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## E-File

VS.

Electronically Filed  
Jul 30 2009 01:37 p.m.  
Tracie K. Lindeman

Respondent.

(Appeal from Judgment of Conviction)

DAVID ROGER  
CLARK COUNTY DISTRICT ATTORNEY  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
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Docket 52573 Document 2009-18674

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4   JOSEPH ALEXANDER HENDERSON,   )           NO.   52573  
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6                                   Appellant,    )  
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11                                   **APPELLANT'S REPLY BRIEF**

12   PHILIP J. KOHN                                   DAVID ROGER  
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JOSEPH ALEXANDER HENDERSON, ) NO. 52573  
)  
Appellant, ) **E-File**  
)  
vs. )  
)  
THE STATE OF NEVADA, )  
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Respondent. )  
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• **I**

1 **II. AFTER DENYING THE DEFENSE MOTION TO DISMISS, THE**  
2 **COURT FAILED TO AFFORD MR. HENDERSON ALTERNATIVE**  
3 **RELIEF SOUGHT BY THE DEFENSE AND THEREBY VIOLATED HIS**  
4 **RIGHT TO DUE PROCESS.**

5 The Respondent argues that the Defense did not call a DNA expert to testify that the  
6 swabs could have been exculpatory. This is a senseless argument. There were no DNA samples  
7 to independently test. The Defense certainly could not perform its own extraction to prove the  
8 evidence was exculpatory. The very reason a Sanborn instruction was needed was because not  
9 enough of a DNA sample had been preserved for the Defense to independently test. Failure to  
10 provide Mr. Henderson relief from this impossible situation violated his constitutionally  
11 protected right to due process.

12 **III. THE COURT ERRED WHEN IT DENIED THE DEFENSE MOTION**  
13 **IN LIMINE AND THE GOVERNMENT SHOULD HAVE BEEN**  
14 **PRECLUDED FROM ARGUING AND PRESENTING EVIDENCE THAT**  
15 **JOSEPH HENDERSON'S IDENTITY IS ASSUMED AS A RESULT OF**  
16 **THE DNA TESTING.**

17 Issue III of Appellant's Opening Brief is hereby incorporated by reference as if set forth  
18 in full in reply to Respondent's Answering Brief.

19 **IV. MR. HENDERSON'S RIGHT TO DUE PROCESS WAS VIOLATED**  
20 **WHEN THE COURT DENIED DEFENSE MOTION FOR A MISTRIAL**  
21 **AFTER THE TESTIMONY OF KIM MURGA.**

22 A. Issue IV(A) of Appellant's Opening Brief is hereby incorporated by reference as if  
23 set forth in full in reply to Respondent's Answering Brief.

24 B. The Respondent argues that none of Murga's notes could have been used to impeach  
25 her. Such an assumption can not be made when the Defense did not get a chance to have an  
26 expert look at the notes in order to evaluate if there was in fact potentially impeachment material  
27 in the notes. (During trial was the first that the Defense was aware of the notes and the trial  
28 court would only grant a few minutes break for the Defense to review the notes. (App. 565)

1 Certainly, not time to have the notes reviewed by a Defense expert, thereby violating the spirit  
2 of discovery rules. (App. 568)

3 The Respondent's claim that everything in the notes was the same information as the  
4 evidence given at trial, is not accurate. There were calculations and other notations not part of  
5 the testimony or the reports of Welch or Guenther. (App. 568-9) That was the problem. The  
6 Defense could not decipher nor analyze the notes without expert assistance. (App. 568-9)  
7 When the trial court inquired, "how is this beneficial to your case, Mr. Reed, assuming that you  
8 did inquire if the witness about these notes", Defense counsel how to answer, "That's a good  
9 question. If I could ask my expert I might be able to answer that question. I can't. I don't know  
10 the answer to that question." (App. 569) The ability to mount an informed defense was  
11 compromised. Accordingly, Mr. Henderson's constitutional right to due process was violated  
12 and his conviction should be vacated.

13 C. Issue IV(C) of Appellant's Opening Brief is hereby incorporated by reference as if  
14 set forth in full in reply to Respondent's Answering Brief.

15  
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18 **V. MR. HENDERSON WAS DENIED A FAIR TRIAL WHEN THE JURY**  
19 **POOL WAS TAINTED BY THE FACT THAT THE DISTRICT COURT**  
20 **DENIED THE DEFENSE REQUEST NOT TO VOICE PEREMPTORY**  
21 **CHALLENGES IN OPEN COURT.**

22 Respondent argues there was no showing of prejudice resulting from the trial court's  
23 denial of the Defense request not to voice peremptory challenges in open court. However,  
24 because the peremptory challenges were made in open court, any potential jurors that were  
25 questioned following each preempt could then tailor their answers to voir dire based on their  
26 perception(s) as to why any previously excused juror was dismissed. This affects the ability and  
27 willingness of potential juror to honestly respond to voir dire. (The practice advocated by this  
28 Court in **Foster** assures much more open and honest responses to voir dire by potential jurors,

1 and therefore a more fair trial for all the parties.) By allowing peremptory challenges in open  
2 court, the trial court denied Mr. Henderson a fair trial.

3  
4 **CONCLUSION**

5 In light of the various errors associated with Mr. Henderson's trial, the judgment of  
6 conviction should be vacated.

7 Respectfully submitted,

8 PHILIP J. KOHN  
9 CLARK COUNTY PUBLIC DEFENDER


10  
11 By: 

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DATED this 30th day of July, 2009.

By   
 KEDRIC A. BASSETT, #4214  
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1 **CERTIFICATE OF SERVICE**

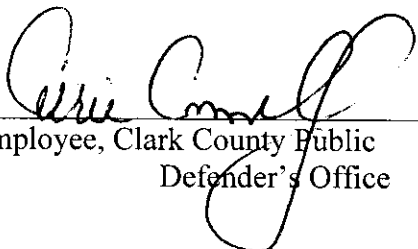
2 I hereby certify that this document was filed electronically with the Nevada  
3 Supreme Court on the 30<sup>th</sup> day of July, 2009. Electronic Service of the foregoing document  
4 shall be made in accordance with the Master Service List as follows:  
5

6 CATHERINE CORTEZ MASTO  
7 STEVEN S. OWENS

KEDRIC A. BASSETT  
HOWARD S. BROOKS

8 I further certify that I served a copy of this document by mailing a true and  
9 correct copy thereof, postage pre-paid, addressed to:

10 JOSEPH ALEXANDER HENDERSON  
11 NDOC No. 67224  
12 c/o Ely State Prison  
13 P.O. Box 1989  
14 Ely, NV 89301

15 BY   
16 Employee, Clark County Public  
17 Defender's Office  
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