No. 23-5611

OCTOBER TERM, 2023

In the

# Supreme Court of the United States

DAVID STEPHEN MIDDLETON,

Petitioner,

v.

WILLIAM GITTERE, WARDEN,
AARON FORD, ATTORNEY GENERAL, STATE OF NEVADA

Respondent.

*On Petition for Writ of Certiorari*
*to the Supreme Court of the State of Nevada*

## Appendix

**CAPITAL CASE**

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## APPENDIX



[1] This supplemental appendix follows in order from Middleton's original appendix that was submitted with his request for an extension of time to file the petition for writ of certiorari.

# APPENDIX E

# APPENDIX E

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**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE**

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| DAVID S. MIDDLETON,<br><br>Petitioner,<br><br>vs.<br><br>RENE BAKER, Warden, and<br>CATHERINE CORTEZ MASTO,<br>Attorney General,<br><br>Respondents. | Case No. CR95-1882<br>Department 10<br><br>**OPPOSITION TO MOTION TO WITHDRAW EXHIBITS**<br><br>(Death Penalty Case) |

Petitioner David Stephen Middleton hereby opposes the State's motion to withdraw exhibits. This opposition is made and based on the following points and authorities and the entire file herein.

DATED this 25th day of April, 2014.

Respectfully submitted,

/s/ David S. Anthony
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Assistant Federal Public Defender

/s/ Albert L. Sieber
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## I. Introduction

On April 10, 2014, the Nevada Supreme Court issued an order of remand to determine whether Mr. Middleton formed an implied attorney-client relationship with Joseph Plater, the attorney currently representing the State from the Washoe County District Attorney's Office ("WCDA"), or whether Mr. Plater received or conveyed privileged information to Mr. Middleton during their meeting in January of 1996. An evidentiary hearing on that issue is currently scheduled with this Court for June 6, 2014.

On April 15, 2014, the WCDA filed a motion to withdraw exhibits with this Court ostensibly to conduct additional DNA testing of Exhibits 164 and 164A, which were admitted at Mr. Middleton's trial as evidence purportedly linking him to one of the alleged victims, Thelma Davila. The State does not contend that its motion is in any way relevant to the issues before the Court that are part of the Nevada Supreme Court's remand order, and it is apparent that it is not.

For the reasons stated below, Mr. Middleton opposes the State's motion and requests that this Court deny it. In the alternative, Mr. Middleton requests that this Court (1) stay its decision on the motion until the disqualification issue is adjudicated, and (2) order that any DNA testing of the items be done in a third party laboratory.

## II. Argument

District Court Rule 11 places an obligation on this Court to maintain the integrity of the evidence contained in the evidence vault. Mr. Middleton is presently challenging his conviction and death sentences, and part of his challenge concerns the issue of the ownership and integrity of Exhibits 164 and 164A, as well as other forensic evidence that was never were properly collected and stored. In such circumstances, allowing the State to withdraw the exhibits for testing poses risks to the integrity of the evidence, and to the reliability of any DNA examination and testing that is done on the items.

As explained in more detail below, Mr. Middleton requests that the State's motion be denied because (1) it is premature and not properly before this Court until it has resolved the issue of whether the WCDA should be disqualified from the instant case; (2) the exhibits

proffered by the State in support of its motion contain factual information that is both unreliable and inconsistent with its evidentiary presentation at trial and with its representations in the instant habeas corpus proceeding; and (3) the State does not demonstrate any good cause to re-test items that have already been subject to examination for biological material and prior DNA testing during post-conviction review. Until these serious issues of the WCDA's prosecutorial misconduct are resolved, this Court cannot properly discharge its obligations under DCR 11 to ensure the integrity of the evidence that the State seeks to withdraw from the evidence vault, nor can it have any confidence in the reliability of the DNA testing that it seeks to perform. Cf. State v. Jensen, 432 N.W.2d 913, 922 (Wis. 1988) (court must consider "whether the exhibit could be subjected to improper use by the jury" before allowing it to be taken into deliberations); Goodrich v. Indiana Michigan Power Co., 783 N.E.2d 793, 797-98 (Ind. App. 2003) (same).

**A. The WCDA's Motion Cannot Be Considered by the Court Until the Issue of its Disqualification from the Case is Decided.**

This Court cannot entertain any motions or requests from the WCDA that are unrelated to the resolution of the disqualification issue. State v. Eighth Judicial District Court (Zogheib), 130 Nev. __, __ P.3d __, 2014 WL 1258812, at *5 n.5 (Nev. 2014) (staying all proceedings in district court pending resolution of disqualification issue). Any order from this Court disqualifying the WCDA from the case necessarily means that it is presently conflicted from prosecuting Mr. Middleton for any unrelated homicide cases or from defending the judgment of conviction in Case No. CR95-1882. As the State explained in its motion to suspend the briefing schedule that was filed in the Nevada Supreme Court,

> If the district court or this Court finds there is a conflict between Plater and Middleton or the Washoe County District Attorney's Office and Middleton, any brief the undersigned files before the evidentiary hearing will probably not be accepted. Another member of the Washoe County District Attorney's Office or a different prosecuting agency will have to prepare to file another brief. Furthermore, any additional work the undersigned counsel prepares on Middleton's brief might be imputed to the Washoe County District Attorney's Office (or at least create an issue for further inquiry about a possible imputation), which would be relevant to whether the entire Washoe County District Attorney's Office should be disqualified.

Ex. 25, Middleton v. State, No. 62869, Motion to Suspend Briefing Schedule at 2 (filed April

23, 2014). Mr. Middleton completely agrees with the State on this point. By the State's own reasoning, its motion to withdraw exhibits "will probably not be accepted" by this Court because "a different prosecuting agency will have to prepare and file" another motion seeking release of exhibits if the WCDA is disqualified from the case. As explained by the Nevada Supreme Court in Zogheib, staying all proceedings unrelated to the disqualification motion is required, given the possibility that the entire WCDA will be removed from the case.

