

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BROWN JR.,

Petitioner,

vs.

**EIGHTH JUDICIAL
DISTRICT COURT JUDGE;
THE HONORABLE
JACQUELINE BLUTH,
DISTRICT COURT JUDGE,**

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

Supreme Court No. **Electronically Filed**
Nov 18 2022 01:23 PM
District Court No. **Elizabeth A. Brown**
Clerk of Supreme Court

**PETITION FOR WRIT OF
MANDAMUS OR, IN THE
ALTERNATIVE, WRIT OF
PROHIBITION**

and

**MOTION FOR STAY OF
DEPOSITION**

COMES NOW, Petitioner, ROBERT BROWN JR., by and through his attorney, CLARK W. PATRICK ESQ., and pursuant to NRS 34.150 and NRS 34.320 et. seq., respectfully petitions this Honorable Court to issue a writ of mandamus ordering the District Court to deny the State's motion to take the deposition of Esther Maestas, John Brocius and Gerald Juneman, or in the alternative, a Writ of Prohibition precluding the District Court from allowing the deposition of Esther Maestas, John

Brocius and Gerald Juneman. While the date for the deposition is not yet set, the State wants it as soon as possible and the trial date is set for April 3, 2023, therefore we are requesting a stay of the conducting of the deposition.

This Petition is based upon the Memorandum of Points and Authorities and Appendix submitted herewith, portions of the record relevant to the determination of this Petition, and any argument should this Honorable Court order a hearing on this matter. The requirements of verification and proof of service are satisfied.

Dated this 18 day of November, 2022.

RESPECTFULLY SUBMITTED:

A handwritten signature in blue ink, appearing to read 'Clark W. Patrick', written over a horizontal line.

CLARK W. PATRICK
Nevada Bar No. 9451
400 South Fourth Street, Ste. 500
Las Vegas, NV 89101
(702) 278-0599
Attorneys for Brown

VERIFICATION

State of Nevada)
) ss:
County of Clark)

CLARK W. PATRICK, being first duly sworn, deposes and says:

1. That Affiant is an attorney duly licensed to practice law in the State of Nevada and is one of the attorneys appointed to represent Mr. Brown herein.

2. That Affiant has read the foregoing Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition and Motion for Stay of Proceedings and knows the contents therein and as to those matters, they are true and correct except as to those matters based on information and belief which he has been informed and believes them to be true.

3. That Mr. Brown has no other remedy at law available to him and that the only means to address this issue is through the instant writ.

4. That Affiant signs this verification on behalf of Mr. Brown, under his direction and authorization and further that Mr. Brown is currently in custody of the authorities of the Clark County Detention Center.

FURTHER. Affiant sayeth naught.

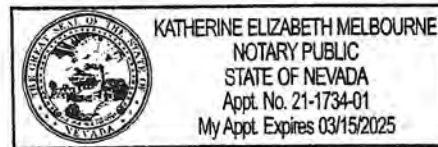

CLARK W. PATRICK

SUBSCRIBED AND SWORN to before me

this 18th day of November, 2022.



NOTARY PUBLIC



MEMORANDUM OF POINTS AND AUTHORITIES

RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this court may evaluate possible disqualification or recusal:

1. Attorney of record for Appellant: Clark Patrick
2. Publicly-held companies or parent corporations: None
3. Law Firm(s) appearing in the Court(s) below:

District Court: C. W. Patrick Law

Direct Appeal: None filed

ROUTING STATEMENT

NRAP 17 governs the division of cases between the Nevada Supreme Court and the Court of Appeals. NRAP 17(b) provides that certain cases shall “presumptively” be heard and decided by the court of appeals. “Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine are presumptively assigned to the court of appeals.” NRAP 17(b)(14).

This matter arises from the granting of the State’s Motion to Take Deposition, which is neither a discovery matter or a motion in limine, but rather a request to create testimony to be used at trial in violation of Petitioner’s Constitutional right to Confront Witnesses. Since the issue does not implicate a discovery matter or involve a motion in limine, this case is not presumptively assigned to the Court of Appeals.

