

1 **GARY A. MODAFFERI, ESQ.**

2 Nevada Bar No. 12450

3 Hawaii Bar No. 3379

4 612 S. 3<sup>rd</sup> Street, Suite A

5 Las Vegas, Nevada 89101

6 Telephone 702.327.3033

7 *Attorney for Defendant*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA, )

11 Plaintiff, )

12 v. )

13 EARNEST BATES, )

14 Defendant. )

CASE NO.: C-18-335316-1

DEPT. NO.: X

15 **MOTION FOR NEW TRIAL**

16 COMES NOW, Defendant, EARNEST BATES, by and through GARY A.  
17 MODAFFERI, ESQ., of The Law Office of Gary A. Modafferi, LLC, and respectfully moves  
18 this Honorable Court for an order granting a new trial.  
19

20 This Motion is predicated upon NRS 176.515.<sup>1</sup> The issue raised by this Motion is  
21 whether, the application of the Open Murder method of charging homicide by the Clark County  
22

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24 <sup>1</sup> NRS 176.515 Court may grant new trial or vacate judgment in certain circumstances.

25 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly  
26 discovered evidence.

27 2. If trial was by the court without a jury, the court may vacate the judgment if entered, take additional  
testimony and direct the entry of a new judgment.

28 3. Except as otherwise provided in NRS 176.09187, a motion for a new trial based on the ground of newly  
discovered evidence may be made only within 2 years after the verdict or finding of guilt.

4. A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding  
of guilt or within such further time as the court may fix during the 7-day period.

1 District Attorney, constituted an unconstitutional Due Process violation against the Defendant's  
2 right to an uncoerced, unanimous verdict? The Defendant is respectfully requesting that the  
3 Defendant be granted a new trial on the remaining offense. A hearing on this matter is  
4 respectfully requested.  
5

6 DATED this 15<sup>th</sup> day of June, 2021.

7 /s/ GARY A. MODAFFERI

8 By: \_\_\_\_\_  
9 Gary A. Modafferi, Esq. (12450)  
10 Attorney for Defendant  
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28 (Added to NRS by 1967, 1443; A 1983, 1671; 2003, 1894; 2011, 280; 2013, 1856; 2015, 785; 2017, 1480)

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**NOTICE OF MOTION**

TO: Steven Wolfson, District Attorney Clark County, Nevada;

**MOTION FOR NEW TRIAL** will be heard on the \_\_\_\_\_ day of \_\_\_\_\_, 2021, at  
\_\_\_\_\_ a.m./p.m. in District Court, Department X.

DATED this 15<sup>th</sup> day of June, 2021.

/S/ GARY A. MODAFFERI

By: \_\_\_\_\_  
Gary A. Modafferi, Esq. (12450)  
612 S. 3<sup>rd</sup> Street, Suite A  
Las Vegas, Nevada 89101  
Telephone 702.327.3033  
Attorney for Defendant

1  
2 **POINTS AND AUTHORITIES**

3 **A. Relevant Facts**

4 The Defendant was tried before a jury on the charge of “open murder,”  
5  
6 which encompassed the offenses of Murder in the First Degree, Murder in the Second Degree,  
7 Voluntary Manslaughter and Involuntary Manslaughter.<sup>2</sup> The State elected to proceed, sua  
8 sponte, with the three most serious offenses of Murder in the First Degree with Use of a Deadly,  
9 Weapon, Second Degree Murder with Use of a Deadly Weapon, and Voluntary Manslaughter  
10 with Use of a Deadly Weapon.<sup>3</sup>

11  
12 The Defense was unable to properly challenge the possibility of tendering a Murder in the  
13 First-Degree charge from being considered by the jury because no legal mechanism to request  
14 that this offense be dismissed for failure of proof exists. There is no legal or statutory mechanism  
15 to challenge the state of mind requirements of Murder in the First Degree through the pretrial  
16 writ of habeas corpus as to insufficient presentation of probable cause to the grand jury as to  
17 willfulness, deliberation and premeditation as demanded by Byford.<sup>4</sup> Accordingly, all first  
18 degree murder charges go to the jury no matter how weak or unsupported those charges are as to  
19 the requisite mens rea.  
20

21 Similarly, there exists no legal mechanism, such as a federal Rule 29 Motion to cull out  
22 unsupported criminal offenses at the close of the State or government’s case.<sup>5</sup> The result was that  
23 the jury was given four alternatives when only three were constitutionally permissible, per  
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28 <sup>2</sup> See Exhibit A – Indictment filed.

<sup>3</sup> See attached Exhibit B, Jury Instructions, filed June 11, 2021.

<sup>4</sup> Byford v. State, 116 Nev. 215, 995 P.2d 700 (2000)

<sup>5</sup> See Federal Rule of Criminal Procedure Rule 29 attached as Exhibit C.

1 Defendant's argument. In this case, the jury indicated to the Court that it was deadlocked on  
2 more than one occasion. The jury was read an Allen or dynamite instruction to break the  
3 deadlock over the Defendant's objection. After the instruction was read, the jury soon returned a  
4 verdict of the lesser included charge of guilty of Voluntary Manslaughter with use of a Deadly  
5 Weapon.<sup>6</sup>

7 **B. Legal Argument**

8 The Open Murder Charge concept, as presented to the facts and circumstances of  
9 Defendant's case is unconstitutional as it infringes upon the Defendant's right to an uncoerced,  
10 unanimous verdict. The circumstances of Defendant's case caused a Murder in the First-Degree  
11 charge to be illegally presented to the jury. The Defendant believes that the State never  
12 approximated the necessary proof to sustain a motion for directed verdict at the close of the  
13 State's case based upon the necessity of all three distinct state of mind components being proven.  
14 Byford is unequivocal about the difference and distinction of those discrete states of mind. Use  
15 of the pretrial writ of habeas corpus to mount a challenge as to the various unproven state of  
16 minds by Byford is also not allowed under the current system.

