

COMMISSION ON JUDICIAL SELECTION APPLICATION

EIGHTH JUDICIAL DISTRICT
DEPARTMENT VII

Replace the highlighted spaces on this page with the vacancy you seek to fill
VII, XXIX, C or N
Candidates may only choose one department.

By

(Patrick A. Ferguson)



Personal Information

1.	Full Name	Patrick Antonio Ferguson
2.	Have you ever used or been known by any other legal name (including a maiden name)? If so, state name and reason for the name change and years used.	No.
3.	How long have you been a continuous resident of Nevada?	19 years.
4.	City and county of residence	City of Las Vegas, Clark County.
5.	Age	52

Employment History

6. Please start with your current employment or most recent employment, self-employment, and periods of unemployment for the last 20 years preceding the filing of this Application.

Current or Last Employer	Nye County District Attorney’s Office
Phone	(775) 751-7080
Physical Address & Website	1520 East Basin Avenue, Pahrump, NV 89060 https://nyecountynv.gov/303/District-Attorney
Date(s) of Employment	January 2023 – Present
Supervisor’s Name and Title	Bradley J. Richardson, Chief Deputy District Attorney
Your Title	Senior Deputy District Attorney
Describe Your Key Duties	Prosecution of crimes committed in Nye County, NV.
Reason for Leaving	

Previous Employer	Douglas County District Attorney’s Office
Phone	(775) 782-9800
Address & Website	1038 Buckeye Road, Minden, NV 89423 https://dcnvda.org/Home.shtml
Date(s) of Employment	February 2020 – January 2023
Supervisor’s Name and Title	Erik Levin, Chief Deputy District Attorney
Your Title	Deputy District Attorney

Describe Your Key Duties	Prosecution of crimes committed in Douglas County, NV.
Reason for Leaving	Accepted employment with Nye County DA's Office.

Previous Employer	Nye County District Attorney's Office
Phone	(775) 751-7080
Address & Website	1520 East Basin Avenue, Pahrump, NV 89060 https://nyecountynv.gov/303/District-Attorney
Date(s) of Employment	September 2013 – February 2020
Supervisor's Name and Title	Kirk D. Vitto, Chief Deputy District Attorney
Your Title	Deputy District Attorney
Describe Your Key Duties	Prosecution of crimes committed in Nye County, NV.
Reason for Leaving	Did not wish to work for D.A. Chris Arabia.

Previous Employer	Hua Ferguson Law Offices
Phone	(702) 239-5715
Address & Website	1810 East Sahara Avenue, Suite 1408, Las Vegas, NV 89104 N/A
Date(s) of Employment	April 2013 – September 2013
Supervisor's Name and Title	Jeannie N. Hua, Esq. Partner
Your Title	Partner
Describe Your Key Duties	Criminal defense of indigent persons charged with crime in Clark County courts, after the Clark County Public Defender's Office declared a conflict of interest.
Reason for Leaving	Accepted employment with the Nye County DA's Office.

Previous Employer	Office of the Attorney General
Phone	(702) 486-3420
Address & Website	555 E. Washington Avenue, Suite 3900, Las Vegas, NV 89101

	https://ag.nv.gov/
Date(s) of Employment	October 2012 – April 2013
Supervisor's Name and Title	Russell Smith, Chief Deputy Attorney General
Your Title	Deputy Attorney General
Describe Your Key Duties	Fraud Unit: Vertical prosecution of miscellaneous fraud-related crimes.
Reason for Leaving	To join my wife in her private practice and afford her a hiatus.

Previous Employer	Office of the Attorney General
Phone	(702) 486-3420
Address & Website	555 E. Washington Avenue, Suite 3900, Las Vegas, NV 89101 https://ag.nv.gov/
Date(s) of Employment	March 2012 – September 2012
Supervisor's Name and Title	Russell Smith, Chief Deputy Attorney General
Your Title	Director
Describe Your Key Duties	Workers' Compensation and Insurance Fraud Units: Administration of two prosecution units, including staff in Reno and Las Vegas. In addition to prosecution of cases, responsibilities included training, formulation of forms and procedures, insurance industry outreach, preparation of press releases, public speaking, budget administration, and supervision of attorneys, investigators, and support staff.
Reason for Leaving	Sought a position involving more prosecution and less administration.

Previous Employer	Office of the Attorney General
Phone	(702) 486-3420
Address & Website	555 E. Washington Avenue, Suite 3900, Las Vegas, NV 89101 https://ag.nv.gov/
Date(s) of Employment	November 2011 – March 2012
Supervisor's Name and Title	Russell Smith, Director
Your Title	Senior Deputy Attorney General
Describe Your Key Duties	Workers' Compensation Fraud Unit: Vertical prosecution of misdemeanor and felony violations of the Nevada Industrial Insurance Act and Unemployment Compensation Law.

Reason for Leaving	Transferred to a supervisory/administrative position.

Previous Employer	Office of the Attorney General
Phone	(702) 486-3420
Address & Website	555 E. Washington Avenue, Suite 3900, Las Vegas, NV 89101 https://ag.nv.gov/
Date(s) of Employment	December 2007 – November 2011
Supervisor's Name and Title	Brian T. Kunzi, Director
Your Title	Senior Deputy Attorney General
Describe Your Key Duties	Insurance Fraud Unit: Vertical prosecution of felony Insurance Fraud, Arson, and related violations.
Reason for Leaving	Transferred to a different prosecution unit to meet staffing needs.

Previous Employer	Office of the Attorney General
Phone	(702) 486-3420
Address & Website	555 E. Washington Avenue, Suite 3900, Las Vegas, NV 89101 https://ag.nv.gov/
Date(s) of Employment	October 2003 – December 2007
Supervisor's Name and Title	Brian T. Kunzi, Director
Your Title	Deputy Attorney General
Describe Your Key Duties	Workers' Compensation Fraud Unit: Vertical prosecution of misdemeanor and felony violations of the Nevada Industrial Insurance Act and Unemployment Compensation Law.
Reason for Leaving	Transferred to a different prosecution unit for a promotion.

Previous Employer	Mendocino County Public Defender's Office
Phone	(707) 234-6950
Address & Website	175 South School Street, Ukiah, CA 95482 https://www.mendocinocounty.org/government/mendocino-public-defender
Date(s) of Employment	August 2002 – October 2003

Supervisor's Name and Title	Jeffrey Thoma, Public Defender
Your Title	Deputy Public Defender
Describe Your Key Duties	Defense of indigent persons charged with felony crimes.
Reason for Leaving	Accepted employment with Nevada AG's Office.

Previous Employer	Clark County District Attorney's Office
Phone	(702) 671-2500
Address & Website	200 Lewis Avenue, 3rd Floor, Las Vegas, NV 89155 https://www.clarkcountynv.gov/government/departments/district_attorney/index.php
Date(s) of Employment	May 2001 – August 2002
Supervisor's Name and Title	Gary Booker, Chief Deputy District Attorney Gary Guymon, Chief Deputy District Attorney
Your Title	Deputy District Attorney
Describe Your Key Duties	Prosecution of crimes committed in Clark County, NV, on the Vehicular Crimes Unit and Trial Team 5B.
Reason for Leaving	Accepted employment with the Mendocino Co. P.D.'s Office.

Previous Employer	Clark County District Attorney's Office
Phone	(702) 671-2500
Address & Website	200 Lewis Avenue, 3rd Floor, Las Vegas, NV 89155 https://www.clarkcountynv.gov/government/departments/district_attorney/index.php
Date(s) of Employment	September 2000 – May 2001

Supervisor's Name and Title	Daniel Ahlstrom, Chief Deputy District Attorney James Tufteland, Chief Deputy District Attorney
Your Title	Law Clerk
Describe Your Key Duties	Bad Check Unit: Screened cases for prosecution; conducted legal research; negotiated cases with defense counsel; assisted and advised staff. Post-Conviction Processes: Wrote appellate briefs, answers to post-conviction petitions for writ of habeas corpus, and oppositions to other post-conviction motions.
Reason for Leaving	Promoted to Deputy District Attorney.

