even though the subpoena may request documents or records "in lieu
9 of appearance"), unless the defense has a court order authorizing the subpoena for pre-trial
10 production of records. LVMPD will not comply with a subpoena which includes a date other
11 than the trial date or an evidentiary hearing date as provided by NRS 174.315. Calendar Call
12 is not an evidentiary hearing.

13 LVMPD will not comply with a subpoena which requests investigative records related
14 to someone other than the client of the defense attorney issuing the subpoena.

15 Subject to the conditions outlined above, if LVMPD receives a subpoena for any of the
16 following items, LVMPD will voluntarily provide the information to the defense:

17 1) LVMPD 911 and Radio Traffic Recordings and CAD printouts.

18 2) LVMPD photographs from the event number assigned the case.

19 3) CCDC records if the attorney issuing the subpoena represents the person
20 whose records are being requested.

21 In the case of 911 calls, CADs and photographs, the deputy district attorney assigned
22 to the case will not be notified of the request and will not receive a copy of items being
23 provided. In the case of CCDC records, the deputy district attorney assigned to the case will
24 get a copy of the records being provided.

25 All other subpoena's *duces tecum* for discovery-type materials will be objected to by
26 LVMPD. The following process will be instituted to protect LVMPD should litigation ensue
27 from that objection:

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1 If LVMPD does not have their own objection to releasing the records:

2 1) If the subpoena is not for a pending court date and merely orders records to
3 be provided directly to the defense, LVMPD will send a letter indicating that the
4 Nevada Revised Statutes in criminal cases do not provide a lawful mechanism
5 for records to be provided directly to the defense without a court order. Should
6 the defense seek these records, they should request the records from the deputy
7 district attorney assigned to the case.

8 2) If the subpoena is for a pending court date, but indicates that the records may
9 be provided directly to the defense in lieu of appearance, LVMPD will send a
10 similar letter indicating that the Nevada Revised Statutes in criminal cases do
11 not provide a lawful mechanism for records to be provided directly to the
12 defense. Notwithstanding, LVMPD will inform the defense that the request for
13 records has been forwarded to the deputy district attorney assigned to the case
14 and the deputy should be prepared to address the issue regarding the records at
15 the identified court date. At that next court date, the deputy should raise the
16 issue regarding the records with the court and either provide them to the defense
17 as discovery or, if there is an issue with disclosure, litigate the issue before the
18 court.

19 In the case of records to which LVMPD has an independent objection:

20 LVMPD will send a similar letter indicating not only that the Nevada Revised Statutes
21 in criminal cases do not provide a lawful mechanism for records to be provided directly to the
22 defense, but that they also object to certain records on substantive grounds. Notwithstanding,
23 the procedure above will be followed with the exception that LVMPD will decide whether it
24 wants to intervene by way of motion to quash for the records to which LVMPD has an
25 independent objection.

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1 E.

2 Defendant's "Requests"

3 Legal authority to support the following so-called "Requests" largely cannot be found
4 in Brady or Nevada statutes. Moreover, not a single request is a "specific request." A specific
5 request is not a generic request that can be applied to any case but rather a request where a
6 particular item germane to the case at issue is sought. See e.g. State v. Huebler, 275 P.3d 91,
7 94 (Nev. 2012) (Defendant specifically requested surveillance video police collected from the
8 apartment where crime occurred); State v. Bennett, 119 Nev. 589, 601 (2003) (Defendant
9 specifically requested statements of jail house informant); Schlafer v. State, 115 Nev. 167, 170
10 (1999) (Defendant specifically requested the notes contemporaneously written by a witness).
11 None of Defendant's requests are particular to this case and instead could be applied to any
12 generic criminal case.

13 II.

14 SPECIFIC RESPONSES TO THE DEFENDANT'S REQUESTS

15 1. Any and all notes and records of any physical or scientific examinations...

16 The State objects as this is not a specific request and this general request is overbroad.
17 NRS 174.235 (1) (b) provides for discovery of scientific data. It requires the State to allow
18 the defense to inspect and copy results of physical or mental examinations, scientific
19 experiments made in conjunction with the case in the custody or control of the State or which
20 could become known to the State by an exercise in due diligence. The State asks the Court to
21 adhere to the statute and order the State to comply with its statutory and constitutional
22 obligations rather than Defendant's overbroad request.

23 1a. All relevant reports of chain of custody...

24 The State objects as this is not a specific request and is overbroad and duplicative. The
25 State asks the Court to adhere to the statute and order the State to comply with its statutory
26 and constitutional obligations rather than Defendant's overbroad request.

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1 **1b. Any and all notes and reports of any experts...**

2 The State objects as this is not a specific request and is overbroad and duplicative. NRS
3 174.235 (1) (b) provides for discovery of scientific data. It requires the State to allow the
4 defense to inspect and copy results of physical or mental examinations, scientific experiments
5 made in conjunction with the case in the custody or control of the State or which could become
6 known to the State by an exercise in due diligence. The State asks the Court to adhere to the
7 statute and order the State to comply with its statutory and constitutional obligations rather
8 than Defendant's overbroad request.

9 **1c. Any and all photographs...during the execution of a search warrant.**

10 Defense requests all photographs taken during the execution of a search warrant. To
11 obtain photos, the defense needs to issue a subpoena to the Las Vegas Metropolitan Police
12 Department. The State is not obligated to obtain these items for the defense.

13 **1d. Any notes and records of any physical exam done on the victim...**

14 The State objects as this is not a specific request nor is this request relevant to the instant
15 case. This request, likely just one of Defense's general stock discovery requests, further
16 demonstrates that Defendant is not asking for "specific requests" but is merely embarking on
17 a duplicative and burdensome fishing expedition. The State will turn over any evidence reports
18 or examinations required under NRS 174.235 (1) (b). Furthermore, any medical records
19 pertaining to the treatment of Ruth Garn can be obtained by Defense through a valid Court
20 order. Any records that the State obtains and intends to introduce in its case in chief have been
21 and will continue to be disclosed as received.

22 **1e. Any and all documentation of forensic testing ordered but not completed.**

23 The State objects as Defendant's request reaches beyond what is required by the State's
24 statutory or constitutional obligations. NRS 174.235 (1) (b) provides for discovery of scientific
25 reports and data – not orders for testing.

26 **1f. Requests for any and all crime scene analysis...and medical testing of victim.**

27 The State objects as this is not a specific request, is overbroad, and duplicative. This
28 request appears to repeat the request for testing performed on evidence, and repeats the request

1 related to the victims physical and/or medical state. Again, the State is aware of its obligations
2 under NRS 174.235 and will comply with its statutory obligations.

3 **1g. Any documentation related to the analysis of any and all evidence seized...**

4 The State objects as this is not a specific request, is overbroad, duplicative and not
5 required by either Nevada statutes or the Constitution. Again, due to the general nature of this
6 request it is unclear what Defendant is seeking. The extent that the request exceeds the State's
7 obligations set forth in NRS 174.235 (1) (b) - scientific reports and data – the State objects.

8 **1h. Any photographic lineups and photographic lineup instructions...**

9 The State has no objection and has previously provided these materials to the defense.

10
11 **2. Any and all notes of interviews of any witnesses and any potential witnesses**
12 **including witnesses the State does not intend to call...**

13 The State objects as this is not a specific request, is overbroad, duplicative and not
14 required by either Nevada statutes or the Constitution. Again, the statute requires only that
15 “any written or recorded statements made by a witness the prosecuting attorney intends to call
16 during the case in chief of the state” be provided to the defense. NRS 174.235. The State
17 understands its constitutional obligation to turn over any exculpatory evidence and intends to
18 comply with that obligation.

19 **2a. Any notes of any statements by the Defendant...**

20 NRS 174.235(1)(a) entitles Defendant to “Written or recorded statements or
21 confessions made by the defendant...or copies thereof, within the possession, custody or
22 control of the State, the existence of which is known, or by the exercise of due diligence may
23 become known, to the prosecuting attorney.” It does not entitle Defendant to non-
24 recorded/non-written statements of such individuals. More specifically, the Nevada Supreme
25 Court has rejected Defendant's assertion that he is entitled to notes of oral statements of
26 Defendant.

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1 "Pretrial discovery of the accused's statements is not constitutionally compelled by the
2 Fourteenth Amendment." Mears v. State, 83 Nev. 3, 7, 422 P.2d 230, 232 (1967). Further,
3 voluntary disclosure is not contemplated by our statutory provisions concerning criminal
4 discovery. See NRS 174.235(1). Thompson v. State, 93 Nev. 342, 565 P.2d 1011 (1977). As
5 such, there is no authority to order discovery of notes of oral statements of Defendant.

6 **2b. Any and all photographs...law enforcement's investigation of the defendants.**

7 To obtain these, the defense needs to issue a subpoena to the Las Vegas Metropolitan
8 Police Department. The State is not obligated to obtain these items for the defense. The State
9 has provided the defense with copies of photographs that it may seek to admit, as is required
10 by NRS 174.235, and it will continue to supplement as necessary. Anything beyond that
11 should be obtained by the defense.

12 **2c. Disclosures of any and all written or recorded communications...**

13 The State objects as this is not a specific request, is overbroad, duplicative and not
14 required by either Nevada statutes or the Constitution. This request is not covered by a single
15 line of any discovery statute. If there is exculpatory information, the State obviously must
16 produce it. But there is no requirement that communication between law enforcement agents
17 be produced and the State requests that this Court not expand the statutory text to include such
18 a requirement.

19 **2d. Any and all 911 calls...**

20 To obtain LVMPD records, the defense needs to issue a subpoena to that agency. The
21 defense has not provided any documentation to show that they have engaged in due diligence
22 by attempting to subpoena these records before asking this Court to compel the State to turn
23 over copies of records which the State obtained pursuant to its lawful subpoena. A case file
24 review was conducted at which time it was confirmed that defense counsel is in possession of
25 those recordings previously produced by the State. Those recordings produced by the State
26 are the calls that the State would seek admission of, and the State's obligation to provide such

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2 information is set forth in NRS 174.235. However, the State is not obligated by NRS 174.235
3 to provide calls for which it is not seeking information. Thus, the State objects to any request
4 to provide additional recording.

5 **2e. Disclosures of any and all written and recorded statements...including CAD...**

6 To obtain Las Vegas Metropolitan Police Department's internal records the defense needs
7 to issue a subpoena to the Las Vegas Metropolitan Police Department. The State is not
8 obligated to obtain these items for the defense.

9 **2f. Photocopies...of any and all handwritten notes...**

10 Defendant requests the notes of all police officers in the case. This request is not covered
11 by applicable discovery statutes. If there is exculpatory information, the State obviously must
12 produce it. But there is no requirement that the notes of all officers be produced and the State
13 requests that this Court not expand the statutory text to include such a requirement.

14 **3. Any and all records and notes regarding any benefits or assistance...**

15 Pursuant to NRS 50.255 the State may have provided a witness fee of \$25.00, mileage
16 and/or transportation expenses to witnesses who testified at the Grand Jury, assuming said
17 witness followed the proper procedures to obtain the fees/reimbursements. Other than the
18 possible witness fee and transportation expenses described above, the State is not aware of any
19 compensation offered to any witness in this case, nor has it entered into any cooperation
20 agreement with any State witness.

21 Furthermore, given the overbroad nature of the request, the State notes that it is not
22 responsible for providing information regarding services rendered by the Victims of Crime
23 Program (or any other similar program) as that agency does not act on the State's behalf in the
24 prosecution of criminal cases. See, Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567
25 (1995)("This in turn means that the individual prosecutor has a duty to learn of any favorable
26 evidence known to the others *acting on the government's behalf in the case, including the*
27 *police.*"); Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997)("[T]he prosecution has a duty
28 to learn of any exculpatory evidence known to others *acting on the government's behalf.*").

1 As such, should defense counsel be requesting that information, she should pretrial the
2 witnesses, or issue the appropriate subpoenas for records.

3 The State is aware of this request by the defense and will provide any information that
4 may constitute a benefit or assistance as the case progresses.

5 **3a. Audio and/or transcripts of any co-defendants who have participated in**
6 **proffer...**

7 This request further illustrates the non-specific, form nature of this Motion. There is
8 no co-defendant in this case. Thus, there is no such information to provide.

9 **4. Any information on any criminal history of any material witness...**

10 This is not a specific request. The State acknowledges that under NRS 50.095, evidence
11 that a witness has been convicted of a crime (if it is punishable by more than one year) is
12 admissible to impeach the credibility of that witness. Evidence of the conviction may be
13 admissible if a period of ten years has not passed from the date of release of the witness from
14 confinement or the expiration of the period of his parole, probation or sentence, whichever is
15 the later date. See NRS 50.095(1)(2). Nonetheless, that statute does not make admissible a
16 witness' prior arrests that did not result in a conviction or an arrest and conviction of a crime
17 that is merely a misdemeanor, or their juvenile record.

18 Nevada case law and NRS 50.085(3) also permit questioning of a witness in relation to
19 arrests/convictions for crimes not amounting to felonies which bear on the honesty or
20 truthfulness of a witness. See, Butler v. State, 120 Nev. 879, 890-91, 102 P.3d 71 (2004) ("This
21 court has held that NRS 50.085(3) permits impeaching a witness on cross-examination with
22 questions about specific acts as long as the impeachment pertains to truthfulness or
23 untruthfulness...[but] if the witness denies a specific act on cross-examination, the State may
24 not introduce extrinsic evidence to the contrary.") However, no statute or case law in the
25 jurisdiction permits unlimited questioning of a witness in regard to his/her criminal
26 background beyond that permitted by NRS 50.095 and 50.085(3). Furthermore, records
27 pertaining to juveniles are sealed and not discoverable.

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1 In light of the above-cited legal authority, in the event that the State learns that one of
2 its testifying witnesses has a felony conviction or an arrest/conviction for a crime bearing on
3 honesty or truthfulness, such evidence will be disclosed. However, that does not alleviate any
4 obligation of defense counsel to conduct their own diligent investigations as to such matters.
5 Court records are generally public records, which defense counsel can locate through their
6 own due diligence. Furthermore, the State objects to Defendant's requests for information
7 which extends beyond the ambit of the State's burden as outlined by case law and statute.

8 **5. Any and all information that shows the defendants did not commit the crimes...**

9 This is not a specific request. This request is extremely overbroad and the State is
10 unable to discern from the request what "specific" discoverable items are being requested.
11 Furthermore, the State is aware of its obligation to provide exculpatory information.

12 **6. Any and all inconsistent statements...**

13 Giglio, governs what impeachment material the State must provide. The State asks the
14 Court to hold it to that constitutional standard. Defendant's request is worded in an overbroad
15 manner to encompass immaterial statements.

16 **7. All updated witness contact information...**

17 The State objects to this request. NRS 174.234 provides the law regarding notice of
18 witnesses. It provides that both sides must disclose witness names and addresses of those
19 witnesses that they intend to call in their case-in-chief not less than 5 judicial days before trial.
20 See NRS 174.234 (1) (a) (2). The State intends to comply with NRS 174.234. However, given
21 Defendant's attempt to solicit the murder of Jamie Nourie, the State will not list any witness'
22 home address on a Notice of Witness. Instead, the State will provide that information directly
23 to defense counsel via e-mail.

24 **8. Any information tending to establish prosecutorial input...**

25 Again, the State objects to this overbroad request which is not covered by the State's
26 discovery obligations, nor is it covered by Brady and its progeny. This is clearly not a specific
27 request and the Defendant can cite no authority suggesting that "prosecutorial input" is
28 discoverable. Furthermore, it may very well be protected by NRS 174.235(2)(a).

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Lay v. State, 116 Nev. at 1194, 14 P.3d at 1262. In light of the foregoing, the State requests that the Court DENY Defendant's Motion to the extent that the specific requests exceed the scope of the Nevada Revised Statutes Discovery Statutes and Brady.

DATED this 18th day of August, 2016.

Respectfully submitted,

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

BY /s//ELIZABETH MERCER

ELIZABETH MERCER
Chief Deputy District Attorney
Nevada Bar #010681

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Opposition, was made this 18th day of August, 2016, by Electronic Filing to:

JENNIFER M. WALDO, ESQ.
E-mail Address: jmw@gregoryandwaldo.com

Shellie Ortega
Secretary for the District Attorney's Office

mmo/GCU


CLERK OF THE COURT

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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ERIN DESHAUN WARE,
#2652033

Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

**THIRD SUPPLEMENTAL NOTICE OF WITNESSES
AND/OR EXPERT WITNESSES
[NRS 174.234]**

TO: ERIN DESHAUN WARE, Defendant; and

TO: JENNIFER M. WALDO, ESQ., Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
NEVADA intends to call the following witnesses and/or expert witnesses in its case in chief.

These witnesses are in addition to those witnesses endorsed on the Information or
Indictment and any other witness for which a separate Notice of Witnesses and/or Expert
Witnesses has been filed.

The substance of each expert witness' testimony and copy of all reports made by or at
the direction of the expert witness has been provided in discovery.

A copy of each expert witness' curriculum vitae, if available, is attached hereto.

***Indicates an additional witness**

//

<u>NAME</u>	<u>ADDRESS</u>
ADAMS, DR. KIMBERLY – 9640 W. TROPICANA, #116, LVN 89147:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
AMUNDSON, MARK – HPD P#1250	
AOYAMA, KATHRYN – LVMPD P#8025 (or designee): LATENT PRINT EXAMINER -	Expert in the science and techniques of fingerprint comparison, and comparisons done in this case and any reports prepared therefrom.
ARMSTONG, DR. BRACKEN – UMC, 1800 W. CHARLESTON, LVN 89102:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
ARMSTRONG, JAMES - CCFD:	He is expected to offer testimony as an expert in the field of emergency care and treatment of trauma victims, victim assessment, as well as his direct involvement with the treatment of Ruth Garn.”
BARRETT, T. – LVMPD P#4972	
BETHARD, J. – LVMPD P#13928	
BOOKER, JAMES – NEVADA DEPARTMENT OF CORRECTIONS	
BROWN, TARA – FBI, 2501 INVESTIGATION PKWY, QUANTICO, VA 22135:	Expert in the field of DNA extractions, comparisons, analysis, and the identification of bodily fluids and is expected to testify thereto.
BURNS, J. – LVMPD P#9805	
BURNS, MIKE - CCFD:	He is expected to offer testimony as an expert in the field of emergency care and treatment of trauma victims, victim assessment, as well as his direct involvement with the treatment of Ruth Garn.”
BUTLER, W. – LVMPD P#10054	
CAMPBELL, J. – LVMPD P#13150	
COATES, DR. JAY – UMC, 1800 W. CHARLESTON, LVN 89102:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
COOK, DARIN – LVMPD P#5730	
CORNELL, BROOKE – LVMPD P#13576	

1 CRAANEN, PETER – FBI, RENO, NV: Expert in the area of forensic analysis of cell phone
2 contents and recovery of the same, and that they are expected to offer testimony regarding the
3 analysis of the cell phones impounded in this case belonging to Defendant and Trudy Presutti.

4 CUNNINGHAM, J. – LVMPD P#5466

5 CUSTODIAN OF RECORDS – CLARK COUNTY DETENTION CENTER

6 CUSTODIAN OF RECORDS – CLARK COUNTY FIRE DEPARTMENT

7 CUSTODIAN OF RECORDS – LVMPD COMMUNICATIONS

8 CUSTODIAN OF RECORDS – LVMPD RECORDS

9 EGGERT, DR., JANICE – 1771 E. FLAMINGO RD., STE. 214-A, LVN 89119, She is a
10 physician expected to give testimony concerning the injuries and treatment of Ruth Garn after
11 the June 10, 2015, robbery.

12 FLETCHER, SHAWN – LVMPD P#5221

13 FLETCHER, TIMOTHY – LVMPD P#6383

14 *FLYNN, PATRICK – LVMPD P#15144 (or designee): Forensic Multimedia Analyst II:
15 Expert in the area of electronic media and computer technology and to the collection and
16 preservation of evidence and is expected to testify as an expert to the identification,
17 documentation, retrieval, collection and preservation of the evidence in this case.

18 FORD, S. – LVMPD P#9063

19 GARN, RUTH – 4126 OXNARD CIR., LVN 89121

20 GIANNONE, JOSEPH – LVMPD P#6225

21 GONZALEZ, ALEX – LVMPD P#6188

22 HALASI, R. – LVMPD P#8783

23 HALL, CHRIS – LVMPD P#6060

24 HALL, EMMETT – ADDRESS UNKNOWN

25 HAMMOND, Z. – LVMPD P#13917

26 HENNESY, D. – LVMPD P#6736

27 HOLSTEIN, DANIEL – LVMPD P#3861

28 HONAKER, JAMIE – DISTRICT ATTORNEY INVESTIGATOR

1 HUGHES, H. – LVMPD P#6750

2 HUNTSMAN, SHAUN - CCFD: He is expected to offer testimony as an expert in the field of
3 emergency care and treatment of trauma victims, victim assessment, as well as his direct
4 involvement with the treatment of Ruth Garn.”

5 JOBRIO, J. – LVMPD P#7299

6 JOHNSON, GAYLE – LVMPD P#10208 (or designee): LATENT PRINT EXAMINER -
7 Expert in the science and techniques of fingerprint comparison, and comparisons done in this
8 case and any reports prepared therefrom.

9 KHIABANI, DR. KAYVAN – 1707 W. CHARLESTON, STE. 190, LVN 89102: He/She is
10 a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10,
11 2015.

12 LARSON, DR. DOUGLAS – UMC, 1800 W. CHARLESTON, LVN 89102: He/She is a
13 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

14 LAYTHORPE, M. – LVMPD P#5448

15 LEIJA, ARMANDO – LVMPD P#2020

16 LOPEZ, C. – LVMPD P#6958

17 LORSON, KARL – LVMPD P#5746

18 LUKOWSKI, W. – LVMPD P#4659

19 MALKOLOSKI, B. – LVMPD P#13802

20 MARCO, RON – CCFD: He is expected to offer testimony as an expert in the field of
21 emergency care and treatment of trauma victims, victim assessment, as well as his direct
22 involvement with the treatment of Ruth Garn.”

23 MATCHKO, W. – LVMPD P#8525

24 MCPEAK, CHRISTOPHER – FBI, 787 W.LAKE MEAD, LVN 89106: Expert in the area of
25 forensic analysis of cell phone contents and recovery of the same, and that they are expected
26 to offer testimony regarding the analysis of the cell phones impounded in this case belonging
27 to Defendant and Trudy Presutti.

28 //

1 MENEZES, DR. JOHN – 1707 W. CHARLESTON, #190, LVN 89102: He/She is a physician
2 and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
3 MITCHELL, S. – LVMPD P#13765
4 MORENO, RICHARD – LVMPD P#4922
5 MOXLEY, DR. JEFFREY – 3663 E. SUNSET, #403, LVN 89120: He/She is a physician and
6 will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
7 MUNOZ, GABE – LVMPD P#7137
8 MUNOZ, I. – LVMPD P#9063
9 MURPHY, DANEEN – LVMPD P#5691
10 NELSON, JASON – LVMPD P#6825
11 NG, DR. MATTHEW – 3150 N. TENAYA WAY., #140, NLV 89128: He/She is a physician
12 and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
13 NOURIE, JAIME – 10347 MAURICE RIVER CT., LVN 89183
14 PEREZ, RAFAEL – 9850 BERMUDA RD., #248, LVN 89123
15 PERIMUTTER, JASON - CCFD: He is expected to offer testimony as an expert in the field
16 of emergency care and treatment of trauma victims, victim assessment, as well as his direct
17 involvement with the treatment of Ruth Garn.”
18 PORTER, MARIA – LVMPD P#8053
19 PRESUTTI, TRUDY – 3010 HACIENDA DR., RENO, NV 89503
20 RAFALOVICH, MARCO – DISTRICT ATTORNEY INVESTIGATOR
21 ROE, M. – LVMPD P#6833
22 ROSSI, A. – LVMPD P#6758
23 SANDOVAL, S. – LVMPD P#8742
24 SAXON, S. – LVMPD P#7849
25 SEDMINIK, G. – LVMPD P#5634
26 SEED, MICHAEL – LVMPD P#6724
27 SEELY, JASON – LVMPD P#7729
28 SMINK, JEFFREY – LVMPD P#6556

1 SMITH, SEAN – LVMPD P#6038

2 SNYDER, DR. BRUCE – 2779 W. HORIZON RIDGE PKWY., #22, HEND, NV 89052:
3 He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on
4 June 10, 2015.