NRAP 17(a)(1) specifies that that the Supreme Court shall hear “All Death Penalty cases”. The State has filed a Notice of Intent to Seek Death Penalty against Petitioner Brown. As there is not presumptive routing to the Court of Appeals and the case involves the death penalty the case should be routed to the Supreme Court.

JURISDICTION

Pursuant to Nevada Revised Statute (“NRS”) 34.170, “a writ of mandamus shall issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601 (1981).

STATEMENT OF ISSUES

Defendant ROBERT BROWN JR. (hereinafter referred to as Brown) asserts that the State is not entitled to take the depositions of Esther Maestas, John Brocius and Gerald Juneman as the State presented no evidence to show these witnesses will be unavailable or unable to attend trial. Brown therefore requests that this Court order the District Court to deny the State’s motion to conduct the videotaped depositions of Esther Maestas, John Brocius and Gerald Juneman.

In addition, Brown respectfully requests this Court grant an stay of the taking of depositions until this matter has been decided.¹

STATEMENT OF THE CASE

Brown is charged by Amended Information with Invasion of the Home While in Possession of a Deadly Weapon, Burglary While in Possession of a Firearm, Murder With use of a Deadly Weapon, Attempt Murder With use of a Deadly Weapon, Possession of Firearm by Ex-Felon, Discharge of Firearm from or Within a Structure, and Child Abuse, Neglect, or Endangerment With use of a Deadly Weapon. The counts involve an incident alleged to have been committed by Brown on December 7, 2012. (Appendix, pages 1-6)

The State filed a Notice of Intent to Seek Death Penalty on August 8, 2014. (Appendix, pages 7-27)

On September 2, 2022 the State filed a Notice of Motion and Motion for Deposition (Appendix, pages 28-39). Brown filed an Opposition to State's Motion for Deposition on September 15, 2022 (Appendix, pages

¹ The district court denied Brown's motion for a stay. (Appendix, pages 62-65)

40-51). After argument on the Motion held on September 20, 2022, the Court granted the State's Motion for Deposition, and denied Brown's oral motion to stay the proceedings. (Appendix, pages 52-61).

Trial in this matter is currently set for April 3, 2023.

STATEMENT OF FACTS

In presenting the following arguments, Brown is relying upon the facts from the Preliminary Hearing Transcripts, police reports generally, as well as those contained within the discovery provided.

Any reference to statements contained herein does not constitute a concession that any such evidence or statements are either accurate, reliable, or admissible in any judicial proceedings, and do not constitute a waiver of the attorney/client privilege. This statement of facts is merely a matrix upon which the arguments are based. Additionally, Brown does not concede that any statement attributable to him is properly admissible before a jury or reliable indicator of his mental state at the time or his current mental state.

On July 1, 2014, a Preliminary Hearing was held before the Honorable Joseph Sciscento, Justice of the Peace.

Ester Maestas testified that she was in Las Vegas visiting her daughter, Nicole Nick in December 2012. (PHT Vol. 1 pg. 5-6). During her stay, she met Nicole's boyfriend, Robert Brown. (PHT Vol. 1 pg. 6). She had seen or met him several times prior to December 2012. (PHT Vol. 1 pg. 7). Nicole's apartment was E-13. (PHT Vol. 1 pg. 8). Brown had an apartment in the same complex. (PHT Vol. 1 pg. 8). When Maestas came to stay with Nicole, Brown gave her a key to Nicole's apartment. (PHT Vol. 1 pg. 8-9). Nicole was staying with Brown in his apartment but was "kicked out" on or about December 6, 2012. (PHT Vol. 1 pg. 9).

