

1 In contrast to Officer Glover, this witness was simultaneously surprised, intoxicated and
2 drowsy. He was also being shot at with a gun. This witness literally had a split second to make
3 the challenged observation and he has shown a propensity to lie about basic circumstances
4 regarding his opportunity to view.²⁷ This witness represents the polar opposite of Officer
5 Glover.

6 **3. The accuracy of the description.** The witness gave a description of his assailant to
7 police within minutes after the shooting. In an affidavit supporting a Las Vegas Metropolitan
8 Police Department Application for Telephonic Search Warrant, Detective Sergeant Mathew
9 Sanford wrote, "Prior to Brabham going into surgery, he told officers that two males wearing
10 dark clothing and ski masks came into the house and shot him." Five weeks later, without any
11 official police explanation of intervening events and after the investigation had been widely
12 publicized; the witness changed his story.

13 In this second statement, the witness said he got a glimpse of the man who shot him and it
14 was "Bates."²⁸ He could not describe what he was wearing, nor could he describe what the
15 second person present was wearing.²⁹ The police investigation into this matter has failed to
16 confirm or verify the presence of a second intruder.

17 high. "TR at p.58 attached as Exhibit E. It can be presumed, that if they were doing drugs together, that both were
18 probably really high.

19 ²⁷ Weapon focus is a factor affecting the reliability of eyewitness testimony. Weapon focus signifies a witness to a
20 crime diverting his or her attention to the weapon the perpetrator is holding, thus leaving less attention for other
21 details necessary to form a reliable eyewitness identification. Elizabeth Loftus has been a pioneer in validating the
22 weapon focus effect. She has shown that a witness will remember less about a crime, or the perpetrator of a crime
23 when a weapon is present, as opposed to if the weapon is not present at an identical crime. Two leading
24 explanations are attributed for the reason the phenomenon occurs, the cognitive arousal or the victim and/or the
25 overall unusualness of the situation. Loftus, E.F., Loftus, G.R. and Messo, J. (1987) Some facts about Weapon
26 Focus. Law and Human Behavior, 11, 55-62. See also Eyewitness Testimony, Elizabeth Loftus originally published
27 this work in 1979, and republished it in 1996. The Innocence Project claims that eyewitness misidentification is
28 the single greatest cause of wrongful convictions nationwide, playing a role in 75% of convictions overturned
29 through DNA testing. The presence of a weapon during a crime and the degree of stress or trauma a witness
30 experienced while viewing the perpetrator is a consistent contributor to this percentage of wrongful conviction.

31 ²⁸ Exhibit A at p.6. His exact words were "I saw a glimpse of his hair. I saw him, a glimpse of him and then I seen
32 shots fired."

33 ²⁹ Exhibit A at p.6. His first statement included descriptions of ski masks and dark clothing on both people

1 **4. The witness' level of certainty.** Initially, the witness was certain that the shooter was
2 wearing a ski mask. After five weeks, and after presumptive media and drug community
3 feedback, the witness was apparently certain that "Bates" was the shooter. This reversal of
4 identifications and perception of circumstances has not been explained either by the witness or
5 by law enforcement.

6 Riley testified that the witness was fast asleep and "kind of out of it" when she woke him
7 after hearing glass break.³⁰ After walking out the bedroom door he was shot. When the witness
8 returned into the room, Riley immediately asked "who did this?" but the witness offered no
9 response.³¹

10 The fact that the witness offered no spontaneous identification to Riley, seconds after being
11 shot, weighs heavily against the reliability of his identification of the Defendant five weeks
12 later. The potential argument that the witness was injured and not able to identify the shooter is
13 rebuffed by the fact that moments later, the witness told police his attacker was wearing a ski
14 mask. During his police interview at UMC, five weeks after the incident, the witness was not
15 asked why he previously told police that his assailant was wearing a ski mask. This subject was
16 never broached by police during the interview.

17 The witness was given a standardized identification warning prior to being shown the array.
18 The key admonition in that warning is the concept that the array may not contain the suspect's
19 photograph. Specifically, the standardized warning states that "this group of photographs may
20 or may not contain a picture of the person who committed the crime now being investigated."³²
21 However, this key instruction was subverted by the officer's oral instruction to the witness
22 immediately before this instruction was given. There, the officer told the witness "Do you think
23 if I showed you some pictures do you think you'd recognize him?"³³ Implicit in this question is
24

³⁰ Exhibit E at p.62.

³¹ Exhibit E at p.67.

³² Exhibit B at p.1.

³³ Exhibit A at p.12.

1 the fact that a photograph of the suspect will be included when within the standardized
2 instruction an opposite message is intended.³⁴ The witness probably assumed as much, given the
3 fact that he had been exposed to the same photograph through the media for weeks prior
4 actually being shown the same photograph.

5 The police officers conducting the array had to have been cognizant of the fact that the
6 photograph they were about to display to the witness had permeated local news coverage for
7 weeks before the array was shown to witness.³⁵ However, this issue was never broached by the
8 police in their interview with the witness.

9 **5. The time between the crime and the confrontation.** There were several seconds
10 between the opportunity to view the shooter and Ms. Riley's question "who did this?" The
11 witness did not offer an answer to Riley's question. There were several minutes between the
12 opportunity to view the shooter and the witness' statement to police that he was shot by one of
13 two intruders both wearing ski masks and dark clothing. There were five weeks between the
14 shooting on December 6, 2010 and the photographic array being shown to the witness at UMC
15 Hospital on January 12, 2012.³⁶ This was the first time the witness told police that the shooter
16 was this Defendant.

17 The identification of the Defendant was poisoned by the public broadcast of the same
18 photograph that was presented in the challenged photographic array. This booking photograph
19

20 ³⁴ Aside from not questioning Mr. Brabham about his previous statement that the shooter was wearing a ski mask,
the police had obviously already arranged a six pack photographic array with the Defendant's photograph
contained therein before even speaking with the witness.

21 ³⁵ The Defendant was arrested by police on December 6, 2010. On December 7, 2010 the same booking
22 photograph was released to the media for mass public display in this highly publicized case.

23 ³⁶ In Manson, the Supreme Court stated, "Glover's description of his vendor was given to D'Onofrio within
minutes of the crime. The photographic identification took place only two days later. We do not have here the
passage of weeks or months between the crime and viewing of the photograph." *Supra* at 115.

24 In Defendant Belcher's case, the five weeks between failure to identify and identification of the Defendant were
poisoned by drug community chatter about who was responsible and public broadcast of the same exact booking
photograph that would be included in the challenged array.

1 was first publicly displayed in the Las Vegas Review Journal at 10:25a.m. on December 7,
2 2010.³⁷

3 This photograph was displayed countless times in print, on television, and throughout digital
4 media. The impermissibly suggestive identification procedure born from the photographic array
5 had at its foundation an initial failure to identify to Riley, a ski mask misidentification to police
6 on the scene, and widespread media exposure of the same challenged photograph between the
7 shooting and the array. When these factors are weighed with the corrupting effect of the
8 suggestive identification itself, there is a very substantial likelihood of irreparable
9 misidentification.

10 **CONCLUSION**

11 The Defendant respectfully prays that his Motion be granted.

12 DATED this 9th day of July, 2012.

13 By: 

14 Robert M. Draskovich, Esq. (6275)
15 Gary A. Modafferi, Esq. (12450)
16 815 S. Casino Center Blvd.
17 Las Vegas, Nevada 89101
18 (702) 474-4222
19 Attorneys for Defendant
20
21
22
23
24

³⁷ See Exhibit F at p.1. The trending topics section at p.3 indicate the widespread public interest this case .
Included in those topics was the witness "Nicholas Brabham."

1 **ROC**

ROBERT M. DRASKOVICH, ESQ. (6275)

2 Gary A. Modafferi, Esq. (12450)

815 S. Casino Center Blvd.

3 Las Vegas, Nevada 89101

Telephone: (702) 474-4222

4 Attorneys for Defendant

5 **DISTRICT COURT**
CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,
7
Plaintiff,

8 vs.

9
10 NORMAN BELCHER,
11 Defendant.

CASE NO.: C270562

DEPT. NO.: VI

12 **RECEIPT OF COPY**

13
14 RECEIPT of MOTION TO SUPPRESS IMPERMISSIBLY SUGGESTIVE
15 PHOTOGRAPHIC IDENTIFICATION PROCEDURE is hereby acknowledged this 11

16 day of July, 2012.


17
18 
19 Deputy District Attorney
Regional Justice Center
20 200 Lewis Avenue
Las Vegas, NV 89101

EXHIBIT “A”

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
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EVENT #: 101206-0354

SPECIFIC CRIME: HOMICIDE**DATE OCCURRED:** 12-06-2010**TIME OCCURRED:** 0243 HRS.**LOCATION OF OCCURRENCE:** 9752 VILLA LORENA**CITY OF LAS VEGAS****CLARK COUNTY**

NAME OF PERSON GIVING STATEMENT: NICK BRABHAM**DOB:** [REDACTED]**SOCIAL SECURITY #:** [REDACTED]**RACE:****SEX:****HEIGHT:****WEIGHT:****HAIR:****EYES:****HOME ADDRESS:****PHONE 1:****WORK ADDRESS:****PHONE 2:**

The following is the transcription of a tape-recorded interview conducted by DETECTIVE K. HARDY, P#3031, AND DETECTIVE D. O'KELLEY, P#4209, LVMPD HOMICIDE Section, on 01-12-2011 at 0925 hours.

Q: Operator, this is Detective K. Hardy, H-A-R-D-Y, P#3031, taking at statement under Event #101206-0354. Name of person giving statement will be Nick, last name is Brabham, B-R-A-B-H-A-M. His birth date is 02-04 of '79. His social is 559-55-9386. Date and time of this interview will be January 12, 2011, at 0925 hours. The location of the interview will be UMC Trauma, uh, ICU, Bed 6. Persons present during this interview are Nick Brabham, ah, Detective O'Kelley,

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P#4209, and myself Detective Hardy. Nick, you understand this is being recorded?

A: Yes.

Q: And you, and you understand that we're here to, uh, ask you questions about a shooting that occurred on December 6, ah, 2010?

A: Yes.

Q: Could you tell me where you were at, uh, on December 6, 2010?

A: At the top of the stairs.

Q: Okay. Now is that the house that you were living at?

A: Yes.

Q: Do you remember the address?

A: Uh, no.

Q: Okay. Do you, um, whose house is that?

A: William's.

Q: And do you know William's last name?

A: (Unintelligible)

Q: Okay. And is that where you resided, or were you just visiting?

A: I was living there.

Q: Okay. And, um, on December 6, do you recall getting shot?

A: Yes.

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Q: Okay. What was going on just prior to the shooting? Do you recall who was in the house?

A: Um, I don't know who was in the house until I got up to the top of the stairs.

Q: Okay, but before the shooting happened, okay, do you recall where you were at?

A: Downstairs.

Q: You were downstairs?

A: Going in the house.

Q: You were going in the house? Okay. Who else was there? Was there anybody else there with you?

A: Alexis.

Q: Who?

A: Alexis.

Q: And who is Alexis?

A: Billy's daughter.

Q: That's Billy's daughter. And anybody else there?

A: No.

Q: Okay. Do you remember a girl named Ashley?

A: She ___ (unintelligible), yeah, she was, she was upstairs with me.

Q: She was upstairs with you?

A: Yeah.

Q: When you got shot, or?

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A: When I got shot too.

Q: Okay. Where was she at when you got shot?

A: I don't know.

Q: Okay. Just...did you hear anything before, before the shooting?

A: No.

Q: Okay. What was the first thing...what was the first thing that caught your attention inside the house?

A: The blonde head.

Q: A what?

A: A blonde head.

Q: A blonde head. And whose was that?

A: Bates.

Q: Who is Bates?

A: Um, Billy's friend, use to be friend, or somebody.

Q: Okay. Do you recall his real name?

A: No.

Q: Okay. Um, how long have...have you known Bates for a while, or?

A: No.

Q: Okay. Have you seen him before?

A: Yeah.

Q: Okay. And, um, when was the first time you saw Bates?

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A: Like a month ago, two months before that.

Q: Okay. But on the night that you got shot, where were you at when you first saw this blonde head that you said was Bates?

A: At the top of the stairs.

Q: Okay. And, uh, where was Bates at?

A: He was right at the left...right, right at the top of the stairs.

Q: Okay. So you're at the top of the stairs, where was Bates at?

A: At the right at the top of the stairs.

Q: At the right?

A: I'm heading my way up the top of the stairs, yeah.

Q: So he was already upstairs?

A: Yeah.

Q: Okay. So, uh, he's up at the right of the top of the stairs, is that like closest to your bedroom?

A: Ashley's room. I mean, uh, Alexis's room.

Q: Alexis's room?

A: Yeah.

Q: Was he in her room, or was he outside of her room?

A: Right at the doorway.

Q: Okay. And that was the first time you saw him?

A: Yeah.

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Q: Can you tell me what he was wearing?

A: No.

Q: Okay. Um, when you saw him, was there any conversation between you and him?

A: No.

Q: Okay. What happened when you, when you...

A: I just heard fire--shots fired.

Q: Okay. Did you hear the shots before you saw him, or did you see him?

A: I saw a glimpse of his hair. I saw him, a glimpse of him and then I seen shots fired.

Q: Okay. Where were you standing when you got shot?

A: I was turning the corner into my _____ (unintelligible) my closet.

Q: Okay.

A: (Unintelligible)

Q: I'm sorry?

A: Laying there still.

Q: Okay. So you were inside your room at the time you got shot?

A: Yeah, on my, on my way into my room.

Q: Okay. Let me take you back. You said you were coming up the stairs and you saw Bates at the top.

A: (Unintelligible)...I see him at the top of the stairs, _____ (unintelligible) turn the

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corner.

Q: And he turned the corner?

A: No, and he...yeah, like he was coming out of the room.

Q: He was coming out of?

A: Yeah.

Q: Whose room?

A: Alexis, Alexis's room.

Q: Okay. And he was coming out of Alexis's room, were you at the top of the stairs by then?

A: Yeah.

Q: And so you were going in your room?

A: Yeah.

Q: And as you went into your room...

A: No, there was shots fired.

Q: Shots were fired.

A: When I hit the top of the stairs.

Q: Okay. Was he firing at you?

A: _____ (unintelligible) hit.

Q: Okay. How many shots did you hear?

A: Three or four.

Q: Okay. Did you see where Alexis was?

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A: No.

Q: Okay. Where were you...I'm gonna back you up a little bit if I can, Nick. Where were you before you were coming up the stairs?

A: Coming in the house.

Q: Coming in the house? So do you think Bates was already in the house before you got there?

A: Yeah.

Q: Okay. And what about Ashley, where was Ashley at?

A: She dropped me off, or she was waiting outside.

Q: She was waiting outside?

A: Yeah.

Q: Okay. And so Bates was already inside. When you got home was the front door open or closed?

A: It was closed.

Q: Did it look like anything was wrong?

A: No.

Q: So you came in the door, we're going up the stairs, and that's the first time you saw Bates.

A: Yeah.

Q: Okay. And Bates was coming out of Alexis's room while you were going in your room?

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A: Like that. I was standing at the top of the stairs when he was coming out of the doorway, and while I was turning, he shot. That's when he shot.

Q: So it was before you got into your room that he, that he started firing?

A: Yes.

Q: And then you continued into your room?

A: Yes.

Q: Okay. And as you continued into your room is that when you think you got shot then?

A: Yeah.

Q: Okay. Did you hear any other shots besides the ones that he was firing at you?

A: After that, yeah.

Q: Okay. About how long after?

A: Two minutes.

Q: And, uh, how many more shots did you hear?

A: Two or three.

Q: And do you know where those were coming from?

A: No.

Q: Okay. Do you think they were coming towards you?

A: I don't know where they were coming from.

Q: Okay. Um, after you got shot, what did you do?

A: Laid in the closet still.

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Q: Okay. Did you see Bates anymore?

A: No.

Q: Did you see Alexis?

A: No.

Q: Um, did Bates ever come into your room after he had shot you?

A: No.

Q: Okay. Was there anybody else in the closet with you?

A: Not that I know of. I thought Ashley was but she wasn't I guess.

Q: Okay. Why do you think Ashley was?

A: 'Cause she was with me. No, she was waiting in the car.

Q: Okay. Do you remember, or?

A: I don't--she was waiting in the car.

Q: Who was Ashley to you?

A: Just a friend.

Q: Okay. Um, so you think Ashley was waiting in the car?

A: Yeah.

Q: Okay. Now, um, as far as describing Bates for me, can you tell me whether he's white or black?

A: He's mixed.

Q: About how tall is he?

A: Six foot one.

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Q: Okay. And how much you think he weighs?

A: Two hundred and ten pounds.

Q: And, um, anything identifiable about him, any certain tattoos, any certain?

A: I just saw blonde hair, blue eyes.

Q: Okay. Was, was that the only person that was in there?

A: That I saw.

Q: That you saw?

A: There was somebody else but I don't know who it was.

Q: What--how do you know there was somebody else?

A: I seen two outlines.

Q: You saw two outlines? Were your lights on or were your lights off?

A: The hall light was on.

Q: The lights were on? Where was the second outline?

A: Behind Bates.

Q: Behind Bates?

A: Yeah.

Q: Could you tell whether it was male or female?

A: No.

Q: Whether they were black or white?

A: No.

Q: Um, and if he was behind Bates, would he of been in Alexis's room/

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A: Yeah.

Q: Okay. Um, did you see the gun that Bates had?

A: No.

Q: Um, could you tell which hand the gun was in/

A: No. He shot me in the back.

Q: He shot you in the back?

A: Yeah, _____ (unintelligible).

Q: Okay. And, um, how is it that you know Bates is the one that shot you?

A: 'Cause he was the person in front.

Q: He what?

A: He was the person in front.

Q: He was the person in the front?

A: Yeah.

Q: Okay. Um, and you recognize him as being over there months before?

A: Yeah.

Q: How many times have you seen him totally?

A: A lot, probably 10,15 times.

Q: Okay. And you only know him as Bates?

A: Yeah.

Q: Do you think if I showed you some pictures do you think you'd recognize him?

A: Yeah

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Q: Okay. What I'm gonna do now, Nick, is I'm gonna read you some instructions. Okay? This is for what's called our photo line-up. Okay? "In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. The fact that the photos are being shown to you should not cause you to believe or guess that the guilty person has been caught. You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those who are guilty. Please keep in mind that hair styles, beards and moustaches are easily changed. Also, photographs do not depict the true complexion of a person. It may be lighter or darker than shown in the photo. You should pay no attention to any markings or numbers that may appear on the photos. Also, pay no attention to whether the photos are in color, or black and white, or any other difference in the type or style of photographs. You should study only the person shown in each photograph. Please do not talk to anyone other than police officers while viewing the photos. You must make up your own mind and not be influenced by other witnesses, if any. When you have completed viewing all the photos, please tell me whether or not you can make an identification. If you can, tell me in your own words how sure you are of the identification. Please do not indicate in any way to other witnesses that you have or have not made an identification. Thank you." Do you understand that?

A: Yes.

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Q: So I'm gonna show you--have you ever seen a photo line-up before?

A: Yeah.

Q: Okay. Well it's the same type of thing, and what I want you to do is...can you write?

A: (Unintelligible)

Q: Can you sign your name?

A: Yeah.

Q: Um, gonna set this right here. Give me a signature right here. That--these are the words that I just read to you. Okay? And, ah, the time now is 9:35. Okay, now I'm gonna show you a photo of six people here. Do you recognize anybody in those photos?

A: (Unintelligible)

Q: And who is that.

A: Bates.

Q: And what number is below the picture you're pointing to?

A: Three.

Q: Three? Okay. If I can get you to put a signature underneath that photograph. I'm sorry? Okay. And as far as this being Bates, can you tell me again what Bates do, uh...

A: He shot me.

Q: He's the one that shot you at your house?

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A: Yes.

Q: Okay. Do you have any idea why he would do this?

A: No.

Q: Okay. Is there anything else that you saw, or that you heard...

A: No.

Q: ...that I didn't ask you about what happened inside there?

A: No.

Q: Okay. Is there anything else that you think that we need to know for our investigation?

A: No.

Q: No?

A: Not that I can realize right now.

Q: Okay.

DO (D. O'KELLEY): When you got to the house you said Ashley was waiting in the car, what were you going home to get something and then come back out?

A: Yeah. _____ (unintelligible) Alexis, I don't remember.

DO. (Unintelligible)

A: I don't remember that part.

DO: And you said when you got to the door everything was okay with the door?

A: Yeah

DO: Did you have to unlock it to get in?

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A: I think I did.

DO: All right.

A: I don't remember that part.

DO: Okay. And did, did Bates ever--did he have permission to be in the house?

A: No.

DO: Did he ever stay there?

A: No.

DO: How about Ashley, did she ever stay there with you?

A: No.

DO: Do you know why Ashley would of have gone into the house after she heard the shots?

A: No. No, she stayed in the car.

DO: Okay. You don't remember her ever coming in the house?

A: No.

DO: How did you, um, how did you find out what happened afterwards?

A: (No response)

DO: How did you know, how did you find out what happened to Alexis?

A: My mom.

DO: Your mom told you?

A: Yeah.

DO: Did you know what happened to her before then?

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A: No.

DO: Do you remember the police coming to visit you here in the hospital ever?

A: No.

DO: Never?

A: Never.

DO: Have you ever seen me before?

A: No.

DO: Okay. All right.

A: I was wondering when you guys were coming.

DO: Okay. So you don't remember me ever talking to you?

A: No. You did?

DO: And the first that you remember Alexis being dead was from your mom?

A: Yeah.

DO: What did she tell you?

A: That Alexis was dead.

DO: Okay. Do you remember how long ago that was?

A: (Unintelligible)

DO: Do you remember how long ago it was?

A: No.

DO: Okay. That's all I have.

Q: Do you know what your condition here is, Nick?

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A: No.

Q: Okay. Has the doctor, have the doctors told you how serious it is?

A: No.

Q: Okay. At any point did you ever think you were gonna die?

A: No.

Q: Huh? Okay. Anything else...

A: Now, now I do though.

Q: You think you might die now?

A: No, I ____ (unintelligible). Now _____ (unintelligible).

Q: Now they tell you what?

A: How serious the condition was.

Q: How, how serious it was?

A: Yeah.

Q: Okay. And, uh, did they tell you where you got shot at?

A: My side.

Q: Okay. Nick, anything else you think we should know?

A: (unintelligible)

Q: That's no?

A: No.

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STATEMENT OF: NICK BRABHAM

Q: All right. Well then we'll conclude the interview, the same people present, time is 0940 hours. Thank you, steno.

THIS VOLUNTARY STATEMENT WAS COMPLETED AT UMC ON THE 12TH DAY OF JANUARY, 2011 AT 0940 HOURS.

KH:DO:sd
11V0035

EXHIBIT “B”

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
PHOTO LINE-UP WITNESS INSTRUCTIONS

NAME: NICHOLAS BRABHAM EVENT#: 101206 - 0354
ADDRESS: 9752 VILLA LORENA AVE INTERVIEWED BY: K. HARDY
PHONE NUMBER: _____ LOCATION: UMC
DATE & TIME: 1/13/11 0930

"In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. The fact that the photos are being shown to you should not cause you to believe or guess that the guilty person has been caught. You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those who are guilty. Please keep in mind that hair styles, beards, and mustaches are easily changed. Also, photographs do not always depict the true complexion of a person - it may be lighter or darker than shown in the photo. You should pay no attention to any markings or numbers that may appear on the photos. Also, pay no attention to whether the photos are in color or black and white, or any other difference in the type or style of the photographs. You should study only the person shown in each photograph. Please do not talk to anyone other than Police Officers while viewing the photos. You must make up your own mind and not be influenced by other witnesses, if any. When you have completed viewing all the photos, please tell me whether or not you can make an identification. If you can, tell me in your own words how sure you are of your identification. Please do not indicate in any way to other witnesses that you have or have not made an identification. Thank you."

SIGNED: [Signature]
DATE & TIME: 1/13/11 0935
ME

STATEMENT:

SEE TRANSCRIPTION

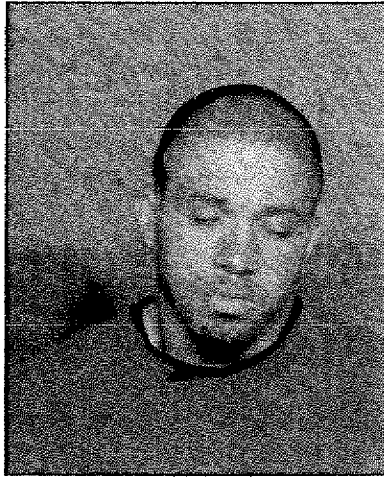
SIGNED: _____
DATE & TIME: _____

OFFICER'S NAME & P#:

K. Hardy #3031

**Las Vegas Metro Police
Department**

Lineup Name: 101206-0354A **Lineup ID:** 22811 01-05-2011



1

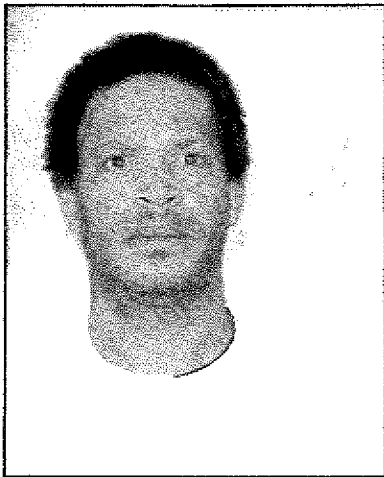


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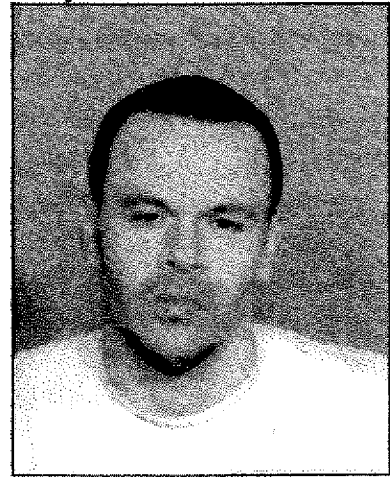
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EXHIBIT “C”

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 1

EVENT #: 101206-0354

SPECIFIC CRIME: HOMICIDE**DATE OCCURRED:** 12-06-10**TIME OCCURRED:** 0243 HRS.**LOCATION OF OCCURRENCE:** 9752 VILLA LORENA**CITY OF LAS VEGAS****CLARK COUNTY**

NAME OF PERSON GIVING STATEMENT: ASHLEY RILEY**DOB:** [REDACTED]**SOCIAL SECURITY #:****RACE:****SEX:****HEIGHT:****WEIGHT:****HAIR:****EYES:****HOME ADDRESS:** [REDACTED]**PHONE 1:** [REDACTED]**WORK ADDRESS:** [REDACTED]**PHONE 2:**

The following is the transcription of a tape-recorded interview conducted by DETECTIVE T. KYGER, P#4194, and DETECTIVE D. LONG, P#3969, LVMPD HOMICIDE Section, on 12-06-2010 at 0639 hours.

TK: This is Detective T. Kyger, P#4191. This will be a taped statement reference a homicide. The event number is 101206-0354. Time of the call was 0243 hours. Location is 9752 Villa Lorena. The time now is 0639 hours on December 6. The statement's being done in the Homicide office. Also present is Detective D. Long, P#3969. This statement's going to with Ashley, last name of Riley, R-I-L-E-Y, date of birth 10-03-81. Ashley, what address are you actually using, your physical address?

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EVENT #: 101206-0354

STATEMENT OF: ASHLEY RILEY

mean?

Q: Okay. Well it's, it's...

A: Like I, when I, when they were shooting I was screaming so they obviously heard me. You know what I mean? Like...

Q: You were screaming?

A: Like I, yeah, when shot I screamed. Yeah.

Q: Okay. I-I-I...

A: I think deaf--there's no way they couldn't of not heard me. Like I screamed more than once.

Q: Okay. Um, do you know your directions? East, west, south, north?

A: Uh huh.

Q: You know? Okay, good. Um, which room were you in, upstairs, downstairs?

A: Upstairs.

Q: Upstairs. And it's toward the front of the house, back of the house?

A: The back of the house.

Q: Towards the back of the house?

A: Uh huh.

Q: Um, there's only one room back there?

A: No, there's one, there's one room in the front, the master bedroom, and then like when you walk up the stairs, you can, if you go right, there's two rooms that split off. The two rooms right there. I was in the one right here, the one off to the left.

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STATEMENT OF: ASHLEY RILEY

So if you go up the stairs...

Q: Turn right.

A: ...and turn right, and then full left.

Q: Go left.

A: (Both talking)

Q: And that's Nick's room.

A: Yeah

Q: Okay. And who's in the other back bedroom?

A: That's, that's Alexis's room, but I don't think she was in that room. I think she was in her dad's room.

Q: Which is the master.

A: The master, yeah.

Q: Upstairs.

A: Yeah.

Q: Okay. Um, so you're playing with the TV, you're playing with the laptop, you guys go to sleep, about what time do you think it was when you went to sleep?

A: I have no idea. Like sometime I think around 2:00.

Q: Around 2:00. Okay.

A: Or 2:00 or 3:00. I don't know, I don't know what time.

Q: Okay. Two...okay, I've gotcha. Um, so around 2:00, 2:30 you fall asleep. Somewhere in that area.

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A: Yeah.

Q: Whatever. Um, Nick and you are in bed in that room, and Alexis is in, you think in the front master bedroom.

A: Yeah.

Q: Okay. Upstairs. Tell me what happens. What's the first thing...are you wearing these clothes?

A: Yeah.

Q: Okay.

A: Just my shoes were off, sitting by the side of the bed.

Q: Okay. What about the hoodie, did you have...

A: I was wearing it, yeah.

Q: Okay. Um, tell me what, the first thing you heard was, or the first thing that woke you up.

A: _____(detective talking over). I heard like knock, it sounded like knocking on the door or something and I, that's what woke me up, and I kinda like listened to see if I heard it again, or whatever, and I heard like a window break, or it's like glass breaking. I assumed it was a window, and that's when I tried to wake up Nick. And...

Q: Okay. Let's slow _____ (unintelligible), I'm gonna go for all the little details here.

A: Okay.

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EVENT #: 101206-0354
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Q: The knocking, was it loud knocking, soft knocking?

A: I mean _____(detective talking over).

Q: Is it like a police knock where they're going boom, boom, boom?

A: It might have been. I mean there was music going. It wasn't loud but there was music on, and the door was shut. So I _____(detective talking over).

Q: It's loud enough for you to hear it.

A: Yeah. I mean I wasn't like sleeping heavily or anything like that, just kinda...

Q: Was it persistent?

A: I don't know. I, I, I think _____(detective talking over).

Q: I mean was it like knocking continuously or just one little knock and that was it?

A: I don't know.

Q: Okay.

A: I don't know. I just heard like _____(detective talking over).

Q: Something that woke you up...

A: Yeah.

Q: And you, and somebody's knocking on the door.

A: Yeah.

Q: Did you know it was from the front door, or could it of been somewhere else?

A: I don't know.

Q: Okay.

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EVENT #: 101206-0354
STATEMENT OF: ASHLEY RILEY

A: I have no idea.

Q: Um, so then you try to wake up Nick.

A: Yeah. _____(detective talking over).

Q: And then you hear glass breaking.

A: No, I, no, I heard the glass breaking and then I tried to wake up Nick.

Q: Okay. Um, do you know where the window was that was getting broke, or was it a window...

A: I have no clue. I don't know. I assumed it was a window but.

Q: Okay, I--I'm just trying to get some idea of what you do know and what you don't know. That's all. Um, do you have--was--it was downstairs obviously.

A: I think, yeah.

Q: Okay.

A: That's what I assumed, yeah.

Q: Okay. So you try to wake up Nick, how do you try to wake him up?

A: I like I pushed, like I pushing him, like Nick, get up. I was like something--a window broke. Someone's breaking in, you know. That's just. He was like what? And I don't know if he just didn't--if he wasn't like all the way awake 'cause he was just kinda looking at me like blank, you know. And so i was like I'm serious, you know, get up, get up. And, and he was like what? And I was like somebody broke, broke something, a window or something like, and he, you know he got up and opened the door and started _____(detective talking

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over).

Q: Okay. Does Nick own a gun?

A: I don't think so.

Q: He doesn't have anything for protection, that you know of? Nothing at all?

A: Huh uh.

Q: Shotgun, rifle that his daddy bought him when he was 12? (laughs)

A: I don't know. Nothing.

Q: Pistols?

A: I've never seen, I've never seen any pistols.

Q: Okay. Now you're wearing blue jeans, um, you have on black tennis shoes now, a blue hoodie, a plaid button down shirt, and a black...

A: Tank top.

Q: ...black tank underneath that.

A: Yeah.

Q: What was Nick wearing?

A: Um, he, well he had put on sweats, like I don't know what colors they were, and he had a white shirt on, and some sort of pants. I don't know.

Q: Okay, a white wife beater, or a tee shirt, or?

A: A tee shirt.

Q: And then like gray sweats, or blue sweats ____ (unintelligible).

A: Something, I don't know.

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STATEMENT OF: ASHLEY RILEY

Q: You don't know.

A: Yeah.

Q: Okay. Um, anything else? Was he, did he have anything on his feet that you know of?

A: I don't know.

Q: Socks, shoes?

A: I don't know.

Q: Okay.

A: I don't think he, I don't think he--I know when he fell asleep he wasn't wearing socks or shoes. I don't know if he put any on though. I don't know. I don't remember. I don't know.

Q: Okay. So when he went to sleep, when he was in the bed, and he was wearing a white tee shirt and some kind of sweats.

A: It may be gray pants, maybe gray sweats, maybe.

Q: Okay.

A: Blue maybe. I don't know.

Q: Okay, you're doing great. You're doing great. Um, so he hears the knock, or he, he gets wakened by you.

A: Uh huh.

Q: And he's kind of out of it. Is he stoned?

A: Yeah, we were smoking weed.

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STATEMENT OF: ASHLEY RILEY

Q: Okay. So he's a little stoned. He's a little slow.

A: Uh huh.

Q: Slow to the jump. Um, but he finally gets moving.

A: Uh huh.

Q: Um, how long after you hear the, ah, glass break do you--does he move?

A: I don't know. I am so not good at estimating time. I don't know.

Q: Okay. I mean was it less than a minute?

A: Probably.

TK: You're, you're shaking him, get up, I hear noise, whatever. He's slowly getting up. Then what?

A: He kinda, I don't think like knew what was going on. Like he wasn't all the way awake for a minute.

TK: Okay. So he's trying to wake up.

A: Yeah, he's kinda like sitting up and like not knowing what's going on. And then like I'm serious, get up. Like a window broke or something broke.

TK: Uh huh.

A: You know, and, and he's like what? I'm like get up, like.

Q: Okay. Did he put shoes on, do you remember?

A: I don't know. I, I put, I put my shoes 'cause they were sitting right by the, by the bed.

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Q: Okay, that makes sense. And then, um, did he grab anything? Did he pick anything up before he went out?

A: I don't think so.

Q: So he went out bare handed.

A: I think so.

Q: So he goes to the door, the door's shut.

A: The _____ (detective talking over).

TK: Your bedroom door.

Q: Bedroom door.

A: Yeah.

Q: Okay, so he opens the door.

A: Uh huh. And like how the door opens, like...okay, 'cause the bed's right there.

Q: Here, you wanna write, draw it for me?

A: Um, okay, I guess this is like, I'd say this is the room, that's the living room, and the stairs were like right here. And then this is the other, the master bedroom. There's like a bathroom right here, and like a laundry thing right here. And then Nick's closet would be like behind the little laundry thing. Like for the little walk-in.

Q: Right.

A: Like that. So _____ (detective talking over).

Q: Where is his room?

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A: The door to the room is like right here, and his bed is like right here.

TK: Okay, so you'll open the door.

Q: So he, and it opens like, like this way, so when he goes to walk out this way, like I was standing like right here, like over, like over here.

A: Like over here somewhere. So he's _____(detective talking

Q: Put a little--yeah, that's fine. over).

Q: Put your initials next to that so I know who that is. Okay, good.

A: Like I think like as he was opening it I was walking this way, 'cause I was right here, my shoes and stuff were right here, my purse should be right there. And, uh, he like took a step or two out and I heard a gunshot and ran right there.

Q: Okay. Did you hear anything before the gunshot, any words?

A: I mean he, he said something but it was like, more like, like he got startled. Like surprised. Like you know I don't know exact—I don't remember exactly what he said, but it was something like oh, or hey, or, or something. You know nothing like...

Q: Like he recognized him? Like hey.

A: No, like what the fuck are you doing in the house type shit. But like not, nothing like, that was like specific.

Q: Okay.

A: It was just like, like he, he said something but it was just like a, like he got surprised. But...

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Q: Okay. But it wasn't like he--the impression I'm getting is he recognized the person.

A: I have no idea.

Q: Okay.

A: 'Cause he didn't say anything. He didn't say anything.

Q: (Both detectives talking at same time.)

TK: But his response was kinda...

A: Like what the fuck are you doing in the house? Like...

Q: Okay. But I...

A: ____ (detective talking over).

Q: ...okay. I, I, okay.

A: That's, I mean that's what I got out of it.

TK: Okay.

Q: How many shots did you hear right then?

A: Three, maybe four.

Q: And what did he do? Did you...

A: I don't know. I, I ran to the closet. I heard the first shot and I, and I ran and hide in a little corner in the closet.

Q: And you were screaming?

A: And I--every--yeah, I screamed every time there was like a shot, I screamed, yeah.

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Q: So they obviously knew you were there.

A: They had to of known I was there. 'Cause I, I mean they didn't see me but...

Q: Right.

A: ...they had, they had to of heard me 'cause I screamed.

Q: Okay. Uh, did Nick come back into the bedroom?

A: Uh huh.

Q: He did some back in?

A: He went into the, into the closet and he said he was shot.

Q: Okay. Did you see where he was shot?

A: Like on, like back on his, think this side maybe.

Q: On his left side?

A: No, his right side.

Q: On his right side? Okay, that...

A: One of his sides, I don't know.

Q: And what did he say? I've been shot. What else did he say?

A: Um, he said, he said, uh, like it hurts, and he said at one point he couldn't breathe, and he said he thought he was gonna die, and he, you know, that's what he, I mean...

TK: Did you say who did this?

A: Yeah. I said who was it? Who did it? And he didn't answer me.