Previous Employer	Las Vegas City Attorney's Office
Phone	(702) 229-6201
Address & Website	495 South Main Street, Las Vegas, NV 89101 https://www.lasvegasnevada.gov/Government/Departments/City-Attorney
Date(s) of Employment	December 1998 – September 2000
Supervisor's Name and Title	Benard Little, Chief Deputy City Attorney
Your Title	Deputy City Attorney
Describe Your Key Duties	Prosecuted various misdemeanor crimes. Responsibilities included all aspects of litigation, from case screening through trial and appeal.
Reason for Leaving	Accepted employment with the Clark Co. D.A.'s Office.

Previous Employer	Schreiber & Shiff, L.L.P.
Phone	(619) 237-9500
Address & Website	555 West Beech Street, Suite 550, San Diego, CA 92101 N/A
Date(s) of Employment	October 1997 – December 1998
Supervisor's Name and Title	Jonathan M. Shiff, Esq., Partner
Your Title	Associate Attorney
Describe Your Key Duties	Handled all aspects of civil litigation. Practice areas included: personal injury, unlawful detainer, construction defect, medical malpractice, and business litigation.
Reason for Leaving	Accepted employment with the Las Vegas City Attorney's Ofc

Educational Background

7. List names and addresses of high schools, colleges and graduate schools (other than law school) attended; dates of attendance; certificates or degrees awarded; reason for leaving.

Bachelor of Arts, Economics, July 1992

University of California Los Angeles

405 Hilgard Avenue

Los Angeles, California 90095

-attended from September 1987 through July 1992

-left because I graduated

University of Redlands

1200 East Colton Avenue

Redlands, California 92373

-attended from August 1986 through May 1987

-left to transfer to UCLA

High School Diploma, June 1986

Pilgrim School

540 S. Commonwealth Ave.

Los Angeles, CA 90020

-attended from Junior High and High School, September 1980 through June 1986

-left to go to college

8. Describe significant high school and college activities including extracurricular activities, positions of leadership, special projects that contributed to the learning experience.

I graduated high school at the age of 16, served as senior class vice-president, and was a finalist to become a National Merit Scholar, enjoying a full academic scholarship for my first year of college at the University of Redlands, where I played intercollegiate volleyball. I made the Dean's Honor List at UCLA and was president of my college fraternity.

9. List names and addresses of law schools attended; degree and date awarded; your rank in your graduating class; if more than one law school attended, explain reason for change.

Juris Doctor, December 1996

79th percentile

University of San Diego School of Law

5998 Alcalá Park

San Diego, California 92110

10. Indicate whether you were employed during law school, whether the employment was full-time or part-time, the nature of your employment, the name(s) of your employer(s), and dates of employment.

I was not employed during law school but interned with the San Diego County District Attorney's Office approximately 12 hours/week.

11. Describe significant law school activities including offices held, other leadership positions, clinics participated in, and extracurricular activities.

I was a member of the San Diego Law Review, tasked with cite-checking and editing proposed articles for publication, which occupied approximately 15 to 20 hours per week.

I volunteered with the Domestic Violence Prevention Project's Temporary Restraining Order Clinic, assisting domestic violence victims complete restraining order applications.

I was a member of Phi Alpha Delta Law Fraternity.

I placed first in the "Race Judicata" 5K run sponsored by the Public Interest Law Foundation.

Law Practice

12. State the year you were admitted to the Nevada Bar.

1997, Bar # 6293

13. Name states (other than Nevada) where you are or were admitted to practice law and your year of admission.

California: 1998, Bar # 195246

14. Have you ever been suspended, disbarred, or voluntarily resigned from the practice of law in Nevada or any other state? If so, describe the circumstance, dates, and locations.

No

15. Estimate what percentage of your work over the last five years has involved litigation matters, distinguishing between trial and appellate courts. For judges, answer questions 16-20 for the five years directly preceding your appointment or election to the bench.

Approximately 100% of my work over the last five years has involved litigation matters. Of that, approximately 99% was in trial court and approximately 1% was in appellate court.

16. Estimate percentage of time spent on:

Legal Discipline	Percentage of Practice
Domestic/family	0
Juvenile matters	3
Trial court civil	0
Appellate civil	0
Trial court criminal	95
Appellate criminal	2
Administrative litigation	0
Other: Please describe	0

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17. In the past five years, what percentage of your litigation matters involved cases set for jury trials vs. non-jury trials?

I would estimate that approximately 50% of my cases were for offenses that proceeded or would have proceeded to jury trial, versus approximately 50% that proceeded or would have proceeded to bench trial.

18. Give the approximate number of jury cases tried to a conclusion during the past five years with you as lead counsel. Give the approximate number of non-jury cases tried to a decision in the same period.

Jury Trials: 3.

Bench Trials: approximately 10.

19. List courts and counties in any state where you have practiced in the past five years.

Ninth Judicial District Court, Douglas County, Nevada

Fifth Judicial District Court, Nye County, Nevada

East Fork Justice Court, Douglas County, Nevada

Tahoe Justice Court, Douglas County, Nevada

Tonopah Justice Court, Nye County, Nevada

Beatty Justice Court, Nye County, Nevada

Pahrump Justice Court, Nye County, Nevada

20. List by case name and date the five cases of most significance to you (not including cases pending in which you have been involved), complete the following tables:

Case 1
Case name and date: State v. Angel David Uribe (2015)
Court and presiding judge and all counsel: Fifth Judicial District Court, Honorable Kim Wanker presiding. Opposing counsel: Lisa Chamlee.
Importance of the case to you and the case's impact on you: This case was important to me because my efforts led to this habitual criminal's conviction of Attempted Murder with Use of a Deadly Weapon, a notoriously difficult charge to prove.
Your role in the case: I was sole counsel.

Case 2
Case name and date: State v. Christopher Hopkins (2006)
Court and presiding judge and all counsel: Eighth Judicial District Court, Honorable Sally Loehrer presiding. Opposing counsel: Craig Mueller.
Importance of the case to you and the case's impact on you: This case was important to me because, even after the court issued to the jury an advisory instruction to acquit, I was able to convince them of the defendant's guilt beyond a reasonable doubt and secure a conviction, which the Supreme Court affirmed on appeal.
Your role in the case:

I was sole counsel.

Case 3
Case name and date: People v. David Geurts (2003)
Court and presiding judge and all counsel: Mendocino County Superior Court, California, Honorable Ronald Brown presiding. Opposing counsel: Katherine Houston.
Importance of the case to you and the case's impact on you: This case was important to me because my efforts led to my client's acquittal at trial of the most serious charge, with the jury hung 11 to 1 and 10 to 2 in favor of acquittal on the remaining charges. No further prosecution was pursued.
Your role in the case: I was sole counsel.

Case 4
Case name and date: State v. Tomarey K. Patterson (2015)
Court and presiding judge and all counsel: Fifth Judicial District Court, Honorable Robert Lane presiding. Opposing counsel: Nathan Gent.
Importance of the case to you and the case's impact on you: This case was important to me because our efforts led to the defendant receiving the maximum sentence for the medical neglect that led to his son's blindness in one eye.
Your role in the case: I was lead counsel.

Case 5
Case name and date: People v. Thomas Gunn (2002)
Court and presiding judge and all counsel: Mendocino County Superior Court, California, Honorable Ronald Brown presiding. Opposing counsel: Marianna Lehr.
Importance of the case to you and the case's impact on you: This case was significant because I got married in the midst of this trial. Anticipating it to be a one-week trial commencing 2 weeks before my wedding day, I found myself flying straight home the day after my wedding to conclude the presentation of evidence on the Monday of Week 3. It was my first jury trial as a defense attorney and my first jury trial in the State of California.
Your role in the case: I was sole counsel.

21. Do you now serve, or have you previously served as a mediator, an arbitrator, a part-time or full-time judicial officer, or a quasi-judicial officer? To the extent possible, explain each experience.

