

IN THE SUPREME COURT OF THE STATE OF NEVADA

No.

Electronically Filed
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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,

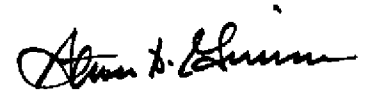
Real Party In Interest.

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

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CLERK OF THE COURT

RTRAN

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, SEPTEMEBER 23, 2013

**RECORDER'S TRANSCRIPT OF HEARING
DEFENDANT'S MOTION TO STRIKE PRELIMINARY HEARING AND DISMISS
CHARGES**

APPEARANCES:

For the State:

ROBERT J. DASKAS, ESQ.
Chief Deputy District Attorney

For the Defendant:

ROBERT M. DRASKOVICH, JR., ESQ.
BRET O. WHIPPLE, ESQ.
GARY A. MODAFERRI, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

1 Las Vegas, Nevada, Monday, September 23, 2013 at 8:37 a.m.

2
3
4 THE MARSHAL: Page 20, State of Nevada v. Belcher, Norman.

5 THE COURT: Good morning. State appearances.

6 MR. DASKAS: Good morning, Your Honor, Robert Daskas on behalf of the
7 State.

8 MR. WHIPPLE: Bret Whipple on behalf of Mr. Belcher, Your Honor.

9 MR. DRASKOVICH: Robert Draskovich on behalf of Mr. Belcher, who is
10 present in custody.

11 MR. MODAFFERI: Good morning, Your Honor, Gary Modafferri on behalf of
12 Mr. Belcher as well.

13 THE COURT: Okay. So, we're on for the defendant's motion to strike
14 preliminary hearing and dismiss charges. Mr. Whipple is presently in trial so I
15 assured his office that we would take this matter first or close to it I guess.

16 MR. WHIPPLE: I appreciate it, Your Honor. Thank you.

17 THE COURT: Okay. So, I have read the briefs so I don't need you to
18 reiterate everything that the briefs say. Now, Mr. Modafferri, I'm -- are you arguing?

19 MR. MODAFFERI: Yes, I am, Judge.

20 THE COURT: Okay, just making sure.

21 MR. MODAFFERI: Thank you.

22 THE COURT: So, you relied on the recent Nevada case, the *Patterson* case
23 with respect to the prelim being a --

24 MR. MODAFFERI: Critical stage.
25

1 THE COURT: Thank you, a critical stage where the Sixth Amendment Right
2 to counsel clearly applies. And there's I don't think a dispute about that part of it.
3 However, I'm wondering if you read the rest of the decision where the court
4 specifically applied a harmless error analysis.

5 MR. MODAFFERI: Harmless error, Judge, after the case has been tried and
6 it's not a death penalty case and there's not an objection. I mean, you need to look,
7 and this is the way I feel about it, the exacting scrutiny that comes from the Eighth
8 Amendment. And it's mentioned right at the top of my research on the reply brief.
9 And this is what the United States Supreme Court says about this. The United
10 States Supreme Court is required heightened reliability in the adjudicative process
11 leading to a death sentence.

12 THE COURT: Right.

13 MR. MODAFFERI: And then they --

14 THE COURT: I think we can all agree we don't want to put someone to death
15 unless we know they're guilty.

16 MR. MODAFFERI: No, and Rule 250, our own Supreme Court Rule says the
17 Court places the highest priority on diligence and the discharge of professional
18 responsibility.

19 THE COURT: Uh-huh.

20 MR. MODAFFERI: But it also goes on to say on in the next sentence the
21 purposes of this rule are to ensure that capital defendants receive fair and impartial
22 trials, appellate review, and post conviction review to minimize the concurrence of
23 error in capital cases.

24 THE COURT: Uh-huh.
25

1 MR. MODAFFERI: And to recognize and promptly correct that error when it
2 exists.

3 THE COURT: Okay.

4 MR. MODAFFERI: So we know right now it was a big mistake with Mr.
5 Maningo showing up and representing Belcher and the only eye witness in a murder
6 case. That was a bad mistake. And I'm not trying to say anything bad about Mr.
7 Maningo.

8 THE COURT: No.

9 MR. MODAFFERI: I like Mr. Maningo.

10 THE COURT: Right.

11 MR. MODAFFERI: And I think he's a good man and a good lawyer.

12 THE COURT: I understand.

13 MR. MODAFFERI: I worked with -- I worked in his office confines for seven
14 years when I was at Cristalli and Saggese and saw him every day. It was a mistake.
15 It got past him. And as soon as the Court saw that it was a mistake it correct that --
16 well he got him off the case. And --

17 THE COURT: Yes.

18 MR. MODAFFERI: -- Mr. Lalli said when he was talking about this matter, I
19 mean, he was quite emphatic about what was going on at that time. Mr. --

20 THE COURT: Yes, we all got him off the case because nobody wanted to
21 have a possible reversible error. We want it done right.

22 MR. MODAFFERI: Right, Mr. Lalli said this was a profound profound critical --

23 THE COURT: Okay. So, going back to what was my question which is the
24 *Patterson* case, which talks about a harmless error analysis. Are you saying the
25 harmless error analysis doesn't apply in a capital case?

1 MR. MODAFFERI: Well I'm saying it doesn't apply, it doesn't apply when the
2 person objects to the court at trial. It's a different standard and we're still in that
3 phase where we could --

4 THE COURT: We haven't had a trial yet --

5 MR. MODAFFERI: I know and --

6 THE COURT: -- and Mr. Maningo won't be the attorney at that trial. But the --
7 I understand, but the proceedings will have been so poisoned. If you look the
8 United States Supreme Court case that I cited in *Coleman* there's a reason why it's
9 critical. It's critical because you have the chance to develop cross-examination.
10 Now why wasn't this witness cross-examined? This only one witness puts him at
11 the murder scene.

12 THE COURT: Is it harmless error analysis?

13 MR. MODAFFERI: No.

14 THE COURT: It's not?

15 MR. MODAFFERI: Not in this case.

16 THE COURT: So even though *Patterson* says Sixth Amendment violation,
17 harmless error analysis -- at prelim, at trial clearly structural error. But the *Patterson*
18 case from our Supreme Court says at prelim harmless error analysis?

19 MR. MODAFFERI: Upon appellate review after the juror's convicted. We
20 don't want that jury trial to be poisoned with the conviction where the Defendant has
21 a chance to cross-examine the witness. I mean, how could you possibly explain not
22 cross-examining Brabham? He said there were two people there. And then at
23 prelim he said there was one. How could you let that go?

24 THE DEFENDANT: I said there was two at prelim.
25

1 MR. MODAFFERI: Do you -- I mean, and not only that, Judge, Maningo
2 represented him on a meth charge.

3 THE COURT: Yes.

4 MR. MODAFFERI: And the guy said he was high on meth at the time he's
5 making the identification.

6 THE COURT: Right.

7 MR. MODAFFERI: And you don't ask him a single question about your
8 perception, your ability to see one person versus two?

9 THE COURT: Do you think Mr. Maningo was not being candid when he said
10 he didn't realize it until the point when he sought to get off the case?

11 MR. MODAFFERI: No I think he really did make a mistake.

12 THE COURT: Okay. State.

13 MR. DASKAS: Submitted, Your Honor.

14 THE COURT: Here's where I am. Because obviously I'm concerned about,
15 as in every case, but especially death penalty cases we obviously want to get it right
16 and we don't want to have to try it more than once. And we have to respect of
17 course Mr. Belcher's constitutional rights. Having said that it seems to me that after
18 reading Patterson closely that a harmless error analysis applies when there is a
19 Sixth Amendment issue at the prelim. And I guess and that's even if there's -- if
20 there was a Sixth Amendment deprivation because counsel had a conflict he wasn't
21 aware of at that time, then the issue is if there was a such a violation whether the
22 error is harmless beyond a reasonable doubt or not.

23 And I think that the only way we can know that for sure is to have an
24 evidentiary hearing about it to understand -- well I guess to clarify and get under
25 oath information about not when he knew of the conflict and what impact if any the

1 alleged conflict had at -- well at the time of the prelim. And with trial -- our trial is in
2 November, so I want to -- we obviously need to get this done soon.

3 Let me look at my calendar. Do you have Odyssey up because mine's
4 taking forever?

5 THE CLERK: Yes.

6 THE COURT: I'm scared to ask, when's the next Thursday that we don't have
7 something?

8 THE CLERK: Prior to the trial --

9 THE COURT: Yes.

10 THE CLERK: Yes, obviously.

11 THE COURT: Preferably.

12 THE CLERK: October 24th is available. After that it's --

13 THE COURT: After trial.

14 THE CLERK: Correct.

15 THE COURT: Which is -- so Nevada Day is Friday October 25th. I could
16 possibly do this Thursday morning October 24th. Now I'm assuming no one, you
17 know, talked to Mr. Maningo in advance about when we might need him. So, what I
18 -- what we're going to do is we'll set it for the morning of October 24th. And
19 obviously we need to check with the -- anticipated witnesses to make sure that
20 everybody is available. If they're not let us know as soon as you can so we can try
21 to work around my schedule. Perhaps if there's a week I'm not in trial we could get
22 it in. But that's the soonest time that I see I have an opening.

23 THE CLERK: Evidentiary hearing October 24th, 8:30 a.m.

24 THE COURT: Okay. Thank you.

25 MR. DASKAS: Thank you, Judge.

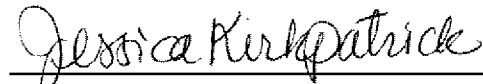
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THE COURT: Tell Judge Pro I said hello.

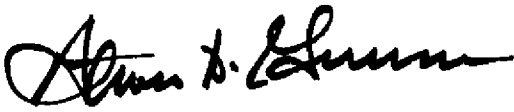
MR. WHIPPLE: Will do, Your Honor.

[Hearing concluded at 8:50 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Jessica Kirkpatrick
Court Recorder/Transcriber


CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

NORMAN BELCHER aka
NORMAN DAVID BELCHER, JR.,

Defendant.

CASE NO. C270562-1

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE
THURSDAY, OCTOBER 24, 2013

**TRANSCRIPT OF PROCEEDINGS RE:
DEFT'S MOTION TO STRIKE PRELIMINARY
HEARING AND DISMISS CHARGES
EVIDENTIARY HEARING**

APPEARANCES:

For the State:

ROBERT J. DASKAS, ESQ.
GIANCARLO PESCI, ESQ.
Chief Deputy District Attorneys

For the Defendant:

ROBERT M. DRASKOVICH, JR., ESQ.
GARY A. MODAFFERI, ESQ.
BRET O. WHIPPLE, ESQ.