Q: Okay.

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A: I don't know.

Q: So you hear three or four gunshots, and Nick runs back in, runs into the closet.

A: I think he kinda like stumbled in the closet.

Q: I understand that.

A: Yeah.

Q: Um, did you hear more gunshots?

A: Yeah. _____(detective talking over).

Q: How long after the first set?

A: I heard like rummaging, like through, like you tell it was like stuff was being moved around. And then I heard three more gunshots, and heard like rummaging around and, and then that's, after a minute Nick was like, um, he's like I need help, you know. And I was like I don't know what to do. Do you think they're gone, and he wasn't me. And then he touched my hand it was cold, and I was like oh my god. That's when I like kinda ran out of the closet and grabbed the phone and jumped out the window.

Q: Okay. Um, did you hear anything...the, the first volley, Nick comes running in, and then you hear another set of about three shots, three gunshots. Where did those shots sound like they were coming from?

A: The master bedroom.

Q: Okay. Did you hear anything?

A: No.

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Q: Did you hear any screams?

A: No.

Q: Okay. Um, did you hear anybody say anything?

A: No.

Q: Nothing of that nature?

A: No, I didn't hear anybody say anything.

Q: Just three gunshots.

A: _____(detective talking over).

Q: Were they fast succession?

A: Yeah. They were right after each other.

Q: Okay. Um, the first four that were probably directed at Nick.

A: _____(detective talking over).

Q: They're what?

A: They weren't, they weren't like back to back like that. Like it was like one, and then like maybe like one, two, and then maybe one, or some--something like that.
It wasn't like...

TK: Boom-boom-boom.

A: Yeah, it wasn't like that.

Q: Okay.

A: I don't know the exact, how it was.

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EVENT #: 101206-0354
STATEMENT OF: ASHLEY RILEY

Q: No, you worded that very well. Okay. Um, did you hear anything going on downstairs?

A: I couldn't really tell, like I don't know.

Q: But nobody yelled back and forth to each other?

A: Not that I heard, no.

Q: Nothing of that nature?

A: Huh uh.

Q: Okay. Did they have to kick any doors?

A: I don't know.

Q: Did you hear any like loud crashes like that?

TK: Like maybe wood splitting, or something.

A: I heard like a window break, or like glass _____ (detective talking over).

Q: You heard another window break?

A: No, no, no, no, I didn't, no, just that one time.

Q: Okay. What I'm talking about is upstairs.

A: Afterwards...

Q: Did, ah, Alexis, did--was the master bedroom door closed, or do you know?

A: Um, I don't think it was closed all the way. I think it was like closed but like maybe just cracked a little bit.

Q: Okay. So they could of just pushed their way in.

A: Yeah.

EXHIBIT “D”

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT**

Event #101206-0354

The following is the transcription of the recorded Application for Search Warrant between affiant, Detective Sergeant Matthew Sanford and Judge Douglas Smith.

MS (MATTHEW SANFORD). Okay, Judge Smith, do you understand this phone call is being recorded?

JS: (JUDGE SMITH). Yes.

MS. This is Detective Sergeant Matthew Sanford, P#5293, of the LVMPD Homicide Section. I am making an application for a telephonic search warrant pursuant to N.R.S. 179.045, under event number 101206-0354. I am talking to Judge Smith. The date is December 6, 2010, with the time being 0610 hours. Judge, would you please place me under oath?

JS: Raise your right hand. Do you solemnly swear the information and testimony you're about to give me is the truth?

MS: Yes sir, I do.

JS: Go ahead.

MS: My name is Detective Sergeant Matthew Sanford, P#5293. I am employed by the Las Vegas Metropolitan Police Department, and have been so employed for 14 years. I am currently assigned to the Homicide Section and have been so for the last eleven months. Judge, my application is as follows.

On December 6, 2010, I was called out and responded to 9752 Villa (V-I-L-L-A) Lorena (L-O-R-E-N-A) Avenue, Las Vegas, Clark County, Nevada, the below described residence, and arrived at said location at approximately 0430 hours. Based on my training and experience, as well as the information provided to me by the detectives and patrol officers at the scene, it appears that a homicide has occurred. Homicide detectives and crime scene analysts were requested and have responded to conduct the investigation, collect evidence and document the crime scene.

There is probable cause to be believe that certain property hereinafter described will be found at the following described premise, to wit: 9725 Villa Lorena Avenue, Las Vegas, Clark County, Nevada. The structure is a two story, single family residence, having a primarily beige color stucco exterior, with the numbers

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION**

Event#: 101206-0354

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9752, black in color, affixed to a white placard located on the west side of the garage facing south.

The property referred to and sought to be seized consists of the following:

1. Paperwork such rent receipts, utility bills and addressed letters showing the names of persons residing at the premise.
2. Written correspondence, diaries, financial records, wills and like items.
3. Items of value such as jewelry, watches, money, credit cards, identification and like items, including receipts for the same.
4. Photographs, video and/or audio tapes or discs, cellular phones, desktop and/or laptop computers.
5. Telephonic information to include caller ID history, answering machine messages, phone directories, call histories, photographs and/or videos stored electronically in residential or cellular phones.
6. A thorough microscopic examination and documentation of the crime scene to discover trace evidence to include, but not limited to, fingerprints, blood, hair, fibers and bodily fluid samples.
7. Unknown caliber shell casings.
8. Marijuana, scales, owe sheets and packing materials used to sell narcotics.
9. Firearms to include handguns, shotguns and rifles, ammunitions for the same, and paperwork associated with the ownership of firearms.

In support of your Affiant's assertion to constitute the existence of probable cause, the following facts are offered.

On December 6, 2010, at 0243 hours, LVMPD dispatch received a 911 call from an anonymous caller that they had heard several gunshots at 9752 Villa Lorena Avenue. Patrol officers and medical personnel were dispatched to the residence. Upon patrol officers' arrival at 9752 Villa Lorena Avenue, they heard noises coming from the backyard. Officers gave verbal commands for the person to come out

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION

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towards them. Officers came in contact with Ashley, A-S-H-L-E-Y, Riley, R-I-L-E-Y, date of birth 10-03 of 1981. Riley informed officers that a young girl was inside and had been shot. Additional patrol officers announced Metro police and made entry into the residence.

A male, later identified as Nicholas, N-I-C-H-O-L-A-S, Brabham, B-R-A-B-H-A-M, date of birth 02-04 of '79, called out to officers that he had been shot. Patrol officers continued to sweep through the residence and located a female, later identified as Alexis, A-L-E-X-I-S, Postorino, P-O-S-T-O-R-I-N-O, date of birth 09-27 of '95, in the bedroom, face down, unresponsive, with several gunshot wounds and several shell casings surrounding her body. Brabham and Postorino were both transported to UMC trauma. Postorino was pronounced deceased by attending physician Dr. Coates, C-O-A-T-E-S, at 0336 hours.

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. Riley informed officers that she had come over to the residence at 2030 hours on December 5, 2010, to smoke marijuana and drink with Brabham. After about an hour and a half or so they went to bed. Riley stated that at unknown time she heard glass break and a loud bang. She awoke Brabham and told him that someone had broken into the residence and was downstairs. Brabham left the bedroom, went downstairs and she heard several gunshots. Riley stated that initially she went into the closet to hide, but when she heard more gunshots she jumped out of the rear window from the second story into the backyard in an attempt to escape. After a few minutes later, she heard police officers arriving and order her to come out to the front of the house, which she did, with her hands up.

During the protective sweep of the residence, patrol officers observed an unknown amount of marijuana inside of the residence.

It has been my experience and training that the examination of the crime scene and recovery of the above described property is necessary in providing the cause of death, the circumstances involved related to the death, and to circumstantially identify the perpetrator of the crime. A thorough microscopic crime search of the premise is necessary in order to establish the location of the crime, its extent, and circumstances surrounding the crime. This search may involve the damaging and/or removal of such items as carpeting, wallboard and other interior or exterior surfaces. The evidence of dominion and control as described is necessary in establishing dominion and control over the premise, and often assists in identifying

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION**

Event#: 101206-0354

Page 4

the perpetrator. Such evidence is normally left or maintained upon or within the premise. Information from diaries, letters, written records, audio or video tapes or discs, cellular phones, personal desktop and/or laptop computers may disclose information about the deceased's associations, relationships, traits and habits, recent activities, future plans, noteworthy occurrences, financial dealings, and recent communications, showing the motive and/or identity of the perpetrator. If items of value are missing, or are not missing, it may show motivation for the murder.

Night service is necessary because my training and experience indicates that trace evidence is often small, sometimes invisible to the eye, and easily eliminated by environmental changes. The residence to be searched is currently unoccupied and secured by officers. During the night time service hours there is no one inside to be annoyed by the night time service of a search warrant.

Wherefore your Affiant requests that a search be issued directing a search for the and seizure of the aforementioned items at the location set forth herein, executing this warrant any time during the day or night.

Judge, do you find there is probable cause for issuance of the search warrant?

JS. Yes.

MS: Do you authorize the night time clause?

JS: Yes.

MS: Do I have your permission to sign your name to both duplicate original search warrants?

JS. Yes.

MS. One duplicate will remain with me in the search warrant packet, and the other copy of the duplicate original will be left at the premise searched.

For the record, Judge, I am now signing your name, Judge, to the duplicate original search warrants.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION

Event#: 101206-0354


Page 5

Judge Smith, this ends our conversation and concludes the recording at 0618 hours on December 6, 2010.

JS: All right.

(END OF RECORDING)

This transcription has been typed
by Shelly Donlan on 12-07-10 at
0900 hours and is true and correct.


Shelly Donlan, P#3766

I, having reviewed this transcription,
affirm that it is true and correct.


Sergeant Matthew Sanford, P#5293

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION**

Event#: 101206-0354

Page 6

Certification:

Having read the transcription of the recorded application for the telephonic Search Warrant issued by this Court on December 6, 2010, under Event #101206-0354 with Detective Sergeant Matthew Sanford, P#5293, as affiant, and having reviewed the application, it appears that the transcription is accurate.

Judge Douglas Smith

MS:sd
10W1465

EXHIBIT “E”

IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

CERTIFIED
COPY

THE STATE OF NEVADA,

Plaintiff,

Vs.

NORMAN BELCHER,

Defendant.

) C 270562
)
) DC Case No.
) JC Case 10F23008X
) Department IX
)
)
)

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

BEFORE THE HONORABLE JOE BONAVENTURE
JUSTICE OF THE PEACE

Taken on January 21, 2011

At 9:00 a.m.

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
ROBERT LANGFORD, ESQ.
Deputy District Attorney

For the Defendant:

ROBERT LANGFORD, ESQ.
LANCE MANINGO, ESQ.

Reported by: TOM MERCER, CCR No. 33

1 Q. Was there also a kind of a business component
2 to your relationship with Nick?

3 A. Yes.

4 Q. Describe that for us?

5 A. Basically I would, like buy pills from him
6 and sell them to other people.

7 Q. What kind of pills?

8 A. Like pain pills.

9 Q. Pain pills?

10 A. Yeah.

11 Q. Any pain pills in particular?

12 A. Like Roxies or Lortabs.

13 Q. Would you, from time to time, go over to
14 Nick's house to purchase pills and then you would sell
15 them to other people?

16 A. Yes.

17 Q. So If I understand your relationship, it was
18 sort of a dual relationship; you had that business
19 piece to it but you were also friends?

20 A. Yes.

21 Q. Did you enjoy just hanging out with Nick?

22 A. Yes.

23 Q. I want to direct your attention to December 5
24 of 2010. Did you go over the Nick's house?

25 A. Yes.

1 Q. Why did you go over there?

2 A. To hang out with Nick.

3 Q. Where did you live at the time?

4 A. On, like Vegas Valley and Maryland.

5 Q. Who did you live with?

6 A. My boyfriend.

7 Q. What's your boyfriend's name?

8 A. Ravon.

9 Q. And can you spell that?

10 A. R-a-v-o-n.

11 Q. What's his last name?

12 A. Harris.

13 Q. Can you spell that?

14 A. H-a-r-r-i-s.

15 Q. So you lived with Ravon. Explain for us why
16 it is that you went over the Nick's house on that day?

17 A. I mean, to hang out with Nick and also I
18 didn't really want to go home.

19 Q. Why didn't you want to go home?

20 A. Because I had been doing drugs and I didn't
21 want him to know that I was really high, I guess.

22 Q. You didn't want Ravon to know that?

23 A. Yeah.

24 Q. So how do you get over to Nick's?

25 A. I drove over there.

1 Q. Tell us what's going on upstairs?

2 A. We were just like hanging out talking and
3 like, smoking weed and --

4 MR. LANGFORD: I'm sorry, Your Honor, I
5 can't hear what she's saying.

6 THE COURT: Everyone needs to be able to
7 hear you because everything you say is being taken
8 down, so I need you to keep your voice up.

9 THE WITNESS: We were smoking weed and
10 smoking meth.

11 MR. LALLI:

12 Q. You were smoking marijuana and smoking
13 methamphetamine?

14 A. Yes.

15 Q. Where was that being done?

16 A. In Nick's room.

17 Q. Is Nick's room upstairs?

18 A. Yes, it is.

19 Q. Where was Alexis during this time?

20 A. I'm not sure.

21 Q. She wasn't in the room there with you?

22 A. No.

23 Q. At some point -- besides ingesting drugs,
24 what were you and Nick doing?

25 A. Talking.

1 asleep too.

2 Q. At some point were you woken by a noise?

3 A. Yes.

4 Q. Describe what you heard?

5 A. I heard what sounded like banging on the door
6 maybe. But I wasn't sure if I was dreaming or if I
7 had really heard it or not. So I kind of like
8 listened for a second, and then I heard like glass
9 break. I assumed it was a window or something. And
10 at that point I woke Nick up.

11 Q. Where was this noise coming from?

12 A. Downstairs somewhere, I'm not sure where.

13 Q. So Nick was asleep through this?

14 A. Yes.

15 Q. How is it that you tried to wake him up?

16 A. I said his name, I said, "Nick, get up." I
17 think I might have touched him a little bit.

18 Q. Shook him a little bit?

19 A. Yeah.

20 Q. Describe for us what happened at that point?

21 A. He was like kind of out of it. When he woke
22 up I was like I'm serious, I think somebody broke in
23 your house or something, you know, get up. And at
24 that point he got up and walked out of the room or
25 whatever.

1 time?

2 A. Three.

3 Q. Where did it sound like the gunshots were
4 coming from?

5 A. The master bedroom.

6 Q. The same room you heard the rummaging?

7 A. Yes.

8 Q. The rummaging, did you hear that after the
9 second round of gunshots or before?

10 A. I'm not sure, I don't really remember.

11 Q. At some point do you kind of notice the
12 condition that's Nick's in? Is he asking you for
13 help? Are you communicating with him?

14 A. Yes.

15 Q. Do you ever ask him about the identity of the
16 person who shot him?

17 A. Yes.

18 Q. What do you say?

19 A. I said, "Who did this? Who did this?" And he
20 didn't answer me.

21 Q. At some point does he ask you for help?

22 A. Yes.

23 Q. Describe that for us?

24 A. He just was, looked like he was in a lot of
25 pain, he was like, "I'm going to die, help me." He

EXHIBIT “F”

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Police fault father in slaying of girl

BY MIKE BLASKY
LAS VEGAS REVIEW-JOURNALPosted: Dec. 7, 2010 | 10:25 a.m.
Updated: Dec. 8, 2010 | 12:47 p.m.Alexus Postorino's death
was collateral damage.

The 15-year-old Southwest Career and Technical Academy sophomore didn't dabble in drug trafficking or other reckless activities, police have determined.

But her father did. And because of his lifestyle, he put Alexus' life in danger, Las Vegas police Lt. Lew Roberts said.

"This should be a message to parents," he said at a news conference Tuesday. "Sometimes there are consequences for your behavior. And sometimes those consequences have collateral damage."

Police arrested Norman David Belcher, 36, on Monday night on charges of murder with a deadly weapon, robbery with a deadly weapon, burglary with a deadly weapon and attempted murder. He is accused of fatally shooting Alexus and wounding Nicholas Brabham, 31, who is in critical condition and considered unlikely to survive.

Police said Belcher was embroiled in a dispute with Alexus' father, William Postorino, over a drug debt.

Belcher — who was paroled in June after serving time for a 2007 manslaughter conviction — thought Postorino owed him money and had sent him threatening text messages, according to an arrest report.

About 3 a.m. Monday, police say, Belcher broke into Postorino's home at 9752 Villa Lorena Ave. intending to commit robbery and to leave no witnesses.

Police said he first confronted and shot Alexus, who was downstairs.

Brabham, Postorino's roommate, was in bed with a woman upstairs. Hearing the noise, she hid in the closet while Brabham confronted Belcher, police said. The woman said she heard several gunshots, and then Brabham came into the closet and collapsed next to her. She escaped by jumping from a second-story window and hiding until the arrival of police who responded to her 911 call.

Police say Belcher took a 60-inch television, a laptop computer and a metal safe containing money before leaving.



Norman Belcher

Tools

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Police arrest man in
deadly home invasion

Alexus Postorino

CRIME & COURTS

Crime and Courts

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Postorino was at a casino at the time of the attack. He arrived at the residence near Tropicana Avenue and Grand Canyon Drive in Spring Valley several hours later. Clark County court records show Postorino pleaded guilty in 2004 to trafficking controlled substances and was sentenced to 12 to 30 months in prison.

He originally was charged with trafficking and manufacturing methamphetamine. Police recovered nearly 40 pounds of the drug from Postorino's residence at the time.

Four suspects in custody after gang-related shooting

Pahrump man arrested on child porn charges

UFC's lawyers come out swinging

Fireworks cause southwest valley house fire

Victims bothered by plea deal, want ex-Las Vegas cop jailed

Postorino told police about the feud with Belcher and gave them his cell phone number, the report said.

A neighbor told police she heard a commotion outside her home and saw a man loading things into a white 2009 Nissan Versa, then speed off minutes before officers arrived.

Police initially were looking for two suspects but now say Belcher was alone.

The Nissan, which Belcher had rented, was found burning in a parking lot near Craig Road and Lamb Boulevard, not far from Belcher's weekly apartment. They learned he had been stopped in the Nissan by a patrol officer near the scene of the shooting and had been given a traffic citation about 30 minutes after the home invasion.

Contacted at his apartment, Belcher denied receiving the citation and claimed to have been in a bar that morning. The keys for the burned Nissan were found in his possession, the report said.

Cell phone records indicated Belcher had made calls from the area where the rental car was found. The patrol officer who issued Belcher a citation identified him.

Belcher, who also goes by the name Norman Bates, has a lengthy criminal history in Las Vegas and has been in and out of prison.

Most recently, he was found guilty of voluntary manslaughter and was sentenced in 2007 to four to 10 years in prison, for which he was given routine credit for about two years already served, court records show.

Belcher was initially indicted by a grand jury in connection with the death of Al Deas, his drug-dealing partner in the southwest valley. Authorities said Belcher beat Deas to death with his fists and a can of hair spray after an argument over money and drugs in May 2003.

The charge was reduced after defense attorneys argued that Deas' death was not clearly caused by the fight. The victim was high on methamphetamine.

Belcher entered an Alford plea, meaning he did not admit guilt but acknowledged prosecutors could win conviction.

In 2005, Belcher pleaded guilty to attempted possession of a stolen vehicle. Police found Belcher asleep in a stolen Ford F-250 pickup. When officers asked him to step out of the vehicle, Belcher rammed a police cruiser and led officers on a chase before crashing. No one was injured.

Belcher pleaded guilty to drug trafficking in 2003 for carrying 18.2 grams of methamphetamine and to conspiracy to commit battery, a gross misdemeanor, in 1993.

Tuesday afternoon, about 25 students at Southwest CTA wore black and had a memorial for Alexis after school.

Jordan Carter, 15, a sophomore at the school, said Alexis was in the school's interior design program and was outgoing, with a "loud and very happy" personality.

Her friends were shocked, he said.

"Yesterday during lunch, we were like, 'Dang, where is Alexis at? Last week, she was sick but she should be here today.' We found out after school she was shot.

"At first, I didn't believe it. When I saw it on the news, it was hard to believe," Carter said.

Cameron Rowland, 16, said Alexis "was a fun person. She usually brought friends together. She knew a lot of people."

Rowland said students were in a somber mood Tuesday.

"In all the classes I've had with her, it's pretty much completely silent where normally it would be really loud and rambunctious."

| | | | | | | |
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Blue Man Group | Fri, 7/6 7:00 p.m.



Review-Journal reporters Francis McCabe and James Haug contributed to this report. Contact reporter Mike Blasky at mblasky@reviewjournal.com or 702-383-0283.

Trending topics: Alexus Postorino | Clark County | ex-felon | Las Vegas | Las Vegas Metro police | Lt. Lew Roberts | Mike Blasky | Nicholas Grabham | Norman David Belcher | teen killed | William Postorino

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EZ

Dec. 11, 2010 | 4:31 p.m.



I bet if the Police shot up this scumbag before he got to kill... all of you would cry foul... and how we was killed over drugs! boo hoo.

Irishfighter

Dec. 9, 2010 | 12:30 a.m.



I hope the Clark County District Attorney, and his lets make a deal at all cost Deputy District Attorney's sleep well at night, knowing they helped kill this little girl.

he hate me

Dec. 8, 2010 | 11:24 p.m.



tom.dee why dont you go back to california. you could never do our job.

twrtoad

Dec. 8, 2010 | 11:06 p.m.



tom.dee.. your not the sharpest tool in the shed are you. I love this " i dated a girl with a brother who was a guard in california". We are not in california. maybe you should figure out which state we are talking about before you comment. Also we are not part of the police force so that comment is also garbage. I will agree through that there needs to be less public involved here. As for the pay, I dont do this to become a millionaire, I do this because i have a family and i wish to see them get protected from the scum in the world. but the reality is they can only take so much before you have to move on. You can't live if you are not making any money. so when you have to leave because you can't afford to work there then inmates get released because not enough people to watch them. then you get people saying how come they were released early. you can't have both unpaid workers and criminals locked up. something has got to give.

tom.dee

Dec. 8, 2010 | 9:52 p.m.



twrtoad.. hay i would love to go to your job and see. i dated a girl who's brother is a guard in a california prison, so your comment about talking to someone or knowing something is BS. tons of overtime. i was wrong on the medical, but the outrageous pensions paid for by the public is what is causing police to be laid off, that and the police unions don't want to concede to anything. the rash of empty homes means less tax dollars and less city services. google san francisco police overtime. police and correction officers is not a job you are drafted to do, it's voluntary. so if you don't like the pay, move on. I would be glad to meet you, and see the prison, but your reaching on the donation.. haha.. first thing prisoners should have no contact with their visitors, behind glass only. maybe that would stop the cell phones, and drugs in prison.

tom.dee

Dec. 8, 2010 | 8:43 p.m.



i wrote postorino and let him know what i thought about how he cared about the safety of his child. He removed his facebook page today and also the pics on myspace with drugs, and just his overall stupid comments. 40lbs of meth gets 12 months, painting on rocks get 5 yrs.. shoot the graffiti kid might end up doing more time than belcher did when he plead guilty to voluntary manslaughter in 2007.. out in less than 3 yrs for killing someone with your hands and a can of hair spray. the judges should have to do some time. i hope a reporter follows up with the judge that allowed him to keep custody and not be in jail for 100 yrs for all that meth. not only did he ruin his family, he wants to ruin others.

kodainvegas

Dec. 8, 2010 | 6:34 p.m.



People go to jail for pot, and sob's like this run around free. In Vegas I was arrested over a 158 dollar parking ticket. 40 pounds of meth, but those hoboes at metro will give you a jay walking ticket on a deserted street. Walk down east Freemont and watch the monkeys breaking up crack on the news stand. Metro is paid off from Gillespie right on down. It's Vegas baby, what happens here stays here 'cause you're in jail. And oh, by the way, don't play your music too loud on the strip, metro will kill you for that. Or if you are armed with a cane or a butter knife or rocks, etc., etc.. metro is a bunch of PUNKS, uneducated PUKES. BITE ME metro!

MojaveDeathdaddy

Dec. 8, 2010 | 6:29 p.m.

The Police state Collateral damage, don't be shy state the truth in it's purest for this was a wanton heinous act of murder of a child. This man is a Monster who was not involved in some higher calling military act that went wrong. This Barely Human being willingly murdered a child for the most base of reasons, money. It is the root of all evil.

MojaveDeathdaddy

Dec. 8, 2010 | 6:28 p.m.

The Police state Collateral damage, don't be shy state the truth in it's purest for this was a wanton heinous act of murder of a child. This man is a Monster who was not involved in some higher calling military act that went wrong. This Barely Human being willingly murdered a child for the most base of reasons, money. It is the root of all evil and this act is just one more example of that.

Jackson

Dec. 8, 2010 | 4:53 p.m.

Because there are too many bleeding heart liberals in control of things. They allow for too many avenues of appeal which allow these dirt bags to appeal over and over and over and over...get my drift? As long as there is an appeal in the process, at the tax payers expense of course, the sentence can not be carried out.

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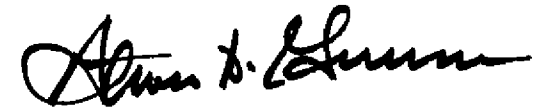
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STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2830
christopher.lalli@clarkcountynyda.com
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN BELCHER,

Defendant.

Case No. C-11-270562-1

Dept No. VI

Date: July 23, 2012

Time: 8:30 a.m.

**STATE'S OPPOSITION TO MOTION TO SUPPRESS
IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC
IDENTIFICATION PROCEDURE**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, through CHRISTOPHER J. LALLI, Chief Deputy District Attorney, and hereby opposes the Defendant's Motion to suppress identification procedure. This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this ____19th____ day of July, 2012.

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

BY /s/CHRISTOPHER J. LALLI

CHRISTOPHER J. LALLI
Chief Deputy District Attorney
Nevada Bar #005398

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

3 In December of 2010, Norman Belcher (hereinafter “the Defendant”) was in a dispute
4 with William Postorino. William lived with his friend, Nick Brabham, and his fifteen-year-
5 old daughter, Alexis. On December 6, 2010, in the early morning hours, the Defendant
6 conducted a strike on William’s home. He entered the residence and soon thereafter shot
7 Nick Brabham multiple times in the abdomen. After rifling through William’s belongings,
8 he gratuitously shot young Alexis, including once in the chest through her heart.

9 William Postorino knew Nick Brabham for about a year. (Reporter’s Transcript of
10 Proceedings, Preliminary Hearing, January 21, 2011, [hereinafter “pht”] at 33.) William did
11 not work. For money, he sold marijuana and prescription drugs (i.e. Xanax, Lortab and
12 Oxycodone) (pht at 34-35). William and the Defendant had known each other for many
13 years, dating back to their grade school days (pht at 35). The Defendant had been over to
14 William and Nick’s and house many times (pht at 40). He knew where Alexis stayed, he
15 knew where Nick stayed, and he knew where William’s bedroom was (pht at 40).

16 In December of 2010, there was conflict between William and the Defendant (pht at
17 36). William had accused the Defendant of breaking into his house and stealing his drugs
18 and pills (pht at 37). What bothered William the most is that his fifteen-year-old daughter,
19 Alexis, was present at the time (pht at 38-39). In the days leading up to the murder, the
20 Defendant was sending William threatening text messages (pht at 41). To bring the dispute
21 to an end, William gave Nick \$450 to give to the Defendant (pht at 43). Nick gave the
22 Defendant the money on December 4, 2010 (pht at 44).

23 Nick had known the Defendant for approximately two months prior to the shooting
24 (Transcript of Voluntary Statement of Nick Brabham taken January 12, 2011, [hereinafter
25 “Ex. 1”] at 4.) Both Nick and William referred to the Defendant by his nickname, “Bates.”
26 The Defendant had been coming over to Nick’s home for months (Ex. 1 at 12). He
27 estimated that he had seen the Defendant “A lot, probably 10, 15 times” prior to the murder
28 (Ex 1 at 12).

1 On December 5, 2010, Nick's friend, Ashley Riley, came over to the house to visit
2 with him (pht at 65). The two had fallen asleep in Nick's room when Ashley heard what she
3 thought was an intruder in the home (pht at 62). She woke Nick who got up and went to
4 investigate (pht at 62-63). Nick walked out of the bedroom and Ashley began to hear
5 gunshots (pht at 63). She ran to the bedroom closet (pht at 63).

6 Nick eventually joined her (pht at 64). He had been shot in the side of his body (pht
7 at 64-65). Ashley asked Nick, "Who did this?" (pht at 67). Nick did not answer. In
8 response, he asked Ashley for help. "I'm going to die. Help me" (pht at 67). Ashley felt his
9 hand and it was cold (pht at 68). She looked at his face and it was "pure white" (pht at 67).
10 Members of law enforcement as well as medical personnel arrived at the scene and
11 immediately transported Nick to the UMC trauma unit. It was in this mental condition, as he
12 was entering surgery, that Nick made the statement that two males wearing dark clothing and
13 ski masks came into the house and shot him.

14 Nick underwent surgery. His recovery was slow and tenuous. He was not medically
15 able to speak to detectives until Detective Ken Hardy went to interview him in the intensive
16 care unit at UMC on January 12, 2011. During this interview, Nick was far more coherent
17 and able to describe what had happened.

18 Prior to seeing a photographic lineup, Nick described for Detective Hardy what
19 occurred. On the morning of the murder, Nick saw the Defendant standing in the doorway
20 of the bedroom (Ex 1 at 6). He was at the top of the stairs. He had just come from the room
21 in which Alexis was staying (Ex. 1 at 8). The Defendant began shooting at Nick (Ex. 1 at
22 9).

23 There was no question that Nick knew who the perpetrator of the crime was:

24 Q: Okay. What was the first thing ... what was the
25 first thing that caught your attention inside the house?

26 A: The blonde head.

27 Q: A what?

28 A: A blonde head.

1 Q: A blonde head. And whose was that?
2 A: Bates.
3 Q: Who is Bates?
4 A: Um, Billy's friend, use to be friend, or somebody.
5 Q: Okay. Do you recall his real name?
6 A: No.
7 Q: Okay. Um, how long have ... have you known
8 Bates for a while, or?
9 A: No.
10 Q: Okay. Have you seen him before?
11 A: Yeah.
12 (Ex. 1 at 4.) He relayed for Detective Hardy what he remembered of the Defendant:
13 Q: And, um, anything identifiable about him, any
14 certain tattoos, any certain?
15 A: I just saw blonde hair, blue eyes.
16 (Ex. 1 at 11.)
17 Q: Okay. And, um, how is it that you know Bates is
18 the one that shot you?
19 A: 'Cause he was the person in front.
20 Q: He what?
21 A: He was the person in front.
22 Q: He was the person in the front?
23 A: Yeah.
24 Q: Okay. Um, and you recognize him as being over
25 there months before?
26 A: Yeah.
27 Q: How many times have you seen him totally?
28 A: A lot, probably 10, 15 times.
Q: Okay. And you only know him as Bates?
A: Yeah.

1 (Ex. 1 at 12.)

2 After Nick make it abundantly clear that he knew "Bates" (the Defendant) and he
3 knew the Defendant had shot him, Detective Hardy began the process of showing him a
4 photographic lineup. Prior to doing so, Nick was read the standard lineup admonishment:

5 Q: Okay. What I'm gonna do now, Nick, is I'm gonna
6 read you some instructions. Okay? This is for what's called our
7 photo line-up. Okay? "In a moment I am going to show you a
8 group of photographs. This group of photographs may or may
9 not contain a picture of the person who committed the crime now
10 being investigated. The fact that the photos are being shown to
11 you should not cause you to believe or guess that the guilty
12 person has been caught. You do not have to identify anyone. It
13 is just as important to free innocent persons from suspicion as it
14 is to identify those who are guilty. Please keep in mind that hair
15 styles, beards and moustaches are easily changed. Also,
16 photographs do not depict the true complexion of a person. It
17 may be lighter or darker than shown in the photo. You should
18 pay no attention to any markings or numbers that may appear on
19 the photos. Also, pay no attention to whether the photos are in
20 color, or black and white, or any other difference in the type or
21 style of photographs. You should study only the person shown
22 in each photograph. Please do not talk to anyone other than
23 police officers while viewing the photos. You must make up
24 your own mind and not be influenced by other witnesses, if any.
25 When you have completed viewing all the photos, please tell me
26 whether or not you can make an identification. If you can, tell
27 me in your own words how sure you are of the identification.
28 Please do not indicate in any way to other witnesses that you
have or have not made an identification. Thank you." Do you
understand that?

A: Yes.

20 (Ex. 1 at 13). When Nick was shown the photo array, he immediately identified the
21 Defendant as the person who shot him (Ex 1. at 14).

22 ARGUMENT

23 A pretrial identification by photograph will be set aside only if the photographic
24 identification procedure was so impermissibly suggestive as to give rise to a very substantial
25 likelihood of irreparable misidentification. *Odoms v. State*, 102 Nev. 27, 30 (1986) (citing
26 *Simmon v. United States*, 390 U.S. 377 (1968)). In the instant case, the photographic lineup
27 was not impermissibly suggestive. Moreover, there is no substantial likelihood of
28 irreparable misidentification. *Cunningham v. State*, 113 Nev. 897, 944 P.2d 261 (1997).

1 Accordingly, the Defendant's Motion to Suppress Impermissibly Suggestive Photographic
2 Identification Procedure must be denied.

3 The photographic lineup in this case was not so impermissibly suggestive as to give
4 rise to a very substantial likelihood of irreparable misidentification. In *Cunningham v. State*,
5 113 Nev. 897 (1997), the defendant sought to suppress a photographic lineup that was overly
6 suggestive. In that case, NHP Officer Christopher Perry ("Perry") had an encounter with an
7 individual in a car who ultimately eluded Perry. *Id.* at 900- 901. Perry described the driver
8 of the car as a "white man with collar-length curly hair." *Id.* at 901. Cunningham, who was
9 actually black, later became a suspect in a homicide in which a car had been stolen from the
10 homicide victim. *Id.* Perry was shown a photographic lineup to determine if the person who
11 had eluded him was Cunningham, the homicide suspect. *Id.*

12 The lineup included photographs of three white men and three light-skinned black or
13 Hispanic men. *Id.* at 901. Despite the fact that Perry had previously told detectives the
14 suspect was a white man, the detective (who knew Cunningham was actually black) asked
15 Perry if it was possible the suspect was a light-skinned black man. *Id.* at 901. Perry
16 answered that it was possible. *Id.* at 901. Cunningham's photo was the only photo
17 displaying short hair, while the other five photo subjects had longer length hair. *Id.* Perry
18 identified Cunningham, a light-skinned black man, as the driver of the car. *Id.*

19 Cunningham argued the procedure was overly suggestive. *Id.* at 903. He asserted
20 that when the detective asked Perry if the driver of the car could have been a light-colored
21 black man, the detective was suggesting the suspect was black and not white. *Id.* Further,
22 shortly before presenting the photographs, the detective told Perry that hair length can
23 change. *Id.* Cunningham argued this was suggestive because his was the only picture
24 portraying short hair. *Id.*

25 The Nevada Supreme Court recognized that a photographic identification must be set
26 aside only if the photographic identification procedure was so impermissibly suggestive as to
27 give rise to a very substantial likelihood of irreparable misidentification. *Id.* at 904. The
28 Court concluded that the district court did not err in admitting the photo lineup. Perry did

1 not identify the defendant based on any statements made by the detective. *Id.* The detective
2 did not unduly suggest to Perry that Cunningham was the suspect the detective had in mind.
3 *Id.* Finally, the pre-printed guidelines themselves stated that hair length can change. *Id.*
4 Accordingly, the Court concluded that Cunningham's argument lacked merit, and the
5 photographic lineup was proper. *Id.*

6 Similarly, in *Odoms v. State*, 102 Nev. 27 (1986), the defendant sought to suppress a
7 photographic lineup that was "so impermissibly suggestive as to give rise to a substantial
8 likelihood of misidentification." *Id.* at 30. The Court's review of the record, however,
9 revealed that the six photographs used in the lineup matched the general description of the
10 assailant which was provided by the witnesses. *Id.* at 31. Further, the witnesses
11 independently reviewed the six photographs. *Id.* Finally, the officer conducting the lineup
12 did nothing to suggest to either eyewitness which photograph to select or which photograph
13 was the defendant. *Id.* Thus, the Court found that the photographic lineup and the
14 identification procedure were not impermissibly suggestive. *Id.* (citing *French v. State*, 95
15 Nev. 586 (1979)). See also *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1982)
16 (photographic spread not impermissibly suggestive where all men in display are remarkably
17 similar in appearance and the only noticeably difference was that Barrett wore darker
18 photosensitive glasses); *United States v. Carbajal*, 956 F.2d 924 (9th Cir. 1991)
19 (photographic lineup allowed where Defendant had facial bruises, but all men Hispanic,
20 about the same range, similar skin, eye, hair coloring, hair length); *United States v. Collins*,
21 559 F.2d 561 (9th Cir. 1977) (photographic line-up allowed where all six black males in
22 photos similar in age range, five or six had similar hair style as Defendant and half of photos
23 depicted person with a beard and all had facial hair).

24 In this case, the photographic lineup shown to Nick was no more suggestive than the
25 lineups in *Cunningham*, *Odoms*, *Barrett*, *Carbajal* or *Collins*. The only complaint the
26 Defendant can muster is that his hair in the array was "light colored" and that he was without
27 facial hair. See Def.'s Mot. at 4. These allegations fall far short of being "so impermissibly
28 suggestive as to give rise to a very substantial likelihood of irreparable misidentification." In

1 *Cunningham*, a detective essentially told the witness that the suspect was black and appeared
2 in the photo array as the only person with short hair. In *Barrett*, the defendant was the only
3 person in the in the array wearing dark glasses. In *Carbajal*, the suspect was the only person
4 in the lineup had facial bruises. And in *Collins*, the suspect was featured in an array where
5 only half of the others had facial hair. *All of these* lineups were found not to be suggestive.
6 Moreover, when viewing the photographic lineup, attached to the Defendant's Motion as
7 Exhibit B, the Defendant's hair can in no way be classified as "light." It is more aptly
8 described as dark. In addition, the facial hair present on some of the individuals in the lineup
9 can hardly be said to be a noticeable feature of them.

