

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

OCT 15 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

LACY L. THOMAS

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA, IN  
AND FOR THE COUNTY OF CLARK,  
AND THE HONORABLE MICHAEL  
VILLANI, DISTRICT JUDGE

Case No. 52351

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

**ANSWER TO PETITION FOR WRIT OF MANDAMUS  
OR IN THE ALTERNATIVE, WRIT OF CERTIORARI**

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Counsel for Respondent

OCT 15 2008

08-26623

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5    LACY L. THOMAS                                    )

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10    AND FOR THE COUNTY OF CLARK, AND  
11    THE HONORABLE MICHAEL VILLANI                                    )

Case No. 52351

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15   Real Party in Interest.                                    )


16                                    **ANSWER TO PETITION FOR WRIT OF MANDAMUS**  
17                                    **OR IN THE ALTERNATIVE, WRIT OF CERTIORARI**

18       COMES NOW, the State of Nevada, Real Party in Interest, by DAVID  
19    ROGER, District Attorney, through his deputy, SCOTT S. MITCHELL, on behalf of  
20    the above-named respondents and submits this Answer to Petition for Writ of  
21    Mandamus or in the Alternative, Writ of Certiorari in obedience to this Court's order  
22    filed September 22, 2008 in the above-captioned case. This Answer is based on the  
23    following memorandum and all papers and pleadings on file herein.

24       Dated this 13<sup>th</sup> day of October, 2008.

25                                    DAVID ROGER  
26                                    Clark County District Attorney  
27                                    Nevada Bar # 002781

28       BY

  
SCOTT S. MITCHELL  
Deputy District Attorney  
Nevada Bar #000346  
Attorney for Respondent

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**MEMORANDUM OF  
POINTS AND AUTHORITIES**

**STATEMENT OF FACTS**

Lacy L. Thomas ("Petitioner") was accused by the Clark County Grand Jury by way of Indictment of five (5) counts of THEFT (Felony – NRS 205.0832, 205.0835); and five (5) counts of MISCONDUCT OF A PUBLIC OFFICER (Felony – NRS 197.110), committed on or between September, 2004 and January, 2007. The Indictment was filed on February 20, 2008. The charges stem from five (5) contracts negotiated by Petitioner with five (5) different entities. Respondent's Appendix ("RA") 1-6.

On April 7, 2008, Petitioner filed a Motion to Disqualify the District Attorney's Office. RA 9. On April 23, 2008, the State filed a Response to the Motion to Disqualify the District Attorney's Office. RA 33. On May 7, Petitioner filed a Reply to Respondent's Response to Motion to Disqualify. RA 42. On May 30, 2008, Petitioner filed a Motion to Vacate the Hearing on the Writ. RA 53.

On June 16, 2008, a hearing was held on Petitioner's Motion to Disqualify the District Attorney's Office. RA 56.

At the hearing, David Roger, Mark Wood, Holly Gordon, and Mary-Anne Miller all testified that University Medical Center (hereinafter "UMC") was the District Attorney's client, not Petitioner. RA 67, 88, 117, 142. David Roger testified that he had never met with or spoken to Petitioner. RA 66. Further, although the District Attorney's office represents the various county agencies, David Roger himself had little or no contact with individual County Managers and did not attend any of their meetings. RA 66, 67.

Mark Wood, a Deputy District Attorney in the Civil Division, was assigned to provide legal advice to UMC from a point predating Petitioner's hiring until November, 2004. RA 85. Mark Wood testified at the hearing that his function was to

1 ensure that proper procedures were followed with respect to UMC contracts and the  
2 placing of items on the agenda for County Commission meetings. RA 86, 92. He  
3 would address legal questions relating to UMC contracts that anybody might have in  
4 these meetings. RA 100. Mark Wood testified that he was not involved with the  
5 contract negotiations, but instead it was Don Haight, who was not employed by Clark  
6 County as an attorney for UMC, that negotiated and wrote the contracts. RA 86.  
7 Thus, Mark Wood's interactions with Petitioner himself were very limited and  
8 impersonal, since these meetings typically involved five to eight other individuals.  
9 RA 99. Mark Wood specifically testified that he did not provide personal legal advice  
10 to anyone during his assignment to UMC. RA 100.