RECORDED BY: JESSICA RAMIREZ, COURT RECORDER

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1 THURSDAY, OCTOBER 24, 2013; 8:27 A.M.

2
3 MR. DASKAS: Good morning, Your Honor. Robert Daskas and Giancarlo
4 Pesci on behalf of the State.

5 THE COURT: Morning.

6 MR. DRASKOVICH: Morning. Robert Draskovich on behalf of Mr. Belcher.

7 MR. WHIPPLE: Bret Whipple on behalf of Mr. Belcher, Your Honor.

8 MR. MODAFERRI: Gary Modafferri on behalf of Mr. Belcher. Good morning,
9 Your Honor.

10 THE COURT: Morning. Morning, Mr. Belcher.

11 Okay. So we're on today for the evidentiary hearing that I set
12 regarding the Defendant's motion to strike preliminary hearing and dismiss
13 charges. Thank you all for being here on time, I appreciate that 'cause I do have a
14 jury trial going on that's starting up at ten. So we need to move it along this
15 morning.

16 Are you ready to go with witnesses?

17 MR. MODAFERRI: We are, Your Honor. There's one preliminary matter.

18 THE COURT: Um-huh.

19 MR. MODAFERRI: Mr. Daskas is requesting that we waive the attorney /
20 client privilege for purposes of cross – for examining Mr. Langford. And we feel
21 that such waiver is unnecessary in order to present this motion. And our position
22 from the beginning has been that Lance Maningo should not have been at that
23 prelim. That his presence to use the Latin phrase was void ab initio. It was like
24 having a unlicensed attorney. He didn't have the stature or the ethical position to
25 make strategic decisions on the Defendant's –

1 THE COURT: Understand the argument.

2 MR. MODAFERRI: Yeah. So from that point we perceive – Mr. Daskas
3 says that this motion is couched in terms in which a strategic decision was made
4 and that washes away whatever arguments there were concerning the Sixth
5 Amendment right to effective assistance of counsel.

6 So based on that, he seeks to cross-examine Mr. Langford to ask what
7 was said in the decision making process that led up to the non cross-examination
8 of Nicholas Brabham.

9 THE COURT: Um-huh.

10 MR. MODAFERRI: We don't see that as – he could testify to the reasons
11 that he decided that but I don't think it's necessary for him to breach whatever
12 communications he had with Mr. Belcher. Because any communications that he
13 had at that point were unknowing and unwitting. He didn't know at that point that
14 he was dealing with conflicted counsel. I just don't understand the nexus and I
15 think that perhaps Mr. Daskas should be allowed to speak to it, because I don't
16 think it exists.

17 THE COURT: Mr. Daskas.

18 MR. DASKAS: Your Honor, the issue is, according to the defense, whether
19 Mr. Belcher received effective representation at the preliminary hearing. And I'm
20 quoting from page 8 of their initial motion to strike. And I quote: Failure to expose
21 those conversations prevents Defendant Belcher from receiving effective
22 representation. End quote.

23 The defense has couched this in terms of effective or ineffective repre-
24 sentation. What we need to probe is, number one, the reasons Mr. Langford and
25 Mr. Maningo elected not to ask a question on cross-examine of Mr. Brabham?

1 And, secondly, whether they received the blessing of their client, Mr. Belcher,
2 before doing it? So absolutely those conversations must be probed and the only
3 way we can do that is by having the Defendant waive the privilege regarding the
4 conversations between the Defendant, Mr. Maningo and Mr. Langford, otherwise
5 this hearing is completely meaningless.

6 The other point I would add, Your Honor, is this that same information
7 that they think is somehow tainted, that is the identification by Mr. Brabham, the
8 witness –

9 THE COURT: Right.

10 MR. DASKAS: -- of the Defendant came in through other sources by the
11 State and that was through Detective Hardy. And so all of these things matter
12 because it's the defense contention – these defense lawyers – that the preliminary
13 hearing should be stricken entirely and either the case remanded or dismissed,
14 according to the defense. So strategy decisions matter and the conversations
15 those two lawyers had at prelim with their client matter.

16 MR. DRASKOVICH: If I could, just briefly, in response. Our primary position
17 has been that it isn't – Mr. Belcher received ineffective assistance of counsel
18 because he did not have conflict free counsel. So I mean this isn't like a post
19 conviction relief claim or my lawyer didn't do his job.

20 Our claim, as Mr. Modafferri has laid out in the motions is that Mr.
21 Belcher at the point of the preliminary hearing, which is an important, critical part in
22 the proceedings, did not have conflict free counsel. And, as a result of not having
23 conflict free counsel, he did not receive effective assistance of counsel.

24 THE COURT: Well, I'm going to be evaluating whether or not there was an
25 actual conflict at the time, which is going to involve an inquiry into what he knew

1 and when he knew it.

2 MR. DRASKOVICH: Okay.

3 THE COURT: So – and, you know, I want to get going with the evidence.
4 But, you know, as we discussed last time and I know, you know, you may disagree,
5 but our Nevada Supreme Court has held and in reliance on the U.S. Supreme
6 Court that the test to be applied is whether the denial of counsel at the preliminary
7 hearing was harmless error. And so I'm going to be inquiring into that.

8 MR. DRASKOVICH: Okay, Judge.

9 THE COURT: So in terms of the strategy decisions, I mean I intend to
10 inquire today about the reasons for not cross-examining the witnesses. For
11 example, in terms of if they didn't cross-examine Mr. Brabham because their
12 general strategy was not to do that and they can explain the reasons for that, that's
13 a difference then, well, gosh, he was my prior client; I'm not going to go bring out
14 on cross-examination that he's using meth. That's a big difference in my mind. I –
15 we may disagree about that.

16 So, I mean, I think their reasoning and strategy has to be inquired into.

17 MR. MODAFERRI: The question, though, Judge, is what comes out
18 regarding what was said between client and attorney. I mean I don't think that in
19 order to litigate or prosecute this motion, Mr. Daskas should get into every specific
20 conversation that led up to that preliminary hearing. I mean that would be –

21 THE COURT: Oh, okay.

22 MR. MODAFERRI: Yeah.

23 THE COURT: So – I mean if they talk, you know –

24 MR. DRASKOVICH: It's the scope.

25 MR. MODAFERRI: Yes.

1 MR. DRASKOVICH: It's primarily the scope of the conversations.

2 THE COURT: Right. I mean I'm not going to allow him to talk about pretrial,
3 you know, did he – and I'm just hypothetical speaking here, did he say he did it or
4 did he say he didn't do it?

5 MR. MODAFERRI: Thank you.

6 THE COURT: We're not asking that today.

7 MR. DRASKOVICH: That being said, let's – we're ready to go.

8 THE COURT: Okay.

9 MR. DRASKOVICH: Okay.

10 MR. MODAFERRI: All right. Thank you.

11 THE COURT: We're not going there.

12 MR. DASKAS: I didn't plan on going there. And, Your Honor, I'm happy to
13 have you question these witnesses to elicit the information you think you need, so.

14 THE COURT: No thanks. I appreciate the – yeah. No thanks. But, no.

15 So, I mean, in terms of you know, intent to cross-examine or how
16 you're approaching prelim I think that there's a reasonable scope to allow
17 questioning there. But, no; no, not when. Not to go beyond that and completely
18 open up every conversation he may have had with his counsel, no.

19 So I don't know, I think – I don't think anyone's intending to go there
20 and I'm certainly not going to let it go there pretrial.

21 Okay. So who are we calling first?

22 MR. MODAFERRI: I guess Mr. Langford is outside, Judge. I would have
23 preferred to put Mr. Maningo on first, if he's here, but.

24 THE COURT: Okay. Apparently I was told a few minutes ago that Mr.
25 Maningo is going to be 15 more minutes –

1 MR. MODAFERRI: Okay.

2 THE COURT: -- so anyway, we'll go with Mr. Langford for right now.

3 MR. MODAFERRI: Yes.

4 THE COURT: Mr. Langford.

5 THE MARSHAL: Yeah, Mr. Maningo is not there, Your Honor.

6 THE COURT: Right. He's expected in just a few minutes I'm told.

7 MR. DRASKOVICH: And, Your Honor, it was our intent to call Mr. Maningo.

8 It's the State's request to call Mr. Langford.

9 THE COURT: Right. And so –

10 MR. MODAFERRI: We'll let them examine him.

11 THE COURT: Okay. That was going to be my question.

12 **ROBERT LANGFORD**

13 [called as a witness, being first duly sworn, testified as follows:]

14 THE COURT CLERK: Please state your complete name, spelling both your
15 first and last name for the record.

16 THE WITNESS: Robert Langford, R-o-b-e-r-t L-a-n-g-f-o-r-d.

17 THE COURT CLERK: Thank you.

18 MR. DASKAS: And, Your Honor, before we proceed I would request of the
19 Court to inquire of Mr. Belcher regarding the waiver of the attorney / client privilege
20 for purposes of this hearing only.

21 THE COURT: Okay. So as we just discussed, Mr. Belcher, in order to
22 proceed I'm going to – I think we need to allow inquiry into communications that
23 may have been had specifically with respect to the preliminary hearing and the
24 strategy regarding the approach and how to address the witnesses in that, in order
25 to proceed with the motion that you brought. Are you –

1 MR. DRASKOVICH: Based upon the Court's prior ruling, yes.

2 THE COURT: Well – okay. So are you willing to waive the privilege in that
3 limited scope, as I've just described for the purposes of this motion?

4 THE DEFENDANT: Yes.

5 THE COURT: Okay. Thank you. Go ahead and have a seat.

6 MR. DASKAS: Thank you, Your Honor.

7 **DIRECT EXAMINATION**

8 BY MR. DASKAS:

9 Q Good morning, Mr. Langford.

10 A Morning.

11 Q You are a criminal defense attorney licensed to practice in the state of
12 Nevada?

13 A Yes.

14 Q Prior to January 21st, 2011, were you appointed to represent Norman
15 Belcher?

16 A Yes.

17 Q Do you see Mr. Belcher in court?

18 A I do.

19 MR. WHIPPLE: Stipulate to identification, Your Honor.

20 THE COURT: Okay.

21 MR. DASKAS: Thank you.

22 THE COURT: Go ahead.

23 MR. DASKAS: Thank you.

24 Q Was Mr. Lance Maningo also appointed to represent Mr. Belcher?

25 A Yes.

1 Q On January 21st, 2011, was a preliminary hearing held in Justice
2 Court, Department 9?

3 A I don't recall the specific date but, yes, that sounds about right.

4 Q Prior to the preliminary hearing, did you and Mr. Maningo meet with
5 Mr. Belcher in the Clark County Detention Center in anticipation of that hearing?