Maestas, Nicole and Maestas' granddaughter, Kayla were at Nicole's apartment on December 7, 2012. (PHT Vol. 1 pg. 16). Nicole and Kayla went to bed in the bedroom. (PHT Vol. 1 pg. 16). Maestas was in the front room watching television. (PHT Vol. 1 pg. 19). She heard a bang on the front door. (PHT Vol. 1 pg. 19-20). The front window broke, and Brown came into the apartment, with a gun in his hand. (PHT Vol. 1 pg. 20). She screamed when she saw the gun. (PHT Vol. 1 pg. 22). She believed that Brown shot her at that time. (PHT Vol. 1 pg. 22). From that point on, she did not remember what happened. (PHT Vol. 1 pg. 23). She thought she passed out at some point. (PHT Vol. 1 pg. 25). She heard

gunshots. (PHT Vol. 1 pg. 25). She went out and knocked on a door and asked for help. (PHT Vol. 1 pg. 27). She went back to Nicole's apartment and waited for the police to come. (PHT Vol. 1 pg. 27).

Homicide Detective Dean Raetz testified that on December 7, 2012 he responded to a homicide at 5421 East Harmon Avenue, apartment E-13, in Clark County Nevada. (PHT Vol. 1 pg. 73-74). He was assigned to document the scene. (PHT Vol. 1 pg. 75). The front window of the apartment had been broken. (PHT Vol. 1 pg. 76). There were eight (8) cartridge casings recovered from the bedroom of the apartment. (PHT Vol. 1 pg. 81). On December 8, 2012, a firearm was recovered from an individual who found the gun on the street. (PHT Vol. 1 pg. 87-88). Forensics matched the shell casings from the apartment to the firearm. (PHT Vol. 1 pg. 88). The firearm was tested for DNA and latent prints, with no results connecting the gun to Brown. (PHT Vol. 1 pg. 89-90).

On July 3, 2014, the Court bound Brown over to District Court on all charges.

ARGUMENT

I. HEIGHTENED RELIABILITY IS REQUIRED IN CAPITAL CASES, REQUIRING INTENSIFIED SCRUTINY BY THE DISTRICT COURT.

Due to the finality of the death penalty, the United States Supreme Court requires heightened reliability in the decisions made by the jury and judge during the course of a capital trial. See, e.g., Zant v. Stephens, 462 U.S. 862, 884 (1983). In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court explained why the Constitution requires an individualized sentencing determination in a capital case even though there is no parallel requirement in non-capital cases:

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305.

As the Supreme Court has observed upon appellate review, “the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.” Zant v. Stephens, 462 U.S. 862, 884-885 (U.S. 1983). In short, death is different. Thompson v. Oklahoma, 487 U.S. 815, 856

(1988) ("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments").

A corollary basic principles of modern death penalty jurisprudence is that "[sentencing] juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193 (1976). This is, in essence, the core holding of Furman v. Georgia, 408 U.S. 238 (1972): "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189.

Accordingly, the defense urges this Court to review the legal issues presented herein to ensure such a "heightened reliability" in the result of this capital litigation. Unlike any other form of criminal litigation, capital litigation should be directed towards greater reliability in the outcome of the case, and great caution used in decisions concerning the manner and method for introducing evidence against the defendant.

II. THE MOTION BROUGHT BY THE STATE FAILED TO ESTABLISH THAT THE WITNESSES WILL BE UNAVAILABLE.

The State's motion asserts "several key witnesses have health issues which, if this trial is in fact set for 1 ½ years from now, may not survive to testify." The State failed to offer anything other than an unsworn, non-specific narrative to support a showing of need or exceptional circumstances justifying the use of deposition. No affidavit or medical records were offered in support of the State's request (Appendix, pages 36).

III. NO EVIDENCE WAS PRESENTED TO SHOW THAT THE WITNESSES WILL BE UNABLE TO ATTEND TRIAL.

Depositions should not be allowed in this case as the State failed to establish any of the named witnesses' inability to attend trial.

N.R.S. 174.175(1) states:

If it appears that a prospective witness ... may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court... may upon motion of a defendant or of the state and notice to the parties order that his testimony be taken by deposition... If the deposition is taken upon motion of the state, the court shall order that it be taken under such conditions as will afford to each defendant the opportunity to confront the witnesses against him.

