IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN BELCHER, Petitioner, vs. THE HONORABLE ELISSA F. CADISH, EIGHTH JUDICIAL DISTRICT COURT JUDGE, Respondent. STATE OF NEVADA REAL PARTY IN INTEREST	S.CT. NO: D.C. CASE NO.: C-11-270562-1 Electronically Filed Dec 12 2013 09:00 a.m. Tracie K. Lindeman Clerk of Supreme Court

PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

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PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

COMES NOW, Petitioner NORMAN BELCHER, by and through his counsel, Robert M. Draskovich, Esq., and Gary A. Modafferi, Esq., and respectfully petitions this Honorable Court for a Writ of Mandamus, or in the alternative, a Writ of Prohibition.

Petitioner is facing the death penalty. His trial is scheduled to begin on September 6, 2014. Petitioner respectfully requests that the District Court be ordered to strike his previously held preliminary hearing, dismiss the charges stemming from that preliminary hearing, and grant a new preliminary hearing with a new date for a pretrial writ of habeas corpus (pretrial), should probable cause be found. Petitioner's writ is based upon the argument that the Petitioner was deprived of effective, conflict-free, assistance of counsel at his preliminary hearing.

Petitioner was deprived of those rights because his attorney had represented the only eyewitness to place the Petitioner at the scene of the murder. This representation had not been disclosed to the Petitioner at the time of the preliminary hearing. Accordingly, Petitioner was denied his right to effective, conflict-free representation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, Article 1, Sec. 8 of the Constitution of the State of Nevada, and Nevada Supreme Court Rule 250.

I.

RELIEF SOUGHT

Petitioner is requesting that this Honorable Court direct the District Court to strike Petitioner's previously held preliminary hearing, dismiss the charges, grant Petitioner a new preliminary hearing, and direct the District Court to grant a new pretrial writ for habeas corpus date, should probable cause be found at Petitioner's newly granted preliminary hearing.

II.

ISSUES PRESENTED FOR REVIEW

1) Whether Petitioner is entitled to the relief sought because of previous counsel's ineffective and conflicted representation of Petitioner at preliminary hearing?
2) Whether the District Court committed error when it applied the harmless error standard in reviewing previous counsel's ineffective and conflicted representation of Petitioner at preliminary hearing?

III.

STATEMENT OF THE CASE

On August 13, 2013, Petitioner filed his Motion to Strike Preliminary Hearing and Dismiss Charges.[1] The motion challenged the legality of a preliminary hearing held on January 21, 2011. At that preliminary hearing, Petitioner was represented by two lawyers as required by Supreme Court Rule 250.[2] The sole eyewitness against the Petitioner was Nick Brabham.[3] It was later learned that Mr. Lance Maningo Esq., Petitioner's lawyer at the preliminary hearing, had also recently represented Mr. Brabham on a methamphetamine charge.[4]

On May 25, 2011, Petitioner filed an *in proper personam* Motion to Dismiss Mr. Langford and Mr. Maningo.[5] A hearing was held on June 8, 2011 to determine the merits of Petitioner's claims.[6] On July 18, 2011, Petitioner, ostensibly frustrated with his counsel's performance, attempted to plead guilty to charges that would

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[1] Petitioner's Appendix (hereinafter "PA") at 1-67.
[2] Transcript of the proceedings taken on January 21, 2011 before the Honorable Joe Bonaventure, PA at 267-375. The two attorneys then representing Petitioner were Robert Langford, Esq., and Lance Maningo, Esq. Mr. Maningo's representation is the subject of this Petition.
[3] PA 368-372.
[4] PA 21-23 Case summary of State v. Nicholas Brabham 09CRN002821-002.
Mr. Maningo negotiated substance abuse counseling as part of Mr. Brabham's plea agreement. PA 21-22. Mr. Brabham's sobriety and ability to identify the Petitioner was the most important issue at the preliminary hearing. Mr. Brabham was not cross-examined at the preliminary hearing.
[5] PA 27-33.
[6] Partial transcripts of the proceedings held on June 25, 2011. PA 35-43. A portion of the hearing was sealed. PA 42. Neither counsel was removed. The District Court directed Petitioner to "meet with counsel discuss the case in order to proceed to properly prepare the case with an eye toward trial."

carry death as a penalty.[7] On September 26, 2011 a hearing was held and the Petitioner was found competent and both Mr. Maningo and Mr. Langford remained as counsel.[8] On December 12, 2011 a hearing was held and Mr. Maningo, for the first time, explained the circumstances of his conflicted representation of Petitioner and witness Brabham.[9]

On July 11, 2012, current counsel filed a Motion to Suppress Impermissibly Suggestive Photographic Identification procedure challenging the procedure in which witness Brabham identified the Petitioner in his hospital bed five weeks after the alleged murder.[10] On July 19, 2012 the State filed State's Opposition to Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure.[11] On July 30, 2012 the Petitioner filed a Reply to State's Opposition to Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure.[12] On August 20, 2012 a hearing was held on Defendant's Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure.[13] The hearing was continued. Counsel for Petitioner subpoenaed both the Detective and witness Brabham to testify about the circumstances of the identification.[14] Neither had been examined by defense counsel at preliminary hearing regarding the challenged identification process. On August 22, 2012 a non-evidentiary hearing was held and Defendant's Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure was denied without the testimony of either Detective Hardy

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[7] PA 45-54. Petitioner's frustration with his conflicted appointed counsel was interpreted as mental incompetence. Accordingly, the Petitioner was ordered to undergo a competency evaluation. PA at 50. Petitioner was later found to be mentally competent. Petitioner stated at the next hearing that he wanted his attorneys to assist with the guilt phase not just the sentencing phase. Petitioner told the Court "my attorneys already found me guilty." PA 58.

[8] PA 56-61.

[9] Transcript of proceedings held on December 12, 2011, PA 85-95. Mr. Maningo's explanation is at PA 88-94.

[10] PA 131-202.

[11] PA 203-231.

[12] PA 232-241.

[13] Transcript of proceedings held August 20, 2012. PA 242-246.