No

22. Describe any pro bono or public interest work as an attorney.

Nearly my entire career has been devoted to public interest, working as either a prosecutor or indigent criminal defense counsel.

23. List all bar associations and professional societies of which you are or have been a member. Give titles and dates of offices held. List chairs or committees in such groups you believe to be of significance. Exclude information regarding your political affiliation.

Nevada Attorneys for Criminal Justice, Clark County Bar Association, California Public Defenders' Association, American Bar Association, National Trial Lawyers Association, San Diego County Bar Association, Phi Alpha Delta Law Fraternity.

24. List all courses, seminars, or institutes you have attended relating to continuing legal education during the past five years. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?

Yes, I am in compliance with my CLE requirements. I typically attend the annual Nevada Prosecutors Conference for my CLE but I also attended the week-long NCFI (National Computer Forensics Institute) approximately 5 years ago.

25. Do you have Professional Liability Insurance or do you work for a governmental agency?

I work for a governmental agency, the Nye County District Attorney's Office, so I do not presently carry professional liability insurance.

Business & Occupational Experience

26. Have you ever been engaged in any occupation, business, or profession other than a judicial officer or the practice of law? If yes, please list, including the dates of your involvement with the occupation, business, or profession.

Yes, I worked as a legal assistant for Arnold & Porter, a prominent international law firm, from March 1993 until August 1994.

27. Do you currently serve or have you in the past served as a manager, officer, or director of any business enterprise, including a law practice? If so, please provide details as to:

- a. the nature of the business
- b. the nature of your duties
- c. the extent of your involvement in the administration or management of the business
- d. the terms of your service
- e. the percentage of your ownership

No.

28. List experience as an executor, trustee, or in any other fiduciary capacity. Give name, address, position title, nature of your duties, terms of service and, if any, the percentage of your ownership.

Not applicable.

Civic Professional & Community Involvement

29. Have you ever held an elective or appointive public office in this or any other state?

No

Have you been a candidate for such an office?

Yes

If so, give details, including the offices involved, whether initially appointed or elected, and the length of service. Exclude political affiliation.

I ran unsuccessfully for Clark County District Attorney in 2006.

In the Fall of 2006, after the November election, I applied for appointment to Justice of the Peace of Department 4 of the Las Vegas Justice Court. I advanced in the process through the selection interviews, but the Honorable Melissa Saragosa was appointed.

In the Spring of 2007, I ran in a crowded race for Judge of Department 6 of the Las Vegas Municipal Court in Spring 2007 and received the endorsement of the Las Vegas Police Protective Association and the Peace Officers Research Association of Nevada before being eliminated in the Primary. The Honorable Martin Hastings was eventually elected to this seat.

In the Spring of 2008, I sought appointment to Judge of Department 1 of the Las Vegas Municipal Court but the Honorable Cynthia Leung was appointed.

In the Spring of 2009, I sought appointment to Justice of the Peace of Department 2 or 10 of the Las Vegas Justice Court and again advanced to the interviews, but the Honorable Joseph Sciscento and Melanie Andress-Tobiasson were selected.

In the Fall of 2014, I sought appointment to Justice of the Peace of Department 6 of the Las Vegas Justice Court, but the Honorable Bita Yeager was selected.

30. State significant activities in which you have taken part, giving dates and offices or leadership positions.

The Heat Is On 2008: volunteered to assist the Nevada Conservation League in its public relations campaign to get the candidates in the 2008 presidential primary election to take a stand on the issue of global warming.

31. Describe any courses taught at law schools or continuing education programs. Describe any lectures delivered at bar association conferences.

Not applicable.

32. List educational, military service, service to your country, charitable, fraternal and church activities you deem significant. Indicate leadership positions.

I was president of the UCLA chapter of Tau Kappa Epsilon Fraternity in college and joined the Phi Alpha Delta Law Fraternity in law school.

33. List honors, prizes, awards, or other forms of recognition.

I graduated high school at the age of 16 and was a finalist to become a National Merit Scholar, enjoying a full academic scholarship for my first year of college at the University of Redlands, where I played intercollegiate volleyball. I made the Dean's Honor List at UCLA and was a member of the Law Review during law school.

As a young prosecutor, I was honored by STOP DUI for my work as a Deputy City Attorney and Deputy District Attorney to get drunk drivers off our roads.

34. Have you at any time in the last 12 months belonged to, or do you currently belong to, any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, creed, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices, and whether you intend to continue as a member if you are selected for this vacancy.

No

35. List books, articles, speeches and public statements published, or examples of opinions rendered, with citations and dates.

Not applicable.

36. During the past ten years, have you been registered to vote?

Yes

Have you voted in the general elections held in those years?

Yes

37. List avocational interests and hobbies.

I have been an avid—though talentless—recreational basketball player for 35 years. Unfortunately, the wear and tear on my body is finally slowing me down.

Conduct

38. Have you read the Nevada Code of Judicial Conduct and are you able to comply if appointed?

Yes

39. Have you ever been convicted of or formally found to be in violation of federal, state or local law, ordinance or regulation? Provide details of circumstances, charges, and dispositions.

No

(with the exception of minor traffic violations)

40. Have you ever been sanctioned, disciplined, reprimanded, found to have breached an ethics rule or to have acted unprofessionally by any judicial or bar association discipline commission, other professional organization or administrative body or military tribunal? If yes, explain. If the disciplinary action is confidential, please respond to the corresponding question in the confidential section.

No

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41. Have you ever been dropped, suspended, disqualified, expelled, dismissed from, or placed on probation at any college, university, professional school or law school for any reason including scholastic, criminal, or moral? If yes, explain.

Yes

I was placed on academic probation at UCLA when my grades slipped.

42. Have you ever been refused admission to or been released from any of the armed services for reasons other than honorable discharge? If yes, explain.

No

43. Has a lien ever been asserted against you or any property of yours that was not discharged within 30 days? If yes, explain.

No

44. Has any Bankruptcy Court in a case where you are or were the debtor, entered an order providing a creditor automatic relief from the bankruptcy stay (providing in rem relief) in any present or future bankruptcy case, related to property in which you have an interest?

No

45. Are you aware of anything that may require you to recuse or disqualify yourself from hearing a case if you are appointed to serve as a member of the judiciary? If so, please describe the circumstances where you may be required to recuse or disqualify yourself.

Routine conflicts of interest would require me to recuse myself in the same circumstances as any jurist but I am aware of no special circumstance that might require me to recuse myself any more frequently than that.

Other

46. If you have previously submitted a questionnaire or Application to this or any other judicial nominating commission, please provide the name of the commission, the approximate date(s) of submission, and the result.

Clark County Judicial Selection Committee for Justice of the Peace, Department Four.

In Fall 2006, I applied for this appointment and advanced to the selection interviews, but the Honorable Melissa Saragosa was appointed.

Las Vegas City Council in re: Selection for Municipal Court Judge, Department One.

In Spring 2008, I applied for this appointment and interviewed with council members, but the Honorable Cynthia Leung was appointed.

Clark County Judicial Selection Committee for Justice of the Peace, Departments Two & Ten.

In Spring 2009, I applied for these appointments and advanced to the selection interviews, but the Honorable Joseph Sciscento and Melanie Andress-Tobiasson were appointed.

**Clark County Judicial Selection Committee for Justice of the Peace, Department Six.
In Fall 2014, I applied for this appointment but the Honorable Bita Yeager was appointed.**

47. In no more than three pages (double spaced) attached to this Application, provide a statement describing what you believe sets you apart from your peers, and explains what education, experience, personality or character traits you possess, or have acquired, that you feel qualify you as a supreme court justice. In so doing, address appellate, civil (including family law matters), and criminal processes (including criminal sentencing).

48. Detail any further information relative to your judicial candidacy that you desire to call to the attention of the members of the Commission on Judicial Selection.

49. Attach a sample of no more than ten pages of your original writing in the form of a decision, "points and authorities," or appellate brief generated within the past five years, which demonstrates your ability to write in a logical, cohesive, concise, organized, and persuasive fashion.