6 A Yes.

7 Q Now, let me ask just for a moment about decisions you and/or you and
8 Mr. Maningo made regarding that preliminary hearing. Were you aware that a
9 potential witness at the preliminary hearing for the State was a surviving victim, Mr.
10 Nicholas Brabham?

11 A Yes.

12 Q What was your understanding of his condition, physical condition, prior
13 to the preliminary hearing?

14 A My recollection is that he was in intensive care for the most part. I
15 don't recall – and there was some talk that we were going to have at least part of
16 the preliminary hearing in the hospital because of the difficulties they were having.
17 My recollection is sometime prior to the preliminary hearing he may have been
18 released from ICU. And he was allowed – they were allowed to do cameras. And
19 so we had a camera feed.

20 So my recollection of his physical condition was that he was, you
21 know, to use the lay term I guess, touch-and-go, day-to-day in terms of whether he
22 would survive or what his capacity for testifying was. That's my recollection.

23 Q Prior to the preliminary hearing you received discovery from the state
24 of Nevada?

25 A Correct.

1 Q From the District Attorney's office?

2 A That's correct.

3 Q Some of that discovery related to Mr. Nicholas Brabham?

4 A Yes.

5 Q Were you aware that he provided a statement to police officers or
6 detectives in which he identified the Defendant, Norman Belcher, as the perpetrator
7 of the crimes?

8 A Yes.

9 Q Was that a concern for you that if he testified at prelim that testimony
10 would be elicited and preserved?

11 A Yes.

12 Q Did you discuss that with Mr. Maningo?

13 A Yes.

14 Q Did you and Mr. Maningo discuss that with the Defendant, Mr.
15 Belcher?

16 A Yes, we did.

17 Q Was a decision made, a strategic decision made regarding the cross-
18 examination of Mr. Brabham?

19 A Yes.

20 Q What was the decision?

21 A The decision was that based on what was the current case law then
22 and what I believe is the current case law today, cross-examination would result in
23 the preservation of that particular witness' testimony.

24 Q How many years have you been practicing law in the state of Nevada?

25 A I refuse to answer on the grounds of age discrimination. I apologize,

1 Your Honor.

2 THE COURT: No problem.

3 THE WITNESS: Since 1990.

4 MR. DASKAS:

5 Q And you've handled a number of murder cases?

6 A I have.

7 Q You're familiar with the case law and you try to stay abreast of the
8 case law regarding the issue we just discussed, preservation of testimony?

9 A In fact, every time I elect not to do this for strategic purposes, I make
10 sure – including consulting with several other experts whom I consider to be
11 experts in this particular field – about the state of the law. What is the likelihood
12 that the Supreme Court would uphold this decision in favor of my client, should
13 there actually arise a need to – for the State wanting to bring in what I consider
14 unpreserved testimony. So, yes, I did in this case. I did last week, it is still the law,
15 so.

16 Q And that decision not to cross-examine Mr. Brabham was discussed
17 with the Defendant, Mr. Belcher?

18 A Absolutely.

19 Q Did he agree with that decision?

20 A He did. You know, you don't want to – a certain amount of client
21 relations requires that you make sure they understand what's going on and that
22 they don't think that you're just sitting there like a potted plant not doing your job.
23 Some attorneys default to the other extreme and they examine and cross-examine
24 and they pontificate and bluster and blow all they can in front of the client, so that
25 the client thinks that they're doing the job that they – you know, I think it's a better

1 practice to just explain why I do or don't do particular things.

2 I have a specific recollection of – because this is a very important thing
3 of informing Mr. Belcher that we were not going to cross-examine the witness; this
4 is why, and he understood and agreed.

5 Q The preliminary hearing actually went forward on – I'll represent to you
6 that the date was January 21st, 2011. Did Mr. Brabham testify?

7 A He did.

8 Q And do you recall the logistics of that testimony?

9 A Yes, I recall that he was on a television screen.

10 Q Testifying from a hospital bed?

11 A Correct.

12 Q And as you described earlier, it was your understanding that his
13 condition was touch-and-go?

14 A Right.

15 Q There was a distinct possibility everybody believed, at least as of that
16 date, that he may not survive those injuries?

17 A That's correct.

18 Q Did that play into your decision not to cross-examine Mr. Brabham?

19 A That along with a couple of other issues, yes.

20 Q What other issues?

21 A Well, you know, another trap that criminal defense attorneys fall into is
22 they just ask too many questions. Mr. Brabham's testimony was clearly garbled, I
23 guess is a good word for it. And I felt like even if some remote reason some judge
24 said, you know, this was going to come in, that better to have this bizarre hospital
25 bed testimony that was unclear in several areas, then to make it better by clearing

1 it up and cross-examining him and allowing him the opportunity to look better than
2 he did once the State was finished with their direct examination. So I mean that
3 alone probably would have caused me to say I have no questions.

4 Q In the pleadings filed in this case, which bring us to court today, Mr.
5 Belcher's current lawyers raise an issue that Mr. Maningo at some point had
6 represented Mr. Brabham are you aware of that now?

7 A Yes.

8 Q And in the defense counsel's moving papers their suggestion is that
9 Mr. Brabham should have been cross-examined about drug usage, are you aware
10 that that's the defense position now?

11 A I'm not.

12 Q Will you accept my representation if I tell you that's what their position
13 is now?

14 A Certainly.

15 Q Would that issue, that is Mr. Brabham's potential drug use, have
16 changed your strategic decision not to cross-examine him?

17 A No.

18 Q Why not?

19 A Well, I think there would have been plenty of other evidence about that
20 and what is he going to say? Yes, I'm a drug addict. Or, no, I'm not a drug addict.
21 I mean there are plenty of other ways to get that particular issue in. I – it had
22 nothing to do with what we were doing that day.

23 Q And I'm assuming that your biggest concern was preventing the
24 preservation of Mr. Brabham's testimony in which he identified Norman Belcher as
25 the perpetrator of the crimes?

1 A Correct.

2 Q That's what drove your decision?

3 A That was – at that date that was, yes, absolutely the primary overriding
4 decision.

5 Q And that's the decision you discussed with Mr. Belcher and the
6 decision with which he agreed?

7 A Prior to the preliminary hearing, yes.

8 MR. DASKAS: Thank you.

9 I have nothing else, Your Honor.

10 THE COURT: I'm sorry. Before you cross, one other – well, no, go ahead.

11 MR. DRASKOVICH: Okay. Thank you.

12 THE COURT: Let's see what you ask about first.

13 **CROSS-EXAMINATION**

14 BY MR. DRASKOVICH:

15 Q Good morning, Robert.

16 A Good morning.

17 Q You were appointed to represent Mr. Belcher in the latter part of 2010?

18 A That's correct.

19 Q And his preliminary hearing occurred on, as it's been represented to
20 you, January 21st, 2011?

21 A Yes, sir.

22 Q And through the course of your earlier representation of Mr. Belcher,
23 both yourself and Mr. Maningo received discovery in reference to the investigation?

24 A Yes.

25 Q And prior to the preliminary hearing you had the opportunity to review

1 the discovery prior to your cross-examination –

2 A Prior to my –

3 Q -- of the various witnesses that were called –

4 A Prior to the preliminary hearing, yes.

5 Q Correct.

6 A Um-huh.

7 Q Okay. And there's been some questions asked of you by the State in
8 reference to your strategic decisions as to whether or not to ask certain witnesses
9 certain questions, correct?

10 A Correct.

11 Q And you'll agree –

12 THE COURT RECORDER: Mr. Daskas can you stay in one place. Your
13 voice goes up and down and you're walking back and forth.

14 MR. DASKAS: That's Mr. Draskovich by the way.

15 THE COURT RECORDER: Draskovich. I'm sorry.

16 MR. DRASKOVICH: Although I use his name more than he would care.

17 THE COURT RECORDER: Oh, I'm sorry; sorry.

18 MR. DASKAS: It's okay.

19 MR. DRASKOVICH:

20 Q Mr. Langford, it was your testimony that it was a strategic decision not
21 to ask any questions of Mr. Brabham because of then existing case law, correct?
22 In reference to the opportunity to cross-examine or cross-examine a potential
23 witness who may or may not be surviving at the time of trial, is that correct?

24 A Correct; and the case law today, yes.

25 Q And it's your testimony that it's not the opportunity to cross-examine

1 but the actual cross-examination that's key in determining whether or not that
2 testimony is preserved?

3 A That's correct.

4 Q So the fact that you may be present in the courtroom and just choose
5 not to ask any questions that doesn't preserve the testimony in your opinion?

6 A That's what the case law says. It's not my opinion. The case law says
7 defense counsel must – there must have been cross-examination; that's what the
8 case law says.

9 Q Okay. So it's not the opportunity but the actual cross-examination?

10 A The case law never says opportunity. Case law says there must have
11 been cross-examination.

12 Q There was a second witness that testified at the preliminary hearing
13 concerning an identification of Mr. Belcher, correct?

14 A That's correct.

15 Q Detective Hardy, homicide detective?

16 A Correct.

17 Q And it was Detective Hardy who on January 12th, 2011 that presented
18 as we call a six pack to Mr. Brabham?

19 A I apologize, I wasn't – I didn't – don't remember. And so at this point I
20 apologize, I don't have a recollection.

21 Q Let me ask you this, if I were to tell you that we have a transcript of
22 this presentation of this six pack and it's transcribed that it occurred on January
23 12th, 2011 would you have any reason to disagree with me?

24 A No.

25 Q And Mr. Hardy testified at the preliminary hearing, correct?

1 A Correct.

2 Q And he testified that Mr. Brabham picked Mr. Belcher out of this lineup,
3 correct?

4 A Correct.

5 Q And you didn't ask any questions of –

6 A I guess. I apologize, Robert, I don't remember specifically. So if he
7 did, he did.

8 Q And if I represent to you that he did, you'd have –

9 A No reason to disbelieve that, correct.

10 Q However you will agree with me that you didn't ask any questions of
11 Mr. – of Detective Hardy either?

12 A Correct.

13 Q And Mr. Hardy appeared to be healthy?

14 A Sure.

15 Q I mean he has retired but he isn't touch-and-go as –

16 A He's still healthy today.

17 Q But you didn't ask any questions of him, correct?

18 A Correct.

19 Q This shooting is alleged to have occurred on December 6, 2010,
20 correct?

21 A I believe that sounds about right, yes.

22 Q You'll agree with me that upon your review of the discovery there is an
23 application of a search warrant sworn out shortly after the shooting of 2010?