[14] PA 243. In the end, neither Mr. Brabham nor Detective Hardy was allowed to testify about the circumstances of the photographic array identification procedure. The photograph at issue was a booking photograph widely circulated in the Las Vegas media during the five week period between the shooting of Mr. Brabham and his initial identification of the Petitioner. Mr. Brabham had previously told police that there were two masked intruders.

or witness Brabham.[15] An order denying Defendant's Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure was filed on October 25, 2012.[16] On September 28, 2012, the Petitioner filed a Notice of Witness/Expert Witness stating that he intended to use Dr. Robert Shomer as an expert witness to testify as to eyewitness perception, retrieval analysis, cross-racial identification issues, weapon focus, and reliability of eye witness identification.[17]

On April 16, 2013 current counsel filed Defendant's Motion for Discovery and for Disclosure of All Exculpatory Evidence and Incorporated Statement of Authority.[18] In pertinent part, Petitioner specifically requested, "all evidence that may establish the identity of an alleged second intruder, other than Norman Belcher, as previously described by percipient witnesses Nicholas Brabham and Ashley Riley. Please include witness statements, forensic evidence, investigative reports and notes, forensic analysis done or not done to debunk the identity of an alleged second intruder present at the time of these alleged offenses."[19] A hearing on Petitioner's discovery motion was held on October 16, 2013.[20] The State's position regarding the second suspect was placed on the record. The Prosecutor stated that, "And in fact I reached out and spoke to the lead homicide detective on this case. What happened was the-there was a surviving victim in the home-…who suggested…that he may have heard and as a result there could have been a second suspect. That was the extent of the information. But pursuant to defense request I reached out to the homicide detective and that is the extent of the information regarding a second

[15] PA 247-256. The Court's reasoning is found at PA 257.
[16] PA 257-258.
[17] PA 259-266. Dr. Shomer will be called to discuss witness Brabham's identification of the Petitioner and the circumstances of the photographic array constructed by police five weeks after the shooting.
[18] PA 499- 519.
[19] PA 517.
[20] PA 490- 498.

suspect. There are no fingerprints. There's no forensic evidence. There are no interviews. That's the extent of the information."[21]

On August 22, 2013 the State filed State's Opposition to Defendant's Motion to Strike Preliminary Hearing and Dismiss Charges.[22] On September 12, 2013, Petitioner filed Reply to State's Opposition to Defendant's Motion to Strike Preliminary Hearing and Dismiss Charges.[23] On October 3, 2013, Petitioner filed a Supplemental Memorandum of Law in Support of Defendant's Motion to Strike Preliminary Hearing and Dismiss Charges.[24] On September 23, 2013, a hearing on Petitioner's Motion to Strike Preliminary Hearing was held.[25] The Court ordered the matter be continued so that the Petitioner could file a Reply to the State's Opposition to Defendant's Motion.[26] Brief arguments were heard by the Court. Counsel argued the non-applicability of the harmless error analysis to Petitioner's denial of conflicted representation. The District Court determined that an evidentiary hearing was needed to determine if the error presented by Mr. Maningo's representation of the Petitioner was harmless beyond a reasonable doubt.[27]

On October 9, 2013, the State filed Notice of Evidence in Support of Aggravation.[28] Nicholas Brabham was noticed by the State as a witness to establish evidence in support of aggravation in four of the seven aggravation circumstances. On October 24, 2013 an evidentiary hearing on Petitioner's Motion to Strike Preliminary Hearing was held.[29] The Court heard the testimony of Petitioner's

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[21] PA 494-495. Witness Brabham testified at the challenged preliminary hearing that there was a second person in the background when the shot was fired. PA 14-15. Again, previous counsel failed to develop any information about this second person's identity or involvement.

[22] PA 68-72. The State's Opposition did not contain a single legal citation in support of their position that Petitioner's motion should be denied. Particularly, no support was offered for the proposition that Mr. Maningo's failure to realize a conflict existed at the time of preliminary hearing somehow excused Petitioner's right to know that this conflict existed. PA 487 Order at paragraph 10.

[23] PA 73-115.

[24] PA 116-123.

[25] Transcript of proceedings held before the court on September 23, 2013, PA 427-434.

[26] Reply to Opposition to Defendant's Motion filed September 12, 2013. PA 73-115.

[27] PA

[28] PA 376-391.

[29] Transcript of proceedings held on October 24, 2013. PA 435-483.

previous counsel Lance Maningo, Esq., and Robert Langford, Esq. The prosecution requested that the attorney-client privilege be waived for purposes of the hearing so that previous defense counsel could be examined about the "strategic" decision not to cross-examine Mr. Brabham at the preliminary hearing. Counsel for Petitioner argued that waiver was unnecessary as Mr. Maningo's presence alone at the preliminary hearing constituted ineffective assistance of counsel.[30] The testimony of Mr. Langford and Mr. Maningo was received by the Court and Petitioner's Motion to Strike was denied. A written order denying Petitioner's Motion was filed on December 4, 2013.[31]

IV.

STATEMENT OF FACTS

Petitioner Norman Belcher is facing the death penalty for the murder of Alexus Posturino and the attempted murder of Nicholas Brabham on December 6, 2010. The sole eyewitness placing Petitioner at the scene of the murder was Nicholas Brabham.[32] Even though witness Brabham had stated under oath that he had previously known the Petitioner,[33] on the night of the murder, witness Brabham did not identify the Petitioner as the shooter. Instead, a police officer, in a sworn affidavit stated that on December 6, 2010, Brabham "told officers that two males wearing dark clothing and ski masks came into the house and shot him."[34] Petitioner was not identified by Mr. Brabham as his assailant on December 6, 2010. Petitioner was not identified by witness Brabham until he was interviewed by police at UMC

[30] Mr. Maningo's presence at Petitioner's preliminary hearing was void *ab initio.* He was not legally permitted to advise the Petitioner on strategic decisions not to cross-examine witnesses at preliminary hearing on the faulty legal theory that failure to cross-examine was the same as legally coexistent with being given an opportunity for cross-examination.

[31] Order denying Defendant's Motion. PA 484-489.

[32] PA 267-375, Witness Brabham's preliminary hearing testimony is found at PA 368-372.

[33] PA 370.

[34] PA 127. At preliminary hearing, witness Ashley Riley testified that immediately after being shot, she asked Mr. Brabham "who did this?" but Mr. Brabham did not answer her. PA 333. At the preliminary hearing, contrary to the statement given to police on the night of the event, witness Brabham said he could not tell whether the second suspect was male or female. PA 14-15.

trauma on January 12, 2011, five weeks after the shooting.[35] The same booking photograph released to Las Vegas media outlets on the day after the shooting, was presented in a photographic array or "six-pack" to witness Brabham five weeks later at UMC.[36]

Ashley Riley testified at the preliminary hearing.[37] She did not see the shooter(s), though she was present in the house when witness Brabham was shot. Ms. Riley testified that immediately prior to the shooting, she and Brabham "were smoking meth."[38] Ms. Riley believed based upon what she heard, "It sounded like there were two people."[39] Defense counsel, as with witnesses Brabham and Detective Hardy, asked no questions of Ms. Riley. Mr. Lance A. Maningo, Esq., was one of two mandated death penalty counsel representing Petitioner at the challenged preliminary hearing.

Nevada Supreme Court Rule 250 requires the presence of two lawyers, "when the district court appoints defense counsel to provide representation at trial."[40] Mr. Maningo had previously represented Mr. Brabham for the offense of possession of methamphetamine.[41] In the Order denying Petitioner's motion, the District Court relied on the statement that, Mr. Maningo "never appeared in Court with Mr.