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

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Case No. CR9225

Department 1

**IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE**

THE STATE OF NEVADA,

Appellant,

vs.

THE STATE'S BRIEF ON APPEAL

CHRISTINA THERESA BUNCH,

Respondent. /

TO: CHRISTINA THERESA BUNCH, Respondent; and

TO: NATHAN L. GENT, ESQ., Attorney for Respondent:

PLEASE TAKE NOTICE that Appellant THE STATE OF NEVADA, by and through ANGELA A. BELLO, Nye County District Attorney, by and through her undersigned deputy, hereby submits its brief in support of its appeal from the order of dismissal entered in the above-entitled case.

DATED this ____ day of August, 2018.

**ANGELA A. BELLO
NYE COUNTY DISTRICT ATTORNEY**

By _____
PATRICK A. FERGUSON
Deputy District Attorney

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

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23 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)24

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NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

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1 I. JURISDICTIONAL STATEMENT.

2 NRS 177.015(1)(a) grants this Court jurisdiction over the State's appeal from
3 the order of dismissal entered in the above-entitled case.

4 II. STATEMENT OF THE ISSUES.

5 Did the State violate its statutory discovery obligations by failing to provide the
6 defendant, at least 30 days before trial, a report that was not contained in the
7 prosecutor's file and used only to refresh a witness's memory, reflecting that someone
8 in the sheriff's office other than the investigating deputy had characterized the call in
9 this case as nonviolent? Did the State violate the defendant's federal constitutional
10 right to due process pursuant to *Brady*¹ and its progeny when said report was
11 produced during trial and admitted as a defense exhibit following cross-examination of
12 the investigating sheriff's deputy? Did the State violate the defendant's state
13 constitutional right to due process pursuant to *Roberts*² and its progeny when said
14 report was produced during trial and admitted as a defense exhibit following cross-
15 examination of the investigating sheriff's deputy? Did the justice court properly grant
16 the defendant's oral motion to dismiss based upon the State's alleged failure to
17 provide exculpatory evidence 30 days in advance of the trial, instead of granting a
18 recess, a continuance, restricting use of the late-disclosed evidence, declaring a
19 mistrial or otherwise fashioning appropriate relief?

20 III. PROCEDURAL HISTORY/STATEMENT OF FACTS.

21 On December 21, 2016, the defendant was arrested by Nye County Sheriff's
22 Deputy C. Sandoval and booked on charges of Burglary, Battery, and Property

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24 ¹ *Brady v. Maryland*, 373 U.S 83, 83 S.Ct. 1194 (1963).
² *Roberts v. State*, 110 Nev. 1121, 881 P.2d 1 (1994).

1 Damage. She posted bond and was released the next day, before seeing a
2 magistrate. Her bond was exonerated on February 28, 2017, because no complaint
3 was yet on file.

4 On May 9, 2017, the defendant was charged by way of criminal complaint with
5 three misdemeanors: Unlawful Trespass Upon Land; Battery; and Injury to Other
6 Property, \$25 or More, and the court issued a summons. On August 1, 2017, the
7 justice court arraigned the defendant, appointed counsel to represent her, and set a
8 pretrial conference for November 29, 2017. On November 29, 2017, her attorney
9 declared a conflict of interest, the justice court appointed the defendant's current
10 counsel to replace him and set another pretrial conference for January 24, 2018. That
11 hearing was continued pursuant to a stipulation of the parties, to accommodate
12 defense counsel. At the continued pretrial conference on April 11, 2018, the defense
13 indicated that it had reviewed the file and was rejecting the State's plea offer, at which
14 time the bench trial was scheduled for June 13, 2018. The record reveals no defense
15 request for discovery pursuant to NRS 174.235.

16 The bench trial proceeded on June 13, 2018. The State's first witness, Brooke
17 Brubaker, testified that on December 21, 2016, her boyfriend's brother, Ryan Brown,
18 had been staying with them at her apartment for about a week. (Reporter's Transcript
19 (hereinafter "RT") at pp. 5-7.) On that day, Mr. Brown's girlfriend, the defendant,
20 whom she had never met, came to the apartment uninvited. (RT at 7-8.) When the
21 defendant entered the apartment, Ms. Brubaker stood in front of her and asked her to
22 leave, but the defendant used her hands and arms to push her aside and proceeded to
23 the bedroom to which Mr. Brown had retreated, where she struggled against him to
24 force the door open. (RT at 9-11.) During the struggle, the defendant flailed her arms

1 and legs, “kicking and . . . punching around,” ultimately kicking a hole in the wall. (RT
2 at 11.) Ms. Brubaker witnessed the defendant make the hole in her wall, (RT at 15),
3 and testified to the accuracy of the photographs admitted as State’s Exhibit 1 depicting
4 that hole. (RT at 12-13.)

5 The State’s next witness was Nye County Sheriff’s Deputy Christina Sandoval,
6 who testified that on December 21, 2016, she was dispatched to the address of Ms.
7 Brubaker’s apartment. (RT at 19-20.) When asked what was the nature of that call,
8 Deputy Sandoval stated, “I’d have to refer to my report, but I believe it was a
9 disturbance.” (RT at 20:16-17.) When she began reviewing her report to refresh her
10 recollection, defense counsel objected “to her refreshing her memory from anything
11 that I was not provided in discovery.” (RT at 21:5-7.) He continued, “So if the State
12 wants to refresh a witness’s memory with their report, I want to make sure and see
13 that it’s one of the discovery pages that I received. Or else I would definitely object to
14 it.” (RT at 21:14-18.)

15 The State then asked the deputy for the writing she was using to refresh her
16 recollection and offered it to defense counsel, suggesting he compare it to page 7 of
17 the discovery. (RT at 21:25 – 22:5.) Defense counsel then complained about having
18 to review the document and instead suggested the witness simply refresh her
19 recollection with a page taken from the discovery documents. (RT at 22:6 – 23:2.)
20 The State, however, opposed this suggestion, pointing out that, if there were a
21 discrepancy between the documents, it might later be argued to be ineffective
22 assistance of counsel for defense counsel to intentionally avoid reviewing the writing
23 and potentially identifying that discrepancy. (RT at 23-24.) The court then took a 5-

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1 minute recess for defense counsel to review the writing Deputy Sandoval had brought
2 with her to court. (RT at 24:9-13.)

3 When court resumed, defense counsel claimed he had reviewed the three
4 pages obtained from Deputy Sandoval and that one of those pages was not provided
5 to him in discovery. (RT at 24:17-21.) He identified a portion of the report that was not
6 included in the discovery and reflected a code, FAMF – family fight, nonviolent. (RT at
7 24:21-25.) He argued that this material was crucial, exculpatory evidence because it
8 indicated that the offense was nonviolent and contradicted the State’s charge of
9 battery, a violent crime. (RT at 25:1-9.)

10 In response, the State asked to conduct further examination of Deputy
11 Sandoval about this writing she had brought with her to court. (RT at 25:12-15.)

12 Deputy Sandoval stated that it was “an outline of the call information.” (RT at
13 25:19-20.) She said that it set forth what the call started out to be, what the call ended
14 up being, the charges that were filed, and the people that were involved. (RT at 25:20-
15 22.) She explained that Spillman, the system the Nye County Sheriff’s Office uses to
16 generate reports, automatically generated this page in question when she printed her
17 narrative. (RT at 26:1-4.) When asked about the source of the information in this
18 report, she stated, “The first page is not necessarily information that I have put in. The
19 narrative, however, is what I’ve put in. That is—those are my words in the narrative.”
20 (RT at 26:19-22.) She stated that when she reviewed the report to refresh her
21 recollection, she was referring to her narrative. (RT at 27:3-5.)

22 Defense counsel then made his first oral motion to dismiss “for violating [his]
23 client’s rights and not providing her with that exculpatory evidence. There’s a statute
24 that says any evidence used at the trial must be provided 30 days in advance.