11 Holly Gordon, a Deputy District Attorney in the Civil Division who succeeded  
12 Mark Wood as counsel to UMC, handled hearings involving hospital medical staff  
13 and reviewed UMC contracts. RA 111. Holly Gordon's work with UMC contracts,  
14 however, involved nothing more than her general determination that the contracts  
15 complied with relevant regulations and did not violate any laws. RA 125-127.  
16 Further, Holly Gordon testified that she never gave private legal advice to Petitioner.  
17 RA 127. In fact, Holly Gordon testified that Petitioner was dismissive and barely civil  
18 toward her, and that Petitioner did not welcome the legal advice she provided  
19 regarding UMC contracts. RA 129.

20 Mary-Anne Miller, who is County Counsel, and heads the District Attorney's  
21 Civil Division, also testified at the hearing. RA 139, 140. Mary-Anne Miller testified  
22 that she interacted with Petitioner very little, and doesn't recall having a single one-  
23 on-one meeting with Petitioner. RA 142, 145. Mary-Anne Miller also testified that  
24 when a UMC contract was reviewed, the review was limited to legalities, and that any  
25 determination of financial profitability of the contract was generally not part of the  
26 District Attorney's review. RA 154. Petitioner himself did not testify at the hearing.  
27 At the close of the hearing, Petitioner requested that the hearing be continued so he  
28

1 could call three additional witnesses: Don Haight, Mike Hayes, and Thom Reilly. RA  
2 163.

3 On June 19, 2008 the court DENIED Petitioner's request to continue the  
4 hearing and also DENIED Petitioner's Motion to Disqualify the District Attorney.  
5 See, Petitioner's Exhibit 3.

6 On July 2, 2008, Petitioner filed a Motion to Reconsider the Court's Order  
7 Denying [Petitioner]'s Motion to Disqualify, then amended its motion on July 22,  
8 2008. RA 168, 174. Respondent filed its Opposition to Amended Motion to  
9 Reconsider on August 1, 2008. On August 20, 2008, the court DENIED Petitioners  
10 Amended Motion to Reconsider. See, Petitioner's Exhibit 4.

11 Petitioner filed this Petition for a Writ of Mandamus or in the Alternative Writ  
12 of Certiorari on September 3, 2008. On September 22, 2008, this Court issued an  
13 order directing Respondent to file an answer to Petitioner's petition. See, Order  
14 Directing Answer, filed 09/22/08, SC No. 52351.

15 **POINTS AND AUTHORITIES**

16 **I. PETITIONER IS NOT ENTITLED TO A WRIT OF MANDAMUS**  
17 **OR WRIT OF CERTIORARI.**

18 **A. Petitioner Has an Adequate Remedy at Law.**

19 A Writ of Mandamus is an extraordinary remedy issued by this Court "to  
20 compel the performance of an act which the law requires as a duty resulting from an  
21 office, trust or station." NRS 34.160; State ex rel. Dep't Transp. v. Thompson, 99  
22 Nev. 358, 359-60, 662 P.2d 1338, 1139 (1983). A Writ of Mandamus may issue  
23 when the petitioner has no plain, speedy and adequate remedy at law. NRS 34.170;  
24 see also Scrimmer v. Eighth Judicial Dist. Court, 116 Nev. 507, 512, 998 P.2d 1190,  
25 1193 (2000). It is soundly within the discretion of the Court to determine if such writ  
26 will be considered. Id.; see also State ex rel. Dep't Transp. v. Thompson, 99 Nev.  
27 358, 662 P.2d 1338 (1983). This Court has generally declined to entertain petitions  
28 for writ of mandamus and prohibition review of district court decisions where such

1 decisions are appealable. Ashokan v. State, Dept. of Ins., 109 Nev. 662, 665, 856  
2 P.2d 244, 246 (1993).