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[35] The process of identification would become the subject of Petitioner's Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure. PA 131-202. The Motion and Reply detail in depth the implausibility of witness Brabham's identification.
The same photograph used by police in the contested array was widely displayed throughout Las Vegas media outlets immediately after the shooting. PA 199 The challenged photograph was included in the photographic array displayed to witness Brabham five weeks later at the hospital. PA 166 At the preliminary hearing, neither of Petitioner's lawyers asked the Detective any questions. It has been Petitioner's contention that the police would never be permitted to show the exact photograph of the suspect to the witness before presenting the six-pack to the witness. The circulation of this photograph, in print and electronic media, accomplished the functional equivalent of showing the photograph to the witness before the identification procedure began. Yet, no questions were asked of either witness Brabham or Detective Hardy about this patently egregious process.

[36] PA 119 Review Journal article December 7, 2010- PA 166 (photographic array shown to witness Brabham).

[37] PA 320-337.

[38] PA 326. Ms. Riley also testified that she and witness Brabham also smoked marijuana immediately prior to the shooting.

[39] PA 332.

[40] Nevada Supreme Court Rule 250 (2)(f).

[41] PA 21-23.

Brabham."[42] This finding was in conflict with court records. According to witness Riley, witness Brabham was under the influence of methamphetamine and marijuana when he had the opportunity to make identification of the Petitioner. The guilty plea agreement negotiated by Mr. Maningo for witness Brabham included substance abuse counseling completed on September 23, 2010.[43]

At the evidentiary hearing on Petitioner's motion, previous counsel testified to the "strategic" legal reasoning behind the decision not to cross-examine witness Brabham. Counsel's "biggest concern was preventing the preservation of Mr. Brabham's testimony in which he identified Norman Belcher as the perpetrator of the crimes."[44] Counsel testified that he consulted experts regarding "the likelihood that the Supreme Court would uphold this decision in favor of my client, should there actually arise a need to - for the State wanting to bring in what I consider unpreserved testimony."[45]When asked about this strategy, specifically whether, "the fact that you may be present in the courtroom and just choose not to ask any questions that doesn't preserve the testimony in your opinion?" Previous Counsel responded, "That's what the case law says. It's not my opinion. The case law says defense counsel must- there must have been cross-examination; that's what the case law says."[46] Previous counsel stated that, "The case law never says opportunity. Case law says there must have been cross-examination."[47] Mr. Maningo testified that if he had been lead counsel he probably would not have chosen to leave these preliminary hearing witnesses uncross-examined.[48]

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[42] Order PA 486 at paragraph 6. Mr. Maningo told the Court he may have made one appearance on September 23, 2010. Id. Court records appended to the Motion show appearances in Court by Mr. Maningo for witness Brabham on this date and on the date of entry of plea, February 8, 2010. PA 23. This was the most crucial appearance because presumably witness Brabham would have been counseled about the plea, his prospective entry into substance abuse counseling, and the nature and extent of his methamphetamine addiction.

[43] PA 22.

[44] PA 448-49.

[45] PA 446.

[46] PA 451.

[47] PA 451. Previous counsel did not recall the fact that witness Brabham told officers that two males wearing dark clothing and ski masks came into the house and shot him. PA 453. Though not clear, previous counsel intimates that the decision to not cross-examine the witnesses was made at or during the preliminary hearing.PA 458-59.

[48] Pa 464.

V.

JURISDICTIONAL STATEMENT

Mandamus is available to direct the district court to do what the law requires. Such extraordinary relief is available where the Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.[49] Consideration of a petition for extraordinary relief may be justified where an important issue of law needs clarification and public policy is served by the Supreme Court's invocation of its original jurisdiction.[50] Petitioner was denied effective, conflict-free representation in a capital proceeding. This Court has mandated that it "places the highest priority on diligence in the discharge of professional responsibility in capital cases."[51] This Court has also mandated that it will "ensure that capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the error in capital cases and to recognize and correct promptly any error that may occur…"[52] Considering the enormous expense and tactical burden of a tainted and superfluous death penalty trial, judicial economy and sound judicial administration militate in favor of granting the requested relief at this point of the proceeding.[53]

Underscoring this argument was the United States Supreme Court's decision in Holloway. There, the Court held, "This court has concluded that the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless-error. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic."[54]

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[49] Margold v. District Court, 109 Nev. 804, 805 (1993) A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion. International Game Tech v. Dist. Ct., 124 Nev. 193, 197 (2008).
[50] Diaz v. Eighth Judicial District Court, 993 P.2d 50,116 Nev. 8 (2000).
[51] Nevada Supreme Court Rule 250(1).
[52] Nevada Supreme Court Rule 250(1).
[53] See e.g. State v. Babayan, 106 Nev. 155, 175-176 (1990)
[54] Holloway v. Arkansas, 435 U.S. 475, 489 (1978)

VI.

ARGUMENT

A. Petitioner is entitled to the relief sought due to previous counsel's conflicted and ineffective representation of Petitioner at preliminary hearing.

Nicholas Brabham is no ordinary witness. Witness Brabham's identification exposes the Petitioner to the death penalty. At the hearing held on December 12, 2011, where Mr. Maningo was removed from further representation of the Petitioner, the prosecutor described witness Brabham as "a critical, critical witness."[55] The prosecutor similarly stated, "This is one of those profound conflicts – one of those profound issues that eradicates everything."[56] Petitioner agrees with the prosecutor's assessment and respectfully prays that he be allowed the right of a conflict-free preliminary hearing with a new pretrial habeas deadline. [57] Mr. Maningo's conflict made his presence at Petition's hearing illegal. Mr. Maningo was not legally capable of advising Petitioner about the ill-advised decision to not cross-examine witness Brabham.

The sole eyewitness to identify Norman Belcher at the scene of the charged murder is Nicholas Brabham. He testified to those events at a preliminary hearing held on January 21, 2011.[58] Lance A. Maningo Esq. was one of two mandated death penalty counsel representing Petitioner. Nevada Supreme Court Rule 250 requires the presence of at least two death penalty qualified attorneys throughout every "critical" stage of the proceedings. Earlier Mr. Maningo represented Nicholas Brabham on a felony drug charge involving methamphetamine.[59] The problem was reported to the Court and the Court removed Mr. Maningo.

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[55] PA 91.
[56] PA 92.
[57] Previous counsel failed to challenge the sufficiency of evidence through the writ process. It is respectfully requested that upon remand for a new preliminary hearing that a new date allowing for such a challenge pursuant to NRS 34.700. be permitted. The preliminary hearing was held in January 2011. Mr. Maningo's conflict due to his representation of witness Brabham was not addressed by the Court until December, 2011.
[58] Mr. Brabham's testimony is found at PA 12-19.
[59] PA 21-23-Public Access – Case Summary.

