

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tara K. Lindeman  
Clerk of Supreme Court

SAMUEL HOWARD,  
Appellant,

v.

THE STATE OF NEVADA,  
Respondent.

Case No. 57469

**OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e)**  
**FOR THIS COURT TO SEAL ALL PLEADINGS AND DOCUMENTS**  
**RELATED TO THE EX-PARTE MOTION FOR SUBSTITUTION**  
**OF COUNSEL FILED IN THIS MATTER**

**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 Appellant

Counsel for Respondent

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5                                   Appellant,

6                   v.

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Case No. 57469

10                   **OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e)**  
11                   **FOR THIS COURT TO SEAL ALL PLEADINGS AND DOCUMENTS**  
12                   **RELATED TO THE EX-PARTE MOTION FOR SUBSTITUTION**  
13                   **OF COUNSEL FILED IN THIS MATTER**

14                   COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County  
15                   District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and  
16                   files this Opposition to Emergency Motion Under NRAP Rule 27(e) for this Court to  
17                   Seal all Pleadings and Documents Related to the Ex-Parte Motion for Substitution of  
18                   Counsel filed in this Matter. This motion is filed pursuant to NRAP Rule 27 and is  
19                   based on the following memorandum and all papers and pleadings on file herein.

20                   Dated this 27<sup>th</sup> day of September, 2012.

21                                   Respectfully submitted,

22                                   STEVEN B. WOLFSON  
23                                   Clark County District Attorney  
24                                   Nevada Bar #001565

25                   BY     /s/ Jonathan E. VanBoskerck

26                                   JONATHAN E. VANBOSKERCK  
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## ARGUMENT

The instant Opposition to Emergency Motion Under NRAP Rule 27(e) for this Court to Seal all Pleadings and Documents Related to the Ex-Parte Motion for Substitution of Counsel filed in this Matter (Opposition to Second Emergency Motion to Seal) is offered to address arguments raised for the first time in Appellant's Emergency Motion Under NRAP Rule 27(e) for this Court to Seal all Pleadings and Documents Related to the Ex-Parte Motion for Substitution of Counsel filed in this Matter (Second Emergency Motion to Seal), filed September 26, 2012. Appellant's contention that Attorney-Client privilege required the filing of an ex-parte motion is erroneous because there is no basis for ex-parte filing with this Court and the Attorney-Client privilege is inapplicable to this matter.

As a preliminary matter Respondent would request that the Second Emergency Motion to Seal and the Opposition to Second Emergency Motion to Seal not be decided by a single Justice pursuant to Nevada Rules of Appellate Procedure (NRAP) Rule 27(c) since Respondent has already moved pursuant to NRAP 27(c)(1) that the Full Court review the Order of September 25, 2012, issued by a single Justice relating to the same issue. This request is based upon judicial economy and consistency grounds. As a second preliminary matter, Respondent would incorporate by reference all arguments raised in the Opposition to Ex-Parte Motion for Substitution of Counsel filed under Seal; and, Motion to Unseal (Opposition to Substitution Motion), filed September 24, 2012, and in the Motion for Reconsideration by Full Court (Motion for Reconsideration), filed September 25, 2012.

While the Certification of Counsel attached to the Second Emergency Motion to Seal contends that both this Court and Respondent have somehow violated Appellant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution to due process, effective assistance of counsel and freedom from conflicted counsel, Appellant does not offer analysis of law or specific facts supporting those naked allegations. Second Emergency Motion to Seal, p. 3-4.

1 Respondent would request leave of Court to address those arguments once they have  
2 been briefed by Appellant.

3 The Certification of Counsel also argues not only the alleged need to seal the  
4 various filings related to this issue but also that it was inappropriate for Respondent to  
5 address an ex-parte filing. The difficulty with this argument is that there is no basis in  
6 statute, rule or precedent for an ex-parte communication of this nature with this Court.  
7 Respondent would direct this Court's attention to the arguments made in Section IV  
8 of the Motion to Reconsider as all the reasons articulated as to why sealing would be  
9 beyond this Court's authority apply equally to ex-parte communication with this  
10 Court. Additionally, NRAP Rule 46(d) governing the withdrawal or substitution of  
11 counsel in criminal appeals does not provide for filing of motions to withdraw or  
12 substitute in an ex-parte fashion or for sealing them. Indeed NRAP Rule 46(d)(3)  
13 specifically requires that an attorney desiring to withdraw from representing a client in  
14 a criminal appeal "shall file a motion to withdraw ... and serve a copy ... on ... any  
15 adverse party. The motion shall clearly state ... the reasons for the motion."

16 NRAP 46(d)(3) requires disclosure to the State of the reason for withdrawal of  
17 defense counsel in a criminal appeal because in many cases it is only the lawyer for  
18 the State that will have an interest in protecting a criminal defendant's constitutional  
19 rights. If defense counsel is laboring under divided loyalties related to facts  
20 potentially relevant to the appeal but that are nonetheless embarrassing to the defense  
21 attorney or the defense lawyer's employer, the only safeguard against the danger that  
22 a defense attorney might attempt to suppress or seal away those facts is the State's  
23 interest in protecting the constitutional rights of the criminal defendant and the State's  
24 interest in the finality of any judgment. Disclosure to the State represents a wise  
25 precaution designed to protect the basic fairness of the process.

