

Unsealed per 12/27/12 opinion.

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Case No. 57469
Tracie K. Lindeman
Clerk of Supreme Court

SAMUEL HOWARD,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

**OPPOSITION TO EX-PARTE MOTION FOR SUBSTITUTION OF
COUNSEL FILED UNDER SEAL; AND MOTION TO UNSEAL**

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

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy District Attorney, JONATHAN E. VANBOSKERCK, and respectfully moves for leave to file this Opposition to Ex-Parte Motion for Substitution of Counsel Filed Under Seal; and Motion to Unseal.

Dated this 24th day of September, 2012

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY /s/ Jonathan E. VanBoskerck

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12-40882

ARGUMENT¹

I

PROTECTING THE FINALITY OF ANY JUDGEMENT THIS COURT MAY ENTER REQUIRES REMAND OF THIS MATTER FOR AN EVIDENTIARY HEARING REGARDING POSSIBLE IMPUTATION OR WAIVER OF ADMITTED CONFLICT

In order to protect the finality of any judgment this Court may enter from negative federal habeas review it is necessary to create a record of the nature of the conflict that the Nevada branch of the Office of the Federal Public Defender (Nevada FPD) admits requires removal of the *entire* Nevada FPD office and whether that admitted conflict must be imputed to other branch offices of the Office of the Federal Public Defender (FPD) or whether Appellant waives any conflict that might be imputed to other branch offices of the FPD.

Respondent submits that the general rule is that conflicts are not typically imputed from one government lawyer to another. Disqualification due to conflicts of interest involving current government officers and employees is governed by Nevada Rules of Professional Conduct (NRPC) Rule 1.11. NRPC Rule 1.11(d) requires that a lawyer currently serving as a public officer must comply with NRPC Rule 1.7 (concurrent client representation) and NRPC Rule 1.9 (duties to former clients). NRPC Rule 1.10 (imputed conflicts of interest) is not incorporated into NRPC Rule 1.11. Nothing in these rules generally requires disqualification of the entire governmental agency involved.

NRPC Rule 1.11 stands for the proposition that conflicts of one governmental agency attorney are generally not imputed to other attorneys in the same office where proper screening measures are implemented. Comment 2 to Rule 1.11 expressly provides:

Because of the special problems raised by imputation within a government agency, paragraph (d) *does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to*

¹ Respondent would incorporate the procedural history and statement of facts contained in Respondent's Answering Brief.

1 *other associated government officers or employees, although ordinarily*
2 *it will be prudent to screen such lawyers.*

3 Ann. Mod. Rules Prof. Cond. Rule 1.11, Comment 2 (emphasis added.); NRPC 1.0A.
4 See also, Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982) (finding where a
5 deputy district attorney who previously represented a criminal defendant was
6 adequately screened, disqualification of the entire office was not appropriate.); In re
7 Grand Jury Inv. Of Targets, 918 F.Supp 1374 (S.D. Cal. 1996) (finding a U.S.
8 Attorney's Office was not disqualified from investigating specific incidents of a state
9 court corruption case even though one Assistant U.S. Attorney, who was not assigned
10 to the investigation, represented one of the subjects during the State's investigation of
11 the same allegations); State ex. rel. Tyler v. MacQueen, 447 S.E.2d 289 (W.Va. 1994)
12 (holding that a prosecutor's office is not disqualified as long as the personally
13 disqualified prosecutor was effectively screened from the case).

14 This Court has recognized that imputed disqualification under NRPC Rule
15 1.10(e) generally does not apply to a governmental agency. Collier v. Legakes, 98
16 Nev. 307, 310, 646 P.2d 1219, 1220-21 (1982). This Court indicated that
17 institutional offices are subject to a different standard than private firms when it
18 comes to imputed disqualification. Id. The Court noted that disqualification based
19 solely on an appearance of impropriety was warranted only in "extreme cases."
20 Collier, 98 Nev. at 310, 646 P.2d at 1221. See also, Attorney General v. Eighth
21 Judicial District Ct., 108 Nev. 1073, 1075, 844 P.2d 124, 125 (1992).