It is particularly important that this Court not entertain the State's motion at the present time because any disqualification order will undoubtedly be imputed to the entire WCDA. In Zogheib, the disqualified attorney "never made an appearance on this case, never obtained or reviewed discovery on this case, and never discussed the case with the deputy district attorney appointed to prosecute the case." Id. at *1. In addition, the district court expressly found "that the screening procedures in place at the Clark County District Attorney's Office were sufficient to ensure that Wolfson had no involvement in the prosecution." Id. at *5. Here, by contrast, there has been no screening of Plater from the case. Not only had there been no screening of Plater, but Plater is counsel of record for the State. He drafted the findings of facts and conclusions of law signed by the district court, and he is the representative for the State in Mr. Middleton's present appeal. Given the complete absence of screening and Plater's continued involvement in the case, any finding that he is disqualified will necessarily present the extraordinary circumstances contemplated in Zogheib requiring disqualification of the entire WCDA from this case. Cf. Collier v. Legakes, 98 Nev. 307, 310, 646 P.2d 1219, 1221 (1982) (noting that an "extreme case might exist even where the state has established an effective screen precluding the individual lawyer's direct or indirect participation in the prosecution").

In summary, under Zogheib and Collier, and in light of the State's concessions in its motion to suspend the briefing schedule on appeal, this Court cannot entertain any motions or requests by the WCDA until it resolves the issue of the office's disqualification.

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**B. The State's Extensive Prosecutorial Misconduct in this Case and the Inconsistency Between its Present Position and its Position in Prior Proceedings Warrants Denial of its Motion.**

In the exhibits to its motion, the State reveals for the first time the existence of exculpatory and impeachment information that is inconsistent with the position that it took at trial to obtain a conviction as well as in the instant habeas proceeding to successfully convince the district court to deny the petition. In his instant petition, Mr. Middleton alleged that the State presented false testimony from Dora Valverde that a blanket found in his storage unit was owned by the alleged victim, Thelma Davila. In the instant habeas proceeding, the State convinced the district court that its presentation of false testimony was harmless because Valverde testified at trial that the clothing items admitted as Exhibit 164A belonged to Davila. In the order drafted by the State, it represented that "Davila's sister and Davila's friend identified 'a black lacy top, and a red hair tie found in Middleton's storage unit as Davila's'" Findings of Fact and Conclusion of Law and Order at 9[1] (citing Middleton v. State, 114 Nev. 1089, 1098, 968 P.2d 296 (1998)) (emphasis in original).

The State's present motion implies a suspicion on its part that the very evidence that it relied upon at trial and in the instant habeas proceeding to excuse its presentation of false testimony as harmless does not really belong to Davila. The State does not proffer any facts to this Court justifying its material change in position, and it also has not made any attempt to reconcile the patent inconsistency between its positions as required under its ethical and constitutional disclosure obligations. Either the State has failed to disclose the factual basis for its change in position, which means that any such information must be disclosed as material exculpatory and impeachment information, or there is no such information and the State's motion should be denied because there is no good cause to justify its motion to withdraw the exhibits.

In addition, as explained below, the State's reliance on an un-named criminal informant as set forth in Exhibit D to its motion demonstrates again that the State has either

[1] Pleadings filed in Middleton's state case are designated by their title and the date of their filing.

failed to disclose material exculpatory and impeachment information in its actual possession during the litigation of the instant habeas proceeding, and/or that there are serious unresolved concerns regarding the complete absence of any demonstration of the reliability of the informant's statements. Just as above, regardless of whether the State's actions are due to misconduct on its part in failing to comply with its ethical and constitutional disclosure obligations, and/or whether the un-named informant is unreliable, the fact remains that this Court cannot release the evidence to the WCDA because there are serious problems that implicate both the reliability of the information before the Court and the integrity of the evidence should this Court release it as requested by the WCDA.

Mr. Middleton will address the State's prosecutorial misconduct first and then discuss the unreliability of the only information that has been proffered by the State as good cause warranting the release of evidence.

**1. The State's Motion Undermines the Factual and Legal Basis for the Denial of Mr. Middleton's Petition for Writ of Habeas Corpus.**

In his petition for writ of habeas corpus,[2] Mr. Middleton alleged that the Washoe County District Attorney's Office, consistent with a long-standing pattern and practice among Nevada prosecutors, failed to disclose exculpatory materials in violation of its obligations under Brady v. Maryland, 373 U.S. 83 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), and presented knowingly false testimony in violation of Napue v. Illinois, 360 U.S. 264, 269 (1959). See (Petition at 159-67 (Claim 9)). Mr. Middleton alleged, inter alia, that the state intentionally withheld impeachment evidence about a key state witness, Dora Valverde, the sister of Thelma Davila, regarding her mental retardation and serious memory problems. Id. at 165-66 (Claim 9(E)). Ms. Valverde provided crucial testimony linking Ms. Davila to three items of evidence found in the search of Mr. Middleton's storage shed, purporting to identify from photographs a pink plaid blanket (State's Exhibit No. 7), a black blouse (State's Exhibits No. 8), and a red hair tie (State's Exhibits Nos. 9). See 8/15/97 TT

[2] Citation references are taken from Middleton's Corrected Petition for Writ of Habeas Corpus (Post-Conviction).

at 390-94; Exs. 1-3.[3] The testimony of Ms. Valverde, an immigrant from Guatemala with limited English language skills, was presented through an interpreter, Sigrid Sattler – the wife of Elliott Sattler, then a prosecutor with the Washoe County District Attorney's Office, see 8/15/97 TT at 380-81; Ex. 13 to 6/6/11 Motion for Leave to Conduct Discovery, and now a judge of this Court, who has recused himself from hearing this matter. See 4/4/2014 Order. These three items purporting to link Mr. Middleton to Ms. Davila's disappearance were later introduced at trial as items of physical evidence, the blanket at State's Exhibit 178, 178-A and the black blouse and red hair tie as State's Exhibit 164A. See 9/2/97 TT at 1640-42, 8/27/97 TT at 1551-52; Exs. 5, 6.