3 Further, a Writ of Certiorari “is an extraordinary remedy and the decision to  
4 entertain a Petition for a Writ of Certiorari lies within the discretion of this court.”  
5 SFPP, L.P. v. Second Judicial Dist. Court, \_\_\_ Nev. \_\_\_, 173 P.3d 715 (Nev. 2007);  
6 NRS 34.020(2). Relief in the form of certiorari may be granted when an inferior  
7 tribunal has exceeded its jurisdiction. Id. at 717. [Certiorari] may be issued when no  
8 plain, speedy, and adequate remedy exists in the ordinary course of law. NRS  
9 34.020(2).

10 In this case, Petitioner is not entitled to an extraordinary remedy as he has an  
11 adequate remedy at law. NRS 177.015(3) provides that a defendant may appeal from  
12 a final judgment or verdict. Should Petitioner be found guilty of the crimes charged,  
13 Petitioner may bring his claim on direct appeal without suffering irreparable harm.  
14 See Calvin v. State, 122 Nev. 1178, 147 P.3d 1097, 1099 (2006) (where the  
15 defendant’s pre-trial writ of mandamus was denied, and the defendant later pled  
16 guilty, the defendant raised his constitutional claim on direct appeal without  
17 prejudice.) Therefore, because Petitioner has an adequate remedy available at law,  
18 Petitioner is not entitled to extraordinary relief and this Petition should be denied.

19 B. Petitioner has Failed to Show that the Trial Court Arbitrarily or  
20 Capriciously Abused Its Discretion or Acted Outside Its Authority.

21 The Court should not grant a Writ of Mandamus or a Writ of Certiorari in the  
22 instant case as Respondent has neither abused his discretion nor acted outside his  
23 authority.

24 A Writ of Mandamus will issue to enforce “the performance of an act which the  
25 law enjoins as a duty especially resulting from an office ... or to compel the  
26 admission of a party to the use and enjoyment of a right ... to which he is entitled and  
27 from which he is unlawfully precluded by such inferior tribunal. NRS 34.160.  
28

1 Mandamus will not lie to control discretionary action unless it is manifestly  
2 abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v.  
3 Second Judicial Dist. Court, 111 Nev. 629, 635, 5 P.3d 562, 566 (2000). Further,  
4 NRS 34.020(2) states:

5 [Certiorari] shall be granted in all cases when an inferior tribunal, board  
6 or officer, exercising judicial functions, has exceeded the jurisdiction of  
7 such tribunal, board or officer and there is no appeal, nor, in the  
8 judgment of the court, and plain, speedy and adequate remedy. Id.

9 In this case, the district court neither abused its discretion nor acted outside of  
10 its authority. Thus, Petitioner's Petition for Writ of Mandamus or in the Alternative  
11 Writ of Certiorari should be denied.

12 **II. THE DISTRICT COURT CORRECTLY DENIED PETITIONER'S**  
13 **MOTION TO DISQUALIFY THE CLARK COUNTY DISTRICT**  
14 **ATTORNEY'S OFFICE.**

15 A. Nevada Statutory Law Designates the District Attorney as the  
16 Prosecutor of Criminal Actions Against County Officers or  
17 Employees, While Simultaneously Mandating the Civil  
18 Representation of County Agencies, Thus Indicating that  
19 Situations Such as the Instant One are Not Considered Conflict of  
20 Interest.

21 As set forth in NRS 228.175 and 228.177, the Attorney General is authorized to  
22 prosecute criminal actions against state officers or employees, and the district attorney  
23 is authorized to prosecute cases against county officers or employees. In fact, per  
24 NRS 252.080, the "district attorney in each county shall be public prosecutor therein."  
25 County officers or employees are defined as "an elected officer of a county or any  
26 county officer or employee who is compensated from a county treasury." NRS  
27 228.177.1. As was testified to by Mary-Anne Miller before the Grand Jury, the  
28 Petitioner was "a public officer under the meaning of the law." (GJT, vol. 1, p. 64,  
11. 3-5).

