

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Gracie K. Lindeman  
Clerk of Supreme Court

SAMUEL HOWARD,  
Appellant,

v.

THE STATE OF NEVADA,  
Respondent.

Case No. 57469

**MOTION FOR RECONSIDERATION BY FULL COURT**

**Appeal From Order Denying Fourth Petition  
for Writ of Habeas Corpus (Post-Conviction)  
Eighth Judicial District Court, Clark County**

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Counsel for Respondent

1 IN THE SUPREME COURT OF THE STATE OF NEVADA  
2  
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5 SAMUEL HOWARD, ) Case No. 57469  
6 Appellant, )  
7 v. )  
8 THE STATE OF NEVADA, )  
9 Respondent. )

10 **MOTION FOR RECONSIDERATION BY FULL COURT**  
11

12 COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark  
13 County District Attorney, through his Chief Deputy, JONATHAN E.  
14 VANBOSKERCK, and files the instant Motion for Reconsideration by Full Court.  
15 This motion is filed pursuant to NRAP Rule 27(a)(3), (c)(1), and (e) and is based  
16 on the following memorandum and all papers and pleadings on file herein.

17 Dated this 25<sup>th</sup> day of September, 2012.

18 Respectfully submitted,

19 STEVEN B. WOLFSON  
20 Clark County District Attorney  
Nevada Bar #001565

21  
22 BY /s/ Jonathan E. VanBoskerck

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1 **ARGUMENT**

2 **I**

3 **RESPONDENT REQUESTS REVIEW BY THE FULL COURT**  
4 **OF THE ORDER FILED SEPTEMBER 25, 2012, ENTERED BY**  
5 **A SINGLE JUSTICE**

6 A single Justice of this Court disposed of Respondent's Opposition to Ex-  
7 Parte Motion for Substitution of Counsel filed under Seal; Motion to Unseal  
8 (Opposition to Substitution Motion), filed September 24, 2012, and Appellant's  
9 Emergency Motion for this Court to Seal the Opposition to Ex-Parte Motion for  
10 Substitution of Counsel filed Under Seal (Emergency Motion to Seal), filed  
11 September 24, 2012, by way of an Order, filed September 25, 2012. Respondent  
12 would request review by the full Court due to the importance of the issues raised  
13 by these motions.

14 NRAP Rule 27(c) permits a single Justice to dispose of motions, however,  
15 NRAP Rule 27(c)(1) indicates that "[t]he court may review the action of a single  
16 justice." Respondent would request review by the full Court due to this Court's  
17 lack of authority to seal the documents at issue (Argument IV, *supra*), the fact that  
18 one or more cases are currently pending before the Eighth Judicial District Court  
19 involving this same issue and because Respondent potentially has an ethical  
20 obligation to provide the factual information contained in Appellant's Ex-Parte  
21 Motion for Substitution of Counsel filed Under Seal (Substitution Motion), filed  
22 September 18, 2012, to any counsel representing a criminal defendant who might  
23 be impacted by the same circumstances.

24 Footnote 2 to the Substitution Motion indicates that multiple cases involving  
25 this conflict are still pending. While Appellant notes the federal court case  
26 numbers, he omits reference to the fact that at least some of these cases are active  
27 in the Eighth Judicial District Court. By way of example, Appellant indicates that  
28 defendant Curtis Guy is subject to the same conflict and provides his federal court  
case number. However, Curtis Guy's habeas case is also currently before state

1 district court under case number 91C098211 and he was represented on that state  
2 case by the Nevada Federal Public Defender (Nevada FPD) until another branch  
3 office of the Federal Public Defender (FPD) was substituted without explanation.  
4 For the same reasons articulated in Respondent's Opposition to Substitution  
5 Motion as to why the instant matter must be remanded for creation of a record, so  
6 too must the district court judges have the ability to create an appropriate record in  
7 those cases.<sup>1</sup>

8 Furthermore, Respondent potentially has an obligation under Brady v.  
9 Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and its progeny to disclose the  
10 underlying facts to any counsel who may represent a habeas petitioner subject to  
11 the same factual circumstances. The factual circumstances set forth in the  
12 Substitution Motion potentially impact multiple criminal defendants represented by  
13 the attorney the Nevada FPD now believes to be incompetent. There is no  
14 guarantee that the Nevada FPD or another branch FPD office will be appointed in  
15 each of those cases and as such Respondent would arguably be required to disclose  
16 this information to defense counsel. If this Court gags Respondent there will be no  
17 way to provide this information to counsel and as such this Court will be  
18 guaranteeing claims of prosecutorial misconduct.

