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*Unstated per 12/27/12
opinion.*

FILED

OCT 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

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No. 57469

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12-40884

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


TO BE FILED UNDER SEAL

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

14 Appellant Samuel Howard files this reply to the State's opposition to Mr.
15 Howard's emergency motion under NRAP 27(e) for this Court to seal all pleadings
16 and documents related to the ex parte motion for substitution of counsel filed in this
17 matter.

18 Dated this 4th day of October, 2012.

19 LAW OFFICES OF THE
20 FEDERAL PUBLIC DEFENDER

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1 **A. Procedural History**

2 Appellant Samuel Howard properly submitted an ex parte motion for
3 substitution of counsel filed under seal on September 14, 2012. Due to a filing error
4 admitted to by the Clerk of this Court, and through no fault of the FPD-Nevada, the
5 ex parte and sealed motion to withdraw was neither filed under seal nor was it filed
6 ex parte. On September 18, 2012, the motion was accidentally filed as a public record
7 and electronically served upon the Respondents, Catherine Cortez Masto, the
8 Attorney General of Nevada as well as Chief Deputy Steven Owens at the Clark
9 County District Attorney's Office.

10 On September 24, 2012, at 11:35 a.m., the State injected themselves into an ex
11 parte proceeding without prior notification or acknowledgment to Mr. Howard's
12 counsel or this Court that they had been inadvertently served. Attorney VanBoskerck
13 filed an unsealed Opposition to Ex parte Motion for Substitution of Counsel Filed
14 Under Seal; Motion to Unseal, ignoring that he had been served accidentally and the
15 motion for substitution had been presented to this Court ex parte.

16 Mr. Howard immediately filed an emergency motion for this Court to seal the
17 State's opposition and motion to unseal, at 4:35 p.m. on September 24, 2012. This
18 Court granted Mr. Howard's motion in an Order signed by Chief Justice Michael
19 Cherry the next day, sealing Mr. Howard's motion and the State's 9/24 response.

20 On September 25, 2012, at 3:51 p.m., Respondents filed another unsealed
21 pleading, entitled "Motion for Reconsideration by Full Court." Despite this Court's
22 Order sealing the information contained within the Respondent's opposition and that
23 Order's finding of good cause to deny the motion to unseal, Respondents' unsealed
24 motion for reconsideration continued to refer at length by reference and insinuation
25 to confidential and privileged information contained within Mr. Howard's original
26 motion for substitution of counsel.

27 On September 26, 2012 at 1:43 p.m., Mr. Howard petitioned this Court to seal
28 any and all pleadings related to his motion for substitution of counsel. The State

1 opposed on September 27, 2012 at 2:24 p.m. That motion remains pending at the
2 time of this filing. This motion follows in reply to the State's opposition.¹
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4 **B. Argument**

5 As a preliminary matter, the State argues that NRAP Rule 46(d)(3)
6 "specifically requires that an attorney desiring to withdraw from representing a client
7 in an criminal appeal 'shall file a motion to withdraw. . . and serve a copy. . . on. . .
8 any adverse party.'" See 9/27/12 Opposition at 3. That is a correct state of the rule
9 governing a motion for withdrawal, not a motion for substitution, as was filed in the
10 instant case. The proper rule at issue is NRAP 46(d)(2), governing motions for
11 substitution, which remains silent as to service upon any adverse party.

12 Next, the State proclaims that if defense counsel is substituted during a
13 criminal appeal, somehow the State is the sole entity that has an interest in protecting
14 a criminal defendant's constitutional rights. Id. The State has apparently forgotten
15 that they do not represent Mr. Howard, nor should they have any interest or business
16 in interfering with the attorney/client relationship of a criminal defendant. The
17 State's suggestion that the "wise precaution" of "disclosure to the State" of the basis
18 for the motion for substitution is necessary as they have an "interest in protecting the
19 constitutional rights of the criminal defendant" is nonsensical. Id. This assertion is
20 at best, an interesting interpretation of the adversary nature of the criminal justice
21 system, especially considering that the State is the same entity aggressively litigating
22 towards their ultimate goal of killing Mr. Howard.

23 As NRAP 26(d) states, this Court approves or disapproves a request for a
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27 ¹ On September 27, 2012, Mr. Howard filed a "Motion to Strike and/or
28 deny relief, Motion for Order directing the State's Conduct." On October 3, 2012 at
4:23 p.m., the State opposed that motion and it is also pending before this Court.

1 substitution, thereby ensuring that Mr. Howard's constitutional rights are protected.²
2 The motion for substitution has been properly filed, signed and affirmed by Mr.
3 Howard's counsel.

4 Finally, the State argues that because the "conflict information" will be made
5 public during the court of an appeal or habeas proceeding in the future, it must not be
6 privileged now for the purpose of the pending motion for substitution. See 9/27/12
7 Opposition at 4. The State's argument should be rejected because as stated in
8 previous motions filed before this court, the motion for substitution is based upon the
9 Court's inadvertent disclosure of information concerning the presentation of legal
10 strategy. This legal strategy is privileged information concerning the attorney/client
11 relationship between Mr. Howard and the FPD-Nevada.

12 This information was appropriately presented ex parte to this Court within Mr.
13 Howard's motion for substitution of counsel. Critical legal strategy unfolded in Mr.
14 Howard's case, subsequent to the issuance of two significant habeas United States
15 Supreme Court decisions.³ This strategy forms the basis of the conflict of interest that
16 necessitates the motion for substitution.

17 There is no case law precisely on point with this unique situation. However,
18 an appropriate analogy arises when during trial, "the government deliberately
19 interferes with the confidential relationship between a criminal defendant and defense
20 counsel." Williams v. Woodford, 306 F.3d 665, 683 (9th Cir. 2002). This
21 "interference violates the Sixth Amendment right to counsel if it substantially
22 prejudices the criminal defendant. . . . Substantial prejudice results from. . .the
23 prosecution's use of confidential information pertaining to defense strategy. . . ." Id.

24 Analysis of the State's actions based upon the inadvertent receipt of Mr.

25
26 ² As noted in previously pleadings, four separate federal district courts
27 as well as the Ninth Circuit Court of Appeals in Mr. Howard's federal capital habeas
case granted each motion for substitution in ex parte, sealed proceedings.


28 ³ Maples v. Thomas, 132 S.Ct. 912, 922-23 (2012); Martinez v. Ryan,
132 S.Ct. 1309 (2012).


1 Howard's motion for substitution easily demonstrates the intentional intrusion into
2 the attorney-client relationship through the accidental acquisition of privileged
3 materials concerning legal strategy. The State is not entitled to benefit and use this
4 legal strategy by proclaiming that it is not attorney-client privileged information.
5 This is precisely what Mr. Howard's counsel is seeking to prevent, the substantial
6 prejudice that will ensue should the State (and Attorney General) not be precluded
7 from using this information until such time that this or any petitioner puts the facts
8 germane to the instant conflict at issue in a public pleading in any court.

9 Due to the above stated reasons as well as argument presented within all
10 previously filed documents filed on behalf of Mr. Howard pertaining to this matter,
11 Appellant Howard respectfully asks that this Court grant the request relief therein.

12 Respectfully submitted this 4th day of October, 2012.

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