10 No fewer than *ten times* in his Motion, the Defendant claims that the photographic
11 lineup is tainted because the photo of the Defendant was broadcast throughout the
12 community by the media. *See* Def.'s Mot. at 3, 4, 5, 6, 7, 9, 11 and 12. This is a curious
13 contention. The fact of the matter is that Nick Brabham was shot and remained barely alive
14 until the time of his surgery. Thereafter, he was confined to the Intensive Care Unit and was
15 too ill to even communicate with members of law enforcement. It is ludicrous to believe that
16 Nick was pursuing the newspaper or watching the evening news while he was fighting for
17 his life. This contention by the Defendant is wholly overblown.

18 Finally, there is no "substantial likelihood of irreparable misidentification." *See*
19 *Cunningham*, 113 Nev. at 904; *see also Bias v. State*, 105 Nev. 869 (the key question is
20 whether the identification is reliable). The instant case was not a crime committed by a
21 stranger. The culprit was a person Nick knew and had visited with many times. *Before even*
22 *looking at the lineup*, Nick told Detective Hardy that "Bates" had shot him. Nick indicated
23 that he had seen the Defendant "a lot," as many as 10 to 15 times prior to the day of the
24 shooting. In addition, William Postorino told authorities that he gave Nick \$450 to give to
25 the Defendant. This suggests that Nick saw the Defendant within days or hours of the
26 shootings. The lineup did nothing more than identify for police the person Nick already
27 knew well as "Bates."

28 The Defendant argues that Nick's identification of the Defendant should be

1 suppressed because he did not identify the Defendant when asked by Riley who shot him.
2 *See* Def.'s Mot. at 5. The fact that Nick was barely clinging to life at the time and chose not
3 to answer in no way undermines his later identification of the Defendant. The Defendant
4 also mischaracterizes Nick's failure to respond to Riley and his observation that the shooter
5 may have been wearing a ski mask as "misidentifications." *See* Def.'s Mot. at 5. Hardly.
6 Failing to respond to a question is not a misidentification. It is also altogether possible that
7 when Nick observed the Defendant, he had a mask or some other covering on his face or
8 head. To label these events as "misidentifications" is reaching.

9 **CONCLUSION**

10 Based upon all of the foregoing, the State respectfully prays that the Defendant's
11 Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure be
12 denied.

13 DATED this __19th__ day of July, 2012.

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

16 BY /s/CHRISTOPHER J. LALLI
17 CHRISTOPHER J. LALLI
18 Chief Deputy District Attorney
Nevada Bar #005398

19
20 CERTIFICATE OF FACSIMILE TRANSMISSION

21 I hereby certify that service of State's Opposition to Motion to Suppress
22 Impermissibly Suggestive Photographic Identification Procedure, was made this 19th day
of July, 2012, by facsimile transmission to:

23 ROBERT M. DRASKOVICH, ESQ.
24 FAX #474-1320
25 ROBERT LANGFORD, ESQ.
FAX #471-6540

26 /s/S. Munoz
27 Secretary for the District Attorney's Office

28 10F23008X/CJL/sam-MVU

Exhibit 1

Exhibit 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
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EVENT #: 101206-0354

SPECIFIC CRIME: HOMICIDE**DATE OCCURRED:** 12-06-2010**TIME OCCURRED:** 0243 HRS.**LOCATION OF OCCURRENCE:** 9752 VILLA LORENA

CITY OF LAS VEGAS**CLARK COUNTY**

NAME OF PERSON GIVING STATEMENT: NICK BRABHAM**DOB:** 02-04-79**SOCIAL SECURITY #:** 559-55-9386**RACE:****SEX:****HEIGHT:****WEIGHT:****HAIR:****EYES:****HOME ADDRESS:****PHONE 1:****WORK ADDRESS:****PHONE 2:**

The following is the transcription of a tape-recorded interview conducted by DETECTIVE K. HARDY, P#3031, AND DETECTIVE D. O'KELLEY, P#4209, LVMPD HOMICIDE Section, on 01-12-2011 at 0925 hours.

Q: Operator, this is Detective K. Hardy, H-A-R-D-Y, P#3031, taking at statement under Event #101206-0354. Name of person giving statement will be Nick, last name is Brabham, B-R-A-B-H-A-M. His birth date is 02-04 of '79. His social is 559-55-9386. Date and time of this interview will be January 12, 2011, at 0925 hours. The location of the interview will be UMC Trauma, uh, ICU, Bed 6. Persons present during this interview are Nick Brabham, ah, Detective O'Kelley,

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P#4209, and myself Detective Hardy. Nick, you understand this is being recorded?

A: Yes.

Q: And you, and you understand that we're here to, uh, ask you questions about a shooting that occurred on December 6, ah, 2010?

A: Yes.

Q: Could you tell me where you were at, uh, on December 6, 2010?

A: At the top of the stairs.

Q: Okay. Now is that the house that you were living at?

A: Yes.

Q: Do you remember the address?

A: Uh, no.

Q: Okay. Do you, um, whose house is that?

A: William's.

Q: And do you know William's last name?

A: (Unintelligible)

Q: Okay. And is that where you resided, or were you just visiting?

A: I was living there.

Q: Okay. And, um, on December 6, do you recall getting shot?

A: Yes.

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Q: Okay. What was going on just prior to the shooting? Do you recall who was in the house?

A: Um, I don't know who was in the house until I got up to the top of the stairs.

Q: Okay, but before the shooting happened, okay, do you recall where you were at?

A: Downstairs.

Q: You were downstairs?

A: Going in the house.

Q: You were going in the house? Okay. Who else was there? Was there anybody else there with you?

A: Alexis.

Q: Who?

A: Alexis.

Q: And who is Alexis?

A: Billy's daughter.

Q: That's Billy's daughter. And anybody else there?

A: No.

Q: Okay. Do you remember a girl named Ashley?

A: She ___ (unintelligible), yeah, she was, she was upstairs with me.

Q: She was upstairs with you?

A: Yeah.

Q: When you got shot, or?

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A: When I got shot too.

Q: Okay. Where was she at when you got shot?

A: I don't know.

Q: Okay. Just...did you hear anything before, before the shooting?

A: No.

Q: Okay. What was the first thing...what was the first thing that caught your attention inside the house?

A: The blonde head.

Q: A what?

A: A blonde head.

Q: A blonde head. And whose was that?

A: Bates.

Q: Who is Bates?

A: Um, Billy's friend, use to be friend, or somebody.

Q: Okay. Do you recall his real name?

A: No.

Q: Okay. Um, how long have...have you known Bates for a while, or?

A: No.

Q: Okay. Have you seen him before?

A: Yeah.

Q: Okay. And, um, when was the first time you saw Bates?

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A: Like a month ago, two months before that.

Q: Okay. But on the night that you got shot, where were you at when you first saw this blonde head that you said was Bates?

A: At the top of the stairs.

Q: Okay. And, uh, where was Bates at?

A: He was right at the left...right, right at the top of the stairs.

Q: Okay. So you're at the top of the stairs, where was Bates at?

A: At the right at the top of the stairs.

Q: At the right?

A: I'm heading my way up the top of the stairs, yeah.

Q: So he was already upstairs?

A: Yeah.

Q: Okay. So, uh, he's up at the right of the top of the stairs, is that like closest to your bedroom?

A: Ashley's room. I mean, uh, Alexis's room.

Q: Alexis's room?

A: Yeah.

Q: Was he in her room, or was he outside of her room?

A: Right at the doorway.

Q: Okay. And that was the first time you saw him?

A: Yeah.

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Q: Can you tell me what he was wearing?

A: No.

Q: Okay. Um, when you saw him, was there any conversation between you and him?

A: No.

Q: Okay. What happened when you, when you...

A: I just heard fire--shots fired.

Q: Okay. Did you hear the shots before you saw him, or did you see him?

A: I saw a glimpse of his hair. I saw him, a glimpse of him and then I seen shots fired.

Q: Okay. Where were you standing when you got shot?

A: I was turning the corner into my _____ (unintelligible) my closet.

Q: Okay.

A: (Unintelligible)

Q: I'm sorry?

A: Laying there still.

Q: Okay. So you were inside your room at the time you got shot?

A: Yeah, on my, on my way into my room.

Q: Okay. Let me take you back. You said you were coming up the stairs and you saw Bates at the top.

A: (Unintelligible)...I see him at the top of the stairs, ____ (unintelligible) turn the

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corner.

Q: And he turned the corner?

A: No, and he...yeah, like he was coming out of the room.

Q: He was coming out of?

A: Yeah.

Q: Whose room?

A: Alexis, Alexis's room.

Q: Okay. And he was coming out of Alexis's room, were you at the top of the stairs by then?

A: Yeah.

Q: And so you were going in your room?

A: Yeah.

Q: And as you went into your room...

A: No, there was shots fired.

Q: Shots were fired.

A: When I hit the top of the stairs.

Q: Okay. Was he firing at you?

A: _____ (unintelligible) hit.

Q: Okay. How many shots did you hear?

A: Three or four.

Q: Okay. Did you see where Alexis was?

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A: No.

Q: Okay. Where were you...I'm gonna back you up a little bit if I can, Nick. Where were you before you were coming up the stairs?

A: Coming in the house.

Q: Coming in the house? So do you think Bates was already in the house before you got there?

A: Yeah.

Q: Okay. And what about Ashley, where was Ashley at?

A: She dropped me off, or she was waiting outside.

Q: She was waiting outside?

A: Yeah.

Q: Okay. And so Bates was already inside. When you got home was the front door open or closed?

A: It was closed.

Q: Did it look like anything was wrong?

A: No.

Q: So you came in the door, we're going up the stairs, and that's the first time you saw Bates.

A: Yeah.

Q: Okay. And Bates was coming out of Alexis's room while you were going in your room?

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A: Like that. I was standing at the top of the stairs when he was coming out of the doorway, and while I was turning, he shot. That's when he shot.

Q: So it was before you got into your room that he, that he started firing?

A: Yes.

Q: And then you continued into your room?

A: Yes.

Q: Okay. And as you continued into your room is that when you think you got shot then?

A: Yeah.

Q: Okay. Did you hear any other shots besides the ones that he was firing at you?

A: After that, yeah.

Q: Okay. About how long after?

A: Two minutes.

Q: And, uh, how many more shots did you hear?

A: Two or three.

Q: And do you know where those were coming from?

A: No.

Q: Okay. Do you think they were coming towards you?

A: I don't know where they were coming from.

Q: Okay. Um, after you got shot, what did you do?

A: Laid in the closet still.

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Q: Okay. Did you see Bates anymore?

A: No.

Q: Did you see Alexis?

A: No.

Q: Um, did Bates ever come into your room after he had shot you?

A: No.

Q: Okay. Was there anybody else in the closet with you?

A: Not that I know of. I thought Ashley was but she wasn't I guess.

Q: Okay. Why do you think Ashley was?

A: 'Cause she was with me. No, she was waiting in the car.

Q: Okay. Do you remember, or?

A: I don't--she was waiting in the car.

Q: Who was Ashley to you?

A: Just a friend.

Q: Okay. Um, so you think Ashley was waiting in the car?

A: Yeah.

Q: Okay. Now, um, as far as describing Bates for me, can you tell me whether he's white or black?

A: He's mixed.

Q: About how tall is he?

A: Six foot one.

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Q: Okay. And how much you think he weighs?

A: Two hundred and ten pounds.

Q: And, um, anything identifiable about him, any certain tattoos, any certain?

A: I just saw blonde hair, blue eyes.

Q: Okay. Was, was that the only person that was in there?

A: That I saw.

Q: That you saw?

A: There was somebody else but I don't know who it was.

Q: What--how do you know there was somebody else?

A: I seen two outlines.

Q: You saw two outlines? Were your lights on or were your lights off?

A: The hall light was on.

Q: The lights were on? Where was the second outline?

A: Behind Bates.

Q: Behind Bates?

A: Yeah.

Q: Could you tell whether it was male or female?

A: No.

Q: Whether they were black or white?

A: No.

Q: Um, and if he was behind Bates, would he of been in Alexis's room/

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A: Yeah.

Q: Okay. Um, did you see the gun that Bates had?

A: No.

Q: Um, could you tell which hand the gun was in/

A: No. He shot me in the back.

Q: He shot you in the back?

A: Yeah, _____ (unintelligible).

Q: Okay. And, um, how is it that you know Bates is the one that shot you?

A: 'Cause he was the person in front.

Q: He what?

A: He was the person in front.

Q: He was the person in the front?

A: Yeah.

Q: Okay. Um, and you recognize him as being over there months before?

A: Yeah.

Q: How many times have you seen him totally?

A: A lot, probably 10,15 times.

Q: Okay. And you only know him as Bates?

A: Yeah.

Q: Do you think if I showed you some pictures do you think you'd recognize him?

A: Yeah

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Q: Okay. What I'm gonna do now, Nick, is I'm gonna read you some instructions. Okay? This is for what's called our photo line-up. Okay? "In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. The fact that the photos are being shown to you should not cause you to believe or guess that the guilty person has been caught. You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those who are guilty. Please keep in mind that hair styles, beards and moustaches are easily changed. Also, photographs do not depict the true complexion of a person. It may be lighter or darker than shown in the photo. You should pay no attention to any markings or numbers that may appear on the photos. Also, pay no attention to whether the photos are in color, or black and white, or any other difference in the type or style of photographs. You should study only the person shown in each photograph. Please do not talk to anyone other than police officers while viewing the photos. You must make up your own mind and not be influenced by other witnesses, if any. When you have completed viewing all the photos, please tell me whether or not you can make an identification. If you can, tell me in your own words how sure you are of the identification. Please do not indicate in any way to other witnesses that you have or have not made an identification. Thank you." Do you understand that?

A: Yes.

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Q: So I'm gonna show you--have you ever seen a photo line-up before?

A: Yeah.

Q: Okay. Well it's the same type of thing, and what I want you to do is...can you write?

A: (Unintelligible)

Q: Can you sign your name?

A: Yeah.

Q: Um, gonna set this right here. Give me a signature right here. That--these are the words that I just read to you. Okay? And, ah, the time now is 9:35. Okay, now I'm gonna show you a photo of six people here. Do you recognize anybody in those photos?

A: (Unintelligible)

Q: And who is that.

A: Bates.

Q: And what number is below the picture you're pointing to?

A: Three.

Q: Three? Okay. If I can get you to put a signature underneath that photograph. I'm sorry? Okay. And as far as this being Bates, can you tell me again what Bates do, uh...

A: He shot me.

Q: He's the one that shot you at your house?

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A: Yes.

Q: Okay. Do you have any idea why he would do this?

A: No.

Q: Okay. Is there anything else that you saw, or that you heard...

A: No.

Q: ...that I didn't ask you about what happened inside there?

A: No.

Q: Okay. Is there anything else that you think that we need to know for our investigation?

A: No.

Q: No?

A: Not that I can realize right now.

Q: Okay.

DO (D. O'KELLEY): When you got to the house you said Ashley was waiting in the car, what were you going home to get something and then come back out?

A: Yeah. _____ (unintelligible) Alexis, I don't remember.

DO. (Unintelligible)

A: I don't remember that part.

DO: And you said when you got to the door everything was okay with the door?

A: Yeah

DO: Did you have to unlock it to get in?

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A: I think I did.

DO: All right.

A: I don't remember that part.

DO: Okay. And did, did Bates ever--did he have permission to be in the house?

A: No.

DO: Did he ever stay there?

A: No.

DO: How about Ashley, did she ever stay there with you?

A: No.

DO: Do you know why Ashley would of have gone into the house after she heard the shots?

A: No. No, she stayed in the car.

DO: Okay. You don't remember her ever coming in the house?

A: No.

DO: How did you, um, how did you find out what happened afterwards?

A: (No response)

DO: How did you know, how did you find out what happened to Alexis?

A: My mom.

DO: Your mom told you?

A: Yeah.

DO: Did you know what happened to her before then?

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STATEMENT OF: NICK BRABHAM

A: No.

DO: Do you remember the police coming to visit you here in the hospital ever?

A: No.

DO: Never?

A: Never.

DO: Have you ever seen me before?

A: No.

DO: Okay. All right.

A: I was wondering when you guys were coming.

DO: Okay. So you don't remember me ever talking to you?

A: No. You did?

DO: And the first that you remember Alexis being dead was from your mom?

A: Yeah.

DO: What did she tell you?

A: That Alexis was dead.

DO: Okay. Do you remember how long ago that was?

A: (Unintelligible)

DO: Do you remember how long ago it was?

A: No.

DO: Okay. That's all I have.

Q: Do you know what your condition here is, Nick?

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 18

EVENT #: 101206-0354
STATEMENT OF: NICK BRABHAM

A: No.

Q: Okay. Has the doctor, have the doctors told you how serious it is?

A: No.

Q: Okay. At any point did you ever think you were gonna die?

A: No.

Q: Huh? Okay. Anything else...

A: Now, now I do though.

Q: You think you might die now?

A: No, I _____ (unintelligible). Now _____ (unintelligible).

Q: Now they tell you what?

A: How serious the condition was.

Q: How, how serious it was?

A: Yeah.

Q: Okay. And, uh, did they tell you where you got shot at?

A: My side.

Q: Okay. Nick, anything else you think we should know?

A: (unintelligible)

Q: That's no?

A: No.

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT**

PAGE 19

**EVENT #: 101206-0354
STATEMENT OF: NICK BRABHAM**

Q: All right. Well then we'll conclude the interview, the same people present, time is
0940 hours. Thank you, steno.

**THIS VOLUNTARY STATEMENT WAS COMPLETED AT UMC ON THE 12TH DAY
OF JANUARY, 2011 AT 0940 HOURS.**

**KH:DO:sd
11V0035**

Original

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JUL 30 4 12 PM '12

CLERK OF COURT

1 RPLY

2 ROBERT M. DRASKOVICH, ESQ. (6275)
3 Gary A. Modafferi, Esq. (12450)
4 815 S. Casino Center Blvd.
5 Las Vegas, Nevada 89101
6 Telephone: (702) 474-4222
7 Attorneys for Defendant

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,
11
12 Plaintiff,
13
14 vs.

CASE NO.: C270562
DEPT. NO.: VI

15 NORMAN BELCHER,
16
17 Defendant.

C-11-270562-1
ROPP
Reply to Opposition
1915589



18 **REPLY TO STATE'S OPPOSITION TO MOTION TO SUPPRESS IMPERMISSIBLY**
19 **SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION PROCEDURE**

20 COMES NOW the Defendant, NORMAN BELCHER, by and through his attorneys of
21 record, Robert M. Draskovich, Esq., and Gary A. Modafferi, Esq., of Turco & Draskovich,
22 LLP., and respectfully submits this Reply in support of an order suppressing any and all
23 evidence directly or derivatively obtained as a result of an impermissibly suggestive
24 photographic identification procedure. The photographic array at issue violates the Defendant's
rights to due process under the Fourteenth Amendment to the United States Constitution and
Article I, Sec. 8 of the Constitution of the State of Nevada.

This Reply is offered in addition to any evidence and/or argument adduced at a hearing
on this matter. It is supported by the attached Memorandum of Law.

DATED this 27th day of July, 2012.

By:

Robert M. Draskovich, Esq. (6275)
Gary A. Modafferi, Esq. (12450)
Attorneys for Defendant

REPLY

The same photograph used in the challenged photographic line-up permeated the Las Vegas media for five weeks before it was inserted into a patently suggestive array.¹ The witness saw that photograph just like everyone else in Las Vegas and that occurred before this staged line-up five weeks earlier. The State summarizes this egregious and fundamentally unfair set of circumstances as a "curious contention."² Had the police slid the same booking photograph into the witnesses' pocket prior to the identification procedure, a complaint of unfairness would not be aptly described as a "curious contention." Tipping off a witness in such a manner would be illegal and cause the suppression of the tainted witness identification. The circumstances of this challenged identification must lead to the same conclusion.

The State argues that the witness' hospitalization insulated him from exposure to the photograph. That contention is beyond reason.³ This witness, steeped in the drug dealing community, would necessarily reach out to determine who fired the shots. The State's unsupported argument would necessarily presume that the witness did not speak with either his roommate William Postorino or his girlfriend Ashley Riley during the five weeks between the shooting and the identification. The State would presume that this witness did not see a single television report or read a single newspaper article that included the same booking photograph he would later be shown by police.

¹ The State in an Orwellian feat of double speak contends that the orange/blondish color of the Defendant's hair "can in no way be classified as "light." It is more aptly described as dark." Opposition at p.6. The witness at issue described the assailant's hair as "blonde." Whether classified as blonde or orange or light red, the State is simply wrong when it argues that the defendant's hair is "dark".

² Opposition at p.8.

³ The State argued that the witness "was confined to the intensive care unit and was too ill to even communicate with members of law enforcement. It is ludicrous to believe that Nick (the witness) was pursuing (sic) the newspaper or watching the evening news while he was fighting for his life. "There is no evidence in the record to support either point. The State would have the Court believe that this witness was magically sequestered from all human, media, and digital communication about the very circumstances that landed him in the hospital. This is truly an outrageous and unproven proposition that is made even less believable by the manner in which subject was so obviously avoided by police and the witness during the course of the identification interview five weeks after the incident. The State argues without support that absolute social and informational isolation should be presumed.

1 Any exposure to the booking photograph poisons the entire process. Given this axiomatic
2 proposition, the State uses anecdotal argument instead of evidence to assure the Court that the
3 witness was not impermissibly and unfairly influenced by a widely circulated booking
4 photograph that happened to also be included in a suggestive photographic array.

5 The State argues that the "lineup did nothing more than identify for police the person Nick
6 already knew well as "Bates." If this argument was correct then why did "Nick" fail to identify
7 the person he already knew well as "Bates" to either his girlfriend or to police immediately after
8 the shooting. If this line-up was as *pro forma* as the State argues then why did the police and the
9 witness seemingly ignore and forget that the last standing identification was of two people
wearing ski masks with no mention of anyone named "Bates"?⁴

10 The use of dark haired comparative photographs in the array is shocking. The witness said
11 that "Bates" had a "blonde head."⁵ This description of "Bates" along with the color of his blue
12 eyes stands as the centerpiece of the witness' scant description given minutes before the
13 photographic array and weeks after the incident. To include all dark haired men in the
14 photographic array with one light haired man with blue eyes was akin to placing a flashing bulb
over the Defendant's head inviting the witness to pick that person.⁶

16 ⁴ It is respectfully suggested that when witness told police that the perpetrators were wearing ski masks the entire
17 identification process was halted because of the reasonable conclusion that the ski masks prevented identification
of the assailants by the witness. When the police made the decision to reapproach the witness to have him review a
photographic array one would think that the ski mask obstacle would at least be dealt with prior to covering new
identification possibilities.

18 Not only is this point ignored by police in their interview of the witness but it was also ignored by the State in its
19 Opposition. The State refuses to view this previous inability to identify the assailant as a misidentification. Instead
they simply write without further explanation, "It is altogether possible that when Nick observed the Defendant, he
had a mask or some other covering on his face or head. To label these events as "misidentifications" is reaching."
20 Opposition at p.9. This argument is circular and defies logic. If there was a mask on the Defendant's face but the
witness was still capable of identifying the masked assailant as the Defendant, then one would reason that the
21 witness would have told the police this fact. The witness did not do this. Instead, the witness told police on the
scene that the gunman and his companion both wore masks. The witness offered no further identification
information presumably because the masks prevented any further reliable identification. Not only did the subject of
22 ski masks elude any further police interrogation during the identification interview five weeks later, but so did the
subject of the second masked companion.

23 ⁵ State's Exhibit 1 at p.4.

24 ⁶ The fact that the Defendant was the only photographic choice not to have facial hair only accentuates the
unfairness of this procedure.

1 In Cunningham police inquired of the witness whether the perpetrator could be a light-
2 skinned black man. The Nevada Supreme Court held that this statement was not enough to
3 prove the identification was impermissibly suggestive. In this case, the police released the same
4 photograph to the public and essentially told the world this is the man that did the crime.⁷ The
5 linchpin in reviewing the propriety of a pretrial identification is that the court must consider (1)
6 whether the procedure is unnecessarily suggestive, and (2) if so, whether under all the
7 circumstances, the identification is reliable despite an unnecessarily suggestive identification
8 procedure.⁸

9 The identification in this case is disturbingly unreliable. The source of the identification is a
10 drug dealer who was ostensibly intoxicated when he had an instant to identify someone shooting
11 at him at close range. This witness told police things that were patently false about the
12 circumstances that directly lead to the identification itself. The witness told police that he was
13 coming into the house when the shooting happened. This is a lie. Instead, as Riley told police,
14 the witness was coming out of the bedroom where he and Riley had been sleeping after
15 consuming methamphetamine, marijuana and alcohol. These facts go directly to the witness'
16 ability to perceive, describe, and relay the circumstances of the identification. The witness says
17 he was awake and ostensibly alert when the shooting happened. This too was a lie. The witness
18 was catapulted into consciousness by Riley.

19 According to Riley, the witness had to be roused from his sleep to investigate the loud
20 noises he apparently had not heard while passed out in bed. The witness told police that when
21 he was shot there were two assailants. According to the police investigation, this too is not true.⁹

22 ⁷ In its Opposition, the State cites Cunningham v. State, 113 Nev. 897, 944 P.2d. 261 (1997) for support. This case
23 does not support approval of this suggestive and unfair identification process. In Cunningham, the Nevada Supreme
24 Court specifically found that "Chandler did not unduly suggest to Perry that Cunningham was the suspect Chandler
had in mind." Id at 265. In this case, the photograph used in the line-up had already been widely associated with the
person responsible for the crimes. The court in Cunningham specifically noted that in that line-up, "Cunningham
was not the only light-skinned black man in the photograph array." Id at 265. However, in this case, the Defendant
was the only light haired black man in the photograph array. This optical disparity was exacerbated by the fact
that the Defendant was also the only person in the line-up with light eyes (blue per LVMPD booking information).

⁸ Bias v. State, 105 Nev. 869, 871, 784 P.2d. 963, 964 (1989).

⁹ The police have seemingly abandoned the two suspect theory that stemmed from this witness' on scene
identification.

1 The witness said that both assailants were wearing ski masks. If this challenged identification is
2 to be determined reliable then this statement was also be untrue. The time between incident and
3 identification is one of the five factors from which reliability is gleaned. In this case five weeks
4 passed between incident and the challenged identification.

5 The bedrock of the American judicial process is the honesty of witnesses at trial. Eyewitness
6 identification testimony presents the most damaging yet least understood evidence that can be
7 offered by a witness. Juries amass great weight behind eyewitness identifications even though
8 eyewitness misidentification represents the most common element in all wrongful convictions
9 later overturned by DNA evidence. This case represents an unholy convergence of an
10 impermissibly suggestive line-up procedure with a witness who is willing to fabricate. The State
11 argues that reliability can be gleaned from the fact that the witness had seen the suspect just
12 immediately prior to the shooting when the witness paid a drug debt for William Posterino.¹⁰

13 The State's argument is that the witness had just seen the Defendant immediately before the
14 shooting and thus his subsequent identification of the Defendant five weeks later is reliable.
15 However, the obvious flaw in this argument is why did it take five weeks? The witness had the
16 chance to convey the same "reliable" identification minutes after the shooting. Instead, the
17 witness told police the shooter and his accomplice were wearing ski masks. According to the
18 State's argument, once the police had settled on a suspect and arrested the Defendant and
19 published his booking photograph, then the "reliable" identification could proceed.

20 The State cites several reported cases in their Opposition. The cited cases are uniformly
21 distinguishable from the circumstances presented by this challenged identification process.

22 ¹⁰ The State writes, "This suggests that Nick (witness) saw the Defendant within days or hours of the shooting."
23 Opposition at p.8. The State argues this fact as if it insures reliability of the hospital identification process five
24 weeks after the shooting. Nothing could be further from reality. The fact that the witness had just seen the
Defendant hours before the shooting reinforces the fact that the subsequent hospital identification process was
unfairly rigged.
If the witness had seen the Defendant 10-15 times prior to the shooting, including just hours prior to the incident
itself, immediate identification on the scene to both police and his girlfriend Ms. Riley, would be expected. This
was not the case. Instead, the witness failed to even respond to Ms. Riley's spontaneous inquiry about the identity
of the shooter and the witness specifically told police that the shooter was wearing a ski mask minutes after Ms.
Riley's question. Neither of these crucial events were addressed in the police interrogation at the hospital even
though the same police officers had to have been aware of these stark inconsistencies in their own investigative
record.

1 Cunningham is discussed at length in the Opposition.¹¹ The Court in Cunningham distilled the
2 Defendant's arguments into two components. The first involved a statement by the police
3 officer made a week before the line-up. In that statement, "Chandler (the officer) asked Perry
4 (the witness) a week before the line-up if the driver of Suzette's car could have been a light-
5 colored black man, Chandler was suggesting that the suspect was black not white."¹² The
6 Cunningham Court began by applying the standard created by the United States Supreme Court
7 in Simmons.¹³ This standard requires a court to consider the totality of surrounding
8 circumstances as to whether a photographic identification was "so unduly prejudicial as to
9 fatally taint the conviction." In Cunningham, the Court noted, "the facts indicate that Perry did
10 not identify Cunningham based on any statements made by Chandler. We further conclude that
11 Chandler did not unduly suggest to Perry that Cunningham was the suspect Chandler had in
12 mind."¹⁴ In this case, police came to witness' hospital room with Belcher predetermined as the
13 correct choice. The witness has already failed to identify Belcher but suddenly there is a
14 photographic array with his picture in it and no explanation about why the witness would
15 suddenly reverse himself on this subject.

16 According to the State's version of events, the witness first told police of Belcher's
17 involvement on January 12, 2011 while at the hospital. However, the police showed up at the
18 hospital, with the knowledge that the witness had been unable to identify any suspect because of
19 the ski masks. In Cunningham, the Court found umbrage in the fact that, "Cunningham was not
20 the only light-skinned black man in the photographic array."¹⁵ However, Defendant Belcher was
21 in fact the only light haired black man with facial hair and light eyes in his photographic array.

22 ¹¹ Cunningham v. State, 113 Nev. 897, 944 P.2d. 261(1997). Cited at pp. 4,5,6 and 7 of the State's Opposition.

23 ¹² *Id.* at 265. In Footnote 4, the court noted that, "the photographic line-up contains three white men and three
24 light colored black or Hispanic men, therefore, even if Chandler was suggesting that the suspect was black, Perry
had three men to choose from."

¹³ Simmons v. United States, 390 U.S. 377, 383, 88 S.Ct. 967, 970-971 (1968). Cited in the Motion to Suppress at
Fn. 10,11,12.

¹⁴ *Id.* at 265.

¹⁵ *Id.* at 265.

1 This fact becomes even more compelling when it is realized that light or "blonde" hair was
2 essentially the centerpiece of the witness' description of the assailant. When witness Brabham
3 was asked if there was "anything identifiable about him, any certain tattoos, any certain? The
4 witness answered, "I just saw blonde hair, blue eyes."¹⁶ When the officer asked, "what was the
5 first thing that caught your attention inside the house?" The witness' answer was "the blonde
6 head." The officer apparently confused asked again, "a what?" the witness again stated, "a
7 blonde head."¹⁷

8 More recently in Thompson, the Nevada Supreme Court found that a photographic line-up
9 was not impermissibly suggestive, "because the photographic line-up consisted of individuals
10 who all matched Coppola's general description of her assailant."¹⁸ In Thompson, a reassuring
11 similarity between the description first given by the victim at the time of the crime and
12 photographs that generally fit the victim's description to police distinguished that case from
13 Defendant Belcher's circumstance. The Court noted "Coppola described the taller assailant,
14 later identified as Thompson, as an American man in his late twenties or early thirties with light
15 brown skin, short hair, and wearing a fitted t-shirt. In the photographic line-up containing
16 Thompson's picture, the men were all African-American, had similarly shaped faces and short
17 hair, appeared to be approximately the same age and Thompson and one other man were
18 wearing white t-shirts."¹⁹ The Court then concluded that based upon the prior description and
19 the survey of photographs that the line-up was not impermissibly suggestive. Specifically, the
20 Court held that, "because the photographic line-up consisted of individuals who all matched

21 ¹⁶ Statement of witness Brabham taken at UMC on January 12, 2011 at p.11. Attached as Exhibit A to the Motion
22 to Suppress.

23 ¹⁷ Exhibit A of Original Motion to Suppress at p.4 Witness Brabham's blonde hair testimony, though negligible
24 and unreliable, becomes even more suspicious when considered with the preliminary hearing testimony of next
door neighbor Brenda Williams. Ms. Williams testified that the suspect, the State portrayed as the Defendant, was
covered by "a hoodie." Ms. Williams confirmed that the hood was up over the suspect's head. Preliminary Hearing
transcript, held before the Honorable Joe Bonaventure, Justice of the Peace, January 21, 2011 at p. 25.

¹⁸ Thompson v. State, 125 Nev. ____, 221 P.3d. 208 (2009).

¹⁹ Id. at 713.

1 Coppola's general description of her assailant, we conclude that it was not impermissibly
2 suggestive."²⁰

3 In Defendant Belcher's case there was no previous description by the witness that would
4 permit the assembly of any photographic array. Instead, the police had arrested a suspect. They
5 took a picture of that suspect and released it to the media. Five weeks passed and they
6 approached the witness with an array containing that picture and asked that witness whether he
7 could make an identification. Unlike Thompson, Brabham offered no prior general description
8 from which similarly appearing suspects could be drawn. The photographs are strikingly
9 dissimilar to Defendant Belcher but that point is almost secondary considering the police had no
10 previous statement or reported basis to believe that this witness could identify Defendant
11 Belcher.²¹

12 Skin color is of the utmost importance in presenting a fair and unnecessarily suggestive
13 photographic line-up.²² Defendant Belcher's skin tone is unique. Men of similar skin tone
14 should have been included by police in the challenged photographic array. High yellow,
15 occasionally yellow, is a term for very light skinned persons of black descent. It is a reference to
16 the usually very pale undertone to the skin color of this group. The term was in common use in
17 the United States at the end of the 19th Century and the early decades of the 20th Century.²³
18 Many high yellows are as light skinned as Europeans, and even lighter than some Europeans.

19 ²⁰ Id. at 713, citing Odoms v. State, 102 Nev. 27, 31 (1986).

20 ²¹ The picture of Defendant Belcher shows a lone light haired black person. It also depicts the only person without
21 facial hair. Equally important, the Defendant is the only person depicted in the photographic line-up with light
22 eyes. This is another crucial point because in the description given immediately before the line-up was shown, the
23 witness described his assailant as having "blue eyes." None of the other men depicted in the line-up have light
24 colored eyes.

²² In Thompson the Court noted that the description called for men with "light brown skin." Id. at 713. In
Cunningham the court, in part, based its decision on the fact that "Cunningham was not the only light skinned black
man in the photographic array. Supra at 265.

²³ The term high yellow has its roots in American culture, sometimes in a derogatory sense, since the end of the
19th Century. It appears in such art as the song, "The Yellow Rose of Texas"(a traditional folk song about a yellow
skinned indentured servant named Emily D. West) and Yellowman, a dramatic play honored as a 2002 Pulitzer
price finalist. As recently as 2004, white R&B singer-songwriter Teena Marie released a song titled "High Yellow
Girl" about her biracial daughter Alia Rose. Rapper Jay-Z refers to his wife Beyonce Knowles, as "my high yellow
broad" in his 2009 song "Off That."

1 Their specific skin hue is generally caused by a mixture of European ancestry.²⁴ Norman
2 Belcher's specific skin hue alone makes this photographic line-up impermissibly suggestive.
3 The other men in the line-up all appear to be light skinned blacks but none of them have this
4 Defendant's yellow hue. Apart from facial hair, eye and hair color, this fact causes a striking
5 optical disparity. The witness chose Defendant Belcher's photograph not because of what he
6 witnessed but because of what happened after the shooting. This makes his identification of the
7 Defendant unreliable. Use of that identification at a trial in this case would violate the
8 Defendant's due process rights.

9 **CONCLUSION**

The Defendant respectfully prays that his Motion be granted.

10 DATED this 27th day of July, 2012.

11 By: 

12 Robert M. Draskovich, Esq. (6275)
13 Gary A. Modafferi, Esq. (12450)
14 Attorneys for Defendant
15
16
17
18
19
20
21
22
23
24

²⁴ The Case of Desiree's Baby; the genetics and evolution of human skin color.

1 **ROC**

ROBERT M. DRASKOVICH, ESQ. (6275)

2 Gary A. Modafferi, Esq. (12450)

815 S. Casino Center Blvd.

3 Las Vegas, Nevada 89101

Telephone: (702) 474-4222

4 Attorneys for Defendant

5 **DISTRICT COURT**
CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,
7 Plaintiff,

8 vs.

9 NORMAN BELCHER,
10 Defendant.

CASE NO.: C270562

DEPT. NO.: VI

11
12 **RECEIPT OF COPY**

13
14 RECEIPT of **REPLY TO STATE'S OPPOSITION TO MOTION TO SUPPRESS**

15 **IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION**

16 **PROCEDURE** is hereby acknowledged this 30 day of July, 2012.

17
18 

19 Deputy District Attorney
20 Regional Justice Center
200 Lewis Avenue
21 Las Vegas, NV 89101

IN THE SUPREME COURT OF THE STATE OF NEVADA

No.

NORMAN BELCHER,

Petitioner,

vs.

**THE HONORABLE ELISSA CADISH, EIGHTH JUDICIAL DISTRICT COURT
JUDGE,**

Respondent,

THE STATE OF NEVADA,

Real Party in Interest.

**APPENDIX TO PETITION FOR WRIT OF MANDAMUS, OR IN THE
ALTERNATIVE, WRIT OF PROHIBITION
VOLUME II**

ROBERT M. DRASKOVICH, ESQ.
Nevada Bar No. 6275
GARY A. MODAFFERI, ESQ.
Of Counsel - Nevada Bar No. 12450
815 S. Casino Center Boulevard
Las Vegas, Nevada 89101
Telephone: (702) 474-4222
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF NEVADA

No.

Electronically Filed
Dec 12 2013 10:11 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

NORMAN BELCHER,

Petitioner,

vs.

**THE HONORABLE ELISSA CADISH, EIGHTH JUDICIAL DISTRICT COURT
JUDGE,**

Respondent,

THE STATE OF NEVADA,

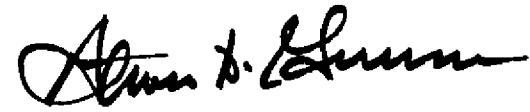
Real Party in Interest.