5 SPIOTTO, LANCE – LVMPD P#4774

6 THOMAS, DR. CASEY – UMC, 1800 W. CHARLESTON, LVN 89102: He/She is a
7 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

8 TWEITO, DR. TIMOTHY – 6980 SMOKE RANCH RD., #110, LVN 89128: He/She is a
9 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

10 WILLIAMS, WESTIN – LVMPD P#9707

11 *WILSON, MICHAEL – LVMPD P#5319

12 YANNIS, C. – LVMPD P#6024

13 ZUCKER, MATTHEW – LVMPD P#5761

14 STEVEN B. WOLFSON
15 Clark County District Attorney
Nevada Bar #001565

17 BY /s//LIZ MERCER
18 LIZ MERCER
19 Chief Deputy District Attorney
Nevada Bar #010681

20 **CERTIFICATE OF ELECTRONIC FILING**

21 I hereby certify that service of State's Notice, was made this 10th day of February, 2016,
22 by Electronic Filing to:

23 JENNIFER M. WALDO, ESQ.
24 E-mail Address: jmw@gregoryandwaldo.com

25 Shellie Ortega
26 Secretary for the District Attorney's Office

27
28 mmo/GCU

Curriculum Vitae

Las Vegas Metropolitan Police Department - Project Management and Video Bureau Statement of Qualifications

Name: Patrick S. Flynn

P# 15144

Date: 6/9/2015

CURRENT CLASSIFICATION		
	Classification	Minimum Qualifications
X	Forensic Multimedia Analyst I	AA Degree in Videography. Forensic Science, Criminal Justice or a related field or equivalent experience.
	Forensic Multimedia Analyst II	Two years experience as a Forensic Multimedia Analyst I.
FORMAL EDUCATION		
Institution	Major	Degree/Date
University of Nevada, Las Vegas (UNLV)	Communication Studies	BA / December 2014
TESTIMONY		
Yes	No	
	X	
EMPLOYMENT HISTORY		
Employer	Title	Date
Las Vegas Metropolitan Police Department	Forensic Multimedia Analyst I	11/12/2014 to Present
Clark County School District – School Police	Intrusion Alarm Technician	9/15/2008 to 11/7/2014

Curriculum Vitae

**Las Vegas Metropolitan Police Department - Project Management and Video Bureau
Statement of Qualifications**

Name: Patrick S. Flynn

P# 15144

Date: 6/9/2015

CURRENT CLASSIFICATION		
	<i>Classification</i>	<i>Minimum Qualifications</i>
X	Forensic Multimedia Analyst I	AA Degree in Videography. Forensic Science, Criminal Justice or a related field or equivalent experience.
	Forensic Multimedia Analyst II	Two years experience as a Forensic Multimedia Analyst I.
FORMAL EDUCATION		
<i>Institution</i>	<i>Major</i>	<i>Degree/Date</i>
University of Nevada, Las Vegas (UNLV)	Communication Studies	BA / December 2014
TESTIMONY		
<i>Yes</i>	<i>No</i>	
	X	
EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Title</i>	<i>Date</i>
Las Vegas Metropolitan Police Department	Forensic Multimedia Analyst I	11/12/2014 to Present
Clark County School District – School Police	Intrusion Alarm Technician	9/15/2008 to 11/7/2014


CLERK OF THE COURT

NWEW
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
LIZ MERCER
Chief Deputy District Attorney
Nevada Bar #010681
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-

ERIN DESHAUN WARE,
#2652033

Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

**FOURTH SUPPLEMENTAL NOTICE OF WITNESSES
AND/OR EXPERT WITNESSES
[NRS 174.234]**

TO: ERIN DESHAUN WARE, Defendant; and

TO: JENNIFER M. WALDO, ESQ., Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
NEVADA intends to call the following witnesses and/or expert witnesses in its case in chief.

These witnesses are in addition to those witnesses endorsed on the Information or
Indictment and any other witness for which a separate Notice of Witnesses and/or Expert
Witnesses has been filed.

The substance of each expert witness' testimony and copy of all reports made by or at
the direction of the expert witness has been provided in discovery.

A copy of each expert witness' curriculum vitae, if available, is attached hereto.

***Indicates an additional witness**

//

<u>NAME</u>	<u>ADDRESS</u>
ADAMS, DR. KIMBERLY – 9640 W. TROPICANA, #116, LVN 89147:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
AMUNDSON, MARK – HPD P#1250	
AOYAMA, KATHRYN – LVMPD P#8025 (or designee): LATENT PRINT EXAMINER -	Expert in the science and techniques of fingerprint comparison, and comparisons done in this case and any reports prepared therefrom.
ARMSTONG, DR. BRACKEN – UMC, 1800 W. CHARLESTON, LVN 89102:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
ARMSTRONG, JAMES - CCFD:	He is expected to offer testimony as an expert in the field of emergency care and treatment of trauma victims, victim assessment, as well as his direct involvement with the treatment of Ruth Garn.”
BARRETT, T. – LVMPD P#4972	
BETHARD, J. – LVMPD P#13928	
BOOKER, JAMES – NEVADA DEPARTMENT OF CORRECTIONS	
BROWN, TARA – FBI, 2501 INVESTIGATION PKWY, QUANTICO, VA 22135:	Expert in the field of DNA extractions, comparisons, analysis, and the identification of bodily fluids and is expected to testify thereto.
BURNS, J. – LVMPD P#9805	
BURNS, MIKE - CCFD:	He is expected to offer testimony as an expert in the field of emergency care and treatment of trauma victims, victim assessment, as well as his direct involvement with the treatment of Ruth Garn.”
BUTLER, W. – LVMPD P#10054	
CAMPBELL, J. – LVMPD P#13150	
COATES, DR. JAY – UMC, 1800 W. CHARLESTON, LVN 89102:	He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.
COOK, DARIN – LVMPD P#5730	
//	

1 *CORNELL, LAURA BROOKE - LVMPD P#13576 (or designee): CRIME SCENE
2 ANALYST: Expert in the identification, documentation, collection and preservation of
3 evidence and is expected to testify as an expert to the identification, documentation, collection
4 and preservation of the evidence in this case.

5 CRAANEN, PETER – FBI, RENO, NV: Expert in the area of forensic analysis of cell phone
6 contents and recovery of the same, and that they are expected to offer testimony regarding the
7 analysis of the cell phones impounded in this case belonging to Defendant and Trudy Presutti.

8 CUNNINGHAM, J. – LVMPD P#5466

9 CUSTODIAN OF RECORDS – CLARK COUNTY DETENTION CENTER

10 CUSTODIAN OF RECORDS – CLARK COUNTY FIRE DEPARTMENT

11 CUSTODIAN OF RECORDS – LVMPD COMMUNICATIONS

12 CUSTODIAN OF RECORDS – LVMPD RECORDS

13 *CUSTODIAN OF RECORDS - AMR

14 EGGERT, DR., JANICE – 1771 E. FLAMINGO RD., STE. 214-A, LVN 89119, She is a
15 physician expected to give testimony concerning the injuries and treatment of Ruth Garn after
16 the June 10, 2015, robbery.

17 *FLETCHER, SHAWN – LVMPD P#5221 (or designee): CRIME SCENE ANALYST:
18 Expert in the identification, documentation, collection and preservation of evidence and is
19 expected to testify as an expert to the identification, documentation, collection and
20 preservation of the evidence in this case.

21 FLETCHER, TIMOTHY – LVMPD P#6383

22 FLYNN, PATRICK – LVMPD P#15144 (or designee): Forensic Multimedia Analyst II:
23 Expert in the area of electronic media and computer technology and to the collection and
24 preservation of evidence and is expected to testify as an expert to the identification,
25 documentation, retrieval, collection and preservation of the evidence in this case.

26 FORD, S. – LVMPD P#9063

27 GARN, RUTH – 4126 OXNARD CIR., LVN 89121

28 GIANNONE, JOSEPH – LVMPD P#6225

1 GONZALEZ, ALEX – LVMPD P#6188

2 HALASI, R. – LVMPD P#8783

3 HALL, CHRIS – LVMPD P#6060

4 HALL, EMMETT – ADDRESS UNKNOWN

5 HAMMOND, Z. – LVMPD P#13917

6 HENNESY, D. – LVMPD P#6736

7 *HOLSTEIN, DANIEL – LVMPD P#3861 (or designee): CRIME SCENE ANALYST:
8 Expert in the identification, documentation, collection and preservation of evidence and is
9 expected to testify as an expert to the identification, documentation, collection and
10 preservation of the evidence in this case.

11 HONAKER, JAMIE – DISTRICT ATTORNEY INVESTIGATOR

12 HUGHES, H. – LVMPD P#6750

13 HUNTSMAN, SHAUN - CCFD: He is expected to offer testimony as an expert in the field of
14 emergency care and treatment of trauma victims, victim assessment, as well as his direct
15 involvement with the treatment of Ruth Garn.”

16 JOBRIO, J. – LVMPD P#7299

17 JOHNSON, GAYLE – LVMPD P#10208 (or designee): LATENT PRINT EXAMINER -
18 Expert in the science and techniques of fingerprint comparison, and comparisons done in this
19 case and any reports prepared therefrom.

20 KHIABANI, DR. KAYVAN – 1707 W. CHARLESTON, STE. 190, LVN 89102: He/She is
21 a physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10,
22 2015.

23 LARSON, DR. DOUGLAS – UMC, 1800 W. CHARLESTON, LVN 89102: He/She is a
24 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

25 LAYTHORPE, M. – LVMPD P#5448

26 LEIJA, ARMANDO – LVMPD P#2020

27 LOPEZ, C. – LVMPD P#6958

28 LORSON, KARL – LVMPD P#5746

1 LUKOWSKI, W. – LVMPD P#4659

2 MALKOLOSKI, B. – LVMPD P#13802

3 MARCO, RON – CCFD: He is expected to offer testimony as an expert in the field of
4 emergency care and treatment of trauma victims, victim assessment, as well as his direct
5 involvement with the treatment of Ruth Garn.”

6 MATCHKO, W. – LVMPD P#8525

7 MCPEAK, CHRISTOPHER – FBI, 787 W.LAKE MEAD, LVN 89106: Expert in the area of
8 forensic analysis of cell phone contents and recovery of the same, and that they are expected
9 to offer testimony regarding the analysis of the cell phones impounded in this case belonging
10 to Defendant and Trudy Presutti.

11 MENEZES, DR. JOHN – 1707 W. CHARLESTON, #190, LVN 89102: He/She is a physician
12 and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

13 MITCHELL, S. – LVMPD P#13765

14 MORENO, RICHARD – LVMPD P#4922

15 MOXLEY, DR. JEFFREY – 3663 E. SUNSET, #403, LVN 89120: He/She is a physician and
16 will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

17 MUNOZ, GABE – LVMPD P#7137

18 MUNOZ, I. – LVMPD P#9063

19 MURPHY, DANEEN – LVMPD P#5691

20 *MURRELL, CARLA – AMR: He is expected to offer testimony as an expert in the field of
21 emergency care and treatment of trauma victims, victim assessment, as well as his direct
22 involvement with the treatment of Ruth Garn.”

23 NELSON, JASON – LVMPD P#6825

24 NG, DR. MATTHEW – 3150 N. TENAYA WAY., #140, NLV 89128: He/She is a physician
25 and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

26 NOURIE, JAIME – 10347 MAURICE RIVER CT., LVN 89183

27 PEREZ, RAFAEL – 9850 BERMUDA RD., #248, LVN 89123

28 //

1 PERIMUTTER, JASON - CCFD: He is expected to offer testimony as an expert in the field
2 of emergency care and treatment of trauma victims, victim assessment, as well as his direct
3 involvement with the treatment of Ruth Garn.”

4 PORTER, MARIA – LVMPD P#8053

5 PRESUTTI, TRUDY – 3010 HACIENDA DR., RENO, NV 89503

6 RAFALOVICH, MARCO – DISTRICT ATTORNEY INVESTIGATOR

7 ROE, M. – LVMPD P#6833

8 ROSSI, A. – LVMPD P#6758

9 SANDOVAL, S. – LVMPD P#8742

10 SAXON, S. – LVMPD P#7849

11 SEDMINIK, G. – LVMPD P#5634

12 SEED, MICHAEL – LVMPD P#6724

13 SEELY, JASON – LVMPD P#7729

14 SMINK, JEFFREY – LVMPD P#6556

15 SMITH, SEAN – LVMPD P#6038

16 SNYDER, DR. BRUCE – 2779 W. HORIZON RIDGE PKWY., #22, HEND, NV 89052:

17 He/She is a physician and will testify to the treatment of Ruth Garn for injuries sustained on
18 June 10, 2015.

19 SPIOTTO, LANCE – LVMPD P#4774

20 THOMAS, DR. CASEY – UMC, 1800 W. CHARLESTON, LVN 89102: He/She is a
21 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

22 *TOLMAN, KEVIN – AMR: He is expected to offer testimony as an expert in the field of
23 emergency care and treatment of trauma victims, victim assessment, as well as his direct
24 involvement with the treatment of Ruth Garn.”

25 TWEITO, DR. TIMOTHY – 6980 SMOKE RANCH RD., #110, LVN 89128: He/She is a
26 physician and will testify to the treatment of Ruth Garn for injuries sustained on June 10, 2015.

27 WILLIAMS, WESTIN – LVMPD P#9707

28 WILSON, MICHAEL – LVMPD P#5319

1 YANNIS, C. – LVMPD P#6024

2 ZUCKER, MATTHEW – LVMPD P#5761

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

6 BY /s//LIZ MERCER
7 LIZ MERCER
8 Chief Deputy District Attorney
9 Nevada Bar #010681

10 **CERTIFICATE OF ELECTRONIC FILING**

11 I hereby certify that service of State's Notice, was made this 8th day of December, 2016,
12 by Electronic Filing to:

13 JENNIFER M. WALDO, ESQ.
14 E-mail Address: jmw@gregoryandwaldo.com

15 Shellie Ortega
16 Secretary for the District Attorney's Office

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28 mmo/GCU

Curriculum Vitae

**Las Vegas Criminalistics Bureau
Statement of Qualifications**

Name: Laura B. Cornell

P#13576

Date: 06-02-09

CURRENT CLASSIFICATION		
	<i>Classification</i>	<i>Minimum Qualifications</i>
X	Crime Scene Analyst I	AA Degree with major course work in Criminal Justice, Forensic Science, Physical Science or related field, including specialized training in Crime Scene
	Crime Scene Analyst II	18 months - two (2) years continuous service with LVMPD as a Crime Scene Analyst I.
	Senior Crime Scene Analyst	Two (2) years as a Crime Scene Analyst II to qualify for the promotional test for Senior Crime Scene Analyst.
	Crime Scene Analyst Supervisor	Four (4) years continuous service with LVMPD and completion of probation as a Senior Crime Scene Analyst. Must have the equivalent of a Bachelor's Degree from an accredited college or university with major course work in Criminal Justice, Forensic Science, Physical Science or related field.
FORMAL EDUCATION		
<i>Institution</i>	<i>Major</i>	<i>Degree/Date</i>
Grossmont College	Forensic Technology	Certificate/Dec 2007
Texas A&M University	Meteorology	B.S./May 1998
Texas A&M University	Geography	B.S./May 1994
TESTIMONY		
<i>Yes</i>	<i>No</i>	
EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Title</i>	<i>Date</i>
LVMPD	Crime Scene Analyst I	9-2-08 to Present
San Diego PD	Crime Scene Unit Intern	11/2007 to 08/2008
San Diego Superior Court	Family Law Office-Student Worker	01/2007 to 02/2008

Curriculum Vitae
JEFFREY SMINK

Name: SMINK, Jeffery

P# 6556

Date: 06-05-00

CURRENT CLASSIFICATION

<i>Classification</i>		<i>Minimum Qualifications</i>
<input checked="" type="checkbox"/>	CRIME SCENE ANALYST I	AA DEGREE WITH MAJOR COURSE WORK IN CRIMINAL JUSTICE, FORENSIC SCIENCE, PHYSICAL SCIENCE OR RELATED FIELD, INCLUDING SPECIALIZED TRAINING IN CRIME SCENE INVESTIGATION.
<input type="checkbox"/>	CRIME SCENE ANALYST II	EIGHTEEN (18) MONTHS - TWO (2) YEARS CONTINUOUS SERVICE WITH LVMPD AS A CRIME SCENE ANALYST I.
<input type="checkbox"/>	SENIOR CRIME SCENE ANALYST	TWO (2) YEARS AS A CRIME SCENE ANALYST II TO QUALIFY FOR THE PROMOTIONAL TEST FOR SENIOR CRIME SCENE ANALYST.
<input type="checkbox"/>	CRIME SCENE ANALYST SUPERVISOR	FOUR (4) YEARS CONTINUOUS SERVICE WITH LVMPD AND COMPLETION OF PROBATION AS A SENIOR CRIME SCENE ANALYST. MUST HAVE THE EQUIVALENT OF A BACHELOR'S DEGREE FROM AN ACCREDITED COLLEGE OR UNIVERSITY WITH MAJOR COURSE WORK IN CRIMINAL JUSTICE, FORENSIC SCIENCE, PHYSICAL SCIENCE OR RELATED FIELD.

FORMAL EDUCATION

<i>Institution</i>	<i>Major</i>	<i>Degree/Date</i>
Crafton Hills College	Fire Investigation/Criminal Justice	N/A
Riverside City College	Physics/General Education	N/A

TESTIMONY

Yes	No	
<input checked="" type="checkbox"/>	<input type="checkbox"/>	San Bernardino County, CA - Juvenile, Municipal, Superior
<input checked="" type="checkbox"/>	<input type="checkbox"/>	LA County, CA - Superior, Federal Court, Los Angeles, CA

EMPLOYMENT HISTORY

<i>Employer</i>	<i>Title</i>	<i>Date</i>
San Bernardino County Sheriff - Scientific Invest. Division	Forensic Specialist II	12- 00/00-00/00
San Bernardino County Sheriff - Identification Division	Evidence Clerk	06-86/11- 07

JEFFERY SMINK
Curriculum Vitae
Page - 1 -

PROFESSIONAL AFFILIATIONS		
<i>Organization</i>		<i>Date(s)</i>
International Association for Identification - California and Nevada State Divisions		1998
Association of Crime Reconstruction		1998
International Association for Identification - National		2000

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Curriculum Vitae

Las Vegas Criminalistics Bureau Statement of Qualifications

Name: Shawn Fletcher

P# 5221

Date: 8-28-03

CURRENT CLASSIFICATION		
	<i>Classification</i>	<i>Minimum Qualifications</i>
	Crime Scene Analyst I	AA Degree with major course work in Criminal Justice, Forensic Science, Physical Science or related field, including specialized training in Crime Scene Investigation.
	Crime Scene Analyst II	18 months - 2 years continuous service with LVMPD as a Crime Scene Analyst I.
X	Senior Crime Scene Analyst	Two (2) years as a Crime Scene Analyst II to qualify for the promotional test for Senior Crime Scene Analyst.
	Crime Scene Analyst Supervisor	Four (4) years continuous service with LVMPD and completion of probation as a Senior Crime Scene Analyst. Must have the equivalent of a Bachelor's Degree from an accredited college or university with major course work in Criminal Justice, Forensic Science, Physical Science or related field.

FORMAL EDUCATION		
<i>Institution</i>	<i>Major</i>	<i>Degree/Date</i>
Central Michigan University	Health & Fitness	Degree 1990
CCSN	Criminal Justice/Law Enforcement	Degree 1995

TESTIMONY		
Yes	No	

EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Title</i>	<i>Date</i>
LVMPD	Sr. Crime Scene Analyst	7-29-96

FLETCHER, SHAWN
SENIOR CSA

P# 5221
SS#: 381-94-9092

CRIMINALISTICS BUREAU - FIELD
DOH: 07-29-96

DATE	CLASS TITLE	AGENCY	CREDIT HOURS
1990	Health Fitness & Health Promotion in Hospital & Corporate Settings Minor in Nutrition	Central Michigan University	Degree
1995	Criminal Justice/ Law Enforcement	CCSN	Degree
01-24-96	Crime Scene Processing for Resident Officers	LVMPD	7
02-28-96	NCIC - Phase III - Full Access	LVMPD	7
07-29 to 08-16-96	Crime Scene Analyst Academy	LVMPD	105
08-16-96	CAPSTUN for Civilians	LVMPD	1.5
09-96	FATS Training	LVMPD	?
09-18, 19 & 09-25-96	Civilian Firearm/Use of Force	LVMPD	21
09-20-96	NCIC - Phase II - Limited Access	LVMPD	4
08-17 to 11-01-96	Field Training	LVMPD	440
09-18 to 09-25-96	Civilian Firearm/Use of Force	LVMPD	21
09-27-96	DI Weaponless Defense/Handcuff	LVMPD	3
09-27-96	Combat Shooting Simulator/FATS	LVMPD	1
09-30-96	Duty Weapon Qualification	LVMPD	2
10-24-96	Driver Training - Level 2	LVMPD	8
11-07-96	Ultraviolet (UV) Light Orientation and Safety Presentation	LVMPD	1
12-13-96	International Association For Identification - Member	# 15197	
01-21-97	Forensic Science	American Institute of Applied Science (AIAS)	260
01-28 to 01-30-97	Top Gun Training	LVMPD	21
02-27-97	Moot Court - Video	LVMPD	2
03-26-97	Introduction to Computers	LVMPD	4
03-30-97	Duty Weapon Qualification	LVMPD	2
01-28 to 01-30-97	Top Gun Training	LVMPD	21
??	Crime Scene Processing for Resident Officers		7
02-28-??	NCIC Phase III	LVMPD	8
06-13-97	NCIC - Phase I - Video	LVMPD	20 Min

06-18-97	Critical Procedures Test	LVMPD	
07-02-97	Duty Weapon Qualification	LVMPD	2
09-08 to 09-12-97	Crime Scene Technology Workshop 2	Northwestern University, Traffic Institute	40
09-30-97	Duty Weapon Qualification	LVMPD	2
10-06 to 10-10-97	Investigative Photography I	Northwestern University, Traffic Institute	40
12-31-97	Duty Weapon Qualification	LVMPD	2
02-23-98	Domestic Violence	LVMPD	1
03-28-98	Critical Procedures Test	LVMPD	2
03-31-98	Duty Weapon Qualification	LVMPD	2
05-19-98	Investigative Profiling of Sexually Deviant Crimes	LVMPD	7
06-23-98	Duty Weapon Qualification	LVMPD	2
08-24 to 08-28-98	Bloodstain Evidence Workshop I	Northwestern University, Traffic Institute	40
09-28-98	Optional Weapon	LVMPD	
11-17-98	Combat Shooting Simulator/FATS	LVMPD	1
12-15-98	Verbal Judo	LVMPD	7
12-22-98	Duty Weapon Qualification	LVMPD	2
03-30-99	Duty Weapon Qualification	LVMPD	2
04-13-99	Critical Procedures Test	LVMPD	2
04-28 to 04-30-99	First Annual Educational Conference Opening Ceremonies (2) Banquet (3)	NSDIAI	
“	Blood Enhancement	NSDIAI	4
“	DNA Evidence	NSDIAI	2
“	Latent Prints on Skin	NSDIAI	2
“	Footwear/Tire Tracks	NSDIAI	2
“	Unabomber	NSDIAI	2
“	JFK-MLK Evidence	NSDIAI	2
“	Laboratory Photography	NSDIAI	2
“	Polly Klass	NSDIAI	2
06-15-99	Duty Weapon Qualification	LVMPD	2
06-30-99	Optional Weapon	LVMPD	
08-23 to	Bloodstain Evidence Workshop 2	Northwestern University,	40

08-27-99		Traffic Institute	
09-21-99	Duty Weapon Qualification	LVMPD	2
09-27-99	Combat Shooting Simulator/FATS	LVMPD	1
01-20-00	Latent Fingerprint Development Workshop	U.S. Secret Service	8
03-08-00	Critical Procedures Testing	LVMPD	
03-22, 23 & 03-24-00	Forensic Death and Homicide Investigation	Public Agency Training Council - National Criminal Justice	24
04-07-00	Winning Courtroom Confrontations Seminar	LVMPD	4
06-13-00	Crime Scene Analyst Certification (qualified) - Completed all requirements and tests	IAI	
06-20-00	Handgun Qualification 3 - Recertification	LVMPD	1
07-18-00	Handgun Qualification 3 - Recertification	LVMPD	1
07-23 to 07-29-00	85 TH International Educational Conference (SEE BELOW) Charleston Civic Center, Charleston, West Virginia	IAI	Total - 13 hrs. (See below)
“	W-BL104 - Blood Presumptive Tests to Enhancement Techniques	IAI	3
“	W-BL205 - Swipes, Wipes and other Transfer Impressions	IAI	2
“	W-CS401 - The Recovery of Skeletal Remains	IAI	4
“	W-FT302 - The Collection and Preservation of Footwear Evidence	IAI	4
10-31-00	Firearms Training Simulator	LVMPD	1
01-26-01	Ridgeology Comparison Techniques - Advanced	Forensic Identification Training Seminars, LLC	40
02-12 to 02-14-01	Clandestine Laboratory Safety Certification Course Occasional Site Worker - Patrol Response to Clandestine Drug Labs (02-14-01 - 4 hours)	LVMPD	24
03-19-01	In-the-Blink-of-an -Eye - Video	LVMPD	15 Min.
03-23-01	Handgun Qualification 1	LVMPD	1
04-05-01	Driver Training Class II	LVMPD	8
04-11 to 04-13-01	NSDIAI - 3 rd Annual Educational Conference Gizmos & Gadgets	NSDIAI	2
“	Officer Involved Shootings	NSDIAI	3
“	Ted Binion Homicide	NSDIAI	2
09-07-01	Firearms Qualification 2 - Recertification	LVMPD	2
10-01-01	RC - Use of Force - Video Training Tape #1	LVMPD	15 Min.
10-29-01	Bloodstain Pattern Analysis - Angle of Impact Proficiency Exercise - Certificate #22	LVMPD Criminalistics Bureau	3

12-20-01	Firearms Training Simulator - Recertification	LVMPD	1
12-21-01	Handgun Qualification 4 - Recertification	LVMPD	1
02-19-02	Handgun Qualification 1 - Recertification	LVMPD	1
03-30-02	Documentation of Footwear & Tire Impressions	LVMPD	1
03-30-02	Forensic Anthropology	LVMPD	1.5
04-02-02	Objective Approach to the Crime Scene	LVMPD	1
04-01-02	Clandestine Laboratory Safety - Fingerprint Processing	LVMPD	1
04-25-02	Chemical Enhancements of Bloodstains, Preliminary Steps	LVMPD - Criminalistics Bureau	1
08-04 to 08-10-02	87 th International Educational Conference - See below	IAI	
“	W-50 - Advanced Documentation for Bloodstain Evidence	“	3
“	W-69 - Painting with Light	“	3
“	Triple Murders in the City of Los Angeles: The Trial in Indonesia	“	1
“	Death Cases: Truth or Consequences	“	1
“	Suicide or Is It?	“	1
01-04-03	IAI - Crime Scene Certification Board - Declared “Senior Crime Scene Analyst”	IAI	
02-03 to 02-05-03	Shooting Incident Reconstruction - Forensic Identification Training Seminars	LVMPD	24

LAS VEGAS CRIMINALISTICS BUREAU

STATEMENT OF QUALIFICATIONS

Name: DANIEL HOLSTEIN

P#: 3861

Date: October 24, 1997

CURRENT CLASSIFICATION		
	<i>CLASSIFICATION</i>	<i>MINIMUM QUALIFICATIONS</i>
	Crime Scene Analyst I	AA degree with major course work in criminal justice, forensic science, physical science or related field, including specialized training in crime scene investigation
	Crime Scene Analyst II	18 months - 2 years continuous service with LVMPD as a Crime Scene Analyst I
X	Senior Crime Scene Analyst	2 years as a Crime Scene Analyst II to qualify for the promotional test for Senior Crime Scene Analyst
	Crime Scene Analyst Supervisor	4 years continuous service with LVMPD and completion of probation as a Senior Crime Scene Analyst. Must have the equivalent of a bachelor's degree from an accredited college or university with major course work in criminal justice, forensic science, physical science or related field.