The State, however, never disclosed to Mr. Middleton's trial counsel documents contained in the District Attorney's files demonstrating that it was aware that Ms. Valverde had significant memory problems – that she was, for example, unable to remember such basic facts as the date of her sister's disappearance, when she first notified authorities regarding her sister's disappearance, or even her sister's age – and that the District Attorney was also likely aware that Ms. Valverde was intellectually disabled.[4] For example, the State failed to disclose an undated note from "Sigrid" (presumably, Sigrid Sattler) to Nancy Cook, an investigator in that office:

> These are the few things that Dora Valverde is confused about: sister's age; date of sister's disappearance August 6th or 8th; not sure if Monday, when she last saw her sister was Thelma's day off or working day?; when supervisor called from Circus Circus she doesn't know if she called because Thelma didn't show up for work or if she called to ask Thelma to report to work; she doesn't remember when she reported Thelma missing (a couple of days after, the same day . . . etc.).

Pet. Ex. 273.

Likewise, the State failed to disclose to trial counsel an e-mail from Cynthia Wyatt,

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[3] Ms. Valverde also purported to identify three additional items of clothing found at or around the scene where her sister's body was recovered (State's Exhibits 10-12), but these items were not linked to Mr. Middleton.

[4] A November 14, 1997 report prepared by Dr. Martha Mahaffey, submitted to the trial court in advance of Mr. Middleton's sentencing, reveals that Ms. Valverde had an intelligence quotient (IQ) of 65, "in the mentally retarded range of intellectual functioning." Pet. Ex. 274.

another investigator in the Washoe County District Attorney's Office, to Nancy Cook (and copying lead prosecutor Tom Viloria), which revealed the depths of Ms. Valverde's memory problems and showed that she required intensive review of her prior recorded statements before testifying in the proceedings against Mr. Middleton:

> Nancy – Sigrid Sattler – will call me or if I'm not here next week, she will call you when she has finished going over Dora's transcribed statements with her. We will need to set a pretrial time for Dora ASAP after that. Sigrid can help with that, since she will be the interpreter we will use.

Ex. 10 to 6/6/11 Motion for Leave to Conduct Discovery (emphasis added); see also Ex. 11 to 6/6/11 Motion for Leave to Conduct Discovery (e-mail stating that Ms. Sattler would be present during the District Attorney's pre-trial preparation of Ms. Valverde).[5] Such evidence falls squarely within the classes of evidence covered under Brady and its progeny. "'Due process does not require simply the disclosure of 'exculpatory' evidence," but also evidence "to impeach the credibility of the State's witnesses." see Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000) (citing Kyles v. Whitley, 514 U.S. 419, 442 n.13, 445-51 (1995)). Such impeachment evidence includes that which would support an "attack[] upon the competence of a witness to testify, i.e., attacks based upon defects of perception, memory, communication and ability to understand the oath to testify truthfully," see Lobato v. State, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004); see also, e.g., Gonzalez v. Wong, 667 F.3d 965, 983 (9th Cir. 2011) (psychological reports indicating that state's witness was schizophrenic could have touched on "competency to perceive accurately and testify truthfully"; withholding the same violated Brady); Silva v. Brown, 416 F.3d 980, 987 -88 (9th Cir. 2005)

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[5] Little is known about Ms. Sattler's relationship with either Ms. Valverde or the Washoe County District Attorney's Office. Ms. Sattler acted as Ms. Valverde's translator during trial proceedings. See 08/15/97 TT at 380-81. The District Attorney's witness list describes her as simply as "translator," with a post office box address that undersigned counsel was unable to connect with any translation services provider or other business. Ex. 12 to 6/6/11 Motion for Leave to Conduct Discovery. From the above-quoted documents, it is apparent that Ms. Sattler undertook a role far in excess of a typical courtroom translator, maintaining communication with the prosecution team and reviewing prior statements with Ms. Valverde in advance of trial. Furthermore, as noted above, during the period she was working with Ms. Valverde, Ms. Sattler was married to Elliott Sattler, then a prosecutor with the Washoe County District Attorney's Office. These circumstances amounted to a violation of state law. See NRS 50.054 ("[A] person shall not act as an interpreter in a proceeding if the interpreter is . . . biased for or against one of the parties.").

(granting relief under Brady where the prosecution failed to disclose evidence that witness against the petitioner had suffered brain damage, noting that "evidence that calls into question a witness's competence to testify is powerful impeachment material"); United States v. Service Deli, 151 F.3d 938, 944 (9th Cir. 1998) (state violated Brady where it failed to disclose notes from a pre-trial interview with its witness indicating that the witness "had a stroke which affected his memory").

By itself, the State's suppression of evidence regarding Ms. Valverde's cognitive deficits states a meritorious claim under Brady. However, as explained in Mr. Middleton's petition, it is now plain that Ms. Valverde's testimony was false in at least one material respect – that the blanket she identified as belonging to her sister (State's Exhibit No. 7) in fact belonged to Mr. Middleton. See Pet. at 73-77; id. at 130-32; id. at 165-66. In light of the surrounding circumstances, where the State developed her testimony through the use of a translator with a close personal relationship to a member of the prosecuting agency and then presented her testimony at trial through the same translator, there is the probability that the testimony of Ms. Valverde – bereaved and intellectually disabled – was unduly influenced or manipulated by the State to provide inculpatory evidence against Mr. Middleton. Cf. Atkins v. Virginia, 536 U.S. 304, 320 & n.25 (2002) (recognizing the susceptibility of the intellectually disabled to suggestion and coercion).

On February 13, 2013, the district court (Elliott, J.) dismissed Mr. Middleton's petition, including his Brady claim, without an evidentiary hearing, upon finding that Mr. Middleton did not establish prejudice from the State's suppression of evidence. See 2/13/2013 Findings of Fact, Conclusions of Law, and Order at 9. This finding was premised in part on a fact urged by the State in its brief filed July 13, 2012 – that Ms. Valverde, along with Ms. Davila's friend Susana Gamboa, also purported to identify "a black lacy top[] and a red hair tie found in Middleton's storage unit as Davila's." See 7/12/2012 Opposition to Motion for Reconsideration at 4; 2/13/2013 Findings of Fact, Conclusions of Law, and Order at 9 (internal quotation marks omitted).