The State speculates that the witnesses “may not survive to testify” until trial (Appendix, pages 36). Such speculation does not satisfy the requirements of the statute and certainly doesn’t provide a basis to deny Brown his right to confront witnesses against him before the jury.

A generalized fear that a witness may be unable to attend trial is insufficient to justify deposing a witness in a criminal case. Commonwealth v. Hilton, 19 Mass. L. Rep. 453 (Mass. Super. 2005), citing U.S. v. Rosenstein, 303 F. Supp. 210, 212 (S.D.N.Y. 1969). In Hilton, the defendant attempted to depose a homeless witness prior to trial pursuant to a Massachusetts statute similar to NRS 174.175. Hilton, 19 Mass. L. Rep. 453 (Mass. Super. 2005). The court held a deposition was not appropriate because the defendant did not establish the witness would likely be unavailable for trial. Id. The court reasoned that the witness lived in the same general area since the time of the crime, the witness could be contacted through his family, and a “generalized fear” that the witness would disappear was insufficient to support a finding of unavailability. Id.

Similar to Hilton, the State only asserted its “generalized fear” that the witnesses would be unavailable for trial. However, unlike Hilton,

where the defendant's fear of losing contact with the witness was more substantial due to the witness being homeless, the State has been in constant contact with the witnesses. The witnesses have not been demonstrated to be "Unavailable as Witnesses". To date all the witnesses listed by the State have been available to testify. Therefore, it has not sufficiently established the witnesses may be unavailable for trial.

Importantly the statutory provision relating to unavailability requires that there be a showing of a "then existing physical or mental illness or infirmity".

NRS 51.055 defines "Unavailable Witness" in relevant part as follows:

1. A declarant is "unavailable as a witness" if the declarant is:
 - (a) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
 - (b) Persistent in refusing to testify despite an order of the judge to do so;
 - (c) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (d) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of the declarant's statement has exercised reasonable diligence but has been unable

to procure the declarant's attendance or to take the declarant's deposit.

There is no foundation to assert that it is necessary that the witnesses should be deposed. The subject statute does not exist as a fallback position for the State when it is inconvenient for them to procure the attendance of a witness. It is a last resort, requiring extraordinary circumstances and only to be used upon a showing of good cause, in order to justify the violation to a defendant's right to a jury trial and confrontation of witnesses before the jury.

The State asserts it may be difficult to secure these witnesses' attendance at a jury trial, but such is not a sufficient reason under NRS 174.175 to allow the depositions, the State must show that the witnesses will be unavailable or fit within one of the statutory categories. The State asserts that the witnesses may "not survive to testify." Again, suppositions and the State's level of confidence do not provide a sufficient legal basis for the district court to invoke the use of the subject statute.

The district court should not have granted the State's motion based upon bare allegations. "While depositions are allowable in criminal cases, the circumstances permitting its use must be exceptional." McGuinness

v. State, 589 P.2d 1032, 1033 (N.M. 1979). The necessity must be clearly established, and the burden of showing that necessity is on the prosecution. Haynes v. People, 265 P.2d 995 (Col. 1954). Here, the State has failed to offer anything other than an unsworn narrative to support its request for a deposition. The Rules of the District Courts of the State of Nevada mandate that “factual contentions involved in any pre-trial or post-trial motion shall be initially presented and heard upon affidavits.” D.C.R. 13(6). The rule further delineates that the “court may set the matter for a hearing at a time in the future and allow oral examination of the affiants to resolve factual issues shown by the affidavits to be in dispute.” Id. The district court could not find that the witnesses may be unavailable to testify by relying on the prosecutor’s unsupported contentions. The defense very much disputes their allegations.

V. TAKING DEPOSITIONS OF THE WITNESSES WOULD VIOLATE BROWN’S CONFRONTATION CLAUSE RIGHTS.

From the founding of this country, the accused’s right to confront witnesses against them has been a protected right. The Confrontation Clause was enacted to prevent trial by deposition and affidavit. The rules of evidence and the N.R.S might have provisions which provide exceptions to that right to confrontation before a jury, however, the right

to confrontation, can only be abridged or truncated by the courts under extraordinary circumstances.