FORMAL EDUCATION		
<i>Institution</i>	<i>Major</i>	<i>Degree/Date</i>
University Of Nevada Las Vegas	Criminal Justice	BS 5/87

ADDITIONAL TRAINING/SEMINARS		
<i>Course / Seminar</i>	<i>Hours</i>	<i>Date</i>
Administration of Justice 66, Fingerprint Classification – Long Beach City College	54	12/21/84
University of Nevada – Bachelor of Arts Degree		05/87
Suicide Prevention Center of Clark County – One Year of Service	Award	06/05/87
CA Homicide Investigators Association – Annual Seminar		03/09 – 03/11/88
PC 832 – Reserve Level III – San Bernardino Sheriff's Department	56	05/17/88
Budget & First Line Supervisor – San Bernardino Sheriff's Department	8	10/26/88
Basic Forensic Death Investigation – Department of the Chief Medical Examiner, County of Los Angeles	120	11/30/88
American Institute of Forensic Sciences – Category I, Continuing Medical Education	20	02/89

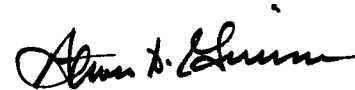
DANIEL HOLSTEIN
LVMPD P#3861
Curriculum Vitae
- 1 -

Under the Influence 11550 H & S – International Law Enforcement Training & Consult., Inc.	8	04/05/89
Handling & Investigation of Officer Involved Shootings – International Law Enforcement Training & Consult., Inc.	8	04/06/89
Arson – Motives – International Law Enforcement Training & Consult., Inc.	8	05/24/89
LVMPD Drug Testing, Film		01/04/91
Firearms Training		09/29/90
Forensic Science Course – A.I.A.S.	260+	02/91
Continuing Medical Education – American Academy of Forensic Science	29.5	02/91
Gangs in Clark County – LVMPD	4.5	01/15/91
Drug Recognition	8	01/11, 01/18/91
Driver's Training	8	12/05/91
Understanding Death, Dying & Grieving	4	12/06/91
Firearms, Toolmarks & Documents	8	01/16/92
Footwear Evidence/Recovering Firearms	8	02/18/92
How to Handle Difficult People	7	02/21/92
In-Service Training – New Pursuit Policy	1	07/92
Auto Theft	3	09/08/92
Child Abuse & Neglect	4	10/13/92
Forensic Seminar – Entomological Society of America	8	12/10/92
Advanced Latent Fingerprint Techniques	40	01/11 – 01/15/93
Polilight Laser Photography & Chemical Techniques	8	02/23/93
NCIC Videotape	20 min.	03/09/93
Forensic Pathology: The Investigation of Violent Death	40	09/17/93
Crime Scene Investigations II	40	06/10/94
Bloodborne Pathogens (Video)	2	09/03/92
Bloodborne Pathogens (Video)		09/94
Gunshot & Stab Wounds: A Medical Examiner's View	8	11/30/94
Instructor Development	40	03/10/95
Florida Association of Medical Examiners & Investigation for Identification	17	09/27 – 09/30/95
Bloodstain Pattern Analysis Workshop	40	12/04 – 12/08/95

DANIEL HOLSTEIN
LVMPD P#3861
Curriculum Vitae
- 2 -

Gunshot & Stab Wounds: A Medical Examiner's View		8	07/22/96
Evidence Photographers International Council		24	11/16 – 11/18/96
Interest-Based Bargaining (Federal Mediation and Conciliation Service)			01/20/97
Top Gun Training		21	04/08 – 04/10/97
TESTIMONY			
Yes	No		
X		Eighth Judicial District, Clark County Nevada	
X		Justice Courts of Las Vegas Township	
X		Federal Court	
EMPLOYMENT HISTORY			
<i>Employer</i>		<i>Title</i>	<i>Date</i>
Las Vegas Metropolitan Police Department		Crime Scene Analyst	2/90 – Present
Riverside County Coroner's Office		Coroner's I Investigator	2/88 – 2/90
Los Angeles County Coroner's Office		Reserve Coroner's Investigator	4/84-4
PROFESSIONAL AFFILIATIONS			
<i>Organization</i>			
American Academy Of Forensic Science			
International Association Of Identification			
International Association Of Bloodstain Interpretation			
Evidence Photographers International Council			

DANIEL HOLSTEIN
LVMPD P#3861
Curriculum Vitae
- 3 -



CLERK OF THE COURT

MOT

AMANDA S. GREGORY, ESQ.
Nevada Bar No. 11107
JENNIFER M. WALDO, ESQ.
Nevada Bar No. 11900
GREGORY & WALDO, LLC
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Email: asg@gregoryandwaldo.com
Attorneys for Defendant
ERIN WARE

DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN WARE,

Defendant.

Case No.: C-15-310099-1

Dept. No.: IX

**MOTION TO DISMISS DUE TO
FAILURE TO PRESERVE
EXCULPATORY EVIDENCE**

COMES NOW the Defendant ERIN WARE, by and through his attorneys, JENNIFER M. WALDO, ESQ. and AMANDA S. GREGORY, ESQ., of GREGORY & WALDO, LLC, and hereby submits the attached Points and Authorities in support of his Motion to Dismiss Due to Failure to Preserve Exculpatory Evidence.

///

///

MOTION TO DISMISS DUE TO FAILURE TO PRESERVE EXCULPATORY EVIDENCE - 1

1 This Motion is made and based upon all the papers and pleadings on file herein, the
2 attached points and authority, and oral argument at the time set for hearing this Motion

3 DATED this 21st day of December, 2016.

4 Respectfully submitted:

5
6 By: /s/Jennifer Waldo
7 JENNIFER M. WALDO, ESQ.
8 AMANDA S. GREGORY, ESQ.
9 Attorneys for Defendant

10 **NOTICE OF MOTION**

11 TO: STATE OF NEVADA, Plaintiff; and

12 TO: DISTRICT ATTORNEY, its attorney:

13 PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Dismiss
14 Due to Failure to Preserve Exculpatory Evidence for hearing in Department 9 of the above-entitled
15 Court, on the 03 day of January, ²⁰¹⁷~~2016~~, at the hour of 9:00 a.m., or as
16 soon thereafter as counsel may be heard.

17 DATED this 21st day of December, 2016.

18
19 GREGORY & WALDO, LLC

20
21 /s/Jennifer Waldo
22 JENNIFER M. WALDO, ESQ.
23 Nevada Bar No.: 11900
24 Attorney for Defendant
25
26

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I.**

3 **PROCEDURAL HISTORY**

4 The Defendant, ERIN WARE, has been charged by way of Information as follows: one
5 (1) count Burglary While in Possession of a Deadly Weapon, one (1) Battery with Intent to Commit
6 a Crime, one (2) counts Robbery with Use of a Deadly Weapon, and one (1) count Battery with
7 Use of a Deadly Weapon Resulting in Substantial Bodily Harm, one (1) count Attempt Murder
8 with Use of a Deadly Weapon, one (1) count Assault with Use of a Deadly Weapon, three (3)
9 counts Discharge Firearm from or within a Structure of Vehicle, one (1) count Ownership or
10 Possession of Firearm by Prohibited Person, and one (1) count Solicitation to Commit Murder.
11 Initially, Mr. Ware was set for two separate trials stemming out of two separate events. However,
12 the cases were consolidated. Trial is set for January 21, 2016.
13
14

15 **II.**

16 **STATEMENT OF FACTS**

17 The State alleges that the Defendant entered a Subway restaurant located at 8790 S.
18 Maryland Parkway while alleged victims Ruth Garn and Jamie Nourie were working. The State
19 alleges that Defendant pointed a gun at the victims, threatening one, and ultimately shooting Ruth
20 Garn multiple times.
21
22

23 There is video surveillance of the entire incident. The suspect's face on the video is
24 difficult to see. Prior to the shooting, the suspect entered into the Subway restaurant and is seen
25 on video requesting a water cup from Nourie. Nourie informs the suspect that he must pay \$0.25
26

MOTION TO DISMISS DUE TO FAILURE TO PRESERVE EXCULPATORY EVIDENCE - 3

1 for the water cup. The suspect gets a quarter from another patron in the store and then buys a water
2 cup. The suspect then gets water, and is seen exiting and reentering the restaurant. At one point
3 the suspect leaves the water cup on a nearby table, goes to the restroom, then returns and picks up
4 the cup again. He then goes back over to the water fountain, refills the cup several times, and
5 drinks out of it. Once the store has no other customers in it the suspect then discards the water
6 cup. From the video footage it cannot be seen exactly where the cup is placed. According to
7 Nourie she did not see where the suspect discarded the cup.
8

9
10 At preliminary hearing, Jamie Nourie testified as follows, while she was watching the video
11 surveillance:

12 Q. Going back to the water cup that you gave him that first time
13 he came in, when he came and used the bathroom, did he still
14 have that same water cup in his hand?

15 A. Yes.

16 Q. What did you see him do with that water cup when he came
17 in to use the bathroom?

18 A. I saw him put it on the table and then go to the restroom.
19 And then I saw him – when he came out, I just saw him
20 drinking it. I didn't see where he had put it, but no one else
21 that day had asked for a water cup.

22 Q. Did you see him near the drinking fountain, drinking out of
23 the cup?

24 A. Yes.

25 Q. Did you ever see him throw it away?

26 A. No.

(Preliminary hearing transcript, pages 48-49). She further testified:

1 Q. Did you, in fact, see the small, clear cup that he had in his
2 hand that you gave him before?

3 A. Yes.

4 Q. What did you see him do with the cup?

5 A. He set it down on one of the tables, right over here.

6 Q. And then after he sets it down on that table, does he go to the
7 restroom?

8 A. Yes.

9 Q. Now I'm going to fast forward. I'm at 4230. Do you see
10 what the Defendant is doing now?

11 A. Yes. He said thank you for letting him use the restroom and
12 asked if it was okay for him to stand in the lobby, because it
was hot outside and he was waiting for a ride.

13 Q. Did he go back to that table and pick up that cup again?

14 A. Yes.

15 Q. And is he drinking out of the cup?

16 A. Yes.

17 Q. Can you circle where the drinking fountain is?

18 A. Here (witness indicating).

19 Q. And is he now going over to where the drinking fountain is?

20 A. Yes.

21 Q. The trash can that's by the drinking fountain, is it to the left
22 or the right?

23 A. It is right here near the window, in the top left corner.
24

25 (Preliminary Hearing Transcript, pages 59-60).
26

1 After the incident, during investigation, a water cup was recovered from the garbage can.
2 DNA testing was done on the cup that was recovered and it tested positive to be Defendant Erin
3 Ware's DNA. As shown above, there is no testimony that anyone saw where the suspect disposed
4 of the cup. Defense counsel did an evidence vault review of all evidence recovered from the scene.
5 In the collected evidence was the cup with Ware's DNA. However, nothing else from the trash
6 can was recovered, and the trash bag was not impounded either. Counsel has received photographs
7 from the scene in discovery. There are photos of a trashcan filled with trash, and a cup on top of
8 the trashcan. There are several other cups visible in the trashcan, as well as other various trash
9 items. Officers removed the plastic cup that they assumed was the cup the suspect drank out of,
10 took photos of only the top of the trashcan, and then allowed for the rest of the trash to be disposed
11 of. At this point counsel has no way of inspecting the rest of the trash in the trashcan, or any other
12 cups that were in the trashcan. Officers took the one cup out that they assumed to be the cup the
13 suspect drank from, and then disposed of everything else.

17 II.

18 ARGUMENT

19
20 "The State's loss or destruction of evidence constitutes a due process violation only if the
21 defendant shows either (1) that the State acted in bad faith, or (2) that the defendant suffered undue
22 prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed."
23 Browning v. State, 120 Nev. 347, 370 (2004), quoting Leonard v. State, 117 Nev. 53, 68 (2001).
24 "Where there is no bad faith, the defendant has the burden of showing prejudice." Leonard v.
25 State, 117 Nev. 53, 68 (2001). "To establish prejudice, the defendant must show that it could be

1 reasonably anticipated that the evidence would have been exculpatory and material to the defense.”
2 Daniel v. State, 119 Nev. 498, 520 (2003), quoting Cook v. State, 114 Nev. 120, 125 (1998). In
3 sum, in order to prevail on the merits of a claim that the State’s destruction of evidence rises to the
4 level of a due process violation mandating dismissal, the defendant must show either bad faith or
5 undue prejudice.
6

7 In Howard v. State, 95 Nev. 580 (1979), the Nevada Supreme Court reversed the
8 defendant’s conviction for burglary where the State collected his shoes, yet failed to preserve them.
9 The Nevada Supreme Court held that even though the State did not lose the evidence in bad faith,
10 the defendant was prejudiced by the loss, because the evidence was material to his
11 misidentification defense.
12

13 The standard for establishing a due process violation based on the destruction of evidence
14 varies based on the classification of the evidence destroyed. Where the evidence can be considered
15 “material exculpatory evidence,” destruction of such evidence violates due process regardless of
16 whether the destruction was performed in good or bad faith. In order to be considered “material
17 exculpatory evidence,” the evidence must “...both possess an exculpatory value that was apparent
18 before it was destroyed, and be of such a nature that the defendant would be unable to obtain
19 comparable evidence by other reasonably available means.” California v. Trombetta, 467 U.S.
20 479, 489 (1984). Where the destroyed evidence cannot be considered material exculpatory
21 evidence, and is merely considered “potentially useful” to the defense, in order to establish a due
22 process violation the defendant must also demonstrate that the evidence was destroyed in bad faith.
23 Arizona v. Youngblood, 488 U.S. 51 (1988).
24
25
26

1 While bad faith may be difficult to show in this case, since most likely the officers assumed
2 the cup on the top of the trash was the cup the suspect was using, the officers should have been
3 very well aware that the items in the trash can in this case would be of substantial importance to
4 the defense. These apparent assumptions regarding the remainder of the evidence in the trash can
5 caused major prejudice to Defendant as he now does not have the opportunity to examine any of
6 the rest of the trash in the garbage can to determine if there are any other cups present that require
7 testing. Even if this act or failure to act was inadvertent, it remains that the trash is a material piece
8 of evidence to this case.
9
10

11 It is clear that a Defendant's right to inspect the evidence the State is using against him is
12 crucial to both Due Process and the fairness of trials generally. Pursuant to N.R.S. 174.235, it is
13 the right of Defendant that access *shall* be given when requested. The underlying logic to this rule
14 is equally clear – the State may not preserve and utilize the evidence that comports with its theory
15 of prosecution while failing to preserve, destroying or hiding the evidence which does not comport
16 with its theory. This right to inspect is wholly without merit if the State is not first mandated to
17 preserve *all* evidence in a secure fashion.
18
19

20 It is indisputable that the Defendant has been substantially prejudiced by this grossly
21 negligent loss of evidence. The Defendant has maintained his innocence throughout the course of
22 this case and asserts it was not him depicted as the suspect on the video. As it stands, the Defendant
23 is unable to fully investigate and build his defense when he has no access to the rest of the evidence
24 at the scene to do further testing.
25
26

1 It cannot be denied that the responsible party for this preclusion is the State. Metro has the
2 responsibility of not only investigating crime but also of securing and preserving the evidence
3 collected in connection with the crimes investigated. There is no other agency that has either the
4 authority or the responsibility of securing and preserving evidence once impounded. The law is
5 clear—it is irrelevant if the conduct was inadvertent because the conduct was so grossly negligent
6 and the prejudice resulting to the Defendant is so severe.
7

8 It is important to note that the exculpatory nature of the evidence lost by the police was
9 apparent to the Defendant from the beginning of the case. Defense Counsel hired an expert to
10 examine and conduct further review and testing regarding the DNA. A trial continuance was
11 requested by defense for this very purpose. However, all the expert was able to do was review the
12 DNA testing regarding the only cup that was recovered from a full trash can.
13

14 As such, this was crucial and potentially exculpatory evidence that the State failed to
15 preserve. The Defense is now in a position of not being able to fully investigate and defend this
16 case.
17

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MOTION TO DISMISS DUE TO FAILURE TO PRESERVE EXCULPATORY EVIDENCE - 9

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III.

CONCLUSION

Without the critical evidence in this case, Erin Ware's defense has been significantly hindered and prejudiced. The Defendant respectfully requests that this Court dismiss the case due to the State's failure to preserve exculpatory evidence.

DATED this 21st day of December, 2016.

GREGORY & WALDO, LLC

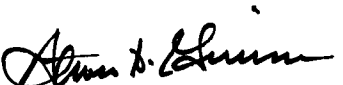
/s/ Jennifer Waldo
AMANDA S. GREGORY, ESQ.
Nevada Bar No.: 11107
JENNIFER M. WALDO, ESQ.
Nevada Bar No. 11900
324 S. 3rd Street, Suite 2
Las Vegas, NV 89101

CERTIFICATE OF MAILING

I, do hereby certify that on the 21st day of December, 2016, I did serve a true and correct copy of the foregoing Defendant's MOTION TO DISMISS DUE TO FAILURE TO PRESERVE EXCULPATORY EVIDENCE by placing in the United States mail, first-class postage fully prepaid, addressed as follows:

Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

/s/ Nicole Petrillo
An Employee of Gregory & Waldo


CLERK OF THE COURT

1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 KRISTINA RHOADES
6 Deputy District Attorney
7 Nevada Bar #12480
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-

CASE NO: C-15-310099-1

12 ERIN DESHAUN WARE,
13 #2652033

DEPT NO: IX

14 Defendant.

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS DUE TO**
16 **FAILURE TO PRESERVE EXCULPATORY EVIDENCE**

17 DATE OF HEARING: JANUARY 3, 2017
18 TIME OF HEARING: 9:00 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through KRISTINA RHOADES, Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Opposition to Defendant's Motion To Dismiss
22 Due To Failure To Preserve Exculpatory Evidence.

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

26 //

27 //

28 //

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 Defendant Erin Ware ("Defendant") is charged by way of Third Amended Information
4 with one (1) count of Burglary While in Possession of a Deadly Weapon, two (2) counts of
5 Robbery With Use of a Deadly Weapon, one (1) count of Battery With Intent to Commit a
6 Crime, one (1) count of Battery With Use of a Deadly Weapon Resulting in Substantial Bodily
7 Harm, one (1) count of Attempt Murder With Use of a Deadly Weapon, one (1) count of
8 Assault With Use of a Deadly Weapon, three (3) counts of Discharge of Firearm From or
9 Within Structure or Vehicle, one (1) count of Ownership or Possession of Firearm by
10 Prohibited Person, and one (1) count of Solicitation to Commit Murder.

11 On August 11, 2016, Defendant's third request to continue his trial was granted over
12 the State's objection. Defendant's trial is currently set for January 23, 2016, with a calendar
13 call date of January 12, 2016.

14 Defendant filed the instant motion to dismiss "due to failure to preserve exculpatory
15 evidence" on December 21, 2016, and instead of serving it to the District Attorney's Office
16 by way of email, thought it best to drop the motion in the holiday mail despite that motion
17 being calendared for hearing on January 3, 2017. Nonetheless, the State has obtained a copy
18 of the motion via Odyssey and responds as follows.

19 STATEMENT OF FACTS

20 On June 10, 2015, at approximately 2:30 p.m., Ruth Garn and Jamie Nourie were
21 working at the Subway located at 8790 S. Maryland Parkway, Las Vegas, Nevada.
22 Preliminary Hearing Transcripts, 7-8, 39.¹ While working, the defendant entered the store and
23 loitered around for a bit. PH, 39-41. Eventually, he asked for a cup for water. PH, 9, 42.
24 Jamie charged him 25 cents for the cup. PH, 9, 42. Defendant filled up the water cup, drank
25 the water for a minute then walked outside. PH, 42. Five (5) to ten (10) minutes later, he
26 walked back inside and asked if he could use the restroom. PH, 10, 42. He set his water cup
27 on the table, went to the restroom and walked back out. PH, 42. When Defendant came out
28

¹ Hereinafter abbreviated, "PH."

of the restroom, he asked if he could wait for his ride inside the restaurant for a bit. Ruth and Jamie allowed him to wait inside. PH, 10, 43. Defendant waited near the drink fountain and continued to drink water. PH, 44, 49, 60. Jamie went into work at 9:30 a.m., and her shift was until 3 p.m. PH, 40. Jamie testified that Defendant was the only customer that day that asked for a water cup. PH, 49. The small clear cups for water are distinguishable from the Subway soda cups.

Jamie and Ruth walked to the back where they began to put dishes away and do prep work. PH, 44-45. There were no other customers in the store at that point. PH, 44-45. While in the back, Ruth walked into the fridge. PH, 45. As Ruth began to walk back out of the fridge, Defendant approached Jamie and stuck a gun in her face. PH, 45-46. Jamie said, "Oh my God" at which point Ruth turned around and saw Defendant holding a gun to Ruth's head. PH, 11. Defendant told Ruth, "Give me all the fucking money." PH, 12. Ruth put her hands in the air and told him that he didn't have to do that, and that they didn't have any money in the back. PH, 12. Defendant pushed her into the desk and told her, "I guess we're just going to have to get it out of your fucking purses." PH, 12. After he pushed Ruth into the desk, Defendant went behind Ruth and grabbed Jamie and put the gun to her neck and said he was going to kill her. PH, 12. At that point, Ruth went into her purse and removed her .357 Ruger Security Six revolver, for which she possessed a concealed carry permit. PH, 12. Ruth removed the gun because she was in fear for Jamie's safety. Ruth turned toward Defendant, pointed the gun at him and told him to drop his weapon. PH, 13.

Defendant fired his weapon at Ruth and shot her in the face. PH, 13. The bullet entered just below her left eye, traveled under her nose, under her cheekbone and exited the right side of her face just above her ear. PH, 13. Ruth fell to the ground onto her right side. PH, 14. Defendant stepped over her and with Jamie and had his gun to Jamie's neck. PH, 14. Ruth tried to get up, at which time Defendant shot her again. PH, 14. That bullet went through her arm and into her stomach. PH, 15. Ruth told Defendant to quit shooting her and put her arm up to block the bullets. PH, 16. He shot her a third time and the bullet entered her chest and bounced off of her sternum and exited right back out. PH, 18.

1 While Defendant was initially focused on Ruth, he ordered Jamie to lay down on the
2 ground and put her face down. PH, 46. Jamie heard Defendant say something to Ruth about
3 getting money out of her purse. PH, 46. After that, Jamie heard a gunshot. PH, 46. She lifted
4 her head to see what was happening and saw Defendant and Ruth struggling over something
5 near the prep table. PH, 46. Defendant ordered her to put her head back down, and then Jamie
6 heard another shot. PH, 46. At that point, Defendant ordered Jamie to get up and go open the
7 safe in the front. PH, 46. Jamie got up and walked past Ruth, who was laying on the floor
8 bleeding. PH, 47. As she walked past Ruth, she noticed that Ruth had her gun on the floor
9 next to her. PH, 49, 57. Defendant still had his gun in his hand. PH, 57. Per the surveillance
10 video of the incident, Defendant picked Ruth's gun up off of the floor and shot her two more
11 times. PH, 57. As Jamie walked to the front, she heard two more gunshots. PH, 47. Jamie
12 was afraid that Ruth was going to die, and that Defendant was going to shoot her as well. PH,
13 47.

14 Once Jamie got near the register, she knelt to try and unlock the safe. At that point,
15 Defendant walked up behind her and put the gun to her neck. PH, 48. Jamie tried to enter the
16 combination to the safe but was shaking so badly that she couldn't get it to open. PH, 48.
17 Jamie told Defendant she could not get it open at which point he ordered her to open the
18 register. PH, 48. Jamie removed the whole drawer from the register and tried to hand it to
19 Defendant, but he just looked at it and ran out. PH, 48. Jamie went back to Ruth and dialed
20 911. PH, 49. Ruth's gun was no longer present. PH, 50.