**APPENDIX TO PETITION FOR WRIT OF MANDAMUS, OR IN THE
ALTERNATIVE, WRIT OF PROHIBITION
VOLUME I**

ROBERT M. DRASKOVICH, ESQ.
Nevada Bar No. 6275
GARY A. MODAFFERI, ESQ.
Of Counsel - Nevada Bar No. 12450
815 S. Casino Center Boulevard
Las Vegas, Nevada 89101
Telephone: (702) 474-4222
Attorneys for Petitioner

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CLERK OF THE COURT

MOT

ROBERT M. DRASKOVICH, ESQ. (6275)
Gary A. Modafferi, Esq. (12450)
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 474-4222
Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

CASE NO.: C270562

DEPT. NO.: VI

NORMAN BELCHER,

Defendant.

MOTION TO STRIKE PRELIMINARY HEARING AND DISMISS CHARGES

COMES NOW the Defendant, NORMAN BELCHER, by and through his attorneys of record, Robert M. Draskovich, Esq., and Gary A. Modafferi, Esq., of Turco & Draskovich, LLP, and respectfully moves this Honorable Court for an order striking the Preliminary Hearing in this matter and dismissing all charges pending from that hearing.

The Defendant's Motion to Strike is based upon the argument that Defendant was entitled to effective, conflict-free, assistance of counsel at his preliminary hearing and he was denied that right in violation of the Fifth, Sixth 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 250.¹

¹ **Rule 250. Procedure in capital proceedings.**

1. The scope and purposes of this rule. The provisions of this rule apply only in cases in which the death penalty is or may be sought or has been imposed, including proceedings for post-conviction relief from a judgment of conviction and sentence of death. This court places the highest priority on diligence in the discharge of professional responsibility in capital cases. The purposes of this rule are: to ensure that capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the occurrence of error in capital cases and to recognize and correct promptly any error that may occur; and to facilitate the just and expeditious final disposition of all capital cases.

2. Appointment and qualifications of counsel.

(a) Applicability. This section applies to all defense counsel including public defenders who are appointed to represent indigent persons in capital cases.

1 This Motion is offered in addition to any evidence and/or argument adduced at a hearing
2 on this matter. It is supported by the attached Memorandum of Law.

3 DATED this 13th day of August, 2013.

4 /s/ Gary A. Modafferi

5 By: _____
6 Robert M. Draskovich, Esq. (6275)
7 Gary A. Modafferi, Esq. (12450)
8 Attorneys for Defendant
9

10 **(b) Trial counsel.** Unless the district court determines pursuant to subsection (2)(e) that defense counsel
11 otherwise has the competence to represent an indigent person in a capital case, an attorney appointed as lead
12 counsel at trial at a minimum must have: (1) acted as lead defense counsel in five felony trials, including one
13 murder trial, tried to completion (i.e., to a verdict or a hung jury); (2) acted as defense co-counsel in one death
14 penalty trial tried to completion; and (3) been licensed to practice law at least three years.

15 **(c) Counsel in post-conviction proceedings in district court.** Counsel appointed to represent a petitioner
16 for post-conviction relief in the district court must have acted as counsel in at least two post-conviction proceedings
17 arising from felony convictions and must otherwise satisfy the court that counsel is capable and competent to
18 represent the petitioner.

19 **(d) Counsel on direct and post-conviction appeal.** Counsel appointed to represent an appellant on direct or
20 post-conviction appeal must have acted as counsel in at least two appeals of felony convictions and must otherwise
21 satisfy the court that counsel is capable and competent to represent the appellant.

22 **(e) Exceptions.** If an attorney does not satisfy the minimum requirements set forth in subsections (2)(b), (c),
23 or (d) of this rule, or if the district court otherwise considers it warranted, the court shall hold a hearing to assess
24 the attorney's competence and ability to act as defense counsel. The court shall thoroughly investigate the
attorney's background, training, and experience and consult with the attorney on his or her current caseload. If
satisfied that the attorney is competent and able to provide the representation, the court shall make that finding on
the record and appoint the attorney.

(f) Co-counsel. When the district court appoints defense counsel to provide representation at trial, it shall
appoint two counsel, one of whom must be qualified under this rule to act as lead counsel in a capital case. When
the court appoints defense counsel to provide representation in a direct appeal, a first post-conviction petition for a
writ of habeas corpus, or an appeal from such post-conviction proceeding, the court may only appoint one counsel
who is qualified under this rule.

(g) Appointment of public defender. When the district court appoints an office of a public defender to
provide representation in a capital case, any attorney assigned by the office to act as defense counsel shall prepare
and file with the court the application form required by subsection (2)(h) of this rule.

(h) Application forms and list of qualified counsel. Each judicial district shall maintain a list of qualified
defense counsel and shall establish procedures to ensure that defense counsel are considered and selected for
appointment to capital cases from the list in a fair, equal and consecutive basis. The judicial districts shall further
arrange for the preparation and distribution of application forms to defense attorneys who wish to be included on
the list. The forms must require specific information respecting the attorney's qualifications to act as defense
counsel in a capital case and a complete statement of any discipline or sanctions pending or imposed against the
attorney by any court or disciplinary body. Before appointing any attorney to act as counsel in a capital case, the
district court to which the case is assigned shall carefully consider the information in the attorney's application
form.

[As amended; January 20, 2000.]

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MOTION TO STRIKE PRELIMINARY HEARING AND DISMISS CHARGES will be heard

DATED this 13th day of August, 2013.

By: _____

Robert M. Draskovich, Esq. (6275)
Gary A. Modafferi, Esq. (12450)
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
(702) 474-4222
Attorneys for Defendant

1 **MEMORANDUM OF LAW**

2 The sole eyewitness to identify Norman Belcher at the scene of the charged murder is
3 Nicholas Brabham. He testified to those events at a preliminary hearing held on January 21,
4 2011.² Lance A. Maningo Esq. was one of two mandated death penalty counsel representing
5 Defendant Belcher at that preliminary hearing. Nevada Supreme Court Rule 250 requires the
6 presence of at least two death penalty qualified attorneys throughout every “critical” stage of the
7 proceedings. Earlier Mr. Maningo represented Nicholas Brabham on a felony drug charge
8 involving possession of methamphetamine.³ His actual conflict due to this prior representation
9 prevented effective cross-examination but more importantly, it prevented effective
10 representation as guaranteed by the Sixth Amendment.

11 Current counsel did not recognize the conflict of this representation until recently. When
12 reviewing evidence photographs from Defendant Belcher’s investigation one of the photographs
13 taken by criminalists at the scene of the murder showed Mr. Brabham’s wallet with his State
14 issued identification card in one partition and Mr. Maningo’s professional business card in
15 another.⁴ This picture was apparently the spark that had Mr. Maningo removed by the Court in
16 December 2011. A prior investigator had been reviewing the same photograph with the
17 defendant when the investigator recognized the problem. The problem was reported to the Court
18 and the Court removed Mr. Maningo.⁵

19 Defendant Belcher had previously complained bitterly about his appointed counsel in the
20 earlier part of these proceedings. On May 25, 2011 Defendant Belcher filed an *in proper*
21 *personam* motion to dismiss both his appointed counsel.⁶ On June 8, 2011, the Court held a

22 ² Mr. Brabham’s testimony is found at pp. 102-108 of the preliminary hearing transcript. An excerpt of that
23 testimony is attached as Exhibit A.

24 ³ See attached Exhibit B -Public Access – Case Summary.

⁴ See attached Exhibit C.

⁵ The transcripts apparently dealing with this removal remain sealed

⁶ See attached Exhibit D. Defendant Belcher complained that “at my preliminary hearing Langford did not cross-
examine 95% of witnesses, explaining to me for strategic reasons.” At p.2. As will be later explained, actual
ineffectiveness pursuant to the Strickland test is not the issue. Mr. Maningo’s actual conflict created a presumption
of prejudice. Mr. Belcher may have opined that counsel was deficient and there may have been the appearance of
deficiency, but Defendant Belcher does not have either the burden of proof or the burden of persuasion to show
ineffectiveness because of the actual conflict. Prejudice is presumed and as the United States Supreme Court stated
in Holloway, “reversal is automatic.” See FN 34.

1 hearing on Defendant's Motion to Dismiss Counsel and Appointment of Alternative Counsel.⁷
2 The Court heard *in camera, ex parte* evidence regarding the impact of Mr. Langford's
3 relationship with Federal Public Defender Franny Forsman. The Court denied the motion.

4 On July 18, 2011 Defendant Belcher complained that his lawyers gave him "the
5 impression that they have no interest in defending me."⁸ When Mr. Maningo stated, "I spoke
6 with our client this morning and I believe were ready to proceed as counsel," Mr. Belcher
7 spontaneously stated "no, I'm going to plead guilty today."⁹ In an apparent display of frustration
8 with his appointed counsel, Mr. Belcher further stated, "I'm not going to speak with them, so
9 therefore there's no – I'm going to plead guilty. I'm fully competent. I know what it means. I
10 know all appeals go out the window. I know it's going to hold a death penalty hearing still. I
11 want to plead guilty today."¹⁰ The frustration that Mr. Belcher felt was literally interpreted as an
12 indication of insanity. Mr. Langford said, "I really believe we're all of us best served by having
13 a psych evaluation done..."¹¹ Mr. Maningo stated, "I can represent that I've seen things that had
14 me concerned about his competency."¹² Mr. Belcher had still not been apprised of the fact that
15 Mr. Maningo had also been criminal counsel for witness Brabham. Mr Belcher then told the
16 Court, "I don't feel like one of the attorney's want to help me."¹³ He went on to say "my
17 attorney's already found me guilty,"¹⁴ and "How's he going to talk to me about strategy when
18 all he tells me is I'm going to be found guilty."¹⁵

19 On December 13, 2011 a hearing challenging the constitutionality of the eyewitness
20 identification procedure by eyewitness Brabham of Defendant Belcher was held before this
21 Honorable Court. It was the Defendant's contention throughout the hearing that Mr. Brabham

22 ⁷ Transcript of Proceedings held on June 8, 2011. Ms. Forsman had a relationship with the murder victim and Mr.
23 Langford had known Ms. Forsman for many years. Attached as Exhibit E.

⁸ Exhibit E at p.3.

⁹ Transcript of Proceedings held on July 18, 2011 at p.2. Attached as Exhibit F.

¹⁰ Exhibit F – pp. 2-3.

¹¹ Exhibit F at p.4.

¹² Exhibit E, at p.6 Mr. Belcher was eventually found fit to proceed. Transcript of Proceedings held on September
24 26, 2011 at p.2. attached as Exhibit G.

¹³ Exhibit G at p.2.

¹⁴ Exhibit G at p.3.

¹⁵ Exhibit G at p.5.

1 did not identify Defendant Belcher until he was shown the same photograph that had been
2 widely distributed in the local media in the five week interim between the shooting and the
3 photographic array. It was argued at the hearing that Brabham's use of drugs and other salient
4 factors caused a misidentification of Mr. Belcher.

5 Mr. Brabham's use of methamphetamine immediately prior to the alleged eyewitness
6 identification was admitted at the preliminary hearing by State witness Ashley Riley.¹⁶ Mr.
7 Maningo had represented Mr. Brabham on a charge of possession of methamphetamine. Mr.
8 Brabham's identification became the subject of a comprehensively litigated motion to suppress
9 on the basis that the procedure was the product of impermissible suggestion.¹⁷ Not a single
10 question was asked of Mr. Brabham at preliminary hearing by either defense counsel.¹⁸ Even if it
11 were not the case, it appeared to the Defendant that the identification process was purposefully
12 left untouched by examination at the preliminary hearing. The actual truth of that contention is
13 of no consequence because actual conflict makes examination of that issue unnecessary. In this
14 case, prejudice to Defendant Belcher is legally presumed.

15 The Nevada Supreme Court has recently reaffirmed the legal precept that "the preliminary
16 hearing is a "critical" stage of the criminal proceedings at which a defendant's Sixth
17 Amendment right to counsel attaches."¹⁹ In Patterson, the Court recognized the Sixth
18 Amendment right of counsel of choice at the preliminary hearing stage. The corollary right to
19 counsel of choice at trial was first recognized in Ryan.²⁰ Mr. Belcher was entitled to effective
20 assistance of counsel at this critical stage for his Sixth Amendment right to counsel to have any
21 meaning. The United States Supreme Court has recognized that the Sixth Amendment right to
22 counsel exists, and is needed, in order to protect the fundamental right to a fair trial or a fair
preliminary hearing.²¹ The Constitution guarantees a fair trial through the Due Process Clauses,

¹⁶ Exhibit H at p.60.

¹⁷ A hearing on the Motion was held on August 22, 2012. The Motion was denied.

¹⁸ Excerpt from preliminary hearing transcript attached as Exhibit I at p.105.

¹⁹ Patterson v. State, 129 Nev. Adv. Op. 17, (April 4, 2013)

²⁰ Ryan v. District Ct., 123 Nev. 419, 426 (2007).

²¹ Gideon v. Wainwright, 372 U.S. 335 (1963)

1 but it defines the basic elements of a fair trial largely through the several provisions of the Sixth
2 Amendment, including the Counsel Clause.²²

3 The Sixth Amendment recognizes the right to assistance of counsel because it envisions
4 counsel's playing a role that is critical to the ability of the adversarial system to produce just
5 results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who
6 plays the role necessary to ensure the trial is fair.²³ It is for that very reason that the United
7 States Supreme Court has recognized that "the right to counsel is the right to effective assistance
8 of counsel."²⁴ Government violates the right to effective assistance when it interferes in certain
9 ways with the ability of counsel to make independent decisions about how to conduct the
10 defense.²⁵ Trial or appellate counsel, however, can also deprive a defendant of the right to
11 effective assistance simply by failing to render "adequate legal assistance."²⁶ The United States
12 Supreme Court had not elaborated on the meaning of the constitutional requirement of effective
13 assistance in those presenting claims of "actual ineffectiveness" until its landmark decision in
14 Strickland.²⁷ The standard governing ineffective assistance of counsel claims enunciated in
15 Strickland was adopted by the Nevada Supreme Court in Lyons. It set forth a two-prong test.²⁸
16 Under this two prong test, a defendant who challenges the adequacy of his counsel's
17 representation must show, first, that his counsel's performance was deficient, and second that he
18 (the Defendant) was prejudiced by this deficiency.²⁹

19 ²² "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury
20 of the State and district wherein the crime shall have been committed, which district shall have been previously
21 ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the
22 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance
23 of Counsel for his defence." See also Article 1 § 8 of the Constitution of the State of Nevada.

24 ²³ Strickland v. Washington, 466 U.S. 668, 685 (1984)

25 ²⁴ McMann v. Richardson, 397 U.S. 759, 771 N.14 (1970).

26 ²⁵ Ryan v. District Court, *supra* (right to chosen counsel was interfered with when the district court prevented
27 retained counsel from assuming the defense of co-defendant with waiver of conflict in husband/wife murder trial);
28 Geders v. United States, 425 U.S. 80 (1976) (the court's bar on attorney-client consultation during overnight recess
29 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)

30 ²⁶ Coyler v. Sullivan, 446 U.S. 335, 344 (1980)

31 ²⁷ Strickland v. Washington, 466 U.S. 668 (1984)

32 ²⁸ Warden v. Lyons, 100 Nev. 430 (1984) cert denied 471 U.S. 1004 (1985)

33 ²⁹ Strickland, *supra*.

1 In limited instances a defendant is relieved of the responsibility of establishing the
2 prejudicial effect of his counsel's actions. An actual conflict of interest which adversely affects
3 a lawyer's performance will result in a presumption of prejudice.³⁰ Such a presumption exists in
4 Defendant Belcher's case. An actual conflict exists in Defendant Belcher's case because of Mr.
5 Maningo's successive and/or simultaneously representation of witness Brabham prevented the
6 conflict free representation that the Defendant was constitutionally entitled.

7 Every defendant has a constitutional right to the assistance of counsel unhindered by
8 conflicting interests.³¹ The presumption of prejudice accorded to a showing of actual conflict of
9 interest cases is due, in part, on the difficulty in measuring the effect of representation tainted by
10 conflicting interests.³² In Holloway, the United States Supreme Court stated that, "Joint
11 representation of conflicting interests is suspect because of what it tends to prevent the attorney
12 from doing."³³ Prejudice is presumed the Court stated, "Accordingly, when a defendant is
13 deprived of the presence and assistance of his attorney, either throughout the prosecution or
14 during a critical stage, at least, the prosecution of a capital offense, reversal is automatic."³⁴

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

22 ³⁰ Cuyler v. Sullivan, 446 U.S. 335 (1980). Mannon v. State, 98 Nev. 224, 226 (1982) (Counsel's conflicting
23 ethical obligations regarding confidential statements created actual conflict. No showing prejudice was required
24 for reversal.)

³¹ 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)

³² Strickland, supra 692. Clark v. State, 108 Nev. 324.

³³ Holloway v. Arkansas, 435 U.S. 475, 484 (1978)

³⁴ Holloway, 435 U.S. at 489-90 (internal citations omitted – emphasis supplied)

1 The identification that placed Mr. Belcher at the scene of the murder came from the
2 testimony of Mr. Brabham. Mr. Maningo's representation of Mr. Belcher violated the Sixth
3 Amendment and that violation should be repaired now rather than later.

4
5 **CONCLUSION**

6 The Defendant respectfully prays that his Motion be granted.

7 DATED this 13th day of August, 2013.

8 /s/ GARY A. MODAFFERI
9 By: _____
10 Robert M. Draskovich, Esq. (6275)
11 Gary A. Modafferi, Esq. (12450)
12 815 S. Casino Center Blvd.
13 Las Vegas, Nevada 89101
14 (702) 474-4222
15 Attorneys for Defendant
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ROBERT M. DRASKOVICH, ESQ. (6275)
Gary A. Modafferi, Esq. (12450)
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 474-4222
Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

CASE NO.: C270562

DEPT. NO.: VI

NORMAN BELCHER,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August, 2013, I served a true and correct copy of the foregoing MOTION TO STIKE PRELIMINARY HEARING AND DISMISS CHARGES upon the following:

Robert Daskas, Esq.
Chief Deputy District Attorney
robert.daskas@clarkcountynyda.com

/s/ Erika W. Magana

An Employee of Turco & Draskovich, LLP.

EXHIBIT “A”

IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

FILED

FEB 4 10 00 AM '11

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

Vs.

NORMAN BELCHER,

Defendant.

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)
)
) DC Case No.
) JC Case 10F23008X
) Department IX
)
)
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C270562

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

C-11-270562-1
TRAN
Reporters Transcript
1224138



BEFORE THE HONORABLE JOE BONAVENTURE
JUSTICE OF THE PEACE

Taken on January 21, 2011

At 9:00 a.m.

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
ROBERT LANGFORD, ESQ.
Deputy District Attorney

For the Defendant:

ROBERT LANGFORD, ESQ.
LANCE MANINGO, ESQ.

Reported by: TOM MERCER, CCR No. 33

MERCER & ASSOCIATES
(702) 388-2973

1 Q. Can you raise your hand to be sworn in?

2 THE COURT: Mr. Brabham, are you able to
3 raise your right hand.

4 THE WITNESS: I can.

5

6 (Whereupon, the witness was duly sworn.)

7

8 THE CLERK: Please state your full name,
9 for the record.

10 THE WITNESS: Nicholas Brabham.

11 THE COURT: Please proceed.

12 MR. LALLI:

13 Q. Nick were you living at 9752 Villa Lorena?

14 A. Yes.

15 Q. Who did you live there with?

16 A. What?

17 Q. Who did you live there with?

18 A. William.

19 Q. And did William have a daughter?

20 A. He has a daughter, yes.

21 Q. What was her name?

22 A. Alexis Postorino.

23 Q. Have you been there in the hospital since
24 being shot back on December 6, 2010?

25 A. Yes.

1 Q. Can you tell us what happened when you got
2 shot?

3 A. I went to the top of the stairs and I seen
4 Norman, and I see him and he shot me and I hid on the
5 floor of the closet.

6 Q. When you say he shot you, did he shoot you
7 with a gun?

8 A. Yes.

9 Q. How many times did he fire?

10 A. I think twice. I know for sure twice, maybe
11 more.

12 Q. Who was the individual who shot you?

13 A. What?

14 Q. Who was the individual who shot you?

15 A. His aka, his name is Bates, Norman.

16 Q. Did you know Bates or Norman before this
17 happened?

18 A. Yes.

19 Q. How did you know him?

20 A. Through mutual acquaintance.

21 Q. Had he ever been over to your house?

22 A. Yes.

23 Q. Was he a friend of Bill's ?

24 A. Yes.

25 Q. When Bates shot you, was he alone or was he

1 with someone else?

2 A. Somebody in the background, but I couldn't
3 see who it was, it was dark in the room.

4 Q. So you don't know if that person was male or
5 female?

6 A. No, I don't.

7 Q. You don't know who that person was?

8 A. No.

9 Q. How certain are you that it was Bates who
10 shot you?

11 A. I'm pretty certain.

12 Q. Did you hear -- what happened after you were
13 shot?

14 A. I was laying in the closet, and next thing I
15 heard one more shot and that's it, that's all I
16 remember.

17 Q. Do you know where that other shot came from?

18 A. No.

19 Q. Now, at some point after you were in the
20 hospital, did the police come and see you?

21 A. Yes.

22 Q. Did they talk to you about who shot you?

23 A. Yes.

24 Q. Did you tell them that it was Bates who shot
25 you?

1 A. Yes.

2 Q. Did they show you a series of photographs?

3 A. Yes.

4 Q. Did they ask you to identify Bates, whether
5 you recognized Bates in that series of photographs?

6 A. Yes.

7 Q. Did you recognize him?

8 A. Yes.

9 Q. Did they ask you to do something to the group
10 of photos that they showed you?

11 A. No, they didn't ask me to do anything but
12 when I see him, point him out.

13 Q. And did you do that?

14 A. Yes.

15 Q. Did you actually sign your name under his
16 photograph?

17 A. Yes, yes.

18 MR. LALLI: Your Honor, that concludes
19 direct examination.

20 MR. LANGFORD: No questions, Judge.

21 MR. LALLI: Thank you, Nick.

22 Your Honor, we have no additional
23 witnesses to call; however, I would like to put some
24 stipulations on the record, if I may.

25 THE COURT: Please.

1 MR. LALLI: The State and defense have
2 stipulated that Alexis Postorino is, in fact, the
3 victim of the murder, we are stipulating to her
4 identity, we are stipulating that cause of death was
5 multiple gunshot wounds and that her manner of death
6 was a homicide.

7 We are also stipulating that as a result
8 of being shot Nicholas Brabham suffered substantial
9 bodily harm.

10 MR. LANGFORD: That's correct, Your Honor.
11 Those stipulations are for purposes of preliminary
12 hearing only. And we are stipulating probably more
13 accurately to the identification of Alexis Postorino
14 as the person listed as the victim in the criminal
15 complaint.

16 MR. LALLI: That's correct.

17 THE COURT: Thank you. The stipulations
18 will be noted for purposes of today's hearing only.

19 Anything else on behalf of the State?

20 MR. LALLI: We rest.

21 THE COURT: The State's rested.

22 Any witnesses or evidence on behalf of the
23 defendant?

24 MR. LANGFORD: We have no witnesses to
25 call. I've advised my client of his constitutional

1 right to testify at the preliminary hearing. Based
2 upon my advice he's going to decline to do so today.

3 THE COURT: Thank you. Argument?

4 MR. LALLI: Submit it.

5 MR. LANGFORD: Submit it.

6 THE COURT: It appearing to me from the
7 amended criminal complaint on file and the testimony,
8 exhibits and stipulations adduced at today's hearing
9 that the crimes of burglary while in possession of
10 deadly weapon, robbery with use deadly weapon two
11 counts, murder with use of deadly weapon, attempt
12 murder with use of deadly weapon, battery with use of
13 deadly weapon resulting in substantial bodily harm and
14 third degree arson, all felony offenses, have been
15 committed, there is sufficient evidence that the
16 defendant, Norman Belcher, has committed said
17 offenses, I hereby order he be bound over and held to
18 answer in the Eighth Judicial District Court.

19 This is the date for entry of plea in
20 district court.

21 THE CLERK: February 1, nine a.m., lower
22 level, district court arraignments.

23 THE COURT: As to the exhibits, I believe
24 all have been admitted. There was a request that
25 Exhibit 9, the key, be returned, is that correct?

1 MR. LALLI: Yes, to Detective Hardy, who I
2 believe is still here.

3 THE COURT: We'll return that to the State
4 to hand over to the detective.

5 Anything else?

6 MR. LANGFORD: Nothing from defense, Judge.

7 MR. DASKAS: Nothing from the State,
8 Judge, thank you.

9 THE COURT: Thank you.


10 The defendant will continue to be held
11 without bail. That concludes the proceeding.

12

13 ATTEST: Full, true and accurate transcript of
14 proceedings.

15

16


TOM MERCER, C.C.R. No. 33

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EXHIBIT “B”

09CRN002821-0002 STATE OF NEVADA VS BRABHAM, NICHOLAS J

| | | | | | |
|------------------------|------------|-------------------------|--------|------------------------------|------------|
| File Date | 09/23/2009 | Case Status | CLOSED | Case Status Date | 09/23/2009 |
| Citation Number | | Case Disposition | CLOSED | Case Disposition Date | 09/23/2010 |

Party Information

| | | | | |
|---------------------|------------------------|-------------------|--------------------|-----------------------|
| Party Name | Party Alias(es) | Party Type | Attorney(s) | Attorney Phone |
| BRABHAM, NICHOLAS J | | DEFENDANT CR/TR | MANINGO, LANCE A | |

Party Charge(s)

| | | | | |
|---------------------|---|----------------------------------|-------------------------|--|
| Case Party | BRABHAM, NICHOLAS J | | | |
| Count Code | Description | Disposition | Disposition Date | |
| 1 9769 | POSSESSION OF METHAMPHETAMINE | GUILTY PLEA W/SENT BEFORE PRELIM | 02/08/2010 | |
| Amended Code | Amended Description | Amended Date | | |
| 9552 | POSSESSION DRUG NOT INTRODUCE INTO COMMERCE | | | |

Financial Entries

| | | | |
|------------------|----------------|------------------------|--------------------------|
| Receipt # | Date | Received From | Amount Paid |
| 7057550 | 08/23/2010 | BRABHAM, NICHOLAS JOHN | 200.00 |
| | Payment | Fee | |
| | CASH | 200.00 | FINE 200.00 |
| Receipt # | Date | Received From | Amount Paid |
| 7055150 | 06/22/2010 | BRABHAM, NICHOLAS JOHN | 150.00 |
| | Payment | Fee | |
| | CASH | 150.00 | FINE 100.00 |
| | | | DV OR ANALYSIS FEE 50.00 |

Docket Entries

| | |
|-------------|---|
| Date | Text |
| 09/23/2010 | CASE CLOSED |
| 09/23/2010 | DEFENDANT PRESENT ON PAD SUBSTANCE ABUSE EDUCATION DONE AND FEES PAID IN FULL PER LRS 350.00 FINE PAID IN FULL NEW DUI STILL IN SCREENING CASE CLOSED |

09/23/2010 STATUS CHECK - HELD The following event: STATUS CHECK NLV scheduled for 09/23/2010 at 8:30 am has been resulted as follows: Result: STATUS CHECK - HEARD Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

09/23/2010 N.L. TYRRELL, JP A STEGE, DDA L MANINGO, ESQ K JOHNSON, CLK RECORDED BY JAVS/TS

08/24/2010 SET FOR COURT APPEARANCE Event: STATUS CHECK NLV Date: 09/23/2010 Time: 8:30 am Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

08/24/2010 STATUS CHECK - HELD The following event: STATUS CHECK NLV scheduled for 08/24/2010 at 8:30 am has been resulted as follows: Result: STATUS CHECK - HEARD Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

08/24/2010 DEFENDANT NOT PRESENT ON PAD SUBSTANCE ABUSE EDUCATION DONE OWES 75.00 PER LRS 350.00 FINE PAID IN FULL WHEN PAYMENT WAS MADE THE CASE WAS CONTINUED BY THE FRONT COUNTER DA STATES NEW DUI IN SCREENING PASSED FOR STATUS CHECK PAD

08/24/2010 N.L. TYRRELL, JP D WESTMEYER, DDA M MCNEIL FOR L MANINGO, ESQ K JOHNSON, CLK S EULIANO, CR/T

06/22/2010 SET FOR COURT APPEARANCE Event: STATUS CHECK NLV Date: 08/24/2010 Time: 8:30 am Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

06/22/2010 STATUS CHECK - HELD The following event: STATUS CHECK NLV scheduled for 06/22/2010 at 8:30 am has been resulted as follows: Result: STATUS CHECK - HEARD Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

06/22/2010 DEFENDANT PRESENT ON PAD SUBSTANCE ABUSE EDUCATION DONE OWES 75.00 PER LRS DEFENDANT HAS 150.00 TODAY - BALANCE DUE 200.00 PASSED FOR FEES PAID TO LRS / FINE PAD CONTINUES

06/22/2010 N.L. TYRRELL, JP A NANCE, DDA J HUA FOR L MANINGO, ESQ K JOHNSON, CLK N SILVERMAN, CR

04/20/2010 STATUS CHECK - HELD The following event: STATUS CHECK NLV scheduled for 04/20/2010 at 8:30 am has been resulted as follows: Result: STATUS CHECK - HEARD Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

04/20/2010 SET FOR COURT APPEARANCE Event: STATUS CHECK NLV Date: 06/22/2010 Time: 8:30 am Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

04/20/2010 DEFENDANT PRESENT ON PAD SUBSTANCE ABUSE EDUCATION DONE OWES 75.00 PER LRS DEFENDANT STATES HE HAS THE 75.00 TODAY - COURT INSTRUCTS THE DEFENDANT TO PAY AT LRS DEFENDANT STATES HE LOST HIS ID AND IS WAITING FOR HIS BIRTH CERTIFICATE TO GET A NEW ID - CANNOT DO THE C/S WITHOUT AN ID PASSED FOR PROOF OF C/S AND CERTIFICATE PAD

04/20/2010 N.L. TYRRELL, JP D WESTMEYER, DDA K KIRIGIN FOR L MANINGO, ESQ K JOHNSON, CLK N SILVERMAN, CR

03/23/2010 SET FOR COURT APPEARANCE Event: STATUS CHECK NLV Date: 04/20/2010 Time: 8:30 am Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

03/23/2010 STATUS CHECK - HELD The following event: STATUS CHECK NLV scheduled for 03/23/2010 at 8:30 am has been resulted as follows: Result: STATUS CHECK - HEARD Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

03/23/2010 DEFENDANT PRESENT ON PAD SUBSTANCE ABUSE EDUCATION DONE OWES 75.00 PER LRS DEFENDANT STATES HE IS LOOKING FOR WORK - ASKS FOR 30 DAYS PASSED FOR STATUS CHECK PAD

03/23/2010 N.L. TYRRELL, JP C MORTON, DDA K KIRIGIN FOR L MANINGO, ESQ K JOHNSON, CLK N SILVERMAN, CR

02/08/2010 Defendant sentenced to: STAY OUT OF TROUBLE Completed on 09/23/2010 Due Date: Required: YES Units: Balance:

02/08/2010 Defendant sentenced to: SUBSTANCE ABUSE COUNSELING. Completed on 09/23/2010 Due Date: Required: YES Units: Balance:

02/08/2010 Defendant sentenced to: STAY OUT OF TROUBLE Due Date: Required: YES Units: Balance:

02/08/2010 Defendant sentenced to: SUBSTANCE ABUSE COUNSELING. Due Date: Required: YES Units: Balance:

02/08/2010 Suspended Sentence Due Date: Required: YES Units: 60 DAYS Balance: 60

02/08/2010 SET FOR COURT APPEARANCE Event: STATUS CHECK NLV Date: 03/23/2010 Time: 8:30 am Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

02/08/2010 ARRAIGNMENT HEARING HELD The following event: FELONY ARRAIGNMENT NLV scheduled for 02/08/2010 at 8:30 am has been resulted as follows: Result: ARRAIGNMENT HEARING HELD Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

02/08/2010 DRUG ANALYSIS FEE NLV Charge #1: POSSESSION OF METHAMPHETAMINE Receipt: 7055150
Date: 06/22/2010

02/08/2010 \$300 FINE Charge #1: POSSESSION OF METHAMPHETAMINE Receipt: 7055150 Date: 06/22/2010
Receipt: 7057550 Date: 08/23/2010

02/08/2010 INITIAL ARRAIGNMENT COMPLAINT PRESENTED ADVISED WAIVED DEFENDANT PRESENT
ON PAD L MANINGO, ESQ CONFIRMS AS CONTRACT ATTORNEY DEFENDANT WAIVES THE
RIGHT TO A TRIAL AND ENTERS A PLEA OF GUILTY TO REDUCED CHARGE POSSESSION OF
DANGEROUS DRUG NOT TO BE INTRODUCED INTO INTERSTATE COMMERCE 60 DAY
SUSPENDED SENTENCE 350.00 FINE (203/80/10/7/50) OR 35 HOURS FLAT COMMUNITY
SERVICE; SUBSTANCE ABUSE EDUCATION; STAY OUT OF TROUBLE PASSED FOR STATUS
CHECK PAD

02/08/2010 N.L. TYRRELL, JP C MORTON, DDA L MQNINGO, ESQ K JOHNSON, CLK N SILVERMAN, CR

12/28/2009 SET FOR COURT APPEARANCE Event: FELONY ARRAIGNMENT NLV Date: 02/08/2010 Time: 8:30
am Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2

12/28/2009 HEARING HELD The following event: FELONY ARRAIGNMENT NLV scheduled for 12/28/2009 at
8:30 am has been resulted as follows: Result: CRIMINAL HEARING HELD Judge: TYRRELL,
NATALIE L Location: DEPARTMENT 2

12/28/2009 DEFENDANT NOT PRESENT ON PAD DEFENDANT CALLED THE COURT - LIVES OUT OF STATE
AND NEEDS TIME TO GER TO LAS VEGAS PASSED FOR DEFENDANT TO BE PRESENT AND I/A
PAD

12/28/2009 M MASKALL FOR N.L. TYRRELL, JP A ALBRITTON, DDA K JOHNSON, CLK N SILVERMAN, CR

09/23/2009 FORM GENERATED CRIMINAL SUMMONS Sent on: 09/23/2009 16:22:37

09/23/2009 SET FOR COURT APPEARANCE Event: FELONY ARRAIGNMENT NLV Date: 12/28/2009 Time: 8:30
am Judge: TYRRELL, NATALIE L Location: DEPARTMENT 2 Result: CRIMINAL HEARING HELD

09/23/2009 COMPLAINT SWORN TO

10/14/2008 BAIL AMOUNT Charge #1: POSSESSION OF METHAMPHETAMINE

EXHIBIT “C”

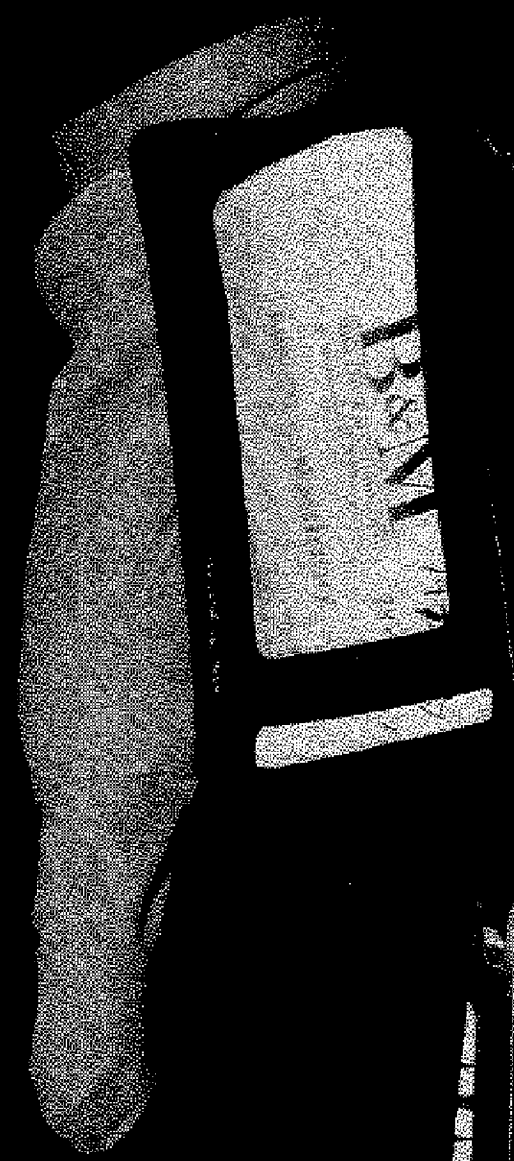


EXHIBIT “D”

50
FILED

MAY 25 2011

John L. Belcher
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA

Plaintiff,

vs.

NORMAN BELCHER

Defendant

) Case No.: C-11-270562

) Dept. No.: VI

) Docket No.: _____

) H.D. 6/6/2011

C-11-270562-1
MDC
Motion to Dismiss Counsel
1431197



MOTION TO DISMISS COUNSEL AND

APPOINTMENT OF ALTERNATE COUNSEL

COMES NOW, the defendant, Norman Belcher, and moves this honorable court to DISMISS COUNSEL, Robert L. Langford and Lance A. Meningo, and appoint other Counsel to represent this defendant.

This motion is based upon all papers, pleadings and documents on file. Factual statements set forth in the POINTS AND AUTHORITIES contained therein.

Dated this 6 day of May 2011

DEFENDANT

- POINTS AND AUTHORITIES -

It is respectfully requested of this court to grant this motion to dismiss counsel for the reasons listed below:

CLERK OF THE COURT

MAY 13 2011

RECEIVED

I. PROCEDURAL BACKGROUND

Since Robert L. Langford was appointed as Counsel on or about January 21, 2011, defendant, Norman Belcher, has been prejudiced and suffered manifest injustice based on Counsel's refusal or failure to:

1) Present to this Court meritorious pretrial issues that may dismiss the charges against defendant, and/or preserve issues for appeal.

2) Robert Langford informed me he is good friends with the godmother of the deceased victim, and since becoming my attorney, has been in contact with the godmother.

3) At my preliminary hearing Langford did not cross-examine 95% of witnesses, explaining to me for strategic reasons.

4) I last had court on 3-23-11 and have not heard from either attorney since, which at that court hearing a trial was set.