1 Obviously this is evidence they are trying to use at trial to refresh the deputy's
2 memory." (RT at 30:5-12.) He went on to argue that "even though the District
3 Attorney's office might not even have been aware of that page of discovery, that was
4 not provided, that missing discovery before today, they still had the burden of providing
5 it. That's what the case law says." (RT at 32:17-21.)

6 Defense counsel separated the page in question from the other two pages of
7 Deputy Sandoval's narrative, (RT at 36:2-3), and the court had copies made and
8 provided to both counsel, and the original returned to the witness. (RT at 37:1-11.)

9 The State then resumed its direct examination of Deputy Sandoval. (RT at
10 37:22-23.) Deputy Sandoval testified that when she arrived at the scene, Ms.
11 Brubaker approached her, apparently not realizing that Deputy Sandoval was there for
12 the disturbance at her apartment. (RT at 38:6-18.) Deputy Sandoval testified Ms.
13 Brubaker then explained the situation to her and that she then entered the apartment,
14 observed the hole in the wall, and took the photographs previously identified by Ms.
15 Brubaker during her testimony. (RT at 39:14 – 41:8.)

16 Deputy Sandoval testified that she then relocated to the defendant's residence,
17 where she contacted the defendant. (RT at 42:13-20.) Deputy Sandoval testified that
18 the defendant admitted to going to Ms. Brubaker's residence, but that she could not
19 recall who had invited her. (RT at 43:2-6.) She claimed that she was invited via text
20 messages that she had already deleted. (RT at 43:6-17.)

21 Defense counsel then took Deputy Sandoval on cross-examination. He marked
22 the contested page from her report as Defendant's Exhibit A, questioned her about it,
23 and moved it into evidence without objection. (RT at 47-49.) He asked the deputy to
24 affirm that there were words on the page reading, "FAMF, family fight, nonviolent,"

1 which she did. (RT at 49.) However, when the deputy then declined to agree that the
2 incident, as described to her by Ms. Brubaker, was nonviolent, he again moved to
3 dismiss “based upon the State failing to provide exculpatory evidence 30 days in
4 advance of the trial.” (RT at 52:11 – 53:13.) The court granted the motion. (RT at
5 54:2-3.)

6 Later that day, the State filed its notice of appeal of the order dismissing the
7 case. On June 22, 2018, the justice court entered its written Order of Dismissal, in
8 which it found that “the State failed to provide defense counsel discovery in a timely
9 manner.”

10 IV. STATEMENT OF THE STANDARD OF REVIEW.

11 The Nevada Supreme Court appears to have applied an “abuse of discretion”
12 standard to State’s appeals in criminal cases in which the trial court erroneously
13 dismissed the charges based upon alleged discovery violations. *See, e.g., State v.*
14 *Tapia*, 108 Nev. 494, 498, 835 P.2d 22, 24 (1992) (“it was an abuse of discretion for
15 the court to exclude the precursor document and to dismiss the case based upon a
16 violation of the discovery order and the court’s determination that the State’s case was
17 weak”); *State v. Stiglitz*, 94 Nev. 158, 160, 576 P.2d 746, 747 (1978) (“We find the
18 court abused its discretion, and reinstate the information.”). *Cf. Evans v. State*, 117
19 Nev. 609, 638, 28 P.3d 498, 518 (2001), *overruled in part on other grounds by Lisle v.*
20 *State*, 351 P.3d 725, 732 (2015); *Langford v. State*, 95 Nev. 631, 636, 600 P.2d 231,
21 235 (1979) (finding no “abuse of discretion” where trial court denied defense motion for
22 mistrial based on alleged discovery violation).

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1 V. SUMMARY OF THE ARGUMENT.

2 The justice court erred in granting the defendant's mid-trial, oral motion to
3 dismiss. The justice court could not have found that the State violated its statutory
4 discovery obligations because it does not appear from the record that the defendant
5 made a discovery request, a necessary prerequisite pursuant to NRS 174.235(1) to
6 trigger the State's statutory discovery obligations. Additionally, even after such a
7 request, the State's obligation to provide materials to the defense not less than 30
8 days before trial would not apply where the document in question is not the
9 defendant's statement or the statement of a State's witness, NRS 174.235(1)(a), or an
10 item the State intended to introduce during its case in chief. NRS 174.235(1)(c).
11 Utilizing a writing to refresh recollection is not akin to introducing it into evidence and
12 the defendant was afforded all of her rights under NRS 50.125 related to the use of
13 this writing to refresh recollection.

14 The State did not violate *Brady* because the document in question, admitted at
15 the trial as Defendant's Exhibit A, was clearly not suppressed, so *Brady* does not
16 apply. Because the record is devoid of any evidence the State knowingly delayed
17 disclosure of this document or garnered any sort of advantage therefrom, the justice
18 court would abuse its discretion for dismissing the case on this basis. Moreover, the
19 document in question does not appear to be favorable to the defense, as it appears to
20 reflect nothing more than the initial code assigned to this call by dispatch and not a
21 statement by a percipient witness.

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1 VI. ARGUMENT.

2 A. The State Did Not Violate Its Statutory Discovery Obligations.

3 The State did not violate its statutory discovery obligations. While defense
4 counsel failed to specifically identify any statute the State was violating, the repeated
5 reference to an obligation to provide discovery 30 days before trial suggests that the
6 defense was referencing NRS 174.285, which reads:

7 **NRS 174.285 Time limits.**

8 1. A request made pursuant to NRS 174.235 or 174.245 may be
9 made only within 30 days after arraignment or at such reasonable later
10 time as the court may permit. A subsequent request may be made only
11 upon a showing of cause why the request would be in the interest of
12 justice.

13 2. A party shall comply with a request made pursuant to NRS
14 174.235 or 174.245 not less than 30 days before trial or at such
15 reasonable later time as the court may permit.

16 (Added to NRS by 1967, 1420; A 1995, 265; 1997, 2369)

17 While subsection 2 of this statute does in fact provide a deadline of 30 days
18 before trial, that deadline is only to comply with a request made pursuant to NRS
19 174.235³ which, according to subsection 1, must be made within 30 days after
20 arraignment. “[V]oluntary disclosure is not contemplated by our statutory provisions
21 concerning criminal discovery.” *Thompson v. State*, 93 Nev. 342, 343, 565 P.2d 1011,
22 1012 (1977).

23 In this case, the defendant was arraigned on August 1, 2017, meaning that a
24 request pursuant to NRS 174.235 would have had to have been made by not later
than August 31, 2017, in the absence of express permission granted by the justice

³ NRS 174.235 provides for discovery requests by criminal defendants while NRS 174.245 provides for discovery requests by prosecuting attorneys and is therefore inapposite.

1 court. Because the record does not reflect any discovery request, the justice court had
2 no basis for finding that the State had violated its statutory discovery obligations.

3 Nevertheless, even if the defendant had timely requested discovery pursuant to
4 NRS 174.235, the State's obligation to provide materials to the defense not less than
5 30 days before trial would not apply to the disputed document in this case. NRS
6 174.235 reads:

7 **NRS 174.235 Disclosure by prosecuting attorney of evidence
8 relating to prosecution; limitations.**

9 1. Except as otherwise provided in NRS 174.233 to 174.295,
10 inclusive, **at the request of a defendant**, the prosecuting attorney shall
11 permit the defendant to inspect and to copy or photograph any:

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

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

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

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

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

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

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

(Added to NRS by 1967, 1419; A 1995, 264; 1997, 2367)

(Emphasis added.)

5 The allegedly withheld information in the disputed document in this case
6 consists of a code, "FAMF Family Fight, Nonviolent," which appears to reflect nothing
7 more than the initial code assigned to this call by dispatch, and not a statement by a
8 percipient witness. (Defendant's Exhibit A.) Deputy Sandoval testified that it was an
9 outline of the call information and set forth, *inter alia*, what the call started out to be.
10 (RT at 25:19-20.) She stated that this page was "not necessarily information that I
11 have put in." (RT at 26:19-20.) This is therefore not the defendant's statement or the
12 statement of a State's witness that would be discoverable pursuant to NRS
13 174.235(1)(a).