21 Ruth was transported to the hospital where she remained for four (4) days. PH, 22. For
22 the first two days she was sedated. PH, 22. She suffered a brain bleed and a myriad of other
23 injuries. PH, 23. While hospitalized she had to undergo surgery to remove the bullet from
24 her stomach. PH, 24. After being released from the hospital, she had to have both orbital
25 floors replaced because they were blown out by the bullet to her face. PH, 26. She had double
26 vision, blurred vision, and can't focus her eyes. PH, 26. She has permanent damage to her
27 right pupil and her left tear duct was ruined. PH, 26, 28. In addition, she can't smell or taste,
28 her left eardrum was perforated from the blast and she sustained inner ear damage and

1 deafness. PH, 26. Additionally, several tendons in her arm were damaged. PH, 27. As a
2 result she can't use her thumb and her pointer finger, middle finger and pinky on her left hand
3 are numb. PH, 27. In addition, she has to use a walker to move around because of issues with
4 her balance caused by damage from the bullets. PH, 28. Ruth was unable to identify
5 Defendant because of damage to her eyesight. PH, 22-23.

6 Jamie met with a sketch artist on June 14, 2015 and assisted them in doing a sketch of
7 Defendant. PH, 67. Then, on July 22, 2015, Jamie viewed a six pack photographic line-up
8 and positively identified Defendant as the individual who robbed them, and shot Ruth multiple
9 times. PH, 63-64.

10 Crime Scene Analysts collected the small clear plastic cup used by Defendant for
11 drinking water on the day of the robbery from the trash can in the northwest corner of the
12 Subway lobby. A photograph of the top of the trash from that trash can has been attached to
13 this opposition as Exhibit 1. It is clear from photograph that there is one (1) clear plastic
14 drinking cup on the top of the trash, surrounded by Subway wrappers and empty Subway soda
15 cups. Exhibit 1. The plastic cup that was collected was swabbed for DNA and subsequent
16 testing revealed that Defendant's DNA was on that cup. In a post-*Miranda* interview
17 following Defendant's arrest, he denied ever being inside of that Subway.

18 On November 30, 2015, Det. Lance Spiotto received a voicemail message that an
19 inmate at the Clark County Detention Center had information that Defendant Erin Ware was
20 attempting to solicit the murder of Jamie Nourie. After receiving the message, Detective
21 Spiotto went to the Detention Center and interviewed the inmate that same day. The following
22 day, Det. Spiotto and Det. Moreno met with the inmate again. During that interview, the
23 inmate informed the detectives that Ware provided him with a great number of details
24 concerning the incident on June 10, 2015 at Subway. The inmate provided those details to the
25 detectives, including the fact that Jamie Nourie was the only witness who could identify
26 Defendant at the preliminary hearing. Defendant told the inmate that he could have his "Pops"
27 or his "broad" pay the person who was willing to kill Jamie. The inmate was able to give the
28 detectives Jamie's home address which Defendant provided to him. The inmate expressed to

1 detectives that he felt he needed to let them know because he was concerned due to the
2 violence used in the robbery, and because he believed Defendant was capable of hiring
3 someone to murder Jamie. The inmate advised detectives that he told Defendant to expect a
4 visit from a family member of his named "Check" who would assist Defendant.

5 On December 7, 2015, when Det. Moreno went to visit with the inmate about
6 potentially wearing a wire, the inmate showed Det. Moreno a letter that Defendant provided
7 to the inmate in which he stated, "I heard you a clean up [sic] man and I need some garbage
8 to be taking out. Handle it and I got 5 stacks for you." The inmate advised detectives that he
9 needed to return with the letter so that Defendant could finish it. At that point, Det. Moreno
10 photographed the letter and gave it to the inmate.

11 The next day, the inmate wore a wire. While the inmate was wearing the wire,
12 Defendant read the letter to the inmate. In addition, they discussed the solicitation in more
13 detail.

14 Then, on December 9, 2015, an undercover detective conducted a videotaped visit with
15 Defendant. Erin Ware believed that the UC was the inmate's family member who went by the
16 name "Check." During that visit, Defendant confirmed that he wanted Jamie Nourie gone
17 "not for a minute" but "forever." He also held up a letter for the UC which contained Nourie's
18 name, address and description and confirmed that he would pay the UC five (5) stacks (\$5,000)
19 for taking care of it. In addition, he held up the Information from Case No. C-15-310099-1
20 and showed the UC the charges that he was facing, along with the list of witnesses attached to
21 the Information. Defendant advised the UC that he needed it done by the 17th of December
22 because that was the day that he was supposed to go to Court and see if everyone is ready for
23 trial. That list contained the name and address of Jamie Nourie. At the conclusion of the visit,
24 it was agreed that the UC would visit Defendant in a few days to follow-up.

25 On December 10, 2015, Det. Moreno was contacted by Alex Gonzalez at the Detention
26 Center who advised that the inmate gave two letters to him from Defendant to forward to Det.
27 Moreno. One of those letters was the letter that Defendant held up during the videotaped visit
28 and described Jamie Nourie, the amount to be paid for her murder, and her work and home

1 addresses. Defendant believed that the inmate was going to mail the letters to his girlfriend to
2 give to "Check"/the UC.

3 The UC met with Defendant again on December 14, 2015. Again, it was a videotaped
4 visit over the video visitation system at the jail. During the second meeting, Defendant
5 reiterated his desire to have Nourie murdered. Additionally, the UC advised Defendant that
6 he'd done his "homework" on Jamie, and held up two photographs of her so that Defendant
7 could confirm whether that was the correct individual. Defendant confirmed that was the
8 Jamie Nourie he was talking about.

9 ARGUMENT

10 **I. THE CHARGES AGAINST DEFENDANT MUST STAND BECAUSE** 11 **DEFENDANT FAILED TO MEET HIS BURDEN PURSUANT TO DANIELS** 12 **v. STATE**

13 Defendant argues that his case should be dismissed due to Metro's failure to preserve
14 exculpatory evidence because Metro did not collect all of the trash in the Subway trash can.
15 Defendant's analysis fails on several grounds, and there is absolutely no basis for dismissal.

16 The Nevada Supreme Court has delineated a clear distinction between failure to
17 preserve evidence and failure to *gather* evidence. Daniels v. State, 114 Nev. 261, 266-267
18 (1998). Defendant cites to both of these standards. In the instant case, it cannot be said that
19 the State failed to preserve evidence (i.e., "State gathered blood evidence from [Defendant]
20 and then allowed it to be lost or failed to deliver it to [defense] counsel. Id. at 266.") Thus, the
21 defense is not entitled to dismissal based on the standard of failing to preserve evidence (see
22 Def.Mot. 6:25-7:6) as it is simply inapplicable to the instant case. Defendant's allegation
23 involves a purported failure to collect evidence rather than failure to preserve evidence that
24 was collected.

25 In Daniels, the Nevada Supreme Court set forth the standard for failure to gather
26 evidence. The Court held:

27 Police officers generally have no duty to collect all potential
28 evidence from a crime scene...this rule is not absolute... The first
part requires the defense to show that the evidence was "material,"
meaning that there is a reasonable probability that, had the

evidence been available to the defense, the result of the proceedings would have been different. *Id.* 881 P.2d at 685; *see United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). If the evidence was material, then the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case. *Ware*, 881 P.2d at 685–686. When mere negligence is involved, no sanctions are imposed, but the defendant can still examine the prosecution's witnesses about the investigative deficiencies. *Id.* When gross negligence is involved, the defense is entitled to a presumption that the evidence would have been unfavorable to the State. *Id.* In cases of bad faith, we conclude that dismissal of the charges may be an available remedy based upon an evaluation of the case as a whole.

Daniels, 114 Nev. 261, 267. In *Daniels*, the Defendant claimed that because the State failed to gather blood evidence from him at the time he was arrested, he was unable to prove he was intoxicated at the time of the crime and therefore, could not present a voluntary intoxication defense to negate the specific intent of the crime. *Daniels*, 114 Nev. at 266. The Court held that “whether the blood evidence would likely have prevented Daniels’ conviction is pure speculation.” *Id.* at 268. As such, the Court found that the blood evidence was not material under the first part of the test. While the Court indicated that because they found that the evidence was not material, an analysis of the second part of the test was unnecessary, the Court still addressed part two of the test finding that the police were not negligent, grossly negligent or acting in bad faith by failing to collect blood evidence. *Id.*

Additionally, in *Gallimort v. State*, Gallimort argued that his conviction should be reversed because the police did not collect the knife Gallimort allegedly used to stab the victim. *Gallimort v. State*, 116 Nev. 315, 997 P.2d 796 (2000). The Court held:

We hold that it is not evident that the knife was material, but even if the knife was material, the police investigator's failure to collect the knife was at most merely negligent. The knife is material only if there is a reasonable probability that had the evidence been available to the defense, the result of Gallimort's trial would have been different. *See id.* at 267, 956 P.2d at 115. The mere possibility that the knife may have affected

1 the outcome of the trial does not establish materiality. See *United*
2 *States v. Agurs*, 427 U.S. 97, 109–110, 96 S.Ct. 2392, 49 L.Ed.2d
3 342 (1976). When Rozier presented the knife to the police
4 investigator she was not certain that the knife was the one
5 Gallimort used to stab her. Appellant can only speculate that the
6 knife may have aided his case.

7 There is no reasonable probability that the availability of the knife
8 would have resulted in a different verdict, since the knife could
9 not be positively identified. Examination of the knife would either
10 have confirmed that it was the knife that was used to cut Rozier if
11 blood had been found on it, or that it was not the knife. The
12 presence or absence of the knife would have had no effect on
13 whether Gallimort was guilty of the crime charged. The evidence
14 against him was the testimony of the victim and eyewitnesses and
15 objective medical evidence of the stab wounds. Which knife was
16 used is immaterial.

17 Even if the knife were material, then the police investigator's
18 failure to collect it was at most merely negligent. There is no
19 evidence that the police investigator acted in bad faith,
20 purposefully concealing the existence of the knife to disadvantage
21 the defense.

22 Gallimort v. State, 116 Nev. 315, 320-21, 997 P.2d 796, 799 (2000).

23 Pursuant to Daniels, Defendant must first show that the evidence was “material”,
24 meaning that there is a reasonable probability that, had the evidence been available to the
25 defense, the result of the proceedings would have been different.” Daniels, 114 Nev. at 267.
26 adopting State v. Ware, 881 P.2d 679 (N.M. 1994).

27 Second, if the evidence is “material,” then the trial court must determine “whether the
28 failure to gather evidence was the result of mere negligence, gross negligence or a bad faith
attempt to prejudice the defendant’s case.” Id. If the failure to collect evidence was due to
negligence, then no sanctions of any kind are assessed against the State, “but the defendant
can still examine the prosecution’s witnesses about the investigative deficiencies.” Id.

Against this test it should be remembered that:

the Due Process Clause has never required officers to undertake a state-of- the-
art investigation of all reported crimes. Officers investigating a crime need not
track down every conceivable investigative lead and seize every scintilla of
evidence regardless of its apparent importance ... or run the risk of denying a
defendant due process ... Id.

1 **A. Materiality: Defendant Has Failed To Establish That The Trash Is Material**

2 In Daniels the Court denied “Daniel’s appeal because he failed to establish that the
3 blood evidence was likely to have been material.” Id. at 268. Again, Defendant in this case
4 confuses the standards. Preservation of evidence is not at issue. The State did not, for
5 example, obtain the Subway trash and lose such evidence. Second, Defendant fails to show
6 the materiality of the purported trash evidence. Defendant must show that it is *reasonably*
7 *probable* that such evidence would *change the result* of the proceedings.

8 Here, Defendant’s claims about the trash being material to his defense are pure
9 speculation. Defendant has not shown how the remaining Subway trash would reasonably
10 change the outcome of the proceedings. Especially in light of the fact that Jamie started her
11 shift at 9:30 a.m. and testified that no one else, except for the Defendant, asked for a water cup
12 that day. And especially in light of the fact that the video surveillance shows Defendant with
13 the water cup go over to the trash can inside the store (the same trash can where the CSA
14 collected the water cup) immediately prior to him charging at Jamie and Ruth armed with his
15 firearm. PH, 60-61. Defendant makes the bare allegation that Metro’s failure to collect the
16 entire trash bag “caused major prejudice to Defendant as he now does not have the opportunity
17 to examine any of the rest of the trash in the garbage can to determine if there are any other
18 cups present that require testing.” Def.Mot. 8:6-8. Yet, Defendant provides absolutely no
19 reasoning as to why the remaining trash would be material in light of the other evidence in this
20 case, and he has utterly failed to show how the trash reasonably changes the outcome of the
21 proceedings.

22 Similar to Gallimort, in this case, evidence of the crime is based on the testimony of
23 the witnesses, officers and CSA’s present at the scene, and latent print, DNA, and forensic
24 multimedia experts. Whether trash that has no apparent relevance to the crime would have
25 revealed anything different than what the evidence actually shows is based on pure
26 speculation. Moreover, the witnesses and evidence will be subject to cross-examination at trial.
27 Defendant’s claim that the remaining trash is “exculpatory” is completely unsupported, and
28 the witness testimony and video surveillance makes it clear that Defendant threw the water

1 cup he purchased (the only one purchased that day) in the trash immediately prior to his
2 extremely violent actions. Defendant committed these crimes by himself and no other
3 customer or person went into the store during the robbery. Thus, the trash inside the Subway
4 can only be said to be inculpatory.

5 The standard is not whether evidence may aide Defendant in his defense, but rather
6 whether such evidence is material such that it would *change the result* of the proceedings.
7 Defendant has failed to meet his burden. As such, pursuant to Daniels, the Court need not
8 address the second part of the test regarding any purported negligence and Defendant's motion
9 should be denied because the evidence is not material.

10 However, if this Court believes that such evidence is material Defendant has not shown
11 that the State's failure to gather all of the trash inside the Subway trash can was done by
12 negligence, gross negligence, or bad faith.

13 **B. Defendant Has Failed To Show The State Acted In Bad Faith, With Gross**
14 **Negligence, Or Mere Negligence**

15 Like Daniels, Defendant has "failed to establish that the State's failure to gather the
16 blood evidence was attributable to negligence, gross negligence, or bad faith." In this case,
17 Metro police officers and crime scene analysts arrived on scene to a severely injured Ruth
18 Garn, and a terrified Jamie Nourie. Officers were able to watch video surveillance of the
19 robbery and attempt murder, and obtained information about the crime, namely that there was
20 one suspect, that he loitered about the store for several minutes prior to the robbery, that he
21 did not purchase anything except for a 25 cent water cup, that he threw the water cup away in
22 the trash can inside the store, and that no one else asked for a water cup that day. There is no
23 indication that the remaining trash from other customers throughout the day would have any
24 relevance whatsoever to the investigation. Officers would logically have no reason to collect
25 all of the other Subway trash. As a practical matter, it seems absurd to ask officers to collect
26 all of the trash at a scene of a robbery because it may be useful for the defense in the future.
27 Officers should not have to guess at what a defendant's possible defense will be (months later)

28 //

1 when they are investigating a crime. Thus, Defendant cannot show that the officers acted in
2 bad faith and his motion to dismiss should be denied.

3 Defendant also cannot show that the officers acted with gross negligence, and he is not
4 entitled to any presumption. In Gallimort, the Court held that if anything, it was merely
5 negligent for the officers to not collect the knife that was likely used in the commission of the
6 crime. As such, it cannot be said that the failure to collect trash that had no evidentiary value
7 whatsoever even comes close to gross negligence. There was no negligence, gross or
8 otherwise, in not collecting the remaining Subway trash and Defendant's motion should be
9 denied.

10 CONCLUSION

11 Based upon the foregoing, the State requests that this Honorable Court DENY
12 Defendant's Motion to Dismiss Due to Failure to Preserve Exculpatory Evidence.

13 DATED this 27th day of December, 2016.

14 Respectfully submitted,

15 STEVEN B. WOLFSON
16 Clark County District Attorney
Nevada Bar #001565

17
18 BY /s/ KRISTINA RHOADES
KRISTINA RHOADES
19 Deputy District Attorney
Nevada Bar #12480

20 CERTIFICATE OF ELECTRONIC FILING

21 I hereby certify that service of the foregoing, was made this 27th day of December,
22 2016, by Electronic Filing to:

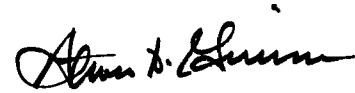
23 JENNIFER M. WALDO, ESQ.
24 E-mail Address: jmw@gregoryandwaldo.com

25
26 /s/ Laura Mullinax
27 Secretary for the District Attorney's Office

28 15F10849X/KR/llm/GCU

Exhibit 1





CLERK OF THE COURT

MOT

AMANDA S. GREGORY, ESQ.
Nevada Bar No. 11107
JENNIFER M. WALDO, ESQ.
Nevada Bar No. 11900
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Attorneys for Defendant
ERIN WARE

DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN WARE,

Defendant.

Case No.: C-15-310099-1

Dept. No.: IX

**MOTION TO DISMISS DUE TO
CONTINUED STATE MISCONDUCT
AND VIOLATIONS OF DEFENDANT'S
FIFTH, SIXTH AND FOURTEENTH
AMENDMENT RIGHTS, OR IN THE
ALTERNATIVE, MOTION TO
SUPPRESS**

COMES NOW the Defendant ERIN WARE, by and through his attorneys, JENNIFER M. WALDO, ESQ. and AMANDA S. GREGORY, ESQ., of GREGORY & WALDO, LLC, and hereby submits the attached Points and Authorities in support of his Motion to Dismiss Due to

MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE, MOTION TO SUPPRESS - 1

Continued State Misconduct and Violations of Defendant's Fifth, Sixth, and Fourteenth Amendment Rights, or in the alternative, Motion to Suppress.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authority, and oral argument at the time set for hearing this Motion

DATED this 30th day of December, 2016.

Respectfully submitted:

By: /s/Jennifer Waldo
JENNIFER M. WALDO, ESQ.
AMANDA S. GREGORY, ESQ.
Attorneys for Defendant

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DISTRICT ATTORNEY, its attorney:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Dismiss Due to Continued State Misconduct and Violations of Defendants Fifth, Sixth, and Fourteenth Amendment Rights, or in the Alternative, Motion to Suppress, for hearing in Department 9 of the above-entitled Court, on the 10 day of January, 2017, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

DATED this 30th day of December, 2016.

GREGORY & WALDO, LLC

/s/Jennifer Waldo
JENNIFER M. WALDO, ESQ.
Nevada Bar No.: 11900
Attorney for Defendant

MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE, MOTION TO SUPPRESS - 2

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I.**

3 **PROCEDURAL HISTORY**

4 The Defendant, ERIN WARE, has been charged by way of Information as follows: one
5 (1) count Burglary While in Possession of a Deadly Weapon, one (1) Battery with Intent to Commit
6 a Crime, one (2) counts Robbery with Use of a Deadly Weapon, and one (1) count Battery with
7 Use of a Deadly Weapon Resulting in Substantial Bodily Harm, one (1) count Attempt Murder
8 with Use of a Deadly Weapon, one (1) count Assault with Use of a Deadly Weapon, three (3)
9 counts Discharge Firearm from or within a Structure of Vehicle, one (1) count Ownership or
10 Possession of Firearm by Prohibited Person, and one (1) count Solicitation to Commit Murder.
11 Initially, Mr. Ware was set for two separate trials stemming out of two separate events. However,
12 the cases were consolidated. Trial is set for January 23, 2016.
13
14

15 **II.**

16 **STATEMENT OF FACTS**

17 The State alleges that the Defendant entered a Subway restaurant located at 8790 S.
18 Maryland Parkway while alleged victims Ruth Garn and Jamie Nourie were working. The State
19 alleges that Defendant pointed a gun at the victims, threatening one, and ultimately shooting Ruth
20 Garn multiple times.
21
22

23 During investigation on this case, the lead detective, Detective Lance Spiotto, attempted
24 initially to obtain a confession from the Defendant. He was unable to obtain one however. The
25

26 MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF
DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE,
MOTION TO SUPPRESS - 3

1 Defendant currently suffers from a serious condition which causes him to have kidney failure. As
2 such, he receives dialysis three days a week at the jail, and is regularly sent to the hospital for
3 treatment of other types of infections. There have been three instances when Defendant was
4 staying at the hospital since counsel has been appointed where Detective Spiotto has entered
5 Defendant's hospital room and attempted to gain a confession from Defendant.
6

7 The underlying robbery in this case occurred on June 6, 2016. Ware was arrested on
8 August 14, 2015 for the robbery case. Ware was arraigned on that case and immediately appointed
9 the undersigned as counsel. While in custody at Clark County Detention Center, Ware was charged
10 with Solicitation to Commit Murder. The details of that charge are as follows, *See Exhibit A*.
11 Arrest Report:
12

13 On November 30, 2015, a confidential informant, who was an inmate at Clark County
14 Detention Center identified as James Booker, contacted Metro and left a message for Detective
15 Lance Spiotto informing him that Ware wanted to have a witness on his robbery case murdered.
16 Booker requested that Spiotto contact him in relation to the possible murder for hire. On that same
17 day Spiotto went to the jail and made contact with Booker. Spiotto conducted a taped interview
18 with Booker.
19

20 On December 1, 2015, Spiotto again met with Booker, only this time Detective Moreno
21 accompanied him. Supposedly during this conversation, Booker voluntarily offered to wear a wire
22 in the jail and attempt to discuss the murder for hire with Ware to record the conversation for
23 detectives. Supposedly Booker had also planned on his own to have his family member who goes
24 by the name of "Check" come visit Ware to carry out the murder for hire.
25
26 MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF
DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE,
MOTION TO SUPPRESS - 4

1 On December 8, 2015, Booker was set up with a recording device and sent back to his
2 housing unit to have a conversation with Ware. Booker was recorded for 1 hour and 55 minutes,
3 during which time he elicited conversation regarding the alleged murder for hire.
4

5 On December 9, 2015, Detectives, along with an undercover officer, set up a video visit
6 with Ware to pretend to be “Check”, and set up the murder for hire. On December 14, 2016, the
7 undercover officer conducted a second video visit with Ware to confirm that he still wanted to
8 have the witness murdered.
9

10 On December 21, 2015, Detective Moreno then met with Ware and conducted a recorded
11 statement with him to discuss the murder for hire. Shortly into the interview Ware stated that he
12 wanted his attorney present.
13

14 Ware was then charged with Solicitation to Commit Murder. Initially, it was a separate
15 case. However, after argument from the State that both cases rose out of the same transaction or
16 occurrence, this Court decided to consolidate the cases. The State argued that the offenses could
17 have been charged within a single charging document, and as such, should be tried together. This
18 Court agreed with that analysis that the cases were so closely tied together that they should be
19 consolidated.
20

21 II.

22 ARGUMENT

23
24 The State violated Mr. Ware’s Sixth, Fifth, and Fourteenth Amendment rights by
25 attempting to get confessions from Ware on the Robbery charge in the hospital after he was
26

MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF
DEFENDANT’S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE,
MOTION TO SUPPRESS - 5

1 represented by counsel, and by sending a confidential informant into the jail with a wire to attempt
2 to elicit conversation from Ware regarding a murder for hire, which included discussions regarding
3 his pending case.
4

5 Under the Sixth Amendment to the United States Constitution, an accused has a right to
6 assistance of counsel in all criminal prosecutions.¹ U.S. Const., Amend. VI; Powell v. Alabama,
7 287 U.S. 45 (1932). The Sixth Amendment right to counsel attaches once adversarial proceedings
8 have begun. Estelle v. Smith, 451 U.S. 454 (1981). The Sixth Amendment is “meant to assure
9 fairness in the adversarial criminal process.” United States v. Danielson, 325 F.3d 1054, 1066 (9th
10 Cir. 2003) (citing United States v. Cronin, 466 U.S. 648 (1984)).
11

12 “A defendant is denied his Sixth Amendment right to counsel if, once the right attaches,
13 government agents ‘deliberately elicit’ incriminating statements in the absence of defendant’s
14 attorney.” Simmons v. State, 112 Nev. 91, 98-99 (1996). Furthermore, the Nevada Supreme Court
15 has stated, “at the very least, the prosecutor and police have an affirmative obligation not to act in
16 a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.”
17 Simmons, 112 Nev. At 98.
18
19
20
21
22
23
24

25 ¹ The Sixth Amendment right to counsel is applicable to the States under the Fourteenth Amendment. Kaczmarek v.
26 State, 120 Nev. 314, 326 (2004).

1 Additionally, under the Fifth Amendment, an accused cannot be compelled to be a witness
2 against himself and has a constitutional right to remain silent.² U.S. Const., Amend. V. And, due
3 process requires that criminal proceedings are fundamentally fair. U.S. Const., Amends. V, XIV.
4

5 The instant case is an egregious example of a violation of a defendant's right to
6 representation without interference from the State. Here, after numerous failed attempts to gain a
7 confession from Defendant after he was hospitalized, Detectives sent a C.I. into the jail with Ware
8 wearing a wiretap to elicit discussion regarding a possible murder for hire, including discussions
9 regarding his existing robbery case. Further, Detectives then went and interrogated Ware
10 regarding the new potential case without even informing counsel.
11

12 Defendant anticipates that the State will argue that Ware's Sixth Amendment right did not
13 attach because the instance where an inmate was sent in with a wire to record Ware was a new
14 case separate from the robbery case in which Ware already had counsel. However, as stated above,
15 the State has already successfully argued to this Court that the Solicitation to Commit Murder
16 charge was out of the same transaction or occurrence as the robbery, and could have been charged
17 in the same charging document as the robbery. This Court agreed with this argument and
18 consolidated the cases. The State cannot now argue that when it sent a CI into the jail to elicit and
19 record conversation from Ware it was regarding a completely different case. The State cannot
20 conform its argument and view on these charges to fit the argument it is currently trying to make
21
22

23
24
25 ² The Fifth Amendment right to be free from self-incrimination is applicable to the States under the Fourteenth
26 Amendment. Malloy v. Hogan, 378 U.S. 1 (1964).
MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF
DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE,
MOTION TO SUPPRESS - 7

1 The charge related to the murder for hire was directly related to and involved the underlying
2 robbery case in which Ware had a Sixth Amendment right to counsel.