5) On 4-25-11 the private investigator for my case hired by Langford, Dennis R. Reefer, visited me and I explained to him that I needed to speak with my attorneys, and requested him to inform them, being that I'd already made numerous attempts to reach them by calling their office to no avail. He explained to me that he would visit with my attorneys on 4-28-11 and will inform them.

6) On 4-29-11 I last attempted again to

1 Contact both attorneys by phone, leaving messages with
2 their Secretaries. So being 4-29-11 was a Friday. The
3 entire next week of Monday thru Friday 5-2-11 thru
4 5-6-11 I waited and hoped they'd visit me to where
5 I Am now under the impression that they ^{have} no interest in
6 defending me. I have a high profile case in which
7 the death penalty is sought.

8 II. ARGUMENT

9 Defendant, Norman Belcher, asserts he is being
10 denied his right to effective representation due to wholly
11 inadequate actions of his court-appointed counsel.

12 Further, Counsel's innate action comport to nothing more
13 than a violation of defendant's due process rights.

14 Counsel has not returned any of defendant's phone calls;
15 defendant has left numerous messages with voice mail,
16 secretary and office clerks.

17 Defendant has made several request to counsel to submit
18 numerous meritorious pretrial issues to this court that
19 may have the charges against the defendant dismissed or
20 at the very least preserve the issues for an appeal.

21 Defendant has an unqualified right to legal assistance
22 that expresses loyalty to said defendant; "The right to counsel
23 is the right (also) to effective assistance of counsel." Cueller
24 v. Sullivan 100 S.Ct. 1708 (1980); and Frazier v. U.S., 18 F.3d 778
25 (9th Cir. 1994). Thus, the adversarial process protected by

1 the Sixth Amendment requires that the accused have "counsel
2 acting in the role of an advocate." Anders v. California, 87 S.Ct.
3 1396 & 1480 (1967).

4 A party whose counsel is unable to provide effective
5 or adequate assistance is no better than one who has
6 no counsel at all; and any appeal(s) would be futile in
7 its gesture. Evitts v. Lucey, 105 S.Ct. 830 (1985); Douglas
8 v. California, 83 S.Ct. 814 (1963).

9 Appointed Counsel for this defendant has done nothing
10 to fairly/properly represent him, refuses to take my phone
11 calls or return my messages this alone is a viable claim
12 as to ineffective counsel. Candel v. Bunnell, No. 92-5530
13 D.C. No. CV-90-6419-WJR(5); filed May 25, 1994 (9th Cir.)

14 Therefore, defendant contends that although Counsel
15 has been appointed in this case, the actions of Counsel,
16 or lack thereof, have created unfair prejudice and
17 obstacles which do not comport the fair procedures owed
18 to the defendant.

19 The plurality opinion in Evitts and Douglas, *infra*, made
20 it very clear that:

21 "There is lacking that equality demanded by the
22 fourteenth amendment, where the "rich man" enjoys the
23 benefit of the law being righteously practiced; in that,
24 Counsel's examination step-by-step (into the record of
25 the case), and research of the law, and marshaling of the

1 facts/arguments in his behalf is done as should befit an
2 advocate of defense; while the indigent, so burdened by
3 a preliminary determination that his case is without
4 merit, is forced to shift for himself." 105 S.Ct. at
5 842; 83 S.Ct. at 816-17

6 Notwithstanding the strong policy favoring autonomy, "ethical,
7 professional and constitutional principals" established coun-
8 sel's standards owed to his/her client. See: American Bar
9 Association (ABA), and Professional Responsibility Code (CPR)

10 As stated above, Mr Langford has informed me
11 he is good friends with the godmother of the deceased
12 victim, and has been in contact with her.

13 So, clearly, a conflict of interest now exist between
14 Counsel/Client (defendant), as all faith and trust has been
15 diminished as a result of Counsel's actions or lack thereof,
16 and a "showing" of conflict of interest requires now
17 showing of prejudice. Cuyler v. Sullivan, 100 S.Ct. at 1717.

18 The law addresses itself to actualities. Adjudication is not a
19 mere mechanical process, nor does it compel any either
20 (or determination.) Griffin v. Illinois, 76 S.Ct. 585 592-594
21 (1956).

22 Therefore, fundamental fairness requires the abolition
23 of prejudice which defendant is presently suffering.

24 This is an actuality that the law must address.
25 Anything short of abdication would further a manifest

1 of injustice. The "effectiveness (in assistance) of
2 counsel" is an individual's most fundamental right, for
3 without it, every other right defendant has to assert
4 becomes affected.
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16 DATED THIS 6th day of May, 2011.

17 I, Norman D. Belcher Jr., do

18 solemnly swear, under the penalty of perjury, that

19 the above information is accurate,

20 correct, and true to the best of my knowledge.

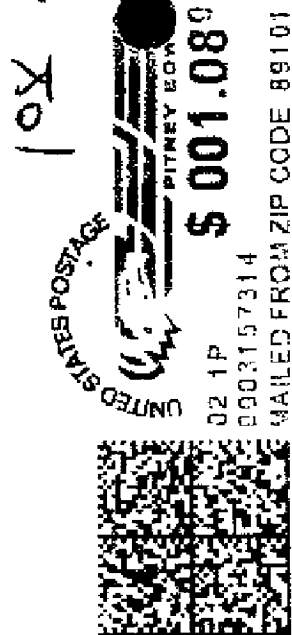
21 NRS 171.102 and NRS 208.165.

22 Respectfully submitted,

23
24 **Norman D. Belcher Jr.**
25

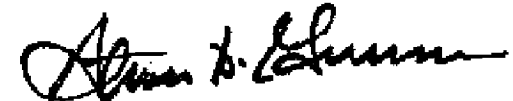
Defendant

Norman D. Belcher Jr. 1076336
330 S. Casino Center Blvd.
Las Vegas, NV. 89101



14

EXHIBIT “E”



CLERK OF THE COURT

TRAN

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

NORMAN BELCHER, aka NORMAN
DAVID BELCHER, JR,
Defendant.

CASE#: C270562-1
DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE
WEDNESDAY, JUNE 8, 2011

PARTIAL TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO DISMISS COUNSEL AND APPOINTMENT OF
ALTERNATE COUNSEL

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
Chief District Attorney
ROBERT STEPHENS, ESQ.
Deputy District Attorney

For the Defendant:

ROBERT L. LANGORD, ESQ.
LANCE A. MANINGO, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

RECEIVED
JUN 10 2011
DEPT 6

1 Wednesday, June 8, 2011 at 10:27 a.m.

2
3 THE MARSHAL: Bottom of page 10, State of Nevada v. Belcher, Norman
4 David, Jr.

5 THE COURT: All right. Good morning, go ahead and state your
6 appearances please.

7 MR. LALLI: Christopher Lalli on behalf of the State.

8 MR. LANGFORD: Robert Langford and Lance Maningo, Your Honor, on
9 behalf of Mr. Belcher. I apologize, Judge, for not being here Monday. I was
10 previously scheduled for a hearing in Pahrump and I couldn't get out of it. And
11 it's a death case, and so I felt it necessary for me to be here.

12 THE COURT: Understood, and Mr. Maningo was here so that was fine.
13 So, we have Mr. Belcher's motion seeking to dismiss these two attorneys who
14 have been appointed as counsel for him in this case, which is -- it's a death
15 penalty case, correct?

16 MR. LALLI: It is, Your Honor.

17 THE COURT: All right. I'm going to need to hear -- well, you still want to
18 proceed with that motion, correct?

19 THE DEFENDANT: Yes.

20 THE COURT: Okay. So, I'm going to need to hear from counsel and Mr.
21 Belcher outside of your presence to try to learn more about the conflicts that
22 have arisen and whether there is a basis to dismiss them. But, if you have
23 something you'd like to tell me I'd be happy to hear it.

24 MR. LALLI: Well, Your Honor, -- and I understand the Court's desire to
25 engage in ex parte dialogue with the Defendant and the -- and his attorneys.

1 THE COURT: So as not to waive attorney/client privilege.

2 MR. LALLI: Right. And I certainly appreciate that. The allegations here
3 are that his attorneys have not come to see him. And with great respect to the
4 Court I think that is an issue that can be discussed without invading the
5 attorney/client privilege.

6 THE COURT: Okay.

7 MR. LALLI: If the discussion turns to where it can't be, then I would
8 certainly -- and I mean, if the Court orders me --

9 THE COURT: No, I understand what you're --

10 MR. LALLI: -- out of here, I'm gone.

11 THE COURT: I understand.

12 MR. LALLI: I'm not going to take the Court on.

13 THE COURT: No, I understand what you're saying.

14 MR. LALLI: But, that is -- that would be my position, Your Honor.

15 THE COURT: Right. Well, there's an issue about not visiting, and then
16 there's an alleged conflict, I guess is what it's alleging as to Mr. Langford.

17 MR. LALLI: So, is the Court going to permit me to stay for at least a little
18 while or am I being asked to leave?

19 THE COURT: I suppose you're right to that extent. I'm a little concerned
20 though that once I start having him tell me about it that it's going to go into:
21 Well, he told me this and he told me that.

22 MR. LALLI: I understand.

23 THE COURT: Let me --

24 THE DEFENDANT: The issues not with the visiting any more.

25 THE COURT: It's not with the visiting anymore.

1 THE DEFENDANT: No.

2 THE COURT: So, does it relate to -- in order to address your motion what
3 -- are you going to need to tell me about communications with your attorneys?

4 THE DEFENDANT: Yes.

5 THE COURT: Let me just -- before I kick you out, let me -- because I
6 don't know that this necessarily gets into, part of it may. So, Mr. Langford,
7 there's an assertion that you may have a conflict. I presume the person you
8 have contact with that he's referring to is Franny Forsman?

9 MR. LANGFORD: That's correct, Your Honor.

10 THE COURT: Okay. And what's your -- I mean, what's your relationship
11 with Franny Forsman. I mean, I presume you know her, but --

12 MR. LANGFORD: Of course, like --

13 THE COURT: I think we all do.

14 MR. LANGFORD: Right. Like everybody in the bar in Clark County
15 certainly knows Franny Forsman. I have worked with her on several projects. I
16 -- however I wouldn't consider us to be social friends. I -- you know, at first I
17 thought I'd never been to her house. But, I recall that once I did go to her
18 house. It was a campaign meeting for a judge. Had nothing to do with her
19 actually, she was just hosting the meeting. That's the only time I've been to
20 her house. I've met her husband on a couple of occasions. I certainly didn't
21 feel like I had any conflict between my feelings about her personally or
22 allegiance to her at all that would compromise my ability to mount a good
23 defense for Mr. Belcher.

24 I did however, and I've explained this also to Mr. Belcher that when
25 I was first called by the Office of Appointed Counsel, I did contact Ms. Forsman

1 to tell -- let her know that I didn't have any conflict and it was my intent to
2 accept the appointment. I did that as a matter of respect, because she is the
3 Federal Public Defender and --

4 THE COURT: Until last week.

5 MR. LANGFORD: Yes, she was, I should say. And, you know, many of
6 us have called her on occasion for advice. And, you know, that -- she of
7 course indicated to me that the last thing she would want would be for anyone
8 to compromise their defense of any criminal defendant. That's her oath. She
9 expected me --

10 THE COURT: I'm sure that would be her position.

11 MR. LANGFORD: She expected me to be just as zealous in my
12 representation as she would be.

13 THE COURT: So, -- okay, so you did talk to her when you got the call
14 about this case. Previous to that -- I mean, when would be the last time you
15 had a conversation with her?

16 MR. LANGFORD: Prior to that time would have been about a month or so
17 earlier. And I guess it's interesting. It was just as -- maybe it was a week or
18 so I -- it was actually a day after this incident that we're here for had occurred.
19 I called her on a professional issue. She had -- was instrumental in putting
20 together a conference on *Kentucky versus* --

21 MR. MANINGO: *Padilla*.

22 MR. LANGFORD: -- *Padilla*, yes. I attended that and in fact it had a
23 couple of successful writs granted by courts and wanted to share that with her
24 and express my -- she interestingly didn't mention anything about this. So, I
25 mean, she didn't feel comfortable sharing any of those personal feelings with

1 me, as I probably would not be with her. I think that speaks to the fact we
2 have a very professional relationship, but we don't have a personal one.

3 MR. MANINGO: And, Your Honor, just to complete the record, I made a
4 courtesy call to Ms. Forsman just like Mr. Langford's. And my only connection
5 with her is through -- I'm on the Federal CJA Panel. And she often is
6 participating --

7 THE COURT: Might be pulled in as conflict counsel.

8 MR. MANINGO: Exactly and that would be the extent of my relationship.

9 MR. LALLI: Your Honor, may I inquire. Counsel just indicated that she
10 participates in -- or at one point did participate in -- is it the selection process of
11 how those people like Mr. Maningo become a part of that conflict board.

12 THE COURT: To get on the CJA Panel.

13 MR. MANINGO: I don't believe she's a part of that process, --

14 THE COURT: Right.

15 MR. MANINGO: -- but in terms of CLEs and when they do the mock trial
16 for the mentor/mentee program, things of that nature. She's always involved,
17 her, or a representative of FPD office.

18 MR. LALLI: Thank you, Your Honor.

19 MR. LANGFORD: It's somewhat moot as well, because that's no longer
20 her position.

21 THE COURT: Right.

22 MR. LANGFORD: It's my understanding in fact she's accepted --

23 THE COURT: She is no longer as of last Tuesday the Federal Public
24 Defender --

25 MR. LANGFORD: And I think she's actually

1 THE COURT: -- Rene Valladeres is.

2 MR. LANGFORD: -- going to go out of state to pursue and advanced
3 degree in creative writing, so --

4 MR. LALLI: That's my understanding, Your Honor.

5 THE COURT: She's going to Bennington to take a writing course, one
6 week a month or something.

7 It should -- I know Ms. Forsman as well. I don't have a personal
8 relationship with her, but I see her at professional functions like probably every
9 Judge I know. Just want that clear while we're talking about the subject as
10 well.

11 So, Mr. Belcher, do you have any facts about these counsel's
12 relationship with Ms. Forsman beyond what they've just disclosed?

13 THE DEFENDANT: No, but to call her is to see -- is basically to see on
14 lines of how she feels about them representing me. To where if they want to
15 know how she feels about representing me then what if was to be a negative
16 response. And they're the only ones that know what was said.

17 THE COURT: Um.

18 MR. LANGFORD: Maybe I can clear that up a bit, Your Honor.

19 THE COURT: Thank you.

20 MR. LANGFORD: I didn't call her to ask her permission or to see if she
21 was okay with it. Quite honestly I just called her to tell her I was going to do it
22 so that she wouldn't read about it in the newspaper and --

23 THE COURT: Okay.

24 MR. MANINGO: Same, Your Honor.

25 THE DEFENDANT: I have other issues besides that problem.

1 THE COURT: Okay. All right, so what I'm aware of based on this
2 presentation about the nature of counsel's relationships with Ms. Forsman does
3 not give rise to an impermissible conflict of interest between them and their
4 client. So, that would not be a basis to dismiss them. So, I will at this point,
5 given what the indications I've gotten about what the other concerns are, I
6 think I'm going to have you step out at this point. If you want -- I mean, I
7 don't expect it to take too long, if you want to hang out for a few minutes. I'll
8 certainly bring you back in to let you know what the resolution is.

9 MR. LALLI: Very well. Thank you, Your Honor.

10 THE COURT: Okay. All right, now.

11 MR. STEPHENS: Your Honor, I'm assuming you'd like me to leave also.
12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 THE COURT RECORDER: Can we go off.

15 THE COURT: Oh, yeah, let's go off for a minute.

16 *[Sealed portion of hearing 10:37 to 11:04 a.m.]*

17 MR. LALLI: Your Honor, just FYI off the record.

18 THE COURT RECORDER: We're on the record. I got it working.

19 THE COURT: Again.

20 THE COURT RECORDER: Yes.

21 THE COURT: Okay. All right, so we're back on the record. And as I was
22 saying based on what I heard today I do not see a basis to dismiss counsel at
23 this point. I have asked counsel to meet further with Mr. Belcher and Mr.
24 Belcher to meet with counsel and discuss the case in order to proceed to
25 properly prepare the case with an eye toward trial. And I have set a status

1 hearing on July 18th at 8:30 to follow up and see how things are going with
2 respect to counsel's preparation. All right.

3 MR. LALLI: Thank you.

4 MR. LANGFORD: Thank you, Your Honor.

5 MR. MANINGO: Thank you.

6 THE COURT: Thank you.

7 [Proceeding concluded at 11:05 a.m.]

8 *****

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21 ATTEST; I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to be best of my ability.

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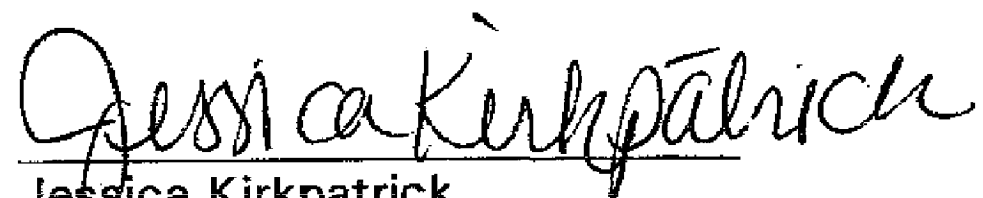
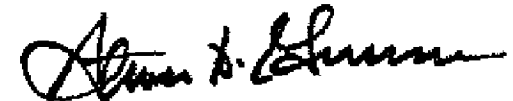

Jessica Kirkpatrick
Court Recorder/Transcriber

EXHIBIT “F”



CLERK OF THE COURT

1 **TRAN**

3 **ORIGINAL**

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

CASE#: C270562-1
DEPT. VI

10 vs.

11 NORMAN BELCHER, aka NORMAN
12 DAVID BELCHER, JR,
13 Defendant.

14 BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE
MONDAY, JULY 18, 2011

**PARTIAL TRANSCRIPT OF PROCEEDINGS
STATUS CHECK**

18 **APPEARANCES:**

19 For the State:

CHRISTOPHER LALLI, ESQ.
Chief District Attorney

22 For the Defendant:

ROBERT L. LANGORD, ESQ.
LANCE A. MANINGO, ESQ.

25 RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

DEPT 6
JUL 21 2011
RECEIVED

Monday, July 18, 2011 at 9:59 a.m.

THE MARSHAL: Page 5, State of Nevada v. Belcher, Norman.

MR. MANINGO: I'll move over the right side.

THE COURT: Sorry we're having to switch folks back and forth today.

All right, good morning. Go ahead and state your appearances.

MR. LANGFORD: Robert Langford for Mr. Belcher.

MR. MANINGO: Lance Maningo for Mr. Belcher.

MR. LALLI: Christopher Lalli on behalf of the State.

THE COURT: Okay. All right, so where are we folks? Counsel, why don't you tell me where your perspective shows us.

MR. MANINGO: We -- Mr. Langford and I both tried to see Mr. Belcher on two occasions since our last hearing. We were unable to meet with him. Was it three?

MR. LANGFORD: Three.

MR. MANINGO: I'm sorry, on three occasions, Your Honor. I spoke with our client this morning and I believe we're ready to proceed as his counsel.

THE DEFENDANT: No, I'm going to plead guilty today.

MR. LANGFORD: No.

THE COURT: Pardon me?

THE DEFENDANT: I'm ready to plead guilty to my charges today.

MR. MANINGO: Your Honor, we haven't had the opportunity to discuss that with Mr. Belcher.

THE DEFENDANT: 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

1 know all appeals go out the window. I know it's going to hold a death penalty
2 hearing still. I want to plead guilty today.

3 THE COURT: To all 7 charges?

4 MR. MANINGO: Your Honor, may we approach?

5 THE COURT: Yes.

6 *[Bench Conference On]*

7 THE COURT: I want to stay on the record.

8 THE COURT RECORDER: Oh, yeah, we're on.

9 THE COURT: Okay.

10 MR. LALLI: I could be back with an acknowledgement of rights in about
11 15 minutes.

12 MR. LANGFORD: I'm sure you could. You know what, we don't --

13 THE COURT: Is there a -- I mean, absent a question about his
14 competency --

15 MR. LANGFORD: Yeah.

16 THE COURT: -- it is his decision on a plea. I mean, I --

17 MR. MANINGO: I don't even know what --

18 THE COURT: I invite you to make as complete a record as you need to.

19 MR. LANGFORD: Well, I mean, we've gone back and forth on this issue.
20 He doesn't want to meet with us. Then he meets with us. He has strange
21 ideations about conversations. And so, I believe that we probably should have
22 the psych people look at this before we proceed.

23 MR. LALLI: May I inquire whether his psych was previously done?

24 MR. LANGFORD: No, there wasn't.

25 THE COURT: There hasn't been any competency evaluation done?

1 MR. MANINGO: Not that I know of. I know Andy -- Andrea Luem
2 represented him before us. I'm not sure.

3 MR. LANGFORD: No, there hasn't been. What happened was we were
4 initially going to do that and then he changed his mind. And so, then it became
5 moving from doing the competency to a straight psych evaluation --

6 THE COURT: Right, --

7 MR. LANGFORD: -- for --

8 THE COURT: -- for the death penalty.

9 MR. LANGFORD: -- the death penalty case. And that hasn't been
10 scheduled to be completed.

11 THE COURT: So, it hasn't happened yet?

12 MR. LANGFORD: No, ma'am.

13 THE COURT: Okay. But, now he's going to refuse to probably be
14 evaluated. We'll have to deal with that. I mean, we -- obviously I want to be
15 sure he is competent. So, --

16 MR. LANGFORD: Right.

17 THE COURT: All right. Aside from the fact that he's standing here trying
18 to plead guilty to everything against your advice --

19 MR. LANGFORD: And has done so on previous occasion, then he
20 changes his mind. We know that they've got him on psychotropic drugs at the
21 jail. So, you know, it -- I really believe we're all of us best served by having a
22 psych evaluation done, taking into account that the psychotropic drugs are
23 being given.

24 THE COURT: Okay. All this evaluation would be is for competency
25 purposes.

1 MR. LANGFORD: That's --

2 THE COURT: That's all I'm ordering. I mean, obviously you can do
3 whatever you need to do in the case, but I would just be ordering a
4 competency evaluation.

5 MR. LANGFORD: I mean, what if we come back and somebody says:
6 Well, --

7 THE COURT: And we'll need to have you complete the form requesting
8 the competency evaluation.

9 MR. LALLI: All right. If counsel is saying for the record that he has seen
10 and Mr. Maningo has seen those things in Mr. Belcher which would lead him to
11 believe that he might be suffering from some deficit in his competency then
12 certainly that would be appropriate.

13 THE COURT: Yes.

14 MR. LALLI: And I think if that's what they're just saying then fine. If
15 they're just saying: Hey their guy just wants to do something --

16 THE COURT: I agree.

17 MR. LALLI: -- contrary to --

18 MR. LANGFORD: No.

19 MR. LALLI: -- and they don't agree with it, then I don't think there's a
20 showing that there's a competency issue.

21 THE COURT: I agree.

22 MR. LANGFORD: I mean, I think at this point --

23 THE COURT: So, are you concerned that he cannot assist in his defense?

24 MR. LANGFORD: Yes. That's --

25 THE COURT: Are you concerned that he does not understand --

1 MR. LANGFORD: -- exactly what I was going to articulate, that he can't
2 assist in his defense.

3 MR. MANINGO: I can represent that I've seen things that had me
4 concerned about his competency.

5 THE COURT: Okay. And that was Mr. Maningo.

6 MR. LALLI: And these are two honorable gentlemen who I certainly
7 respect and admire --

8 THE COURT: Right, of course.

9 MR. LALLI: -- and I'm not going to quibble with that.

10 THE COURT: Right.

11 MR. LALLI: But, I just wanted to make sure that that was the record I'm
12 making.

13 THE COURT: All right. Well, I'm going to have to let him know that's
14 where we are then.

15 *[Bench Conference Off]*

16 THE COURT: All right. So, counsel have raised concerns before we
17 proceed on the plea that Mr. Belcher has expressed his desire to make to
18 evaluate his competency. And I am required once that issue is raised regarding
19 competency to have that evaluated before I --

20 THE DEFENDANT: I'm going to refuse the visit then.

21 THE COURT: Pardon me.

22 THE DEFENDANT: I'm going to refuse -- I'm going to refuse to speak to
23 the psych. I know I'm competent.

24 THE COURT: Okay.

25

1 THE DEFENDANT: So, I'm not even going to come to court no more. I'm
2 pleading guilty today. If you want to take my plea take it, if not --

3 THE COURT: I can't take it if there's a concern about your competency,
4 sir. I --

5 THE DEFENDANT: There's no concern about my -- they're not my
6 attorneys. You gave them to me. They're not my attorneys. I'm not dealing
7 with them.

8 MR. LANGFORD: Your Honor, perhaps if we could have a status check
9 of --

10 THE DEFENDANT: There's not going to be no status check. I'm not
11 coming back to court.

12 MR. LANGFORD: -- one week, Your Honor, so that I can determine what
13 the caselaw is on this particular issue.

14 MR. LALLI: Your Honor, if Mr. Belcher wants to plead guilty --

15 THE DEFENDANT: I'm going to plead guilty.

16 MR. LALLI: -- then he ought to speak to the -- whoever goes and visits
17 him so that he can convince that person that he is in fact competent.

18 THE COURT: Right.

19 MR. LALLI: And then the Court would certainly be free to accept his
20 guilty plea.

21 THE COURT: Right. And you understand that's the problem is that --

22 THE DEFENDANT: But, I been through this with them.

23 THE COURT: Please be quiet and listen. The problem is that I can't
24 accept your plea of guilty, and I can't find that it's freely and voluntarily
25 entered when there's a concern about whether you're competent. If in fact

1 you're evaluated and it's determine: Yep, he's fully competent to proceed.
2 Then you can plead guilty everyday -- you know, you can do -- that's your
3 decision to make ultimately, whether counsel agrees or not. You are correct,
4 you can plead guilty, but only if I know that in fact you are competent to make
5 that decision. You understand that it would be a real problem if courts were
6 accepting guilty pleas from folks who might not be competent to do so.

7 THE DEFENDANT: Okay. Well, I've been through this before and they
8 kept saying they were going to bring a psychiatrist. And a psychiatrist never
9 came.

10 THE COURT: Well, we're going to make sure that someone comes now
11 and does a competency evaluation. So, I'm just going to go ahead and --

12 THE DEFENDANT: I'm not -- I'm going to refuse. I'm not coming back to
13 court no more.

14 THE COURT: Oh, well, now -- oh, I need to send it to Competency Court
15 to do that.

16 MR. LALLI: So, you're -- the case is being referred to -- it's still
17 Department V?

18 THE COURT: It's now Department XXV sitting next door.

19 MR. LALLI: Understood. Thank you.

20 THE COURT: So, let's go ahead and refer it for a competency hearing.

21 THE DEFENDANT: I'm not going to come back to court, so that's up to
22 you.

23 THE COURT: Then I guess you won't be pleading.

24 THE MARSHAL: Stand up.
25

1 THE CLERK: Competency proceedings will be August 9th at 2 p.m.
2 Department XXV.

3 THE COURT: All right. And get, right, the form. Mr. Langford and Mr.
4 Maningo, if you would ---

5 MR. LANGFORD: I'm sorry.

6 THE COURT: -- complete the forms req -- for the competency evaluation.
7 So, that will proceed in Department XXV for the competency hearing. If you're
8 determined competent then it would be returned back to me for further
9 proceedings and we can take up the issues at that time.

10 MR. LALLI: Thank you, Your Honor. The -- Your Honor, the --

11 THE COURT: Hold.

12 THE CLERK: Excuse me, I misspoke. That will be at 9:30.

13 THE COURT: Sorry, so it's August 9th at 9:30 a.m.?

14 THE CLERK: Yes, Your Honor.

15 MR. LALLI: Your Honor, I believe Mr. Maningo has filed a motion
16 pertaining to discovery. Is everything just kind of stayed until this is --

17 THE COURT: That'll be stayed.

18 MR. LALLI: Thank you.

19 THE COURT: Everything is stayed and we'll put it back on calendar if
20 he's determined competent, unless of course he enters a guilty plea.

21 ...

22 ...

23 ...

24

25

1 MR. MANINGO: Very good. Thank you, Your Honor.

2 MR. LALLI: Thank you.

3 THE COURT: Okay. Thank you.

4 [Proceeding concluded at 10:07 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video recording in the above-entitled case to be best of my ability.

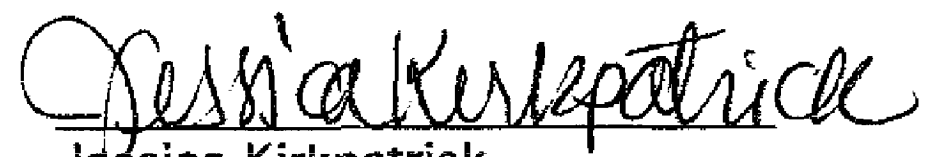
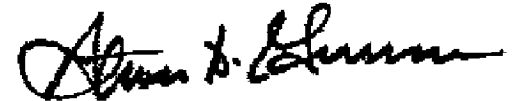

Jessica Kirkpatrick
Court Recorder/Transcriber

EXHIBIT “G”



CLERK OF THE COURT

TRAN

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

NORMAN BELCHER, aka NORMAN
DAVID BELCHER, JR,
Defendant.

CASE#: C270562-1
DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE
MONDAY, SEPTEMBER 26, 2011

TRANSCRIPT OF PROCEEDINGS
STATUS CHECK: REPRESENTATION OF DEFENDANT

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
Chief District Attorney

For the Defendant:

LANCE A. MANINGO, ESQ.
ROBERT L. LANGFORD, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

RECEIVED
SEP 29 2011
DEPT 8

1 Monday, September 26, 2011 at 8:56 a.m.

2
3 THE MARSHAL: Top of page, Judge, State of Nevada v. Belcher,
4 Norman.

5 THE COURT: Okay. Go ahead and state appearances folks.

6 MR. LANGFORD: Robert Langford for Mr. Belcher.

7 MR. MANINGO: Lance Maningo also for Mr. Belcher.

8 MR. LALLI: Christopher Lalli on behalf of the State.

9 THE COURT: Okay. So, where are we on this? I see that Mr. Belcher
10 was found competent and was returned back to this department. So, where
11 are we?

12 MR. LANGFORD: I think we're on for the Court's determination as to
13 whether to replace current counsel with alternate counsel.

14 THE COURT: Right. So, Mr. Belcher, where are you on that matter?

15 THE DEFENDANT: I still feel there's an attorney client break down. I'm
16 just not comfortable. I don't feel like one of the attorney's want to help me.

17 THE COURT: Okay. I know we had talked about this some previously in
18 particular about the alleged conflict issue. Is there something other than that
19 that we're talking about?

20 THE DEFENDANT: No.

21 THE COURT: Okay. They don't have a legal conflict of interest as I've
22 previously found. I know I did put it over just to see how things were going.
23 But, I mean, you need to have counsel to represent you in this very serious
24 matter. And these are skilled and qualified counsel, who do not have a legal
25

1 conflict of interest. So, I don't know what to tell you. You need to proceed
2 with counsel.

3 THE DEFENDANT: I understand.

4 THE COURT: And that's only going to work if you communicate with
5 them so they can help you. I mean, I don't have a justification legally to
6 terminate their interest and hire yet new counsel to start over.

7 THE DEFENDANT: I understand.

8 THE COURT: So, are you going to cooperate with them and continue
9 with counsel?

10 THE DEFENDANT: I doubt it.

11 THE COURT: Well, what are you going to do? I mean, it's not --

12 THE DEFENDANT: I don't know.

13 THE COURT: -- you're facing these very serious charges. And I want
14 you to have the kind of representation you ought to have to challenge the
15 State's case.

16 THE DEFENDANT: My attorney's already found me guilty. He's telling
17 me I'm -- I don't want to discuss it right now, but all he's focused on is the
18 disposition of being found guilty, the sentencing matter. That's all he's
19 focused on.

20 THE COURT: Well, sentencing is certainly a big part of what you have to
21 look at in this case where the State is seeking the death penalty. That's not to
22 say that's the only thing.

23 THE DEFENDANT: Uh-huh.

24 THE COURT: But, it's a big part of what they need to be researching and
25 preparing for.

1 THE DEFENDANT: But, not -- no other research on anything else, not
2 even knowing where -- what kind of evidence can hold up or not, we don't
3 know. I don't have the legal vocabulary for this --

4 THE COURT: Yeah.

5 THE DEFENDANT: -- so I just have to go with what you got to say.

6 THE COURT: Well, --

7 THE COURT RECORDER: Mr. Maningo, can you pull the microphone
8 closer?

9 THE COURT: Drag it over -- will it pull out? No.

10 MR. MANINGO: I think it might be stuck.

11 MR. LANGFORD: Why don't we put him over closer?

12 We'll go meet with Mr. Belcher, Your Honor, and go over the
13 evidence more carefully with him this --

14 THE COURT: The evidence on guilt --

15 MR. LANGFORD: Correct.

16 THE COURT: -- for the so called guilt phase.

17 MR. LANGFORD: And discuss future strategies with him.

18 THE COURT: Are you going to meet with them and let them talk to you
19 about those issues?

20 THE DEFENDANT: I'm not sure right now.

21 THE COURT: You're not sure right now. Well, I can't force you to
22 participate with them, but you're not going to complain later that you didn't
23 have adequate counsel if you chose not to communicate with them. Do you
24 understand that? It's up --

25 THE DEFENDANT: I understand. I understand.

1 THE COURT: Okay. I mean, I want you to have every possible
2 representation that you can in this case. And you have two very competent
3 experienced counsel that are prepared to do that for you. But, it's only going
4 to happen if you communicate with them and about strategy and preparation
5 for this trial.

6 THE DEFENDANT: How's he going to talk to me about strategy when all
7 he tells me is I'm going to be found guilty?

8 THE COURT: Well, he's telling me he's going to come talk about the
9 evidence and how best to respond to it. So, I'm going to order that you have
10 that conversation which requires both of you to -- all three of you to participate
11 in the conversation. I'm going to put this over for 30 days for another status
12 check. And at that time -- I mean, depending on -- I mean, I'm hoping that you
13 will be satisfied that you in fact your counsel are looking at both aspects of the
14 case, both the guilt phase and the penalty phase.

15 And again they're going to need your help to be able to do that.
16 And we'll see where you are at that point. And if I need to hear from you
17 separately then I will do that at that time. But, let's go ahead and have that
18 conversation which ought to take some time to get through what the State's
19 got in this case and how best to respond to it. Let's go ahead and put this
20 over for 30 days.

21 THE CLERK: October 24th, at 8:30 a.m.

22 THE DEFENDANT: Did you get my apology letter for how I was acting in
23 your courtroom?

24 THE COURT: I believe I had read that before. And I do accept that
25 apology. And that's fine. I mean, obviously you're in a difficult situation but I

1 do want to have the best possible representation for you to go forward in this
2 case. And I want to be sure that your rights are protected here, okay.

3 MR. LALLI: Your Honor, I don't think I received a copy of that letter. So,
4 I would request that please.

5 THE COURT: Okay. Let me --

6 MR. LALLI: I don't need it this moment obviously --

7 THE COURT: Right.

8 MR. LALLI: -- but I just would --

9 THE COURT: That --

10 MR. LALLI: -- do request a copy of that.

11 THE COURT: That's fair. Okay. We'll go ahead and get a copy of that
12 to you.

13 MR. LALLI: Thank you.

14 THE COURT: Thank you.

15 MR. LANGFORD: Thank you, Your Honor.

16 [Proceeding concluded at 9:03 a.m.]

17 *****

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to be best of my ability.

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Jessica Kirkpatrick
Court Recorder/Transcriber

EXHIBIT “H”

IN THE JUSTICE'S, COURT OF LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

FILED

FEB 4 10 00 AM '11

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

Vs.

NORMAN BELCHER,

Defendant.

)
)
) DC Case No.
) JC Case 10F23008X
) Department IX

C270562

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

C-11-270562-1
TRAN
Reporters Transcript
1224138



BEFORE THE HONORABLE JOE BONAVENTURE
JUSTICE OF THE PEACE

Taken on January 21, 2011

At 9:00 a.m.

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
ROBERT LANGFORD, ESQ.
Deputy District Attorney

For the Defendant:

ROBERT LANGFORD, ESQ.
LANCE MANINGO, ESQ.

Reported by: TOM MERCER, CCR No. 33

MERCER & ASSOCIATES
(702) 388-2973

1 Q. Tell us what's going on upstairs?

2 A. We were just like hanging out talking and
3 like, smoking weed and --

4 MR. LANGFORD: I'm sorry, Your Honor, I
5 can't hear what she's saying.

6 THE COURT: Everyone needs to be able to
7 hear you because everything you say is being taken
8 down, so I need you to keep your voice up.

9 THE WITNESS: We were smoking weed and
10 smoking meth.

11 MR. LALLI:

12 Q. You were smoking marijuana and smoking
13 methamphetamine?

14 A. Yes.

15 Q. Where was that being done?

16 A. In Nick's room.

17 Q. Is Nick's room upstairs?

18 A. Yes, it is.

19 Q. Where was Alexis during this time?

20 A. I'm not sure.

21 Q. She wasn't in the room there with you?

22 A. No.

23 Q. At some point -- besides ingesting drugs,
24 what were you and Nick doing?

25 A. Talking.

EXHIBIT “I”

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IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

FILED

FEB 4 10 00 AM '11

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

Vs.

NORMAN BELCHER,

Defendant.

Handwritten: C 270562
DC Case No.
JC Case 10F23008X
Department IX
Handwritten: C 270562

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

C-11-270562-1
TRAN
Reporters Transcript
1224138



BEFORE THE HONORABLE JOE BONAVENTURE
JUSTICE OF THE PEACE

Taken on January 21, 2011

At 9:00 a.m.

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
ROBERT LANGFORD, ESQ.
Deputy District Attorney

For the Defendant:

ROBERT LANGFORD, ESQ.
LANCE MANINGO, ESQ.