On July 18, 2011 Petitioner complained that his lawyers gave him "the impression that they have no interest in defending me."[60] When Mr. Maningo stated, "I spoke with our client this morning and I believe were ready to proceed as counsel," Mr. Belcher spontaneously stated "no, I'm going to plead guilty today."[61] In an apparent display of frustration with his appointed counsel, Petitioner further stated, "I'm not going to speak with them, so therefore there's no – I'm going to plead guilty. I'm fully competent. I know what it means. I know all appeals go out the window. I know it's going to hold a death penalty hearing still. I want to plead guilty today."[62] The frustration that Petitioner displayed was literally interpreted as an indication of insanity.

Mr. Langford said, "I really believe we're all of us best served by having a psych evaluation done…"[63]Mr. Maningo stated, "I can represent that I've seen things that had me concerned about his competency."[64] At this time, Petitioner had still not been apprised of the fact that Mr. Maningo had also been criminal counsel for witness Brabham. Petitioner then told the Court, "I don't feel like one of the attorney's want to help me."[65] He went on to say "my attorney's already found me guilty,"[66] and "How's he going to talk to me about strategy when all he tells me is I'm going to be found guilty."[67]

On December 13, 2011 a hearing challenging the constitutionality of the eyewitness identification procedure by eyewitness Brabham of Defendant Belcher was held. It was the Petitioner's argument that Mr. Brabham's identification of Petitioner was fatally flawed. had not identified Petitioner until he was shown the same photograph that had been widely distributed in the local media in the five week

[60] PA 37.
[61] PA 45-54-Transcript of Proceedings held on July 18, 2011
[62] PA 46-47.
[63] PA 48.
[64] PA 40. Petitioner was eventually found fit to proceed. Transcript of Proceedings held on September 26, 2011
[65] PA 57.
[66] PA 58.
[67] PA 60.

interim between the shooting and the photographic array. It was argued at the hearing that witness Brabham's drug intoxication and other salient factors caused a misidentification of Petitioner. Mr. Brabham's use of methamphetamine, marijuana, and alcohol, immediately prior to the alleged eyewitness identification, was admitted at the preliminary hearing by State witness Ashley Riley.[68] Mr. Maningo had represented Mr. Brabham on a charge of possession of methamphetamine. Mr. Brabham's identification became the subject of a comprehensively litigated motion to suppress on the basis that the procedure was the product of impermissible suggestion.[69] Not a single question was asked of Mr. Brabham at preliminary hearing by either defense counsel.[70]

Even if it were not the case, it appeared to the Petitioner that the identification process was purposefully left untouched by examination at the preliminary hearing. The actual truth of that contention is of no consequence because actual conflict makes examination of that issue unnecessary. In this case, prejudice to the Petitioner is legally presumed.

This Court has recently reaffirmed the legal precept that "the preliminary hearing is a "critical" stage of the criminal proceedings at which a defendant's Sixth Amendment right to counsel attaches."[71] In Patterson, the Court recognized the Sixth Amendment right of counsel at the preliminary hearing stage. The United States Supreme Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial or a fair preliminary hearing.[72] The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.[73]

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[68] PA 64.
[69] A hearing on the Motion was held on August 22, 2012. The Motion was denied.
[70] PA 67.
[71] Patterson v. State, 129 Nev. Adv. Op. 17, (April 4, 2013)
[72] Gideon v. Wainwright, 372 U.S. 335 (1963)
[73] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

The Sixth Amendment recognizes the right to assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair.[74] It is for that very reason that the United States Supreme Court has recognized that "the right to counsel is the right to effective assistance of counsel."[75] Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.[76] Trial or appellate counsel, however, can also deprive a defendant of the right to effective assistance simply by failing to render "adequate legal assistance."[77]

The United States Supreme Court had not elaborated on the meaning of the constitutional requirement of effective assistance in those presenting claims of "actual ineffectiveness" until its landmark decision in Strickland.[78] The standard governing ineffective assistance of counsel claims enunciated in Strickland was adopted by the Nevada Supreme Court in Lyons. The Court set forth a two-prong test.[79] Under this two prong test, a defendant who challenges the adequacy of his counsel's representation must show, first, that his counsel's performance was deficient, and second that he (the Defendant) was prejudiced by this deficiency.[80]

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ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." See also Article 1 § 8 of the Constitution of the State of Nevada.

[74] Strickland v. Washington, 466 U.S. 668, 685 (1984) ,adopted by this Court in Lyons v. Warden, 100 Nev. 430, 432 683 P.2d 504, 505 (1984).

[75] McMann v. Richardson, 397 U.S. 759, 771 N.14 (1970).

[76] Ryan v. District Court, *supra* (right to chosen counsel was interfered with when the district court prevented retained counsel from assuming the defense of co-defendant with waiver of conflict in husband/wife murder trial); Geders v. United States, 425 U.S. 80 (1976) (the court's bar on attorney-client consultation during overnight recess amounted to an unconstitutional interference) Herring v. New York, 422 U.S. 853 (1975)(bar on summation at bench trial) Brooks v. Tennessee, 406 U.S. 605, 612 (1972)(requirement that defendant be the first defense witness)

[77] Coyler v. Sullivan, 446 U.S. 335, 344 (1980)

[78] Strickland v. Washington, 466 U.S. 668 (1984)

[79] Warden v. Lyons, 100 Nev. 430 (1984) cert denied 471 U.S. 1004 (1985)

[80] Strickland, *supra.*

In limited instances a defendant is relieved of the responsibility of establishing the prejudicial effect of his counsel's actions. An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice.[81] Such a presumption exists in this Petition. An actual conflict exists in Petitioner's case because of Mr. Maningo's representation of witness Brabham prevented the conflict free representation that Petitioner was constitutionally entitled.

Every defendant has a constitutional right to the assistance of counsel unhindered by conflicting interests.[82] The presumption of prejudice accorded to a showing of actual conflict of interest cases is due, in part, on the difficulty in measuring the effect of representation tainted by conflicting interests.[83] In Holloway, the United States Supreme Court stated that, "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."[84] The Court then stated, **"Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic."[85]**

The conversations Mr. Maningo is presumed to have had with Mr. Brabham during his representation about Brabham's methamphetamine possession and usage are obviously privileged.[86] They could not have been exposed by his attorney for use at Mr. Belcher's preliminary hearing. Failure to expose those conversations prevents Petitioner from receiving effective representation. On the night of the murder Mr. Brabham was under the influence of methamphetamine. His ability to perceive the Petitioner as the shooter was perhaps the most critical piece of evidence in the

[81] Cuyler v. Sullivan, 446 U.S. 335 (1980). Mannon v. State, 98 Nev. 224, 226 (1982) (Counsel's conflicting ethical obligations regarding confidential statements created actual conflict. No showing prejudice was required for reversal.)
[82] Holloway v. Arkansas, 435 U.S. 475 (1978) Harvey v. State, 96 Nev. 850 (1980)(discussing at length the risks of conflict in joint representation in appointed cases)
[83] Strickland, *supra* at 692. Clark v. State, 108 Nev. 324.
[84] Holloway v. Arkansas, 435 U.S. 475, 484 (1978)
[85] Id. At 489.
[86] On February 8,2010 less than a year earlier, Mr. Maningo personally pled Mr. Brabham to a reduced charge of

State's arsenal of evidence against the Petitioner. Witness Brabham did not identify the Petitioner on the night of the murder. His ability to identify the Petitioner allegedly arose between that night and an identification procedure with police five weeks later.