1 As evidenced by statute, there can be no doubt that the Nevada legislature has  
2 emphasized its strong preference that the District Attorney be the prosecutor when a  
3 county officer is being criminally charged. The Attorney General is not empowered  
4 to prosecute county officers or employees unless the District Attorney either (1) states  
5 in writing to the Attorney General "that he does not intend to act in the matter," or (2)  
6 the Attorney General has inquired in writing whether the District Attorney intends to  
7 act in the matter and "has not received a written response within 30 days after the  
8 district attorney received the inquiry," or (3) the District Attorney has responded in  
9 writing that he intends to act in the matter, "but an information or indictment is not  
10 filed within 90 days after the response." NRS 228.177. Even in the event of one of  
11 these three situations, the Attorney General must receive leave of the court to proceed  
12 with the prosecution. NRS 228.177.3. Thus, the Attorney General is not even  
13 allowed to proceed as prosecutor except in relatively extreme or unusual  
14 circumstances. None of these special circumstances is present here, and Petitioner  
15 does not contend otherwise.

16 More importantly, the same Nevada statutory law requires district attorneys to  
17 provide legal advice to their respective county agencies. NRS 252.160 reads as  
18 follows: "The district attorney shall, without fees, give his legal opinion to an  
19 assessor, collector, auditor or county treasurer, and to all other county, township, or  
20 district officers within his county, in any matter relating to the duties of their  
21 respective offices." It is therefore obvious from the statutory scheme set forth above  
22 that the law does not contemplate the instant situation to be a conflict of interest, as  
23 the law itself goes out of the way to require the District Attorney to prosecute the  
24 same county officials that he is required to legally advise. Given this statutory  
25 scheme, which appears to be dispositive of the issue before the court, it is not  
26 surprising that Petitioner was unable to find case law applicable to the instant set of  
27 facts. Petitioner has completely ignored this body of law in his petition.



1                   B.     Other Jurisdictions Have Not Disqualified Prosecutors in Cases  
2                             Similar to the Case at Bar.

3             In a case very similar to the one at bar, a New Mexico state official contended  
4 on appeal of his conviction that the State Attorney General should have been  
5 disqualified from assisting Federal prosecutors in prosecuting him criminally because  
6 the same attorney general's office provided civil legal advice to the defendant and the  
7 state agency for which he worked. Citing numerous authorities, the Federal Eleventh  
8 Circuit Court of Appeals specifically found that "an inherent conflict of interest does  
9 not arise merely because a state attorney general prosecutes a state officer whom he  
10 formerly represented." U.S. v. Troutman, 814 F.2d 1428 (11<sup>th</sup> Cir. 1987) at 1438.  
11 The court agreed with the many courts who have addressed the issue that "*a state*  
12 *attorney general has a primary responsibility to protect the interests of the people of*  
13 *the state and must be free to prosecute violations of those interests by a state officer*  
14 *regardless of his representation of the state officer in past or pending litigation.*" Id.  
15 (Emphasis added).

16             Furthermore, the Troutman court held that the trial court has absolute discretion  
17 regarding whether to permit a defendant to call a prosecutor as a witness, and may  
18 deny the request if it does not appear the prosecutor possesses information vital to the  
19 defense, and it was not an abuse of discretion to deny the request where the testimony  
20 of the prosecutor was not vital to the defense and could be obtained through other  
21 witnesses. Id. at 1439, 1440.

22                   C.     In Conventional Conflict-Of-Interest Cases Not Involving Public  
23                             Officers, Nevada Case Law Has Indicated a Strong Preference  
24                             That, In the Absence of "Extreme" Circumstances Not Alleged  
25                             Here, District Attorneys Not Be Disqualified From Prosecution.  
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1 The Courts have generally been reluctant to disqualify an entire prosecutor's  
2 office. The California Court of Appeals in People v. Petrisca, 41 Cal. Rptr. 3d 182  
3 (2006) stated:

4 Moreover, "[d]isqualification of an entire prosecutorial office  
5 from a case is disfavored by the courts, absent a substantial  
6 reason related to the proper administration of justice." The  
7 showing of conflict of interest necessary to justify so drastic a  
8 remedy must be especially persuasive. (Citation omitted).