14 Neither is this an item the State intended to introduce during its case in chief
15 that would be discoverable pursuant to NRS 174.235(1)(c). The only items the State
16 offered into evidence were the photographs admitted as State's Exhibit 1. The State
17 at no time manifested an intention to "introduce" during its case in chief any report,
18 much less the report admitted at trial as Defendant's Exhibit A. (See, e.g., RT at
19 29:15-19.) The page in question was part of a 3-page report, the other two pages of
20 which were being utilized by the witness, Deputy Sandoval, to refresh her memory.
21 (RT at 27:3-5.) Contrary to defense counsel's repeated assertion, utilizing a writing to
22 refresh recollection is not akin to introducing it into evidence vis-à-vis NRS
23 174.235(1)(c).

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1 Moreover, NRS 50.125, which governs writings used to refresh recollection,
2 provides for certain rights related to the use such writings, all of which were afforded to
3 the defendant in this case. NRS 50.125 reads as follows:

4 **NRS 50.125 Writing used to refresh memory.**

5 1. If a witness uses a writing to refresh his or her memory:

6 (a) While testifying, an adverse party is entitled:

7 (1) To have it **produced** at the hearing;

8 (2) To **inspect** it;

9 (3) To **cross-examine** the witness thereon; and

10 (4) To **introduce in evidence** those portions which relate to the
11 testimony of the witness for the purpose of affecting the witness's
12 credibility.

13 (b) Before testifying, if the judge in his or her discretion determines
14 that the interests of justice so require, an adverse party is entitled:

15 (1) To have it produced at the hearing;

16 (2) To inspect it;

17 (3) To cross-examine the witness thereon; and

18 (4) To introduce in evidence those portions which relate to the
19 testimony of the witness for the purpose of affecting the witness's
20 credibility.

21 2. If it is claimed that the writing contains matters not related to the
22 subject matter of the testimony, the judge shall examine the writing in
23 chambers, excise any portions not so related, and order delivery of the
24 remainder to the party entitled thereto. Any portion withheld over
objections shall be preserved and made available to the appellate court in
the event of an appeal.

 3. If a writing is not produced or delivered pursuant to order under
this section, the judge shall make any order which justice requires, except
that in criminal cases when the State elects not to comply, the order shall
be one:

(a) Striking the testimony; or

(b) If the judge in his or her discretion determines that the interests of
justice so require, declaring a mistrial.

(Added to NRS by 1971, 790; A 2015, 404)

(Emphasis added.)

 Defense counsel in this case had the report in question produced, inspected it,
cross-examined Deputy Sandoval about it, and admitted a copy of it into evidence as a
defense exhibit. Because the defendant was afforded all of these rights, none of the
proposed sanctions set forth in NRS 50.125(3) would be appropriate, much less the

1 sanction actually imposed in this case, the most severe sanction, dismissal with
2 prejudice, which is not even one of the options enumerated in the statute.

3 A plain reading of NRS 174.235 reveals that it does not apply to the report in
4 question here and that the State did not violate its statutory discovery obligations.

5 B. Even if the State Had Violated Its Statutory Discovery Obligations, Dismissal
6 Was Not the Appropriate Remedy for Delayed Disclosure.

7 The general rule in the imposing of sanctions is that they be applied only in
8 extreme circumstances where willful noncompliance of a court's order is shown by the
9 record. *Finkelman v. Clover Jewelers Boulevard*, 91 Nev. 146, 147, 532 P.2d 608, 609
10 (1975). Where the State has attempted to comply with a discovery order in good faith,
11 it is an abuse of discretion to dismiss the charges. *State v. Stiglitz*, 94 Nev. 158, 161-
12 62, 576 P.2d 746, 748 (1978). "Before this court will dismiss a case for prosecutorial
13 misconduct, the misconduct must be clearly demonstrated to be **substantial** and
14 **prejudicial.**" *Sheriff v. Fullerton*, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996)
15 (emphasis added).

16 In *State v. Tapia*, 108 Nev. 494, 835 P.2d 22 (1992), the Nevada Supreme
17 Court addressed the situation in which the State was found to have failed to exercise
18 due diligence in obtaining documentation for use at trial, thereby violating a discovery
19 order. *Id.* at 497, 835 P.2d at 24. NRS 174.295(2), the statute addressing this
20 situation, reads:

21 If at any time during the course of the proceedings it is brought to the
22 attention of the court that a party has failed to comply with the provisions
23 of NRS 174.234 to 174.295, inclusive, the court may order the party to
24 **permit the discovery** or inspection of materials not previously disclosed,
grant a continuance, or **prohibit the party from introducing** in
evidence the material not disclosed, or it may enter **such other order as**
it deems just under the circumstances.

1 In reversing a dismissal granted on the second day of jury trial, the Nevada
2 Supreme Court said:

3 However, where the State's non-compliance with a discovery order is
4 inadvertent and the court takes appropriate action to protect the defendant
5 against prejudice, there is no error justifying dismissal of the case.
6 *Maginnis v. State*, 93 Nev. 173, 176, 561 P.2d 922, 923 (1977); *see also*
7 *Lopez v. State*, 105 Nev. 68, 77-79, 769 P.2d 1276 (1989) (defendant's
8 late receipt of reports did not warrant mistrial where defense received
9 documents at same time as prosecution and there was no showing of
10 intentional withholding of the evidence from defendant); *Langford v. State*,
11 95 Nev. 631, 635-36, 600 P.2d 231, 234-35 (1979) (absent showing of
12 bad faith by State or unalleviated prejudice to the defendant, trial court
13 properly denied motion for mistrial).

9 *Tapia*, 108 Nev. at 497, 835 P.2d at 24.

10 The supreme court then concluded that the trial court in *Tapia* had abused its
11 discretion by excluding the contested documentation and dismissing the case. *Id.* at
12 498, 835 P.2d at 24. The trial court's decision was reversed, and the case was
13 remanded for further proceedings. *Id.*

14 In *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), *overruled in part on other*
15 *grounds by Lisle v. State*, 351 P.3d 725, 732 (2015), the Nevada Supreme Court
16 addressed the midtrial disclosure of an incriminating letter written by the defendant.
17 Because the trial court provided an appropriate remedy by postponing the cross-
18 examination of the pertinent witnesses, no substantial prejudice to the defendant
19 resulted. *Evans* at 638, 28 P.3d at 518. Because the court found no evidence the
20 State had acted in bad faith, and the prosecutor disclosed the letter to defense counsel
21 as soon as he learned its significance, the court found no discovery violation had
22 occurred. *Id.*

23 In *Nelson v. State*, 2016 Nev. App. LEXIS 253, 2016 WL 3584476 (Nev. Ct.
24 App. 2016), the Nevada Court of Appeals observed that by raising a *Brady* objection

1 on the first day of trial, the defendant demonstrated her knowledge of the evidence in
2 time to use it in cross-examination. *Id.* at *3. Accordingly, because the disclosure was
3 made at a time that the evidence was still of value to the defense, the court concluded
4 that the defendant could not show that the State violated *Brady*. *Id.*

5 In *Coddington v. State*, 2018 Nev. Unpub. LEXIS 152, 415 P.3d 12 (Nev. 2018)
6 (unpublished disposition), the court quoted *United States v. Miller*, 529 F.2d 1125,
7 1128 (9th Cir. 1976) for the proposition that the inquiry on appeal for late disclosure of
8 evidence is “whether the lateness of the disclosure so prejudiced appellant’s
9 preparation or presentation of his defense that he was prevented from receiving his
10 constitutionally guaranteed fair trial.” The court found that Coddington had failed to
11 show that the State acted in bad faith or that he was prejudiced by receiving, on the
12 third day of trial, a photo of text messages he had requested during discovery.
13 *Coddington*, 2018 Nev. Unpub. LEXIS 152 at *15. The court noted that Coddington
14 cross-examined the witness on the late-disclosed information before denying him any
15 relief. *Id.* at *16.