3
4 It cannot be disputed that the conversation that was recorded between the CI and Ware was
5 regarding his robbery case in which he was already arraigned on and appointed counsel on. It can
6 also not be disputed that when the CI entered the jail to record Ware while wearing a wire he was
7 acting under direction of the State and as an agent of the State.

8
9 Defendants are aware that when they make phone calls or have video visits they are being
10 recorded. It is an egregious violation of Defendant's constitutional rights, however, when they are
11 being recorded having conversations in the jail by a confidential information working for the State,
12 and having discussions regarding his case elicited from him.

13
14 Detectives did not even stop after having a CI with a wire record Ware in the jail, they then
15 sent in an undercover detective to set up the murder for hire with Ware. Defendants are aware that
16 when they make phone calls or have video visits they are being recorded.

17
18 Defendant's Sixth Amendment rights should extend to him not being set up and recorded
19 at the jail by agents of the State. After numerous failed attempts by Detective Spiotto to gain a
20 confession from Ware while he was in the hospital long after Ware was appointed counsel, he then
21 proceeded to just record Ware in the jail using a wire on an inmate confidential informant. That
22 informant was also shortly thereafter removed from Ware's housing unit, and sent up to High
23 Desert State Prison.

24
25
26 MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF
DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE,
MOTION TO SUPPRESS - 8

1 The Sixth Amendment protections afforded to Defendants are to protect against this very
2 type of behavior and misconduct by the State. As such, Mr. Ware requests that this Court dismiss
3 the charges against him. In the alternative, Mr. Ware requests that all evidence obtained in
4 violation of Mr. Ware's Sixth Amendment rights be suppressed. Should the Court not be inclined
5 to grant this Motion on its face, an evidentiary hearing is requested to gather all relevant testimony
6 and evidence.
7

8
9 **III.**

10 **CONCLUSION**

11 Based on the above, Mr. Ware respectfully requests that this Court dismiss the case against
12 him based on the constitutional violations that have taken place. At a minimum the Court should
13 suppress all evidence obtained regarding the Solicitation to Commit Murder charge which
14 completely stemmed out of the violations. In the alternative, Mr. Ware requests an evidentiary
15 hearing to resolve any outstanding factual questions which may remain for the Court prior to
16 ruling.
17

18 DATED this 30th day of December, 2016.

19 GREGORY & WALDO, LLC

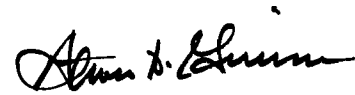
20 /s/ Jennifer Waldo
21 AMANDA S. GREGORY, ESQ.
22 Nevada Bar No.: 11107
23 JENNIFER M. WALDO, ESQ.
24 Nevada Bar No. 11900
25 324 S. 3rd Street, Suite 2
26 Las Vegas, NV 89101

MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF
DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE,
MOTION TO SUPPRESS - 9

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/s/ Nicole Petrilllo
An Employee of Gregory & Waldo

416



CLERK OF THE COURT

1 **SUPP**

2 AMANDA S. GREGORY, ESQ.

3 Nevada Bar No. 11107

4 JENNIFER M. WALDO, ESQ.

5 Nevada Bar No. 11900

6 GREGORY & WALDO, LLC

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11 Email: asg@gregoryandwaldo.com

12 Attorneys for Defendant

13 ERIN WARE

14 DISTRICT COURT

15 CLARK COUNTY NEVADA

16 THE STATE OF NEVADA,

17 Plaintiff,

18 vs.

19 ERIN WARE,

20 Defendant.

Case No.: C-15-310099-1

Dept. No.: IX

**SUPPLEMENT TO MOTION TO
DISMISS DUE TO CONTINUED STATE
MISCONDUCT AND VIOLATIONS OF
DEFENDANT'S FIFTH, SIXTH AND
FOURTEENTH AMENDMENT RIGHTS,
OR IN THE ALTERNATIVE, MOTION
TO SUPPRESS**

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SUPPLEMENT TO MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND
VIOLATIONS OF DEFENDANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE
ALTERNATIVE, MOTION TO SUPPRESS - 1

EXHIBIT A

SUPPLEMENT TO MOTION TO DISMISS DUE TO CONTINUED STATE MISCONDUCT AND VIOLATIONS OF DEFENDANT’S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE ALTERNATIVE, MOTION TO SUPPRESS - 2

ARREST REPORT

EMAILED TO RECORDS
TRANSCRIPTIONS☒ City☐ County☒ Adult☐ JuvenileSector/Beat A2

ID/EVENT# 151209-3323	ARRESTEE'S NAME (Last) (First) (Middle) WARE ERIN DESHAUN			S.S.#
ARRESTEE'S ADDRESS (Number, Street, City, State, Zip Code) 3010 HACIENDA RENO, NEVADA 89502				
CHARGES SOLICITATION TO COMMIT MURDER				
OCURRED	DATE 11/30/15	DAY OF WEEK Monday	TIME 1800	LOCATION OF ARREST (Number, Street, City, State, Zip Code) 330 S. Casino Center Las Vegas, Nevada 89101
RACE Blk	SEX M	D.O.B. 02/16/90	HT. 5'6	WT. 160
HAIR Blk	EYES Brn	PLACE OF BIRTH Duarte, California		
ARRESTING OFFICER #1: R. MORENO		P#: 4922	ARRESTING OFFICER #2: 	
CONNECTING REPORTS (Type or Event Number) TCR, DOA, Prop Rpt., Voluntary Statement, 15120610-2629				

APPROVED BY (PRINTED NAME): Sgt. J. Herring P#5241

CIRCUMSTANCES OF ARREST:

On November 30th, 2015 I Detective R. Moreno P#4922 was contacted by LVMPD Detective L. Spiotto P#4774 in the Robbery Section. Detective Spiotto stated that he received information from an inmate that will be referred to as confidential informant (herein referred to as CI). The CI stated that another fellow inmate contacted him in reference to a Solicitation to Commit Murder of a witness in a criminal case. The CI stated that he had contact with this fellow inmate at the Clark County Detention Center where the two are currently being housed. The CI stated that the inmate who made these serious allegations of Soliciting to Commit Murder was identified as Erin Ware ID#2652033.

During my investigation it was brought to my attention that earlier on November 30th, 2015 the CI was talking with a relative by the use of the inmate phone system at the Clark County Detention Center. The phone system inside the jail is called the ICS phone systems. The CI had his wife place a three way call for him. The CI provided the phone number of 702-828-3521 for his relative to call; this number is registered to LVMPD Homicide section. The CI left a message for Detective Lance Spiotto to contact him in reference to a Murder for Hire case where a male inmate wanting to have a witness to a Robbery investigation murdered. Detective Spiotto is the case agent on that particular Robbery (150610-2629). The phone call in which the CI made to the LVMPD Homicide section to contact with Detective Spiotto was recorded by use of the ICS phone system.

After receiving the message Detective Spiotto then went to the Clark County Detention Center and made contact with the CI. The CI provided a taped statement to Detective Spiotto on the information that he received from an inmate that was identified as Erin Ware. Ware is currently in custody for several felonies to include, Attempt Murder. These crimes are all related to a Robbery with a Deadly Weapon at a Subway restaurant located at 8790 S. Maryland Parkway, this Robbery is documented under LVMPD event 150610-2629. Detective Spiotto is in fact the case agent on that Robbery. The conversation between Detective Spiotto and the CI took place on November 30th, 2015 at approximately 1555 hours. This conversation was recorded and later transcribed under the original Robbery event number 150610-2629.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
CONTINUATION REPORT

ID/EVENT #: 151209-3323

On December 1st, 2015 Detective Spiotto and I went to CCDC and made contact with the CI. Detective Spiotto introduced me to the CI. The three of us spoke about the same information that the CI had revealed to Detective Spiotto the day previous. The following is a synopsis of that conversation:

The CI stated that fellow inmate Erin Ware has been telling him very intimate details of a robbery that occurred at a Subway restaurant. The CI stated that Ware told him that, after the robbery started, the employee (clerk) reached into her purse to grab a gun, so he then shot her multiple times. The CI stated that Ware told him that there was another witness to the robbery and was the only living witness that could identify him on the current charges he is in custody for. Ware told the CI that he wants somebody to kill the witness "Jamie" because she was the only one at the preliminary hearing that identified him.

Ware stated that he could have "Pop's" (Ware's father) or his "broad" to pay the person who could do this for him. Ware stated that his fiancée has a good job up in Reno and that she could pay them. The CI stated that Ware gave the witnesses name of Jaime and her address on Maurice River. The CI stated that they could go back into the Subway on Maryland Parkway, rob the store and kill her during the robbery. Ware also stated or they could rob her at her house then kill her there. The CI stated that Ware said it would look better if it was done at the store, that way it would be less likely to connect it back to Ware.

The CI stated that after hearing the intimate details of how violently Ware shot one of the store employees and then how Ware bragged about shooting her again multiple times, he knew that he had to report this to officers. The CI stated that he came forward with this information because he believes that Ware is definitely capable of hiring somebody to kill Jamie.

I informed the CI that I would be the primary detective conducting this investigation. I informed him if any new information arose to please notify a correction officer and that they would contact me. During our meeting with the CI, he brought up to me that he would wear a wire to capture Ware telling him about wanting "Jamie" killed.

The CI stated that he was freely and voluntarily doing this on his own admissions. The CI stated that he is a willing witness to this very serious allegation of Solicitation to Commit Murder. The CI stated that he knows he will have to testify at some point to the eye witness testimony he is providing to us.

The CI brought up to me that Ware is expecting a visit from the CI's family who could possibly carry out this Murder for Hire. The CI stated that he has told Ware that his sister or his nephew who goes by the moniker of "Check" would be coming to visit him soon.

On December 7th, 2015 Detective Cook P#5730 and I met up with the CI to discuss wearing a recording device at which time the CI freely and voluntarily agreed to wear a device. As we were departing from the CI, he pulled out a folded up piece of lined paper. The letter appeared to be a hand written note that read as follows:

"Check what's the deal bruh. Im gonna be real brief. Im up in the county jail for Attempt Murder and Robbery. Some shit that I wouldn't even be here for if a nigga wouldn't of put my name in it. I heard you a cleanup man and I need some garbage to be taking out. Handle it and I got 5 stacks for you."

The CI stated that he needed to return with the letter so that Ware could finish it before they send it in the mail. I then took a picture of this letter with my department cell phone and returned the letter back to the CI.

On December 8th, 2015 at approximately 0930 hours Detective C. Hall P#6060 accompanied me at CCDC. We then briefly spoke with the CI together about wearing a recording device on his person to record any conversation that he may have with fellow inmate Erin Ware about any information on him wanting to Solicit to Commit Murder on the witness, Jamie. The CI freely and voluntarily agreed to wear a recording device on his person to assist the investigation. We then placed a recording device on the CI. At approximately 1000 hours, Officer M. Zucker P#5741 then escorted the CI was back to his POD where he was currently housed.

CONTINUATION REPORT

ID/EVENT #: 151209-3323

From the time the device was placed on the CI you were able to hear casual conversation coming from the device. The CI and Ware were strategically placed together to clean the rec yard. This provided the two of them to be alone while they cleaned up the rec area together. The recording is approximately one hour and 55 minutes; at approximately 43 minutes into the recording is when you can begin to hear a primarily two way conversation between the CI and Ware. There are quiet spots as well as some background noise at times. Their conversation lasted approximately 54 minutes off and on until about one hour and thirty-seven minutes of the recording.

The CI and Ware were heard talking about various unrelated conversations while briefly talking about the Solicitation to Commit Murder. At one point the CI appeared to go get a letter that Ware had been working on to mail out. Ware read the letter out loud:

"What's the deal bruh. Im gonna be real brief. Im up in the county jail for Attempt Murder and Robbery. Some shit that I wouldn't even be here for if a nigga wouldn't of put my name in it. I heard you a cleanup man and I need some garbage to be taking out. Handle it and I got 5 stacks for you."

The two spoke about various topics to include information on the Solicitation to Commit Murder that Ware has been planning.

On December 9th at approximately 1740 hours Detective C. Hall P#6060, the undercover employee UCE43, and I Detective R. Moreno P#4922 all made contact with Corrections Officer J. Seely P# at the Clark County Detention Center located at 330 Casino Center. We had already scheduled a pre-planned jail visit with undercover employee UCE043, (herein referred to as UC) and the suspect Erin Ware ID#2652033. The preplanned visit was for December 9th, 2015 at 1830 hours until 1925 hours, in visitation booth #61. This scheduled appointment was made with the cooperation of Officer G. Munoz P#7137.

At approximately 1830 hours, Officer J. Seely escorted our UC to visitation booth #61. This jail visitation was recorded by audio and video recording through the use of the Clark County Detention Center in house camera system. The visit was recorded both audio and video for evidentiary purposes. Once the UC sat down in booth #61 and the video recorder was already recording. The undercover officer (UCE043) was alone for approximately 12 minutes until inmate Erin Ware ID#2652033, shows up and sits down. Ware then greeted the undercover detective.

The two then began to converse with each other, Ware used slightly coded words or sentences to communicate with the undercover detective. This jail visit was transcribed but the following is a synopsis of their conversation;

Ware greets the UC by saying "What's crackin bro"? "You my boy folk"? (Ware appeared to be referring to the CI). The UC responds by saying his own preplanned aka "Yeah uh check man, your fam sent me.

Ware: "Oh, oh okay yeah okay uh, yeah man uh it's really real man. I wanted uh to meet up with you man so uh, kind of got some business you know, handle some business, we can handle some business together. I'm posed to be havin' uh somethin' out there flyin' to you in about next couple of days you should be receivin' it like probably Friday. You feel me"? (This is referring to a letter being mailed out).

UC: "Uh yeah, yeah fam told me you got some work man so you know that's why I'm here".

Ware: "Yeah uh, yeah man uh I got uh, I got like five stacks". (Referring to \$5,000)

UC: "It's always spacy. I, I understand where we at man but's it's all good you know. If we need, we need some work done I gotta know what I need to do though. You know"?

CONTINUATION REPORT

ID/EVENT #: 151209-3323

Ware: "Right. Well uh, somebody be get, somebody, someone will be getting wick you. You'll understand, you'll know. You'll know for sure uh."

At this point of the visit Ware places a handwritten letter up so that the UC is able to read the letter through the video monitor. The UC then took a few photographs of the letter with the use of his department cell phone that he had on his person. The letter had the first and last name of the intended victim "Jamie Nourie". It also had her home address and place of work at the subway 8790 S. Maryland Parkway.

UC: "Alright, alright so uh what we talkin' about though I mean you just want that, you just want that shit gone for a minute? Or, uh you know".

Ware: "Yeah".

UC: "Uh you know can't talk or what? What's up"?

Ware: "Uh yeah pretty much but uh, not for a minute shit forever".

UC: "Forever? Uh we talkin' that real shit then huh"?

Ware: "Yeah, yeah, yeah, yeah, yeah".

UC: "So we, we gotta make sure, we gotta make sure our shit straight you know, cause this some shit we can't come back from".

Ware: "Yeah absolutely".

UC: "So you know I'm a have to, I'm a have to get some information from you, you know we gotta talk that payment".

Ware: "Mm-hmm".

UC: "You know"?

Ware: "Mm-hmm, mm-hmm, yeah".

UC: "You know..."

Ware: "That, that's and that's one thing like I told you know, yo, yeah, yeah your folks know me man, your folks no me".

On December 10th I was contacted by Officer Gonzalez P#6188 at the Clark County Detention Center who stated that he received a couple letters in person from the CI. I then went to CCDC and made contact with Correction Officer Gonzalez and Correction Officer Munoz P#7137. Officer Gonzalez stated that the CI thought he was being removed from his current housing area in the medical POD to general population. Therefore the CI met with Officer Gonzalez handed him the two letters and asked to give them to me. Officer Gonzalez accepted the two letters and notified me as soon as possible. The letters were handwritten in pencil, one was in standard print and the other letter was written in cursive writing. The following are the content of both letters;

"Jaime"

"Check whats the deal bruh? Im gonna be real brief Im in county jail for attempted murder & robbery for some shit that I didn't do and wouldn't even be here is a nigga wouldn't have put my name in it. I heard that you're a clean up man and I need the garbage to be taken out. Handle it and I got 5 stacks for you. The garbage about 5'5, blondish brown hair with glasses, thin build, address is 10347 maurice

CONTINUATION REPORT

ID/EVENT #: 151209-3323

river ct LV, NV 89183. I don't care how you do it, just clean up before the 17th of December & the \$ is yours".

8790 S. Maryland Parkway is where the subway is. I know for sure that on Wednesday from 9am-3pm the trash is there. It don't matter where and how it happen. I just need it to happen. My life is on the line bruh. Don't worry about the cash I got you. When I get out Imma bless you with a little more if everything goes as planned. I appreciate it bruh much love.

On December 14th, 2015 at approximately 1740 hours Detective C. Hall P#6060, the UC, and I Detective R. Moreno P#4922 all made contact with Corrections Officer M. Zucker P#5761 at the Clark County Detention Center located at 330 Casino Center. We had already scheduled a pre-planned jail visit with our UC and the suspect Erin Ware ID#2652033. The preplanned visit was for December 14th, 2015 at 1830 hours until 1925 hours, in visitation booth #57. This scheduled appointment was made with the cooperation of Correction Officer G. Munoz P#7137.

This second jail visit was set up in order to verify the information we received from Ware during our initial visit with him and to confirm that Ware still wanted the witness killed.

At approximately 1830 hours, Correction Officer Zucker escorted our undercover officer (UCE043) to visitation booth #57. This jail visitation was recorded by audio and video recording through the use of the Clark County Detention Center in house camera system for evidentiary purposes. Once the UC sat down in booth #57 the video recorder was already recording. The UC was alone for a short period until inmate Erin Ware ID#2652033 approached the visitation booth #57.

The two then began to talk with each other, Ware used slightly coded words or sentences to communicate with the UC. This jail visit recording will be transcribed at a later time; the following is a synopsis of their conversation;

Ware and the UC greeted each other and began to have similar conversation as in the initial interview. The UC asked if Ware still wanted the trash taken out at which time Ware acknowledged yes. Ware and the UC agreed to have at least half of the money up front prior to the murder to take place.

Ware provided a phone number to the UC of 626-391-2644 and stated that he went by "Bird". Ware stated that the UC could call "Bird" at this number before December 17th, 2015 and to make contact with him about being paid.

The UC had a photograph of the victim Jamie Nourie that he had brought to the visit with Ware. The UC put the picture up to the video monitor and asked Ware if this was the trash that he wanted taken out? Ware acknowledged the UC both verbally and physically by nodding his head. Shortly thereafter the two ended their conversation.

Due to the above facts and circumstances there is probable cause to believe that Erin Deshaun Ware did willfully and unlawfully commit the criminal offense of Solicitation to Commit Murder NRS 199.500.2 Ware arranged to commit murder against a witness Jamie Nourie in his pending criminal case. The Solicitation was committed by Ware, when he told undercover detectives he wants to murder the only remaining witness in his current case. Ware would pay detectives to have the witness Jamie Nourie killed to prevent her from testifying in his current case. Ware devised a plan to have Nourie killed at her place of work located at 8790 S. Maryland Pkwy (Subway Restaurant). Ware devised a plan as a rouse to have the Subway store robbed and in the process Nourie was to be killed. Ware stated this rouse would then look as if Nourie was killed during a robbery and would not bring any attention to him. Ware also stated to undercover detectives that if his plan failed, Nourie was to be murdered at her place of residence. Ware had obtained Nourie's address and

CONTINUATION REPORT

ID/EVENT #: 151208-3323

information from discovery and was planning the attack. Ware told undercover detectives that his family would pay half of the money up front and the remaining portion when the job was finished. These actions taken by Ware to devise a plan to eliminate Nourie by means of murder for hire constitute the criminal offense of Solicitation to Commit Murder in violation of NRS 199.500.2.


CLERK OF THE COURT

MOT

AMANDA S. GREGORY, ESQ.
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Attorneys for Defendant
ERIN WARE

DISTRICT COURT

CLARK COUNTY NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN WARE,

Defendant.

Case No.: C-15-310099-1

Dept. No.: IX

**MOTION TO WITHDRAW DUE TO
CONFLICT**

COMES NOW JENNIFER M. WALDO, ESQ., and AMANDA S. GREGORY, ESQ.,
attorneys for Defendant ERIN WARE, and hereby moves for an Order of this Court allowing them
to withdraw as attorney of record for the Defendant.

DATED this 5th day of January, 2016.

GREGORY & WALDO, LLC.

/s/ Jennifer M. Waldo

JENNIFER M. WALDO, ESQ.
Attorney for Defendant
ERIN WARE

MOTION TO WITHDRAW DUE TO CONFLICT - 1

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JENNIFER WALDO, makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the appointed counsel assigned to represent the Defendant in the instant matter.

2. That an actual conflict exists in this case, the nature of which cannot be revealed in court pleadings. That defense counsel can provide this Honorable Court with further information about the conflict ex parte, outside the presence of the District Attorney.

3. Therefore, Defendant asks this Court to allow the law office of GREGORY & WALDO, LLC to withdraw in this case due to conflict of interest and to appoint independent counsel to represent the Defendant.

4. The Defendant has been notified of the presentation of this motion.

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

EXECUTED on this 5th day of January, 2016.

/s/ Jennifer M. Waldo

JENNIFER M. WALDO, ESQ.

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TO: DISTRICT ATTORNEY, its attorney:

DATED this 5th day of January, 2016.

/s/ Jennifer M. Waldo

ERIN WARE

I, do hereby certify that on the 5th day of January, 2016, I did serve a true and correct copy of the foregoing Defendant's MOTION TO WITHDRAW DUE TO CONFLICT by means of electronic service, addressed as follows:

/s/ Jennifer M. Waldo

An Employee of Gregory & Waldo, LLC.



1 MOT
2 HOFLAND & TOMSHECK
3 Joshua Tomsheck, Esq.
4 Nevada State Bar No. 9210
5 josht@hoflandlaw.com
6 228 South Fourth Street, 1st Floor
7 Las Vegas, Nevada 89101
8 Telephone: (702) 895-6760
9 Facsimile: (702) 731-6910
10 Attorney for Defendant

11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA
14 Plaintiff,
15 v.
16 ERIN DESHAUN WARE,
17 #2652033
18 Defendant.

19 Case Number: C-15-310099-1
20 Department: IX

21 Date of Hearing:
22 Time:

23 MOTION TO AUTHORIZE CLARK COUNTY DETENTION CENTER TO
24 PROCURE PRESCRIPTION EYEWEAR FOR DEFENDANT

25 COMES NOW Defendant, ERIN WARE, by and through his attorney of record,
26 Joshua Tomsheck of the law firm of Hofland & Tomsheck and hereby moves this
27 Honorable Court for an order requiring the Clark County Detention Center to provide
28 necessary prescription eyewear for the Defendant to assist in his defense in the instant
case.

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2 This motion is based upon the attached points and authorities, all pleadings and
3 papers on file herein and any oral argument this Court may deem necessary at the
4 hearing in this matter.
5

6 Dated this 21st day of July, 2017.

7 HOFLAND & TOMSHECK

8
9 /s/J. Tomsheck

10 Joshua Tomsheck, Esq.
11 Nevada State Bar No. 9210
12 228 S. 4th Street, 1st Floor
13 Las Vegas, Nevada 89101
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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD.

PLEASE TAKE NOTICE that the undersigned will bring the foregoing MOTION on for hearing before the above-entitled Court, at the Clark County Courthouse, in Las Vegas, Nevada on the 1st day of **AUGUST**, 2017, in District Court Department IX, at _____ .m., or as soon thereafter as counsel can be heard

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF PROCEDURAL FACTS

Defendant Erin Ware was bound over to this Court on October 16, 2015.

Defendant's initial arraignment on October 19, 2015 was continued to October 27, 2015. An Amended Information was filed on October 20, 2015.

The Second Amended Information was filed on October 27, 2015 and Defendant was arraigned that same day on eleven felony counts. The Second Amended Information charged Defendant with One (1) Count Burglary While in Possession of a Deadly Weapon (Category B Felony - NRS 205.060 - NOC 50436), One (1) Count of Battery with Intent to Commit a Crime (Category B Felony - NRS 200.400.2 - NOC 50151), Two (2) Counts of Robbery with Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - NOC 50138), One (1) Count of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony - NRS 200.481 - NOC 50226), One (1) Count of Assault with a Deadly Weapon (Category B Felony - NRS

200.471 - NOC 50201), One (1) Count of Attempt Murder with Use of a Deadly Weapon
(Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031), Three (3)
Counts of Discharge of Firearm From or Within a Structure or Vehicle (Category B
Felony - NRS 202.287 - NOC 51445), and One (1) Count of Ownership or Possession of
Firearm by Prohibited Person (Category B Felony - NRS 202.360 - NOC 51460).

Calendar Call is set for August 17, 2017 and Jury Trial is set for August 28, 2017.

II. APPLICABLE LAW

Pursuant to fundamental Constitutional principles, a Defendant must possess the
ability to assist in his defense at trial. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788
(1960).