22 This matter goes beyond a mere appearance of impropriety and potentially falls
23 into the category of "extreme cases" under Collier because of the admission by the
24 Nevada FPD that the conflict must be imputed to *every* attorney currently assigned to
25 the Nevada FPD and because the conflict will likely be an issue in future state and
26 federal habeas petitions. The Nevada FPD concedes that a web of relationships
27 between Patricia Erickson (Erickson), one time counsel for Appellant, former Federal
28 Public Defender Franny Forsman (Forsman) and current Chief of the Capital Habeas
29 Unit Michael Pescetta (Pescetta) have not only created a conflict requiring Pescetta's

1 removal from the case but that *Pescetta's conflict must be imputed to every attorney*
2 *currently assigned to the Nevada FPD or that every attorney in that office also suffers*
3 *a conflict over divided loyalties between their client and Forsman and Pescetta.* (Ex-
4 Parte Motion for Substitution of Counsel filed Under Seal (Substitution Motion), filed
5 September 14, 2012, p. 10-11).

6 The Nevada FPD alleges that "Erickson has effectively abandoned and
7 provided ineffective representation to many of her capital clients (including Mr.
8 Howard[.]" (Substitution Motion, p. 10). The Nevada FPD admits:

9 [B]oth former Federal Public Defender Franny Forsman and current
10 Chief of the Capital Habeas Unit, Michael Pescetta have repeatedly
11 vouched through testimony and affidavits regarding Ms. Erickson's
12 effectiveness and fitness to practice law. This vouching and ratification
13 of Ms. Erickson's abilities occurred before this Court, the federal district
14 court, and before the Nevada State Bar. Investigation suggests that *both*
15 *Ms. Forsman and Mr. Pescetta knew of Ms. Erickson's problems and*
were given information from other professionals that Ms. Erickson was
not performing effectively on her death penalty cases. Further
investigation has determined that Ms. Forsman may have failed to
recognize Ms. Erickson's failings due to their personal friendship, and
Mr. Pescetta may have failed to recognize the same due to his romantic
and personal relationship with Ms. Erickson.

16 *This conflict is fatal and must be imputed to all other members of*
17 *the office. This is not a conflict where a screening mechanism could*
18 *sufficiently allow for continuation of representation by other members of*
19 *the office.* No matter how well intentioned this office is carrying out its
20 legal responsibilities to Mr. Howard, counsel may be subject to subtle
21 influences manifested in a reluctance to engage in confrontation with
22 counsel's past (Forsman) superior and current immediate superior
(Pescetta) or to fully investigate the issues. The mere perception that the
attorneys assigned to Mr. Howard's case may not engage in aggressive
oral argument, discovery, examination and presentation of appropriate
Martinez or Maples issues that may alienate or embarrass present or
former management in the office proves that the only reasonable solution
is substitution of counsel. Continued representation will result in
insurmountable problems of line drawing in this capital case. An
adequate screening process is impractical and impossible because the
conflict involves the capital habeas chief, who manages every attorney
and staff member within the unit.

25 (Substitution Motion, p. 10-11 (emphasis added)).

26 The Substitution Motion goes on to suggest that the facts underlying the
27 conflict at hand raise issues under Maples v. Thomas, __ U.S. __, 132 S.Ct. 912
28 (2012), and Martinez v. Ryan, __ U.S. __, 132 S.Ct. 1309 (2012). (Substitution

1 Motion, p. 11-12). While Respondent will obviously contend that Maples and
2 Martinez are inapplicable, it goes without saying that the Nevada and federal courts
3 will be called upon to adjudicate multiple habeas challenges claiming ineffective
4 assistance of counsel premised upon the Nevada FPD's assessment of Erickson's
5 professional competency and upon Forsman's and Pescetta's vouching for Erickson
6 under oath even though they, according to the Nevada FPD, were aware of the falsity
7 of their testimony.²

8 There is simply no instance in this court's precedents of a governmental agency
9 conceding that the conflict of one attorney must be imputed to all other attorneys in
10 the governmental unit. Respondent would submit that such an admission moves this
11 matter outside of the general presumption created by NRPC 1.11 that a public agency
12 will be able to effectively screen conflicted attorneys such that other lawyers in the
13 governmental unit will be able to undertake representation without actual conflict or
14 the appearance of impropriety. The Nevada FPD has already admitted that this policy
15 assumption does not apply. (Substitution Motion, p. 10-11).

16 The solution proffered by the Nevada FPD is to allow them to cherry pick
17 substitute counsel. The Nevada FPD suggests that another branch office of the FPD
18 pick up this case without any consideration of the impact of future claims of imputed
19 conflicts premised upon this same web of relationships. (Substitution Motion, p. 13).
20 Moreover, the Substitution Motion does not address what screening mechanisms will
21 effectively protect Appellant from the same divided loyalties that the Nevada FPD
22 contends requires disqualification of every attorney currently assigned to the Nevada
23 FPD. How do those screening methods differ from those that apparently failed inside
24

25
26 ² The Substitution Motion seems to indicate that Forsman and Pescetta knowingly
27 made false statements under oath vouching for Erickson's professional competency
28 while at the same time attempts to lessen the blow of such an assessment by
suggesting that Forsman and Pescetta's judgment may have been clouded regarding
Erickson's professional competency. Ferreting out that factual nuance alone merits an
evidentiary hearing since bad faith and dishonesty are far more difficult to screen
against than mere bad judgment.

