

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

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3 SAMUEL HOWARD

4 Appellant,

5 vs.

6 RENEE BAKER, WARDEN, and  
7 CATHERINE CORTEZ MASTO,  
8 ATTORNEY GENERAL FOR THE  
9 STATE OF NEVADA,

Respondents.

Case No. 57469

SEP 28 2012  
TRACEE K. KIDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

TO BE FILED UNDER SEAL

*Unsealed per 12/28/12  
opinion.*

10  
11 MOTION TO STRIKE RESPONDENTS' PLEADINGS, MOTION FOR ORDER  
12 DIRECTING RESPONDENTS' CONDUCT

13 Appellant Samuel Howard files this Motion respectfully requesting that this  
14 Court strike Respondents' September 24th and September 25<sup>th</sup> pleadings and direct  
15 Respondents' conduct as outlined herein.

16 Dated this 27th day of September, 2012.

17 LAW OFFICES OF THE  
18 FEDERAL PUBLIC DEFENDER

19 *[Signature]*

20 LORI C. TEICHER  
21 First Assistant Federal Public Defender  
22 Nevada State Bar No. 6143

23 *[Signature]*

24 MEGAN C. HOFFMAN  
25 Assistant Federal Public Defender  
26 Nevada State Bar No. 9835  
27 411 E. Bonneville Ave., Suite 250  
28 Las Vegas, Nevada 89101  
(702) 388-6577

12-40883

1    **A.    INTRODUCTION**<sup>1</sup>

2           Mr. Howard is in the custody of the State of Nevada at Ely State Prison  
3 pursuant to a state court judgment of conviction and sentence of death. The Office  
4 of the Federal Defender for the District of Nevada presently represents Mr. Howard  
5 before this Court. The Federal Public Defender of Nevada is charged with mandatory  
6 representation of all indigent Nevada prisoners under a sentence of death who have  
7 filed federal habeas corpus petitions pursuant to 28 U.S.C. §2254. 18 U.S.C. §3599;  
8 18 U.S.C. §3006A. These prisoners are represented by the Capital Habeas Unit  
9 (CHU) of the Federal Public Defender for the District of Nevada (FPD-Nevada).

10          As explained to this Court in the Ex parte Motion for Substitution of Counsel  
11 Filed Under Seal, Appellant's counsel requested relief from this Court based upon the  
12 presentation of legal strategy and privileged information concerning the attorney-  
13 client relationship between Mr. Howard and the undersigned counsel.

14          After issuance of two important United States Supreme Court decisions  
15 decided last term<sup>2</sup>, this office developed a course of action to investigate and fully  
16 explore how those decisions would impact CHU clients. Investigation led to the  
17 discovery of a compelling conflict of interest that prevents the ability of this office  
18 to continue as Mr. Howard's counsel.

19          Federal Defender Rene Valladares and undersigned counsel Lori Teicher took  
20 measured, thoroughly researched and vetted steps to evaluate the conflict. Careful  
21 steps were taken to protect Mr. Howard's rights, ensuring that nothing was  
22 overlooked and all possible legal and procedural claims would be preserved,  
23 notwithstanding the potential for "embarrassment" of the FPD-Nevada.

24          The conflict issue has been appropriately resolved by consult with the  
25

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26                   <sup>1</sup>The Respondents in this case have been represented by the Clark  
27 County District Attorney's Office, not the Attorney General for the State of Nevada.

28                   <sup>2</sup> Maples v. Thomas 132 S.Ct. 912 (2012); Martinez v. Ryan, 132 S.Ct.  
1309 (2012).

1 Administrative Office of the Courts in Washington D.C.. Separate and distinct out-  
2 of-district Federal Defender offices were approved as counsel by Ninth Circuit Chief  
3 Judge Alex Kozinski for all affected CHU clients. Substitution of counsel motions  
4 were made and approved by no less than four federal district courts for the district of  
5 Nevada and the Ninth Circuit Court of Appeals.<sup>3</sup>

6 Acceptance of cases by out of district Federal Defender offices was approved  
7 by all courts and protects each petitioner's mandatory right to counsel trained in  
8 capital habeas litigation, who have the resources and ability to effectively and swiftly  
9 litigate these cases. Further, this solution, which was approved by all courts involved  
10 in each case, eliminates the enormous financial obligation to the state and federal  
11 system that would have occurred with substitution of private counsel. This procedure  
12 guarantees that each former client will receive the type of quality federal  
13 representation that a federal defender office can provide without incurring any  
14 additional cost to the United States or the State of Nevada.

15 The substitution of counsel in all cases has proceeded as quickly as possible,  
16 as the undersigned counsel is cognizant of the need for each client to present all new  
17 claims expeditiously. See Maples and Martinez. Moreover, it was imperative to  
18 ensure a speedy transition in order for successor counsel to employ whatever rights  
19 or remedies that may be available to Petitioner, under the Maples and Martinez  
20 decisions. Counsel represents to this Court that Respondents' improper injection of  
21 themselves into this ex parte proceeding harms Mr. Howard's right to a timely  
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23 <sup>3</sup> See Exhibits 1-5, Court Orders in Curtis Guy v. Renee Baker et al.,  
24 2:11-cv-01809-GMN-RJJ; Rodney L. Emil v. Renee Baker et al., 3:00-cv-0654-KJD-  
VPC; Patrick Charles McKenna v. Renee Baker et al., 2:11-cv-0191-JCM-PAL;  
25 Charles Robins v. Renee Baker et al., 2:99-cv-0412-LRH-PAL. It is important to  
26 note that in each instance, submission of motions and all proceedings detailing the  
27 conflict were ex parte and sealed. Mr. Howard's motion for substitution of counsel  
28 in the Ninth Circuit Court of Appeals was opposed by the Nevada Attorney General's  
office. Howard v. Renee Baker et al., Case No. 10-99003. That court ordered an ex  
parte telephonic hearing before the Appellate Commissioner, who subsequently  
granted the motion for substitution of counsel. Federal Defender Services of Idaho  
presently represent Mr. Howard in the Ninth Circuit Court of Appeals. See Exs. 1-5.