9 The Nevada Supreme Court has indicated that disqualification of a prosecutor's  
10 office may be warranted in "extreme cases where the appearance of unfairness or  
11 impropriety is so great that the public trust and confidence in our criminal justice  
12 system could not be maintained without such action. Collier v. Legakes, 98 Nev. 307,  
13 310, 646 P.2d 1219 (1982); (Emphasis Added).

14 In a case ten years after Collier v. Legakes, *supra*, the Nevada Supreme Court  
15 was presented in Attorney General v. Eighth Judicial District Court in and for the  
16 County of Clark, 108 Nev. 1073, 844 P.2d 124 (1992), with a case different from the  
17 instant one, but similar to Petitioner's characterization of this one. There,  
18 disqualification of the district attorney's office had been ordered by the district court  
19 after it was determined that a DA's office investigator had previously interviewed the  
20 defendant and other witnesses in the case before coming to work for the district  
21 attorney. The district attorney, however, had not allowed the investigator to have any  
22 involvement with the prosecution of the defendant. The Nevada Supreme Court  
23 reversed the district court order, finding it to be an abuse of discretion to disqualify  
24 the district attorney absent an evidentiary hearing in which it was established that the  
25 case presented "extreme" danger of unfairness as required by the opinion in Collier.  
26 *Supra*. The mere appearance of an arguable conflict was not enough to disqualify the  
27 district attorney, the court held, citing approvingly its previous holding in Collier that  
28 the trial judge, in exercising his discretion, should consider all the facts and

1 circumstances and determine whether the prosecutorial function could be carried out  
2 impartially without any breach of privileged communication, Collier v. Legakes,  
3 *supra*, 98 Nev. at 311.

4 The thrust of the above-stated law is that disqualification might be justified in  
5 the very rare case where it is shown that the prosecutor's prior or current relationship  
6 with the defendant makes him privy to confidential information relevant to the  
7 prosecution. Again, however, Petitioner has not alleged this to be the case. Even if  
8 this court were to find all the above argument unpersuasive, in order to disqualify the  
9 District Attorney here it would have to specifically find through an evidentiary  
10 hearing the existence of privileged, confidential information obtained from the  
11 Petitioner by virtue of the District Attorney's role of provided legal advice to county  
12 officers, and that information being used against the Petitioner so as to cast doubt  
13 upon the possibility of a fair trial. Merely alleging that the criminal prosecutor and  
14 the attorneys providing legal advice to UMC officials both come from the same office  
15 is clearly not enough for Petitioner to carry its burden in this motion.

16 At the June 16, 2006 evidentiary hearing ("hearing"), Petitioner failed to elicit  
17 any testimony establishing that prosecution by the District Attorney's Office presents  
18 "extreme" danger of unfairness to Petitioner.

19 Petitioner failed to present any evidence, testimony, or even an offer of proof  
20 that privileged communications occurred between himself and the District Attorney's  
21 Office. Further, there was no testimony presented or even proffered at the hearing to  
22 support the existence of an attorney-client relationship between the District Attorney's  
23 Office and Petitioner in his individual capacity.

24 Petitioner claims that attorneys in the Civil Division of the District Attorney's  
25 Office formerly represented Petitioner and "their interests are materially adverse to  
26 [Petitioner]'s interests." Petition For Writ of Mandamus/Certiorari ("Petition") 8. The  
27 District Attorney's Office, however, does not represent county officers individually,  
28 but instead designates the county agency, in this case UMC, as its client. At the

1 hearing, David Roger, Mark Wood, Holly Gordon, and Mary-Anne Miller all testified  
2 that UMC was the District Attorney's client, not Petitioner. RA 67, 88, 117, 142.