This Court has affirmed the importance of live, unfettered, face-to-face confrontation before the jury. Quoting the United States Supreme Court, it has been noted, “[w]e have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” Smith v. State, 111 Nev. 499, 502 (Nev. 1995) (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1987)).

From the mid-1960s through the 1990s, the right to confront witnesses had been eroded by the courts. See Ohio v. Roberts, 448 U.S. 56 (1980). More recently, the original purpose of the Confrontation Clause has been reasserted in a series of United States Supreme Court cases. See Crawford v. Washington, 541 U.S. 36 (2004); Davis v. Washington, 547 U.S. 813 (2006); Giles v. California, 554 U.S. 353 (2008); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011).

The witness stand is the place where witnesses give evidence. It is the place where the witness exposes himself to the jurors, a group of

strangers to the witness, and submits her credibility to their judgment. The confrontation clause requires that a witness give a statement under oath and submit to what has been termed the “ordeal of a cross-examination.” See Mattox v. United States, 156 U.S. 237, 244 (1895). It also requires that jury be able “to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.” Maryland v. Craig, 497 U.S. 836, 845-846 (1990). Demeanor evidence is importantly relevant on the issue of credibility. See California v. Green, 399 U.S. 149 (1979), and jurors are to be so instructed. As explained by Judge Learned Hand, a witness’s “demeanor is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared and have rested our affirmance of finding of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale,” Dyer v. MacDougall, 201 F.2d 265, 269 (2nd Cir. 1952).

Demeanor evidence is of considerable legal consequence. It can have a dispositive effect in the outcome of a case “in which the existence or nonexistence of a determinative fact depends upon the credibility to be given to testimonial evidence.” Harding v. Purtle, 275 Cal. App. 2d 396, 400, 79 Cal. Rptr. 772 (1969). Although demeanor evidence does not appear on the record, and for that reason has led to the rule that the fact finder is the exclusive judge of credibility, many is the case which is affirmed on appeal because the reviewing court necessarily deferred to the finding to the trier of fact on issues of credibility. This is particularly true in Nevada where the Court as a matter of Constitutional mandate may not weigh evidence in a criminal case.

The primary object of the [Confrontation Clause] was to prevent depositions or ex-parte affidavits...being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether his is worth of belief.

Kentucky v. Stincer, 782 U.S. 730, 736-37 (1987), quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895).

Underlying both the constitutional principles and the rules of evidence is a preference for live testimony. Live testimony gives the jury

the opportunity to observe the demeanor of the witness while testifying. United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007). William Blackstone long ago recognized this virtue of the right to confrontation, stressing that through live testimony, "and this [procedure] only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." 3 William Blackstone, *Commentaries on the Laws of England* 373-74 (1768).

More recently, the United States Court of Appeals for the Third Circuit voiced the importance of observing, firsthand, a witness's demeanor while testifying:

Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. Even beyond the precise words themselves lies the unexpressed indication of his alignment with one side or the other in the trial. It is indeed rarely that a cross-examiner succeeds in compelling a witness to retract testimony which is harmful to his client, but it is not infrequently that he leads a hostile witness to reveal by his demeanor -- his tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance -- that his evidence is not to be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness. The demeanor of a witness, as Judge Frank said, is 'wordless language.'

Gov't of the Virgin Islands v. Aquino, 378 F.2d 540, 548 (3rd Cir. 1967) (quoting Broad. Music, Inc. v. Havana Madrid Rest. Corp., 175 F.2d 77,80 (2nd Cir. 1949).

Courts have recognized that an experienced witness can be “cagey” under cross-examination, United States v. cote, 2007 WL 1000849 (S.D.N.Y. 2007), can anticipate the reach of a line of cross-examination and give nonresponsive and unwanted answers, People v. Auer, 393 Mich. 667, 674 (Mich. 1975), appear more comfortable in the presence of a jury than an inexperienced witness, Ledesma v. State, 141 Tex. Crim. 37, 39, 181 S.W, 2d 705 (Tex. Crim. App. 1944), and be rehearsed with the earlier videotaped deposition in preparation for live testimony at a subsequent trial.