19 While sealing these facts away under lock and key will protect several  
20 defense lawyers, the Nevada FPD and the FPD from potential embarrassment,  
21 doing so only sows the seeds of future litigation and is patently unfair to criminal  
22 defendants who may be subject to the same circumstances.

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27 <sup>1</sup> Respondent would incorporate by reference the arguments offered in the  
28 Opposition to Substitution Motion.

## II

### **THIS COURT'S ORDER DENIED RESPONDENT AN OPPORTUNITY TO RESPOND TO THE MOTION TO SEAL**

This Court denied Respondent's Opposition to Substitution Motion, at least as it related to unsealing the Substitution Motion, and granted Appellant's Emergency Motion to Seal in less than 24 hours. (Order, filed September 25, 20012).<sup>2</sup> The speed with which this Court addressed the Emergency Motion to Seal deprived Respondent of an opportunity to file a response.

Nevada Rules of Appellate Procedure (NRAP) Rule 27(a)(3)(A) grants a party opposing a motion 7 days in which to file a response. Since this Court acted in less than 24 hours Respondent was deprived of the privilege under NRAP Rule 27(a)(3)(A) to file a response within 7 days. A party is not deprived of the right to respond merely because a motion is brought as an emergency motion since emergency motions are subject to the general motion rules under NRAP Rule 27. NRAP Rule 27(e)(5). The right of response under NRAP Rule 27(a)(3)(A) is not premised upon leave of court or in any way dependent upon the discretion of this Court. Respondent had a right to respond and as such Respondent would request that this Court withdraw the Order of September 25, 2012, and consider the instant responsive pleading.

## III

### **APPELLANT'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF NRAP RULE 27(e) PRECLUDES EMERGENCY RELIEF**

Appellant's extraordinary request for emergency relief must be denied due to Appellant's failure to comply with the requirements of Nevada Rules of Appellate Procedure (NRAP) Rule 27(e).

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<sup>2</sup> The Order denying the Motion to Unseal and granting the Emergency Motion to Seal is silent as to Respondent's request for remand for an evidentiary hearing. Respondent respectfully requests clarification as to whether that request was denied or is still under consideration by this Court.

1 Requests for emergency relief from this Court are to be raised in a formal  
2 manner. Matter of Dunleavy, 104 Nev. 784, 787, 769 P.2d 1271, 1273 (Nev.  
3 1988). Appellant's Emergency Motion to Seal fails to comply with the very  
4 specific prerequisites to emergency relief set forth in NRAP Rule 27(e). The rule  
5 starts off by requiring that "a movant certif[y] that to avoid irreparable harm relief  
6 is needed in less than 14 days[.]" NRAP Rule 27(e). The Emergency Motion to  
7 Seal does not indicate that relief is needed in less than 14 days nor does it contain  
8 any discussion of possible irreparable harm to Appellant. The silence of the  
9 Emergency Motion to Seal on this point is not only fatal to the request for  
10 emergency relief but it is further evidence that the Nevada FPD and the FPD as a  
11 whole are conflicted by divided loyalties between Appellant and several defense  
12 attorneys. Appellant will suffer no harm if the facts of this matter are not sealed  
13 but those defense attorneys as well as the Nevada FPD and the FPD may suffer  
14 embarrassment. Substitution Motion, p. 10, 11. However, any potential  
15 embarrassment to Appellant's former and current lawyers simply is not relevant to  
16 a discussion of whether Appellant will suffer irreparable harm if the Emergency  
17 Motion to Seal is not addressed within 14 days.

18 The Emergency Motion to Seal also fails to comply with NRAP Rule  
19 27(e)(2)'s requirement that "[a] motion filed under this subdivision shall include  
20 the title 'Emergency Motion Under NRAP 27(e)' immediately below the caption of  
21 the case[.]" While the Emergency Motion to Seal does contain "emergency" in the  
22 title it omits reference to NRAP 27(e). NRAP Rule 27(e)(2) also requires "a  
23 statement immediately below the title of the motion that states the date or event by  
24 which action is necessary." The Emergency Motion to Seal neglects to comply  
25 with this requirement as well.

26 NRAP Rule 27(e)(3) requires "that a motion ... shall be accompanied by a  
27 certificate of counsel ... entitled 'NRAP 27(e) Certificate[.]'" The Emergency  
28 Motion to Seal omits this specific document in favor of a "Declaration of

1 Counsel.” (Emergency Motion to Seal, p. 2). However, regardless of the title of  
2 the document, it fails to comply with the content requirements of NRAP Rule  
3 27(e)(3). NRAP Rule 27(e)(3) requires that the certificate contain telephone  
4 numbers and office addresses for the lawyers representing the parties, specific facts  
5 relative to notice of the motion, and “[f]acts showing the existence and nature of  
6 the claimed emergency[.]” NRAP Rule 27(e)(3)(A)-(C). The Declaration of  
7 Counsel attached to the Emergency Motion to Seal fails to contain any of this  
8 required information.