3 Roger testified that he had never met with or spoken to Petitioner. RA 66.  
4 Further, although the District Attorney's office represents the various county agencies,  
5 David Roger himself had little or no contact with individual County Managers and did  
6 not attend any of their meetings. RA 66, 67.

7 Mark Wood, a Deputy District Attorney in the Civil Division, was assigned to  
8 provide legal advice to UMC from a point predating Petitioner's hiring until  
9 November, 2004. RA 85. Wood testified at the hearing that his function was to  
10 ensure that proper procedures were followed with respect to UMC contracts and the  
11 placing of items on the agenda for County Commission meetings. RA 86, 92. He  
12 would address legal questions relating to UMC contracts that anybody might have in  
13 these meetings. RA 100. Mark Wood testified that he was not involved with the  
14 contract negotiations, but instead it was Don Haight, who was not employed by Clark  
15 County, that negotiated and wrote the contracts. RA 86. Thus, Mr. Wood's  
16 interactions with Petitioner himself were very limited and impersonal, since these  
17 meetings typically involved five to eight other individuals. RA 99. Mark Wood  
18 specifically testified that he did not provide personal legal advice to anyone during his  
19 assignments to UMC matters. RA 100.

20 Holly Gordon, a Deputy District Attorney in the Civil Division who succeeded  
21 Mark Wood as counsel to UMC, handled hearings involving hospital medical staff  
22 and reviewed UMC contracts. RA 111. Holly Gordon's work with UMC contracts,  
23 however, involved nothing more than her general determination that the contracts  
24 complied with relevant regulations and did not violate any laws. RA 125-127.  
25 Further, Holly Gordon testified that she never gave private legal advice to Petitioner.  
26 RA 127. In fact, Holly Gordon testified that Petitioner was dismissive and barely civil  
27 toward her, and that Petitioner did not welcome the legal advice she provided  
28 regarding UMC contracts. RA 129.

1 Mary-Anne Miller, who is County Counsel, and heads the District Attorney's  
2 Civil Division, also testified at the hearing. RA 139. Miller testified that she  
3 interacted with Petitioner very little, and doesn't recall having a single one-on-one  
4 meeting with Petitioner. RA 142, 145. Miller also testified that when a UMC  
5 contract was reviewed, the review was limited to legalities, and that any determination  
6 of financial profitability of the contract was generally not part of the District  
7 Attorney's review. RA 154. Finally, as County Counsel, Mary-Anne Miller is  
8 uniquely qualified to know who her clients were, and who they were not, and whether  
9 or not other attorneys in the Civil Division were Petitioner's personal attorneys. At  
10 the hearing, Mary-Anne Miller made it clear that she, and other attorneys in the Civil  
11 Division, represent the county agency UMC, and not Petitioner individually. RA 142.

12 Thus, the testimony on record establishes that the District Attorney's Office did  
13 not give Petitioner personal legal advice and that all meetings between representatives  
14 of the District Attorney's office and Petitioner involved other persons. Petitioner did  
15 not testify at the hearing nor did he submit any documentary evidence tending to  
16 justify disqualification. Accordingly, this is not an "extreme case where the  
17 appearance of unfairness or impropriety is so great" as to warrant disqualification of  
18 the District Attorney's office.

19 D. The District Attorney's Prosecution of Petitioner is Not Substantially  
20 Related to the District Attorney Civil Division's Representation of UMC.

21 Petitioner claims that application of the "substantially related" test for  
22 determining whether disqualification of an attorney is proper under Waid v. Eighth  
23 Judicial dist. Court Ex Rel., County of Clark, 121 Nev. 605, 119 P.3d 1219 (2005),  
24 supports his position that the District Attorney's Office should be disqualified here.  
25 Petition 9. Petitioner's claim fails however because: (1) application of the  
26 "substantially related" test in this case, assumes that Petitioner himself is the former  
27 client of the District Attorney's Office, instead of UMC only; and (2) the District  
28

1 Attorney's prosecution of Petitioner is not substantially related to the District  
2 Attorney Civil Division's representation of UMC.