1 assertion of any new claim that must be presented by unconflicted counsel. Any  
2 delay caused by Respondents in this matter cannot be held against Mr. Howard and  
3 is in violation of his federal and state constitutional rights to due process.

4 Due to a filing error admitted to by the Clerk of this Court, and through no fault  
5 of the FPD-Nevada, the Ex parte and Sealed motion to withdraw was neither filed  
6 under seal nor was it filed ex parte. It was accidentally filed as a public record and  
7 electronically served upon the Respondents, Catherine Cortez Masto, the Attorney  
8 General of Nevada as well as Chief Deputy Steven Owens at the Clark County  
9 District Attorney's Office.

10 The Respondents, through Attorney VanBoskerck, admitted contacting this  
11 Court to confirm that Mr. Howard's motion was to have been filed under seal.  
12 9/24/12 Opp. After having been advised an employee of this Court that his motion  
13 should have been sealed, Mr. VanBoskerck filed an unsealed Opposition to Ex parte  
14 Motion for Substitution of Counsel Filed Under Seal; Motion to Unseal. In other  
15 words, he ignored this Court's admission that he was served accidentally. He also  
16 ignored the "Ex parte" notation on Mr. Howard's motion. Further, Respondents'  
17 unsealed opposition and motion to unseal improperly cited Mr. Howard's sealed, ex  
18 parte motion at length.

19 Upon review of the Respondents' opposition and motion, Mr. Howard  
20 immediately filed an emergency motion for this Court to seal the Respondents'  
21 opposition and motion to unseal. That motion noted that Mr. Howard "intends to fully  
22 and quickly reply to Chief Deputy District Attorney Vanboskerck's unsealed motion  
23 which quotes at length the ex parte sealed motion seeking appropriate relief." This  
24 Court immediately granted Mr. Howard's motion on September 25, 2012 in an Order  
25 signed by Chief Justice Michael Cherry.

26 On September 25, 2012, Respondents filed another unsealed pleading, entitled  
27 "Motion for Reconsideration by Full Court." Despite this Court's Order sealing the  
28 information contained within the Respondent's Opposition and that Order's finding

1 of good cause to deny the Motion to Unseal, Respondents' unsealed Motion for  
2 Reconsideration continues to refer at length by reference and insinuation to  
3 confidential and privileged information contained within Mr. Howard's original  
4 motion for substitution of counsel.

5 Due to this Court's filing error, a sealed, ex parte motion, which contained  
6 privileged and confidential information having a direct impact upon the attorney-  
7 client relationship between Mr. Howard and the FPD-Nevada and outlined legal  
8 strategy, was served upon the district attorney and attorney general. On September  
9 26, 2012, due to Respondents' repeated misconduct and unwillingness to comply with  
10 this Court's order, Mr. Howard petitioned this Court to seal any and all pleadings  
11 related to his motion for substitution of counsel. 9/26/12, Mtn. to Seal. That motion  
12 remains pending at the time of this filing. Respondents filed their opposition to the  
13 motion on September 27, 2012.

14 Mr. Howard continues to submit that his constitutional rights under the Fifth,  
15 Sixth and Fourteenth Amendments to the United States Constitution to due process  
16 and to the effective assistance of counsel, including the right to be represented by  
17 conflict-free counsel, are in jeopardy as a result of the prosecutorial misconduct and  
18 procedural errors which have occurred in the last week in this matter. This motion  
19 follows.

## 20 B. ARGUMENT

### 21 1. Mr. Howard's motion for the substitution of counsel is properly 22 before the Court on an ex parte motion, filed under seal.

23 As an initial matter, Mr. Howard addresses Respondents' unfounded and  
24 irrelevant assertion or purported concern that the Office of the Federal Public  
25 Defender is in any way attempting to protect itself from embarrassment. However,  
26 to ensure there is no confusion as to this issue and in order for this Court to be able  
27 to focus on the actual issue before it, Mr. Howard advises this Court that his request  
28 to seal pleadings and documents in this matter is made exclusively in connection with

1 his motion for substitution of counsel in order to protect Mr. Howard's constitutional  
2 right to be represented by conflict-free counsel. This office anticipates that  
3 unconflicted counsel will present the nature of this conflict in future, unsealed  
4 litigation pertaining to other FPD-Nevada clients and in this matter. When and if such  
5 claims are raised, the FPD-Nevada has no intention of moving to seal any future  
6 pleadings or documents concerning the development of any legal claim in connection  
7 with the conflict of interest which has developed between Mr. Howard and the FPD-  
8 Nevada.

9 Nevertheless, the fact remains that but for this Court's error, Respondents  
10 would not have been aware of the nature or content of Mr. Howard's motion for  
11 substitution of counsel. Respondents' opposition to the substitution motion and their  
12 motion for reconsideration of the order to seal the records in this case ignores the fact  
13 that Mr. Howard's original motion was also filed ex parte. In other words,  
14 Respondents have neither the right nor standing to participate in the proceedings  
15 surrounding Mr. Howard's ex parte motion for substitution of counsel.

16 The term "ex parte" has the following definitions:

17 ex parte, adv. On or from one party only, usu. without notice to or  
18 argument from the adverse party.

19 ex parte, adj. Done or made at the instance and for the benefit of one  
20 party only, and without notice to, or argument by, any person adversely  
interested; of or relating to court action taken by one party without  
notice to the other, usu. for temporary or emergency relief.