17 The Supreme Court of Nevada concluded in Byford that the Kazalyn instruction to the  
18 jury erroneously "blurred the distinction between first and second – degree murder" by failing to  
19 adequately distinguish between the distinct elements of deliberation and premeditation required  
20 for a conviction for first degree murder as opposed to lesser homicide offenses.<sup>7</sup> The State  
21 benefited from the legal largesse of having judicially supervised procedure to prevent the  
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<sup>6</sup> See attached Exhibit D – Verdict form filed June 11, 2021.

<sup>7</sup> Byford, supra, 116 Nev. at 234-36 N.4, 994 P.2d at 713, 714, N.4.

unwarranted and factually unsupported Murder in the First Degree offense from being funneled into the deliberation process as a bargaining chip for a compromise verdict.

Proof of the “horse-trading” that took place in the jury deliberation room is manifested by the juror question in this case as to whether a plea bargain was offered to the Defendant and his reasons for rejecting the bargain.<sup>8</sup> The open murder charge and the seemingly purposeful omission of any procedural safeguard to prevent the jury from considering unwarranted murder charges caused an unconstitutional and illegal compromise verdict.

## CONCLUSION

It is respectfully requested that the Defendant be granted a new trial.

Respectfully submitted this 15<sup>th</sup> day of June, 2021.

/s/ Gary A. Modafferi

GARY A. MODAFFERI, ESQ. (12450)  
*Attorney for Defendant*

<sup>8</sup> This inquiry went unanswered by request of both parties.

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6 **GARY A. MODAFFERI, ESQ.**

Nevada Bar No. 12450

7 Hawaii bar No. 3379

8 612 S. 3<sup>rd</sup> Street, Suite A

Las Vegas, Nevada 89101

9 Telephone 702.327.3033

10 *Attorney for Defendant*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 THE STATE OF NEVADA, )

14 Plaintiff, )

15 v. )

16 EARNEST BATES, )

17 Defendant. )

CASE NO.: C-18-335316-1

DEPT. NO.: X

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20 **CERTIFICATE OF SERVICE**

21  
22 I HEREBY CERTIFY that on the 15<sup>th</sup> day of June, 2021, I served a true and correct copy  
23 of the foregoing **MOTION FOR NEW TRIAL** upon the following:

24 Michael Schwartzer, Esq.

Chief Deputy District Attorney

25 [michael.schwartz@clarkcountyda.com](mailto:michael.schwartz@clarkcountyda.com)

26 Clark County District Attorney's Office

27 [motions@clarkcountyda.com](mailto:motions@clarkcountyda.com)

28 [PDMotions@clarkcountyda.com](mailto:PDMotions@clarkcountyda.com)

/s/ Erika W. Magaña

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Assistant to Gary A. Modafferi Esq.



**EXHIBIT “A”**

ORIGINAL

FILED IN OPEN COURT  
STEVEN D. GRIERSON  
CLERK OF THE COURT

OCT 04 2018

BY   
KIMBERLY ESTALA, DEPUTY

1 IND  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 JACQUELINE BLUTH  
6 Chief Deputy District Attorney  
7 Nevada Bar #10625  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 EARNEST BATES,  
13 #5018059

14 Defendant.

CASE NO: C-18-335316-1

DEPT NO: III

INDICTMENT

15 STATE OF NEVADA }  
16 COUNTY OF CLARK } ss.

17 The Defendant above named, EARNEST BATES, accused by the Clark County Grand  
18 Jury of the crime(s) of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony  
19 - NRS 200.010, 200.030, 193.165 - NOC 50001), committed at and within the County of Clark,  
20 State of Nevada, on or about the 9th day of June, 2018, as follows: did willfully, unlawfully,  
21 feloniously and with malice aforethought, kill ARLANDUS JONES, a human being, with use

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C-18-335316-1  
IND  
Indictment  
4785400




1 of a deadly weapon, to wit: a firearm, by shooting at and into the body of the said ARLANDUS  
2 JONES, the said killing having been willful, deliberate and premeditated.

3 DATED this 3 day of October, 2018.

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

7 BY

8   
9 JACQUELINE BLUTH  
10 Chief Deputy District Attorney  
11 Nevada Bar #10625

12 ENDORSEMENT: A True Bill

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14 Foreperson, Clark County Grand Jury  
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1 Names of Witnesses and testifying before the Grand Jury:

2 ALSHALABI, GHASSAN – c/o CCDA 200 LEWIS AVE, LAS VEGAS, NV

3 BOUCHER, DOLECH - LVMPD

4 RICE, SHIRANNAH – c/o CCDA 200 LEWIS AVE, LAS VEGAS, NV

5 ROQUERO, LEONARDO – c/o CCDA 200 LEWIS AVE, LAS VEGAS, NV

6  
7 Additional Witnesses known to the District Attorney at time of filing the Indictment:

8 JONES, CYNTHIA – 34210 PARK SIDE DR, LAKE ELSINORE, CA 92532

9 JONES, STEVE - 34210 PARK SIDE DR, LAKE ELSINORE, CA 92532

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