3 First, the District Attorney's Office represents UMC only, not its officers or  
4 directors. David Roger, Mark Wood, Holly Gordon, and Mary-Anne Miller all  
5 testified at the hearing that UMC was and is the District Attorney Office's client, not  
6 Petitioner. RA 67, 88, 117, 142. Although Petitioner points out that the inquiry into  
7 whether an attorney-client relationship existed is very fact-specific, Waid at 611, he  
8 merely alleges that the existence of Petitioner's employment contract with UMC,  
9 "together with the District Attorney's position regarding their representation of the  
10 hospital," shows that an attorney-client relationship existed between the District  
11 Attorney's office and Petitioner individually. Petition 10. Petitioner's employment  
12 contract, however, made it clear that the District Attorney's office was legal counsel  
13 for UMC. RA 117. Thus, Petitioner's conclusory assertions without more, do not  
14 show that an attorney-client relationship existed between the District Attorney's office  
15 and Petitioner individually.

16 Second, the District Attorney's prosecution of Petitioner is not substantially  
17 related to the District Attorney Civil Division's representation of UMC. Under  
18 Waid's three-part test for determining when a former and present matter are  
19 substantially related, the court is required to do the following: (1) make a factual  
20 determination concerning the scope of the former representation; (2) evaluate whether  
21 it is reasonable to infer that the confidential information allegedly given would have  
22 been given to a lawyer representing a client in those matters, and (3) determine  
23 whether that information is relevant to the issues raised in the present litigation. Id. at  
24 610.

25 First, the scope of the District Attorney's representation of UMC while  
26 Petitioner was CEO was limited primarily to reviewing UMC contracts for legal  
27 sufficiency, in the context of meetings where several individuals were present. Any  
28 legal counsel given to Petitioner himself was in the context of these meetings, and

1 with regard only to legal sufficiency of UMC contracts. RA 86, 91,111, 118, 145.  
2 Second, Petitioner has failed to allege any specific confidential information that was  
3 given to representatives of the District Attorney's office during his tenure as CEO of  
4 UMC. Therefore, it is not reasonable to infer that Petitioner gave representatives of  
5 the District Attorney's office any confidential information aside from whatever legal  
6 counsel was given regarding legal sufficiency of UMC contracts.

7 Finally, the legal counsel given to Petitioner in the context of these meetings  
8 regarding legal sufficiency of UMC contracts, is not relevant to the issues raised in the  
9 present prosecution. Holly Gordon testified that reviewing the legal sufficiency of a  
10 UMC contract constituted making sure the contract complied with a particular set of  
11 statutes, and looking for "red flags" such as: indemnification of the contractor by the  
12 hospital, whether the contract complied with the Budget Act, and whether the contract  
13 purported to insure anyone else. RA 126, 127. Holly Gordon further testified that  
14 when reviewing a contract, that the document contained proper bidding procedures.  
15 RA 127. Finally, the financial profitability of a UMC contract was never part of the  
16 review by representatives of the District Attorney's Office. RA 131, 132, 154. Thus,  
17 Petitioner has failed to meet his burden that the two matters are substantially related  
18 because any legal counsel given to Petitioner by representatives of the District  
19 Attorney's Office was limited in scope and not relevant to the issues raised in the  
20 present prosecution.

21  
22 **III. THE DISTRICT COURT CORRECTLY DENIED PETITIONER'S**  
23 **REQUEST TO CONTINUE THE HEARING IN ORDER TO**  
24 **LOCATE ADDITIONAL WITNESSES.**

25 At the close of the hearing, Petitioner requested that the hearing be continued so  
26 he could call three additional witnesses: Don Haight, Mike Hayes, and Thom Reilly.  
27 RA 163. The court denied Petitioner's request as well as his motion. See, Petitioner's  
28 Exhibit 3, pg. 4. Petitioner then filed a Motion to Reconsider the court's denial,

1 which was also denied. See, Petitioner's Exhibit 4. Petitioner claims that he was  
2 denied a complete evidentiary hearing to establish a conflict of interest when the court  
3 denied his request to continue the hearing in order to locate additional witnesses  
4 "necessary to the determination of the issue raised in his motion." Petition 11.  
5 Petitioner's counsel also claims that as a result of the court denying his motion to  
6 continue the hearing, Petitioner himself was denied the opportunity to testify and  
7 present evidence of a conflict of interest. Petition 13.