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The State's motion to withdraw evidence now calls into question the basis of the district court's dismissal of Mr. Middleton's petition, as well as the State's good faith in litigating its motion to dismiss. Specifically, the State now seeks to withdraw State's Exhibit 164A – which includes "the black lacy top and [the] red hair tie" urged by the State at trial as proof of Mr. Middleton's guilt and as a basis to deny his petition for writ of habeas corpus – in an attempt to link Mr. Middleton to the deaths or disappearances of women other than Ms. Davila. See 4/15/2014 Motion to Withdraw Exhibits at 4 & Affidavit of Kathleen Bishop ¶¶ 5-6, 14-15. In other words, the State now takes the position that these items may not have belonged to Ms. Davila at all, but rather to other women. This, in turn, calls into question whether any of Ms. Davila's purported identifications of her sister's items of clothing were accurate. It also calls into question the purported identifications of these items of clothing by Ms. Gamboa. In both ways, the State's acknowledgment that these items may have been misidentified dramatically changes the evidentiary picture upon which the district court erroneously dismissed Mr. Middleton's claims that the State violated Brady and presented false testimony from Ms. Valverde.[6]

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[6] Ms. Valverde's purported identifications and testimony suffer from additional problems. While Ms. Sattler provided translation services for the WCDA prior to trial and then proceeded to act as a translator at trial itself, Ms. Valverde's translator during the preliminary hearing was a different person, Carlos Gonzalez. See 7/14/95 HT at 12. Payment records indicate that Mr. Gonzalez may have met with Ms. Valverde on July 13, 1995, one day before the preliminary hearing. See Ex. 7. At the outset of the hearing itself, Mr. Gonzalez engaged in a series of untranslated exchanges with Ms. Valverde, for which he was admonished by the district court. See 7/14/95 HT at 12-14. Less than one month later, Mr. Gonzalez falsely testified under oath regarding his qualifications as an interpreter in a separate case; for his actions, he was convicted of perjury and two other crimes of dishonesty in April 1996, a little over one year before Mr. Middleton's case went to trial. Exs. 8, 9.

After pleading guilty, Mr. Gonzalez explained that he fabricated his credentials because of "a 'war' between he [sic] and the Washoe County Public Defender, Michael Specchio." Ex. 10. He conceded that he used "the court as a battlefield/Chess Board between Mr. Specchio and myself." Ex. 11. The "war" between Specchio and Gonzalez was initiated by Specchio's complaints that Mr. Gonzalez "committed numerous errors in translation" in a death penalty case; that Mr. Gonzalez had admitted "off the record" that he "generally 'slants' the translation in favor of the person (agency) paying his fees"; and that Mr. Gonzalez paraphrases the testimony "rather than conduct literal word-for-word interpretation." Ex. 12. Mr. Specchio formally lodged these complaints in an August 21, 1995, letter to the Washoe County judges, justices of the peace, court administrators, and

**2. The State's Motion Raises Additional Issues Regarding Its Misconduct in Failing to Disclose Exculpatory and Impeachment Information.**

There are additional troublesome aspects to the State's pending motion. According to Kathleen Bishop's affidavit, the State received information no later than July 16, 2013, that Evonne Haley, Mr. Middleton's girlfriend at the time of the alleged offenses for which he was convicted, admitted to being "involved with Middleton in five Murders and only charged with credit card theft." Motion to Withdraw Exhibits, Affidavit of Kathleen Bishop ¶¶ 13-14, 16-17. The State's motion, however, speaks only to Ms. Bishop's knowledge of Ms. Haley's alleged confessions, not that of other members of the Washoe County Sheriff's Office, the Washoe County District Attorney's Office, or other representatives of the State. In this regard, the State's motion leaves many questions unanswered. For example, the anonymous letters upon which Ms. Bishop relies (appended to her affidavit as Exhibit D) are undated, leaving few clues as to when they were prepared. One of the letters, however, indicates that, in addition to apparently being sent to the Montrose (Colorado) Sheriff's Office, it was sent to the Nevada Office of the Attorney General. In other words, it appears that the State already had possession of this document even before it was received from the Colorado authorities, but failed to disclose it to Mr. Middleton's counsel upon its receipt.

Likewise, the motion states that the Washoe County Sheriff's Office was contacted by the Colorado authorities on February 26, 2013, a mere two weeks after the State succeeded on its motion to dismiss Mr. Middleton's petition. The motion, however, gives no indication if there were earlier discussions by and among Colorado authorities and any representatives of the State of Nevada other than Ms. Bishop. While Mr. Middleton

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court masters, just over a month after Middleton's preliminary hearing. Id. The letter referred to improper conduct from the same time period as Mr. Middleton's preliminary hearing, during which he was represented by the Washoe County Public Defender's Office, including Mr. Specchio. Mr. Gonzalez had other reasons to slant his translations in favor of the State. At the time of Mr. Middleton's preliminary hearing, he was on probation in the State of Nevada for the sexual assault of several girls. Exs. 13-15. In short, no tribunal ever has had a chance to hear the testimony of Ms. Valverde through the use of an interpreter who did not bear a bias for the prosecution.

supposes that it is possible that the Colorado authorities first made contact with Nevada officials in February 2013 upon its first receipt of the anonymous letter, the State's motion permits the inference that Nevada officials were already engaged in discussions regarding Ms. Haley's purported incriminating statements at the same it was prevailing upon the district court to dismiss Mr. Middleton's petition.[7]