24 A Yes, I have a recollection of that.

25 Q And that search warrant is a telephonic search warrant sworn to Judge

1 Douglas Smith by one Detective Sanford?

2 A I don't recall that.

3 Q If I were to approach you with a copy of it, would it perhaps refresh
4 your recollection?

5 A Sure.

6 MR. DRASKOVICH: If I may approach the witness?

7 THE COURT: Yes, go ahead.

8 MR. DRASKOVICH:

9 Q Take your time and let me know when you're finished.

10 A You might have to hold it from back there [indicating], but –

11 Q Arms getting shorter?

12 THE COURT: Need your glasses?

13 THE WITNESS: No. I don't have them.

14 [Reviewing report]. Yes, Judge Smith, Detective Sanford. Yes.

15 MR. DRASKOVICH:

16 Q So you recall reviewing this document?

17 A I don't recall specifically reviewing that document, but it would have – if
18 it came in the packet I'm sure I reviewed it.

19 Q And you will agree with me that in this affidavit Detective Sanford
20 testifies or swears under oath that on the day of the shooting and prior to go into
21 surgery, the sole eyewitness, Mr. Brabham, told officers that two males wearing
22 dark clothing and ski masks came into the house and shot him?

23 A I'm sorry. I don't recall.

24 MR. DRASKOVICH: If I may approach, Your Honor?

25 THE COURT: Yes, go ahead.

1 MR. DRASKOVICH: I have it underlined for –

2 THE COURT: Uh-huh.

3 MR. DRASKOVICH: -- for your convenience. Or the highlighted is on page
4 3.

5 THE WITNESS: Yes, that appears to be what he said in the search warrant.

6 MR. DRASKOVICH:

7 Q Thank you. So you agree with me that close in time to the time of the
8 shooting we had Mr. Brabham, the sole eyewitness, at least telling this detective,
9 Detective Sanford, that two males with masks entered that residence and ultimately
10 shot him, correct?

11 A Correct.

12 Q However at the time of preliminary hearing, which occurred on January
13 21st, 2011, you didn't elicit that testimony from Mr. Brabham?

14 A I didn't cross-examine Mr. Brabham.

15 Q So your answer is no, you didn't elicit that at the time of the shooting
16 there were two men and they were masked, correct?

17 A That's correct.

18 Q And at the time of the preliminary hearing on January 21st, 2011, you
19 did not elicit that testimony from Detective Hardy, who was involved in this
20 investigation, correct?

21 A That's correct.

22 Q And you'll agree with me the purpose of preliminary hearing is to
23 determine not only that a crime was committed but the Defendant, in fact, was the
24 individual that committed the crime?

25 A That is one of the purposes of a preliminary hearing, yes.

1 Q And the other purposes?

2 A Sometimes it's to preserve testimony.

3 Q Okay.

4 A That's why they don't go to the Grand Jury.

5 Q Okay. 'Cause at the Grand Jury there's no actual cross-examination
6 that occurs?

7 A That's correct.

8 Q And the purpose – you had testified that the purpose that you didn't
9 elicit any testimony from Mr. Brabham is because he may not be available to testify
10 at trial?

11 A I said that was the initial reason why I wasn't going to do it, but it
12 became evident to me that there were reasons beyond that not to do it.

13 Q And in reference to Detective Hardy was there another reason why no
14 testimony was elicited from Detective Hardy concerning this identification of Mr.
15 Belcher?

16 A Regarding the six pack?

17 Q Yes.

18 A I felt there'd be plenty of opportunity to do that later on, so.

19 Q Okay. And there were, in fact, nine witnesses that testified at the
20 preliminary hearing, correct?

21 A I don't recall how many.

22 Q And if I were to tell you there were nine, you wouldn't have any reason
23 to disagree with me?

24 A Unless you're as bad at numbers as I am, so I don't think so.

25 Q Okay. And you will agree with me that eight of the nine witnesses

1 were not cross-examined?

2 A Again, I apologize, I don't recall.

3 Q And if I were to represent to you that eight of the nine were not, would
4 you have any reason to disagree with me?

5 A I would have no reason to disbelieve that.

6 MR. DRASKOVICH: Thank you, Mr. Langford. I have no further questions.

7 THE COURT: Any redirect?

8 MR. DASKAS: No, Your Honor.

9 **EXAMINATION**

10 BY THE COURT:

11 Q When was it first brought to your attention that Mr. Maningo had
12 previously represented Mr. Brabham?

13 A I don't recall the specific date, Your Honor, but I do recall the
14 circumstances –

15 Q Okay.

16 A -- and we had produced the 800 pictures. I don't recall the exact
17 number, I just remember I hadn't seen so many pictures in a murder case in a long
18 time, but that was partly because of the advent of the digital camera. It used to be
19 there were a little more judicious in how they burnt through film. And anymore they
20 take ten shots of the exact same thing.

21 Because of how time consuming it was going to be to show the
22 pictures to Mr. Belcher, we had our investigator tasked with doing that. So he
23 visited Mr. Belcher at the jail and was going through all of the pictures one by one.
24 And I don't recall if it was Mr. Redke [phonetic] or Mr. Belcher who first noticed it,
25 but in one of the pictures there was Mr. Maningo's business card. I believe it was

1 on the nightstand of Mr. Brabham and – or his wallet or something. At any rate, it
2 was in his personal effects or someplace. So Mr. Redke came back and called us
3 and said, you know.

4 And at the time I don't think there was any issue between Mr. Maningo
5 and Mr. Belcher, but everyone felt like because it was a death penalty case, it was
6 most prudent to replace Mr. Maningo at the time. Mr. Maningo apologized
7 profusely and, you know, when he got on the case he thinks it just slipped through
8 his conflicts check, so.

9 Q I'm sure – well, let me just ask. This conversation was after prelim?

10 A Yes, ma'am.

11 Q And how long after that was it brought to the Court's attention that he
12 had this conflict that could interfere with his representation in the case? I'm just
13 trying to get a timing down.

14 A It may have been a week; it may have been two weeks. I recall that
15 there were discussions first with Mr. Belcher and then with the State about how we
16 should handle it and what we needed to do. I don't recall, Your Honor, the
17 timeframe.

18 Q Fair to say within a couple of weeks of bringing it to the Court's
19 attention?

20 A Yes, Your Honor.

21 Q So with respect to the witnesses, other than Mr. Brabham, who weren't
22 in the hospital and, you know, looking like a strong possibility they might not make
23 it, why did you choose not to cross-examine other witnesses?

24 A Again, the default setting it seems with particularly new attorneys or
25 attorneys who just want to – I don't know – is to ask so many questions. If you

1 know that there are going to be witnesses that the State is going to want to bring or
2 if you know that they're going to have to get that evidence into a trial, a jury trial
3 down the road, a lot of times all you do is tip your hand to what your strategy is,
4 what you're going to cross-examine.

5 They go back to their office, I know, because I used to go back to my
6 office when I was a DA and I'd say, how can I clean this up when we go to trial?
7 Who do I call? Well, how do I need to pretrial Detective Hardy now to talk about,
8 what other things are there? As opposed to when it gets to trial, if nobody has
9 raised that issue when you get to trial, then you hit him over the head with it and he
10 hasn't had an opportunity to do a big strategy session with the District Attorney
11 over what this is so, you know. I mean I – and look, can you make mistakes and
12 can you second guess everything? Sure, you can.

13 But I had specific reasons and I am – you know, in this particular case
14 I wasn't going to ask a thousand different things and clean everything up for the
15 State, where they didn't ask the witnesses this and so I'm going to ask the
16 witnesses and make sure it gets into the record. I don't think that's the best
17 practice.

18 Q Did you and Mr. Maningo discuss that and agree on that strategy prior
19 to the prelim?

20 A As to the other witnesses, Your Honor?

21 Q Yeah.

22 A No, not prior to the preliminary hearing. A preliminary – particularly in
23 this case, you think about it, this preliminary hearing went pretty quick from the time
24 of the murder until there was a preliminary hearing. I know that was because they
25 were trying to preserve Mr. Brabham's testimony and that's why they were rootin'-

1 || tootin' to get it on.

2 And so, you know, there wasn't – and it was just get those witnesses
3 on, identify Mr. Belcher and murder and we're in and done. And so I don't – we
4 didn't discuss how we were going to or whether we were going to cross the
5 witnesses until they gave their testimony. And when it became obvious that this
6 was just a skeleton preliminary hearing, bare bones, I wasn't going to flush it out. I
7 wasn't going to put meat on the State's case.

8 Q And so did you and Mr. Maningo discuss that during the prelim –

9 A Yeah.

10 Q -- or at counsel table?

11 A Certainly. I mean what – you know, typically what you do is you – you
12 know, Court's indulgence –

13	Q	Right.
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14 A -- and no questions. And that's what we did.

15 THE COURT: Any other questions to follow it?

16 MR. DASKAS: Thank you, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. DASKAS:

19 Q Mr. Langford if you were to identify the key issue at the preliminary
20 hearing of this matter, would it have been the identification of Mr. Belcher?

21 A Oh, absolutely.

22 Q And that's the issue with which you are most concerned?

23 | A That was the issue I was most concerned that day, correct.

24 Q And, again, that obviously played into your decision not to have Mr.
25 Brabham's testimony preserved for the State?

1 A Was the primary reason.

2 Q Now, speaking of preservation of testimony, Mr. Draskovich asked you
3 some questions about the opportunity to cross-examine versus actual cross-
4 examination. It's true, is it not, that there are cases, published cases one could find
5 that hold it's the opportunity to cross-examine that determines preservation, not
6 actual cross-examination?

7 A They occasionally will phrase it, but it wasn't in a case where there
8 was actual cross-examination, so.

9 Q Understood. And I just want to be clear that someone could do
10 research and find a case or cases that say it's the opportunity to cross-examine not
11 actual cross-examination?

12 A Those cases deal with the full and fair opportunity to cross-examine.

13 Q Understood.

14 A In other words, was there enough ammunition in the defense
15 attorney's gun to be able to have a full opportunity or fair opportunity? And so,
16 yeah, when you talk opportunity, that's the kind of cases. When you talk about
17 does it preserve the testimony, it really is about there was no cross-examination.
18 And that's when they say, no, it wasn't preserved.