8 Petitioner, however, has not even alleged that specific privileged  
9 communication took place between himself and representatives of the District  
10 Attorney's Office. Instead he makes a purely legal argument that a conflict of interest  
11 exists here simply because he is being prosecuted by the same office which represents  
12 UMC in civil matters. Petition 8. The witnesses whom Petitioner seeks to call,  
13 therefore, have no bearing upon this issue. First, Don Haight, who was not employed  
14 by Clark County as an attorney, was employed instead as a Contracts Administrator.  
15 RA 86, 128. As such, Don Haight cannot testify as to any of his communications with  
16 Petitioner regarding contracts because he was not the County's assigned legal  
17 representative to UMC. RA 86, 128. Second, Mike Hayes, also cannot provide any  
18 competent testimony necessary to this issue because, as a non-lawyer, he is not  
19 qualified to testify as to any legal relationship between Petitioner and the District  
20 Attorney's Office. Third, Thom Reilly, who was also not employed by Clark County  
21 as an attorney, was employed as the County Manager. Thus, like Don Haight and  
22 Mike Hayes, Thom Reilly is not qualified to testify as to any legal relationship  
23 between Petitioner and the District Attorney's Office. Moreover, there is nothing  
24 Thom Reilly could have testified to at the hearing that Petitioner himself could not  
25 have testified to, especially with regard to any legal relationship between Petitioner  
26 and the District Attorney's Office. These three individuals, therefore, are not  
27 competent to testify concerning whether an attorney-client relationship existed  
28 between Petitioner and the District Attorney's Office.



1 Further, Petitioner never testified, nor at any time stated his intention to testify,  
2 about any alleged close, personal, confidential attorney client-relationship existing  
3 with any member of the District Attorney's Office. At the hearing, Petitioner made it  
4 clear that he did not intend to call any other witness aside from the three additional  
5 unsubpoenaed witnesses. RA 155.

6 Finally, in light of the fact that Petitioner's counsel voiced his intention to  
7 pursue the issue of disqualification for over 3 ½ months, there was ample opportunity  
8 to locate and have in attendance his additional witnesses. Even if the court erred  
9 however, any error by the trial judge in not allowing witnesses to testify is harmless,  
10 when the court allows counsel to make an offer of proof regarding the proposed  
11 witnesses' testimony, and there is no indication that such witnesses would have made  
12 a difference in the outcome of the hearing. Kirksey v. State, 112 Nev. 980, 1004, 923  
13 P.2d 1102, 1117 (1996).

14 Here, when asked by the court for an offer of proof as to the proposed witnesses  
15 testimony, Petitioner stated that he had not spoken with the witnesses at length and  
16 further stated: "I cannot as an officer of the court tell you that I can give you an offer  
17 of proof as to what they're going to say" RA 164. Petitioner would ask this Court to  
18 rely on his mere supposition as to his witnesses expected testimony. Thus, based on  
19 Petitioner's inability to make any offer of proof as to the proposed witnesses expected  
20 testimony, and because the proposed witnesses are not competent to testify regarding  
21 this purely legal issue, there is no indication that his proposed witnesses would have  
22 made a difference in the outcome of the hearing.

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CONCLUSION

Based on the foregoing, the State respectfully requests that the Petition for Writ of Mandamus or in the Alternative, Writ of Certiorari be DENIED and this case be allowed to proceed to trial as soon as possible.

Dated October 13, 2008.

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**Judge Michael Villani**  
**Department XVII**  
**Clark County Courthouse**  
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