Reported by: TOM MERCER, CCR No. 33

MERCER & ASSOCIATES
(702) 388-2973

1 A. Yes.

2 Q. Did they show you a series of photographs?

3 A. Yes.

4 Q. Did they ask you to identify Bates, whether
5 you recognized Bates in that series of photographs?

6 A. Yes.

7 Q. Did you recognize him?

8 A. Yes.

9 Q. Did they ask you to do something to the group
10 of photos that they showed you?

11 A. No, they didn't ask me to do anything but
12 when I see him, point him out.

13 Q. And did you do that?

14 A. Yes.

15 Q. Did you actually sign your name under his
16 photograph?

17 A. Yes, yes.

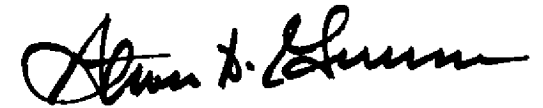
18 MR. LALLI: Your Honor, that concludes
19 direct examination.

20 MR. LANGFORD: No questions, Judge.

21 MR. LALLI: Thank you, Nick.

22 Your Honor, we have no additional
23 witnesses to call; however, I would like to put some
24 stipulations on the record, if I may.

25 THE COURT: Please.



CLERK OF THE COURT

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

NORMAN BELCHER, aka,
Norman David Belcher, Jr., #1076336
Defendant.

CASE NO: C-11-270562-1

DEPT NO: VI

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE PRELIMINARY
HEARING TESTIMONY AND DISMISS CHARGES

DATE OF HEARING: AUGUST 26, 2013
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ROBERT J. DASKAS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Strike Preliminary Hearing Testimony And Dismiss Charges.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

FACTUAL AND PROCEDURAL HISTORY

On January 21, 2011, a Preliminary Hearing was held in Justice Court Department 9 before the honorable Joe Bonaventure. Defendant was represented by attorneys Robert

1 Langford and Lance Maningo. Eight (8) witnesses - - including Nicholas Brabham - - were
2 called by the State. During the Preliminary Hearing, defense counsel made the strategic
3 decision to cross-examine only one (1) of those eight (8) witnesses (Mr. Laroya). Defense
4 counsel made the strategic decision to ask no questions of Nicholas Brabham. This strategic
5 decision undoubtedly was discussed with Defendant by defense counsel.¹

6 On December 12, 2011, during a hearing before this Court, Lance Maningo informed
7 this Court of a potential conflict regarding his continued representation of Defendant
8 Belcher. TR at p. 4. Mr. Maningo explained that, while reviewing crime scene photographs,
9 he saw a photograph of a wallet which presumably belonged to witness Nicholas Brabham.
10 TR at p. 5. The wallet contained a business card of Mr. Maningo's law firm. TR at p. 5.
11 Further research revealed that Mr. Maningo's law firm represented Nicholas Brabham in a
12 case which resulted in a misdemeanor plea.² TR at p. 5. Mr. Maningo explained, "[T]he
13 extent of my firm's representation of him was status check for fines, fees, and community
14 service." TR at p. 5. Mr. Maningo informed this Court that he made one (1) appearance on
15 Mr. Brabham's case on September 23, 2010. TR at p. 5. The misdemeanor case was closed
16 on that date because Mr. Brabham satisfied a "stay out of trouble" condition of the case. TR
17 at p. 5. Mr. Maningo explained that he never appeared in court with Mr. Brabham. TR at p.
18 5. Finally, Mr. Maningo stated, "I've spoken to Mr. Belcher. He has no issue or concern
19 with it. But we all, I think, agree that the conflict really rests with Mr. Brabham." TR at p.
20 6.

21 Out of an abundance of caution, the State requested that Mr. Maningo be removed
22 from the case. TR at p. 7-8. This Court agreed. *Id.*

23 //

24 //

25 //

26
27 ¹ Counsel recognizes that, if this Court deems it necessary, a hearing may need to be held to elicit testimony from Robert Langford
and Lance Maningo to establish this fact.

28 ² Case Number 08FN2386B.

1 **DISCUSSION**

2 **I. THE ISSUE REGARDING MR. MANINGO'S REPRESENTATION OF A**
3 **WITNESS HAS BEEN RESOLVED BY THIS COURT**

4 Defendant filed the instant Motion to Strike Preliminary Hearing and Dismiss
5 Charges based on Mr. Maningo's representation of Nicholas Brabham. Defendant's current
6 lawyers argue that Mr. Maningo's "actual conflict due to this representation prevented
7 effective cross-examination but more importantly, it prevented effective representation as
8 guaranteed by the Sixth Amendment." Motion at p. 4. Defendant's current lawyers
9 apparently "did not recognize the conflict of this representation until recently." Motion at p.
10 4.

11 Although Defendant's current counsel only recently recognized this issue, prior
12 counsel, the State, Defendant and, most importantly, this Court, were made aware of it - -
13 and resolved it - - eight (8) months ago. 12/12/11 TR at p. 4. Mr. Maningo, in the presence
14 of Defendant Belcher, told this Court, "I've spoken to Mr. Belcher. He has no issue or
15 concern with it." TR at 6. Accordingly, Defendant is not entitled to the relief he now seeks.

16 **II. THERE WAS NO PREJUDICE TO DEFENDANT BECAUSE DEFENDANT**
17 **AND HIS LAWYERS MADE THE STRATEGIC DECISION TO WAIVE**
18 **CROSS EXAMINATION OF THE WITNESS**

19 Defendant's current lawyers claim that Mr. Maningo's prior representation of
20 Nicholas Brabham "prevented effective cross-examination..." of Mr. Brabham. Motion at 4.
21 Defendant glosses over a critical fact: Defendant, through his lawyers, made the strategic
22 decision to waive cross-examination of Nicholas Brabham. Undoubtedly, this strategic
23 decision was discussed with Mr. Belcher. Defendant cannot now be heard to complain that
24 his lawyer did not *effectively* cross-examine a witness when he agreed that very witness
should not be cross-examined at all.

25 Additionally, in a twisted bit of logic, Defendant acknowledges that "[t]he
26 conversations Mr. Maningo is presumed to have had with Mr. Brabham ... are *obviously*
27 *privileged.*" Remarkably, Defendant then claims that "[f]ailure to expose those
28 conversations prevents Defendant Belcher from receiving effective representation." Motion

1 at 8. In other words, Defendant's argument is that counsel's failure to expose conversations
2 *which legally could not be exposed because they were privileged* constitutes ineffective
3 representation. Defendant acknowledges those conversations were legally off limit.
4 Accordingly, there was no prejudice to Defendant.

5 **III. DEFENDANT IS NOT ENTITLED TO THE REMEDY HE REQUESTS**
6 **BECAUSE PROBABLE CAUSE EXISTED TO BIND OVER DEFENDANT**
7 **EVEN ABSENT NICHOLAS BRABHAM'S TESTIMONY**

8 Assuming, *arguendo*, that Defendant's argument had any merit whatsoever, he would
9 not be entitled to the relief he seeks (striking the Preliminary Hearing and dismissing the
10 charges). Absent the testimony of Nicholas Brabham, there was probable cause to bind over
11 Defendant on the charges.

12 Defendant argues that "[t]he sole eyewitness to identify Norman Belcher at the scene
13 of the charged murder is Nicholas Brabham." Motion at 4. Defendant intimates that an
14 effective cross-examination of Nicholas Brabham would have destroyed Brabham's
15 identification of Defendant Belcher at Preliminary Hearing as the perpetrator of the crimes
16 and, therefore, resulted in dismissal of the charges. *See* Motion at 4, 8, 9 ("The identification
17 that placed Mr. Belcher at the scene of the murder came from the testimony of Mr.
18 Brabham..."). What Defendant fails to recognize is the identification of Defendant Belcher
19 at the scene of the murder came from a second source at the Preliminary Hearing.

20 Detective Ken Hardy testified at the Preliminary Hearing. TR at p. 83. On January
21 12, 2011, Detective Hardy interviewed Nicholas Brabham at University Medical Center
22 (UMC) where was recovering from his gunshot injuries. TR at p. 86. Detective Hardy
23 showed Nicholas Brabham a photographic lineup which contained six (6) photographs,
24 including Defendant Belcher in position number three 3. TR at p. 87-93. Nicholas Brabham
25 identified Defendant Belcher as the perpetrator of the crimes. Brabham's signature appeared
26 under the photograph in position number three 3. TR at p. 92. A copy of the photographic
27 lineup was admitted during the Preliminary Hearing as State's Exhibit 5. TR at p. 92. Thus,
28 contrary to Defendant's argument, testimony independent of Nicholas Brabham was
admitted during Preliminary Hearing through Detective Ken Hardy which identified

1 Defendant Belcher as the perpetrator of the crimes. Detective Hardy's testimony alone,
2 coupled with the admission of the photographic lineup, constituted probable cause to bind
3 over Defendant on the charges.

4 **CONCLUSION**


5 Based on the foregoing, Defendant's Motion to Strike Preliminary Hearing and
6 Dismiss Charges must be denied.

7 DATED this 22nd day of August, 2013.

8 Respectfully submitted,

9 STEVEN B. WOLFSON
10 Clark County District Attorney
Nevada Bar #001565

11
12 BY


13 ROBERT M. DRASKOVICH
14 Chief Deputy District Attorney
Nevada Bar #004963

15 **CERTIFICATE OF FACSIMILE TRANSMISSION**

16 I hereby certify that service of State's Opposition To Defendant's Motion To Strike
17 Preliminary Hearing Testimony And Dismiss Charges, was made this 22nd day of August,
18 2013, by facsimile transmission to:

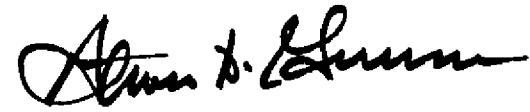
19 ROBERT M. DRASKOVICH, Esq.
20 474-1320

21
22 BY


23 R. JOHNSON

24 Secretary for the District Attorney's Office
25
26
27

28 RJD/rj



CLERK OF THE COURT

RPLY

ROBERT M. DRASKOVICH, ESQ. (6275)
Gary A. Modafferi, Esq. (12450)
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 474-4222
Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

CASE NO.: C270562

DEPT. NO.: VI

NORMAN BELCHER,

Defendant.

**REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE
PRELIMINARY HEARING AND DISMISS CHARGES**

COMES NOW, NORMAN BELCHER, by and through his attorneys of record, Robert M. Draskovich, Esq., and Gary A. Modafferi, Esq., of counsel, for Turco & Draskovich, LLP, and respectfully submits the following Reply to State's Opposition to Defendant's Motion to Strike Preliminary Hearing and Dismiss Charges.

The Defendant's Motion to Strike Preliminary Hearing and Dismiss and remand is based upon the argument that Defendant was entitled to effective, conflict-free, assistance of counsel at his preliminary hearing and he was denied that right 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.

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1 This Reply is offered in addition to any evidence and/or argument adduced at a hearing
2 on this matter.

3 DATED this 13th day of September, 2013.

4 /s/ Gary A. Modafferi
By: _____
5 Robert M. Draskovich, Esq. (6275)
6 Gary A. Modafferi, Esq. (12450)
7 815 S. Casino Center Boulevard
8 Las Vegas, Nevada 89101
9 Attorneys for Defendant
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1 **MEMORANDUM OF LAW**

2 The United States Supreme Court has required heightened reliability in the adjudicative
3 process leading to a death sentence.¹ Defendant Belcher was constitutionally entitled to conflict
4 free assistance of counsel at his preliminary hearing. He did not receive that assistance and that
5 error should be corrected now instead of wasting resources at a trial and correcting that error on
6 appeal.²

7 The State's Opposition misapprehends the right to conflict free assistance of counsel. The
8 State's Opposition also misapprehends the concomitant procedure that must be employed
9 should waiver of the right to conflict free representation be considered by the trial court. The
10 waiver procedure was set out and mandated in Ryan.³ This required procedure was not followed
11 at Defendant Belcher's preliminary hearing.

12 On January 21, 2011, the day of the preliminary hearing, Defendant Belcher did not know
13 that his lawyer had also represented critical witness Nicholas Brabham. This disclosure was not
14 made to the Defendant until approximately 10 months after the fact.⁴ At the time the State was
15 made aware of this actual conflict, they immediately moved to disqualify Mr. Maningo. The
16 State's position then was very clear:

17 MR. LALLI: Your Honor, it's our position that due to the nature of
18 who this witness is and I think Mr. Maningo has indicated a clear conflict
19 of interest in having represented this gentleman. This Nick Brabham I'm
20 not sure – I know the Court has a lot of cases. Nick Brabham is the person
21 who Mr. Belcher shot and left for dead.

22 THE COURT: Uh-huh.

23 ¹ Loewenfield v. Phelps, 484 U.S. 231, 238-39 (1988) ("Qualitative difference between death and other penalties
24 calls for greater degree of reliability when the death sentence is imposed").

² The Defendant 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 to the prejudice suffered by Defendant
Belcher.

³ Ryan v. Dist. Ct., 123 Nev 419 (2007) (attached for Court's convenience as Exhibit B)

⁴ 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." (See attached Exhibit
A, Transcript of Proceedings December 12, 2011 at p. 5.) The Court minutes attached to the Motion to Strike are
specific in that Mr. Maningo personally represented Brabham in court on possession of methamphetamine charges.

1 MR. LALLI: Who has the ability to identify him and –

THE COURT: He's a pretty important witness.

2 MR. LALLI: -- is a critical, critical witness in the case.

THE COURT: Yeah.

3 MR. LALLI: Which is a capital case, which is a case that there will be
4 no offer made. This is a case that will go to trial. And so out of an
5 abundance of caution it is our position that Mr. Belcher needs a new
6 lawyer just because this is a case that will be litigated well beyond the
7 existence of the case in front of Your Honor. This case will go to the
8 Supreme Court.⁵

9 The "clear" conflict that existed at the Defendant's preliminary hearing with this "critical"
10 witness has poisoned the well and it must be corrected before this matter can proceed. In its
11 Opposition, the State seemingly argues that the recent holding in Patterson, that the preliminary
12 hearing is a critical stage of the proceedings for purposes of the Sixth Amendment right to
13 effective assistance of counsel, should be disregarded.⁶ The State argues that Brabham's
14 testimony and its impact on the probable cause assessment at the preliminary hearing can be
15 parceled out and that this Court can revisit the justice court's decision much like a reviewing
16 court at a Franks hearing.⁷ The State suggests that probable cause can be found apart from the

15 ⁵ Exhibit A.

16 ⁶ Patterson v. Nevada, 129 Nev. Adv. Op. 13 (filed April 4, 2013)

17 ⁷ Franks v. Delaware, 438 U.S. 154 (1978) In Franks the Supreme Court set forth the procedure to challenge the
18 veracity of an affidavit supporting a search warrant. The summation of that procedure is outlined below. It includes
19 an assessment of probable cause when the material that is subject of the alleged falsity or reckless disregard is
20 proven. The State has no authority to support the imposition of this procedure in this instance. No such authority
21 exists because the harm to be prevented is so much different:

22 "In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of
23 course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an
24 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. 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. Defendant Belcher 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.

1 testimony of the witness that created the conflict. The impact of conflict on the right of effective
2 assistance of counsel is not measured in these suggested increments

3 Given Mr. Maningo's actual conflict, he was not ethically allowed to be at the preliminary
4 hearing representing Mr. Belcher in any capacity. His divided loyalty to Brabham prevented
5 systematic effective assistance of counsel. In Patterson, the Nevada Supreme Court stated that
6 pretrial proceedings are often considered to be "critical" stages because "the results might well
7 settle the accused's fate and reduce the trial itself to a mere formality."⁸ The issue before this
8 Court is not just whether Mr. Maningo was ineffective for failing to cross-examine his former
9 client at preliminary hearing. Instead, the larger issue is whether Mr. Maningo's representation
prevented effective assistance of counsel at this critical stage.

10 In Coleman, the United States Supreme Court emphasized the need for effective assistance
11 of counsel at the preliminary hearing stage.⁹ There, the majority recited the significant steps
12 which counsel could take at that juncture to protect and preserve his client's rights:

13 First, the lawyer's skilled examination and cross-examination of
14 witnesses may expose fatal weaknesses in the State's case that may lead
15 the magistrate to refuse to bind the accused over. Second, in any event, the
16 skilled interrogation of witnesses by an experienced lawyer can fashion a
17 vital impeachment tool for use in cross-examination of the State's
18 witnesses at the trial, or preserve testimony favorable to the accused of a
19 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.

20 The Sixth Amendment right to counsel includes a correlative right to representation free
21 from conflicts of interest.¹⁰ This right is not witness specific as argued by the State in its
22 Opposition.¹¹ Joint and successive representation of conflicting interests is suspect because of

23 ⁸ Patterson, supra quoting, Powell v. Alabama, 287 U.S. 45, 57 (1932)

24 ⁹ Coleman v. Alabama, 399 U.S. 1 (1970).

¹⁰ Lewis v. Mayle, 391 F.3d 989, 995 (9th Cir. 2004)

¹¹ The State argued that "Defendant made a strategic decision to waive cross-examination of Nicholas Brabham. Undoubtedly, this strategic decision was discussed with Mr. Belcher." Opposition at p.3. There is no record of this

1 the effect it may have on a counsel's performance.¹² To establish a violation of the right to
2 conflict-free counsel, the defendant must show either that (1) in spite of objection, the trial court
3 failed to allow him the opportunity to show that potential conflicts impermissibly imperil his
4 right to a fair trial or (2) that an actual conflict of interest existed."¹³

5 Both the State and the Court recognized that this case presented an actual conflict and both
6 the State and Court concurred on the remedy of immediate removal when presented with the
7 issue.¹⁴ Mr. Lalli stated that disqualification and removal of Mr. Maningo was necessary,
8 "Because this is one of those profound conflicts – or one of those profound issues that
9 eradicates everything." Mr. Lalli was correct. Mr. Maningo's representation of Witness
10 Brabham caused actual conflict that created ineffective assistance of counsel at the preliminary
11 hearing.¹⁵

12 If Mr. Belcher knew of the conflict then, at the time of the preliminary hearing, he would
13 have objected. Any person in their right mind would have objected. The State's suggestion, that
14 Mr. Maningo's comment that "he (Defendant Belcher) has no issue or concern with it" and that
15 this constituted a legal waiver by the Defendant is legally and factually incorrect.¹⁶ It is
16 factually incorrect because Mr. Belcher did not know of the conflict he was allegedly waiving.
17 It is legally incorrect because in order to be voluntary, Defendant Belcher had to know of the
18 conflict before waiver could be considered.

19 In Ryan, the Nevada Supreme Court set forth exacting requirements that must be made
20 before a finding of valid conflict free assistance of counsel can be determined. This procedure
21 came with the understanding that if the waiver of conflict-free representation is valid it would
22 entail the waiver of certain important rights at trial, on appeal, and in post-conviction

23 decision but more importantly when the decision was made, the Defendant must have been informed about the
24 nature of the conflict that existed. Any advice the Defendant received from counsel at that point cannot be
25 considered. Defendant Belcher did not know about this conflict and accordingly he was incapable of waiving that
26 conflict pursuant to Ryan v. Dist. Ct., 123 Nev. 419 (2007)(Attached for Court's convenience as Exhibit B)

¹² Holloway v. Arkansas, 435 U.S. 475 at 489-90 (1978)

¹³ Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)(A "possible conflict [of interest] inheres in almost every instance
of multiple representation).

¹⁴ Exhibit A at pp. 7-11.

¹⁵ 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)

¹⁶ Exhibit A at p.4, as argued in Opposition at p.3.

1 proceedings, including waiver of the right to seek a mistrial based on any conflicts arising from
2 the conflicted representation.¹⁷

3 Pursuant to the Court's directive in Ryan, the attorney who has the conflict must advise their
4 client of their right to consult with independent counsel to advise them on the nature of the
5 conflict of interest. If the Defendant chooses not to seek the advice of independent counsel, they
6 must expressly waive their right to do so, or their waiver of conflict free representation will be
7 ineffective. When a defendant knowingly, intelligently, and voluntarily waives the right to
8 conflict-free representation, the district court must accept the waiver. Once the district court
9 accepts the waiver, the defendant cannot subsequently seek a mistrial arising from the conflict
10 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.¹⁸

11 In this case, the State argues that Mr. Maningo's statement made ten months after the fact
12 constitutes effective waiver.¹⁹ This is simply untrue. Defendant Belcher had a right to know of
13 the conflict before the preliminary hearing for waiver to the right to conflict free representation
to be effective.

14 The Court, his counsel, and independent counsel should have all counseled Defendant
15 Belcher on the impact of this conflict. This did not happen. A defendant may waive his right to
16 the assistance of an attorney who is unhindered by conflicts.²⁰ However, "a valid waiver of
17 conflict must be voluntary, knowing and intelligent, such that the defendant is sufficiently
18 informed of the consequences of his choice."²¹ Defendant Belcher did not know of the
19 consequences of Mr. Maningo's representation of witness Brabham accordingly he could not
20 have possibly waived the impact of those consequences.²²

21 ¹⁷ Ryan, supra, at p.4. Attached as Exhibit B. Surprisingly, considering this Opposition, in Ryan, the State in Ryan
22 presented a littery of cases and arguments that mitigated against finding a valid waiver where the existence of
interest existed. See fn. 20.

23 ¹⁸ Ryan, supra at p.4, attached as Exhibit B.

¹⁹ Opposition at p.3. "I've spoken to Mr. Belcher. He has no issue or concern with it."

24 ²⁰ Holloway, supra 435 U.S. 475, 483 N.5.

²¹ Belmontes v. Woodford, 350 F.3d. 861, 885 (9th Cir. 2003).

²² 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.

1 Courts have uniformly required that the canvassing court “ascertain with certainty” that a
2 defendant knowingly and intelligently waived that right by “focusing on what the defendant
3 understood.”²³ Being generally advised of the dangers and possible consequences of the conflict
4 is constitutionally insufficient.²⁴ These types of general advisements are constitutionally
5 insufficient. Instead, specific ramifications of Mr. Maningo’s representation of witness Brabham
6 must have been communicated to Mr. Belcher. This did not happen Mr. Belcher was not told
7 that his attorney owed a continuing duty of loyalty to witness Brabham. Mr. Belcher was not
8 told that Mr. Maningo had an ethical obligation to maintain any confidences learned through his
9 representation of witness Brabham. Defendant Belcher was not told about issues of addiction
10 and perception frailties because those topics could not be ethically exposed by Mr. Maningo’s
11 cross-examination of his former client. Those topics though were at the heart of Defendant
Belcher’s defense.

12 The Ninth Circuit has continually held that a reviewing court must “indulge every
13 reasonable presumption against the waiver of fundamental rights.”²⁵ The State’s glancing,
14 unsupported assertion that Mr. Maningo’s after the fact statement suffices as a valid waiver is
15 not legally supportable. Ryan dealt with conflict waiver and the right to chosen counsel in
16 retained cases. However, the assistance of counsel guaranteed by the Sixth Amendment also
17 contemplates that such assistance be untrammelled and unimpaired in court appointed cases. The
court cannot require that one lawyer simultaneously represent conflicting interests.²⁶

18 The State alleges in its Opposition that “Defendant cannot now be heard to complain that his
19 lawyer did not effectively cross-examine a witness when he agreed that very witness should not
20 be cross-examined at all.”²⁷ There is no evidence of this alleged agreement and even if there
21 was such an agreement it could not have been effectively counseled because Defendant Belcher
22 did not know that his attorney was also the witnesses’ attorney. The sobriety and perception of

23 ²³ Lewis v. Mayle, 391 F.3d. 989 (9th Cir. 2004); Lockhart v. Terhune, 250 F.3d. 1223, 1233 (9th Cir. 2001).

24 ²⁴ Lewis, supra.

25 ²⁵ United States v. Allen, 831 F.2d. 1487, 1498 (9th Cir. 1987)(citation omitted)

26 ²⁶ United States v. Jeffers, 520 F.2d. 1256 (1975)

27 ²⁷ Opposition at p.3.

1 witness Brabham was perhaps the most salient and crucial piece of evidence presented by the
2 State. It went unchallenged.

3 Mr. Brabham's alleged identification of the Defendant has been the subject of intense
4 pretrial scrutiny. There was no on scene identification of the Defendant by Witness Brabham.
5 When questioned by witness Riley immediately after being shot, Brabham did not name Belcher
6 as the shooter. It was not until Detectives showed up five weeks later displaying a widely
7 circulated mug shot that Brabham identified Belcher as the shooter. Without Brabham's
8 testimony, there is no other witness placing Belcher at the scene of the murder.

9 Ordinarily, conflict of interest claims arise in situations where a single attorney represents
10 two or more defendants in the same criminal proceeding. However, an actual conflict of interest
11 also arises when defense counsel is unable to effectively cross-examine a prosecution witness
12 because the attorney had previously represented the witness.²⁸ The Court explained the dangers
13 of such a situation in Ross; "The problem that arises when one attorney represents both the
14 defendant and the prosecution witness is that the attorney may have privileged information
15 obtained from the witness that is relevant to cross-examination, but which he refuses to use for
16 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-

17 Witness Brabham was in the throes of a methamphetamine addiction at the very moment he
18 testified to seeing Norman Belcher and another yet unidentified person shooting at him. He said
19 the assailants wore masks. State Witness Ashley Riley testified that she had smoked
20 methamphetamine and marijuana with Witness Brabham just prior to the shooting. Specifically,
21 Riley testified that "we were smoking weed and meth."³⁰ Neither the State nor the defense
22 asked witness Brabham about his drug induced intoxication at the time he saw two people at the
23 scene of the murder. Mr. Maningo had just represented that same witness on a charge of

24 ²⁸ Ross v. Heyne, 638 F.2d. 978, 983 (7th Cir. 1980)

²⁹ 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)

³⁰ PHT at p.60.

1 possession of methamphetamine. The casual nexus between those two events is profoundly
2 disturbing and must be corrected before this case can proceed.

3 The State argues that Detective Hardy's testimony about the hospital identification standing
4 alone prevents the relief requested. It does not. The State's argument fails to account for the fact
5 that Mr. Maningo's conflicted representation poisoned the entire preliminary proceeding.
6 Similarly, Mr. Maningo had an absolute duty to question the suggestive identification procedure
7 employed by Metro involving his client Witness Brabham.³¹

8 The failure of conflicted counsel to ask a single question of any witness about the suggestive
9 photographic array, particularly Witness Brabham, who had been unable to identify anyone at
10 the scene, further underscores the prejudice suffered by Defendant Belcher by Mr. Maningo's
11 joint and/or successive representation. The State argues that Mr. Maningo made a strategic
12 decision not to cross-examine witness Brabham. This argument necessarily implies that Mr.
13 Belcher was not entitled to a choice in that decision. He was not told that he had the right to
14 conflict free representation when he needed to know about that right the most- at the
15 preliminary hearing.³²

16 CONCLUSION

17 The Defendant respectfully prays that the preliminary hearing be stricken and the
18 charges dismissed.

19 DATED this 11th day of September, 2013.

20 /s/ GARY A. MODAFFERI

21 By: _____
22 Robert M. Draskovich, Esq. (6275)
23 Gary A. Modafferi, Esq. (12450)
24 Attorneys for Defendant

22 ³¹ For the Court's convenience, Defendant's Reply to State's Opposition to Motion to Suppress Impermissibly
23 Suggestive Photographic Identification Procedure has been attached as Exhibit C . This Reply codifies the
24 arguments made on this subject. It underscores the importance of examining Brabham regarding the procedure
utilized at the hospital five weeks after the murder.

³² The State argues that the failure to cross-examine Brabham was a "strategic decision." However, 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.

CERT

ROBERT M. DRASKOVICH, ESQ. (6275)

Gary A. Modafferi, Esq. (12450)

815 S. Casino Center Blvd.

Las Vegas, Nevada 89101

Telephone: (702) 474-4222

Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

NORMAN BELCHER,

Defendant.

CASE NO.: C270562

DEPT. NO.: VI

CERTIFICATE OF SERVICE

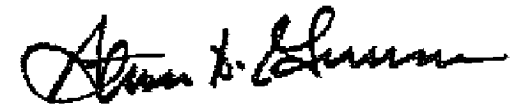
I HEREBY CERTIFY that on the 12th day of September, 2013, I served a true and correct copy of the foregoing **REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE PRELIMINARY HEARING AND DISMISS CHARGES** upon the following:

Robert Daskas, Esq.
Chief Deputy District Attorney
robert.daskas@clarkcountyda.com

/s/ Erika W. Magana

An Employee of Turco & Draskovich, LLP.

EXHIBIT “A”



CLERK OF THE COURT

RTRAN

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

NORMAN BELCHER, aka NORMAN
DAVID BELCHER, JR,
Defendant.

CASE#: C270562-1
DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE
MONDAY, DECEMBER 12, 2011

TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO PLACE ON CALENDAR

APPEARANCES:

For the State:

CHRISTOPHER LALLI, ESQ.
Chief District Attorney

For the Defendant:

ROBERT L. LANGFORD, ESQ.
LANCE A. MANINGO, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

RECEIVED
DEC 13 2011
DEPT 6

1 Monday, December 12, 2011 at 10:03 a.m.

2
3 THE MARSHAL: Bottom of page 4, State of Nevada v. Belcher, Norman
4 David.

5 [Colloquy regarding previous case]

6 THE COURT: Mr. Langford, I have an order that was signed for you if
7 you want to come on up and get that.

8 MR. LANGFORD: Thank you, Your Honor.

9 THE COURT: Just Tim had given me that to just give to you.

10 All right, now I got from the -- we were going to be talking about
11 the trial date. And I got a short memo from Mr. Langford about what
12 mitigation work had been done. I guess what I didn't get and perhaps I wasn't
13 clear about what I needed is what remains to be done and why you need a trial
14 continuance.

15 MR. LANGFORD: Okay. I apologize.

16 THE COURT: Because that was what -- you know, you had anticipated
17 needing a continuance because of additional work that needed to be done and
18 so I was looking to get some more information --

19 MR. LANGFORD: Okay.

20 THE COURT: -- about that.

21 MR. LANGFORD: I don't have a problem orally addressing or even
22 sharing what I've done so far.

23 THE COURT: Okay. Go ahead.
24
25

1 MR. LANGFORD: The way it -- the process works, Your Honor, is that
2 there is an initial gathering of materials and information, an initial evaluation
3 done of anyone who is the subject of a possible death penalty.

4 THE COURT: Right.

5 MR. LANGFORD: That's a psychological medical examination and a
6 gathering of the initial records. And I always say initial records, because
7 usually those records then suggest other records. So, we have about
8 completed that initial -- Mr. Belcher is scheduled to see Dr. Bradley today,
9 unfortunately. And I didn't realize that he was going to be here. I think -- I told
10 Mr. Maningo she's pretty much a -- not a morning person. So, I'm hoping it
11 was scheduled for this afternoon. I -- it probably was. And that brings to a
12 close the first stage of what you do in a mitigation case of a death penalty
13 case.

14 So, at this point then based on what her observations are we'll go
15 from there in terms of the type of -- or if we even need a mitigation specialist.
16 I checked last week again. And unfortunately the standard is that everyone
17 now is doing a neuropsych evaluation, and so we've contacted somebody
18 about doing that. I recently did one in another case and it's a nightmare to get
19 somebody over to the jail to do it. And consequently doctors are falling off left
20 and right in wanting to do them or agreeing to do them. But, I think Dr.
21 Bradley has arranged for somebody to do that. So, that's where we are?

22 I -- you know, I said two years in the past, but probably not that
23 long. So -- but we are certainly not a month or two away from finishing where
24 -- we need to be on --

25

1 THE COURT: So, what about other investigation regarding Defendant, his
2 family, background and history? Are you doing that?

3 MR. LANGFORD: Those are the things -- but honestly in order to do an
4 effective job of that, Your Honor, you need to have whatever documents that
5 you can acquire first to give you insights into what questions need to be asked
6 or what particular people you need to talk to.

7 THE COURT: So, how long -- I mean, so just to be clear, you're telling
8 me you will not be ready for trial as scheduled in February, is that correct?

9 MR. LANGFORD: That's correct, Your Honor.

10 THE COURT: And how long are you telling me you need to complete
11 what you need to in order to be fully prepared to try this case?

12 MR. LANGFORD: 9 months --

13 THE COURT: From now?

14 MR. LANGFORD: -- from February.

15 THE COURT: From February.

16 THE COURT: Let me hear from the State.

17 MR. LALLI: Well, you know, I'm in a difficult position to challenge or
18 comment upon that sort of an estimate given the record that Mr. Langford
19 made. And I understand that they're not going to be ready in February and
20 we're not going to oppose resetting the trial thereafter. I did not bring my trial
21 schedule today.

22 THE COURT: Oh.

23 MR. LALLI: And I think there's another issue that the Court needs to
24 address and that is the issue of the potential conflict with Mr. Maningo.

25 THE COURT: Mr. Maningo.

1 MR. MANINGO: If we're prepared to address that, Your Honor, we can.
2 Yes, I put that motion on calendar in front of Your Honor to have -- really to
3 punt it to you, Your Honor.

4 Here's what happened is during the course of meeting with our
5 client about 3 weeks ago we went through every crime scene photo, all the
6 photos that are discovery in this case. One of the pictures that our investigator
7 and Mr. Belcher saw was a picture of a wallet that had a card in it and it was
8 my law firm's business card. That prompted me to do additional research in --
9 within my firm. And I found out that at one time prior my firm represented
10 Nicholas Brabham who is the -- a victim witness in this case.

11 I did further research and it looks like what happened was from --
12 excuse me, from about March through August of 2010 my firm represented on
13 a case that was ultimately pled down to I believe misdemeanor. And the extent
14 of my firm's representation of him was status checks for fines, fees, and
15 community service.

16 It looks like -- I looked at the minutes and my court -- my firm's file.
17 And it looks like I appeared at one hearing which was on September 23rd, which
18 was the closing of that case at the end of a stay out of trouble period. So, I
19 never was there appearing with him.

20 So, I've already apologized to the State, my client, Mr. Langford
21 and now to the Court for not noticing this conflict earlier.

22 THE COURT: So, I'm sorry -- just kind of process-wise had you not run
23 Mr. Brabham's name through your firm's conflict system?

24 MR. MANINGO: We did, Your Honor, and we have that in place all of our
25 insurances -- all of everything requires that. I have no --

1 THE COURT: So, he somehow wasn't in the system?

2 MR. LALLI: I have no real explanation for why. There was a misspelling
3 of his name with my file versus how the court had it.

4 THE COURT: Oh.

5 MR. MANINGO: It still should have been caught, Your Honor.

6 THE COURT: Okay.

7 MR. MANINGO: And I really have --

8 THE COURT: So, you had run it but for some reason it hadn't popped
9 up?

10 MR. MANINGO: Yes.

11 THE COURT: Okay.

12 MR. MANINGO: Yes.

13 THE COURT: Okay.

14 MR. MANINGO: So, I'm here to one, let the Court know of the conflict.

15 I've already let everyone else involved with the case know about it. I've
16 spoken to Mr. Belcher. He has no issue or concern with it. But we all, I think,
17 agree that the conflict really rests with Mr. Brabham.

18 THE COURT: Right.

19 MR. MANINGO: Our position -- or I guess I should speak for myself only
20 on this one. I would prefer to stay on the case. I'd prefer Your Honor to let me
21 stay on the case. But I do understand the relationship I had with a prior client,
22 albeit very minimal. A suggestion I would offer the Court and but yet yield to
23 Your Honor 100 percent would be perhaps the State, Your Honor, and we bring
24 Mr. Brabham in here to see his thoughts on the conflict.

25

1 I've held off contacting him directly, even though he is my client or
2 was my client. Just I want direction from the Court. I've spoken to the State
3 Bar. They've indicated that -- they've advised me to do what I'm doing which
4 is hold off contacting, trying to get a waiver with one client when you're
5 representing another and have the Court determine what would be the best
6 course of action. Sorry.

7 THE COURT: State.

8 MR. LALLI: Your Honor, it's our position that due to the nature of who
9 this witness is and I think Mr. Maningo has indicated a clear conflict of interest
10 in having represented this gentleman. This Nick Brabham I'm not sure -- I know
11 the Court has a lot of cases. Nick Brabham is the person who Mr. Belcher shot
12 and left for dead.

13 THE COURT: Uh-huh.

14 MR. LALLI: Who has the ability to identify him and --

15 THE COURT: He's a pretty important witness.

16 MR. LALLI: -- is a critical, critical witness in this case.

17 THE COURT: Yeah.

18 MR. LALLI: Which is a capital case, which is a case that there will be no
19 offer made. This is a case that will go to trial. And so out of an abundance of
20 caution it is our position that Mr. Belcher needs a new lawyer just because this
21 is a case that will be litigated well beyond the existence of the case in front of
22 Your Honor. This case will go to the Supreme Court. It will go -- work its way
23 through the federal system for years and years and years. And if at some point
24 some judge somewhere along the line believes this is a problem, even in spite
25 of the fact there were numerous waivers and records made, we go back to

1 square one. Because this is one of those profound conflicts -- or one of those
2 profound issues that eradicates everything. So, out of an abundance of caution
3 it's out position that Mr. Belcher needs a new lawyer.

4 THE COURT: Just to be clear, instead of Mr. Maningo, there's no issue
5 with Langford remaining on the case?

6 MR. LALLI: I don't see where there's any legal conflict as to Mr.
7 Langford.

8 MR. LANGFORD: And for the record I've never talked with Mr. Brabham
9 other than -- actually I didn't cross-examine him in court. And I've not spoken
10 with Mr. Maningo about his representation other than what he laid out to the
11 Court today.

12 THE COURT: Okay.

13 THE DEFENDANT: Can I ask you a question?

14 THE COURT: Yes

15 THE DEFENDANT: How does this work with Langford running for David
16 Roger's spot now?

17 THE COURT: Well, at the moment I don't think that puts him in a conflict
18 situation. If -- I'm aware from the newspaper that he applied. But that is, you
19 know, going through a process. But that's not -- it's not like the DA's Office is
20 reviewing his application or something like that. It's going to the County
21 Commission and -- actually a committee established by the County
22 Commission. So, I don't think that presents a conflict at this particular point in
23 time that that's pending. Fair question though.

24 I would say given the fairly recent representation by Mr. Maningo of
25 Brabham I think that he has at least a potential conflict in the case, could

1 become an actual conflict given the important role of Mr. Brabham in this case.
2 And I unfortunately think that I need to remove Mr. Maningo from counsel in
3 this case. We'll need to get another counsel appointed to replace him so we do
4 have the two attorneys on the case along -- someone along with Mr. Langford.

5 MR. MANINGO: I understand, Your Honor.

6 THE COURT: Just, you know, out of an abundance of caution for all
7 sides.

8 I guess having said that and given the representation about the
9 need for the continuance regarding the mitigation issue even aside from the
10 conflict, I mean, I don't know that that change in counsel changes how much
11 time it is for you to get ready?