At bottom, live testimony gives juror’s an opportunity to observe a witness’s demeanor. United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007). Live cross-examination also affords the defense the ability to use their most current investigative information and all information the defense learns up to and during the trial. In Yida, the Ninth Circuit found persuasive a statement in an amicus brief from Professor Richard D. Friedman of the University of Michigan Law School. Friedman

explained that "[w]itnesses who testify live at the current trial speak as of the current time," while witness testimony via "transcript speaks as of the time of the prior proceeding and cannot be updated" the accused can only use recently acquired information in cross-examining a witness if that testimony is live. The ability to cross-examine a witness at trial using the most current investigative information available cuts to the heart of the Sixth Amendment's confrontation clause. Yida, 498 F.3d 945, 951 (9th Cir. Cal. 2007).

In Brumley v. Wingard, 269 F. 3d 629, 640-42 (6th Cir. 2001) the United States Court of Appeals for the Sixth Circuit relied upon Barber v. Page, 390 U.S. 719, 722 (1968) wherein the Supreme Court squarely held that a witness is not unavailable when in custody serving a sentence in a different jurisdiction that the trial proceedings. Therefore, should Ives be granted probation and moved to Arizona under the interstate compact, she would not be unavailable.

In Dixon v. State, 27 Md. App. 443, 340 A.2d 396, 402 (Md. App. 1975) the court held that it's criminal depositions rule, virtually identical to Nevada's, had as its purpose the perpetuation of evidence and noted that its Supreme Court held in Kardy v. Shook, 237 Md, 524, 207 A.2d 83

(1965) that trial courts lack an inherent power to direct the taking of depositions. Other states are consistent in recognizing that while depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional. McGuinness v. State, 92 N.M. 441, 442, 589 P.2d 1032, 1033 (N.M. 1979). State v. Barela, 86 N.M. 104, 519 P.2d 1185 (N.M. Ct. App. 1974). The necessity must be clearly established, and the burden of showing that necessity is on the prosecution. Haynes v. People, 128 Colo 565, 265 P.2d 995 (1954). While depositions are allowable in criminal cases when the legislature so provides, the circumstances permitting their use must be extraordinary. The necessity must be clearly established, and the duty of showing that necessity is the burden of the prosecution. See United States v. Mitchell, 385 F. Supp. 1190, 1192 (D.C. D.C. 1974).

In the instant case, as the State is seeking the death penalty, the right to confrontation of witnesses before the jury is necessary and mandated, unless truly extraordinary circumstances exist. No such circumstances exist in this case, and instead it appears that the request for the deposition was made due to the prosecutor's displeasure over the time necessary for counsel to properly prepare the case for trial.

A body of case law supports that use of deposition testimony should only be allowed when defendant caused or intended the unavailability of the witness. In Giles v. California, 554 U.S. 353 (2008) the court allowed prosecutors to introduce statements the murder victim made to a police officer responding to a domestic violence call the decedent had previously made against the defendant. Id. at 356. On that previous call, the decedent had informed the responding officer that Giles had threatened to kill her. Id. at 357. The California trial court admitted in this previous statement to police and Mr. Giles was convicted. On appeal the California Supreme Court noted that the California Code allowed in previous statements by witnesses if the defendant caused the unavailability of the witness at trial—otherwise known as the doctrine of “forfeiture by wrongdoing.” Id. Reasoning that Giles had forfeited his right to confront the deceased by murdering her and thereby causing her unavailability at trial, the California Supreme Court affirmed Giles’ conviction. Id.

The Supreme Court reversed. The Court found that the Sixth Amendment provides that in all prosecutions the accused has the right to confront witnesses against them. Further, such a witness against the

accused will ordinarily be present at trial for cross-examination. Id. at 358 (citing Crawford v. Washington, 541 U.S. 36, 68 (2004)). In conclusion, the court wrote, “the Confrontation Clause is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” Id. Crawford, at 54 (quotation marks omitted.). Pursuant to that principle, the court conducted a historical analysis and concluded that the rule of forfeiture, historically, would not allow the introduction of a statement because the witness was dead and allegedly killed by the accused.