16 Because the record is devoid of any evidence the State knowingly delayed
17 disclosure of this document or garnered any sort of advantage therefrom, the justice
18 court abused its discretion if it dismissed the case on this basis.

19 C. The State Did Not Violate the Defendant’s Federal Constitutional Right to Due
20 Process Pursuant to *Brady* and its Progeny.

21 In *Brady v. Maryland*, 373 U.S 83, 83 S.Ct. 1194 (1963), the Supreme Court
22 held “that the **suppression** by the prosecution of evidence **favorable** to an accused
23 **upon request** violate due process where the evidence is **material** either to guilt or to
24 punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87, 83

1 S.Ct. at 1196-97 (emphasis added). “The heart of the holding in *Brady* is the
2 prosecution’s suppression of evidence, in the face of a defense production request,
3 where the evidence is favorable to the accused and is material either to guilt or to
4 punishment.” *Moore v. Illinois*, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568 (1972).

5 There are therefore three elements to a *Brady* violation: (1) suppression of
6 evidence by the prosecution; (2) the favorable character of said evidence; and (3) the
7 materiality of the evidence to guilt or punishment.⁴ The fact that suppressed evidence
8 was exculpatory did not constitute a constitutional due process violation warranting
9 relief without a showing of materiality.

10 In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976), the Court
11 expounded on this pronouncement. “The rule of *Brady v. Maryland*, 373 U.S. 83,
12 arguably applies in three quite different situations. Each involves the discovery, **after**
13 **trial**, of information which had been known to the prosecution but unknown to the
14 defense.” *Id.* at 103, 96 S.Ct. at 2397 (emphasis added).

15 The first situation involves the prosecution’s knowing use of perjured testimony.
16 “[A] conviction obtained by the knowing use of perjured testimony is fundamentally
17 unfair, and must be set aside if there is any reasonable likelihood that the false
18 testimony could have affected the judgment of the jury.” *Id.*

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21 ⁴ The defense request for discovery was later held to be non-essential in the federal
22 constitutional analysis. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375,
23 3383 (1985); see, e.g., *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 1565
24 (1995); *Roberts v. State*, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994) (“The Supreme
Court later unified its approach and held that, in all cases except the prosecutor’s
knowing use of perjured testimony, evidence is ‘material’ if there exists a reasonable
probability that, had the evidence been disclosed, the result of the proceeding would
have been different.”)

1 The second situation in which *Brady* applies is characterized by a pretrial
2 request for specific evidence. “[I]mplicit in the requirement of materiality is a concern
3 that the suppressed evidence might have affected the outcome of the trial.” *Id.* at 104,
4 96 S.Ct. at 2398.

5 The third situation in which *Brady* applies is probably the most common and
6 includes cases in which only a general request for exculpatory matter, or no request at
7 all, has been made. *Id.* at 107, 96 S.Ct. at 2399.

8 The problem arises in two principal contexts. First, in advance of
9 trial, and perhaps during the course of a trial as well, the prosecutor must
10 decide what, if anything, he should voluntarily submit to defense counsel.
11 Second, after trial a judge may be required to decide whether a
12 nondisclosure deprived the defendant of his right to due process. Logically
13 the same standard must apply at both times. For unless the omission
14 deprived the defendant of a fair trial, there was no constitutional violation
15 requiring that the verdict be set aside; and absent a constitutional
16 violation, there was no breach of the prosecutor's constitutional duty to
17 disclose.

18 *Id.* at 107-08, 96 S.Ct. at 2399.

19 A critical point to take away is that “the prosecutor will not have violated his
20 constitutional duty of disclosure unless his omission **is of sufficient significance to**
21 **result in the denial of the defendant’s right to a fair trial.**” *Id.* at 108, 96 S.Ct. at
22 2400 (emphasis added). The Court expressly rejected the assumption that a
23 prosecutor has a constitutional obligation to disclose any information that might affect
24 the jury’s verdict. *Id.* “If everything that might influence a jury must be disclosed, the
only way a prosecutor could discharge his constitutional duty would be to allow
complete discovery of his files as a matter of routine practice. . . . [T]he Constitution
surely does not demand that much.” *Id.* at 109, 96 S. Ct. at 2400. Prosecutors “are
under no duty to report *sua sponte* to the defendant all that they learn about the case

1 and about their witnesses.” *Id* (quoting with approval *In re Imbler*, 60 Cal. 2d 554, 569,
2 387 P.2d 6, 14 (1963)); *accord Moore*, 408 U.S. at 795, 92 S.Ct. at 2568 (“We know of
3 no constitutional requirement that the prosecution make a complete and detailed
4 accounting to the defense of all police investigatory work on a case.”). “The mere
5 possibility that an item of undisclosed information might have helped the defense, or
6 might have affected the outcome of the trial, does not establish ‘materiality’ in the
7 constitutional sense.” *Agurs*, 427 U.S. at 109-10, 96 S.Ct. at 2400.

8 [S]ince we have rejected the suggestion that the prosecutor has a
9 constitutional duty routinely to deliver his entire file to defense counsel, we
10 cannot consistently treat every nondisclosure as though it were error. It
11 necessarily follows that the judge should not order a new trial every time
12 he is unable to characterize a nondisclosure as harmless Unless
13 every nondisclosure is regarded as automatic error, the constitutional
14 standard of materiality **must impose a higher burden on the defendant.**

12 *Id.* at 111-12, 96 S.Ct. at 2401 (emphasis added).

13 While it did not expressly state the standard of materiality to apply, the Court in
14 *Agurs* did state that if, in the context of the entire record, “the **omitted evidence**
15 **creates a reasonable doubt that did not otherwise exist**, constitutional error has
16 been committed.” *Id.* at 112, 96 S.Ct. at 2402 (emphasis added); *accord Mazzan v.*
17 *Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000); *Jimenez v. State*, 112 Nev. 610,
18 618-19, 918 P.2d 687, 692 (1996).

19 In *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985), the Supreme
20 Court clarified that “evidence favorable to an accused,” as that phrase was used in
21 *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196, included impeachment evidence, as well as
22 exculpatory evidence. *Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380. The question
23 before the Court in *Bagley* was whether the Government’s failure to disclose
24 information that might have been helpful to the defense in conducting cross-

1 examination resulted in constitutional error. *Id.* at 678, 105 S.Ct. at 3381. Its answer
2 to that question was that “a constitutional error occurs, and the conviction must be
3 reversed, only if the evidence is material in the sense that its **suppression**
4 **undermines confidence in the outcome of the trial.**” *Id.* (emphasis added).

5 Concluding that the same standard should apply to both the second and third
6 *Brady* situations, the Court in *Bagley* held that the following test for materiality should
7 apply in both, regardless of whether a request for specific evidence has been made:
8 “The evidence is material only if there is a **reasonable probability** that, had the
9 evidence been disclosed to the defense, the **result of the proceeding would have**
10 **been different.** A ‘reasonable probability’ is a probability sufficient to undermine
11 confidence in the outcome.” *Id.* at 682, 105 S. Ct. at 3383 (emphasis added). Later
12 re-stated in the context of a jury trial, the test is “whether there is a reasonable
13 probability that the withheld evidence would have altered at least one juror’s
14 assessment” *Cone v. Bell*, 556 U.S. 449, 452, 129 S.Ct. 1769, 1773 (2009).

15 In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), the Supreme Court
16 added to this analysis that materiality should be determined based upon the
17 cumulative effect of all suppressed evidence. If the net effect of the evidence withheld
18 by the State raises a reasonable probability that its disclosure would have produced a
19 different result, the defendant will be entitled to a new trial. *Id.* at 421, 115 S.Ct. at
20 1559.