1 the Nevada FPD office? How often might the conflict infect other branch officers of
2 the FPD by way of the transfer of attorneys currently assigned to the Nevada FPD? Is
3 there a shared file system or database between the various offices? Are the
4 relationships such that regional or national supervisors at the FPD will operate under
5 the same divided loyalties that have apparently infected the entire Nevada FPD office?
6 Will other branch offices of the FPD or regional or national supervisors of the FPD be
7 impacted by a desire to protect the FPD from scandal or embarrassment?

8 Respondent submits that in a typical public defender conflict case these issues
9 would not be particularly relevant because of the presumption of effective screening.
10 However, the Nevada FPD has told this Court that such a presumption is an unsafe
11 assumption in this matter. The Nevada FPD has rebutted the assumption of effective
12 screening that typically insulates government lawyers from the general rule of
13 imputed conflicts and based upon this admission this Court must create a record that
14 establishes the nature of the conflict and the efficacy of any screening mechanisms
15 such that it is clear that Appellant's right to conflict free representation was protected
16 or waived.

17 This Court will be inviting unfavorable federal habeas review if it uncritically
18 allows the Nevada FPD to hand pick substitute counsel without creating a record
19 establishing the parameters of the alleged conflict and explaining what screening
20 mechanisms will be employed such that the conflict cannot be further imputed to
21 other branch offices of the FPD. This second issue will be particularly important in
22 light of the Nevada FPD's admission that the conflict must be imputed to *every*
23 *attorney assigned to the Nevada FPD*. The issue of the effectiveness of any screening
24 mechanism is of even greater concern due to the cavalier way in which the FPD has
25 failed to screen off the Nevada FPD after the discovery of the conflict. Rather than
26 completely screening out the Nevada FPD once the extent of the imputed conflict was
27 revealed, the FPD admits that conflicted lawyers with the Nevada FPD met with
28 Appellant and counsel from the Idaho branch office of the FPD to discuss Appellant's

1 case and the Nevada FPD's conflict. (Substitution Motion, p. 3). In order to protect
2 the finality of any judgment this Court might enter, the record must distinguish the
3 screening techniques that failed to prevent the spread of the conflict within the
4 Nevada FPD from those that will allegedly prevent the spread of the conflict to other
5 branch offices of the FPD.

6 In Houston v. Schomig, 533 F.3d 1076 (9th Cir. 2008), cert. den., 555 U.S.
7 1187, 129 S.Ct. 1346 (2009), the Ninth Circuit Court of Appeals criticized this Court
8 for the fashion in which this Court disposed of a conflict of interest claim premised
9 upon allegations that an attorney with the Clark County Public Defender suffered
10 from divided loyalties. Like the instant matter, Houston involved a fact pattern of
11 divided loyalties brought to the attention of the court by defense:

12 Attorney Craig Jorgenson was appointed from the Clark County
13 Public Defender's office to defend Houston against charges that he fired
14 shots from his car into a car driven by Terrance Chadwick and occupied
15 by two of Chadwick's sisters. Both the state and the defense agreed that
16 there was a history of "bad blood" between Houston and Chadwick's
17 family. ...

18 After the jury had been empaneled, Jorgenson discovered for the
19 first time that the Clark County Public Defender's office had represented
20 the victim and key prosecution witness, Chadwick, in a factually-related
21 case[.] ...

22 The next morning, before opening arguments, Jorgenson
23 immediately moved to withdraw from Houston's case because he felt
24 conflicted by his office's prior representation of Chadwick. Jorgenson
25 explained that the earlier case involving Chadwick was "tied factually, to
26 the state's theory of retribution and the motive" in Houston's case and
27 that Houston's defense theory implicated Chadwick as the aggressor.
28 Jorgenson told the judge that his "heart is going to be with Mr.
Chadwick," and that he believed Chadwick had not committed the crime
in the earlier case, for which Chadwick had been convicted and served a
prison sentence. Such wrongful conviction, Jorgenson explained, may
have given Chadwick a motive to act as the aggressor toward Houston or
to lie in order to convict Houston out of revenge. Jorgenson also
expressed concern that, under his cross examination, Chadwick may
admit facts which would expose him to criminal liability or impact his
parole status.