19 MR. DASKAS: Understood. Thank you.

20 Nothing else, Your Honor.

21 THE COURT: Anything further.

22 MR. DRASKOVICH: We have no further questions.

23 THE COURT: Okay.

24 Thank you, Mr. Langford.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: I saw Mr. Maningo waiting outside while Mr. Langford was
2 testifying. I assume we're call Mr. Maningo now?

3 MR. DRASKOVICH: Yes, thank you.

4 THE COURT: Okay. Good.

5 THE MARSHAL: Okay. Make your way to the box, remain standing, raise
6 your right hand, face that gentleman right there [indicating].

7 **LANCE MANINGO**

8 [called as a witness, being first duly sworn, testified as follows:]

9 THE COURT CLERK: Please state your complete name, spelling both your
10 first and last name for the record.

11 THE WITNESS: Lance Maningo. Lance, L-a-n-c-e, Maningo, M-a-n-i-n-g-o.

12 THE COURT CLERK: Thank you.

13 **DIRECT EXAMINATION**

14 BY MR. MODAFERRI:

15 Q Good morning, Mr. Maningo. How are you.

16 A Good morning.

17 Q Thank you for being here. I wanted to ask you a few questions about
18 your participation at a preliminary hearing in this matter. Do you recall when that
19 occurred approximately?

20 A I do. Approximately 2011.

21 Q And was it in January of 2011?

22 A I believe so.

23 Q Okay. And during that time you represented Mr. Belcher in a joint 250
24 capacity with Mr. Langford, is that correct?

25 A Correct.

1 Q And were you appointed in this matter?

2 A Yes, I was.

3 Q And at the time of your appointment did you go through the normal
4 processes of getting discovery?

5 A Yes.

6 Q And in the course of getting that discovery did you prepare for
7 preliminary hearing?

8 A Yes.

9 Q Mr. Langford just testified here and he was discussing specifically the
10 decision making process in not cross-examining Nicholas Brabham. Do you recall
11 that?

12 A Yes, I do.

13 Q Could you – we've already had a little off-the-record decision making
14 processing, which the Defendant would waive whatever discussions occurred
15 between yourself and cocounsel with regards to that decision, so don't feel
16 concerned about that.

17 THE COURT: As well as conversations with Mr. Belcher regarding that
18 strategy decision, it's a narrow scope of waiver.

19 MR. MODAFERRI: Yes.

20 THE COURT: And just to confirm, Mr. Belcher you are agreeing with that?

21 THE DEFENDANT: Yeah.

22 THE COURT: Okay.

23 THE WITNESS: If I could get – could I get some clarification on that, Your
24 Honor?

25 THE COURT: Yeah; yes.

1 MR. MODAFERRI: Go ahead.

2 THE COURT: With respect to –

3 THE WITNESS: With respect to the waiver.

4 THE COURT: -- the strategy for prelim in terms of how to approach –
5 whether or not to cross-examine the witnesses is really the focus.

6 THE WITNESS: Okay. Very good.

7 MR. MODAFERRI: It's limited in that respect.

8 THE WITNESS: Yes, I had conversations with both Mr. Langford and Mr.
9 Belcher about that.

10 MR. MODAFERRI:

11 Q And can you tell me what those conversations were?

12 A As I'm sure you know and as Robert testified, he was lead counsel in
13 this case. With respect to the strategy at preliminary hearing, he believed it to be
14 the best course of action to limit our cross-examination of the witnesses that the
15 State was going to present at preliminary hearing.

16 Q So – and a conscious decision was made to actually forego cross-
17 examination of Brabham?

18 A And other witnesses, correct.

19 Q And other witnesses, yes. And what was it that led to that decision?
20 What legal reasoning?

21 A The purpose – most of this came from Robert. Really, he was lead
22 counsel. I yielded to his decision making on this. His strategy approach was
23 primarily to limit the record that could be made at the time of preliminary hearing,
24 as well as protect confrontation clause issues down the road.

25 Q Was he of the opinion that foregoing cross-examination on witnesses

1 such as Detective Hardy and Nicholas Brabham, that by doing that he would
2 essentially be foreclosing the ability of the State to use that examination at a future
3 trial, should the witness not be available?

4 A That's correct.

5 Q And did he understand or did you tell him or did you have discussions
6 with him about the fact that it was the opportunity to cross-examine, in which courts
7 measure whether the record is preserved?

8 A We went back-and-forth on that issue several times looking at different
9 law, different approaches and, yes, we had many conversations about it prior to
10 preliminary hearing.

11 Q In fact the law in that is old, isn't it? I mean it dates back to *Pointer v.*
12 *Texas* decided by the United States Supreme Court in 1965.

13 A I believe that's correct.

14 Q And you disagreed with Mr. Langford on his assessment of the law,
15 didn't you?

16 A I don't know that we disagreed. I think that we just had conversation
17 as colleagues handling a case together, discussing two different approaches.

18 Q And can I put this politely. If you were lead counsel, you wouldn't have
19 done it that way?

20 A Probably not, probably not.

21 Q Your representation of Nicholas Brabham dated back to 2010, correct?

22 A I believe that's correct. I believe early 2010.

23 Q And you represented him on possession of methamphetamine
24 charges?

25 A That's correct.

1 Q You – in conversations we've had, you've indicated that you didn't
2 handle all of the proceedings with Mr. Brabham, but you were there when the case
3 was closed out?

4 A Yes.

5 Q And you also – did you have discussions – well, during the course of –
6 I should not even ask that.

7 The charge of possessing methamphetamines and the disposal of that
8 case, did that involve in your mind whether or not Mr. Brabham was in fact a drug
9 user? That scenario crossed your mind in his defense, correct?

10 A In the defense of Mr. Brabham?

11 Q Yes. I mean –

12 A I'm sorry. I'm not real clear on that question.

13 Q It was a bad question. If you're representing someone who is accused
14 of possessing methamphetamine and you were going to assist him through the
15 process of getting through that charge, one of the main things that you would be
16 focusing on is are you a drug user?

17 A I suppose that would enter the equation, yes.

18 Q Should you go into Drug Court? Should you get treatment? How
19 should you address that potential problem in disposing of this criminal charge?

20 A Yes.

21 Q And that equation, of course, would have been applicable to Mr.
22 Brabham?

23 A Under that scenario, yes.

24 Q Yes. And on the day of preliminary hearing it was testified by Ashley –

25 THE COURT: Sorry, are we back to Mr. Belcher's prelim now?

1 MR. MODAFERRI: Yes, I'm sorry.

2 THE COURT: Okay.

3 MR. MODAFERRI:

4 Q On the day of preliminary hearing it was the Ashley Riley, a person at
5 the scene of the shooting, that Brabham was under the influence of methamphet-
6 amine. Do you recall that testimony?

7 A Yes, I do.

8 Q Now if you knew at that time that you were his lawyer on methamphet-
9 amine charges and that you had questioned and counseled him on his drug usage,
10 you at that singular instant would have divided loyalties about questioning him
11 regarding that drug usage and questioning his perceptions about whether he could
12 identify the shooter.

13 A If I had known of my prior representation at that time, yes, but I didn't
14 know about my prior representation.

15 Q And believe me, this isn't to blame you or anything.

16 A I understand.

17 Q I you had brought this to the Court's attention approximately 11
18 months later in December, on December 12th of 2012, is that correct? Do you want
19 to see the transcript just so you got the dates straight?

20 A I would take your representations on that.

21 Q So that was the first time that the Court was made aware of – was it at
22 that hearing or did you do it before that?

23 A I don't recall the exact scenario but as soon as it was made aware –
24 as soon as I was made aware of it, we immediately brought it to everyone's
25 attention, as well as the Court.

1 Q And do you recall the position of the District Attorney's office claiming
2 that Brabham was a critical witness and that you had to be excused?

3 A I recall that and I believe that we agreed in an abundance of caution
4 that I should be removed at that time.

5 Q Okay. When you say abundance of caution, do you – would you have
6 accepted the case – you know what that's not important. I'll withdraw that
7 question.

8 I have no further questions, Your Honor.

9 THE COURT: Cross.

10 **CROSS-EXAMINATION**

11 BY MR. DASKAS:

12 Q Mr. Maningo, you mentioned that if it were your decision to cross-
13 examine or not cross-examine Mr. Brabham, you may have elected to cross-
14 examine Mr. Brabham at preliminary hearing?

15 A That's just my approach generally.

16 Q Sure.

17 A Is yes, I generally –

18 Q Sure.

19 A -- would ask questions at preliminary hearing.

20 Q You would agree with me, though, that if you had cross-examined Mr.
21 Brabham, then his testimony would have been preserved?

22 A I would agree with that, yes.

23 Q The decision not to cross-examine Mr. Brabham, at least preserved
24 the argument by the defense down the road that Mr. Brabham's testimony was not
25 preserved?

1 A Correct.

2 Q In other words you maintained that potential argument by the decision
3 not to cross-examine?

4 A Yes.

5 Q The decision to cross-examine would have eliminated that argument
6 down the road?

7 A Yes.

8 Q All right. Mr. Modafferri asked you about the other witness in the
9 house, her first name is Ashley, you recall that?

10 A Yes.

11 Q And Mr. Modafferri elicited from you that Ashley testified that Mr.
12 Brabham was under the influence of drugs that night?

13 A I don't remember the specific testimony but I believe that's correct,
14 yes.

15 Q In other words, there was testimony elicited at the preliminary hearing
16 through another witness that Mr. Brabham was under the influence?

17 A Yes.

18 Q Yet the Justice of the Peace hearing the evidence still bound over the
19 case?

20 A Yes.

21 Q At some point once you realized you had represented Mr. Brabham,
22 as you mentioned, that issue is now brought to Judge Cadish's attention?

23 A Yes.

24 Q You were in court and Judge Cadish asked you some questions about
25 that representation?

1 A I believe it was a collective decision and I would refer back to the
2 abundance of caution that I stated earlier and we decided. And I believe it was
3 ultimately Judge Cadish that decided that I should be removed from the case.

4 Q Do you remember during the course of the proceedings between
5 January and the preliminary hearing was held, and in December of when you
6 eventually said to the Court I've got to go; or the Court said you got to go; or Mr.
7 Lalli said you've got to go. During that time there were approximately three or four
8 hearings in which Mr. Belcher openly complained about the fact that he wasn't
9 receiving adequate representation.

10 A I recall that, yeah.

11 Q And he said that in his mind that his own lawyers had essentially
12 convicted him. That he wanted in fact, at one point, to plead guilty?