NRS 211.140 states, in pertinent part:

1. The Sheriff of each county has charge and control over all prisoners committed to his or her care in the respective county jails, and the chiefs of police and town marshals in the several cities and towns throughout this State have charge and control over all prisoners committed to their respective city and town jails and detention facilities.
2. A court shall not, at the request of any prisoner in a county, city or town jail, issue an order which affects the conditions of confinement of the prisoner unless, except as otherwise provided in this subsection, the court provides the sheriff, chief of police or town marshal having control over the prisoner with:
 - (a) Sufficient prior notice of the court's intention to enter the order. Notice by the court is not necessary if the prisoner has filed an action in the court challenging his or her conditions of confinement and has served a copy of the action on the sheriff, chief of police, or town marshal.
 - (b) An opportunity to be heard on the issue.

As used in this subsection, "conditions of confinement" includes, but is not limited to, a prisoner's access to the law library, privileges regarding visitation and the use of the telephone, the type of meals provided to the prisoner and the provision of medical care in situations which are not emergencies.

3. The sheriffs, chiefs of police and town marshals shall see that the prisoners

1 under their care are kept at labor for reasonable amounts of time within the
2 jail or detention facility, on public works in the county, city or town, or as part
3 of a program of release for work established pursuant to NRS 211.120 or
211.171 to 211.200, inclusive,

- 4 4. The sheriff, chief of police or town marshal shall arrange for the
5 administration of medical care required by prisoners while in his or her
6 custody. The county, city or town shall pay the cost of appropriate medical:
7 (a) Treatment provided to a prisoner while in custody for injuries incurred
8 by a prisoner while the prisoner is in custody and for injuries incurred
9 during the prisoner's arrest for commission of a public offense if the
10 prisoner is not convicted of that offense;
11 (b) Treatment provided to a prisoner while in custody for any infectious,
12 contagious or communicable disease which the prisoner contracts while
13 the prisoner is in custody; and
14 (c) Examinations required by law or by court order conducted while the
15 prisoner is in custody unless the order otherwise provides.

12 **III. LEGAL ARGUMENT**

13 Pursuant to subsection 4(c) of NRS 211.140, Mr. Ware seeks an order from this
14 Court compelling the Clark County Detention Center to facilitate an eye examination
15 and procurement of corrective lenses or corrective glasses on his behalf. Mr. Ware
16 submits that said eyewear is necessary for him to assist in his defense at trial in this case.
17 Mr. Ware has difficulty reviewing discovery and assisting counsel without the requisite
18 corrective lenses.¹
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27 ¹ As required by NRS 211.140, this pleading was electronically served on Assistant General Counsel for the Las
28 Vegas Metropolitan Police Department.

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IV. CONCLUSION

Based on the foregoing, MR. WARE respectfully requests that this Court grant his request for the Clark County Detention Center to Procure Prescription Eyewear for him.

Dated this 21st day of July, 2017.

HOFLAND & TOMSHECK

By: /s/ J. Tomsheck
Joshua Tomsheck, Esq.
Nevada Bar No. 9210
228 South Fourth Street, 1st Floor
Las Vegas, Nevada 89101
(702) 895-6760

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DECLARATION

I, JOSHUA TOMSHECK, ESQ. make the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada;
2. I am a private attorney appointed to represent Defendant in the instant matter and am familiar with the facts and circumstances of this case.
3. My client, Erin Ware, indicates that he is in need of corrective lenses to adequately review items of discovery and assist me in preparation for his defense.
4. Upon information and belief, Mr. Ware's eyesight has deteriorated to such a degree since his incarceration that new prescription corrective lenses are necessary in order for him to function in the detention center and to review the significant volumes of material related to the case currently pending against him and to assist me with his defense.

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

EXECUTED this 21st day of July, 2017.

/s/ J. Tomsheck
Joshua Tomsheck, Esq.


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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of HOFLAND & TOMSHECK and that on
The 21st day of July, 2017, service of a true and correct copy of the foregoing MOTION
was made as indicated below:

- DAMOTIONS@CLARKCOUNTYDA.COM
- ELIZABETH.MERCER@CLARKCOUNTYDA.COM
- C9479B@LVMPD.COM

/s/ Olivia Campbell
An Employee of Hofland & Tomsheck



1 **OPPS**
2 LIESL FREEDMAN
3 General Counsel
4 State Bar No. 5309
5 MARTINA GEINZER
6 Assistant General Counsel
7 State Bar No. 9337
8 Las Vegas Metropolitan Police Department
9 400 S. Martin Luther King Blvd.
10 Las Vegas, Nevada 89106
11 Tel: (702) 828-3310
12 Fax: (702) 828-3191
13 Email: m10172g@lvmpd.com
14 *Attorneys for Specially Appearing Interested*
15 *Party Sheriff Lombardo of the Las Vegas*
16 *Metropolitan Police Department*

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

13
14 THE STATE OF NEVADA,

15 Plaintiff,

16 vs.

17
18 ERIN WARE, ID#2652033

19 Defendants.
20

Case No. C-15-310099-1

Dept. No. 9

**SPECIALY APPEARING INTERESTED
PARTY SHERIFF LOMBARDO'S
OPPOSITION TO MOTION TO
AUTHORIZE CLARK COUNTY
DETENTION CENTER TO PROCURE
PRESCRIPTION EYEWEAR FOR
DEFENDANT**

Date of Hearing: August 1, 2017

Time of Hearing: 9:00 a.m.

21
22 COMES NOW, specially appearing interested party SHERIFF JOSEPH LOMBARDO of
23 the LAS VEGAS METROPOLITAN POLICE DEPARTMENT ("Sheriff"), by and through his
24 attorneys, LIESL FREEDMAN, General Counsel and MARTINA GEINZER, Assistant General
25 Counsel, and files this Opposition to the Motion to Authorize Clark County Detention Center to
26 Procure Prescription Eyewear for Defendant.

27 ///


28 ///

OFFICE OF GENERAL COUNSEL
Las Vegas Metropolitan Police Department
400 S. Martin L. King Blvd.
Las Vegas, Nevada 89106
(702) 828-3310

1 This Opposition is based upon the filings currently before this Court, the following points
2 and authorities, the records attached hereto, and all oral argument and/or documentary evidence
3 allowed by counsel at the time of the hearing.

4 DATED this 26th day of July, 2017.

6 By:


LIESL FREEDMAN
General Counsel
State Bar No. 5309
MARTINA GEINZER
Assistant General Counsel
State Bar No. 9337
Las Vegas Metropolitan Police Department
400 Martin Luther King Blvd.
Las Vegas, Nevada 89106
Tel: (702) 828-3310
Fax: (702) 828-3191
Email: m10172g@lvmpd.com
*Attorneys for Sherriff Lombardo of the Las Vegas
Metropolitan Police Department*

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 Defendant in this action is ERIN WARE, ID# 2652033, who is being detained at the Clark
18 County Detention Center pending trial in this action, currently set for August 28, 2017. Defendant
19 was initially represented by the Public Defender's Office. *See* Court Minutes of August 18, 2015,
20 attached as Exhibit 1. Subsequently, the Public Defender withdrew and independent counsel was
21 appointed. *See* Motion to Withdraw Due to Conflict, attached as Exhibit 2.

22 On July 21, 2017, about five (5) weeks before his trial date, Defendant filed a Motion to
23 Authorize Clark County Detention Center to Procure Prescription Eyewear for Defendant
24 ("Motion"). In the Motion, Defendant seeks an order from this Court requiring the Clark County
25 Detention Center to provide him with prescription eyewear in order to assist in his defense in the
26 criminal case.

27 ///

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1 Specially, appearing Interested Party Sherriff Joseph Lombardo of the Las Vegas
2 Metropolitan Police Department files this Opposition to the Motion to Authorize on the following
3 grounds:

- 4 (1) The Motion to Authorize was never properly served upon the Sheriff.
- 5 (2) Defendant has not provided any authority that would place the duty upon the
6 Sheriff to provide prescription eye wear based upon Defendant's alleged need for
7 the defense of his criminal case.
- 8 (3) Defense related expenses are statutorily chargeable to the Office of Appointed
9 Counsel, not the Sheriff.

10 For the foregoing reasons, LVMPD respectfully requests this Court deny the Motion or in
11 the alternative have, as the statute requires, Defendant be held responsible for the costs of the
12 prescription eyeglasses through the Office of Appointed Counsel.

13 **II. ARGUMENT**

14 **A. The Sheriff was Not Properly Served with the Motion to Authorize.**

15 The Motion should be denied because Defendant did not properly serve the Motion on the
16 government agent in charge of the operations of the Clark County Detention Center, Sherriff
17 Lombardo of the Las Vegas Metropolitan Police Department¹.

18 In the Motion Defendant states that "[a]s required by NRS 211.140, this pleading was
19 electronically served on Assistant General Counsel of the Las Vegas Metropolitan Police
20 Department." (Motion to Authorize at p. 5, footnote 1.) However, according to the Nevada
21 Electronic Filing and Conversion Rules (the "NECFR") any party, or other interested person,
22 must consent to electronic service before electronic service is valid. NEFCR Rule 9(c). The
23 Eighth Judicial District Court makes available a form "Consent to Service by Electronic Means"
24 for the convenience of litigants and their counsel.

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26 _____

27 ¹ The Motion to Authorize requests an order requiring "Clark County Detention Center" to provide a prescription
28 eyewear; however, Clark County Detention Center is a building, not a government agency, and any request is
properly directed to the government agent in charge of operation of the Clark County Detention Center – i.e., Sheriff
Lombardo of the Las Vegas Metropolitan Police Department.

1 A review of this Court's records reveals that neither the Clark County Detention Center,
2 nor the government agent in charge of operation of the Clark County Detention Center, the
3 Sheriff, has ever appeared in this Action. Moreover, the person purportedly served on behalf of
4 Clark County Detention Center, Charlotte Bible, has never registered as a user in this action or
5 consented to electronic service in this action. Therefore, for purposes of this action, the Sheriff is
6 a "nonregistered recipient." Given that the Sheriff has never made an appearance in this action,
7 registered for electronic service, or consented to electronic service, the Motion should have been
8 served personally, or, at the very least served "by traditional means such as mail, express mail,
9 overnight delivery, or facsimile transmission" NEFCR Rule 9(d).

10 Instead, the Motion was only served via e-mail on an Assistant General Counsel of
11 LVMPD, Charlotte Bible, to her email address. See Motion p. 5, footnote 1. Defendant cannot
12 simply serve requests for orders via email on one Assistant General Counsel of LVMPD who has
13 never appeared in or had any prior involvement in this action. Based on the foregoing, the Sheriff
14 respectfully requests that this Court deny the Motion.

15 **B. The Sheriff does not have a duty to provide prescription eye wear based upon**
16 **Defendant's alleged need for the defense of his criminal case.**

17 Defendant claims that it is a fundamental principle that a defendant must possess the
18 ability to assist in his defense during her trial. She cites *Dusky v. United States*, 362 U.S. 402, 12
19 (1960) for authority. However, *Dusky* is inapplicable to the facts at hand. *Dusky* deals with a
20 criminal defendant's **mental** competency and established that the test for competency "must be
21 whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable
22 degree of rational understanding—and whether he has a rational as well as factual understanding
23 of the proceedings against him". *Id* at 402. Defendant has cited no authority requiring the
24 detention facility to provide prescription glasses. LVMPD is not preventing Defendant from
25 assisting in his defense.

26 Defendant here claims that he has difficulty reviewing discovery and assisting counsel
27 without the requisite corrective lenses. (Motion p. 5, ln. 18-19). As stated above that is not the
28 principle set forth in *Dusky*. It is undisputed that there is an obligation to provide adequate

1 medical care to inmates. See, e.g. *Estelle v. Gamble*, 429 U.S. 94 (1976); *Bell v. Wolfish*, 441
2 U.S. 520 (1979). However, that duty does not give the Sheriff obligations to provide Defendant
3 corrective lenses to assist with his criminal defense. As the jailer, there is no legal obligation of
4 the Sheriff to ensure the defendant has the ability to assist his counsel. Rather, the Sheriff ensures
5 that the Defendant is physically confined and transported to the proceedings until otherwise
6 directed by a Court.

7 As a practical matter, there are several options available to Defendant that do not include
8 the Sheriff paying for prescription glasses to “assist in his defense.” Here are just a few of the
9 options: (1) Defendant can pay for new glasses; (2) his counsel can read him the documents; or
10 (3) Defendant can obtain reading glasses from the commissary. This prescription eyewear issue is
11 no different from a Defendant who cannot read. The Sheriff or LVMPD did not create the
12 condition of which Defendant complains. Therefore, the Sheriff requests that the Court deny the
13 Motion.

14 **C. Defense related expenses are chargeable to the Office of Appointed Counsel.**

15 Governmental entities are subject “to only such liabilities as are specially provided by
16 law.” *Schweiss v. District Court*, 23 Nev. 226, 230 (1896). Defendant claims that an eye
17 examination and procurement of corrective lenses or corrective glasses is necessary for him to
18 assist in his defense at trial in this case. See Motion, p. 5, ln. 16-19.

19 According to Nevada’s statutory scheme the financial liability regarding expenses
20 incidental to a criminal defendant’s representation rests with the county. Specifically, the
21 legislature has provided that counties which have a population of 100,000 or more “shall create
22 by ordinance the office of the public defender.” NRS 260.010. Clark County established the
23 office of public defender through Clark County Ordinance 2.16.010. Clark County Ordinance
24 2.16.170.

25 In 2008, Clark County established the Office of Appointed Counsel to oversee the
26 Indigent Defense Panel which consists of private attorneys who contract with the county to
27 provide legal representation, outside of the Office of the Public Defender, to indigent criminal
28 defendants. The Office of Appointed Counsel is responsible for the appointment of attorneys for

1 indigent defendants and the approval of the expenses incurred pursuant to NRS 7.155. NRS
2 7.155 states in relevant part that “[t]he compensation and expenses of an attorney appointed to
3 represent a defendant must be paid from the county treasury...”. In short, all associated costs and
4 expenses regarding an indigent criminal Defendant are to be borne by Clark County.

5 Defendant appears to be indigent and as such was initially represented by the Office of the
6 Public Defender. *See* Exhibit 1. Due to a Conflict, the Public Defender withdrew and the Court
7 appointed independent counsel through the Office of Appointed Counsel. *See* Exhibit 2. It is not
8 appropriate for the expense to be paid through the LVMPD Detention Services Division budget.

9 If the Court accepts Defendant’s representation that an eye exam and corrective glasses
10 are necessary for the defense, all related expenses should be paid with the funds provided through
11 the Office of Appointed Counsel. The Sheriff of the LVMPD is not responsible for those
12 expenses. Accordingly the Sheriff requests that the Motion be denied.

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1 **IV. CONCLUSION**

2 Defendant is asking the Court to enter an order that would make the Sheriff responsible
3 for paying expenses related to an inmate's criminal defense. There is no statutory provision that
4 would allow the payment of those costs to be charged to the Sheriff for defense related expenses.
5 Accordingly, the Sheriff respectfully requests that this Court deny Defendant's Motion. In the
6 alternative, if this Court determines that Defendant's request is reasonable and necessary to his
7 defense, the Sheriff requests the expenses be borne by the Office of Appointed Counsel.

8 DATED this 26th day of July, 2017.

9 Respectfully submitted,

10
11 By:


LIESL FREEDMAN
General Counsel
State Bar No. 5309
MARTINA GEINZER
Assistant General Counsel
State Bar No. 9337
Las Vegas Metropolitan Police Department
400 Martin Luther King Blvd.
Las Vegas, Nevada 89106
Tel: (702) 828-3310
Fax: (702) 828-3191
Email: m10172g@lvmpd.com
*Attorneys for Sherriff Lombardo of the Las Vegas
Metropolitan Police Department*

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July 2017, I served a true and correct copy of the foregoing document entitled: **SPECIALLY APPEARING INTERESTED PARTY SHERIFF LOMBARDO OF THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S OPPOSITION TO MOTION TO AUTHORIZE CLARK COUNTY DETENTION CENTER TO PROCURE PRESCRIPTION EYEWEAR FOR DEFENDANT** as indicated below:

 submitted electronically for filing and/or service within the Eighth Judicial District Court pursuant to Administrative Order 14-02 for e-service to the following:

 sending a copy via facsimile to the parties herein, as follows; and/or

✓ sending a copy via electronic mail; and/or

 placing the original copy in a sealed envelope, first-class, postage fully pre-paid thereon and depositing the envelope in the U.S. mail at Las Vegas, Nevada, addressed as follows:

Joshua Tomsheck, Esq.
HOFLAND & TOMSHECK
josht@hoflandlaw.com

CLARK COUNTY DISTRICT ATTORNEY's OFFICE
Email: PDMotions@clarkcountyda.com
Elizabeth.Mercer@clarkcountyda.com

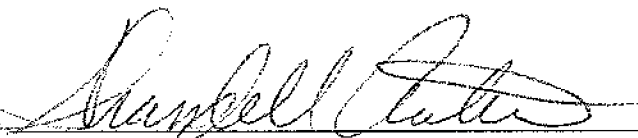
By: 
Employee of the Las Vegas Metropolitan
Police Department

EXHIBIT 1

EXHIBIT 1

**Justice Court, Las Vegas Township
Clark County, Nevada**

Court Minutes



15F10849X State of Nevada vs. Ware, Erin Deshaun Lead Atty: Public Defender

8/18/2015 7:45:00 AM Initial Appearance (in custody) Result: Matter Heard

PARTIES Attorney Cox, G. Darren
PRESENT: Defendant Ware, Erin Deshaun

Judge: Sciscento, Joseph S.
Prosecutor: Burns, Patrick
Court Reporter: O'Neill, Jennifer
Court Clerk: Jackson, Pamela

PROCEEDINGS

Attorneys:	Cox, G. Darren	Ware, Erin Deshaun	Added
	Public Defender	Ware, Erin Deshaun	Added
Hearings:	9/1/2015 9:00:00 AM: Preliminary Hearing		Added
Events:	Initial Appearance Completed		
	<i>Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint</i>		
	Public Defender Appointed		
	Bail Reset - Cash or Surety		
	<i>Counts: 001; 002; 003; 004; 005 - \$250000.00/\$250000.00 Total Bail</i>		

EXHIBIT 2

EXHIBIT 2

0042
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite #226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED

AUG 21 9 56 AM '15



ORIGINAL

JUSTICE COURT, LAS VEGAS

CLARK COUNTY, NEVADA

KRL

THE STATE OF NEVADA,

Plaintiff,

v.

ERIN DESHAUN WARE,

Defendant.

CASE NO. 15F10849X

DEPT. NO. 2

DATE: August 24, 2015
TIME: 7:45 a.m.

MOTION TO WITHDRAW DUE TO CONFLICT

COMES NOW, the Defendant, ERIN DESHAUN WARE, by and through KAMBIZ SHAYGAN-FATEMI, Deputy Public Defender and respectfully moves this Honorable Court to allow the Public Defender to withdraw and to appoint independent counsel due to a conflict of interest.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 20th day of August, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By:


KAMBIZ SHAYGAN-FATEMI, #12491
Deputy Public Defender

15F10849X
MWC
Motion to Withdraw Due to Conflict
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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the foregoing Motion To Withdraw Due To
Conflict will be heard on 24th day of August, 2015, at 7:45 a.m., Department No. 2.

DATED this 20th day of August, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: _____

KAMBIZ SHAYGAN-FATEMI #12491
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing MOTION TO WITHDRAW DUE TO
CONFLICT is hereby acknowledged this 21 day of August, 2015.

CLARK COUNTY DISTRICT ATTORNEY

By: _____



MOT
HOFLAND & TOMSHECK
Joshua Tomsheck, Esq.
Nevada State Bar No. 9210
228 South Fourth Street, 1st Floor
Las Vegas, Nevada 89101
josh@hoflandlaw.com

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ERIN DESHAUN WARE,

#2652033

Defendant.

Case No. C-15-310099-1

Dept. No. IX

MOTION TO CONTINUE TRIAL DATE

COMES NOW, the Defendant, ERIN DESHAUN WARE, by and through his attorney of record, Joshua Tomsheck, Esq., of the law firm of Hofland & Tomsheck, and requests an Order from this Honorable Court continuing the trial date in this matter in ordinary course from the present trial date pursuant to NRS 174.515(1).

This Motion is made pursuant and is based on the pleadings and papers on file herein, and the following Points and Authorities.

DATED this 15th day of August, 2017.

By: /s/ J. Tomsheck
Joshua Tomsheck, Esq

1
2 **NOTICE OF MOTION**

3 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

4 PLEASE TAKE NOTICE that the undersigned will bring DEFENDANT'S
5 MOTION TO CONTINUE TRIAL DATE on for hearing in Department III of the above
6 entitled Court, on the 29 day of August, 2017 at the hour
7 of 9:00am am/pm, or as soon thereafter as counsel may be heard.
8
9

10
11 **HOFLAND & TOMSHECK**

12
13 By: /s/ J. Tomsheck

14 Joshua Tomsheck, Esq.
15 Nevada Bar Number: 009210
228 South Fourth Street, 1st Floor
16 Las Vegas NV 89101
(702) 895-6760
Attorney for Defendant

17 **POINTS AND AUTHORITIES**

18 **I**

19 **PROCEDURAL BACKGROUND**

20 Defendant Erin Ware was bound over to this Court on October 16, 2015
21 following a preliminary hearing in the instant case number. In the Court below and
22 at the time this case was held over to District Court, the undersigned was not Mr.
23 Ware's attorney of record.
24

25
26 Defendant's initial arraignment on October 19, 2015 was continued to October
27 27, 2015. An Amended Information was filed on October 20, 2015.
28

1 The Second Amended Information was filed on October 27, 2015 and
2 Defendant was arraigned that same day on eleven felony counts. The Second
3 Amended Information charged Defendant with One (1) Count Burglary While in
4 Possession of a Deadly Weapon (Category B Felony – NRS 205.060 – NOC 50436), One
5 (1) Count of Battery with Intent to Commit a Crime (Category B Felony – NRS
6 200.400.2 – NOC 50151), Two (2) Counts of Robbery with Use of a Deadly Weapon
7 (Category B Felony – NRS 200.380, 193.165 – NOC 50138), One (1) Count of Battery
8 with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B
9 Felony – NRS 200.481 – NOC 50226), One (1) Count of Assault with a Deadly Weapon
10 (Category B Felony – NRS 200.471 – NOC 50201), One (1) Count of Attempt Murder
11 with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330,
12 193.165 – NOC 50031), Three (3) Counts of Discharge of Firearm From or Within a
13 Structure or Vehicle (Category B Felony – NRS 202.287 – NOC 51445), and One (1)
14 Count of Ownership or Possession of Firearm by Prohibited Person (Category B
15 Felony – NRS 202.360 – NOC 51460).

16
17
18 On January 6, 2016, in Case C-16-311782-1, Defendant was charged with One
19 (1) Count of Solicitation to Commit Murder (Category B Felony – NRS 199.500.2 –
20 NOC 50037) (which would ultimately be consolidated into this instant case).

21
22 On February 1, 2016, the State filed a Notice of Motion and Motion to
23 Consolidate, or in the Alternative, Motion to Admit Evidence of Other Acts Pursuant
24 to NRS 48.045(2).
25
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27
28

1 On February 4, 2016 the State filed a Notice of Motion and Motion to Permit the
2 State to Introduce Res Gestae Evidence and Evidence of Flight.

3
4 Defendant Ware's prior defense counsel filed an Opposition to State's Motion
5 to Consolidate, or in the Alternative, Motion to Admit Evidence of Other Acts
6 Pursuant to NRS 48.045(2) on February 19, 2016. On February 22, 2016, prior defense
7 counsel filed an opposition to State's Motion to Permit the State to Introduce Res
8 Gestae Evidence and Evidence of Flight.

9
10 The Motions were set for argument on February 25, 2016. On February 25, 2016,
11 the Motions Hearing was continued to March 1, 2016 where they were argued and the
12 Calendar Call and Jury Trial set for March 17, 2016 and March 28, 2016 was vacated
13 and set to August 11, 2016 and August 22, 2016, respectively.

14
15 On May 11, 2016, this Honorable Court filed the Decision and Order on the
16 State's Motion to Consolidate or in the Alternative, Motion to Admit Evidence of
17 Other Acts Pursuant to NRS 48.045(2), the Defendant's Opposition and the arguments
18 of Counsel. This Honorable Court granted the State's Motion.

19
20 On May 12, 2016, this Honorable Court filed the Decision and Order on the
21 State's Motion to Permit the State to Introduce Res Gestae Evidence and Evidence of
22 Flight, the Defendant's Opposition and the arguments of Counsel. This Honorable
23 Court granted the Motion in part, and denied in part. That same day, May 12, 2016,
24 this honorable Court issued an Order consolidating case number C-15-31009-1 with
25 Case Number C-16-311782-1.

26
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28 ///

1 Defendant was ultimately charged with One (1) Count Burglary While in
2 Possession of a Deadly Weapon (Category B Felony – NRS 205.060 – NOC 50436), One
3 (1) Count of Battery with Intent to Commit a Crime (Category B Felony – NRS
4 200.400.2 – NOC 50151), Two (2) Counts of Robbery with Use of a Deadly Weapon
5 (Category B Felony – NRS 200.380, 193.165 – NOC 50138), One (1) Count of Battery
6 with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B
7 Felony – NRS 200.481 – NOC 50226), One (1) Count of Assault with a Deadly Weapon
8 (Category B Felony – NRS 200.471 – NOC 50201), One (1) Count of Attempt Murder
9 with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330,
10 193.165 – NOC 50031), Three (3) Counts of Discharge of Firearm From or Within a
11 Structure or Vehicle (Category B Felony – NRS 202.287 – NOC 51445), One (1) Count
12 of Ownership or Possession of Firearm by Prohibited Person (Category B Felony –
13 NRS 202.360 – NOC 51460) and One (1) Count of Solicitation to Commit Murder
14 (Category B Felony – NRS 199.500.2 – NOC 50037).