25 Id. at 1080. The trial court denied the motion to withdraw after concluding that there
26 was no actual conflict and that Chadwick's waiver of his attorney-client privilege
27 disposed of any potential conflict. Id.

28 These facts caused the Ninth Circuit to express concern that:

1 Based on the trial record along, the Nevada Supreme Court denied relief
2 on this claim because Jorgenson had not personally represented
3 Chadwick, Chadwick had waived his attorney-client privilege, and the
4 prior representation did not involve the same facts as Houston's case.
The Nevada Supreme Court made no mention of the trial judge's failure
to obtain a waiver from Houston or of Jorgenson's subjective belief that
his representation was conflicted.

5 Id. at 1080-81.

6 The Ninth Circuit went on to criticize both the trial court and this Court:

7 In this case, after Chadwick waived his attorney-client privilege, the trial
8 judge concluded that no conflict existed, without ever inquiring into the
9 impact the prior representation may have had on Houston or on
Jorgenson's performance. Indeed, the judge saw "no conflict
10 whatsoever" and failed to see "how Mr. Houston has a right to waive
anything." Because any conflict that existed was Houston's either to
11 waive or to assert, the trial judge's exclusive focus on Chadwick was
misplaced, rendering the conflict inquiry inadequate. ... Similarly, the
12 Nevada Supreme Court failed to reach the issue of whether Jorgenson
acted adversely to his *current* client, or whether his performance
prejudiced Houston.

13 Id. at 1081. These concerns caused the Ninth Circuit to remand the case for an
14 evidentiary hearing regarding the alleged conflict of interest. Id. at 1083.

15 The Ninth Circuit did attempt to limit the scope of the holding to facts
16 involving divided loyalties:

17 We are cognizant of the potential increase in litigation arising from the
18 imputation of one attorney's conflict to an entire public defender's office.
However, the facts of this case are unique and, therefore, unlikely to open
19 the floodgates of imputed conflict claims. This is particularly true
because this case concerns a longstanding feud between Houston and
20 Chadwick and the prior representation at issue here was the direct result
of that "bad blood." We are confident that allowing further exploration
21 of the fact that Jorgenson subjectively felt conflicted and expressed this
to the trial judge will not create a broad rule of imputed disqualification.

22 Id. at 1083.

23 While the specific facts of Houston are somewhat different from those at hand,
24 they are not as dissimilar as one might assume. Just as in Houston current counsel
25 disclosed to this Court a conflict involving former and current federal public
26 defenders that the reporting attorney felt amounted to a conflict. In Houston
27 Jorgenson admitted that based upon another public defender's representation of a
28 state's witness that he felt conflicted because he believed that witness' version of facts

1 that would relate to issues in the current case and that his “heart is going to be with
2 Mr. Chadwick[.]” *Id.* at 1080. The Substitution Motion indicates that *every attorney*
3 *with the Nevada FPD* is subjectively conflicted regarding loyalties to a former
4 supervisor and a current supervisor related to factual allegations that the Nevada FPD
5 believes are relevant to Appellant’s claims of ineffective assistance of counsel. The
6 Substitution Motion indicates that the Nevada FPD has concluded that Erickson’s
7 representation of Appellant was professionally incompetent, that Forsman and
8 Pescetta were aware of Erickson’s professional incompetence and despite this
9 knowledge both Forsman and Pescetta knowingly offered false statements under oath
10 as to Erickson’s competence. The Substitution Motion is vague as to the full extent of
11 the conduct engaged in by Forsman and Pescetta, either they were blinded by
12 friendship and romance or they were knowingly protecting a friend or lover.

13 Furthermore, just as in Houston there is an insufficient record regarding the
14 conflict and the impact of the conflict upon the current representation of Appellant.
15 The Ninth Circuit believed this Court’s disposition of the conflict allegation in
16 Houston was inadequate because the record did not demonstrate an inquiry into the
17 conflict nor a waiver of the conflict. The record before this Court does not reflect an
18 inquiry into the nature and scope of the conflict nor does it reflect a waiver of the
19 conflict by Appellant. The Nevada FPD has compounded this issue by failing to
20 comply with the client signature or affidavit requirements of Nevada Rules of
21 Appellate Procedure (NRAP) Rule 46(d)(2), which requires that any request for
22 substitution of counsel be evidenced by the signature of a client or an affidavit of
23 counsel. The Substitution Motion does not include Appellant’s signature nor does it
24 include an affidavit of counsel supporting the motion. This failure to comply with
25 NRAP Rule 46(d)(2) has left this Court in the position of having to address a conflict
26 of interest issue based upon nothing more than argument of counsel.