The United States Supreme Court has required heightened reliability in the adjudicative process leading to a death sentence.[87] The Petitioner was constitutionally entitled to conflict free assistance of counsel at his preliminary hearing, particularly since death is a potential punishment. Petitioner did not receive that assistance and that error should be corrected now instead of wasting resources at a trial and correcting that error on after a tainted death penalty trial.[88]

There was no waiver of this conflict as required by law. There was no waiver because Petitioner was not informed that a conflict existed until eleven months after the preliminary hearing. The waiver procedure was set out and mandated in Ryan.[89] This required procedure was not followed at Petitioner's preliminary hearing. Instead, a representation was made by Mr. Maningo that, "I've spoken to Mr. Belcher. He has no issue or concern with it. But we all agree that the conflict really rests with Mr. Brabham."[90] This is not compliance with Ryan.

On January 21, 2011, the day of the preliminary hearing, the Petitioner did not know that his lawyer had also represented critical witness Nicholas Brabham. This disclosure was not made to the Defendant until December 12, 2011.[91] At the time the

[87] Loewnfield v. Phelps,484 U.S. 231, 238-39 (1988)("Qualitative difference between death and other penalties calls for greater degree of reliability when the death sentence is imposed").

[88] Petitioner is specifically requesting that the current charges be dismissed and that the matter be remanded for a new preliminary hearing date along with a new writ date. Previous counsel did not challenge the sufficiency of evidence presented at the tainted preliminary hearing adding further prejudice suffered by Petitioner.

[89] Ryan v. Dist. Ct.,123 Nev 419 (2007) .

[90] PA 486 Order at paragraph 6.

[91] Mr. Maningo told the Court: " Here's what happened is during the course of meeting with our client about 3 weeks ago we went through every crime scene photo, all the photos that are discovery in this case. One of the pictures that our investigator and Mr. Belcher saw was a picture of a wallet that had a card in it and it was my law firm's business card. That prompted me to do additional research in – within my firm. And I found out that at one time prior my firm represented Nicholas Brabham who is the – a victim witness in this case." PA 89

State was made aware of this actual conflict, they immediately moved to disqualify Mr. Maningo. The State's position then was very clear:

> MR. LALLI: Your Honor, it's our position that due to the nature of who this witness is and I think Mr. Maningo has indicated a clear conflict of interest in having represented this gentleman. This Nick Brabham I'm not sure – I know the Court has a lot of cases. Nick Brabham is the person who Mr. Belcher shot and left for dead.
>
> THE COURT: Uh-huh.
>
> MR. LALLI: Who has the ability to identify him and –
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> THE COURT: He's a pretty important witness.
>
> MR. LALLI: -- is a critical, critical witness in the case.
>
> THE COURT: Yeah.
>
> MR. LALLI: Which is a capital case, which is a case that there will be no offer made. This is a case that will go to trial. And so out of an abundance of caution it is our position that Mr. Belcher needs a new lawyer just because this is a case that will be litigated well beyond the existence of the case in front of Your Honor. This case will go to the Supreme Court.[92]

The "clear" conflict that existed at the Petitioner's preliminary hearing with this "critical" witness has poisoned the well and it must be corrected before this matter can proceed. The witnesses were not examined, a writ was not filed, and there was no transcript of witness Brabham to further investigate his initial failure to identify the Petitioner. Petitioner's ability to investigate the presence and identity of the second masked suspect came to a complete halt in January 2011 because the only witness to that suspect was not questioned when an opportunity was given. The District Court in its Order, before trial, approximates that "Mr. Maningo's representation of Nicholas Brabham did not contribute to the outcome of the preliminary hearing in this matter, and it will not contribute to the outcome of the

[92] PA 91.

trial."[93] Respectfully, this determination constitutes an abuse of discretion this finding cannot be determined at this point in the prosecution.

Alternatively, the District Court found the systemic contamination of Mr. Maningo's conflicted representation can be parcelled out and that probable cause, even without witness Brabham's testimony, remains. No authority exists to suggest that witness Brabham's testimony and its impact on the probable cause assessment at the preliminary hearing can be parceled out and that the District Court can revisit the justice court's decision much like a reviewing court at a Franks hearing.[94] The impact of conflict on the right of effective assistance of counsel is not measured in these suggested increments. The required loyalty of counsel cannot be so measured. Given Mr. Maningo's actual conflict, he was not ethically allowed to be at the preliminary hearing representing Petitioner in any capacity. His divided loyalty to Brabham prevented systematic effective assistance of counsel.

In Patterson, the Nevada Supreme Court stated that pretrial proceedings are often considered to be "critical" stages because "the results might well settle the accused's

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[93] PA 489 Order at p. 6.

[94] Franks v. Delaware, 438 U.S. 154 (1978) In Franks the Supreme Court set forth the procedure to challenge the veracity of an affidavit supporting a search warrant. The summation of that procedure is outlined below. It includes an assessment of probable cause when the material that is subject of the alleged falsity or reckless disregard is proven. No authority to support the imposition of this procedure in this instance was ever provided. No such authority exists because the harm to be prevented is so much different. In Franks, The Court stated;

"In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue." Franks at 171-172.

This procedure will not provide an effective remedy to an entire representation tainted by conflict. Particularly in a death penalty case where the witness at issue is so central to the State's proof. However, even if a Frank's procedure was utilized, the identification procedure testified to by the detective at the hospital involving Witness Brabham is still tainted by the conflict. Petitioner was entitled to effective cross-examination not only about the on- scene identification factors but also the procedure employed five weeks later at the hospital.

fate and reduce the trial itself to a mere formality."[95] The issue before this Court is not just whether Mr. Maningo was ineffective for failing to cross-examine his former client at preliminary hearing. Instead, the larger issue is whether Mr. Maningo's representation prevented effective assistance of counsel at this critical stage.