In any event, the State waited at least nine months – and perhaps longer – to advise Mr. Middleton of Ms. Haley's alleged incriminating statements, after the filing of his opening brief. The suppression of this material sounds in Brady to the extent it establishes Ms. Haley as a viable alternative suspect in the deaths for which Mr. Middleton was convicted, see, e.g., Petition at 81-84, 86, 89-91, 160-62, or provides evidence in mitigation of Mr. Middleton's alleged offenses, see, e.g., Green v. Georgia, 442 U.S. 95 (1979) (per curium) (reversing sentence of death where trial court excluded mitigating evidence of relative culpability among co-defendants); Rupe v. Wood, 93 F.3d 1434, 1439-41 (9th Cir. 1996) ("relative culpability is an appropriate mitigating circumstance" under Lockett v. Ohio, 438 U.S. 586 (1978), such that a petitioner is entitled to "use evidence that shows he did not play as great a role in the offense as the prosecution would like the jury to believe"); Nev. Rev. Stat. § 200.035 (listing as statutory mitigating circumstances that "[t]he defendant was an accomplice in a murder committed by another person and the defendant's participation in the murder was relatively minor" and/or that "[t]he defendant acted under duress or under the domination of another person," as well as "[a]ny other mitigating circumstance"); see also Banks v. Dretke, 540 U.S. 668 (2004) (granting habeas relief where prosecutor failed to provide Brady material both prior to trial and during the petitioner's post-conviction litigation). Moreover, by withholding this evidence for at least those nine months – and perhaps also including the time it was litigating Mr. Middleton's petition – the prosecution violated its professional obligations to "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused

[7] At the present time, the State has not disclosed the date contained on the post-marked envelope which would show when it first obtained the evidence.

or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information." See Nev. Rules of Prof'l Cond. 3.8(d); see also Nev. Rules of Prof'l Cond. 3.3 (duty of candor to tribunal).

Finally, the State's motion introduces as an exhibit an unsigned, undated affidavit in the name of Reno Police Department Detective David Jenkins in support an application of a search warrant for Ms. Haley's car. Motion to Withdraw Exhibits, Affidavit of Kathleen Bishop Ex. C. The form of this document reveals that the State is in the actual or constructive possession of additional materials which have not been previously produced to counsel. Specifically, this Jenkins affidavit is identified as pages 60 through 62 of a much larger document consisting of 242 pages, the remainder of which have apparently never been produced.

The extensive discovery litigation before trial should have led the State to disclose Jenkins' entire report. In its discovery pleadings, the WCPD specifically requested "[c]opies of all law enforcement reports from the State of Colorado used by the local authorities in the prosecution of the Defendant, David Stephen Middleton," as well as "[r]eports of all physical evidence regarding the death of Buffy Rice Donohue reviewed by local authorities and experts in the prosecution of the within matter." State v. Middleton, Motion for Discovery, at 4 (filed August 18, 1995). Likewise, subsequent counsel requested any and all documentation of alleged criminal activity against Middleton in the possession of the RPD, WCSO, and the Montrose Police Department. State v. Middleton, Combined Motion for Exculpatory Materials and For Discovery, at 11 (filed March 15, 1996). The State does not explain why these discovery requests would not have required the disclosure of Jenkins' 242 page deputy report.

**3. The State's Motion and Exhibits Fail to Include Any Indicia of Reliability of the "New" Information to Warrant Withdrawing the Evidence for Additional Examination and Testing.**

The State's motion relies heavily on two undated letters from an unnamed informant purporting to link Mr. Middleton, through the alleged hearsay statements of his former girlfriend Evonne Haley, to various murders and missing persons cases in Nevada, Colorado,

and Florida. See Motion to Withdraw Exhibits, Affidavit of Kathleen Bishop Ex. D. As explained below, however, these informant letters lack adequate indicia of reliability and cannot operate to satisfy this Court's independent obligation to protect and preserve evidence in its custody, which is placed at undue risk if this Court were to permit the WCDA to withdraw the evidence without making a reliable factual showing that such action is necessary.

Courts apply several factors to determine the reliability of an informant's tip. For example, a well-known informant's tip is held to be more reliable than an anonymous informant's tip. See McMorran v. State, 118 Nev. 379, 387, 46 P.3d 81, 86 (2002); Florida v. J.L., 529 U.S. 266, 271 (2000); Adams v. Williams, 407 U.S. 143, 146-47 (1972). That is because an anonymous informant typically cannot be questioned about the basis for knowing the information or their motive for providing the tip, nor can the anonymous informant be held accountable for providing false information in violation of the law. See J.L., 529 U.S. at 271; Adams, 407 U.S. at 146-47. Here, the letters on their face do not reveal the author's identity, and accordingly there is no basis for determining the veracity of the accusations or a possible motive for providing them.

The State's motion does not disclose whether any investigative agency provided these letters to it or, now that it is informed of its contents – from Colorado, Nevada, or otherwise – whether it has attempted to ascertain the identity of the informant. The State accordingly provides no evidence that the informant has "a proven track record of reliability," see Adams, 407 U.S. at 146-47, or that any investigative agency has concluded from a face-to-face encounter with the author that the allegations contained in the letter are worthy of belief, see, e.g., United States v. Romain, 393 F.3d 63, 73 (1st Cir. 2004) (noting that in-person meeting with informant bolsters reliability because "officers may perceive and evaluate personally an informant's mannerisms, expressions, and tone of voice" and because informant knows

that he may be tracked down and held accountable for false assertions).[8] Likewise, the State provides no evidence that the allegations contained in the letters have been corroborated by it or any other investigative agency. See Spinelli v. United States, 393 U.S. 410, 417-18 (1969).

Also relevant to an assessment of a confidential informant's reliability is whether the information contained therein is based on knowledge not available to the general public. See, e.g., McMorran, 118 Nev. at 387, 46 P.3d at 86 ("[R]eliability might come in the form of information . . . indicating that the informant has inside knowledge about the subject."); Alabama v. White, 496 U.S. 325, 332 (1990) (contrasting those circumstances where informant "demonstrated inside information," and therefore reliability, with those where "the general public" could discern those same facts). The letters submitted in support of the State's motion do not meet this standard regarding the relevant accusations against Mr. Middleton and Ms. Haley. On the one hand, the letters describe Ms. Haley's and the author's alleged involvement in various drug transactions – accusations that do not involve Mr. Middleton in any way and cannot possibly serve as the basis for the testing the State now seeks. On the other hand, the only conceivably relevant accusations – Ms. Haley's alleged admissions to being involved in various murders in Florida, Colorado, and Nevada – readily could be fabricated by anyone based on the vast amount of public information generated in this case. For example, a former Reno Police Department officer published in 2008 a book that purports to be a "true story" about the crimes allegedly committed by Mr. Middleton. See Jeff Kaye, Beware of the Cable Guy: From Cop to Serial Killer (Polimedia Pubs. 2008). By itself, this book covers most or all of the information that could be used to construct the informant's allegations, including Ms. Haley's conviction for credit-card theft in Nevada; her