12 MR. LANGFORD: I don't think it does.

13 THE COURT: Okay. So, I mean, it sounds like we're looking at
14 November of next -- at least that's what you're asking for. And you said you
15 didn't bring your trial schedule?

16 MR. LALLI: Correct and as a --

17 THE COURT: Well, perhaps we could put it on for a confirmation of
18 counsel and look at the schedule.

19 MR. LANGFORD: I think that's what we were going to ask, Your Honor.

20 MR. LALLI: That's fine. Your Honor. And what I would also ask at that
21 time is that we set some sort of -- just some sort of scheduling deadlines for
22 the defense and the State to file any motions that they intend to file in the case
23 and briefing schedules, things of that nature just to keep this case on track. So
24 that if it is continued an additional 9 months --

25 THE COURT: Right. It will go.

1 MR. LALLI: -- we have some reasonable probability of it being tried then.

2 THE COURT: Okay. So, I guess here's where I am going to do is I
3 probably can't put this on now until January to come back for confirmation.
4 And we can at that time talk about a trial schedule and as you indicated a --
5 kind of a schedule. So, perhaps we can talk before we come back to court,
6 and you know, at least agree on as much as you can agree in terms of those
7 issues.

8 MR. LALLI: Right.

9 THE COURT: Why don't we -- I don't know how bad is January 4th
10 looking at the moment? I know we've put a lot there.

11 [Colloquy between the Court and the Clerk]

12 THE COURT: Okay. So, we'll need to contact, is it Mr. Christiansen's
13 office?

14 MR. LANGFORD: I've already contacted Mr. Christiansen's office. He
15 was --

16 THE COURT: Okay. Thank you. I appreciate you giving him a heads up.

17 MR. LANGFORD: He's aware of what's going.

18 THE COURT: Okay. So, we'll try to confirm additional counsel,
19 replacement counsel for Mr. Belcher, and we'll talk about a new trial date and
20 related schedule and deadlines at that time.

21 MR. LALLI: Great.

22 THE COURT: Okay.

23 MR. LALLI: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. LANGFORD: Thank you, Your Honor.

1 THE DEFENDANT: Thank you.

2 [Proceeding concluded at 10:18 a.m.]

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video recording in the above-entitled case to be best of my ability.

23 
24 Jessica Kirkpatrick
25 Court Recorder/Transcriber

EXHIBIT “B”

Kelly RYAN, Petitioner,

v.

The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, In and For the COUNTY OF CLARK, and The Honorable Jackie Glass, District Judge, Respondents, and
The State of Nevada, Real Party in Interest.

No. 49114.

Supreme Court of Nevada.

October 11, 2007.

704 *704 Cristalli & Saggese, Ltd., and Michael V. Cristalli, Las Vegas, for Petitioner.

705 *705 Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, and Robert J. Daskas, Deputy District Attorney, Clark County, for Real Party in Interest.

BEFORE THE COURT EN BANC.

OPINION

By the Court, DOUGLAS, J.:

This is an original petition for a writ of mandamus challenging the district court's order denying petitioner Kelly **Ryan's** motion to substitute counsel. Kelly **Ryan** and her husband Craig Titus are accused of brutally murdering their roommate, stuffing her body in the trunk of their Jaguar, and setting the car on fire to cover up the alleged crimes.

Ryan seeks to have Michael Cristalli of Cristalli & Saggese represent her at trial. Cristalli's partner, Marc Saggese, already represents codefendant Titus, raising the specter of dual representation and the accompanying potential for conflicts of interest at trial.

The primary issue raised in the petition is whether the district court manifestly or arbitrarily and capriciously abused its discretion when it refused to substitute in Michael Cristalli as **Ryan's** counsel of choice. We grant **Ryan's** petition and issue a writ directing the district court to canvass both defendants to determine whether they knowingly, intelligently, and voluntarily waive their right to conflict-free representation. In doing so, we conclude that a court must honor a criminal defendant's voluntary, knowing, and intelligent waiver of conflict-free representation so long as the conflicted representation will not interfere with the administration of justice. We also conclude that for a waiver of conflict-free representation to be effective, the defendant must also specifically waive the right to a mistrial as a result of her attorney's potential or actual conflict of interest depriving her of her right to effective assistance of counsel arising from the dual representation. Finally, we conclude that before engaging in dual representation, the attorney must advise the criminal defendant of her right to consult with independent counsel to review the potential conflicts of interest posed by the dual representation. If the defendant chooses not to seek independent counsel, then the defendant must expressly waive her right to do so before the defendant's waiver of conflict-free representation can be valid.

RELEVANT FACTS AND PROCEDURAL HISTORY

In March 2006, the **State** obtained an indictment against **Ryan** and Titus, charging both defendants with the crimes of: (1) murder with the use of a deadly weapon, (2) kidnapping, (3) accessory to murder, and (4) third-degree arson. The charges related to the brutal murder of their roommate, Melissa Ann James. According to the **State**, **Ryan** and Titus may

have implicated themselves and each other in the murder.

In September 2006, **Ryan** dismissed her counsel of record and substituted in Gregory Denué, Esq. The same month, Titus dismissed his lawyers and retained Marc Saggese, Esq., of Cristalli & Saggese. In February 2007, Denué filed a motion to substitute counsel, wherein Denué agreed to substitute in Michael Cristalli of Cristalli & Saggese as **Ryan's** defense counsel. Cristalli filed a memorandum of points and authorities in support of his firm's dual representation of **Ryan** and Titus. Cristalli relied on the dissenting opinion in *Wheat v. United States*^[1] as support. Cristalli contended that in certain circumstances the trial court has discretion to allow dual or multiple representation, particularly where there are no apparent conflicts and the codefendants waive conflict-free representation.

706 The **State** filed an opposing memorandum of points and authorities. In summary, the **State** argued that (1) there was an actual conflict of interest because **Ryan** and Titus implicated themselves and each other in the crimes charged, (2) it would be impossible to predict what other potential conflicts of interest may arise during trial, (3) creating an artificial wall of conflict-free representation *706 between **Ryan** and Titus would not remedy the conflict of interest, (4) any waiver by **Ryan** or Titus was likely invalid, and (5) Cristalli & Saggese's dual representation would create a built-in ineffective-assistance-of-counsel issue.

The district court held a hearing on **Ryan's** motion for substitution. Cristalli explained that once he learned that **Ryan** sought to hire him as counsel, he immediately explained to her the "particulars" of his firm representing both defendants in the case.

Cristalli also submitted to the court a conflict-waiver letter drafted by Cristalli & Saggese and signed by both **Ryan** and Titus. The letter states, in pertinent part, that (1) neither defendant has implicated the other in the crimes charged; (2) after a thorough review of discovery and lengthy discussions with multiple counsel, neither defendant intends to plead guilty or cooperate with the **State**; (3) a joint defense agreement has been prepared to be executed by both defendants and both attorneys;^[2] (4) either defendant's decision to cooperate with the **State** might change the firm's ability to continue representation; (5) in the event of a serious conflict or disagreement, the firm would be required to withdraw and represent neither defendant; and (6) the firm's withdrawal would be "inconvenient and potentially adverse to each [defendant]," but the defendants understood that the "present benefits of dual representation outweigh this contingent problem."

At the hearing, Cristalli argued that a future conflict could only arise if either **Ryan** or Titus decided to cooperate with the **State**, which he believed would not occur although he acknowledged that "theoretically, anything could happen." Cristalli argued that there was no conflict because there was a joint defense, but he stated, "Now, can there in the future arise a conflict? Absolutely. But the Courts have said specifically in *Wheat* we are not here to speculate on the potential for a conflict." At the conclusion of the hearing, the district court indicated that it would appoint advisory counsel to speak with **Ryan** regarding the potential conflicts of interest.

A few days later, the district court held another hearing on the motion for substitution. It indicated that it had appointed attorney William B. Terry to speak with **Ryan** about the dual representation, that Terry had spent a significant amount of time with **Ryan**, and that Terry had no meaningful dialogue with **Ryan** about the dual representation because it appeared that her mind was already made up.

Denué indicated that he had been approached by both Titus's mother and Titus's attorney and had been asked to sign a joint defense agreement.^[3] Denué stated that he had refused to sign a joint defense agreement because he thought he would be harming his client if he did so.

The **State** contended that the Sixth Amendment guarantees an effective advocate, not necessarily an advocate of one's choice. It argued that an inherent problem with dual representation is that the codefendants may be precluded from asserting their best defenses. The **State** criticized Cristalli's suggestion that he would deal with a conflict when it arises, because both Cristalli and Saggese would have to withdraw at trial and such a conflict would likely result in a mistrial. The **State** noted that because **Ryan's** statements indicated that Titus was involved in actually lighting the car on fire, **Ryan's** best defense would be that Titus committed the arson, not her.

The district court then canvassed **Ryan** on the ramifications of dual representation:

THE COURT: So, Ms. **Ryan**, as you stand here today, you have been provided with a copy of the letter regarding affiliated representation and also the joint-defense agreement. Those both discuss in detail the subject matter of why we're here today; is that right?

DEFENDANT **RYAN**: Yes, your Honor.

707 *707 THE COURT: Okay. And it's your position at this point that you still wish to have the representation of Mr. Cristalli despite the fact that there have been discussions about —

(Colloquy not on the record)

THE COURT: — what could happen or could not happen as a result of having the same law firm represent you.

DEFENDANT **RYAN**: Yes, your Honor.

THE COURT: And you wish to waive at this point any conflict; is that right?

DEFENDANT **RYAN**: That is correct.

The district court then canvassed Titus on whether he understood the ramifications of dual representation:

THE COURT: All right. Mr. Titus, now I get to ask you a question. You've just heard the same questions that I spoke to Ms. **Ryan** about.

And you've been provided a copy of the February 22nd affiliated-representation letter as well as the February 22nd joint-defense agreement; is that correct?

DEFENDANT TITUS: Yes, ma'am.

THE COURT: And you've read them over.

DEFENDANT TITUS: Yes, ma'am.

THE COURT: And you understand what's in them?

DEFENDANT TITUS: Absolutely.

THE COURT: Okay. And is it your position after reviewing these documents and talking to Mr. Saggese that you also wish to waive any potential conflict; is that right?

DEFENDANT TITUS: Yes, ma'am.

The district court then stated that it had reviewed the briefs, the Nevada Rules of Professional Conduct, and the *Wheat* case. The district court noted that it strongly believed in an individual's right to choose their own counsel, but that the district court had an "obligation to make sure that this case goes to trial, that there is effective and fair representation of all parties, and, hopefully, we have an error-free record, so that we only have to do this one time."

The district court then quoted a few paragraphs from *Wheat*, which provided that district courts had broad discretion to refuse conflict waivers:

The district court must recognize a presumption in favor of the petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of an actual conflict, but by a showing of a serious potential for conflict.

The evaluation of the facts and circumstances of each case under this standard must be left primarily for

the informed judgment of the trial court.^[4]

The district court reasoned that even if there was a consistent defense throughout trial, the specter of ineffective assistance of counsel would surely haunt the appeal. The district court also concluded that if the joint defense agreement did not present an actual conflict, it did pose a very serious potential for conflict. Further, the district court stated that it was very troubled that Terry did not have a meaningful dialogue with **Ryan** as to her understanding of dual representation and its implications, especially when **Ryan** and Titus were facing potential life sentences if convicted.

The district court consequently ruled that there was an actual or serious potential conflict inherent in the dual representation, and issued a written order denying **Ryan's** request for substitution of counsel. **Ryan** now petitions this court for a writ of mandamus.

DISCUSSION

Standard of review

This court may issue a writ of mandamus to compel the performance of an act which the law requires.^[5] A writ of mandamus should only issue to control discretionary actions when the district court has manifestly or arbitrarily and capriciously abused its discretion.^[6]

708 *708 *Sixth Amendment right to counsel*

Under the Sixth Amendment, criminal defendants "who can afford to retain counsel have a qualified right to obtain counsel of their choice."^[7] However, the "essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."^[8] Thus, the right to retain one's own counsel may clash with the right to conflict-free representation, and the presumption in favor of the right to retain the counsel of one's choice.^[9]

Right to conflict-free representation must be exercised or waived by the defendant

Because there can be a benefit in a joint defense against common criminal charges, there is no per se rule against dual representation.^[10] The Second Circuit Court of Appeals concluded in *United States v. Perez* that "[w]here the right to counsel of choice conflicts with the right to an attorney of undivided loyalty, the choice as to which right is to take precedence must generally be left to the defendant and not be dictated by the government."^[11] However, the right to choose one's own counsel may clash with the right to conflict-free representation, and the presumption in favor of the right to choose one's counsel "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict."^[12] The district court is afforded broad discretion in making conflict determinations, and

the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.^[13]

This is not to say that courts have unfettered discretion to reject a defendant's right to choose counsel where a potential conflict exists.

Undoubtedly, even if Cristalli & Saggese's dual representation of **Ryan** and Titus does not raise an actual conflict, it raises the potential for serious conflict during trial. Depending on the course of events prior to and during trial, either defendant could testify against the other, imposing the inescapable duty of vigorous cross-examination by the other defendant's counsel. Although speculative at best, the potential is still troublesome; if the joint defense were to fall apart, regardless of the cause or motive, it could be nearly fatal to the ability of Cristalli & Saggese to represent either defendant. However, **Ryan** and Titus appear eager to present a unified front against the prosecution and have

expressed as much through their joint defense agreement and waiver of conflict-free representation.

709 The Eighth Circuit Court of Appeals recently concluded that (1) as a general rule, non-indigent criminal defendants have a Sixth Amendment right to be represented by counsel of their own choice; (2) courts are afforded little leeway in interfering with that choice; (3) a non-indigent criminal defendant's right to retain private counsel of her choice directly derives from her Sixth Amendment right to determine the type of defense that she wishes to present; and (4) where a non-indigent criminal defendant's choice of counsel threatens to interfere with the administration of justice, the district court must carefully balance the defendant's Sixth Amendment right to be represented by counsel of her choosing against the court's interest in the orderly administration of justice.^[14] The Eighth Circuit noted that "709 "[I]awyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney."^[15] The Eighth Circuit concluded that attorneys are not interchangeable because

[w]ithin the range of effective advocacy, attorneys will differ as to their trial strategy, oratory style, and the importance they place on certain legal issues. They may also differ with respect to expertise in certain areas of law, and experience or familiarity with opposing counsel and the judge. These differences will impact a trial in every way the presence or absence of counsel impacts a trial.^[16]

This reasoning is persuasive insofar as it addresses the constitutional magnitude of denying a non-indigent defendant's right to choose her own counsel in favor of imposing conflict-free representation. The California Court of Appeal most aptly described the hazards of imposing rights on defendants when it quoted John Stuart Mill's observation that

"[i]n each person's own concerns[,] his individual spontaneity is entitled to free exercise. Considerations to aid his judgment, exhortations to strengthen his will may be offered to him, even obtruded on him, by others; but he himself is the final judge. All errors which he is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem his good."^[17]

Thus, although the district court has broad discretion to balance a non-indigent criminal defendant's right to choose her own counsel against the administration of justice, we conclude that there is a strong presumption in favor of a non-indigent criminal defendant's right to counsel of her own choosing.^[18] This presumption should rarely yield to the imposition of involuntary conflict-free representation. **Ryan** and **Titus** must be advised of the pitfalls and potential horrors of conflicted dual representation, but once so advised they cannot be forced to embrace their right to conflict-free representation when they would prefer to waive it in order to pursue the defense strategy of their choosing.^[19] If, however, they knowingly, intelligently, and voluntarily embrace a potentially conflicted dual representation, the conflict of interest is forever waived.^[20]

710 *710 Thus, we further conclude that when a defendant knowingly, intelligently, and voluntarily waives her right to conflict-free representation, she also waives her right to seek a mistrial arising out of such conflicted representation. Further, the waiver is binding on the defendant throughout trial, on appeal, and in habeas proceedings.^[21] Thus, the defendant cannot subsequently seek a mistrial arising out of the conflict that he waived and "cannot [subsequently] be heard to complain that the conflict he waived resulted in ineffective assistance of counsel."^[22] We therefore overrule our prior holding in *Hayes v. State*^[23] to the extent that it empowers the district court to declare a mistrial due to a conflict of interest in the face of a knowing, intelligent, and voluntary waiver of conflict-free representation.

After reviewing the record, it appears the district court was not convinced that **Ryan's** and **Titus's** waivers of conflict-free counsel were knowing, intelligent, and voluntary. The district court noted at the hearing and in the written order that it was troubled by the fact that **Terry** failed to have a meaningful dialogue with **Ryan** about the consequences of dual representation and the potentially serious conflicts that may arise. The district court seemed concerned that **Ryan's** mind was made up before she consulted with **Terry**.

Consequently, in granting this petition in part, we direct the district court to conduct an extended canvass to determine whether **Ryan** and Titus have made a knowing, intelligent, and voluntary waiver of their right to conflict-free representation.^[24] **Ryan** and Titus must also be advised that a waiver of the right to conflict-free representation means that they cannot seek a mistrial or raise claims of ineffective assistance of counsel based on any conflict caused by the dual representation. If these elements are satisfied, then Cristalli & Saggese may be allowed to engage in the dual representation of these two defendants.

Attorneys must advise criminal defendants of the right to seek independent counsel before the client agrees to waive conflict-free representation

Nevada Rule of Professional Conduct 1.7 prohibits lawyers from engaging in dual representation if the representation involves a concurrent conflict of interest or a significant risk that the dual representation will materially limit the lawyer's ability to represent one or both clients. Pursuant to RPC 1.7(b)(4), the attorney must also secure the informed consent of each affected client in writing before engaging in the dual representation.^[25]

711 A waiver of conflict-free representation entails 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 dual representation. Consequently, we now require attorneys to advise criminal defendants of their right to consult with independent counsel to advise them on the potential conflict of interest and the consequences of waiving the right to conflict-free representation. The attorney must advise the clients to seek the advice of independent counsel before the attorney engages in the dual representation. If the clients choose not to seek the advice of independent counsel, the clients must expressly waive the right to do so before agreeing to any waiver of conflict-free representation. If the attorney fails to advise criminal defendants of their right to seek the advice of independent counsel, the clients' waivers of conflict-free representation are ineffective unless and until the attorney advises the clients to seek the advice of independent counsel and the clients do so or expressly waive the right to do so.

CONCLUSION

We conclude that there is a strong presumption in favor of a non-indigent criminal defendant's right to choose counsel and, therefore, when a non-indigent criminal defendant's choice of counsel results in dual or multiple representation of clients with potentially conflicting interests, the defendant may waive the right to conflict-free counsel. An attorney or firm attempting to engage in dual or multiple representation of two or more criminal defendants must advise the defendants of their right to seek independent counsel to advise them on the potential conflict of interest. If the defendants choose 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 out of the conflict that he waived and cannot subsequently claim that the conflict he waived resulted in ineffective assistance of counsel.

We grant **Ryan's** petition for a writ of mandamus in part and direct the clerk of this court to issue a writ of mandamus directing the district court to hold a new canvass of both defendants. The new canvass must ensure that the defendants understand that their waiver of conflict-free representation will preclude them from seeking a mistrial arising out of any conflicts from the dual representation and will preclude claims based on the conflict from being raised on appeal or during post-conviction proceedings. The waiver must be knowing, intelligent, and voluntary.

We concur: GIBBONS, HARDESTY, PARRAGUIRRE, CHERRY and SAITTA, JJ.

MAUPIN, C.J., dissenting:

While the majority has developed a legal construct for dual representation in criminal cases that comports with Sixth Amendment standards, I see no abuse of discretion by the district court in relation to those standards.

To explain, it is readily apparent from this record that the attorneys seeking our embrace of their dual representation may have misperceived their obligation to ensure that petitioner's decision was knowing, intelligent, and voluntary. This is underscored by the representation to the justice court below by one of these attorneys that "once he learned that [Ms.] Ryan sought to hire him as counsel, he immediately explained to her the 'particulars' of his firm representing both petitioner and her co-defendant at trial." There is no indication in this record that this interaction involved access to independent counsel. The misperception is further underscored by counsels' submission of the "conflict waiver letter" signed by petitioner, which was *drafted by them* and like-wise obtained without any indication that independent counsel was retained in connection with petitioner's execution of it. Of great importance is the fact that the letter affirms that neither petitioner nor her codefendant intended to plead guilty or cooperate with the police. While acknowledging that petitioner and her codefendant had engaged in discussions with "multiple" counsel concerning this issue, the execution of the letter and the record is devoid of any indication that petitioner executed the letter based upon independent advice of an attorney with no interest in her codefendant's defense. More problematic is the section of this letter that represented that "neither defendant has implicated the other in the crimes charged."^[1] In short, petitioner's ultimate agreement submitted to the court was a *fait accompli*, and was generated by *712 her codefendant's attorney at a time when the codefendant apparently needed petitioner's cooperation.

Moreover, the letter acknowledges that conflicts requiring withdrawal of joint counsel could occur. While not of necessity a ground for denying the application for joint representation, counsel's statement in this regard demonstrates that the joint approach may not last. This acknowledgment certainly justified the district court's reliance on the following passage in Wheat v. United States.^[2]

The District Court must recognize a presumption in favor of the petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.^[3]

Considering counsels' acknowledgement of "trouble ahead" with their failure to have independent counsel involved at the time of their discussions of joint representation with petitioner, I cannot see how she can now ever appropriately waive her right to conflict-free representation. And, notwithstanding our majority's statement that proper waiver can eventuate, under these circumstances, there will remain an issue to be resolved on post-conviction relief, in the event of a conviction at trial, concerning effectiveness of her counsel during the current proceedings.

I want to stress that there is no indication in the record that proposed joint counsel in any way intentionally set out to subvert the legal processes of the trial court. Rather, I believe that this attempt at joint representation has been mismanaged and that, had appropriate independent advice been provided at the outset, petitioner's waiver of conflict-free representation could be approved.

[1] 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

[2] A joint defense agreement was subsequently submitted to the district court.

[3] It is unclear whether Saggese was the attorney who approached Denué about the joint defense agreement.

[4] The district court quoted Wheat, 486 U.S. at 164, 108 S.Ct. 1692.

[5] NRS 34.160.

[6] Washoe County Dist. Attorney v. Dist. Ct., 116 Nev. 629, 636, 5 P.3d 562, 566 (2000); see also City of Sparks v. District Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996).

[7] United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984).

[8] Wheat, 486 U.S. at 159, 108 S.Ct. 1692.

[9] *Id.* at 164, 108 S.Ct. 1692.

[10] Holloway v. Arkansas, 435 U.S. 475, 482-83, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

[11] 325 F.3d 115, 125 (2d Cir.2003).

[12] Wheat, 486 U.S. at 164, 108 S.Ct. 1692.

[13] *Id.* at 163, 108 S.Ct. 1692.

[14] U.S. v. Gonzalez-Lopez, 399 F.3d 924, 928-29 (8th Cir.2005), *aff'd* and remanded, 548 U.S. _____, 126 S.Ct. 2557 (2006).

[15] *Id.* at 928 (quoting U.S. v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir.1992)).

[16] *Id.* at 934 (citation omitted).

[17] Alcocer v. Superior Court (People), 206 Cal. App.3d 951, 254 Cal.Rptr. 72, 74-75 (1988) (quoting John Stuart Mill, *On Liberty* 93 (Bobbs-Merrill ed.1956)).

[18] See U.S. v. Amini, 149 F.R.D. 647, 651 (D.Utah.1993) (holding that in the absence of a strong showing of adverse impact on the administration of justice, speculative or potential conflicts are not enough to overcome the strong presumption favoring the defendant's choice of counsel).

[19] As for RPC 1.7 and RPC 1.10(a), an attorney's ethical obligation to avoid conflicts of interest does not preclude criminal defendants from selecting counsel of their choosing, so long as the conflicted counsel agrees to the representation.

[20] We are aware of the cases cited by the State, U.S. v. Stites, 56 F.3d 1020, 1025 (9th Cir.1995) (holding that where a district court finds an actual conflict, it may decline a proffered waiver); U.S. v. Shwayder, 312 F.3d 1109, 1117 (9th Cir.2002) (concluding that the defendant's waiver of conflict of interest was not valid where he was not adequately informed of the significance of the conflicts that might arise); Coles v. Arizona Charlie's, 973 F.Supp. 971, 975 (D.Nev.1997) (holding that any doubts as to the existence of a conflict of interest should be resolved in favor of disqualification); Carter v. State, 102 Nev. 164, 170, 717 P.2d 1111, 1114 (1986) (concluding that a defendant's right of waiver cannot preclude a trial court from declaring a mistrial "when there is a manifest necessity for doing so"); Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (holding that "[a]n actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant"); Harvey v. State, 96 Nev. 850, 852, 619 P.2d 1214, 1216 (1980) (noting that joint representation presents a number of risks, "the possibility of inconsistent pleas; factually inconsistent alibis; conflicts in testimony; differences in degree of involvement in the crime; tactical admission of evidence; the calling, cross-examination, and impeachment of witnesses; strategy in final argument; and the possibility of guilt by association" (quoting State v. Olsen, 258 N.W.2d 898, 905 (Minn.1977) (footnotes omitted))); Koza v. District Court, 99 Nev. 535, 540-41, 665 P.2d 244, 247 (1983) (concluding that the district court abused its discretion in appointing the public defender to represent defendant where the defendant had a conflict with a former client). However, we conclude these cases are distinguishable.

[21] Gomez v. Abitow, 29 F.3d 1128, 1135-36 (7th Cir.1994) (holding that where the defendant knowingly and intelligently waives the right to conflict-free counsel, the waiver precludes claims of ineffective assistance of counsel based on the conflict).

[22] *Id.* at 1135.

[23] 106 Nev. 543, 797 P.2d 962 (1990).

[24] We note that our holding today does not disturb the district court's discretion to reject a valid waiver when dual representation would interfere with the administration of justice. However, fear of a mistrial is no longer an adequate ground to reject a knowing, intelligent, and voluntary waiver of the right to conflict-free representation.

[25] RPC 1.10(a) further prohibits lawyers associated with the same firm from "represent[ing] a client when any one of them practicing alone would be prohibited from doing so."

[1] Petitioner has, at least to a degree, implicated her codefendant in these matters.

[2] 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

[3] *Id.* at 164, 108 S.Ct. 1692.

EXHIBIT “C”

1 **RPLY**

ROBERT M. DRASKOVICH, ESQ. (6275)

2 Gary A. Modafferi, Esq. (12450)

815 S. Casino Center Blvd.

3 Las Vegas, Nevada 89101

Telephone: (702) 474-4222

4 Attorneys for Defendant

5 **DISTRICT COURT**
CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 NORMAN BELCHER,

10 Defendant.

CASE NO.: C270562

DEPT. NO.: VI

11
12 **REPLY TO STATE'S OPPOSITION TO MOTION TO SUPPRESS IMPERMISSIBLY**
SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION PROCEDURE

13 COMES NOW the Defendant, NORMAN BELCHER, by and through his attorneys of
14 record, Robert M. Draskovich, Esq., and Gary A. Modafferi, Esq., of Turco & Draskovich,
15 LLP., and respectfully submits this Reply in support of an order suppressing any and all
16 evidence directly or derivatively obtained as a result of an impermissibly suggestive
17 photographic identification procedure. The photographic array at issue violates the Defendant's
18 rights to due process under the Fourteenth Amendment to the United States Constitution and
Article I, Sec. 8 of the Constitution of the State of Nevada.

19 This Reply is offered in addition to any evidence and/or argument adduced at a hearing
20 on this matter. It is supported by the attached Memorandum of Law.

21 DATED this 27th day of July, 2012.

22
23 By: _____
Robert M. Draskovich, Esq. (6275)
24 Gary A. Modafferi, Esq. (12450)
Attorneys for Defendant

REPLY

The same photograph used in the challenged photographic line-up permeated the Las Vegas media for five weeks before it was inserted into a patently suggestive array.¹ The witness saw that photograph just like everyone else in Las Vegas and that occurred before this staged line-up five weeks earlier. The State summarizes this egregious and fundamentally unfair set of circumstances as a "curious contention."² Had the police slid the same booking photograph into the witnesses' pocket prior to the identification procedure, a complaint of unfairness would not be aptly described as a "curious contention." Tipping off a witness in such a manner would be illegal and cause the suppression of the tainted witness identification. The circumstances of this challenged identification must lead to the same conclusion.

The State argues that the witness' hospitalization insulated him from exposure to the photograph. That contention is beyond reason.³ This witness, steeped in the drug dealing community, would necessarily reach out to determine who fired the shots. The State's unsupported argument would necessarily presume that the witness did not speak with either his roommate William Postorino or his girlfriend Ashley Riley during the five weeks between the shooting and the identification. The State would presume that this witness did not see a single television report or read a single newspaper article that included the same booking photograph he would later be shown by police.

¹ The State in an Orwellian feat of double speak contends that the orange/blondish color of the Defendant's hair "can in no way be classified as "light." It is more aptly described as dark." Opposition at p.6. The witness at issue described the assailant's hair as "blonde." Whether classified as blonde or orange or light red, the State is simply wrong when it argues that the defendant's hair is "dark".

² Opposition at p.8.

³ The State argued that the witness "was confined to the intensive care unit and was too ill to even communicate with members of law enforcement. It is ludicrous to believe that Nick (the witness) was pursuing (sic) the newspaper or watching the evening news while he was fighting for his life." There is no evidence in the record to support either point. The State would have the Court believe that this witness was magically sequestered from all human, media, and digital communication about the very circumstances that landed him in the hospital. This is truly an outrageous and unproven proposition that is made even less believable by the manner in which subject was so obviously avoided by police and the witness during the course of the identification interview five weeks after the incident. The State argues without support that absolute social and informational isolation should be presumed.

1 Any exposure to the booking photograph poisons the entire process. Given this axiomatic
2 proposition, the State uses anecdotal argument instead of evidence to assure the Court that the
3 witness was not impermissibly and unfairly influenced by a widely circulated booking
4 photograph that happened to also be included in a suggestive photographic array.

5 The State argues that the "lineup did nothing more than identify for police the person Nick
6 already knew well as "Bates." If this argument was correct then why did "Nick" fail to identify
7 the person he already knew well as "Bates" to either his girlfriend or to police immediately after
8 the shooting. If this line-up was as *pro forma* as the State argues then why did the police and the
9 witness seemingly ignore and forget that the last standing identification was of two people
wearing ski masks with no mention of anyone named "Bates"?⁴

10 The use of dark haired comparative photographs in the array is shocking. The witness said
11 that "Bates" had a "blonde head."⁵ This description of "Bates" along with the color of his blue
12 eyes stands as the centerpiece of the witness' scant description given minutes before the
13 photographic array and weeks after the incident. To include all dark haired men in the
14 photographic array with one light haired man with blue eyes was akin to placing a flashing bulb
over the Defendant's head inviting the witness to pick that person.⁶

16 ⁴ It is respectfully suggested that when witness told police that the perpetrators were wearing ski masks the entire
17 identification process was halted because of the reasonable conclusion that the ski masks prevented identification
18 of the assailants by the witness. When the police made the decision to reapproach the witness to have him review a
19 photographic array one would think that the ski mask obstacle would at least be dealt with prior to covering new
20 identification possibilities.
21 Not only is this point ignored by police in their interview of the witness but it was also ignored by the State in its
22 Opposition. The State refuses to view this previous inability to identify the assailant as a misidentification. Instead
23 they simply write without further explanation, "It is altogether possible that when Nick observed the Defendant, he
24 had a mask or some other covering on his face or head. To label these events as "misidentifications" is reaching."
Opposition at p.9. This argument is circular and defies logic. If there was a mask on the Defendant's face but the
witness was still capable of identifying the masked assailant as the Defendant, then one would reason that the
witness would have told the police this fact. The witness did not do this. Instead, the witness told police on the
scene that the gunman and his companion both wore masks. The witness offered no further identification
information presumably because the masks prevented any further reliable identification. Not only did the subject of
ski masks elude any further police interrogation during the identification interview five weeks later, but so did the
subject of the second masked companion.

⁵ State's Exhibit 1 at p.4.

⁶ The fact that the Defendant was the only photographic choice not to have facial hair only accentuates the
unfairness of this procedure.

1 In Cunningham police inquired of the witness whether the perpetrator could be a light-
2 skinned black man. The Nevada Supreme Court held that this statement was not enough to
3 prove the identification was impermissibly suggestive. In this case, the police released the same
4 photograph to the public and essentially told the world this is the man that did the crime.⁷ The
5 linchpin in reviewing the propriety of a pretrial identification is that the court must consider (1)
6 whether the procedure is unnecessarily suggestive, and (2) if so, whether under all the
7 circumstances, the identification is reliable despite an unnecessarily suggestive identification
8 procedure.⁸

9 The identification in this case is disturbingly unreliable. The source of the identification is a
10 drug dealer who was ostensibly intoxicated when he had an instant to identify someone shooting
11 at him at close range. This witness told police things that were patently false about the
12 circumstances that directly lead to the identification itself. The witness told police that he was
13 coming into the house when the shooting happened. This is a lie. Instead, as Riley told police,
14 the witness was coming out of the bedroom where he and Riley had been sleeping after
15 consuming methamphetamine, marijuana and alcohol. These facts go directly to the witness'
16 ability to perceive, describe, and relay the circumstances of the identification. The witness says
17 he was awake and ostensibly alert when the shooting happened. This too was a lie. The witness
18 was catapulted into consciousness by Riley.

19 According to Riley, the witness had to be roused from his sleep to investigate the loud
20 noises he apparently had not heard while passed out in bed. The witness told police that when
21 he was shot there were two assailants. According to the police investigation, this too is not true.⁹

22 ⁷ In its Opposition, the State cites Cunningham v. State, 113 Nev. 897, 944 P.2d. 261 (1997) for support. This case
23 does not support approval of this suggestive and unfair identification process. In Cunningham, the Nevada Supreme
24 Court specifically found that "Chandler did not unduly suggest to Perry that Cunningham was the suspect Chandler
had in mind." Id at 265. In this case, the photograph used in the line-up had already been widely associated with the
person responsible for the crimes. The court in Cunningham specifically noted that in that line-up, "Cunningham
was not the only light-skinned black man in the photograph array." Id at 265. However, in this case, the Defendant
was the only light haired black man in the photograph array. This optical disparity was exacerbated by the fact
that the Defendant was also the only person in the line-up with light eyes (blue per LVMPD booking information).

⁸ Bias v. State, 105 Nev. 869, 871, 784 P.2d. 963, 964 (1989).

⁹ The police have seemingly abandoned the two suspect theory that stemmed from this witness' on scene
identification.

1 The witness said that both assailants were wearing ski masks. If this challenged identification is
2 to be determined reliable then this statement was also be untrue. The time between incident and
3 identification is one of the five factors from which reliability is gleaned. In this case five weeks
4 passed between incident and the challenged identification.

5 The bedrock of the American judicial process is the honesty of witnesses at trial. Eyewitness
6 identification testimony presents the most damaging yet least understood evidence that can be
7 offered by a witness. Juries amass great weight behind eyewitness identifications even though
8 eyewitness misidentification represents the most common element in all wrongful convictions
9 later overturned by DNA evidence. This case represents an unholy convergence of an
10 impermissibly suggestive line-up procedure with a witness who is willing to fabricate. The State
11 argues that reliability can be gleaned from the fact that the witness had seen the suspect just
12 immediately prior to the shooting when the witness paid a drug debt for William Posterino.¹⁰
13 The State's argument is that the witness had just seen the Defendant immediately before the
14 shooting and thus his subsequent identification of the Defendant five weeks later is reliable.
15 However, the obvious flaw in this argument is why did it take five weeks? The witness had the
16 chance to convey the same "reliable" identification minutes after the shooting. Instead, the
17 witness told police the shooter and his accomplice were wearing ski masks. According to the
18 State's argument, once the police had settled on a suspect and arrested the Defendant and
19 published his booking photograph, then the "reliable" identification could proceed.

20 The State cites several reported cases in their Opposition. The cited cases are uniformly
21 distinguishable from the circumstances presented by this challenged identification process.

22 ¹⁰ The State writes, "This suggests that Nick (witness) saw the Defendant within days or hours of the shooting."
23 Opposition at p.8. The State argues this fact as if it insures reliability of the hospital identification process five
24 weeks after the shooting. Nothing could be further from reality. The fact that the witness had just seen the
Defendant hours before the shooting reinforces the fact that the subsequent hospital identification process was
unfairly rigged.

If the witness had seen the Defendant 10-15 times prior to the shooting, including just hours prior to the incident
itself, immediate identification on the scene to both police and his girlfriend Ms. Riley, would be expected. This
was not the case. Instead, the witness failed to even respond to Ms. Riley's spontaneous inquiry about the identity
of the shooter and the witness specifically told police that the shooter was wearing a ski mask minutes after Ms.
Riley's question. Neither of these crucial events were addressed in the police interrogation at the hospital even
though the same police officers had to have been aware of these stark inconsistencies in their own investigative
record.

1 Cunningham is discussed at length in the Opposition.¹¹ The Court in Cunningham distilled the
2 Defendant's arguments into two components. The first involved a statement by the police
3 officer made a week before the line-up. In that statement, "Chandler (the officer) asked Perry
4 (the witness) a week before the line-up if the driver of Suzette's car could have been a light-
5 colored black man, Chandler was suggesting that the suspect was black not white."¹² The
6 Cunningham Court began by applying the standard created by the United States Supreme Court
7 in Simmons.¹³ This standard requires a court to consider the totality of surrounding
8 circumstances as to whether a photographic identification was "so unduly prejudicial as to
9 fatally taint the conviction." In Cunningham, the Court noted, "the facts indicate that Perry did
10 not identify Cunningham based on any statements made by Chandler. We further conclude that
11 Chandler did not unduly suggest to Perry that Cunningham was the suspect Chandler had in
12 mind."¹⁴ In this case, police came to witness' hospital room with Belcher predetermined as the
13 correct choice. The witness has already failed to identify Belcher but suddenly there is a
14 photographic array with his picture in it and no explanation about why the witness would
15 suddenly reverse himself on this subject.

16 According to the State's version of events, the witness first told police of Belcher's
17 involvement on January 12, 2011 while at the hospital. However, the police showed up at the
18 hospital, with the knowledge that the witness had been unable to identify any suspect because of
19 the ski masks. In Cunningham, the Court found umbrage in the fact that, "Cunningham was not
20 the only light-skinned black man in the photographic array."¹⁵ However, Defendant Belcher was
21 in fact the only light haired black man with facial hair and light eyes in his photographic array.