In Coleman, the United States Supreme Court emphasized the need for effective assistance of counsel at the preliminary hearing stage.[96] There, the majority recited the significant steps which counsel could take at that juncture to protect and preserve his client's rights:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The Sixth Amendment right to counsel includes a correlative right to representation free from conflicts of interest.[97] This right is not witness specific as suggested by the District Court's Order.[98] Joint and successive representation of

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[95] Patterson, supra quoting, Powell v. Alabama, 287 U.S. 45, 57 (1932)
[96] Coleman v. Alabama, 399 U.S. 1 (1970).
[97] Lewis v. Mayle, 391 F.3d 989, 995 (9th Cir. 2004)
[98] PA 487-488 The Court found that "Defendant cannot now be heard to complain that his lawyer failed to effectively cross-examine a witness when Defendant agreed that very witness should not be cross-examined at all." PA 488. There is no record of this decision but more importantly when the decision was made, the Petitioner must have been informed about the nature of the conflict that existed. Any advice the Petitioner received from counsel at that point cannot be considered. Petitioner did not know about this conflict and accordingly he was incapable of waiving that conflict pursuant to Ryan v. Dist. Ct., 123 Nev. 419 (2007).

conflicting interests is suspect because of the effect it may have on a counsel's performance.[99] To establish a violation of the right to conflict-free counsel, the defendant must show either that (1) in spite of objection, the trial court failed to allow him the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial or (2) that an actual conflict of interest existed."[100]

The State recognized that this case presented an actual conflict and both the State and Court concurred on the remedy of immediate removal when presented with the issue.[101] Mr. Lalli stated that disqualification and removal of Mr. Maningo was necessary, "Because this is one of those profound conflicts – or one of those profound issues that eradicates everything." Mr. Lalli was correct. Mr. Maningo's representation of Witness Brabham caused actual conflict that created ineffective assistance of counsel at the preliminary hearing.[102] If Petitioner knew of the conflict at the time of the preliminary hearing, he would have objected. Any person in their right mind would have objected. The State's suggestion, that Mr. Maningo's comment that "he (Defendant Belcher) has no issue or concern with it" and that this constituted a legal waiver by the Defendant is legally and factually incorrect.[103] It is factually incorrect because Mr. Belcher did not know of the conflict he was allegedly waiving. It is legally incorrect because in order to be voluntary, Defendant Belcher had to know of the conflict before waiver could be considered.

In Ryan, the Nevada Supreme Court set forth exacting requirements that must be made before a finding of valid conflict free assistance of counsel can be determined. This procedure came with the understanding that if the waiver of conflict-free

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[99] Holloway v. Arkansas, 435 U.S. 475 at 489-90 (1978).

[100] Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)(A "possible conflict [of interest] inheres in almost every instance of multiple representation).

[101] PA 90-94.

[102] See, e.g. Bragg v. Galaza, 242 F.3d 1082, 1087 (9th Cir.) amended by 253 F.3d. 1150 (9th Cir. 2001)(to show an actual conflict a petitioner must show that counsel actively represented conflicting interests). Mr. Maningo's simultaneous possession of privileged information about the nature and circumstances of witness Brabham's continuing methamphetamine addiction, coupled with his absolute duty to use that information on Petitioner's behalf, constitutes actual conflict. It is this type of conflict that Petitioner must have been apprised of before the preliminary hearing.

[103] PA 70-71.

representation is valid it would entail the waiver of certain important rights at trial, on appeal, and in post-conviction proceedings, including waiver of the right to seek a mistrial based on any conflicts arising from the conflicted representation.[104]

Pursuant to the Court's directive in Ryan, the attorney who has the conflict must advise their client of their right to consult with independent counsel to advise them on the nature of the conflict of interest. If the Defendant chooses not to seek the advice of independent counsel, they must expressly waive their right to do so, or their waiver of conflict free representation will be ineffective. When a defendant knowingly, intelligently, and voluntarily waives the right to conflict-free representation, the district court must accept the waiver. Once the district court accepts the waiver, the defendant cannot subsequently seek a mistrial arising from the conflict nor can the defendant subsequently claim that the conflict he waived resulted in ineffective assistance of counsel. The waiver must be knowingly, intelligent, and voluntary.[105]

In this case, the State argued that Mr. Maningo's statement made ten months after the fact constitutes effective waiver.[106] This is simply untrue. Petitioner had a right to know of the conflict before the preliminary hearing for waiver to the right to conflict free representation to be effective. The Court, his counsel, and independent counsel should have all counseled Petitioner on the impact of this conflict. This did not happen. A defendant may waive his right to the assistance of an attorney who is unhindered by conflicts.[107] However, "a valid waiver of conflict must be voluntary, knowing and intelligent, such that the defendant is sufficiently informed of the consequences of his choice."[108] Petitioner did not know of the consequences of Mr.

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[104] Ryan, supra,, Ironically, considering the State's position in this matter, in Ryan, the State presented a litany of cases and arguments that mitigated against finding a valid waiver where the existence of conflict existed. See fn. 20.
[105] Ryan, supra .
[106] PA 70-71 – The purported waiver consisted of, "I've spoken to Mr. Belcher. He has no issue or concern with it."
[107] Holloway, supra 435 U.S. 475, 483 N.5.
[108] Belmontes v. Woodford, 350 F.3d. 861, 885 (9th Cir. 2003).

Maningo's representation of witness Brabham accordingly he could not have possibly waived the impact of those consequences.[109]

Courts have uniformly required that the canvassing court "ascertain with certainty" that a defendant knowingly and intelligently waived that right by "focusing on what the defendant understood."[110] Being generally advised of the dangers and possible consequences of the conflict is constitutionally insufficient.[111] These types of general advisements are constitutionally insufficient. Instead, specific ramifications of Mr. Maningo's representation of witness Brabham must have been communicated to Petitioner. Petitioner was not told that his attorney owed a continuing duty of loyalty to witness Brabham. Petitioner was not told that Mr. Maningo had an ethical obligation to maintain any confidences learned through his representation of witness Brabham. Petitioner was not told about issues of addiction and perception frailties because those topics could not be ethically exposed by Mr. Maningo's cross-examination of his former client. Those topics however, were at the heart of Petitioner's defense.

The Ninth Circuit has continually held that a reviewing court must "indulge every reasonable presumption against the waiver of fundamental rights."[112] The State's glancing, unsupported assertion that Mr. Maningo's after the fact statement suffices as a valid waiver is not legally supportable. Ryan dealt with conflict waiver and the right to chosen counsel in retained cases. However, the assistance of counsel guaranteed by the Sixth Amendment also contemplates that such assistance be untrammeled and unimpaired in court appointed cases. A court cannot require that one lawyer simultaneously represent conflicting interests.[113] The District Court found that "Defendant cannot now be heard to complain that his lawyer did not

[109] It is important to underscore that Mr. Maningo himself did not recognize that the conflict existed on the date of the preliminary hearing – January 21, 2011.
[110] Lewis v. Mayle, 391 F.3d. 989 (9th Cir. 2004); Lockhart v. Terhune, 250 F.3d. 1223, 1233 (9th Cir. 2001).
[111] Lewis, supra.
[112] United States v. Allen, 831 F.2d. 1487, 1498 (9th Cir. 1987)(citation omitted)
[113] United States v. Jeffers, 520 F.2d. 1256 (1975)

effectively cross-examine a witness when he agreed that very witness should not be cross-examined at all."[114] There is no evidence this alleged agreement was legally permissible and even if there was such an agreement it could not have been effectively counseled because Petitioner did not know that his attorney was also the witnesses' attorney.