15 On August 4, 2016, previous defense counsel filed a Motion to Continue Trial,
16 which was opposed by the State on August 5, 2016. The Motion was granted on
17 August 11, 2016.

18 On August 16, 2016, at scheduled Calendar Call, the trial was vacated and
19 reset. A Status Check for Trial Readiness was set for November 8, 2016, with the
20 Calendar Call on January 12, 2017 and Jury Trial on January 23, 2017.

21 A Motion for Discovery was filed on August 12, 2016 by previous defense
22 counsel.

1 An Order Releasing Medical Records was filed on August 12, 2016.

2 The State filed an Opposition to Defendant's Motion for Discovery on August
3 18, 2016.
4

5 The matter was heard on August 23, 2016, where this Honorable Court denied
6 parts of the motion, and granted parts of the motion. (See court minutes)
7

8 At the Status Check on Trial Readiness on November 8, 2016, prior defense
9 counsel anticipated being ready for trial in January.

10 The State filed the Third Supplemental Notice of Witnesses and/or Expert
11 Witnesses on December 7, 2016.
12

13 On December 8, 2016 the State filed the Fourth Supplemental Notice of
14 Witnesses and/or Expert Witnesses.

15 On December 21, 2016, a Motion to Dismiss for Failure to Preserve Exculpatory
16 Evidence was filed.
17

18 The State filed an Opposition to the Motion to Dismiss for Failure to Preserve
19 Exculpatory Evidence on December 27, 2016.
20

21 On December 30, 2016, prior defense counsel filed a Motion to Dismiss for
22 Violations of Defendant's Fifth, Sixth and Fourteenth Amendment Rights, or in the
23 Alternative, Motion to Suppress. That same day, prior defense counsel filed a
24 Supplement to Defendant's Motion to Dismiss for Violations of Defendant's Fifth,
25 Sixth and Fourteenth Amendment Rights.
26

27 The matter was heard on January 3, 2017 and denied.
28

1 On January 6, 2017, previous defense counsel filed a Motion to Withdraw due
2 to conflict.

3
4 All pending motions were heard on January 10, 2017. The Motion to Withdraw
5 was granted and the Motion to Dismiss was taken off calendar. A Status Check for
6 Confirmation of Counsel on January 17, 2017.

7 On January 17, 2017, the undersigned confirmed as counsel.

8 On February 7, 2017 a Status Check regarding resetting of trial was heard.

9
10 Currently, Calendar Call is set for August 17, 2017 and Jury Trial is set for
11 August 28, 2017.

12
13 **II.**
14 **DECLARATION IN SUPPORT OF DEFENDANT'S MOTION TO**
15 **CONTINUE CALENDAR CALL AND TRIAL DATE**

16 STATE OF NEVADA)
17) ss:
18 COUNTY OF CLARK)

19 JOSHUA TOMSHECK, ESQ, being first duly sworn, deposes and says:

- 20
21 1. That your Declarant is a duly licensed attorney in the State of Nevada.
22 2. That your Declarant has full knowledge of all matters contained herein
23 and is competent to testify thereto of his own personal knowledge.
24 3. That your Declarant makes this affidavit in support of Motion to
25 Continue Calendar Call and Trial Date.
26 4. That Declarant is the court appointed attorney for Defendant in the
27 above encaptioned matter.
28

- 1 5. That Declarant was appointed to this case only seven months ago.
2 Previous defense counsel was appointed in August of 2015 and had in
3 excess of fifteen (15) months to prepare for Trial before anticipating
4 “ready” for trial.
- 5 6. Defendant is charged in the Third Amended Information with One (1)
6 Count of Burglary While in Possession of a Deadly Weapon (Category B
7 Felony - NRS 205.060 - NOC 50436), One (1) Count of Battery with
8 Intent to Commit a Crime (Category B Felony - NRS 200.400.2 - NOC
9 50151), Two (2) Counts of Robbery with Use of a Deadly Weapon
10 (Category B Felony - NRS 200.380, 193.165 - NOC 50138), One (1) Count
11 of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily
12 Harm (Category B Felony - NRS 200.481 - NOC 50226), One (1) Count
13 of Assault with a Deadly Weapon (Category B Felony - NRS 200.471 -
14 NOC 50201), One (1) Count of Attempt Murder with Use of a Deadly
15 Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 -
16 NOC 50031), Three (3) Counts of Discharge of Firearm From or Within a
17 Structure or Vehicle (Category B Felony - NRS 202.287 - NOC 51445),
18 One (1) Count of Ownership or Possession of Firearm by Prohibited
19 Person (Category B Felony - NRS 202.360 - NOC 51460) and One (1)
20 Count of Solicitation to Commit Murder (Category B Felony - NRS
21 199.500.2 - NOC 50037).
- 22 7. These charges are voluminous in nature, are extremely serious and
23 contain the possibility of an extensive period of incarceration if
24 convicted.
- 25 8. The Calendar Call in this matter is currently set for August 17, 2017.
- 26 9. The trial in this matter is currently set for August 28, 2017.
- 27 10. That Declarant was not the original attorney of record for Defendant in
28 either case.

- 1 11. That Declarant is in the process of reviewing the submitted discovery,
2 which is voluminous in nature, as well as conducting a full and effective
3 defense investigation.
- 4 12. That Declarant requires more time to conduct a thorough investigation
5 for these serious charges in order to effectively prepare for trial.
- 6 13. That Declarant requires further preparation to be effective, pursuant to
7 Strickland and its progeny, to represent Defendant at trial, as these two
8 consolidated cases involve complex defense issues on very serious
9 charges carrying the potential of a significant prison sentence.
- 10 14. That Declarant has been diligently investigating and preparing this
11 matter for trial, however more time is required to prepare an effective
12 defense and conduct a thorough investigation.
- 13 15. Denial of this request for continuance would deny the undersigned
14 sufficient time to be able to effectively prepare this matter for Trial,
15 taking into amount the exercise of due diligence.
- 16 16. This request is not for purposes of delay. Further, denial of this request
17 for continuance could result in a miscarriage of justice.
- 18 17. I sign this declaration in accordance with NRS 53.045 and under penalty
19 of perjury.

20
21 DATED this 15th day of August, 2017.

22 Respectfully Submitted By:

23 /s/ J. Tomsheck

24 JOSHUA TOMSHECK, ESQ.

25 Nevada Bar No. 009210

26 228 S. 4th Street, 1st Floor

27 Las Vegas, Nevada 89101

28 (802) 895-6760

 Attorney for Defendant

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III.

CONCLUSION

Defendant respectfully request in accordance with NRS 174.515(1) that Trial in this matter be continued to a date convenient for both this Court and the State, so that counsel for the defense can effectively prepare.

DATED this 15th day of August, 2017.

HOFLAND & TOMSHECK

By: /s/ J. Tomsheck
Joshua Tomsheck, Esq.
Nevada Bar Number: 009210
228 South Fourth Street, 1st Floor
Las Vegas NV 89101
(702) 895-6760
Attorney for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2017, I served a true and accurate copy of the foregoing, MOTION upon the parties to this action by email transmission to:

OFFICE OF THE DISTRICT ATTORNEY
DAMotions@clarkcountyda.com
Elizabeth.Mercer@clarkcountyda.com
Kristina.Rhoades@clarkcountyda.com

/s/ Olivia Campbell
An Employee of HOFLAND & TOMSHECK



1 **ORDR**

2
3
4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**

6 **THE STATE OF NEVADA,**

7 **Plaintiff,**

8 **vs.**

CASE NO.C-15-310099-1

9 **ERIN WARE**

DEPT. NO: 9

10 **ID # 02652033**

11 **Defendant.**

12
13 **ORDER FOR TRANSPORT**

14 Based on the preceding Motion, the Court being fully advised on the premises, approval
15 received from the Las Vegas Metropolitan Police Department, Detention Services Division
16 ("DSD") (Martina Geinzer approving form and content of Order), and good cause appearing,

17 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the DSD will transport
18 Defendant ERIN WARE, ID#02652033 to the Offices of Jeimelie Magdats, Las Vegas Family
19 Eye Care 1300 S. Eastern Ave. Las Vegas, Nevada 89104, (702) 385-2242 for the purpose of eye
20 exam.

21 **IT IS FURTHER ORDERED,** that the appointment will be arranged between the Medical
22 Administration Offices of DSD and Ailen Hernandez, office manager of Dr. Jeimelie Magdats
23 office so that neither attorneys for the Defendant or the State of Nevada or anyone else will be
24 informed of the date of the appointment for security reasons.

25 **IT IS FURTHER ORDERED THAT** Defendant is responsible for the transportation fee
26 and medical costs. Prior to the appointment being made, the Defendant is responsible for
27 providing a check for the transportation fee in the amount of \$200.00 to the DSD Inmate
28 Accounts with the Inmate's name and ID number included, and will provide notification to the

1 DSD Medical Administration Office when the same has occurred. At the time the appointment is
2 made, the DSD Medical Administration Office can verify with the provider that the provider and
3 the Defendant have made arrangements for payment of services. DSD is not responsible for any
4 payment of services related to the appointment.

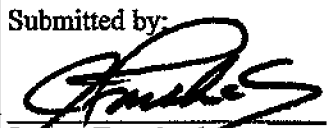
5 All of the DSD rules, regulations and protocols will be followed in regards to the number
6 of transport officers and the presence of the officers directly outside the secured room used for the
7 exam. The secured room will be inspected and approved by corrections officers. The officers
8 shall approve and follow their protocol of securing the inmate at all times both during
9 transportation and during the examination itself to ensure the safety of civilians present at the
10 office during the time of the appointment, this will include random physical/visual checks by the
11 officers which may involve opening the door of the examination room if said room does not have
12 a window in the door.

13 DATED this 24th day of October, 2017.

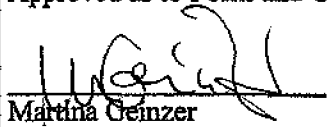
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15 
16 DISTRICT COURT JUDGE

17 JENNIFER P. TOGLIATTI

18 Submitted by:

19 
20 Joshua Tomscheck
21 Attorney for Erin Ware
22 Bar # 9210
23 702-895-6760

24 Approved as to Form and Content:

25 
26 Martina Geinzer
27 Assistant General Counsel
28 for Las Vegas Metropolitan Police Department
Detention Services Division



NWEW
HOFLAND & TOMSHECK
Joshua Tomsheck, Esq.
Nevada State Bar No. 009210
josht@hoflandlaw.com
228 South Fourth Street, 1st Floor
Las Vegas, Nevada 89101
Telephone: (702) 895-6760
Facsimile: (702) 731-6910
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY NEVADA

STATE OF NEVADA

Plaintiff,

v.

ERIN DESHAUN WARE #2652033,

Defendant.

Case Number: C-15-310099-1

Department: 9

NOTICE OF ALIBI WITNESSES AND NOTICE OF WITNESSES

[NRS 174.233 and 174.234]

TO: STATE OF NEVADA;

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that Defendant ERIN DESHAUN WARE by and through her attorney, JOSHUA TOMSHECK, ESQ., of the Law Firm of HOFLAND & TOMSHECK submits the following alibi witnesses pursuant to NRS 174.233 and notice of witnesses pursuant to NRS 174.234 which may be called in its case in chief.

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NOTICE OF ALIBI WITNESSES

1. Aaron Simmons - Address Unknown (will supplement as information becomes available).
2. Richard Nolen - Address Unknown (will supplement as information becomes available).

NOTICE OF WITNESS

NAME

ADDRESS

1. Dr. Upple at Reno Orthopedic Clinic 555 N. Arlington Ave, Reno 89503

Dated this 30TH of January, 2018.

HOFLAND & TOMSHECK

By: /s/ J. Tomsheck
Joshua Tomsheck, Esq.
Nevada State Bar No. 009210
josht@hoflandlaw.com
228 South Fourth Street, 1st Floor
Las Vegas, Nevada 89101
Telephone: (702) 895-6760
Facsimile: (702) 731-6910
Attorney for Erin Deshaun Ware

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on the 30th day of January, 2018, I served a true and accurate copy of the foregoing, NOTICE OF ALIBI WITNESSES AND NOTICE OF WITNESSES upon the parties to this action by electronic filing to the following:

Kristina.Rhoades@clarkcountyda.com
DAMotions@clarkcountyda.com
Elizabeth.Mercer@clarkcountyda.com

By: /s/ Adrienne Theeck
An employee of Hofland & Tomscheck



OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ELIZABETH MERCER
Chief Deputy District Attorney
Nevada Bar #010681
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-

ERIN WARE,
#2652033

Defendant.

CASE NO: **C-15-310099-1**

DEPT NO: **IX**

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS DUE TO
CONTINUED STATE MISCONDUCT AND VIOLATIONS OF DEFENDANT'S
FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, OR IN THE
ALTERNATIVE, MOTION TO SUPPRESS**

DATE OF HEARING: **FEBRUARY 7, 2018**
TIME OF HEARING: **9:30 A.M.**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ELIZABETH MERCER, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Opposition to Defendant's Motion to Dismiss Due to Continued State Misconduct and Violations of Defendant's Fifth, Sixth, and Fourteenth Amendment Rights, or in the Alternative, Motion to Suppress.

This Opposition To Defendant's Motion To Dismiss Due To Continued State Misconduct And Violations Of Defendant's Fifth, Sixth, And Fourteenth Amendment Rights, Or In The Alternative, Motion To Suppress 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.

1 **POINTS AND AUTHORITIES**

2 **STATEMENTS OF THE CASES**

3 A warrant was issued for the arrest of Defendant Erin Ware (hereinafter "Defendant")
4 on or about July 23, 2015. Defendant was arrested on August 11, 2015. He was arraigned in
5 Justice Court on August 18, 2015; and, at that time a preliminary hearing was scheduled for
6 September 1, 2015. The Public Defender's office filed a motion to withdraw due to conflict
7 which was heard on August 24, 2015. That motion was granted and the preliminary hearing
8 was reset to September 9, 2015.

9 At the time set for the preliminary hearing on September 9, 2015, defense counsel
10 requested to continue and the State did not oppose that request. The preliminary hearing was
11 rescheduled to October 15, 2015. On October 15, 2015, the preliminary hearing was held
12 during which witnesses Ruth Garn, Jamie Nourie, and Detective Lance Spiotto testified.
13 Following the hearing, Defendant was bound over to the District Court on all charges. During
14 that hearing, witness Jamie Nourie was the only witness who was able to identify Defendant
15 as the perpetrator of the crimes charged.

16 He was arraigned in District Court on November 16, 2015. At that time, he invoked
17 his right to a trial within sixty (60) days and his jury trial was scheduled for January 4, 2016.
18 At the calendar call on December 17, 2015, defense counsel requested a brief continuance.
19 The matter was reset to March 28, 2016.

20 Four (4) days after the December 17th calendar call, Defendant was rebooked on one
21 count of Solicitation to Commit Murder. On December 23, 2015, he was charged *via* Criminal
22 Complaint with soliciting the murder of Jamie Nourie, the only witness who is able to identify
23 him in Case No. C310099. That case was assigned Case No. 15F18958X. The following day
24 he was arraigned and the preliminary hearing was scheduled for January 7, 2016. Prior to the
25 preliminary hearing, the State sought and obtained an Indictment. The Indictment was filed
26 in District Court Case No. C311782 on January 6, 2016.

27 //

28 //

1 The State filed a Motion to Consolidate Case No. C311782 in Case No. C310099 on
2 February 1, 2016. The Motion was heard on March 9, 2016. This Honorable Court entered
3 an Order granting that Motion on May 11, 2016.

4 In the interim, the March 28, 2016 trial date was vacated at defense counsel's request.
5 The trial was reset to August 22, 2016. Defense counsel filed another Motion to Continue on
6 August 4, 2016. The State filed an Opposition to that Motion on August 5, 2016. On August
7 11, 2016 the Motion was granted and trial was reset to January 23, 2017. Thereafter, new
8 counsel was appointed and his current trial start date is February 7, 2018.

9 Prior defense counsel filed the instant motion on December 30, 2016, and a Supplement
10 to that motion on the same day. The State's Opposition to that Motion is set forth below.

11 **STATEMENT OF FACTS**

12 On June 10, 2015, at approximately 2:30 p.m., Ruth Garn and Jamie Nourie were
13 working at the Subway located at 8790 S. Maryland Parkway, Las Vegas, Nevada.
14 Preliminary Hearing Transcripts, 7-8, 39.¹ While working, the defendant entered the store and
15 loitered around for a bit. PH, 39-41. Eventually, he asked for a cup for water. PH, 9, 42.
16 Jamie charged him 25 cents for the cup. PH, 9, 42. Defendant filled up the water cup, drank
17 the water for a minute then walked outside. PH, 42. Five (5) to ten (10) minutes later, he
18 walked back inside and asked if he could use the restroom. PH, 10, 42. He set his water cup
19 on the table, went to the restroom and walked back out. PH, 42. When Defendant came out
20 of the restroom, he asked if he could wait for his ride inside the restaurant for a bit. Ruth and
21 Jamie allowed him to wait inside. PH, 10, 43. Defendant waited near the drink fountain and
22 continued to drink water. PH, 44, 49, 60. Defendant was the only customer that day that asked
23 for a water cup. PH, 49.

24 Jamie and Ruth walked to the back where they began to put dishes away and do prep
25 work. PH, 44-45. There were no other customers in the store at that point. PH, 44-45. While
26 in the back, Ruth walked into the fridge. PH, 45. As Ruth began to walk back out of the
27 fridge, Defendant approached Jamie and stuck a gun in her face. PH, 45-46. Jamie said, "Oh
28

¹ Hereinafter abbreviated, "PH."

1 my God” at which point Ruth turned around and saw Defendant holding a gun to Ruth’s head.
2 PH, 11. Defendant told Ruth, “Give me all the fucking money.” PH, 12. Ruth put her hands
3 in the air and told him that he didn’t have to do that, and that they didn’t have any money in
4 the back. PH, 12. Defendant pushed her into the desk and told her, “I guess we’re just going
5 to have to get it out of your fucking purses.” PH, 12. After he pushed Ruth into the desk,
6 Defendant went behind Ruth and grabbed Jamie and put the gun to her neck and said he was
7 going to kill her. PH, 12. At that point, Ruth went into her purse and removed her .357 Ruger
8 Security Six revolver, for which she possessed a concealed carry permit. PH, 12. Ruth
9 removed the gun because she was in fear for Jamie’s safety. Ruth turned toward Defendant,
10 pointed the gun at him and told him to drop his weapon. PH, 13.

11 Defendant fired his weapon at Ruth and shot her in the face. PH, 13. The bullet entered
12 just below her left eye, traveled under her nose, under her cheekbone and exited the right side
13 of her face just above her ear. PH, 13. Ruth fell to the ground onto her right side. PH, 14.
14 Defendant stepped over her and with Jamie and had his gun to Jamie’s neck. PH, 14. Ruth
15 tried to get up, at which time Defendant shot her again. PH, 14. That bullet went through her
16 arm and into her stomach. PH, 15. Ruth told Defendant to quit shooting her and put her arm
17 up to block the bullets. PH, 16. He shot her a third time and the bullet entered her chest and
18 bounced off of her sternum and exited right back out. PH, 18.

19 While Defendant was initially focused on Ruth, he ordered Jamie to lay down on the
20 ground and put her face down. PH, 46. Jamie heard Defendant say something to Ruth about
21 getting money out of her purse. PH, 46. After that, Jamie heard a gunshot. PH, 46. She lifted
22 her head to see what was happening and saw Defendant and Ruth struggling over something
23 near the prep table. PH, 46. Defendant ordered her to put her head back down, and then Jamie
24 heard another shot. PH, 46. At that point, Defendant ordered Jamie to get up and go open the
25 safe in the front. PH, 46. Jamie got up and walked past Ruth, who was laying on the flooring
26 bleeding. PH, 47. As she walked past Ruth, she noticed that Ruth had her gun on the floor
27 next to her. PH, 49, 57. Defendant still had his gun in his hand. PH, 57. Per the surveillance
28 video of the incident, Defendant picked Ruth’s gun up off of the floor and shot her two more

1 times. PH, 57. As Jamie walked to the front, she heard two more gunshots. PH, 47. Jamie
2 was afraid that Ruth was going to die, and that Defendant was going to shoot her as well. PH,
3 47.

4 Once Jamie got near the register, she knelt to try and unlock the safe. At that point,
5 Defendant walked up behind her and put the gun to her neck. PH, 48. Jamie tried to enter the
6 combination to the safe but was shaking so badly that she couldn't get it to open. PH, 48.
7 Jamie told Defendant she could not get it open at which point he ordered her to open the
8 register. PH, 48. Jamie removed the whole drawer from the register and tried to hand it to
9 Defendant, but he just looked at it and ran out. PH, 48. Jamie went back to Ruth and dialed
10 911. PH, 49. Ruth's gun was no longer present. PH, 50.

11 Ruth was transported to the hospital where she remained for four (4) days. PH, 22. For
12 the first two days she was sedated. PH, 22. She suffered a brain bleed and a myriad of other
13 injuries. PH, 23. While hospitalized she had to undergo surgery to remove the bullet from
14 her stomach. PH, 24. After being released from the hospital, she had to have both orbital
15 floors replaced because they were blown out by the bullet to her face. PH, 26. She had double
16 vision, blurred vision, and can't focus her eyes. PH, 26. She has permanent damage to her
17 right pupil and her left tear duct was ruined. PH, 26, 28. In addition, she can't smell or taste,
18 her left eardrum was perforated from the blast and she sustained inner ear damage and
19 deafness. PH, 26. Additionally, several tendons in her arm were damaged. PH, 27. As a
20 result she can't use her thumb and her pointer finger, middle finger and pinky on her left hand
21 are numb. PH, 27. In addition, she has to use a walker to move around because of issues with
22 her balance caused by damage from the bullets. PH, 28. Ruth was unable to identify
23 Defendant because of damage to her eyesight. PH, 22-23.

24 Jamie met with a sketch artist on June 14, 2015 and assisted them in doing a sketch of
25 Defendant. PH, 67. Then, on July 22, 2015, Jamie viewed a six pack photographic line-up
26 and positively identified Defendant as the individual who robbed them, and shot Ruth multiple
27 times. PH, 63-64.

28 //

1 The plastic cup used by Defendant for drinking water on the day of the robbery was
2 swabbed for DNA. Subsequent testing revealed that Defendant's DNA was on that cup. In a
3 post-*Miranda* interview following Defendant's arrest, he denied ever being inside of that
4 Subway.

5 On November 30, 2015, Det. Lance Spiotto received a voicemail message that an
6 inmate at the Clark County Detention Center had information that Defendant Erin Ware was
7 attempting to solicit the murder of Jamie Nourie. After receiving the message, Detective
8 Spiotto went to the Detention Center and interviewed the inmate that same day.

9 The following day, Det. Spiotto and Det. Moreno met with the inmate again. During
10 that interview, the inmate informed the detectives that Ware provided him with a great number
11 of details concerning the incident on June 10, 2015 at Subway. The inmate provided those
12 details to the detectives, including the fact that Jamie Nourie was the only witness who could
13 identify Defendant at the preliminary hearing. Defendant told the inmate that he could have
14 his "Pops" or his "broad" pay the person who was willing to kill Jamie. The inmate was able
15 to give the detectives Jamie's home address which Defendant provided to him. The inmate
16 expressed to detectives that he felt he needed to let them know because he was concerned due
17 to the violence used in the robbery, and because he believed Defendant was capable of hiring
18 someone to murder Jamie. The inmate advised detectives that he told Defendant to expect a
19 visit from a family member of his named "Check" who would assist Defendant.

20 On December 7, 2015, when Det. Moreno went to visit with the inmate about
21 potentially wearing a wire, the inmate showed Det. Moreno a letter that Defendant provided
22 to the inmate in which he stated, "I heard you a clean up [*sic*] man and I need some garbage
23 to be taking out. Handle it and I got 5 stacks for you." The inmate advised detectives that he
24 needed to return with the letter so that Defendant could finish it. At that point, Det. Moreno
25 photographed the letter and gave it to the inmate.

26 The next day, the inmate wore a wire. While the inmate was wearing the wire,
27 Defendant read the letter to the inmate. In addition, they discussed the solicitation in more
28 detail.

1 Then, on December 9, 2015, an undercover detective conducted a videotaped visit with
2 Defendant. Erin Ware believed that the UC was the inmate's family member who went by the
3 name "Check." During that visit, Defendant confirmed that he wanted Jamie Nourie gone
4 "not for a minute" but "forever." He also held up a letter for the UC which contained Nourie's
5 name, address and description and confirmed that he would pay the UC five (5) stacks (\$5,000)
6 for taking care of it. In addition, he held up the Information from Case No. C-15-310099-1
7 and showed the UC the charges that he was facing, along with the list of witnesses attached to
8 the Information. Defendant advised the UC that he needed it done by the 17th of December
9 because that was the day that he was supposed to go to Court and see if everyone is ready for
10 trial. That list contained the name and address of Jamie Nourie. At the conclusion of the visit,
11 it was agreed that the UC would visit Defendant in a few days to follow-up.

12 On December 10, 2015, Det. Moreno was contacted by Alex Gonzalez at the Detention
13 Center who advised that the inmate gave two letters to him from Defendant to forward to Det.
14 Moreno. One of those letters was the letter that Defendant held up during the videotaped visit
15 and described Jamie Nourie, the amount to be paid for her murder, and her work and home
16 addresses. Defendant believed that the inmate was going to mail the letters to his girlfriend to
17 give to "Check"/the UC.