26 The Certification of Counsel also alleges that this Court and Respondent have  
27 violated Appellant's Attorney-Client privilege. Second Emergency Motion to Seal, p.  
28 2-4. Appellant does not specify which information was provided in violation of

1 attorney-client privilege nor does Appellant address the reality that current counsel  
2 moved for substitution so that successor counsel could actively pursue this very  
3 information in the public setting of State and Federal Court. Ex-Parte Motion for  
4 Substitution of Counsel filed Under Seal (Substitution Motion), filed September 14,  
5 2012, p. 11. It is difficult to accept that the same information would be privileged for  
6 purpose of a substitution motion but not for purpose of a public appeal or habeas  
7 proceeding.

8 Further, the Substitution Motion does not contain information protected by the  
9 Attorney-Client privilege. The allegations contained in the Substitution Motion  
10 amount to an assertion that the Nevada Office of the Federal Public Defender (Nevada  
11 FPD) has concluded that a particular attorney is incompetent and that one or more  
12 lawyers associated with the Nevada FPD falsely testified regarding this attorney's  
13 competence despite knowing of her alleged incompetence. Substitution Motion, p.  
14 10-11. This type of information is outside the scope of the Attorney-Client privilege  
15 since NRS 49.115(3) specifically states that there is no Attorney-Client privilege "[a]  
16 to a communication relevant to an issue of breach of duty by the lawyer to his or her  
17 client[.]"

18 Even if this Court is willing to ignore the crystal clear language of NRS  
19 49.115(3), the information is still not protected by Attorney-Client privilege. NRS  
20 49.095 specifically limits the privilege to; 1) Confidential communications, 2)  
21 between the lawyer and the client, 3) made for the purpose of rendering professional  
22 legal services. The purpose of the Substitution Motion was to *prevent* the Nevada  
23 FPD from rendering professional legal services. As there was no intent to render  
24 professional legal services any alleged confidential communication is not privileged.

25 Moreover, that the Nevada FPD filed the Substitution Motion with this Court  
26 demonstrates that the communication was not between the Nevada FPD and  
27 Appellant. The communication was specifically intended to be between the Nevada  
28 FPD and this Court and as such it is not privileged under NRS 49.095. Further, the

1 Substitution Motion does not recount the contents of any communication between  
2 Appellant and his attorney but instead contains conclusions based upon the  
3 observations and knowledge of the Nevada FPD. Observations and knowledge not  
4 directly tied to communication between the lawyer and the client are not protected by  
5 the Attorney-Client privilege. In re Grand Jury Proceedings, 13 F.3d 1293, 1296 (9<sup>th</sup>  
6 Cir. 1994) (The information sought by the grand jury from Attorney Chesnoff does  
7 not involve the disclosure of confidential communications made for the purpose of  
8 rendering professional legal services. The grand jury seeks information regarding  
9 Chesnoff's observation and knowledge of his client's expenditures during a European  
10 cruise trip, the client's income producing activities and the client's lifestyle.  
11 Therefore, Chesnoff cannot validly assert the attorney-client privilege).

12 Ultimately, however, the Substitution Motion does not involve confidential  
13 communications because a communication is confidential only where "it is not  
14 intended to be disclosed to third persons[.]" NRS 49.055; *see also*, Esposito v. U.S.,  
15 436 F.2d 603, 606 (9<sup>th</sup> Cir. 1970) (Testimony by attorney at hearing on motion to  
16 vacate sentences that he advised his client to plead guilty did not violate attorney-  
17 client privilege inasmuch as it appeared that attorney's remarks to accused were not  
18 confidential and it was expected they would be repeated to the court). The purpose of  
19 the Substitution Motion was to replace the Nevada FPD with substitute counsel that  
20 the Nevada FPD believed would vigorously pursue the information in the Substitution  
21 Motion in the public setting of Federal and State Court. There was never any intent  
22 for this information to remain confidential and as such it is not protected by the  
23 Attorney-Client privilege.

24 Appellant had no legal authority to support a legitimate expectation that the  
25 Substitution Motion could be filed in an ex-parte fashion and the nature of the  
26 information contained in the motion and the purpose of the motion preclude the abuse  
27 of the Attorney-Client privilege to protect one or more attorneys and the Office of the  
28 Federal Public Defender (FPD) from potential embarrassment. This Court should

1 unseal the Substitution Motion and Opposition to the Substitution Motion and remand  
2 this matter to district court for an evidentiary hearing regarding possible imputation of  
3 the Nevada FPD's admitted imputed conflict to the FPD generally or for the  
4 appointment of counsel not associated with the FPD.

5  
6 **CONCLUSION**

7 WHEREFORE, the State respectfully requests that the Substitution Motion and  
8 the Opposition to Substitution Motion be unsealed and that this matter be remanded  
9 for an evidentiary hearing or for appointment of counsel not associated with the FPD.

10 Dated this 27<sup>th</sup> day of September, 2012.

11 Respectfully submitted,

12 STEVEN B. WOLFSON  
13 Clark County District Attorney  
14 Nevada Bar #001565

15 BY */s/ Jonathan E. VanBoskerck*

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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 27, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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LORI C. TEICHER  
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BY /s/ eileen davis  
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JEV//ed