13 A That's correct.

14 Q And the reason he wanted to plead guilty was because he didn't feel
15 like the lawyers he had were fighting for him. Let me rephrase that.

16 A I don't know what his reasons for wanting to plead guilty were.

17 Q He stated it on the record that you had already convicted him – not
18 you, specifically. I think he framed it collectively as my lawyers have already
19 convicted me?

20 A I remember him saying something like that, yes.

21 Q And it was at that moment when Mr. Langford said, you know, this guy
22 needs a psych eval and he was referred over for – I don't know what the term is
23 here.

24 THE COURT: Competency.

25 MR. MODAFERRI: Competency hearing.

1 THE COURT: Yes.

2 MR. DASKAS: Your Honor, I apologize. The defense raised this issue
3 before we started this hearing and the Court instructed the State and I agreed that
4 we wouldn't ask questions about, for example, whether Mr. Belcher told his lawyers
5 he did it.

6 THE COURT: Ah –

7 MR. DASKAS: Yet Mr. Modafferri just stood up and he said to Mr. Maningo,
8 at one point Mr. Belcher wanted to plead guilty was that because his lawyers, he
9 believed, weren't fighting for him?

10 Well, in my mind, Your Honor, he just opened the door to other
11 reasons Mr. Belcher may want to plead guilty.

12 THE COURT: All right.

13 MR. DASKAS: I only mention it because this is completely irrelevant to the
14 reason for this hearing and so I would object to relevance. And, he is opening the
15 door to questions he may not want the State to ask.

16 MR. DRASKOVICH: And briefly in response, Mr. Modafferri is moving on;
17 however the questions were concerning what was stated on the record –

18 THE COURT: Right.

19 MR. DRASKOVICH: -- so it wasn't getting into anything –

20 THE COURT: Right. So just focus on what was stated on the record so as
21 not to open the door. I'm not holding the door has been opened yet.

22 MR. MODAFERRI: And again, Your Honor, this is just putting it to context,
23 the implied argument from the State that everything was hunky-dory and that there
24 was a potential waiver down the road. I mean there had been problems in this
25 matter with Mr. Belcher before we came up to December, 2011, correct?

1 MR. DRASKOVICH: Which were stated on the record.

2 THE COURT: There have been some issues over time. Go.

3 MR. MODAFERRI: Okay. I have no further questions.

4 Thank you, Mr. Maningo.

5 THE WITNESS: Thank you, sir.

6 MR. DASKAS: Nothing, Your Honor. Thank you.

7 THE COURT: Hold on.

8 **EXAMINATION**

9 BY THE COURT:

10 Q Okay. So to be clear and I think it already is, but I just want to make
11 sure. At the time of the prelim did you recognize Mr. Brabham?

12 A No.

13 Q Did you know that you had had any relationship with him at all?

14 A None at all.

15 Q Did you recall that you had ever represented him?

16 A At time of preliminary hearing, no, Your Honor.

17 Q And – but – and, sorry. Had you done a conflict check at the outset of
18 the case?

19 A We did. We have a database that we enter all of our names into. We
20 did the same thing with this case. And after the fact I believe we found that it was
21 either a spelling mistake on the frontend or when we received Mr. Brabham's case
22 that it didn't connect up.

23 Q Okay.

24 A So. And I did look at that file and it appears that I believe out of seven
25 appearances, I think I might have – I believe I made one and then the following

1 status checks were done by my associate attorneys.

2 Q Right.

3 A It may have been two, but I had no recollection of him.

4 Q Sure. And his testimony at prelim was from a hospital bed by video,
5 correct?

6 A That's what I recall, yes.

7 Q Okay. Had you ever seen him in the hospital before?

8 A No.

9 Q Okay. So I take it then that your prior representation of him had
10 nothing to do with the decision not to cross-examine him at the prelim?

11 A Correct, Your Honor, I had no idea who he was or that he was a prior
12 client.

13 Q And although you might have – if you were lead counsel – might have
14 cross-examined at prelim, did you feel that it was a legitimate strategy decision not
15 to cross-examine?

16 A I did. Robert and I had many conversations about how we were going
17 to address preliminary hearing and we went back and forth on the issue. And,
18 ultimately, he decided that that was the strategy he preferred.

19 Q Right.

20 A So I didn't fight with him about it –

21 Q Right.

22 A -- I didn't –

23 Q And how long was it from – so, backup. So I want to just go through
24 with you. How did you discover you did have a conflict?

25 A Pardon me?

1 Q How did you discover that you had previously represented Mr.
2 Brabham?

3 A During review of discovery, specifically photographs. There was a
4 photograph of a wallet. And in that wallet or laying to the side of it there was a
5 business card of mine. And then we followed up on that and found that I
6 represented Mr. Brabham in the past. I believe about a year prior.

7 Q Okay. And how long a period of time was there from when you
8 discovered that until it was brought to the Court's attention and you were removed
9 from the case?

10 A I can't recall specifically but it was days. A short period of time.

11 Q Okay. And, again, this is obvious, but certainly it was after prelim?

12 A Yes.

13 THE COURT: Okay. Any additional questions? You don't have to, I'm just
14 inviting the opportunity.

15 MR. MODAFERRI: I understand.

16 **REDIRECT EXAMINATION**

17 BY MR. MODAFERRI:

18 Q Just one. At the time that the decision was made not to ask Mr.
19 Brabham any questions, you – the both of you knew that the witness said that there
20 were two people at the scene of the shooting wearing ski masks.

21 A I can't recall specifically. I just haven't reviewed the portion of the file
22 well enough for a long time. So I hesitate to answer that question. I just haven't
23 reviewed it.

24 MR. MODAFERRI: Okay. Thank you, Mr. Maningo. Thank you.

25 THE COURT: Anything further?

1 MR. DASKAS: No, Your Honor.

2 THE COURT: Okay.

3 Thank you, Mr. Maningo.

4 THE WITNESS: Thank you, Your Honor.

5 MR. DRASKOVICH: The defense is – we have no other witnesses we
6 intend to call.

7 THE COURT: Any other witnesses for the State?

8 MR. DASKAS: No, Judge.

9 THE COURT: Okay. All right.

10 Any additional argument? Obviously, I've read the briefs but go
11 ahead.

12 MR. DRASKOVICH: There's nothing I could argue that wouldn't be
13 repeating what's been laid out. Your Honor knows our point. It's our position that
14 prelim is a critical stage of the proceeding.

15 THE COURT: It's been declared so, so therefore it is.

16 MR. DRASKOVICH: And it's our position, obviously that there was a conflict
17 whether it was known or not by the defense attorney and on that we'll submit it.

18 THE COURT: Okay.

19 MR. MODAFERRI: Your Honor may I just bring up one extra point if you
20 don't mind.

21 THE COURT: Go ahead.

22 MR. MODAFERRI: The Supreme Court just last week released a case,
23 *Rugamas*.

24 THE COURT: U.S. or Nevada?

25 MR. MODAFERRI: Nevada.

1 THE COURT: Uh-huh.

2 MR. MODAFERRI: And it deal with an assessment of whether hearsay at
3 the Grand Jury should come in. And they applied the harmless error standard that
4 I know the Court has been so interested in.

5 THE COURT: Uh-huh.

6 MR. MODAFERRI: I know in *Patterson* that they talked about harmless error
7 within the context of a trial that's already occurred. And our position laid out in the
8 supp and in the reply is you need a trial to apply harmless error.

9 Harmless error cannot stand alone to judge a motion in this point and
10 stature, because you could never find beyond a reasonable doubt whether that
11 error was harmless, because you have no trial with evidence to make that
12 assessment. That distinguishes this matter right here from that matter in
13 *Patterson*.

14 In *Patterson*, the Court recognized both structural errors and errors
15 that were within the harmless –

16 THE COURT: So if we have a trial and the case goes up on appeal,
17 hypothetically –

18 MR. MODAFERRI: Um.

19 THE COURT: -- then the Supreme Court can look back with a harmless
20 error analysis.

21 MR. MODAFERRI: And that would be a matter of convenience. But think
22 about all the resources that would be wasted if that weren't the case.

23 What do we lose by pushing the reset button on this, you know?
24 We've lost the –

25 THE COURT: Okay. Why don't you do this – actually, that's an interesting

1 point and I meant to ask this. What, exactly, are you asking me to do today?

2 MR. MODAFERRI: To remand this back for a new prelim and give him a
3 new writ date, because out of all of the ripple effects of him not having conflict free
4 effective counsel at prelim, he didn't get the chance to writ out, PC based upon two
5 shooters, ski mask, who shot the gun. He didn't have the opportunity to properly
6 litigate that lengthy motion to suppress ID.

7 THE COURT: How was that a ripple effect of the conflict that counsel was
8 not aware of at the time?

9 MR. MODAFERRI: Well, you know what, Judge, I don't think that conflict is
10 assessed that way. If you didn't recognize that you had before you someone that
11 you should recused yourself from hearing a matter, the recusal is still there.

12 THE COURT: Yes.

13 MR. MODAFERRI: Right?

14 THE COURT: Yes.

15 MR. MODAFERRI: And the same goes for an attorney. Just the fact that
16 you look the other way so as to not remember who you've represented, doesn't
17 mean you're still not conflicted. I mean it's a matter of law, not just a matter of
18 perception.

19 If Mr. Belcher knew at that given point in time that his lawyer was still –
20 let's not put it that way – Mr. Belcher had a right to know that his lawyer standing
21 before him also represented the critical witness –

22 THE COURT: Right.

23 MR. MODAFERRI: -- and that's the bottom line.

24 THE COURT: Sure. Okay.

25 State.

1 MR. DASKAS: Mr. Maningo – I'm sorry. Mr. Modafferri wants to push the
2 reset button. Well, if we push the reset button, it would be as it pertains to Nicholas
3 Brabham. Even if you struck his testimony entirely, there is still probable cause to
4 bind over Mr. Belcher on the charges before this Court. The eyewitness
5 identification that came, via the photographic lineup, was introduced through
6 Detective Ken Hardy unobjected to and for good reason, because it would have
7 come in anyway, even if there had been a defense objection.

8 And so pushing a reset button does nothing. We're right back where
9 we are today, which is there was probable cause to bind over the Defendant on all
10 the charges, even without the identification by Nicholas Brabham, which dovetails
11 into the ultimate point here and that is there's no harm. There's no harm. And this
12 Court has asked Mr. Modafferri in previous hearings whether he agreed that this is
13 a harmless error analysis; and, I think he resisted somewhat in previous hearings,
14 but it is a harmless error analysis.