18 The UC met with Defendant again on December 14, 2015. Again, it was a videotaped
19 visit over the video visitation system at the jail. During the second meeting, Defendant
20 reiterated his desire to have Nourie murdered. Additionally, the UC advised Defendant that
21 he'd done his "homework" on Jamie, and held up two photographs of her so that Defendant
22 could confirm whether that was the correct individual. Defendant confirmed that was the
23 Jamie Nourie he was talking about.

24 After detectives completed their investigation with regard to whether there really was
25 anybody trying to assist Ware in paying for the murder of Jamie Nourie, Defendant was
26 rebooked.

27 //

28 //

ARGUMENT

I. SIXTH AMENDMENT

It has been well settled that the right to counsel under the Sixth Amendment attaches at the initiation of the criminal proceedings. *See United States v. Gouveia*, 467 U.S. 180, 187, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). “Whatever else it may mean, the right to counsel guaranteed by the Sixth and Fourteenth Amendments means at least that person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him – ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” *Id.* 467 U.S. at 193, 104 S.Ct. at 2400 (*citing Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977) (*quoting Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972))). Thereafter, government efforts to elicit information from the accused represent “critical stages” at which the Sixth Amendment right to counsel applies. *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 85 L.Ed.2d 139 (1985); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

The Nevada Supreme Court has consistently followed the offense-specific model for Sixth Amendment protections:

However, the Sixth Amendment right to counsel does not even attach in a case until adversarial proceedings have commenced in that case “‘whether by way of formal charge, preliminary hearing, indictment, information or arraignment.’” The right “cannot be invoked once for all future prosecutions.”

“The police have an interest ... in investigating new or additional crimes [after an individual is formally charged with one crime.] ... [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities....

“Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.”

Thus, the offense-specific Sixth Amendment right does not require suppression of statements deliberately elicited during a criminal investigation merely because the right has attached and been invoked in an unrelated case.

See Kaczmarek v. State, 120 Nev. 314, 326-7, 91 P.3d 16, 25 (2004).

1 Defendant was arraigned on the Criminal Complaint in Case No. 15F10849X on
2 August 18, 2015. That Criminal Complaint only charged him with crimes committed during
3 the course of the robbery of Ruth Garn and Jamie Nourie at Subway on June 10, 2015. At that
4 time, his right to counsel *as to those offenses only* attached.

5 Nearly six (6) months later, Booker – who was not an informant at the time – contacted
6 LVMPD and left a message for Det. Spiotto indicating that Defendant was attempting to hire
7 someone to murder Jamie Nourie. Det. Spiotto made contact with Booker on the same date
8 and conducted a tape recorded interview during which Booker confirmed the information.
9 Then, Det. Moreno and Det. Spiotto met with Booker once again on December 1, 2015 at
10 which time he confirmed the information. Booker was signed up as a C.I. on December 7,
11 2015 and then he wore a wire on December 8, 2015. Then, Defendant had conversations with
12 the undercover detective on December 9th and 14th, 2015 wherein he solicited the murder of
13 Jamie Nourie. Defendant was arrested on the charge of Solicitation to Commit Murder on
14 December 21, 2015, and arraigned on the same charge on December 24, 2015. At that time,
15 his right to counsel on the Solicitation charge attached.

16 As such, Defendant's 6th Amendment right to counsel was not violated by contact with
17 Booker and the U.C. because Defendant only had the right to counsel as to the Robbery event.

18 **II. THE FIFTH AMENDMENT**

19 Defendant also makes the conclusory claim that recording of his conversations with
20 Booker and the U.C. pertaining to the solicitation to commit murder was a violation of his
21 Fifth Amendment rights; however, he fails to cite any apposite legal authority.

22 The Nevada Supreme Court has held that where an inmate voluntarily approaches a
23 “snitch” and that “snitch” then contacts that police on his own initiative, the incriminating
24 statements may be received in evidence against the accused. Thompson v. State, 105 Nev.
25 151, 771 P.2d 592 (1989). See also Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991)
26 (Where defendant gave incriminating statements to jailhouse “snitch” who later contacted the
27 police was admissible against defendant.) In the present case, Booker was not signed up as a
28 CI until December 7, 2015. He reached out to detectives on his own volition. Therefore, there

1 can be absolutely no claim that Defendant's statements to Booker on, before, or in between
2 November 30 or December 1, 2015 violated his Fifth Amendment privilege.

3 The Nevada Supreme Court has specifically sanctioned the use of surreptitious
4 recording device on an individual such as Ware in Honeycutt v. State, 118 Nev. 660, 56 P.3d
5 362 (2002).

6 In Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394 (1990), the United States Supreme
7 Court held that, "[a]n undercover law enforcement officer posing as a fellow inmate was not
8 required to give Miranda warning to an incarcerated suspect before asking questions that could
9 elicit an incriminating response." In it's ruling, the Supreme Court stated:

10 In Miranda v. Arizona, *supra*, the Court held that the Fifth
11 Amendment privilege against self-incrimination prohibits admitting
12 statements given by a suspect during "custodial interrogation" without
13 a prior warning. Custodial interrogation means "questioning initiated
14 by law enforcement officers after a person has been taken into
15 custody...." *Id.* 384 U.S., at 444, 86 S.Ct., at 1612. The warning
16 mandated by Miranda was meant to preserve the privilege during
17 "incommunicado interrogation of individuals in a police-dominated
18 atmosphere." *Id.*, at 445, 86 S.Ct., at 1612. That atmosphere is said to
19 generate "inherently compelling pressures which work to undermine
20 the individual's will to resist and to compel him to speak where he
21 would not otherwise do so freely." *Id.*, at 467, 86 S.Ct., at 1624.
22 "Fidelity to the doctrine announced in Miranda requires that it be
23 enforced strictly, but only in those types of situations in which the
24 concerns that powered the decision are implicated." Berkemer v.
25 McCarty, 468 U.S. 420, 437, 104 S.Ct. 3138, 3148, 82 L.Ed.2d 317
26 (1984).

19 Conversations between suspects and undercover agents do not
20 implicate the concerns underlying Miranda. The essential ingredients
21 of a "police-dominated atmosphere" and compulsion are not present
22 when an incarcerated person speaks freely to someone whom he
23 believes to be a fellow inmate. Coercion is determined from the
24 perspective of the suspect. Rhode Island v. Innis, 446 U.S. 291, 301,
25 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980); Berkemer v. McCarty,
26 *supra*, 468 U.S., at 442, 104 S.Ct., at 3151. When a suspect considers
27 himself in the company of cellmates and not officers, the coercive
28 atmosphere is lacking. Miranda, 384 U.S., at 449, 86 S.Ct., at 1614
29 ("[T]he 'principal psychological factor contributing to a successful
30 interrogation is privacy-being alone with the person under
31 interrogation' "); *id.*, at 445, 86 S.Ct., at 1612. There is no empirical
32 basis for the assumption that a suspect speaking to those whom he
33 assumes are not officers will feel compelled to speak by the fear of
34 reprisal for remaining silent or in the hope of more lenient treatment
35 should he confess.

36 //

1 It is the premise of Miranda that the danger of coercion results from
2 the interaction of custody and official interrogation. We reject the
3 argument that Miranda warnings are required whenever a suspect is
4 in custody in a technical sense and converses with someone who
5 happens to be a government agent. Questioning by captors, who
6 appear to control the suspect's fate, may create mutually reinforcing
7 pressures that the Court has assumed will weaken the suspect's will,
8 but where a suspect does not know that he is conversing with a
9 government agent, these pressures do not exist. The state court here
10 mistakenly assumed that because the suspect was in custody, no
undercover questioning could take place. When the suspect has no
reason to think that the listeners have official power over him, it
should not be assumed that his words are motivated by the reaction he
expects from his listeners. "[W]hen the agent carries neither badge nor
gun and wears not 'police blue,' but the same prison gray" as the
suspect, there is no "interplay between police interrogation and police
custody." Kamisar, Brewer v. Williams, Massiah and Miranda: What
is "Interrogation"? When Does it Matter?, 67 Geo.L.J. 1, 67, 63
(1978).

11 Miranda forbids coercion, not mere strategic deception by taking
12 advantage of a suspect's misplaced trust in one he supposes to be a
13 fellow prisoner. As we recognized in Miranda: "[C]onfessions remain
14 a proper element in law enforcement. Any statement given freely and
15 voluntarily without any compelling influences is, of course,
16 admissible in evidence." 384 U.S., at 478, 86 S.Ct., at 1629. Ploys to
17 mislead a suspect or lull him into a false sense of security that do not
18 rise to the level of compulsion or coercion to speak are not within
Miranda's concerns. Cf. Oregon v. Mathiason, 429 U.S. 492, 495-496,
97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) (per curiam); Moran v.
Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (where
police fail to inform suspect of attorney's efforts to reach him, neither
Miranda nor the Fifth Amendment requires suppression of
prearrest confession after voluntary waiver).

19 Miranda was not meant to protect suspects from boasting about their
20 criminal activities in front of persons whom they believe to be their
21 cellmates. This case is illustrative. Respondent had no reason to feel
22 that undercover agent Parisi had any legal authority to force him to
23 answer questions or that Parisi could affect respondent's future
treatment. Respondent viewed the cellmate-agent as an equal and
showed no hint of being intimidated by the atmosphere of the jail. In
recounting the details of the Stephenson murder, respondent was
motivated solely by the desire to impress his fellow inmates. He spoke
at his own peril.

24 Id. 496 U.S. at 296-7, 110 S.Ct. at 2397-8.

25 Despite this well reasoned and logical interpretation of decades of legal precedent, the
26 Nevada Supreme Court in Boehm carved out a State law ground not adopted by any other
27 jurisdiction. In Boehm, recognizing that all prior decisions of the Nevada Supreme Court
28 had been abrogated by Perkins, held that "Fifth Amendment protections" applied to jailhouse

1 informants on cases where the Sixth Amendment had not attached. In so holding, the Court
2 stated, “To determine whether custodial interrogation without prior warning in contravention
3 of the Nevada Constitution has occurred, this court examines whether the suspect was (1) in
4 custody, (2) being questioned by an agent of the police, and (3) subject to “interrogation.””
5 Boehm at 913.

6 Since Boehm, the Nevada Supreme Court has on at least two occasions made rulings
7 either contrary to the Boehm’s specific holding, or inconsistent with the interpretation that
8 Defendant has specifically espoused for it. In Mitchell v. State, 114 Nev. 1417, 971 P.2d
9 813 (1998) (*reversed on habeas in part on other grounds*, 149 P.3d 33 (2006)), a year after
10 Boehm, the Nevada Supreme Court changed the determination as to whether an incarcerated
11 person is in custody for purposes of Miranda. According to Boehm, an incarcerated person
12 is per se “in custody” for purposes of the Fifth Amendment. However, in Mitchell, the Court
13 stated:

14 In Alward, 112 Nev. at 154, 912 P.2d at 251, we reiterated that “a
15 suspect may not be subjected to an interrogation in official ‘custody’
16 unless that person has previously been advised of, and has knowingly
17 and intelligently waived [his or her Miranda rights].” We stated that
18 the test for determining whether a defendant who has not been arrested
19 is in custody “‘is how a reasonable man in the suspect’s position
20 would have understood his situation.’ ” Id. at 154, 912 P.2d at 252
(*quoting Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138,
82 L.Ed.2d 317 (1984)). The court will consider the totality of the
circumstances, including: (1) the site of interrogation; (2) whether the
investigation has focused on the suspect; (3) whether the objective
indicia of arrest are present; and (4) the length and form of
questioning. Id. at 154-55, 912 P.2d at 252.

21 Prison inmates are not automatically deemed to be “per se ‘in
22 custody.’ ” Turner, 28 F.3d at 983. The Turner court explained:

23 [T]o determine whether Miranda warnings were necessary in a prison
24 setting, “we look to some act which places further limitations on the
25 prisoner.” ... Under this concept, we consider “the language used to
26 summon the individual, the physical surroundings of the
27 interrogation, the extent to which he is confronted with evidence of
his guilt, and the additional pressure exerted to detain him ... to
determine whether a reasonable person would believe there had been
a restriction of his freedom over and above that in his normal prisoner
setting.

28 Id. at 983 (*quoting Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d
381 (1968)).

1 Mitchell at 1423-4. Therefore, almost immediately after it's ruling in Boehm, the Court
2 moved away from a per se designation and changed the distinction of when an inmate is "in
3 custody."

4 This exact issue was raised before the Nevada Supreme Court in Honeycutt v. State,
5 118 Nev. 660, 56 P.3d 362 (2002). In Honeycutt, the defendant was awaiting trial on sexual
6 assault charges:

7 Prior to the second trial, David Paule, an inmate incarcerated with
8 Honeycutt, informed Detective Larry Hanna that Honeycutt had
9 approached him and offered him \$3,000.00 to hire someone to murder
10 the victim in the sexual assault case. Paule gave Hanna a piece of
11 paper that Honeycutt had given him that contained the victim's name
and address. Hanna told Paule that in exchange for eliciting
information from Honeycutt regarding the solicitation, he would try
to get Paule's charge of being an ex-felon in possession of a firearm
"taken away."

12 Based on this information, the police sent Paule back to speak with
13 Honeycutt twice with a tape recorder, but the tapes malfunctioned
14 each time and failed to record the conversations. Both times Paule
15 stated that Honeycutt talked more evasively about wanting the victim
16 killed and never specifically stated it again. The third time, when a
17 recording was successfully made, Honeycutt made no admissions to
Paule's repeated questions about his wanting to solicit the victim's
murder. Paule also arranged for Honeycutt to speak to an undercover
officer, Mark Preusch, about killing the victim. At that meeting,
Honeycutt stated nothing, but Preusch testified that Honeycutt held up
a piece of paper that said he wanted the victim to disappear.

18 ...
19 Honeycutt filed a motion to suppress his statements made to Paule and
20 Preusch because they were elicited without proper Miranda warnings.
21 Honeycutt also filed motions to exclude the Luxor security tape and
22 renewed his motion to exclude testimony regarding his prior
conviction. The district court denied all motions, stating that Miranda
warnings were not required, and although the prior bad act evidence
was prejudicial, its probative value outweighed the prejudicial effect.

23 Id. at 666 (internal notes omitted). Although the issue was fully briefed, including the impact
24 of Holyfield and Boehm, the Court did not enter into an analysis. However, the Court affirmed
25 the District Court's denial of the motion to suppress based upon Holyfield and Boehm, finding
26 no error. Honeycutt at 666-7, n. 6.

27 //

28 //

1 As an initial starting point, the Fifth Amendment protections only apply to crimes that
2 have been previously committed. “Generally, a statement or confession, as contemplated by
3 Miranda relates to a crime already committed” Norrid v. State, 925 S.W.2d 342, 345
4 (Tx.Crim.App. 1996); Buttersworth v. State, 400 S.E.2d 908, 910 (GA. 1991). In the instant
5 matter as well as Honeycutt, the statements which are being sought to be introduced are not
6 statements or confessions of a previously committed crime, it is a recording of the current
7 crime. To extend Fifth Amendment protections to crimes that haven’t yet been completed
8 would be to essentially create an “inmate privilege,” providing inmates with the freedom to
9 commit new crimes knowing that police would be severely limited in their ability to
10 investigate them.

11 In Holyfield, the Defendant had been arrested and refused to implicate himself in the
12 crime being investigated. Thereafter, the police deliberately placed an informant in the cell in
13 hopes of gaining a confession. The next day, the informant alleged to have gotten a confession,
14 despite evidence to the contrary. The Court’s biggest concern appeared to be the reliability of
15 the informant. It appears that it was the offensive conduct that lead the Court to this legally
16 unsupported rule.

17 Likewise, in Boehm, the Defendant had been arrested and had in fact invoked his right
18 to a lawyer. Thereafter, the police actively sought an informant, placed a wire on him, and
19 then placed him in the cell. Offended by this behaviour, the Court created the Fifth
20 Amendment protections which every other jurisdiction has rejected.

21 The circumstances in this case are distinguishable from both Holyfield and Boehm.
22 Usually, when a person is confronted by ongoing criminal activity, and they contact the police,
23 their efforts to assist the police are not considered to formulate an agency relationship. *See*
24 State v. Miller, 110 Nev. 690, 877 P.2d 1044 (1994). In Simmons v. State, 112 Nev. 91, 912
25 P.2d 217 (1996), the Court addressed a similar situation where an informant came forward,
26 however, the Court found no agency relationship. In Simmons, an in custody defendant made
27 it known that he was going to contact a friend by telephone. Based upon that knowledge, the
28 friend contacted the police. The police asked if they could record the conversations between

1 him and Defendant. Additionally, the police instructed the witness not to attempt to
2 deliberately illicit incriminating responses. In holding that the friend was not an agent of the
3 government, the Court held:

4 The determination of whether a person is a State agent “must be made
5 under the facts and circumstances of each case.” United States v.
6 Taylor, 800 F.2d 1012, 1015 (10th Cir.1986). Moreover, “[i]ssues
7 concerning exigent circumstances, consent, and whether an individual
8 is acting as an agent for the police present mixed questions of fact and
law.” State v. Miller, 110 Nev. 690, 694, 877 P.2d 1044, 1047 (1994)
(citing Hayes v. State, 106 Nev 543, 550 n. 1, 797 P.2d 962, 966
(1990)).

9 Id at 99. The Court relied heavily on the fact that the friend was the person who contacted the
10 police, the police never attempted to coerce the friend to cooperate, and the police
11 considerations involved:

12 As with the Fourth Amendment, the policy of the Sixth and
13 Fourteenth Amendments is not to discourage citizens from assisting
14 in the apprehension of criminals. *See* Coolidge v. New Hampshire,
15 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Miller, 110 Nev.
16 at 696-97, 877 P.2d at 1048-49. For these reasons, we conclude that
17 the district court did not err in determining that Mike O. was not acting
as an agent of the police. Having concluded that Mike O. was not an
agent of the State, we logically also conclude that Simmons' Sixth and
Fourteenth Amendment right to counsel was not violated. *See*
Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d
246 (1964); Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991).

18 Id at 101.

19 As opposed to the conduct which concerned the Court in Holyfield and Boehm, the
20 conduct of Booker is more closely resembled that of Simmons and Miller. Perhaps it was this
21 policy consideration that caused the Court to affirm the district court's finding in Honeycutt
22 that Miranda warnings are not necessary in the instant situation.

23 Perhaps an Alabama appellate court best summed up the policy considerations
24 confronted by the Court in this particular case. Crawford v. State, 377 So.2d 145 (Ala.Cr.App.
25 1979) involved a defendant who stood accused of murdering several members of his family.
26 While in jail and awaiting trial, the defendant sought to have the lone adult witness, his sister-
27 in-law who survived his attack, murdered. The inmate who the defendant sought to solicit
28 informed a prison official. The prison official placed a wire on the inmate and informed him

1 not to investigate any thing other than the defendant's attempt to suppress the victim's
2 testimony. The defendant was heard on tape attempting to solicit the murder of his sister-in-
3 law for \$3000. The Alabama appellate court upheld the admission of the incriminating
4 statements and explained:

5 Police are under a duty to investigate and attempt to prevent the
6 completion of crimes; especially when a life is at stake. To hold that
7 the use of a volunteer informant in the investigation of a crime in
progress is an illegal interrogation of a defendant would unduly
restrain the basic duty of law enforcement.

8 Id. at 156.

9 The Alabama Court went on to say:

10 The (State) need not sit idly by when it is discovered that a
11 defendant, when under indictment, and represented by counsel is
undertaking to (suppress testimony). In orderly society there can be
12 no question that individual constitutional rights are not broad enough
to allow one charged with crime a license to poison the very
13 foundation of the judicial process. (The appellant) was not at liberty
to personally, or through counsel, subvert the judicial process itself...

14 Id. (quoting Deskins v. Commonwealth, 512 S.W.2d 520 (Ky. 1975).

15 Based on all of the above, LVMPD did not violate Defendant's 5th Amendment rights
16 when recording his statements to fellow inmate Booker, or when recording his statements to
17 the UC. There is no basis to suppress, or to dismiss this case, and the State asks that
18 Defendant's motion be denied.

19 DATED this 6th day of February, 2018.

20 Respectfully submitted,

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

23
24 BY /s/ ELIZABETH MERCER
25 ELIZABETH MERCER
26 Chief Deputy District Attorney
27 Nevada Bar #010681
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that service of the above and foregoing was made this 6th day of
3 FEBRUARY 2018, to:

4 JOSHUA TOMSHECK, ESQ.
5 josht@hoflandlaw.com

6
7 BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office

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AINF

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FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 07 2018

BY: A. Trujillo
ATHENA TRUJILLO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERIN DESHAUN WARE,
#2652033

Defendant.

CASE NO: C-15-310099-1

DEPT NO: IX

FOURTH AMENDED

INFORMATION

C-15-310099-1
AINF
Amended Information
4718907



STATE OF NEVADA

COUNTY OF CLARK

} ss.

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ERIN DESHAUN WARE, the Defendant(s) above named, having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031); and SOLICITATION TO COMMIT MURDER (Category B Felony - NRS 199.500.2 - NOC 50037)**, on or between the 10th day of June, 2015, and the 14th day of December, 2015, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

///

1 COUNT 1 - ROBBERY WITH USE OF A DEADLY WEAPON

2 did, on or about the 10th day of June, 2015, willfully, unlawfully, and feloniously take
3 personal property, to-wit: a handgun, from the person of RUTH GARN and/or JAIMIE
4 NOURIE and/or SHERRI FOLEY and/or BURDETT JONES, or in her or his presence, by
5 means of force or violence, or fear of injury to, and without the consent and against the will of
6 RUTH GARN and/or JAIMIE NOURIE and/or SHERRI FOLEY and/or BURDETT JONES,
7 with use of a deadly weapon, to-wit: a handgun.

8 COUNT 2 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON


9 did, on or about the 10th day of June, 2015, willfully, unlawfully, feloniously and with
10 malice aforethought attempt to kill RUTH GARN, a human being, with use of a deadly
11 weapon, to-wit: a handgun, by shooting at and into the body of the said RUTH GARN.

12 COUNT 3 - SOLICITATION TO COMMIT MURDER

13 did, on or between the 9th day of December, 2015, and the 14th day of December, 2015,
14 wilfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit another, to-
15 wit: an UNDERCOVER OFFICER, to commit the murder of JAMIE NOURIE.

16 STEVEN B. WOLFSON
17 Clark County District Attorney
18 Nevada Bar #001565

19 BY


20 ELIZABETH MERCER
21 Chief Deputy District Attorney
22 Nevada Bar #010681

23
24 15F10849X/eam/GCU
25 LVMPD EV#1506102629
26 (TK2)
27
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FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 07 2018

BY: A. Trujillo
ATHENA TRUJILLO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

C-15-310099-1
GPA
Guilty Plea Agreement
4718890



THE STATE OF NEVADA,

Plaintiff,

-vs-

CASE NO: C-15-310099-1

ERIN WARE,
#2652033

DEPT NO: IX

Defendant.

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031); ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); and, SOLICITATION TO COMMIT MURDER (Category B Felony - NRS 199.500.2 - NOC 50037), as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty is based upon the plea agreement in this case which is as follows:

As to the charge of Robbery with Use of a Deadly Weapon, the parties stipulate to a term of imprisonment of ten (10) to twenty-five (25) years in the Nevada Department of corrections. As to the charge of Attempt Murder with Use of a Deadly Weapon, the parties stipulate that the sentence on that count will run consecutively to the Robbery with Use of a Deadly Weapon Count. The parties retain the right to argue for between three (3) and seven

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1 (7) years on the bottom end. The parties stipulate to a total of twenty-five (25) years on the
2 back end of the Attempt Murder with Use of a Deadly Weapon count. As to the charge of
3 Solicitation to Commit Murder, the State agrees to make no recommendation and agrees to
4 run the sentence on that count concurrently. Additionally, the State agrees to dismiss Case
5 No. C317264 after sentencing in this case. Defendant agrees to pay restitution as to all counts
6 and cases, including those being dismissed.

7 I agree to the forfeiture of any and all weapons or any interest in any weapons seized
8 and/or impounded in connection with the instant case and/or any other case negotiated in
9 whole or in part in conjunction with this plea agreement.

10 I understand and agree that, if I fail to interview with the Department of Parole and
11 Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate,
12 by affidavit review, confirms probable cause against me for new criminal charges including
13 reckless driving or DUI, but excluding minor traffic violations, the State will have the
14 unqualified right to argue for any legal sentence and term of confinement allowable for the
15 crime(s) to which I am pleading guilty, including the use of any prior convictions I may have
16 to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without
17 the possibility of parole, life with the possibility of parole after ten (10) years, or a definite
18 twenty-five (25) year term with the possibility of parole after ten (10) years.

19 Otherwise I am entitled to receive the benefits of these negotiations as stated in this
20 plea agreement.

21 CONSEQUENCES OF THE PLEA

22 I understand that by pleading guilty I admit the facts which support all the elements of
23 the offense(s) to which I now plead as set forth in Exhibit "1".

24 I understand that as a consequence of my plea of guilty to the charge of Robbery with
25 Use of a Deadly Weapon, I must be sentenced to a minimum term of imprisonment of two (2)
26 years and up to a maximum term of fifteen (15) years, plus a consecutive one (1) to fifteen
27 (15) years as to the deadly weapon enhancement. The minimum sentence may not exceed
28 forty percent (40%) of the maximum sentence.

**PLEADING
CONTINUES
IN NEXT
VOLUME**