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[8] Even if the State took the position that it has determined the identity of the informant, this fact would be insufficient to establish the reliability of the accusations contained therein absent additional disclosures to this Court and undersigned counsel. See, e.g., People v. Sparks, 734 N.E.2d 216, 223 (Ill. Ct. App. 2000) (despite State's representation that an informant was known to them, "the State seeks to limit access to its informant by classifying him or her as 'confidential,' thus preventing defendants, as well as this court, from assessing the informant's veracity or basis of knowledge").

relationship with Mr. Middleton; their life together in Florida, Colorado, and Nevada; suspicions that Ms. Haley and Mr. Middleton committed additional crimes in those jurisdictions; and the details of an alleged murder in Reno corresponding to the circumstances of the death of victim Katherine Powell. A simple Google search for either "Evonne Haley" or "David Middleton" reveals much of the same information.

In short, none of the relevant considerations support a finding that the informant letters upon which the State now so heavily relies are in any way reliable, and thus they cannot serve as a basis for the sort of fishing expedition upon which the State seeks to embark.

Finally, the Bishop affidavit establishes on its face that Mr. Middleton could not have been responsible for at least three of the four missing persons cases from Reno because he did not reside in the State of Nevada at the time. According to Bishop, during "the course of the Powell and Davila homicide investigation, it was learned that MIDDLETON had lived in the State of Colorado prior to moving to Reno in approximately April of 1994." Bishop Affidavit at ¶ 11. However, the State ostensibly seeks to connect Middleton to Reno missing persons cases from November 22, 1993 (Roberta Girard), August 16, 1993 (Audree Gagne), and January 1, 1994 (Barbara Siegal). Id. at ¶ 14. Ironically, Bishop asserts that Buffy Rice Donohue was missing from Montrose, Colorado, on November 21, 1993, just one day before Roberta Girard went missing in Reno, on November 22, 1993. Id. at ¶ 11. Other than the fact that the State is presently investigating missing persons cases from Reno, it does not proffer any evidence whatsoever that Mr. Middleton was even in the State of Nevada at the relevant time, and its allegations regarding Donohue tend to prove that he was not. The State's motion and the Bishop affidavit do not establish any factual basis for the proposition that Mr. Middleton could have been involved in these missing persons cases.

**C. This Court Should Deny the State's Motion Because it Lacks Sufficient Detail and Because the State has Already Removed Any Biological Material From the Requested Items.**

The State's request to remove evidence for testing from the court evidence vault contains insufficient detail to permit this Court to grant it. The State's request lacks any

indication of which specific DNA tests could be fruitful, fails to demonstrate that the Washoe County Crime Lab is actually capable of conducting any of these "novel" tests, and fails to acknowledge its duty to ensure that any material tested is not completely consumed. Nev. Rev. Stat. § 176.0912 requires this Court to "preserve" any biological evidence in its possession and provide notice if any materials will be consumed. This Court cannot comply with that mandate if it allows the State to remove potential biological evidence without knowing which DNA tests the State proposes, without establishing safeguards for ensuring that the State will not consume the samples in testing, and without reviewing and approving the State's proposed protocols. Moreover, the State has already examined the items in question for biological material and removed any it found for storage in its own lab, where it remains today. The State fails to demonstrate how, after a decade in an uncontrolled environment, the State could possibly find new biological material its experts failed to discover in 1995. This Court should deny the State's vague and unsupported motion. In the alternative, this Court should only permit testing to be conducted by an independent third-party laboratory, particularly if the samples would be consumed during testing.

**1. The State's Motion Lacks Sufficient Detail to be Granted.**

This Court simply cannot maintain proper oversight of the exhibits in its control and ensure the preservation of biological material without an understanding of what specific testing the State proposes. See Nev. Rev. Stat. § 176.0912. With no expert affidavit or any other such documentation, the State asks this Court to allow it to withdraw Exhibits 164 and 164A so that they may be "examined for the presence of DNA evidence," using "more sophisticated DNA detection and analysis methods" than were available at the time of Middleton's trial. Motion at 3. But the State does not identify which specific methods it plans to use to locate and test any biological material, it does not explain when the new testing technology became available, nor does it provide any assurances that testing will not consume any material actually located.

Since the State already removed all the biological material it found on the requested items in 1995, the State now requests not to retest that material (which remains in its

possession) but to re-examine items it already said contained no biological material. Ex. 16. At bottom, this appears to be a fishing expedition of materials that have been stored in an uncontrolled environment for a decade. The State offers no support for the proposition that new testing or examination methods can locate previously undetected biological material, rather than to detect DNA in existing biological samples. Indeed, it is difficult to understand what the State proposes doing with Exhibits 164 and 164A, beyond removing them into evidence so they can be "examined." Motion at 4. While the affidavit attached to the State's motion mentions Short Tandem Repeat ("STR") technology as a possible novel method for detecting "smaller amounts of DNA," it fails to explain how this method differs from the PCR analysis already conducted, which "gives forensic scientists the ability to analyze minute DNA samples." Office of the Inspector General, FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities (2004), available at http://www.justice.gov/oig/special/0405/chapter2.htm. The State also fails to explain how it proposes to detect "smaller amounts of DNA" when it already claims to have removed all the biological materials from the requested items. Ex. 16.

The State's vague request also does not indicate what set of testing standards the WCCL may use.[9] For example, it does not indicate whether the lab follows the FBI's Quality Assurance Standards for Forensic DNA Testing Laboratories. See http://www.fbi.gov/about-us/lab/biometric-analysis/codis/qas_testlabs. It does not indicate whether the testing will be conducted pursuant to a different set of standards. It does not refer to a specific (and qualified) individual who will conduct any testing. It does not explain how it will ensure that the samples are not contaminated (or further contaminated, since they may already be contaminated). It does not ensure that samples (assuming they are found) will not be

[9] When a defendant requests post-conviction DNA testing, he must specify, among other things, which tests he proposes, the results of prior DNA testing, and the specific evidence that can be subject to a genetic marker test. Nev. Rev. Stat.§ 176.0918. While this statute does not apply to the State, its requirements are instructive here. The statute balances the need for testing against the importance of preserving the integrity of evidence. This Court cannot conduct any similar balancing without knowing what testing the State proposes.

consumed during testing, or set forth a proposal for any safeguards if consumptive testing does occur. And it provides no explanation for why previously undetected biological material would now be detected. The State's Motion is wholly insufficient, and this Court should deny it.