Justice Scalia, writing for the majority, found that the rule of forfeiture was historically used only when there was a showing that the accused acted with the purpose of preventing the witness from testifying at trial. Giles 361-373. Giles was charged with the murder of the woman whose statement was sought to be admitted, but, under common law principles her statement would not have been admissible in court unless it could be shown that Giles killed her with the specific purpose that she would be unavailable to testify at trial. As Justice Scalia puts it:

The manner in which the rule was applied makes plain that unfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused

a person to be absent but had not done so to prevent the person from testifying--as in the typical murder case involving accusatorial statements by the victim--the testimony was excluded unless it was confronted or fell within the dying-declarations exception.

Giles v. California, 554 U.S. 353, 361-362 (U.S. 2008).

Like, Crawford, the Giles decision declines to extend exceptions to the Confrontation Clause, “unheard of at the time of the founding or for 200 years thereafter.” Giles at 377.

NRS 174.175 is just such an exception. If it is applied as the state requests, based upon the mere allegation that it is “entirely possible” that a witness’s appearance at trial is “unlikely,” Brown’s Confrontation Clause right to confront witnesses against him before a live jury would be severely violated. Such an abridgement of the Confrontation Clause was not contemplated by the founders and authors of the Constitution and Bill of Rights and should not be extended by the bare statutory definitions of NRS 174.175. In essence NRS 174.175 is an improper extension and codification of the “forfeiture by wrongdoing” rule and should not be liberally or broadly used by the District Court in the granting of deposition. Without a specific finding that the witnesses “may not survive to testify”, any abridgment of Brown’s right to confront them is unconstitutional.

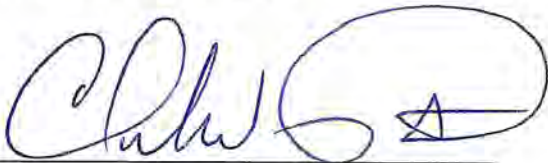
CONCLUSION.

Pursuant to the requirements of NRS 174.175, the 6th Amendment to the United States Constitution, and Art I §§ 3, 7, and 8 of Nevada Constitution, the State's motion should have been denied. Respondent district court erred and abused its discretion in granting the motion. The writ of mandamus or prohibition should therefore issue. In addition, Brown respectfully requests this Court grant a stay of the taking of a deposition until this matter has been decided.

DATED this 18 day of November 2022.

RESPECTFULLY SUBMITTED

CLARK W. PATRICK
C.W. PATRICK LAW

BY 

CLARK W. PATRICK
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Attorney for BROWN

CERTIFICATE OF COMPLIANCE

1. I hereby certify this writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(9) because this writ has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font of the Century Schoolbook style.

2. I further certify that this writ complies with the page and type-volume limitations of NRAP 21(d) because, excluding the parts of the writ exempted by NRAP 32(c)(2), it is either proportionally spaced, has a typeface of 14 points or more, and contains 5865 words.

3. Finally, I hereby certify that I have read this appellate writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this writ complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 21, which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event

that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18 day of November 2022.

RESPECTFULLY SUBMITTED

CLARK W. PATRICK
C.W. PATRICK LAW

BY 

CLARK W. PATRICK
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400 South Fourth Street, Ste. 500
Las Vegas, NV 89101
(702) 278-0599
Attorney for BROWN

CERTIFICATE OF MAILING

The undersigned does hereby certify that on November 18, 2022, a copy of the foregoing Petition for Writ of Mandamus or in the Alternative Petition for Writ of Prohibition and Motion for Stay of Deposition was filed with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Clark County District Attorney's Office
Regional Justice Center
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

I further certify that on November 18, 2022, a copy of the foregoing Writ was mailed to the following:

The Honorable Jacqueline Bluth
Eighth Judicial District Court, Department 6
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101


CLARK W. PATRICK, ESQ.