21 Black's Law Dictionary, 262 (Bryan A. Garner ed., West Publishing Co. 2d pocket  
22 ed.1996). This Court has explained the use of ex parte motions as:

23 Ex parte motions, that is, motions without notice, are of various kinds  
24 and are frequently and commonly permitted under the Nevada law and  
25 practice. They are frequently permissible in procedural matters, and also  
26 in situations under circumstances of emergency, as in the case of an  
application for an injunction to prevent irreparable injury which would  
result from delay, and where there is no plain, speedy and adequate  
remedy at law.

27 Dangberg Holdings Nevada, L.L.C. v. Douglas County and its Bd. of County Com'rs,  
28 115 Nev. 129, 146, 978 P.2d 311, 321 (1999) (quoting Farnow v. District Court, 64

1 Nev. 109, 118, 178 P.2d 371, 375 (1947)).

2 In Nevada, proceedings in which an *ex parte* motion is filed to address issues  
3 of the attorney-client relationship (such as a motion to withdraw or substitute  
4 counsel) are conducted under seal. In Rhyne v. State, 118 Nev. 1, 7-8, 38 P.3d 163  
5 (Nev. 2002), this Court cited with approval the district court's procedure of holding  
6 an *ex parte* hearing with the defendant and his counsel to discuss any disruption to  
7 the attorney-client relationship. See also Vanisi v. State, 2010 WL 3270985, \*4 (Nev.  
8 2010) (This Court cited with approval the procedure involving a "sealed hearing  
9 outside the presence of the jury and the prosecution," when trial counsel filed a  
10 motion requesting an *ex parte* hearing to address issues of attorney-client privilege.)

11 Other courts have also cited with approval the use of *ex parte* and sealed (i.e.  
12 outside the presence of the government and the public) hearings and pleadings to  
13 address issues concerning the attorney-client relationship. In fact, the Ninth Circuit  
14 Court of Appeals exercised this same procedure in Mr. Howard's case just last month,  
15 when it granted the FPD-Nevada permission to withdraw from its representation of  
16 Mr. Howard and permitted Federal Defender Services for Idaho to substitute in as  
17 counsel, following an *ex parte* hearing with the Appellate Commissioner. Ex. 5. See  
18 also e.g. U.S. v. Prime, 363 F.3d 1028, 1035 (9th Cir. 2004) (noting the lower court  
19 addressed an *ex parte* motion to withdraw and substitute counsel in a "closed-court  
20 inquiry without the prosecution to address this request.") (vacated on other grounds  
21 by Prime v. U.S., 543 U.S. 1101 (2005)); U.S. v. Corona-Garcia, 210 F.3d 973, 977  
22 (9th Cir. 2000) (citing with approval the trial court's "immediate" suspension of  
23 proceedings to conduct an *ex parte* hearing concerning a motion for substitution of  
24 counsel); U.S. v. Hutchinson, 573 F.3d 1011, 1025 (10th Cir. 2009) (Noting the court  
25 "responded to [substitution of counsel motion] by holding an *ex parte* hearing, a  
26 sometimes helpful if not always necessary step, and one that certainly suggests a  
27 degree of care."); U.S. v. Fields, 483 F.3d 313, 352 (5th Cir. 2007) (holding a court  
28 "adequately investigated the potential conflict" when it "held an *ex parte* hearing on

Fields's motion for substitute counsel."); Wetterstroem v. Com, 2011 WL 1642307 (Ky. 2011) (noting counsel filed a motion to withdraw and requested it be sealed, and the court "so ordered."); Kolkman v. State, 857 P.2d 1202, 1205 (Alaska App. 1993) (lower court held an *ex parte* hearing on counsel's motion to withdraw). The federal district court of Nevada has also utilized the *ex parte* motion and hearing practice in four other cases in which the FPD has moved to substitute counsel based upon the same conflict present in Mr. Howard's case. Exs. 1-4. In each of those cases the motion was granted without allowing the Respondents to participate in the proceedings.

Mr. Howard filed an *ex parte* motion, under seal, with this Court, requesting the substitution of counsel based upon an irrevocable conflict of interest between Mr. Howard and the FPD-Nevada. Respondents were erroneously - through no fault of Mr. Howard - served with the pleading and now have fully interjected themselves in the proceedings in an attempt to interfere with Mr. Howard's constitutional right to conflict-free counsel. Maples v. Thomas, 132 S.Ct. at 924 n.8; see also Strickland v. Washington, 466 U.S. 668 (1984); Wood v. Georgia, 450 U.S. 261, 271 (1981). The use of an *ex parte* motion and hearing to accomplish the withdrawal of conflicted counsel is appropriate in this case.

To the extent that Respondents assert the pleadings in this matter should not be sealed, the argument is a non-starter. As noted above, matters involving a conflict of interest within the attorney-client relationship are properly conducted *ex parte* (out of the presence of the government) and under seal (out of the presence of the public). Indeed, Mr. Howard's constitutional right to the effective assistance of conflict-free counsel supercedes the public's (and Respondents') right to access his confidential motion to substitute counsel in this matter. See generally Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 9-10 (1986). As the Supreme Court held in Press-Enterprise, any presumption of public access "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher



1 values and is narrowly tailored to serve that interest.” Id. (citation omitted.) Mr.  
2 Howard can show such overriding interest.

3 This Court has recognized that a criminal defendant’s right to conflict-free  
4 counsel and corresponding attorney-client relationship may be an overriding interest  
5 sufficient to overcome a public access presumption:

6 There is certainly a point at which legislation could be seen as an  
7 unwarranted intrusion into the judicial process or into the attorney-client  
8 relationship. For example, a statute could not lawfully interfere with the  
9 right of a criminally accused to meet privately with an attorney. Another  
10 example would be a law which prohibited all confidential  
11 communications between members of public bodies and their attorneys.  
12 In the open meeting law itself is a declaration that “all public bodies  
13 exist to aid in the conduct of the people’s business.” A law which  
14 substantially frustrates the ability of a public body to receive  
15 confidential communications from its attorney would quite obviously  
16 limit the capacity of a public body “to aid in the conduct of the people’s  
17 business.” Confidentiality goes to the very heart of the advisor-advisee  
18 relationship, and there comes a point at which mandatory disclosure of  
19 confidences or prohibition of all confidential communication could  
20 destroy the relationship. This point, quite clearly, is not reached in the  
21 law as it is now written.