**2. The State Already Analyzed Exhibits 164 and 164A for Biological Material.**

The State's failure to detail its proposal for testing is particularly relevant here, since the State has already examined every item in Exhibits 164 and 164A for "stains possibly containing biological material" and "hairs and fibers" and conducted DNA testing on every stain and hair root it found. Ex. 16. Notably, the State is not requesting the biological material it already tested for re-testing, which is housed not in this Court's evidence locker, but in the WCCL's frozen storage area. Ex. 17.[10] Instead, it is conducting a new search for biological material, but it has failed to provide any basis for believing biological material remains on the requested items. And the State's previous examination concludes just the opposite: the State already gathered all the available biological evidence from the items. Ex. 16. The State has not disclosed any information to Mr. Middleton that would provide a factual basis for questioning the prior examinations for biological material by WCCL personnel, and any such evidence must be disclosed under Brady.

In 1995, Washoe County Criminalist Maria Fassett initially examined all twenty-one items initially identified under control number Q04083.[11] Ex. 16. These items—described by Fassett as "twenty-one assorted items of lingerie"—were later presented as Exhibits 164 and 164A. Ex. 24. Fassett examined the items for biological material and trace evidence. The trace and biological materials she found were forwarded for DNA testing and are no longer held in this Court's vault. Ex. 16.

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[10] The State cannot test these items if the tests would consume the remaining samples without providing notice to Middleton. Nev. Rev. Stat. § 176.0912.

[11] The contemporaneous forensic reports refer to twenty-one items but the State lists only twenty in its affidavit. Compare Ex. 16 with State's Ex. 1 ¶ 5. It is unclear whether one item is now missing or if the affidavit the State submitted is incorrect on this point.

Fassett located stains possibly containing biological material on three of the twenty-one items, giving the stains control number P91785. DNA testing on two of the stains (from red and blue underwear) was consistent with Mr. Middleton's then-girlfriend, Evonne Haley, and her daughter, Natasha Hunter. Ex. 18. These results actually supported Mr. Middleton's position at trial (and the preliminary hearing testimony of Evonne Haley) that the items belonged to Haley. 7/18/1995 TT at 198 (Haley describing a "box of lingerie" she owned). Only one stain lacked sufficient biological material for testing, but the State has not represented to the Court that this sample has been tested or the results thereof, and that sample is housed not in this Court's evidence locker, but in the WCCL's own frozen storage area. Ex. 17.

Fassett also removed trace fibers and hair from the items, giving them control number P19186. Ex. 16. A second criminalist, Richard Berger, reviewed the trace evidence she collected and found one hair with a "small amount of tissue." Ex. 19. Once again, DNA testing on the hair was consistent with Haley. Ex. 18. The State also compared the hair samples to exemplars from the Buffy Rice Donohue homicide investigation, and another homicide investigation regarding Roberta Bendus. Ex. 20; Ex. 21.

In short, the State has already done the testing it now purports needs to be done in light of the allegations in the anonymous letter attached as State's Ex. 1 to its motion. It has made no showing that there is any biological material in the contents of Exhibits 164 and 164A or that novel testing methods could detect previously undetected biological material. This Court should deny the State's motion.

**3. <u>In the Alternative, Testing Should Be Conducted at an Independent Lab.</u>**

DNA testing is plagued with problems concerning the reliability of testing. As Justice Alito recently observed:

> [F]orensic DNA testing rarely occurs [under] idyllic conditions. Crime scene DNA samples do not come from a single source obtained in immaculate conditions; they are messy assortments of multiple unknown persons, often collected in the most difficult conditions. The samples can be of poor quality due to exposure to heat, light, moisture, or other degrading elements. They can be of minimal or insufficient quantity, especially as investigators push DNA

> testing to its limits and seek profiles from a few cells retrieved from cigarette butts, envelopes, or soda cans. And most importantly, forensic samples often constitute a mixture of multiple persons, such that it is not clear whose profile is whose, or even how many profiles are in the sample at all. All of these factors make DNA testing in the forensic context far more subjective than simply reporting test results . . . .

Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 81 (2009) (Alito, J., concurring) (quoting Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing, 58 Emory L.J. 489, 497 (2008)). Moreover, the only specific testing the State mentioned in its motion, STR analysis, is "plagued by issues of suboptimal samples, equipment malfunctions and human error, just as any other type of forensic DNA test." Id. (quoting R. Michaelis, R. Flanders, & P. Wulff, A Litigator's Guide to DNA 341 (2008)). In fact, STR is particularly sensitive to mishandling. Id.

Thus, if the State now proposes (and again it is unclear based on its request) to scour the various clothing items for DNA, decades after they were discovered and lodged with the Court, and after they have been handled repeatedly by individuals in the WCCL, it is imperative that this Court impose restrictions on the handling of the items to prevent contamination and to ensure accurate results. Rather than release the items to the WCCL, they should be released to a third party crime lab, pursuant to a detailed testing protocol.

First, the WCCL lab's previous work in this case has been sub-optimal, to say the least. It failed to maintain a chain of custody for critical exemplar hairs from one of the victims, and only "discovered" the hairs on some items purportedly found in Middleton's storage unit after it obtained the exemplars. Exs. 22-23. The lab apparently switched the samples from the two different victims—at one point saying that DNA was consistent with Davila, then saying it was consistent with Powell, and characterizing the mistake a "clerical error." Compare 7/16/1995 Summary Draft Report (finding hair root from plaid blanket (Q04127) matched Davila) with 4/16/1996 Final Report (finding hair root from same blanket matched Powell).