21 The *Kyles* court emphasized four aspects of materiality. *Id.* at 434-37, 115
22 S.Ct. at 1565-67. First, the touchstone of materiality is “reasonable probability” of a
23 different result. *Id.* at 434, 115 S.Ct. at 1566. “A ‘reasonable probability’ of a different

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1 result is accordingly shown when the government's evidentiary suppression
2 'undermines confidence in the outcome of the trial.' *Bagley*, 473 U.S. at 678." *Id.*

3 Second, materiality is not judged by a sufficiency of evidence test. "One does
4 not show a *Brady* violation by demonstrating that some of the inculpatory evidence
5 should have been excluded, but by showing that the favorable evidence could
6 reasonably be taken to put the whole case in such a different light as to undermine
7 confidence in the verdict." *Kyles*, 514 U.S. at 434-35, 115 S.Ct. at 1566.

8 Third, once a court has made a finding of constitutional error pursuant to *Bagley*
9 (i.e., that there is a reasonable probability that, had the evidence been disclosed to the
10 defense, the result of the proceeding would have been different), there is no need for
11 further harmless-error review, as such error cannot be harmless. *Id.* at 435, 115 S.Ct.
12 at 1566.

13 Fourth and finally, materiality of suppressed evidence must be considered
14 collectively, not item by item. *Id.* at 436, 115 S.Ct. at 1567. "[T]he Constitution is not
15 violated every time the government fails or chooses not to disclose evidence that
16 might prove helpful to the defense. 473 U.S. at 675, and n. 7." *Kyles*, 514 U.S. at 436-
17 37, 115 S.Ct. at 1567 (quoting *Bagley*). The Constitution does not demand an open
18 file policy or prosecutorial disclosure of "any evidence tending to exculpate or
19 mitigate." *Id.* at 437, 115 S.Ct. at 1567.

20 [S]howing that the prosecution knew of an item of favorable evidence
21 unknown to the defense does not amount to a *Brady* violation, without
22 more. But the prosecution, which alone can know what is undisclosed,
23 must be assigned the consequent responsibility to gauge the likely **net**
24 **effect** of all such evidence and make disclosure when the point of
"reasonable probability" is reached.

Id. (emphasis added).

1 If the withheld evidence is “too little, too weak, or too distant from the main
2 evidentiary points to meet *Brady*’s standards,” the defendant should be denied relief.
3 *United States v. Turner*, 137 S.Ct. 1885, 1894 (2017).

4 After Deputy Sandoval reviewed the document in question to refresh her
5 memory in this case, defense counsel inspected it, received a copy of it, cross-
6 examined Deputy Sandoval about it, then admitted a copy of it as Defendant’s Exhibit
7 A. The State therefore did not violate *Brady* because the document in question was
8 clearly not suppressed, having been admitted at trial.

9 As noted by the United States Supreme Court, "the term '*Brady* violation'
10 is sometimes used to refer to any breach of the broad obligation to
11 disclose exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 281,
12 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). Nonetheless, a "true" *Brady*
13 violation occurs only when a court determines that "the suppressed
14 evidence would have produced a different verdict." *Id.* Accordingly, **it is
not practicable to analyze a *Brady* violation prior to entry of a verdict.**
See, e.g., United States v. McPartlin, 595 F.2d 1321, 1346 (7th Cir. 1979).
Thomas v. District Court, 133 Nev. Adv. Op. No. 63, 402 P.3d 612, 628 n.12 (2017)
(emphasis added).

15 As did the courts in *Thomas* and *Coddington*, this court should frame its
16 discussion in terms of late disclosure, rather than *Brady*. *Id.*; *Coddington* at *14. As in
17 *Coddington, id.*, there was no mention of *Brady* by the trial court in the case at bar.
18 (Order of Dismissal filed 6/22/18.) As such, this Court should engage in the statutory
19 discovery analysis discussed above, and not a *Brady* due process analysis at all.

20 However, if the Court continues an analysis under *Brady*, it should conclude
21 that the document in question is not favorable to the defense, as it appears to reflect
22 nothing more than the initial code assigned to this call by dispatch and not a statement
23 by Deputy Sandoval or any other percipient witness competent to testify to whether the

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1 battery and property damage to which Ms. Brubaker testified were somehow
2 “nonviolent.”

3 Finally, even if the Court concluded that this evidence was potentially favorable,
4 it falls well below the standard of materiality set out in the constitutional case law. This
5 solitary piece of evidence, even if it had been suppressed instead of admitted by the
6 defense at trial, would not create a reasonable doubt in light of the witness testimony
7 adduced at trial, and would not affect the outcome of the trial or otherwise deny the
8 defendant a fair trial. It is simply “too little, too weak, or too distant from the main
9 evidentiary points to meet *Brady’s* standards.” *United States v. Turner*, 137 S.Ct. 185,
10 1894 (2017).

11 D. The State Did Not Violate the Defendant’s State Constitutional Right to Due
12 Process Pursuant to *Roberts* and its Progeny.

13 In *Roberts v. State*, 110 Nev. 1121, 1131-32, 881 P.2d 1, 7-8 (1994), the
14 Nevada Supreme Court elected to exercise its authority to depart from *Bagley* and
15 interpret the due process clause in Article 1, section 8, subsection 5, of the Nevada
16 Constitution as requiring a standard more favorable to the accused in “specific
17 request” situations than in general request or no request situations. Acknowledging
18 that there must exist more than “the *mere possibility* that the undisclosed information
19 *might* have helped the defense” and that there be “a *real possibility* that the evidence
20 would have affected the result,” *id.* at 1132, 881 P.2d at 8 (citations omitted), the court
21 concluded that, in Nevada, “the proper standard for analyzing whether a *Brady*
22 violation has occurred after a specific request is whether there exists a reasonable
23 **possibility** that the claimed evidence would have affected the judgment of the trier of
24 fact, and thus the outcome of the trial.” *Id.* (emphasis added); *see, e.g., Mazzan v.*

1 *Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000); *Jimenez v. State*, 112 Nev. 610,
2 618-19, 918 P.2d 687, 692 (1996).

3 So again, even assuming that the evidence in question had been suppressed—
4 which it clearly was not—there is no evidence the defendant in this case made a
5 specific request for the document admitted as Defendant’s Exhibit A. In the absence
6 of such evidence, it would be error to employ the “reasonable possibility” standard.
7 However, even applying this standard, the defense proffered no argument supporting
8 a conclusion that there was any reasonable possibility that suppression of this
9 evidence would have affected the outcome of the trial. The defense failed to meet its
10 burden to proffer evidence and argument in support of its motion.

11 VII. CONCLUSION.

12 The State did not violate any of its statutory discovery obligations, nor any state
13 or federal constitutional guarantee of due process. The evidence in question would
14 not have been discoverable under Nevada’s discovery statute even if the defense had
15 properly requested discovery. The evidence was not suppressed, since it was
16 admitted at trial. The evidence was not favorable to the defense because they failed
17 to proffer how they might have used this evidence to impeach a State’s witness or how
18 it might have otherwise exculpated the defendant. Finally, the defense never
19 established how this single piece of omitted evidence “could reasonably be taken to
20 put the whole case in such a different light as to undermine confidence in the verdict.”

21 *Kyles*, 514 U.S. at 434-35, 115 S.Ct. at 1566.

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For the foregoing reasons, the State respectfully requests that this Court reverse the order of dismissal in this case and remand the matter back to the Justice Court to conclude the bench trial.

DATED this 22nd day of August, 2018.

ANGELA A. BELLO
NYE COUNTY DISTRICT ATTORNEY

By _____
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CERTIFICATE OF SERVICE

I, Juanita Torres, Executive Legal Secretary, Office of the Nye County District Attorney, P.O. Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

**THE STATE'S BRIEF ON APPEAL in
BJC Case No(s). 16CR06107
STATE v. CHRISTINA T. BUNCH**

upon said Defendant(s) herein by delivering a true and correct copy thereof on _____ to the following:

NATHAN L. GENT, ESQ.
AT THE NYE COUNTY DISTRICT ATTORNEY'S OFFICE,
IN PAHRUMP, NEVADA

Juanita Torres