22 McKay v. Board of County Comm’rs, 103 Nev. 490, 495 n.5, 746 P.2d 124, 126 n.5  
23 (1987) (concluding a public meeting was improperly closed but recognizing a  
24 distinction in the “public access” interest when weighed against a criminal  
25 defendant’s right to a confidential attorney-client relationship).

26 Similarly, the Administrative Office of the United States Courts, *Guide to*  
27 *Judiciary Policies and Procedures*, provides that information under the Criminal  
28 Justice Act should be made available to the public unless such information is:

judicially placed under seal, or could reasonably be expected to *unduly*  
*intrude upon the privacy of attorneys or defendants; compromise*  
*defense strategies, investigative procedures, attorney work product, the*  
*attorney-client relationship* or privileged information provided by the  
defendant or other sources; or otherwise adversely affect the defendant’s  
right to the effective assistance of counsel, a fair trial, or an impartial  
adjudication.

29 U.S. v. Connolly, 321 F.3d 174, 199 (1st Cir. 2003) (emphasis added) (quoting the  
30 A.O. Guide § 5.01(A)). As Mr. Howard outlines further in this brief, the issues  
31 presented in his motion for the substitution of counsel present an overriding interest -

1 namely the right to the effective assistance of conflict-free counsel - in which  
2 government or public access is not allowed. Mr. Howard has narrowly tailored his  
3 request to seal documents to the motion for substitution of counsel and related  
4 pleadings, to protect his constitutional right to the effective assistance of counsel, to  
5 be represented by conflict-free counsel, and to the attorney-client privilege. He has  
6 made no attempt, nor does the FPD-Nevada plan to attempt, to seal any future  
7 pleadings on the nature of the conflict as presented in any subsequent habeas or  
8 appellate proceedings. Mr. Howard properly moved to file these documents under  
9 seal.

10 Finally, Respondents' eccentric contention that this Court does not have the  
11 authority to seal filed pleadings or other documents is patently without merit.  
12 Opposition, p. 6-7. All courts, including this Court, have the inherent "supervisory  
13 power over its own records and files" and access may be denied in certain limited  
14 circumstances, including "the painful and sometimes disgusting details of a divorce  
15 case ..." or where such files may be used as "reservoirs of libelous statements for  
16 press consumption ... or as sources of business information that might harm a  
17 litigant's competitive standing." Nixon v. Warner Communications, Inc., 435 U.S.  
18 589 (1978) (internal citations omitted). The evidence presented in Mr. Howard's  
19 motion for substitution of counsel falls squarely within the exceptions noted by  
20 Nixon. The motion is properly before this Court as an ex parte, sealed document.<sup>4</sup>

21 2. **Chief Deputy District Attorney Vanboskerck's actions are in**  
22 **flagrant violation of Nevada Rules of Professional Conduct and**  
23 **violate Mr. Howard's Sixth Amendment rights.**

24 Chief Deputy District Attorney Vanboskerck's actions, as outlined

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25 <sup>4</sup> Respondents devote significant space in their opposition to Mr.  
26 Howard's motion for substitution of counsel arguing that the conflict of interest  
27 cannot be imputed to the entire FPD-Nevada office. See 9/24/12 Opp. to Motion, p.  
28 2-11. This argument is without merit and Mr. Howard has extensively briefed this  
issue in his motion for substitution of counsel. See 9/14/12, Motion, p. 8-10, 11-12.  
Further, Respondents have no standing to make this argument as they are not a party  
to the motion for substitution of counsel. See definition of ex parte, infra at 6.

1 within his Oppositions to Mr. Howard's ex parte and sealed pleading filed with this  
2 Court, clearly violated Nevada Rules of Professional Conduct 4.4(b), 8.4(d) as well  
3 as Mr. Howard's Sixth Amendment rights. Vanboskerck states that he "contacted  
4 the Supreme Court Clerk's Office on September 21, 2012, and was informed that the  
5 Substitution Motion was currently sealed." See Opposition at 11, n.3. Undersigned  
6 counsel reports to this Court that no lawyer or employee of either the office of the  
7 Clark County District Attorney or Nevada Attorney General contacted the office of  
8 the FPD-Nevada to inform our office that those prosecutorial agencies had been  
9 accidentally served with the ex-parte, sealed motion for substitution of counsel.

10       RPC 4.4(b) states that with respect to the rights of third persons, "[a] lawyer  
11 who receives a document relating to the representation of the lawyer's client and  
12 knows or reasonably should know that the document was inadvertently sent shall  
13 promptly notify the sender." RPC 8.4(d) states that "[i]t is professional misconduct  
14 for a lawyer to. . . [e]ngage in conduct that is prejudicial to the administration of  
15 justice." The Supreme Court has characterized the Sixth Amendment as  
16 "fundamental to our system of justice, [and] is meant to assure fairness in the  
17 adversary criminal process." United States v. Morrison, 449 U.S. 361, 364 (1981).  
18 See Chamberlain Group, Inc. V. Lear Corp., 270 F.R.D. 392, 398 (N.D. Ill.  
19 2010)(lawyer's duty to disclose receipt of privileged documents under this rule  
20 applies even when documents are received outside normal discovery process).