22 ¹¹ Cunningham v. State, 113 Nev. 897, 944 P.2d. 261(1997). Cited at pp. 4,5,6 and 7 of the State's Opposition.

23 ¹² Id. at 265. In Footnote 4, the court noted that, "the photographic line-up contains three white men and three
24 light colored black or Hispanic men, therefore, even if Chandler was suggesting that the suspect was black, Perry
had three men to choose from."

¹³ Simmons v. United States, 390 U.S. 377, 383, 88 S.Ct. 967, 970-971 (1968). Cited in the Motion to Suppress at
Fn. 10,11,12.

¹⁴ Id at 265.

¹⁵ Id at 265.

1 This fact becomes even more compelling when it is realized that light or “blonde” hair was
2 essentially the centerpiece of the witness’ description of the assailant. When witness Brabham
3 was asked if there was “anything identifiable about him, any certain tattoos, any certain? The
4 witness answered, “I just saw blonde hair, blue eyes.”¹⁶ When the officer asked, “what was the
5 first thing that caught your attention inside the house?” The witness’ answer was “the blonde
6 head.” The officer apparently confused asked again, “a what?” the witness again stated, “a
7 blonde head.”¹⁷

8 More recently in Thompson, the Nevada Supreme Court found that a photographic line-up
9 was not impermissibly suggestive, “because the photographic line-up consisted of individuals
10 who all matched Coppola’s general description of her assailant.”¹⁸ In Thompson, a reassuring
11 similarity between the description first given by the victim at the time of the crime and
12 photographs that generally fit the victim’s description to police distinguished that case from
13 Defendant Belcher’s circumstance. The Court noted “Coppola described the taller assailant,
14 later identified as Thompson, as an American man in his late twenties or early thirties with light
15 brown skin, short hair, and wearing a fitted t-shirt. In the photographic line-up containing
16 Thompson’s picture, the men were all African-American, had similarly shaped faces and short
17 hair, appeared to be approximately the same age and Thompson and one other man were
18 wearing white t-shirts.”¹⁹ The Court then concluded that based upon the prior description and
19 the survey of photographs that the line-up was not impermissibly suggestive. Specifically, the
20 Court held that, “because the photographic line-up consisted of individuals who all matched

21 ¹⁶ Statement of witness Brabham taken at UMC on January 12, 2011 at p.11. Attached as Exhibit A to the Motion
22 to Suppress.

23 ¹⁷ Exhibit A of Original Motion to Suppress at p.4 Witness Brabham’s blonde hair testimony, though negligible
24 and unreliable, becomes even more suspicious when considered with the preliminary hearing testimony of next
door neighbor Brenda Williams. Ms. Williams testified that the suspect, the State portrayed as the Defendant, was
covered by “a hoodie.” Ms. Williams confirmed that the hood was up over the suspect’s head. Preliminary Hearing
transcript, held before the Honorable Joe Bonaventure, Justice of the Peace, January 21, 2011 at p. 25.

¹⁸ Thompson v. State, 125 Nev. _____, 221 P.3d. 208 (2009).

¹⁹ Id. at 713.

1 Coppola's general description of her assailant, we conclude that it was not impermissibly
2 suggestive."²⁰

3 In Defendant Belcher's case there was no previous description by the witness that would
4 permit the assembly of any photographic array. Instead, the police had arrested a suspect. They
5 took a picture of that suspect and released it to the media. Five weeks passed and they
6 approached the witness with an array containing that picture and asked that witness whether he
7 could make an identification. Unlike Thompson, Brabham offered no prior general description
8 from which similarly appearing suspects could be drawn. The photographs are strikingly
9 dissimilar to Defendant Belcher but that point is almost secondary considering the police had no
10 previous statement or reported basis to believe that this witness could identify Defendant
11 Belcher.²¹

12 Skin color is of the utmost importance in presenting a fair and unnecessarily suggestive
13 photographic line-up.²² Defendant Belcher's skin tone is unique. Men of similar skin tone
14 should have been included by police in the challenged photographic array. High yellow,
15 occasionally yellow, is a term for very light skinned persons of black descent. It is a reference to
16 the usually very pale undertone to the skin color of this group. The term was in common use in
17 the United States at the end of the 19th Century and the early decades of the 20th Century.²³
18 Many high yellows are as light skinned as Europeans, and even lighter than some Europeans.

19 ²⁰ Id. at 713, citing Odoms v. State, 102 Nev. 27, 31 (1986).

20 ²¹ The picture of Defendant Belcher shows a lone light haired black person. It also depicts the only person without
21 facial hair. Equally important, the Defendant is the only person depicted in the photographic line-up with light
22 eyes. This is another crucial point because in the description given immediately before the line-up was shown, the
23 witness described his assailant as having "blue eyes." None of the other men depicted in the line-up have light
24 colored eyes.

²² In Thompson the Court noted that the description called for men with "light brown skin." Id. at 713. In
Cunningham the court, in part, based its decision on the fact that "Cunningham was not the only light skinned black
man in the photographic array. Supra at 265.

²³ The term high yellow has its roots in American culture, sometimes in a derogatory sense, since the end of the
19th Century. It appears in such art as the song, "The Yellow Rose of Texas"(a traditional folk song about a yellow
skinned indentured servant named Emily D. West) and Yellowman, a dramatic play honored as a 2002 Pulitzer
price finalist. As recently as 2004, white R&B singer-songwriter Teena Marie released a song titled "High Yellow
Girl" about her biracial daughter Alia Rose. Rapper Jay-Z refers to his wife Beyonce Knowles, as "my high yellow
broad" in his 2009 song "Off That."

1 Their specific skin hue is generally caused by a mixture of European ancestry.²⁴ Norman
2 Belcher's specific skin hue alone makes this photographic line-up impermissibly suggestive.
3 The other men in the line-up all appear to be light skinned blacks but none of them have this
4 Defendant's yellow hue. Apart from facial hair, eye and hair color, this fact causes a striking
5 optical disparity. The witness chose Defendant Belcher's photograph not because of what he
6 witnessed but because of what happened after the shooting. This makes his identification of the
7 Defendant unreliable. Use of that identification at a trial in this case would violate the
8 Defendant's due process rights.

9 CONCLUSION

The Defendant respectfully prays that his Motion be granted.

10 DATED this 27th day of July, 2012.

11 By: _____
12 Robert M. Draskovich, Esq. (6275)
13 Gary A. Modafferi, Esq. (12450)
14 Attorneys for Defendant
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²⁴ The Case of Desiree's Baby; the genetics and evolution of human skin color.

1 **ROC**

ROBERT M. DRASKOVICH, Esq. (6275)

2 Gary A. Modafferi, Esq. (12450)

815 S. Casino Center Blvd.

3 Las Vegas, Nevada 89101

Telephone: (702) 474-4222

4 Attorneys for Defendant

5 **DISTRICT COURT**
CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 NORMAN BELCHER,

10 Defendant.

CASE NO.: C270562

DEPT. NO.: VI

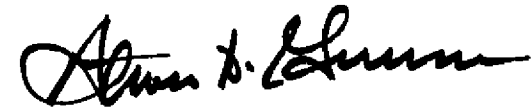
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12 **RECEIPT OF COPY**

13
14 RECEIPT of **REPLY TO STATE'S OPPOSITION TO MOTION TO SUPPRESS**

15 **IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION**

16 **PROCEDURE** is hereby acknowledged this _____ day of _____, 2012.

17
18
19 _____
Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
20 Las Vegas, NV 89101
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CLERK OF THE COURT

SUPPL

ROBERT M. DRASKOVICH, ESQ. (6275)
Gary A. Modafferi, Esq. (12450)
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 474-4222
Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

CASE NO.: C270562

DEPT. NO.: VI

NORMAN BELCHER,

Defendant.

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO STRIKE PRELIMINARY HEARING AND DISMISS CHARGES**

COMES NOW the Defendant, NORMAN BELCHER, by and through his attorneys of record, Robert M. Draskovich, Esq., and Gary A. Modafferi, Esq., of Turco & Draskovich, LLP, and respectfully submits the following Supplemental Memorandum of Law in Support of Defendant's Motion to Strike Preliminary Hearing and Dismiss Charges.

The Defendant's Motion to Strike is based upon the argument that Defendant was entitled to effective, conflict-free, assistance of counsel at his preliminary hearing and he was denied that right in violation of the Fifth, Sixth 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.

At a prior hearing held on September 23, 2013, the Court inquired as to whether the denial of effective counsel at the preliminary hearing constituted "harmless-error." Counsel responded that because of the nature and importance of the preliminary hearing, the timing of his objection, and the fact that this is a capital prosecution, harmless-error review is erroneous and even if it were employed, the error was not harmless.

1 This Supplemental Memorandum follows to support those arguments.

2 DATED this 3rd day of October, 2013.

3 /s/ Gary A. Modafferi

4 By: _____
5 Robert M. Draskovich, Esq. (6275)
6 Gary A. Modafferi, Esq. (12450)
7 Attorneys for Defendant
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1 **SUPPLEMENTAL MEMORANDUM OF LAW**

2 In Holloway, the United States Supreme Court made the distinction that capital prosecutions
3 must be considered differently. There, the Court held that, “this court has concluded that the
4 assistance of counsel is among those constitutional rights so basic to a fair trial that their
5 infraction can never be treated as harmless-error.¹ Accordingly, when a defendant is deprived of
6 the presence and assistance of his attorney, either throughout the prosecution or during a critical
7 stage in, at least, the prosecution of a capital offense, reversal is automatic.”

8 The timing of this objection and the nature of the penalty do not lend themselves to
9 harmless-error review as described in Patterson.² Trial errors are subject to harmless-error
10 review because these errors “may ... be qualitatively assessed in the context of other evidence
11 to determine whether [they were] harmless beyond a reasonable doubt.” At this point there is no
12 other evidence to determine context. Without a trial, this analysis cannot be employed.

13 The Court went on to state, “conversely, “structural defects” affect the framework within
14 which trial proceeds, rather than simply an error in the trial process itself. Such errors are
15 grounds for reversal because they “defy analysis by harmless-error standards.”³

16 Mr. Belcher’s situation, having been denied effective, conflict-free representation, at
17 preliminary hearing, but before trial, is a structural defect that defies analysis by a harmless-
18 error standard. The State suggests that the exercise of a death penalty trial will wash away the
19 sins of this constitutional deprivation but that suggestion is error. The Patterson Court found that
20 the Defendant there was not entitled to relief because it did not result in total deprivation of
21 counsel.⁴ In Patterson, the defendant still had qualified retained counsel who was not subject to
22 conflict.

23 Defendant Belcher, due to Mr. Maningo’s ethical disability and divided loyalties, was totally
24 deprived of counsel both by rule and by circumstance. As the Court in Holloway stated, “the
25 mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the

26 ¹ Holloway v. Arkansas, 435 U.S. 475, 489 (1978)(emphasis supplied)

27 ² Patterson v. State, 129 Nev. Adv. Op. 17, 21 (2013)

28 ³ Patterson, id, citations omitted quoting Arizona v. Fulminante, 499 U.S. 279 at 309-310 (1991)

29 ⁴ Patterson, id, citing Manley v. State, 115 Nev. 114, 123 (1999)

1 advocate's conflicting obligations have effectively sealed his lips on crucial matters."⁵ The rules
2 that prevented rigorous cross-examination are NRPC Rules 1.6 and 1.7.⁶

3 Mr. Belcher was entitled to strict compliance with these rules. Compliance is examined with
4 heightened scrutiny in capital cases because of the Nevada Supreme Court's expressed
5 sentiment that, "this court places the highest priority on diligence in the discharge of
6 professional responsibility in capital cases."⁷ This type of scrutiny at this juncture of Mr.
7 Belcher's prosecution does not lend itself to harmless-error review. Similarly, this Court will

8 ⁵ Holloway, supra at 490.

9 ⁶ **Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed
10 consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted
11 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:

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

12 (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;

13 (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;

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

15 (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

16 (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.]

18 **Rule 1.7. Conflict of Interest: Current Clients.**

19 (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:

20 (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.

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

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

23 (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

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

[Added; effective May 1, 2006.]

⁷ Supreme Court Rules adopted by the Supreme Court of Nevada, Rule 250 (1).

1 not be able to determine with any modicum of confidence that proceeding to trial with the error
2 that exists will not, beyond a reasonable doubt, contribute to the defendant's conviction.⁸

3 Exactly the opposite is true. The failure to cross-examine Nicholas Brabham at preliminary
4 hearing has had rippling effects throughout this prosecution. Proceeding to trial now without the
5 benefit of a constitutionally sound preliminary hearing will most likely contribute to the
6 Defendant's conviction.

7 The Defense has repeatedly come before this Court through written motion asking for any
8 evidence of the second suspect that Nicolas Brabham described to police on the night of the
9 shooting. According to a Las Vegas Metropolitan Police Department Application for
10 Telephonic Search Warrant, "prior to Brabham going into surgery, he told officers that two
11 males wearing dark clothing and ski masks came into the house and shot him."⁹ It is the State's
12 position that no investigation regarding this second suspect was ever conducted because no
13 second suspect ever existed. According, to the State, in response to Defendant's specific
14 discovery requests, there exists no follow-up investigation any forensic comparison to a second
15 suspect.

16 With his client facing death, it was incumbent upon Counsel at preliminary hearing to
17 inquire about the "two males wearing dark clothing and ski masks (that) came into the house
18 and shot him."¹⁰ The failure to do so could never be harmless, particularly when counsel should
19 not have represented client at the hearing. The reasons for inquiry into such matters, by non-
20 conflicted counsel, at the preliminary hearing stage were delineated in Coleman:

21 First, the lawyer's skilled examination and cross-examination of witnesses
22 may expose fatal weaknesses in the State's case that may lead the
23 magistrate to refuse to bind the accused over. Second, in any event, the
24 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

⁸ Patterson, supra at 21. Citing Hernandez v. State, 124 Nev. 639, 653 (2008)

⁹ Exhibit A at p.3.

¹⁰ Exhibit A at p.3.

1 possible the preparation of a proper defense to meet that case at the trial.
2 Fourth, counsel can also be influential at the preliminary hearing in making
3 effective arguments for the accused on such matters as the necessity for an
4 early psychiatric examination or bail.¹¹

5 Mr. Belcher was deprived of all of these benefits because Mr. Maningo's divided
6 loyalties created a structural error resulting in a total deprivation of counsel. The foundational
7 pieces of Mr. Belcher's defense were irretrievably altered. Mr. Maningo's unlawful
8 representation of Defendant Belcher at preliminary hearing has had a destructive rippling effect
9 on his defense.

10 This rippling effect included the failure to file a Writ of Habeas Corpus (Pre-Trial)
11 challenging the sufficiency of proof at the preliminary hearing. The rippling effect also included
12 a failure of investigation into the identity of the second shooter based upon inquiry that could
13 have only come from Witness Brabham. Mr. Brabham is the only person who could give detail
14 about how this second shooter might be physically identified. There was no recorded inquiry
15 from the State or police about the second shooter's identity. Preliminary hearing counsel had an
16 absolute duty to ask Brabham about this second person.

17 In Patterson, the question presented to the Court was whether the deprivation of
18 Patterson's Sixth Amendment right of counsel at the preliminary hearing was a structural error
19 warranting reversal of Patterson's judgment of conviction, or rather was it trial error subject to
20 harmless-error review? As noted earlier, this Honorable Court does not have the luxury of a
21 trial to put that assessment into context. Equally important, in Patterson, the defendant still had
22 qualified, non-conflicted counsel to represent him throughout the preliminary hearing.

23 Mr. Belcher was deprived of this right. Furthermore, the heightened scrutiny of the
24 Eighth Amendment due to the possible application of the death penalty was not an issue in
Patterson. It is a weighty consideration in this case. The United States Supreme Court has
required heightened reliability in the adjudicative process leading to a death sentence.¹²

¹¹ Coleman v. Alabama, 399 U.S. 1, 9-10 (1970)

¹² 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 would be inconsistent with a harmless-error review at this juncture).

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DATED this 3rd day of October, 2013.

By: _____
Robert M. Draskovich, Esq. (6275)
Gary A. Modafferi, Esq. (12450)
Attorneys for Defendant

CERT

ROBERT M. DRASKOVICH, ESQ. (6275)

Gary A. Modafferi, Esq. (12450)

815 S. Casino Center Blvd.

Las Vegas, Nevada 89101

Telephone: (702) 474-4222

Attorneys for Defendant

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

NORMAN BELCHER,

Defendant.

CASE NO.: C270562

DEPT. NO.: VI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 2013, I served a true and correct copy of the foregoing **SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO STIKE PRELIMINARY HEARING AND DISMISS CHARGES** upon the following:

Robert Daskas, Esq.
Chief Deputy District Attorney
robert.daskas@clarkcountynvda.com

/s/ Erika W. Magana

An Employee of Turco & Draskovich, LLP.

EXHIBIT “A”

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT**

Event #101206-0354

The following is the transcription of the recorded Application for Search Warrant between affiant, Detective Sergeant Matthew Sanford and Judge Douglas Smith.

MS (MATTHEW SANFORD). Okay, Judge Smith, do you understand this phone call is being recorded?

JS: (JUDGE SMITH). Yes.

MS. This is Detective Sergeant Matthew Sanford, P#5293, of the LVMPD Homicide Section. I am making an application for a telephonic search warrant pursuant to N.R.S. 179.045, under event number 101206-0354. I am talking to Judge Smith. The date is December 6, 2010, with the time being 0610 hours. Judge, would you please place me under oath?

JS: Raise your right hand. Do you solemnly swear the information and testimony you're about to give me is the truth?

MS: Yes sir, I do.

JS: Go ahead.

MS: My name is Detective Sergeant Matthew Sanford, P#5293. I am employed by the Las Vegas Metropolitan Police Department, and have been so employed for 14 years. I am currently assigned to the Homicide Section and have been so for the last eleven months. Judge, my application is as follows.

On December 6, 2010, I was called out and responded to 9752 Villa (V-I-L-L-A) Lorena (L-O-R-E-N-A) Avenue, Las Vegas, Clark County, Nevada, the below described residence, and arrived at said location at approximately 0430 hours. Based on my training and experience, as well as the information provided to me by the detectives and patrol officers at the scene, it appears that a homicide has occurred. Homicide detectives and crime scene analysts were requested and have responded to conduct the investigation, collect evidence and document the crime scene.

There is probable cause to believe that certain property hereinafter described will be found at the following described premise, to wit: 9725 Villa Lorena Avenue, Las Vegas, Clark County, Nevada. The structure is a two story, single family residence, having a primarily beige color stucco exterior, with the numbers

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION**

Event#: 101206-0354

Page 2

9752, black in color, affixed to a white placard located on the west side of the garage facing south.

The property referred to and sought to be seized consists of the following:

1. Paperwork such rent receipts, utility bills and addressed letters showing the names of persons residing at the premise.
2. Written correspondence, diaries, financial records, wills and like items.
3. Items of value such as jewelry, watches, money, credit cards, identification and like items, including receipts for the same.
4. Photographs, video and/or audio tapes or discs, cellular phones, desktop and/or laptop computers.
5. Telephonic information to include caller ID history, answering machine messages, phone directories, call histories, photographs and/or videos stored electronically in residential or cellular phones.
6. A thorough microscopic examination and documentation of the crime scene to discover trace evidence to include, but not limited to, fingerprints, blood, hair, fibers and bodily fluid samples.
7. Unknown caliber shell casings.
8. Marijuana, scales, owe sheets and packing materials used to sell narcotics.
9. Firearms to include handguns, shotguns and rifles, ammunitions for the same, and paperwork associated with the ownership of firearms.

In support of your Affiant's assertion to constitute the existence of probable cause, the following facts are offered.

On December 6, 2010, at 0243 hours, LVMPD dispatch received a 911 call from an anonymous caller that they had heard several gunshots at 9752 Villa Lorena Avenue. Patrol officers and medical personnel were dispatched to the residence. Upon patrol officers' arrival at 9752 Villa Lorena Avenue, they heard noises coming from the backyard. Officers gave verbal commands for the person to come out

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION

Event#: 101206-0354

Page 3

towards them. Officers came in contact with Ashley, A-S-H-L-E-Y, Riley, R-I-L-E-Y, date of birth 10-03 of 1981. Riley informed officers that a young girl was inside and had been shot. Additional patrol officers announced Metro police and made entry into the residence.

A male, later identified as Nicholas, N-I-C-H-O-L-A-S, Brabham, B-R-A-B-H-A-M, date of birth 02-04 of '79, called out to officers that he had been shot. Patrol officers continued to sweep through the residence and located a female, later identified as Alexis, A-L-E-X-I-S, Postorino, P-O-S-T-O-R-I-N-O, date of birth 09-27 of '95, in the bedroom, face down, unresponsive, with several gunshot wounds and several shell casings surrounding her body. Brabham and Postorino were both transported to UMC trauma. Postorino was pronounced deceased by attending physician Dr. Coates, C-O-A-T-E-S, at 0336 hours.

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. Riley informed officers that she had come over to the residence at 2030 hours on December 5, 2010, to smoke marijuana and drink with Brabham. After about an hour and a half or so they went to bed. Riley stated that at unknown time she heard glass break and a loud bang. She awoke Brabham and told him that someone had broken into the residence and was downstairs. Brabham left the bedroom, went downstairs and she heard several gunshots. Riley stated that initially she went into the closet to hide, but when she heard more gunshots she jumped out of the rear window from the second story into the backyard in an attempt to escape. After a few minutes later, she heard police officers arriving and order her to come out to the front of the house, which she did, with her hands up.

During the protective sweep of the residence, patrol officers observed an unknown amount of marijuana inside of the residence.

It has been my experience and training that the examination of the crime scene and recovery of the above described property is necessary in providing the cause of death, the circumstances involved related to the death, and to circumstantially identify the perpetrator of the crime. A thorough microscopic crime search of the premise is necessary in order to establish the location of the crime, its extent, and circumstances surrounding the crime. This search may involve the damaging and/or removal of such items as carpeting, wallboard and other interior or exterior surfaces. The evidence of dominion and control as described is necessary in establishing dominion and control over the premise, and often assists in identifying

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION**

Event#: 101206-0354

Page 4

the perpetrator. Such evidence is normally left or maintained upon or within the premise. Information from diaries, letters, written records, audio or video tapes or discs, cellular phones, personal desktop and/or laptop computers may disclose information about the deceased's associations, relationships, traits and habits, recent activities, future plans, noteworthy occurrences, financial dealings, and recent communications, showing the motive and/or identity of the perpetrator. If items of value are missing, or are not missing, it may show motivation for the murder.

Night service is necessary because my training and experience indicates that trace evidence is often small, sometimes invisible to the eye, and easily eliminated by environmental changes. The residence to be searched is currently unoccupied and secured by officers. During the night time service hours there is no one inside to be annoyed by the night time service of a search warrant.

Wherefore your Affiant requests that a search be issued directing a search for the and seizure of the aforementioned items at the location set forth herein, executing this warrant any time during the day or night.

Judge, do you find there is probable cause for issuance of the search warrant?

JS. Yes.

MS: Do you authorize the night time clause?

JS: Yes.

MS: Do I have your permission to sign your name to both duplicate original search warrants?

JS. Yes.

MS. One duplicate will remain with me in the search warrant packet, and the other copy of the duplicate original will be left at the premise searched.

For the record, Judge, I am now signing your name, Judge, to the duplicate original search warrants.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION

Event#: 101206-0354


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Judge Smith, this ends our conversation and concludes the recording at 0618 hours
on December 6, 2010.

JS: All right.

(END OF RECORDING)

This transcription has been typed
by Shelly Donlan on 12-07-10 at
0900 hours and is true and correct.


Shelly Donlan, P#3766

I, having reviewed this transcription,
affirm that it is true and correct.


Sergeant Matthew Sanford, P#5293

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
APPLICATION FOR TELEPHONIC SEARCH WARRANT
CONTINUATION**

Event#: 101206-0354

Page 6

Certification:

Having read the transcription of the recorded application for the telephonic Search Warrant issued by this Court on December 6, 2010, under Event #101206-0354 with Detective Sergeant Matthew Sanford, P#5293, as affiant, and having reviewed the application, it appears that the transcription is accurate.

Judge Douglas Smith

MS:sd
10W1465

1 **MOT**

2 ROBERT M. DRASKOVICH, ESQ. (6275)

3 Gary A. Modafferi, Esq. (12450)

4 815 S. Casino Center Blvd.

5 Las Vegas, Nevada 89101

6 Telephone: (702) 474-4222

7 Attorneys for Defendant

FILED

JUL 11 3 21 PM '12

Stan K. L. L.
CLERK OF THE COURT

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 NORMAN BELCHER,

14 Defendant.

CASE NO.: C270562

DEPT. NO.: VI

15 **MOTION TO SUPPRESS IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC**
16 **IDENTIFICATION PROCEDURE**

17 COMES NOW the Defendant, NORMAN BELCHER, by and through his attorneys of
18 record, Robert M. Draskovich, Esq., and Gary A. Modafferi, Esq., of Turco & Draskovich,
19 LLP., and respectfully moves this Honorable Court for an order suppressing any and all
20 evidence directly or derivatively obtained as a result of an impermissibly suggestive
21 photographic identification procedure. The photographic array at issue violates the Defendant's
22 right to due process under the Fourteenth Amendment to the United States Constitution and
23 Article I, Sec. 8 of the Constitution of the State of Nevada.

24 This Motion is offered in addition to any evidence and/or argument adduced at a hearing
on this matter. It is supported by the attached Memorandum of Law.

DATED this 11th day of July, 2012.

By: 

Robert M. Draskovich, Esq. (6275)

Gary A. Modafferi, Esq. (12450)

Attorneys for Defendant

NOTICE OF MOTION

T.C.: District Attorney, Clark County, Nevada;

MOTION TO SUPPRESS IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC

IDENTIFICATION PROCEDURE will be heard on the 23 day of July, 2012, at

8:30 a.m./p.m. in Department VI.

DATED this 11th day of July, 2012.

By:

Robert M. Draskovich, Esq. (6275)
Gary A. Modafferi, Esq. (12450)
 815 S. Casino Center Blvd.
 Las Vegas, Nevada 89101
 (702) 474-4222
 Attorneys for Defendant

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MEMORANDUM OF LAW

On December 6, 2010 Nicholas Brabham (hereinafter "witness") described the entry of two intruders at 2:43 a.m. at 9758 Villa Lorena. Alexis Postorino was killed from gunshot wounds inflicted by one of the intruders. The witness was wounded in the back but survived several gunshots. It is the photographic array shown to the witness and the public release of that same booking photograph used in the suggestive array that is the subject of this constitutional challenge.

The witness was still recovering from his wounds when he was interviewed at UMC trauma on January 12, 2011, five weeks after the incident. It was during this interview that the witness first told police that one of his two assailants was the Defendant. Seconds after the shots were fired, the witness did not identify the assailant to his girlfriend Ashley Riley (hereinafter "Riley"). Minutes later, the witness told police that he was shot by one of two persons both wearing ski masks and dark clothing.

The witness was a guest of William Postorino, the lessee of the home where the shooting happened on the early morning hours of December 6, 2010. The witness was with his friend Riley in the upstairs portion of the house.¹ The witness was suddenly roused by Riley who woke when she heard people breaking glass on the lower level of the home. They were both sleeping. This was not the story the witness told the police but it is the story that Riley told the police.²

The witness told the police on January 12, 2011 that he had just entered the house at about 2:30 a.m. when, at the top of the stairs, he saw "a blonde head," he later identified as "Bates." "Bates" is a nickname for the Defendant. Postorino knew the Defendant from the fifth grade.³ However, the witness had just met the Defendant for the first time a month or two prior

¹ See attached Exhibit A, Statement of Nick Brabham, 19 pp. at p.3 hereinafter "TR".

² Ms. Riley gave a statement to police where she stated that she drank alcohol, smoked methamphetamine, and marijuana with the witness and then fell asleep with him on his bed. Two intruders came into the home. She screamed hid in a closet and then saw that the witness returned to the room – with bullet wounds. Ms. Riley jumped from the second story window, leaving the witness in the upstairs room. On January 12, 2012 the witness told police that Riley was outside in the car and not in the upstairs bedroom and then he stated he could not remember the details of Riley's whereabouts.

³ TR at pp.4-5.

1 to the shooting. The witness did not have the lifetime familiarity with the Defendant that
2 F'ostorino had developed.

3 There was no conversation on the morning of the shooting with either of the people the
4 witness said were present on the upper level of the home.. The witness described his opportunity
5 to view the Defendant as a "glimpse" and immediately thereafter, the witness said "and then I
6 seen shots fired."⁴ The assailant fired three or four shots at the witness.⁵ The witness did not
7 described any facial features on January 12, 2011; rather, he simply said that "I just saw blonde
8 hair, blue eyes" and that the shooter was of "mixed" racial origin.⁶ The witness also told police
9 that there was second person behind the Defendant but the witness was unable to say whether it
10 was male or female or black or white. December 6, 2010, the witness told police both assailants
11 were wearing ski masks and dark clothing.

12 On January 12, 2012, the police asked the witness, "do you think if I showed you some
13 pictures do you think you'd recognize him?"⁷ Implicit in this police question is the suggestion
14 that the array would contain the Defendant's photograph. The preceding standardized
15 precautions about viewing the array, however, are intended to disabuse the witness of this
16 specific suggestive assumption.

17 The police then showed the witness a line-up containing the booking photograph of the
18 Defendant. As will be later described, this same booking photograph had been widely
19 distributed throughout the media beginning on December 7, 2011. The Defendant is the only
20 person depicted in the photographic array with light colored hair.⁸ The Defendant is the only
21 person depicted in the photographic array without facial hair. All of the other five participants
22 have dark hair on their heads and hair on their faces.

21 ⁴ TR at p.6.

22 ⁵ The witness asserted that Riley was waiting in the car when the shooting started. TR at p.10.

23 ⁶ TR at p.12.

24 ⁷ TR at p.12.

⁸ See Exhibit B attached. Photo Line-Up Witness Instructions and Line-Up.

1 During the identification interview with the witness at UMC on January 12, 2011, the
2 police do not address the fact that the witness previously did not identify the shooter to Riley.
3 Neither did the police address the fact that moments later, immediately after the shooting; the
4 witness told police that the shooter was wearing a ski mask. It is disturbing that these previous
5 misidentifications were simply ignored by both the police and the witness during the
6 identification interview at UMC five weeks after the shootings. Also disturbing, is the fact that
7 knowing the witness has already told police five weeks earlier that the shooter was wearing a
8 ski mask, police show up to interview at UMC with a prefabricated photographic array
9 containing the same booking picture released to the media weeks prior.

10 The issue of tainted and suggestive identification procedures was addressed by the United
11 States Supreme Court in Stovall.⁹ There, the Court set out the due process protection analysis to
12 be employed when convictions are based on impermissibly suggestive eyewitness
13 identifications.¹⁰ In Simmons,¹¹ the Court succinctly set out the governing rule that pretrial
14 identification procedures obtained through suggestive photograph arrays will be suppressed if
15 the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of
16 irreparable misidentification. These two cases hold that suggestive identification procedures are
17 disapproved because they gratuitously increase the likelihood of misidentification.

18 Such is the case of Norman Belcher, the only blonde haired mixed race person in a
19 photographic array shown to a witness who had previously described his assailant as donning a
20 ski mask. This fact alone gratuitously increased the spectre of irreparable misidentification.
21 However, further analysis is necessary.¹²

22 ⁹ Stovall v. Denno, 388 U.S. 293 (1967) where the court held that the Defendant was protected from unnecessarily
23 suggestive pretrial identification procedures because such procedures were conducive to irreparable mistaken
24 identification and thus violated due process of law.

¹⁰ Simmons v. United States, 390 U.S. 377 (1968)

¹¹ Simmons, id, at 384.

¹² The precepts set forth in Stovall and Simmons have been adopted by the Nevada Supreme Court. The Court has
held that in reviewing the propriety of a pretrial identification, the court considers "(1) whether the procedure is
unnecessarily suggestive, and (2) if so, whether under all circumstances, the identification is reliable despite an
unnecessarily suggestive procedure. Bias v. State, 105 Nev. 869, 871 (1989) See, Also Cunningham v. State, 113
Nev. 897, 904 (1997) quoting Simmons, 390 U.S. 377, 383-84 (1968).

1 By the time the police appear at UMC to show the witness the contested photographic array,
2 the well of fair play had already been poisoned because the police released the same booking
3 photograph to the media on December 7, 2010. This process ensured that the witness would be
4 exposed to that same photograph countless times as he recuperated at UMC for five weeks. The
5 witness would also be allowed the opportunity to discuss the on-going police investigation both
6 as it was reported in the press and as it was reported by the witness' contacts in the drug
7 community. This previous exposure combined with the fact that the Defendant was the only
8 light haired person in the array, prevented any meaningful fairness in the identification
9 procedure. It also made the witness' identification of the Defendant patently unreliable.

10 The standardized analytical factors used to determine reliability in the face of a suggestive
11 identification procedure were announced in Manson v. Brathwaite.¹³ There the United States
12 Supreme Court set out a specific five part test for determining when due process requires
13 suppression of an out-of-court identification infected by suggestive procedures. The operative
14 constitutional proposition identified by the Manson Court was that the Due Process Clause of
15 the Fourteenth Amendment requires "fairness" in identification procedures, and specifically it
16 demands "reliability" be proven by the State when suggestive identification procedures are
17 employed by the police.¹⁴

18 "Reliability is the linchpin," wrote Justice Blackman for the Court.¹⁵ The Court in Manson
19 held that once an identification procedure is determined to be unnecessarily suggestive, a
20 reliability analysis based upon five factors must be employed.¹⁶ The factors include; 1) the
21 opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree
22 of attention; 3) the accuracy of the prior description of the criminal; 4) the level of certainty
23 demonstrated at the confrontation, and; 5) the time between the crime and the confrontation.

24 ¹³ Manson v. Brathwaite, 432 U.S. 98 (1977)

¹⁴ *Id* at 113-114

¹⁵ *Id* at 114.

¹⁶ The five factors had also been set out in Biggers, 409 U.S. 199-200.

1 Against these factors is to be weighed the corrupting effect of the suggestive identification
2 procedure itself.¹⁷

3 In this case, the suggestive procedure was actually a process that began on December 7,
4 2010, when the same booking photograph, that would later be included in the challenged array,
5 was disseminated to the public. The weight of the evidence of these factors leads to the
6 inescapable conclusion that the identification of the Defendant was not only unnecessarily
7 suggestive but it was also unreliable. This unreliability cannot be ignored nor can it be repaired.

8 **1. The opportunity to view:** In his statement to police at UMC, the witness said he
9 had just entered his home in the early morning hours and as he reached the top of the stairs,
10 while turning, the assailant began shooting.¹⁸ According to Riley this is a lie because the witness
11 had actually been asleep in bed when he was roused by her. The witness then, according to
12 Riley, left the bedroom to check only to rush back into the same bedroom after being shot. Riley
13 asked the witness who shot him but he did not respond. The witness then told police, minutes
14 after he was shot, that there were two people in the house and that they were both wearing ski
15 masks and dark clothing.

16 The witness told police, at UMC, five weeks after the shooting, that he was shot in the
17 back and that he did not "know where the shots were coming from."¹⁹ The first thing that caught
18 the witness' attention was "the blonde head."²⁰ The witness told police that he first saw the
19 assailant when he reached the top of the stairs and the assailant was coming out of a bedroom
20 doorway. The witness could not describe what he was wearing.²¹ There was no conversation
21 between the witness and assailant. The witness said he had "a glimpse of him and then I seen
22 shots fired."

21 ¹⁷ Manson, supra, at 114.

22 ¹⁸ Exhibit A at p.9.

23 ¹⁹ Exhibit A at p.9.

24 ²⁰ Exhibit A at p.4.

²¹ Exhibit A at p. 6.

1 The witness never told police he actually saw the assailant's face. The encounter lasted
2 seconds in a hallway where the witness told police that he actually had seen "two outlines."²²
3 The witness could not tell whether the person in the second outline was male or female or black
4 or white.²³ The identification, which was formed in an instant, occurred while shots were being
5 fired as the witness was going up the stairs or running back into the bedroom he came from,
6 depending upon whether the witness or Riley is telling the story.²⁴

7 **2. Degree of attention.** The witness was under the influence of drugs and possibly
8 alcohol.²⁵ He told police weeks after the shooting that he caught a glimpse of a blonde with blue
9 eyes. The Defendant has reddish hair with light eyes. The witness said he was coming in the
10 house, yet, his girlfriend said he just woke up. In Manson, the United States Supreme Court
11 made an important distinction about the type of witness at issue.

12 There, the Court was determining the reliability of an identification made by a narcotics
13 officer named Jimmy D. Glover. As the Court noted, "Glover was not a casual or passing
14 observer, as so often is the case with eyewitness identification." The Court went on to point out
15 "as a specially trained, assigned, and experienced officer, he could be expected to pay
16 scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his
17 vendor. In addition, he knew that his claimed observations would be subject later to close
18 scrutiny and examination at any trial."²⁶

19 ²² Exhibit A at p.11.

20 ²³ Exhibit A at p.11.

21 ²⁴ Exhibit A p.7. the witness initially told police "that two males wearing dark clothing and ski masks came into
22 the house and shot him" see Exhibit D. Application for telephonic search warrant at p.3 attached as Exhibit D.

23 ²⁵ The witness' girlfriend Riley gave a lengthy statement to police. Pages 37 through 51 are relevant to this issue:
24 It is attached as Exhibit C. at p. 43 . There she states to police that the witness was intoxicated by drug and alcohol
25 use. She also contradicts the witness about the circumstances of initial contact with the assailant. Ms. Riley states
26 that the witness was sleeping immediately before the shooting and not walking up the stairs as he told police.
27 Exhibit C pp.43-44. Ms. Riley testified that immediately prior to the shooting she and the witness "were smoking
28 weed and smoking meth" Exhibit E at p.60.

29 ²⁶ Manson, supra, at 115. When police arrived they found marijuana at the Posterino residence. Mr. Posterino, the
30 lessee of the home at issue, was alleged to have been dealing marijuana and other drugs from the home. See
31 attached Exhibit D. Riley, the witness' girlfriend testified at preliminary hearing that she would remain at the
32 witness' home "because I had been doing drugs and I didn't want him (Ravon Harris) to know that I was really