27 All other things being equal, the typical outcome in cases involving the
28 imputation of conflicts between public defenders and public defender offices is a

1 refusal to impute the conflict premised upon the presumption of effective screening
2 embodied in NRPC Rule 1.11 and other similar rules. See, State v. Williams, 652
3 N.W.2d 844 (Iowa.App. 2002) (Potential conflict of interest based on fact that defense
4 attorney was engaged to marry assistant county attorney did not adversely affect
5 counsel's performance, and thus defendant was not entitled to new trial, where defense
6 attorney testified that, although she and her fiancé occasionally socialized with
7 prosecutor in defendant's case, no specific information regarding defendant's case was
8 shared, there was no evidence that fiancé became privy to any confidential
9 information, defense attorney denied that her personal relationships in any way
10 affected her performance, and defendant failed to present any evidence that defense
11 attorney's ability to exercise independent professional judgment or zealously represent
12 defendant was negatively affected). However, this Court is not in a position to
13 determine whether all other things are equal. What sets this case apart from the
14 typical public defender conflict case is that the Nevada FPD has not just disclosed a
15 conflict impacting one attorney but has instead admitted that the conflict of one
16 current federal public defender must be imputed to *every attorney with the Nevada*
17 *FPD and that all screening mechanisms would be ineffective in containing the*
18 *conflict*. While this conflict may be appropriately screened by substituting another
19 FPD branch office, such a course *must* be justified by a record establishing the nature
20 of and extent of the conflict, the effectiveness of any screening mechanisms between
21 the Nevada FPD and other branch offices of the FPD and whether Appellant has
22 waived any conflict on the record after a through judicial canvass.

23 This Court has correctly noted that “[a]n appellate court is not particularly well-
24 suited to make factual determinations in the first instance.” Ryan’s Express
25 Transportation Services, Inc. v. Amador Stage Lines, Inc., __ Nev. __, 279 P.3d 166,
26 172 (Nev. 2012). This honest admission caused this Court to conclude in Ryan’s
27 Express that “more facts are necessary for us to consider the sufficiency of ...
28 screening measures, we ... remand this matter to the district court for the limited

1 purpose of conducting an evidentiary hearing and entering written findings of fact and
2 conclusions of law regarding the adequacy of the screening.” *Id.* at ___, 279 P.3d at
3 168. The unique nature of the admission that every attorney in the Nevada FPD’s
4 office is subject to an imputed conflict that cannot be screened and the silence of the
5 record as to the nature of any screening mechanisms in place that might effectively
6 screen other FPD branch offices from imputation of the conflict requires an
7 evidentiary hearing to provide this Court with sufficient facts for it to determine
8 whether Appellant’s right to conflict free representation will be protected.

9 II

10 **THE SUBSTITUTION MOTION MUST BE UNSEALED SO THAT THE** 11 **DISTRICT COURT MAY MAKE APPROPRIATE RECORDS IN SEVERAL** 12 **HABEAS CASES CURRENTLY PENDING**

13 The Nevada FPD filed the Substitution Motion under sealed despite a lack of
14 authority to do so. The Substitution Motion cites no statute, rule or case allowing for
15 filing under seal. According to the Nevada Supreme Court Clerk’s Office the
16 Substitution Motion was in fact filed under seal.³ Footnote 2 of the Substitution
17 Motion indicates that the facts underlying the conflict are also relevant to several
18 habeas cases pending before the district court. Respondent requests unsealing of the
19 Substitution Motion so that the judges presiding over those matters can make
20 appropriate records regarding the conflict.

21 CONCLUSION

22 WHEREFORE, the State respectfully requests that this matter be remanded for
23 an evidentiary hearing and that the Substitution Motion be unsealed.

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28 ³ Undersigned Counsel contacted the Supreme Court Clerk’s Office on September 21,
2012, and was informed that the Substitution Motion was currently sealed.

1 Dated this 24th day of September, 2012

2 Respectfully submitted,

3 STEVEN B. WOLFSON
4 Clark County District Attorney

5 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 the
3 Nevada Supreme Court on September 24, 2012. Electronic Service of the foregoing
4 document shall be made in accordance with the Master Service List as follows:

5
6 CATHERINE CORTEZ MASTO
Nevada Attorney General

7 LORI C. TEICHER
8 First Assistant Federal Public Defender

9 MEGAN C. HOFFMAN
Assistant Federal Public Defender

10 JONATHAN E. VANBOSKERCK
11 Chief Deputy District Attorney

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13 /s/ jennifer garcia
14 Employee, Clark County
15 District Attorney's Office

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