21       The Sixth Amendment is implicated where "government interference in the  
22 relationship between attorney and defendant violates the defendant's right to effective  
23 assistance of counsel." United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985).  
24 Courts have stated on numerous occasions that they "cannot tolerate impermissible  
25 interferences with the right to the assistance of counsel and deplore any governmental  
26 action which intrudes on the attorney-client relationship." State v. Warner, 722 P.2d  
27 291, (Ariz. 1986)(defendant's seized documents from cell shakedown search included  
28 privileged documents reviewed by the prosecutor, objection by defense denied by

1 trial court upon discovery, remanded for hearing for determination whether state can  
2 prove he had a fair trial as no evidence introduced at trial was tainted by the  
3 invasion). The Supreme Court's approach to remedy these violations is based upon  
4 principles of equity and justice, to "identify and then neutralize the taint by tailoring  
5 relief appropriate to the circumstances" to assure the defendant's constitutional rights  
6 are upheld. United States v. Morrison, 449 U.S. 361, 365 (1981). An equitable  
7 remedy must be fashioned so that Mr. Howard is placed in the same position he  
8 would have been in had the State not received the Motion for Substitution.

9 This is not a case where the attorney "fulfilled any ethical duties by giving  
10 prompt notification to opposing counsel" upon receipt of confidential documents  
11 clearly not meant for his review. Merit Incentives v. Eighth Judicial District Court,  
12 262 P.3d 720, 721 (Nev. 2011). Instead, the State chose to exacerbate their ethical  
13 transgression by filing the most recent reconsideration motion. Senior Deputy  
14 District Attorney Vanboeskerck viewed, printed and filed pleadings opposing Mr.  
15 Howard's motion that was plainly designated as "ex parte" and "sealed". The proper  
16 sanction for this impermissible interference with the right to assistance of counsel is  
17 denial of Respondents' multitude of motions and preclusion of the State's ability to  
18 utilize this information. Mr. Howard respectfully requests the following relief: that  
19 Respondents' September 24<sup>th</sup> and September 25<sup>th</sup> pleadings to this Court be stricken  
20 for the reasons outlined above; that this Court entertain and grant Mr. Howard's  
21 motion for substitution of counsel ex parte and under seal; that Respondents' are  
22 directed to return all copies of the ex parte sealed motion; that Respondents' are  
23 precluded from disclosing any information learned from the sealed motion to any  
24 third parties; that this Court enter an order prohibiting any and all dissemination of  
25 the contents of sealed documents<sup>5</sup>; that all Respondents (including the Attorney  
26

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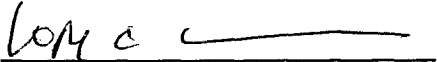
27 <sup>5</sup> Of the five FPD-Nevada conflict cases, two have Eighth Judicial  
28 District cases pending: State v. Curtis Guy (91C098211) and State v. Patrick C. McKenna (79C044366). Respondents should be ordered to refrain from discussing


1 General) be precluded from using this information until such time that this or any  
2 petitioner puts the facts germane to the instant conflict at issue in a public pleading  
3 in any court<sup>6</sup>.

4 Due the above-stated reasons, undersigned counsel and Petitioner Howard  
5 respectfully ask that this Court grant the requested relief therein.

6 Respectfully submitted this 27th day of September, 2012.

7  
8 LAW OFFICES OF THE  
FEDERAL PUBLIC DEFENDER

9  
10   
LORI C. TEICHER  
11 First Assistant Federal Public Defender  
Nevada State Bar No. 6143

12  
13   
MEGAN C. HOFFMAN  
14 Assistant Federal Public Defender  
15 Nevada State Bar No. 9835  
16 411 E. Bonneville Ave., Suite 250  
17 Las Vegas, Nevada 89101  
18 (702) 388-6577  
19 Counsel for the Appellant  
20

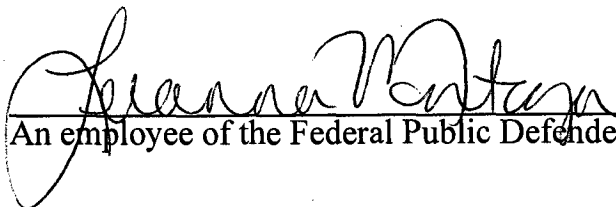
21 the contents of the privileged documents and injecting themselves into another ex  
22 parte motion for substitution, unless ordered by that court to be included. The FPD-  
23 Nevada fully intends to move for substitution, requesting that it be heard ex parte in  
24 those cases. A status check is set in Mr. Guy's case for October 15, 2012 before  
25 Judge Kathleen Delaney. Attorney Vanboskerck has been aware of the intent to  
26 substitute and has not once indicated any opposition to the forthcoming motion.  
Undersigned counsel Teicher represents to this Court that during previous status  
checks on Mr. Guy's case, the FPD-Nevada has informed the district court that  
substitution of new counsel was pending in federal court and pro hac vice  
applications were being processed so that the motion for substitution could be  
presented to the district court as soon as possible.

27 <sup>6</sup> For example, if successor counsel chooses to employ facts relevant to  
28 conduct as proffer for cause and prejudice to overcome a procedural default.  
Martinez v. Ryan, 132 S.Ct. 1309 (2012).

1 **CERTIFICATE OF SERVICE**

2 In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby  
3 certifies that on this September 27, 2012, a true and correct copy of the foregoing was mailed in the  
4 United States mail, first-class postage prepaid and addressed to the parties as follows:

5 Jonathan E. VanBoskerck  
6 Chief Deputy District Attorney  
7 Clark County District Attorneys Office  
8 200 Lewis Avenue  
9 Post Office Box 552212  
10 Las Vegas, NV 89155-2212

11   
12 An employee of the Federal Public Defender's Office  
13  
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1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2                                   \*\*\*\*\*

3                   **SAMUEL HOWARD**

4                                   Appellant,

5                   vs.