15 We would be here anyway because the identification of the Defendant
16 by Nicholas Brabham came in through Detective Ken Hardy anyway. And so I
17 don't see where there's any harm whatsoever. And, even digging a little bit
18 deeper, we know from Mr. Langford and from Mr. Maningo, this was a strategic
19 decision and a sound strategic decision. Because even Mr. Maningo had to agree,
20 although he might have made a different decision, that by not cross-examining,
21 they at least maintained the argument down the road if Mr. Brabham died, that his
22 testimony wasn't preserved. Mr. Maningo had to agree with that. And that
23 illustrates and demonstrates why the decision was made.

24 Mr. Brabham testified via Skype from essentially what could have
25 been his deathbed. He was in the hospital, my recollection is still in intensive care,

1 but I'll defer to Mr. Langford's testimony and there was a good chance he was not
2 going to survive. Why on earth would the defense elicit from him a single question,
3 thereby preserving his identification of Norman Belcher? It would make no
4 strategic sense whatsoever. I'll submit it.

5 MR. DRASKOVICH: Just briefly in reply is the State agreeing that in the
6 event that Mr. Brabham is unavailable at trial, his testimony will not be presented to
7 this jury?

8 THE COURT: I'm thinking no, but you know.

9 MR. DRASKOVICH: And I see the State's not agreeing to that or –

10 THE COURT: No.

11 MR. DASKAS: I'm not here to answer Mr. Draskovich's questions, unless he
12 wants to answer mine.

13 MR. DRASKOVICH: We'll submit it.

14 THE COURT: Okay. Thank you.

15 All right. So – I mean I understand. So number one, you know, as I
16 discussed at the last hearing, I have read with interest the *Patterson* decision from
17 the Nevada Supreme Court issued in April of this year. And I understand – well, it
18 was a murder conviction, was not death penalty, but certainly was a murder case,
19 which has very serious consequences albeit not death penalty. And the issue
20 there in analyzing the Sixth Amendment was because of a choice of counsel and
21 not a conflict issue in that case. So I do recognize that it's certainly not the exact
22 same situation we find ourselves in here.

23 But in analyzing that, the Court recognized that had even the choice of
24 counsel issue been a problem at the time of trial, that would have been a structural
25 error that would have mandated reversal at that time. And so – but the Court

1 determined that because the issue was at the preliminary hearing, that the correct
2 analysis was a harmless error analysis and quoted from the United States
3 Supreme Court in *Coleman versus Alabama*, to the affect that at the preliminary
4 hearing stage the test to be applied is whether the denial of counsel at the
5 preliminary hearing was harmless error.

6 And so – and the issue being raised now with respect to the conflict of
7 interest that Mr. Maningo may have had, because of his representation of Mr.
8 Brabham previously would be – is a Sixth Amendment issue with respect to
9 whether that effectively denied him of counsel at the time. So it seems to me that
10 that holding applies here and that a harmless error analysis is appropriate in
11 accordance with the decision of the Nevada Supreme Court and the U. S. Supreme
12 Court.

13 And the Nevada Supreme Court went on to say: an error is harmless
14 if this Court can determine beyond a reasonable doubt that the error did not
15 contribute to the Defendant's conviction. And I understand – so, obviously, we
16 haven't had a trial, there isn't a conviction and we'll see what happens at the time
17 of trial in that regard.

18 But in looking back at this preliminary hearing and the arguments
19 made on behalf of the Defendant about the impact of this conflict at the time of
20 prelim, we can all agree Mr. Brabham is a very important witness in this case. And,
21 certainly, his identification of the Defendant is very important in this case,
22 undoubtedly.

23 But it's also very clear and in fact undisputed that Mr. Maningo was
24 completely unaware at the time of prelim that he had ever represented Mr.
25 Brabham. He didn't recognize him. It had been some time since he had – and by

1 some time I mean months – since he had represented him and been in court with
2 him. That was for one, you know, status hearing that it wasn't a particularly lengthy
3 and substantive contact that he had from what is before me.

4 And, more importantly, the issues raised by the defense about the
5 failure to have cross-examined Mr. Brabham, all of the evidence before me is that
6 that decision was strategic to do with whether or not his testimony would be
7 preserved if he were unavailable at trial.

8 And, perhaps, in a more general strategic view of Mr. Langford
9 regarding not tipping his hand at the time of prelim, and you know, it's not up to me
10 at this point and time to evaluate whether, in fact, he's correct about the
11 confrontation analysis, if it turns out Mr. Brabham is unavailable at the time of trial.
12 And I'm not intending to rule on that issue today. But it is – but it was strategic
13 decisions that were made by counsel at the time, who were at the time unaware of
14 and unaffected by the fact that Mr. Maningo had previously represented Mr.
15 Brabham.

16 And so it seems to me that the – it is beyond a reasonable doubt that
17 that representation by Mr. Maningo of Mr. Brabham previously did not contribute at
18 all to the outcome of the preliminary hearing and will not contribute to the outcome
19 of the trial.

20 And I guess I would add additionally that there is some case law – in
21 looking at conflict issues – there's some case law, when it talks about conflict of
22 counsel that talks about an actual conflict, as one that affected counsels'
23 performance; and, that its based on the impact of that conflict on an attorney's
24 ability to fully represent his or her client. And so under some of those cases, given
25 the lack of awareness in this circumstance, it's not necessarily clear that this would

1 actually be considered an actual conflict at that time. But assuming it is, because
2 he had represented Mr. Brabham, my decision is that the harmless error analysis
3 applies and that it was, in fact, harmless error. So for all of those reasons I'm
4 going to deny the motion.

5 We are – are we still set for trial in November?

6 MR. MODAFERRI: No.

7 THE COURT: I didn't think so. It's showing that on the calendar and I
8 thought we continued the trial 'till next year.

9 MR. DRASKOVICH: We did but we wanted to preserve this –

10 THE COURT: Oh, no, no.

11 MR. DRASKOVICH: -- and we wanted to keep this date, so that's –

12 THE COURT: Obviously, we needed to take care of this. I just was looking
13 at the calendar, but anyway. Okay. State –

14 MR. DASKAS: And, Your Honor, I'm assuming you want the State to
15 prepare the order?

16 THE COURT: Yes, please.

17 MR. DASKAS: Yes. Thank you.

18 THE COURT: A thorough order, please.

19 MR. DASKAS: Yes, understood.

20 THE COURT: Not just a one line, motion denied.

21 . . .

22 . . .

23 . . .

24 . . .

25 . . .

1 MR. DASKAS: I wouldn't do that. Thank you.

2 THE COURT: Thank you.

3 MR. DASKAS: Yes.

4 [Proceedings concluded, 9:38 a.m.]

5 * * * * *

6 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video
7 proceedings in the above-entitled case to the best of my ability.

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DEBRA WINN, Court Transcriber

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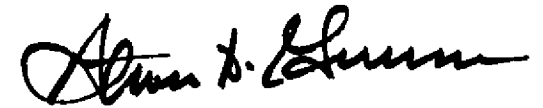
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CLERK OF THE COURT

ORDR

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, NV 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

**ORDER DENYING DEFENDANT'S MOTION TO STRIKE PRELIMINARY
HEARING TESTIMONY AND DISMISS CHARGES**

THIS CAUSE having come on for hearing before the Honorable Judge Elissa Cadish, Eighth Judicial District Court Judge, on the 24th day of October, 2013, the Defendant being present, represented by ROBERT DRASKOVICH, ESQ. and BRET WHIPPLE, ESQ. and GARY MODAFFERI, ESQ., the State being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ROBERT J. DASKAS and GIANCARLO PESCI, Chief Deputy District Attorneys, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court finds as follows:

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FINDINGS OF FACT & CONCLUSIONS OF LAW

1. On January 21, 2011, an Amended Criminal Complaint was filed which charged Defendant Belcher with Burglary While in Possession of a Firearm, Robbery With use of a Deadly Weapon, Murder With Use of a Deadly Weapon, Attempt Murder With Use of a Deadly Weapon, Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm and Third Degree Arson.
2. On January 21, 2011, a preliminary hearing was held in this matter in Justice Court Department 9 before the honorable Joe Bonaventure. Defendant was represented by attorneys Robert Langford and Lance Maningo. Eight (8) witnesses - - including Nicholas Brabham - - were called by the State. During the preliminary hearing, defense counsel made the strategic decision to cross-examine only one (1) of those eight (8) witnesses (Mr. Laroya).
3. On the day of the preliminary hearing, witness Nicholas Brabham was confined to a hospital bed in University Medical Center where he was struggling to recover from gunshot injuries he suffered in this case. *See* PHT 101-105. The extent and severity of his injuries prevented Brabham's transportation from the hospital to court, so he testified via video-conference from his hospital bed. *Id.* He was not cross-examined. *Id.* at 105.
4. Detective Ken Hardy testified at the preliminary hearing. PHT at 83. Detective Hardy explained that on January 12, 2011, he interviewed Nicholas Brabham at University Medical Center where was recovering from his gunshot injuries. PHT at 86. Detective Hardy showed Nicholas Brabham a photographic lineup which contained six (6) photographs, including Defendant Belcher in position number three. PHT at 87-93. Nicholas Brabham identified Defendant Belcher as the perpetrator of the crimes. Brabham's signature appeared under the photograph in position number three. PHT at 92. A copy of the photographic lineup was admitted during the preliminary hearing as State's Exhibit 5. PHT at 92.

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- 1 5. Following the presentation of witnesses and evidence, Defendant Belcher was bound
2 over to the Eighth Judicial District Court by Judge Bonaventure. PHT at 107.
- 3 6. On December 12, 2011, during a hearing before this Court, Mr. Maningo informed
4 this Court of a potential conflict regarding his continued representation of Defendant
5 Belcher. Transcript (“TR”) 12/12/11 at p. 4. Mr. Maningo explained that, while
6 reviewing crime scene photographs, he saw a photograph of a wallet which
7 presumably belonged to witness Nicholas Brabham. TR at p. 5. The wallet contained
8 a business card of Mr. Maningo’s law firm. TR at p. 5. Further research revealed that
9 Mr. Maningo’s law firm represented Nicholas Brabham in a case which resulted in a
10 misdemeanor plea.¹ TR at p. 5. Mr. Maningo explained, “[T]he extent of my firm’s
11 representation of him was status check for fines, fees, and community service.” TR at
12 p. 5. Mr. Maningo informed this Court that he made one appearance on Mr.
13 Brabham’s case on September 23, 2010. TR at p. 5. The misdemeanor case was
14 closed on that date because Mr. Brabham satisfied a “stay out of trouble” condition of
15 the case. TR at p. 5. Mr. Maningo explained that he never appeared in court with Mr.
16 Brabham. TR at p. 5. Finally, Mr. Maningo stated, “I’ve spoken to Mr. Belcher. He
17 has no issue or concern with it. But we all, I think, agree that the conflict really rests
18 with Mr. Brabham.” TR at p. 6.
- 19 7. Out of an abundance of caution, the State requested that Mr. Maningo be removed
20 from the case. TR at p. 7-8. This Court agreed. *Id.* Ultimately, attorneys Robert
21 Draskovich and Bret Whipple were appointed to represent Defendant. Attorney Gary
22 Modafferi is an associate of Robert Draskovich.
- 23 8. On or about August 13, 2013, Defendant filed the instant Motion to Strike
24 Preliminary Hearing Testimony and Dismiss Charges. Defendant’s argument is that
25 he was denied effective representation as guaranteed by the Sixth Amendment
26 because Mr. Maningo, Defendant’s counsel at the preliminary hearing, previously
27

28 ¹ Case Number 08FN2386B.