The sobriety and perception of witness Brabham was perhaps the most salient and crucial piece of evidence presented by the State. It went unchallenged. At the hearing, Mr. Langford testified that the decision to not cross-examine witness Brabham was "strategic." Mr. Langford told the District Court that, "The decision was that based on what the current case law then and what I believe is the current case law today, cross-examination would result in preservation of that particular witness' testimony."[115] Mr. Langford continued, "I have a specific recollection of- because this is a very important thing of not going to cross-examine the witness; this is why, and he understood and agreed."[116]

Seven of eight witnesses were not cross-examined by Petitioner's defense counsel at preliminary hearing. Respectfully, current counsel submits that in Chavez this Court reaffirmed the historic principle that it is the opportunity for cross-examination that will determine whether preliminary hearing testimony is adequately preserved.[117] Simply declining the opportunity to cross-examine a preliminary witness does not constitute a viable legal strategy to prevent testimonial preservation for trial. In Chavez this Court stated Court it would "determine the adequacy of the opportunity on a case-by case basis, taking into consideration such factors as the extent of discovery that was available to the defendant at the time of cross-examination and whether the magistrate judge allowed a thorough opportunity

[114] PA 71.
[115] PA 445.
[116] PA 447.
[117] Chavez v. State, 125 Nev.328,213 P3.3d 476 (2009). Mr. Maningo did not agree with this strategy but went along because he was not lead counsel.

to cross-examine the witness."[118] Simply foregoing cross-examination is not legally commensurate with being denied the opportunity for cross-examination. Simply not participating in cross-examination at a preliminary hearing will not prevent preservation of that testimony for future use. If that were the case, the use of preliminary hearing to accomplish this goal would be useless. The decision to rely on this unsound strategy violates the reasonable effectiveness test of Strickland. However, it has been Petitioner's consistent position that he was entitled to two conflict free lawyers to properly counsel him on the impact of this decision from the outset.

Mr. Brabham's alleged identification of the Petitioner has been the subject of intense pretrial scrutiny. There was no on scene identification of the Defendant by witness Brabham. When questioned by witness Riley immediately after being shot, witness Brabham did not name Petitioner as the shooter. Petitioner simply told police that there were two assailants wearing dark clothes and masks. It was not until Detectives showed up five weeks later displaying a widely circulated mug shot that witness Brabham identified Petitioner as the shooter. Without Brabham's testimony, there is no other witness placing Petitioner at the scene of the murder. The District Court found that witness Brabham's subsequent hospital identification legally and factually divisible from his in-court identification at preliminary hearing. The Court found that, "Thus, contrary to defendant's argument, testimony independent of Nicholas Brabham was admitted during preliminary hearing through Detective Ken Hardy which identified Defendant Belcher as the perpetrator of the crimes."[119] This finding is incorrect.

Detective Hardy's testimony describing witness Brabham's hospital identification was not independent of witness Brabham. It was this flawed

[118] Chavez at 484. In Chavez, the Court cited to an emphasized quote taken from Pantano, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." at 483.
[119] PA 488.

uncontested hospital identification that evolved into the flawed preliminary hearing identification. These incidents are indivisible and at the root of Petitioner's defense. Proceeding on the theory that failing to cross-examine these witnesses somehow prevents the use of their preliminary testimony at trial is simply wrong. It is not strategy.[120] Most importantly, it is not "strategy" that Mr. Maningo could ethically discuss with the Petitioner. Mr. Maningo's conflict made his legal representation of Petitioner void *ab initio.*

Ordinarily, conflict of interest claims arise in situations where a single attorney represents two or more defendants in the same criminal proceeding. However, an actual conflict of interest also arises when defense counsel is unable to effectively cross-examine a prosecution witness because the attorney had previously represented the witness.[121] The Court explained the dangers of such a situation in Ross; "The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney may have privileged information obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. The more difficult problem which arises is the danger that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information."[122]

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[120] See e.g., People v. Witterbort, 81 Mich App.529, 265 N.W. 2d 404 (1978)(where defense counsel's failure to cross-examine witness was explained by the likelihood that cross-examination would have been "counter-productive" rather than by the alleged incompetency of counsel, trial court did not abuse its discretion in admitting trial testimony); Nabbefeld v. State, 83 Wis. 2d 515, 266 N.W. 2d 292 (1978)(It would be "contrary to interests of justice to prohibit the use of the preliminary hearing testimony of an unavailable witness when the circumstances reveal that cross-examination was declined as a matter of strategy to protect the defendant");Commonwealth v. Thompson,538 Pa. 297,648 A.2d 315 (1994) ("the Commonwealth may not be deprived of its ability to present inculpatory evidence at trial merely because the defendant, despite having an opportunity to do so, did not cross-examine the witness at the preliminary hearing.");State v. Ricks, 122 Idaho 856, 840 P2d.400 ("a decision by counsel not to cross-examine at any prior hearing or to do so only limited, no matter how much practical sense the decision makes, does not appear to effect the adequacy of opportunity.")

[121] Ross v. Heyne, 638 F.2d. 978, 983 (7th Cir. 1980)

[122] Ross v. Heyne, 638 F.2d. 979, 983 (7th Cir. 1980) quoting United States v. Jeffers, 520 F.2d. 1256, 1265 (7th Cir. 1975) cert denied, 423 U.S. 1066 (1976)

Witness Brabham was in the throes of a methamphetamine addiction at the very moment he testified to seeing Norman Belcher and another yet unidentified person shooting at him. He said the assailants wore masks. Riley testified that "we were smoking weed and meth."[123] Neither the State nor the Defense asked witness Brabham about his drug induced intoxication at the time he saw two people at the scene of the murder. Mr. Maningo had just represented that same witness on a charge of possession of methamphetamine. The casual nexus between those two events is profoundly disturbing and must be corrected before this case can proceed.

The State argues that Detective Hardy's testimony about the hospital identification standing alone prevents the relief requested. It does not. The State's argument fails to account for the fact that Mr. Maningo's conflicted representation poisoned the entire preliminary proceeding. Similarly, Mr. Maningo had an absolute duty to question the suggestive identification procedure employed by Metro involving his client Witness Brabham.[124] The failure of conflicted counsel to ask a single question of any witness about the suggestive photographic array, particularly witness Brabham, who had been unable to identify anyone at the scene, further underscores the prejudice suffered by Petitioner. The Court found that Mr. Maningo made a strategic decision not to cross-examine witness Brabham. This argument necessarily implies that Petitioner was not entitled to a choice in that decision. Petitioner was not told that he had the right to conflict free representation when he needed to know about that right the most- at the preliminary hearing.[125]

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[123] PA 326.

[124] See PA 106-114- Defendant's Reply to State's Opposition to Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure. This Reply codifies the arguments made on this subject. It underscores the importance of examining witness Brabham regarding the procedure utilized at the hospital five weeks after the murder.