6                   **RENEE BAKER, WARDEN, and**  
7                   **CATHERINE CORTEZ MASTO,**  
8                   **ATTORNEY GENERAL FOR THE**  
9                   **STATE OF NEVADA,**

                                  Respondents.

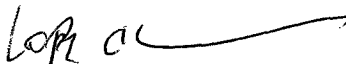
Case No. 57469

10                   **APPELLANT'S INDEX TO THE MOTION TO STRIKE RESPONDENTS'**  
11                   **PLEADINGS, MOTION FOR ORDER DIRECTING RESPONDENTS'**  
12                   **CONDUCT**

- 13                   1.       ORDER; United States District Court, District of Nevada, Guy v. Baker,  
                          2:11-cv-1809-GMN, Dated 7/10/2012
- 14                   2.       ORDER; United States District Court, District of Nevada, Emil v. Baker,  
                          3:00-cv-00654-KJD, Dated 7/12/2012
- 15                   3.       ORDER; United States District Court, District of Nevada, McKenna v.  
16                   Baker, 2:11-cv-0191-JCM, Dated 7/12/2012
- 17                   4.       ORDER; United States District Court, District of Nevada, Robbins v.  
                          Baker, 2:99-cv-0412-LRH, Dated 7/18/2012
- 18                   5.       ORDER; United States Court of Appeals for the Ninth Circuit,  
19                   Howard v. Baker, 10-99003, Dated 8/10/2012

20                   Dated this 26th day of September, 2012.

21                                   LAW OFFICES OF THE  
22                                   FEDERAL PUBLIC DEFENDER

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24                                   **LORI C. TEICHER**  
25                                   First Assistant Federal Public Defender  
26                                   Nevada State Bar No. 6143

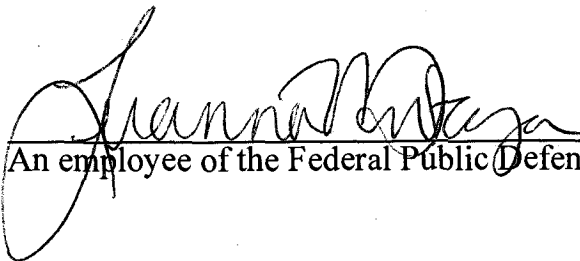
27                                   

28                                   **MEGAN C. HOFFMAN**  
                                  Assistant Federal Public Defender  
                                  Nevada State Bar No. 9835  
                                  411 E. Bonneville Ave., Suite 250  
                                  Las Vegas, Nevada 89101  
                                  (702) 388-6577

1 **CERTIFICATE OF SERVICE**

2 In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby  
3 certifies that on this September 27, 2012, a true and correct copy of the foregoing was mailed in the  
4 United States mail, first-class postage prepaid and addressed to the parties as follows:

5 Jonathan E. VanBoskerck  
6 Chief Deputy District Attorney  
7 Clark County District Attorneys Office  
8 200 Lewis Avenue  
9 Post Office Box 552212  
10 Las Vegas, NV 89155-2212

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12 An employee of the Federal Public Defender's Office  
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1 be discharged from its representation of the petitioner, and the Federal Public Defender for the  
2 Central District of California will be appointed to represent the petitioner.

3 The Federal Public Defender for the Central District of California will be directed to file a  
4 notice of appearance of counsel in this action. After that notice is filed, the court will set a schedule  
5 for further proceedings.

6 **IT IS THEREFORE ORDERED** that the motion for substitution of counsel (ECF No. 21)  
7 is **GRANTED**.

8 **IT IS FURTHER ORDERED** that the Federal Public Defender for the District of Nevada is  
9 discharged from the representation of the petitioner in this case.

10 **IT IS FURTHER ORDERED** that the Federal Public Defender for the Central District of  
11 California is appointed to represent the petitioner in this case.

12 **IT IS FURTHER ORDERED** that the Federal Public Defender for the Central District of  
13 California shall, within **30 days** after the date this order, file a Notice of Appearance of Counsel for  
14 Petitioner, indicating their acceptance of this appointment, or other document indicating that they  
15 cannot accept the appointment.

16 **IT IS FURTHER ORDERED** that the requirements of Local Rule IA 10-2 ("Admission to  
17 Practice in a Particular Case") shall be waived in this case.

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1           **IT IS FURTHER ORDERED** that the Clerk of the Court shall **SERVE** a copy of this  
2 order on each of the following:

3  
4   Curtis Guy  
5   #33750  
6   Ely State Prison  
7   P.O. Box 1989  
8   Ely, NV 89301

9   Federal Public Defender  
10   Central District of California  
11   321 E. 2nd Street  
12   Los Angeles, CA90012

13  
14           Dated this 10th day of July, 2012.

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UNITED STATES DISTRICT JUDGE



## ORDER

On July 3, 2012, Emil's counsel filed supplemental briefing in support of the motion for substitution of counsel, under seal, as ordered (ECF No. 205).

1 The court has carefully considered the material filed under seal in this case on July 3, 2012  
2 (ECF No. 205), and determines that, in the interests of justice, substitution of counsel is warranted.  
3 *See Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012) (holding that an “interests of justice” standard is to  
4 be applied to motions for substitution of counsel in capital habeas cases). The motion for  
5 substitution of counsel will be granted, the Federal Public Defender for the District of Nevada will  
6 be discharged from its representation of the petitioner, and the Federal Public Defender for the  
7 Central District of California will be appointed to represent the petitioner.

8 The Federal Public Defender for the Central District of California will be directed to file a  
9 notice of appearance of counsel in this action. After that notice is filed, the court will set a schedule  
10 for further proceedings.

11 **IT IS THEREFORE ORDERED** that the motion for substitution of counsel (ECF No. 200)  
12 is **GRANTED**.

13 **IT IS FURTHER ORDERED** that the Federal Public Defender for the District of Nevada is  
14 discharged from the representation of the petitioner in this case.