9 The Nevada FPD is asking this Court to protect defense lawyers associated  
10 with the Nevada FPD, the Nevada FPD and the FPD from potential embarrassment  
11 that in no way imposes irreparable harm upon Appellant. Even if this Court is  
12 willing to consider the potential embarrassment to those lawyers, the Nevada FPD  
13 and the FPD, there is no indication that the mere potential for embarrassment  
14 amounts to irreparable harm.

15 **IV**  
16 **THIS COURT DOES NOT HAVE THE AUTHORITY TO SEAL MOTIONS**  
17 **TO PROTECT ATTORNEYS AND GOVERNMENTAL AGENCIES FROM**  
**POTENTIAL EMBARRASSMENT**

18 The Substitution Motion and the Emergency Motion to Seal asks this Court  
19 to exercise authority it does not have and as such the documents should be  
20 immediately unsealed.

21 The Nevada FPD filed the Substitution Motion under seal without providing  
22 a legal basis for doing such and the Emergency Motion to Seal likewise asked this  
23 Court to seal a document without identifying this Court’s legal authority to do so.  
24 The Nevada Revised Statutes do not provide this Court with the general authority  
25 to seal any document filed with this Court. The Legislature has allowed the  
26 judiciary to seal documents only in very specific instances. By way of example,  
27 NRS 125.110 (certain documents may be sealed upon request in divorce  
28

proceedings); NRS 179.045 (affidavit or oral recording supporting search warrant may be sealed upon a showing of good cause).

While this Court may have the authority to create such a rule of appellate procedure, any such rule may not take effect until 30 days after it is published. NRS 2.120(1). As such it would not be applicable to the instant matter.

Neither does this Court have the inherent authority to seal documents to protect attorneys and governmental agencies from potential embarrassment. In Ryan's Express Transportation Services, Inc. v. Amador Stage Lines, Inc., \_\_ Nev. \_\_, 279 P.3d 166 (2012), this Court felt it important to publish an opinion explaining where the authority to remand a case back to district court for an evidentiary hearing arose from. This Court explained that “[i]n Nevada, there is no specific statute or rule that specifically authorizes this court to remand a matter to district court for additional fact-finding[.]” Id. at \_\_, 279 P.3d at 172. This Court admitted that it had engaged in such practices previously without identifying the source of its authority to do so. Id. This Court also noted that other jurisdictions had resolved the issue by court rule. Id. at \_\_, 279 P.3d at 173.

The Court concluded that it had the inherent authority to remand back to district court for factual findings:

By virtue of constitutional existence, this court is vested with inherent authority to accomplish and carry out basic functions of the judiciary. Halverson v. Hardcastle, 123 Nev. 245, 261-62, 163 P.3d 428, 440 (2007); *see also* Whitlock v. Salmon, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988). The court’s authority encompasses powers “*reasonable and necessary*” for the administration of court procedure and management of judicial affairs. Halverson, 123 Nev. at 261, 163 P.3d at 440 (quoting Borger v. Dist. Ct., 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004)). While our inherent authority is not infinite, it should be exercised when established methods fail. Id. at 263, 163 P.3d at 441.

Ryan's Express, \_\_ Nev. at \_\_, 279 P.3d at 173.

1        Ryan's Express and the cases it relied upon involved larger constitutional  
2 issues directly related to the ability of the judiciary to function as a judiciary.

3        Ryan's Express amounted to an exercise of inherent authority in order to allow this  
4 Court to perform its basic constitutional function of adjudicating cases in a correct  
5 fashion by providing this Court with the ability to acquire an adequate record. This  
6 Court had constitutional authority to order an evidentiary hearing because "an  
7 appellate court must have the ability to resolve factually disputes that arise post-  
8 appeal." Id. at \_\_\_, 279 P.3d at 173. Inherent authority allowed this Court to  
9 require an evidentiary hearing because this Court required an adequate record in  
10 order to perform its function as an appellate court. Likewise, Halverson v.  
11 Hardcastle, 123 Nev. 245, 273-78, 163 P.3d 428, 447-51 (2007), protected the right  
12 of the judiciary to function as a judiciary by controlling the assignment of cases  
13 between judges and by preventing one judicial officer from denying another  
14 judicial officer the ability to function as a judge. Similarly, Whitlock v. Salmon,  
15 104 Nev. 24, 26, 752 P.2d 210, 211 (1988), protected the ability of the judiciary to  
16 perform judicial functions from legislative encroachment. Whitlock reaffirmed the  
17 judiciary's right to control the conduct of courtroom *voire dire* but also affirmed  
18 the legislative branch's ability to protect substantive rights by statute. Id. Borger  
19 v. Dist. Ct., 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004), also protected the  
20 judiciary's basic management of judicial functions from legislative encroachment.