Second, the twenty-one clothing items in question have been stored together in a single container for the last decade, making it likely that, if there is in fact any biological material, it is a mixed sample. This is especially the case here, where the State's prior testing on these items revealed two different DNA sequences (consistent with Haley's and her daughter). CITE to DNA tables. As the State's expert already pointed out, mixed samples require "subjective" and nuanced interpretation. 7/18/1995 TT at 133. An independent third party lab, rather than the State, should conduct any testing that requires subjective interpretation.

Third, the WCCL does not have the capabilities to conduct the most sensitive DNA testing. See Washoe Sherriff, Biology Unit, http://www.washoesheriff.com/sub.php?page=biology-unit&expand=Forensic%20Sciences ("The WCSO DNA Casework/Database Sections do not provide [mitochondrial DNA (mtDNA) analysis.]"). If more sensitive testing is warranted (and the State has not demonstrated it is), it is appropriate to send it to a third party lab that can conduct more sensitive and reliable tests.

Finally, an independent third party lab could conduct the tests to ensure that any potential exculpatory evidence is discovered and retained. For example, Middleton has maintained that the items in Exhibits 164 and 164A belong to his former girlfriend, Haley. Any further DNA testing should be compared to samples from Haley and her children, especially since prior DNA testing was consistent with them. Ex. 18. In addition, any DNA profile should also be checked against the known exemplars of all WCCL and WCSO personnel that have handled the evidence. The third party lab could also ensure that all interested parties—the State and Middleton—receive copies of test results.

## III. Conclusion

For the foregoing reasons, the State's motion to withdraw Exhibits 164 and 164A should be denied. In the alternative, the State's motion (1) should not be entertained until the resolution of the issue of the WCDA's disqualification from the case, and (2) any

examination or testing of the items should be performed by a third party laboratory.

DATED this 25th day of April, 2014.

Respectfully submitted,

/s/ David S. Anthony
DAVID S. ANTHONY
Assistant Federal Public Defender

/s/ Albert L. Sieber
ALBERT L. SIEBER
Assistant Federal Public Defender

Attorneys for Petitioner

**AFFIRMATION PURSUANT TO NRS 239B.030**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 25th day of April, 2014.

RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
David Anthony
Assistant Federal Public Defender

/s/ Albert L. Sieber
ALBERT L. SIEBER
Assistant Federal Public Defender

**CERTIFICATE OF SERVICE**

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 25th day of April, 2014, a true and correct copy of the foregoing NOTICE OF APPEARANCE, was filed electronically with the Second Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Richard A. Gammick
Washoe County District Attorney
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Joseph R. Plater
Washoe County District Attorney
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/s/ Jeremy Kip
An employee of the Federal Public Defender

**EXHIBITS TO OPPOSITION TO MOTION TO WITHDRAW EXHIBITS**

1 State trial exhibit number 7 (photograph-blanket), State v. Middleton, Case No. CR95-1882, 8/15/97

2 State trial exhibit number 8 (photograph - ladies black blouse), State v. Middleton, Case No. CR95-1882, 8/15/97

3 State trial exhibit number 9 (photograph - red hair holder), State v. Middleton, Case No. CR95-1882, 8/15/97

4 State trial exhibit number 178-A, (bag containing pink/peach plaid blanket) State v. Middleton, Case No. CR95-1882, 9/02/97

5 State trial exhibit number 164-A, (bag containing three items including black lace blouse) State v. Middleton, Case No. CR95-1882, 8/27/97

6 State trial exhibit number 164-A, (bag containing three items including red hair holder) State v. Middleton, Case No. CR95-1882, 8/27/97

7 Vendor Payment History printout re Carlos M. Gonzalez, 071395 Middleton, Washoe County Office of the Comptroller, 8/03/95

8 Excerpt of Reporter's Transcript of Proceedings, Sentencing, Three-Judge Panel, State v. Carlos Gutierrez, Case No. CR04-1795, 8/08/95

9 Judgment, State v. Carlos Miguel Gonzalez, Case No. CR96-0562, 6/04/96

10 Presentence investigation report re Carlos Miguel Gonzalez, Case No. CR96-0562, 5/29/96

11 Defendant's Statement, Carlos M. Gonzalez, 4/08/96

12 Correspondence to District Court Judges, Justices of the Peace and Court Masters from Michael R. Specchio re Carlos Gonzales - Interpreter, Washoe County Public Defender, 8/21/95; and partial transcript of a preliminary hearing in State v. Durham, Washoe County Case No. RJC 71,663, 6/05/95

13 Order Granting Probation, People v. Carlos Gonzalez, 6/03/93

14 Reno Police Department, Convicted Person Registration re Carlos Gonzalez, Discharge date: 6/98

15 Report of sentence/abstract of judgment re Carlos Gonzalez, People v. Gonzalez, Case No. CR137069

16 Forensic lab report by Maria Fassett, criminalist, Washoe County Sheriff's Office, Forensic Science Division, 4/21/95

17 Memorandum to DDA T. Viloria from David L. Atkinson, 7/09/97

18 Correspondence from Renee Romero to Tom Viloria enclosing tables of DNA results from the Middleton case, 5/08/97

19 Forensic lab report by Richard A. Berger, criminalist, Washoe County Sheriff's Office, Forensic Science Division, 4/27/95

20 Forensic lab report by Richard A. Berger re Buffy Rice Donohue, criminalist, Washoe County Sheriff's Office, Forensic Science Division, 6/09/95

21 Forensic lab report regarding Roberta Bendus by Richard A. Berger, criminalist, Washoe County Sheriff's Office, Forensic Science Division, 4/27/95

22 Forensic Science Division Examination Request Form by T. Lowry regarding blanket - pink + white color, Washoe County Sheriff's Office, 5/10/95

23 Forensic Science Division Examination Request Form by T. Lowry regarding white/brown/cream reversable blanket opposite side purple/brown/cream, Washoe County Sheriff's Office, 5/10/95

24 Photographs of state trial exhibit 164

25 Motion to Suspend Briefing Schedule, Middleton v. State, Nev. Sup. Ct. No. 62869, 4/23/14