15 **IT IS FURTHER ORDERED** that the Federal Public Defender for the Central District of  
16 California is appointed to represent the petitioner in this case.

17 **IT IS FURTHER ORDERED** that the Federal Public Defender for the Central District of  
18 California shall, within **30 days** after the date this order, file a Notice of Appearance of Counsel for  
19 Petitioner, indicating their acceptance of this appointment, or other document indicating that they  
20 cannot accept the appointment.

21 **IT IS FURTHER ORDERED** that the requirements of Local Rule IA 10-2 (“Admission to  
22 Practice in a Particular Case”) shall be waived in this case.

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1           **IT IS FURTHER ORDERED** that the Clerk of the Court shall **SERVE** a copy of this  
2 order on each of the following:

3  
4 Rodney Emil  
5 #22063  
6 Ely State Prison  
7 P.O. Box 1989  
8 Ely, NV 89301

9 Federal Public Defender  
10 Central District of California  
11 321 E. 2nd Street  
12 Los Angeles, CA90012

13 Dated this 12 day of July, 2012.

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UNITED STATES DISTRICT JUDGE





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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA  
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9 PATRICK CHARLES McKENNA, )

10 Petitioner, )

11 vs. )

12 RENEE BAKER, *et al.*, )

13 Respondents. )  
14 \_\_\_\_\_ )  
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2:11-cv-0191-JCM-PAL

**ORDER**

16 In this capital habeas corpus action, on June 8, 2012, the petitioner, Patrick Charles  
17 McKenna, filed, under seal, a motion for substitution of counsel (ECF No. 38). Subsequently, the  
18 court ordered McKenna to file a supplemental declaration of counsel, under seal, providing a more  
19 detailed explanation of the need for the substitution of counsel (ECF No. 40).

20 On July 3, 2012, McKenna's counsel filed supplemental briefing in support of the motion for  
21 substitution of counsel, under seal, as ordered (ECF No. 41).

22 The court has carefully considered the material filed under seal in this case on July 3, 2012  
23 (ECF No. 41), and determines that, in the interests of justice, substitution of counsel is warranted.  
24 *See Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012) (holding that an "interests of justice" standard is to  
25 be applied to motions for substitution of counsel in capital habeas cases). The motion for  
26 substitution of counsel will be granted, the federal public defender for the District of Nevada will be

1 discharged from its representation of the petitioner, and the federal public defender for the District of  
2 Arizona will be appointed to represent the petitioner.

3 The federal public defender for the District of Arizona will be directed to file a notice of  
4 appearance of counsel in this action. As the case is currently stayed, pending proceedings in state  
5 court, there will likely be no significant further activity in the case after the notice of appearance of  
6 counsel is filed, and before the stay is lifted.

7 **IT IS THEREFORE ORDERED** that the motion for substitution of counsel (ECF No. 38)  
8 is **GRANTED**.

9 **IT IS FURTHER ORDERED** that the federal public defender for the District of Nevada is  
10 discharged from the representation of the petitioner in this case.

11 **IT IS FURTHER ORDERED** that the federal public defender for the District of Arizona is  
12 appointed to represent the petitioner in this case.

13 **IT IS FURTHER ORDERED** that the federal public defender for the District of Arizona  
14 shall, within **30 days** after the date this order, file a notice of appearance of counsel for petitioner,  
15 indicating their acceptance of this appointment, or other document indicating that they cannot accept  
16 the appointment.

17 **IT IS FURTHER ORDERED** that the requirements of Local Rule IA 10-2 ("Admission to  
18 Practice in a Particular Case") shall be waived in this case.

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1           **IT IS FURTHER ORDERED** that the clerk of the court shall **SERVE** a copy of this  
2 order on each of the following:

3  
4 Patrick Charles McKenna  
5 #14968  
6 Ely State Prison  
7 P.O. Box 1989  
8 Ely, NV 89301

9 Federal Public Defender  
10 District of Arizona  
11 850 W. Adams Street  
12 Suite 201  
13 Phoenix, AZ 85007-2730

14 Dated this 12th day of July, 2012.

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UNITED STATES DISTRICT JUDGE



CHARLES ROBINS,  
a/k/a Ha'im Al Matin Sharif,  
  
Petitioner,  
  
vs.  
  
RENEE BAKER, *et al.*,  
  
Respondents.

In this capital habeas corpus action, on June 8, 2012, the petitioner, Charles Robins, filed, under seal, a motion for substitution of counsel (ECF No. 215). Subsequently, the court ordered Robins to file a supplemental declaration of counsel, under seal, providing a more detailed explanation of the need for the substitution of counsel (ECF No. 217).

On July 3, 2012, Robins' counsel filed supplemental briefing in support of the motion for substitution of counsel, under seal, as ordered (ECF No. 220).

The court has carefully considered the material filed under seal in this case on July 3, 2012 (ECF No. 220), and determines that, in the interests of justice, substitution of counsel is warranted. *See Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012) (holding that an “interests of justice” standard is to be applied to motions for substitution of counsel in capital habeas cases). The motion for substitution of counsel will be granted, the Federal Public Defender for the District of Nevada will

1 be discharged from its representation of the petitioner, and the Federal Public Defender for the  
2 District of Arizona will be appointed to represent the petitioner.

3 The Federal Public Defender for the District of Arizona will be directed to file a notice of  
4 appearance of counsel in this action. After the notice of appearance of counsel is filed, the court will  
5 set a schedule for further proceedings.

6 **IT IS THEREFORE ORDERED** that the motion for substitution of counsel (ECF No. 215)  
7 is **GRANTED**.

8 **IT IS FURTHER ORDERED** that the Federal Public Defender for the District of Nevada is  
9 discharged from the representation of the petitioner in this case.