[125] All that is necessary in such instance is that the Defendant be given the "opportunity to cross-examine" in order for the testimony to be preserved. Pointer v. Texas, 380 U.S. 400 (1965). There was no strategic gain in once having been given the opportunity to cross-examine to fail to exercise that opportunity.

B. The district court was incorrect when it applied the harmless error standard to review previous counsel's conflicted and ineffective representation of Petitioner at preliminary hearing.

In Holloway, the United States Supreme Court underscored that capital prosecutions must be considered differently. There, the Court held that, "this court has concluded that the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless-error.[126] Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic."

The timing of this objection and the nature of the penalty do not lend themselves to harmless-error review as described in Patterson.[127] Trial errors are subject to harmless-error review because these errors "may … be qualitatively assessed in the context of other evidence to determine whether [they were] harmless beyond a reasonable doubt." At this point there is no other evidence to determine context. Without a trial, this analysis cannot be employed. The Court went on to state, "conversely, "structural defects" affect the framework within which trial proceeds, rather than simply an error in the trial process itself. Such errors are grounds for reversal because they "defy analysis by harmless-error standards."[128]

Petitioner's situation, having been denied effective, conflict-free representation, at preliminary hearing, but before trial, is a structural defect that defies analysis by a harmless-error standard. The District Court order suggests that the exercise of a death penalty trial will wash away the sins of this constitutional deprivation but that suggestion is error. The Patterson Court found that the Defendant there was not entitled to relief because it did not result in total deprivation of counsel.[129] In

[126] Holloway v. Arkansas, 435 U.S. 475, 489 (1978)(emphasis supplied)
[127] Patterson v. State, 129 Nev. Adv. Op. 17, 21 (2013)
[128] Patterson, id, citations omitted quoting Arizona v. Fulminante, 499 U.S. 279 at 309-310 (1991)
[129] Patterson, id, citing Manley v. State, 115 Nev. 114, 123 (1999)

Patterson, the defendant still had qualified retained counsel who was not subject to conflict. Petitioner, due to Mr. Maningo's ethical disability and divided loyalties, was totally deprived of counsel both by rule and by circumstance. As the Court in Holloway stated, "the mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[130] The rules that prevented rigorous cross-examination are NRPC Rules 1.6 and 1.7.[131]

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[130] Holloway, supra at 490.

[131] **Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take suitable action;

(3) To prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action;

(4) To secure legal advice about the lawyer's compliance with these Rules;

(5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) To comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.

[Added; effective May 1, 2006.]

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

[Added; effective May 1, 2006.]

Petitioner was entitled to strict compliance with these rules. Compliance is examined with heightened scrutiny in capital cases because of the Nevada Supreme Court's expressed sentiment that, "this court places the highest priority on diligence in the discharge of professional responsibility in capital cases."[132] This type of scrutiny at this juncture of Petitioner's prosecution does not lend itself to harmless-error review. Similarly, this Court will not be able to determine with any modicum of confidence that proceeding to trial with the error that exists will not, beyond a reasonable doubt, contribute to the defendant's conviction.[133] Exactly the opposite is true. The failure to cross-examine Nicholas Brabham at preliminary hearing has had rippling effects throughout this prosecution. Proceeding to trial now without the benefit of a constitutionally sound preliminary hearing will most likely contribute to the Defendant's conviction.

Petitioner had repeatedly come before the District Court through written motion asking for any evidence of the second suspect that Nicolas Brabham described to police on the night of the shooting. According to a Las Vegas Metropolitan Police Department Application for Telephonic Search Warrant, "prior to Brabham going into surgery, he told officers that two males wearing dark clothing and ski masks came into the house and shot him."[134] It is the State's position that no investigation regarding this second suspect was ever conducted because no second suspect ever existed. According, to the State, in response to Petitioner's specific discovery requests, there exists no-follow-up investigation any forensic comparison to a second suspect.

With his client facing death, it was incumbent upon Counsel at preliminary hearing to inquire about the "two males wearing dark clothing and ski masks (that)

[132] Supreme Court Rules adopted by the Supreme Court of Nevada, Rule 250 (1).
[133] Patterson, supra at 21. Citing Hernandez v. State, 124 Nev. 639, 653 (2008)
[134] PA 187

came into the house and shot him."[135] The failure to do so could never be harmless, particularly when counsel should not have represented client at the hearing.

Petitioner was deprived of all of these benefits because Mr. Maningo's divided loyalties created a structural error resulting in a total deprivation of counsel. The foundational pieces of Petitioner's defense were irretrievably altered. Mr. Maningo's unlawful representation of Petitioner at preliminary hearing has had a destructive rippling effect on his defense. This rippling effect included the failure to file a Writ of Habeas Corpus (Pre-Trial) challenging the sufficiency of proof at the preliminary hearing. The rippling effect also included a failure of investigation into the identity of the second shooter based upon inquiry that could have only come from witness Brabham. Mr. Brabham is the only person who could give detail about how this second shooter might be physically identified. There was no recorded inquiry from the State or police about the second shooter's identity. Preliminary hearing counsel had an absolute duty to ask Brabham about this second person. Without a preliminary hearing transcript generated from cross-examination, comprehensive litigation of Petitioner's Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure became difficult if not impossible.

In Patterson, the question presented to the Court was whether the deprivation of Patterson's Sixth Amendment right of counsel at the preliminary hearing was a structural error warranting reversal of Patterson's judgment of conviction, or rather was it trial error subject to harmless-error review? As noted earlier, this Honorable Court does not have the luxury of a trial to put that assessment into context. Equally important, in Patterson, the defendant still had qualified, non-conflicted counsel to represent him throughout the preliminary hearing. Mr. Belcher was deprived of this right. Furthermore, the heightened scrutiny of the Eighth Amendment due to the possible application of the death penalty was not an issue in Patterson. It is a

[135] PA 187.

weighty consideration in this case. The United States Supreme Court has required heightened reliability in the adjudicative process leading to a death sentence.[136]

CONCLUSION

It is respectfully prayed that the Petition be granted.

Dated this 11th day of December, 2013.

By /s/ Gary A. Modafferi

GARY A. MODAFFERI, ESQ. (12450)
ROBERT M. DRASKOVICH, ESQ. (6275)
Attorneys for Petitioner

[136] Lowenfield v. Phelps, 484 U.S. 231, 238-39 (1988)(Supporting the proposition that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed" and such a heightened degree of scrutiny would be inconsistent with a harmless-error review at this juncture- before trial).

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 11th day of December, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I hereby certify that in accordance with NRAP 25(1)(d) I sent true and accurate copies of the Petition for Writ of Mandamus, Or in the Alternative, Writ of Prohibition, on the 11th day of December, 2013, via United States mail, prepaid First-Class postage affixed thereto addressed as follows:

The Honorable Elissa Cadish
Regional Justice Center
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