21        This Court has criticized the Eighth Judicial District Court for  
22 inappropriately sealing documents. In Johanson v. Eighth Judicial District Court  
23 of Nev. ex rel., 124 Nev. 245, 247-48, 182 P.3d 94, 95-96 (Nev. 2008), this Court  
24 determined that the district court abused its discretion in sealing documents related  
25 to District Court Judge Robert W. Lueck's (Judge Lueck) divorce without making  
26 findings supporting such a decision and without providing the opposing part a  
27 meaningful opportunity to be heard. This Court criticized the lower court for  
28

1 infringing upon freedom of speech without establishing a record supporting an  
2 imminent threat to the administration of justice. Id. at 250-52, 182 P.3d at 98.

3 This Court was not impressed by the argument that the district court had the  
4 inherent authority to seal documents related to Judge Lueck's divorce:

5 Lueck contends, however, that the district court's inherent power to  
6 completely seal divorce cases extends beyond NRS 125.110. We are  
7 unpersuaded by this argument. Even if the district court retains  
8 inherent authority to seal the record in divorce cases, here, Lueck has  
failed to demonstrate that the district court's order sealing the entire  
case file was a necessary exercise of that power to protect his or any  
other person's rights or to otherwise administer justice.

9 Johanson, 124 Nev. at 250, 182 P.3d at 97-98 (footnote omitted).

10 This Court specifically noted that a "judicial campaign has no apparent  
11 bearing on the administration of justice or any other protected interest[.]" Id. at  
12 252, 182 P.3d at 98. Respondent cannot fathom why inherent authority could not  
13 be exercised to protect a judge running for office from the potential embarrassment  
14 of a divorce while inherent authority would be available to protect several defense  
15 lawyers associated with the Nevada FPD, the Nevada FPD and the FPD from  
16 potential embarrassment. Moreover, just as the order in Johanson "failed to  
17 demonstrate that the district court's order sealing the entire case file was a  
18 necessary exercise of that power to protect ... [Judge Leuck] or any other person's  
19 rights or to otherwise administer justice[.]" id. at 250, 182 P.3d at 98, so too the  
20 Order of this Court denying the Motion to Unseal and granting the Emergency  
21 Motion to Seal fails to address just what rights are being protected and just whom  
22 is being protected. The Order is absolutely silent on this issue other than a vague  
23 assurance that "[h]aving reviewed the documents, this Court has determined that  
24 good cause does not exist to unseal the original motion, and ... because the State's  
25 opposition contains confidential information from the original motion, appellant's  
26 motion to seal the opposition ... is granted." (Order, filed September 25, 2012).

27 The desire to protect non-party lawyers and governmental agencies from  
28 potential embarrassment simply does not rise to the level "reasonable and

1 necessary” under this Court’s precedents to justify an inherent judicial authority to  
2 seal documents. While another set of facts might provide a basis for a legitimate  
3 discussion, the facts currently at hand do not appear to endanger the ability of this  
4 Court to function as a Court. This Court should unseal the Substitution Motion and  
5 Opposition to the Substitution Motion since this Court does not have the authority  
6 to seal documents in order to protect non-party lawyers and governmental  
7 agencies.

8 **CONCLUSION**

9 WHEREFORE, the State respectfully requests that the Substitution Motion  
10 and the Opposition to Substitution Motion be unsealed and that this matter be  
11 remanded for an evidentiary hearing.

12 Dated this 25<sup>th</sup> day of September, 2012.

13 Respectfully submitted,

14 STEVEN B. WOLFSON  
15 Clark County District Attorney  
16 Nevada Bar #001565

17 BY */s/ Jonathan E. VanBoskerck*

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1                                   **CERTIFICATE OF SERVICE**

2           I hereby certify and affirm that this document was filed electronically with  
3 the Nevada Supreme Court on September 25, 2012. Electronic Service of the  
4 foregoing document shall be made in accordance with the Master Service List as  
5 follows:

6  
7                                   CATHERINE CORTEZ MASTO  
                                  Nevada Attorney General

8                                   LORI C. TEICHER  
9                                   MEGAN C. HOFFMAN  
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10                                  JONATHAN E. VANBOSKERCK  
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