10 **IT IS FURTHER ORDERED** that the Federal Public Defender for the District of Arizona is  
11 appointed to represent the petitioner in this case.

12 **IT IS FURTHER ORDERED** that the Federal Public Defender for the District of Arizona  
13 shall, within **30 days** after the date this order, file a Notice of Appearance of Counsel for Petitioner,  
14 indicating their acceptance of this appointment, or other document indicating that they cannot accept  
15 the appointment.

16 **IT IS FURTHER ORDERED** that the requirements of Local Rule IA 10-2 ("Admission to  
17 Practice in a Particular Case") shall be waived in this case.

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1           **IT IS FURTHER ORDERED** that the Clerk of the Court shall **SERVE** a copy of this  
2 order on each of the following:

3  
4 Charles Robins  
5 #27820  
6 Ely State Prison  
7 P.O. Box 1989  
8 Ely, NV 89301

9 Federal Public Defender  
10 District of Arizona  
11 850 W. Adams Street  
12 Suite 201  
13 Phoenix, AZ 85007-2730

14 Dated this 17th day of July, 2012.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE





**FILED**

UNITED STATES COURT OF APPEALS

AUG 10 2012

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SAMUEL HOWARD,

Petitioner - Appellant,

v.

RENEE BAKER, Director of Nevada  
Department of Corrections,

Respondent - Appellee.

No. 10-99003

D.C. No. 2:93-cv-01209-LRH  
District of Nevada (Las Vegas)

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

Appellee's motion to file a late opposition to Appellant's motion for substitution of counsel is granted.

On August 9, 2012, the court held an ex parte hearing on the opposed motion of the Office of the Federal Public Defender for the District of Nevada for substitution of counsel. The Public Defenders explained the nature of the conflict that prevents them from continuing to represent Appellant, and they noted that their motions for substitution of counsel in four other cases, all based on the same conflict, had been recently granted by the district court.

The motion for substitution of counsel is granted. The court hereby appoints the Office of Federal Defender Services of Idaho as counsel of record for this

appeal. The Clerk shall amend the court's docket to reflect that Assistant Federal Public Defenders Bruce D. Livingston, and Brady Ward King, 702 West Idaho Street, Suite 900, Boise, Idaho 83702, (208) 331-5530, are now Appellant's appointed counsel of record for this appeal.

Within 30 days after the date of this order, and on the first business day of every month thereafter, Appellant shall file in this court a report regarding the status of state court proceedings. Within 14 days after the Nevada Supreme Court resolves Appellant's fourth state post-conviction petition, appellant shall so notify this Court.

The Clerk shall amend the court's docket to reflect that Assistant Federal Public Defenders Michael Charlton, and Megan Hoffman are no longer Appellant's appointed counsel of record for this appeal.

Briefing is stayed pending further order of the Court.

The Clerk shall serve this order on counsel and on Appellant individually at Reg. No. 18329, Ely State Prison, P.O. Box 1989, Ely, Nevada 89301.

The Clerk shall also serve this order on former counsel.

 ca9\_ecfnoticing@ca9.uscourts.gov  
08/10/2012 09:18 AM

To ECF\_NVCHU@fd.org  
Subject 10-99003 Samuel Howard v. Renee  
Baker "Appellate Commissioner Order  
Filed"

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**United States Court of Appeals for the Ninth Circuit**

**Notice of Docket Activity**

The following transaction was entered on 08/10/2012 at 9:11:03 AM PDT and filed on 08/10/2012

**Case Name:** Samuel Howard v. Renee  
Baker

**Case Number:** 10-99003

**Document(s):** Document(s)

**Docket Text:**

Filed order (Appellate Commissioner) Appellee's motion to file a late opposition to Appellant's motion for substitution of counsel is granted. On August 9, 2012, the court held an ex parte hearing on the opposed motion of the Office of the Federal Public Defender for the District of Nevada for substitution of counsel. The Public Defenders explained the nature of the conflict that prevents them from continuing to represent Appellant, and they noted that their motions for substitution of counsel in four other cases, all based on the same conflict, had been recently granted by the district court. The motion for substitution of counsel is granted. The court hereby appoints the Office of Federal Defender Services of Idaho as counsel of record for this appeal. The Clerk shall amend the court's docket to reflect that Assistant Federal Public Defenders Bruce D. Livingston, and Brady Ward King, 702 West Idaho Street, Suite 900, Boise, Idaho 83702, (208) 331-5530, are now Appellant's appointed counsel of record for this appeal. Within 30 days after the date of this order, and on the first business day of every month thereafter, Appellant shall file in this court a report regarding the status of state court proceedings. Within 14 days after the Nevada Supreme Court resolves Appellant's fourth state post-conviction petition, appellant shall so notify this Court. The Clerk shall amend the court's docket to reflect that Assistant Federal Public Defenders Michael Charlton, and Megan Hoffman are no longer Appellant's appointed counsel of record for this appeal. Briefing is stayed pending further order of the Court. The Clerk shall serve this order on counsel and on Appellant individually at Reg. No. 18329, Ely State Prison, P.O. Box 1989, Ely, Nevada 89301. The Clerk shall also serve this

order on former counsel. (MOATT Direct Criminal) [8282529] (DL)

**Notice will be electronically mailed to:**

Mr. Michael Charlton, Assistant Federal Public Defender  
Jared M. Frost, Deputy Attorney General  
Honorable Larry R. Hicks, District Judge  
Ms. Megan Hoffman, Assistant Federal Public Defender  
Brady Ward King, Assistant Federal Public Defender  
Bruce D. Livingston, Assistant Federal Public Defender  
USDC, Las Vegas

The following document(s) are associated with this transaction:

**Document Description:** Main Document

**Original Filename:** 10-99003substitutionofcounsel.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1106763461 [Date=08/10/2012] [FileNumber=8282529-0]  
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