1 represented witness Nicholas Brabham and Brabham was asked no questions on
2 cross-examination during the preliminary hearing.

3 9. The standard to be applied is whether the denial of counsel at the preliminary hearing
4 was harmless error. *See Patterson v. State*, - - Nev. - - , 298 P.3d 433 (2013)
5 (violation of defendant's right to counsel at preliminary hearing was harmless error)
6 (trial errors are subject to harmless error review because these errors may be
7 quantitatively assessed in the context of other evidence presented in order to
8 determine whether they were harmless beyond a reasonable doubt). An error is
9 harmless if the court can determine beyond a reasonable doubt that the error did not
10 contribute to the Defendant's conviction or, in this case, the decision to bind over the
11 case. *See id.*

12 10. At the time of the preliminary hearing, Mr. Maningo was unaware of his previous
13 representation of Nicholas Brabham.

14 11. The decision not to cross-examine Nicholas Brabham was a strategic one. On
15 October 24, 2013, Robert Langford, Esq. and Lance Maningo, Esq. testified at an
16 evidentiary hearing on this matter. Defense counsel recognized that, had they cross-
17 examined Brabham, his preliminary hearing testimony would have been preserved for
18 use at trial. Conversely, because no questions were asked of Brabham during the
19 preliminary hearing, defense counsel maintained the argument that Brabham's
20 preliminary hearing testimony would be inadmissible at trial if Brabham ultimately
21 was "unavailable" for trial. Given Brabham's medical condition at the time of
22 preliminary hearing, this strategic decision was sound. Moreover, this decision was
23 discussed with - - and agreed to by - - Defendant.

24 12. Because Brabham was asked no questions on cross-examination - - a decision which
25 was strategically sound given Brabham's medical condition and discussed with
26 Defendant Belcher - - Mr. Maningo's prior representation of Brabham had no effect
27 whatsoever on Defendant Belcher's preliminary hearing. Defendant cannot now be
28 heard to complain that his lawyer failed to *effectively* cross-examine a witness when

1 Defendant agreed that very witness should not be cross-examined at all.

2 13. Assuming, *arguendo*, that Defendant's argument had merit, he would not be entitled
3 to the relief he seeks (striking the preliminary hearing and dismissing the charges).
4 Absent the testimony of Nicholas Brabham, there was probable cause to bind over
5 Defendant on the charges. Defendant argues that "[t]he sole eyewitness to identify
6 Norman Belcher at the scene of the charged murder is Nicholas Brabham." Motion at
7 4. Defendant intimates that an effective cross-examination of Nicholas Brabham
8 would have destroyed Brabham's identification of Defendant Belcher at preliminary
9 hearing as the perpetrator of the crimes and, therefore, resulted in dismissal of the
10 charges. See Motion at 4, 8, 9 ("The identification that placed Mr. Belcher at the
11 scene of the murder came from the testimony of Mr. Brabham...").

12 14. Defendant's argument is flawed because the identification of Defendant Belcher at
13 the scene of the murder came from a second source at the preliminary hearing.
14 Detective Ken Hardy testified at preliminary hearing. PHT at p. 83. On January 12,
15 2011, Detective Hardy interviewed Nicholas Brabham at University Medical Center
16 where was recovering from his gunshot injuries. PHT at p. 86. Detective Hardy
17 showed Nicholas Brabham a photographic lineup which contained six (6)
18 photographs, including Defendant Belcher in position number three. PHT at 87-93.
19 Nicholas Brabham identified Defendant Belcher as the perpetrator of the crimes.
20 Brabham's signature appeared under the photograph in position number three. PHT
21 at 92. A copy of the photographic lineup was admitted during the preliminary hearing
22 as State's Exhibit 5. PHT at 92. Thus, contrary to Defendant's argument, testimony
23 independent of Nicholas Brabham was admitted during preliminary hearing through
24 Detective Ken Hardy which identified Defendant Belcher as the perpetrator of the
25 crimes. Detective Hardy's testimony alone, coupled with the admission of the
26 photographic lineup, constituted probable cause to bind over Defendant on the
27 charges.

28 ///


1 15. Beyond a reasonable doubt, Mr. Maningo's representation of Nicholas Brabham did
2 not contribute to the outcome of the preliminary hearing in this matter, and it will not
3 contribute to the outcome of the trial.

4 16. For all of these reasons, the Court hereby denies Defendant's Motion to Strike
5 Preliminary Hearing Testimony and Dismiss Charges.

6 **ORDER**

7 THEREFORE, IT IS HEREBY ORDERED that the Defendant's Motion to Strike
8 Preliminary Hearing Testimony and Dismiss Charges is hereby DENIED.

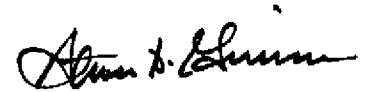
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10 DATED this 27 day of November, 2013.

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13 _____
14 DISTRICT JUDGE

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

18 
19 ROBERT J. DASKAS
20 Chief Deputy District Attorney
21 Nevada Bar #004963

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CLERK OF THE COURT

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
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8 THE STATE OF NEVADA,
9 Plaintiff,
10

11 vs.

12 NORMAN BELCHER, aka NORMAN
13 DAVID BELCHER, JR,
Defendant.

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) CASE#: C270562-1
)
) DEPT. VI
)
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14 BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE
15 WEDNESDAY, OCTOBER 16, 2013

16 **RECORDER'S TRANSCRIPT OF HEARING**
17 **DEFENDANT'S MOTION TO CONTINUE TRIAL**

18 APPEARANCES:

19 For the State:

ROBERT J. DASKAS, ESQ.
GIANCARLO PESCI, ESQ.
Chief Deputy District Attorney

21 For the Defendant:

22 ROBERT M. DRASKOVICH, JR., ESQ.
23 BRET O. WHIPPLE, ESQ.
GARY A. MODAFERRI, ESQ.

24 RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER
25

1 Las Vegas, Nevada, Wednesday, October 16, 2013

2 [Case called at 9:08 a.m.]

3
4 THE COURT: What page is he on?

5 THE COURT RECORDER: 8.

6 THE CLERK: Page 8.

7 MR. DRASKOVICH: 8.

8 THE COURT: Thank you.

9 MR. DASKAS: Good morning, Your Honor, Robert Daskas and Giancarlo
10 Pesci on behalf of the State.

11 THE COURT: Okay.

12 MR. DRASKOVICH: Good morning, Robert Draskovich on behalf of Norman
13 Belcher.

14 MR. WHIPPLE: Bret Whipple, Your Honor, on behalf of Mr. Belcher.

15 MR. MODAFFERI: Gary Modafferri on behalf of Mr. Belcher. Good morning,
16 Your Honor.

17 THE COURT: Good morning, Mr. Belcher.

18 THE DEFENDANT: Good morning.

19 THE COURT: Okay. This is defense motion to continue the trial just to back
20 up a moment, I do have you guys set for the 24th for that evidentiary hearing on the
21 conflict issue that was raised. Let me just confirm that I have that, yes.

22 MR. MODAFFERI: That's correct, Your Honor.

23 THE COURT: Okay.

24 MR. MODAFFERI: And I have Mr. Maningo per court order to be present at
25 8:30 on that day.

1 THE COURT: Good.

2 MR. MODAFFERI: In discussions with Mr. Daskas he indicated a desire to
3 have Mr. Langford present, but I hadn't yet made those plans. I thought just Mr.
4 Maningo would be necessary. But I'll go back the office and have him here if he can
5 be.

6 THE COURT: Okay.

7 MR. DASKAS: And, Your Honor, my position is he -- Mr. Langford also needs
8 to be here, because there was a strategic decision not to cross-examine certain
9 witnesses. And Mr. Langford needs to speak to that issue.

10 THE COURT: I see, okay. So, and just to be clear that's the only matter I
11 have set that morning, so I expect you guys to be here at 8:30 not at 9:30. Okay.
12 All right, so let's talk about the motion to continue trial.

13 MR. MODAFFERI: Judge, I'll talk to that -- we need extra time because if this
14 case does get to a penalty phase based upon the notice of the aggravation and just
15 common sense as the way this case has unfolded, a big, enormous chunk of the
16 jury's decision would be based on prior homicide that Mr. Belcher is convicted of.
17 The circumstances of that homicide are unusual. They're not -- they will be what
18 drives the jury's decision as to life and death and we need more time to investigate.

19 THE COURT: And so according to the motion you just recently got some
20 documentation?

21 MR. MODAFFERI: Yes, Judge, and our investigator -- yes, we got about 14
22 volumes of things and we're going through it right now. I'm not trying to blame
23 anyone. We're just saying it's necessary.

24 THE COURT: Okay. State.
25

1 MR. DASKAS: Your Honor, what I want to make perfectly clear is this,
2 because I mentioned this to Mr. Modafferri before the case was called this morning.
3 Even without the prior homicide information the defense is not ready. They've not
4 completed their mitigation investigation.

5 THE COURT: Okay.

6 MR. DASKAS: So, for the defense to suggest that somehow they're recently
7 in possession of information which causes them not to be ready is simply not true.

8 THE COURT: Okay.

9 MR. DASKAS: They're not ready.

10 THE COURT: They mentioned both in their motion.

11 MR. DASKAS: Yes, yes.

12 THE COURT: So to be fair I was the one who asked about the additional
13 documents.

14 MR. MODAFFERI: I'm not trying to blame Mr. Daskas at all or the State. I'm
15 saying it's what we need to get to that point.

16 THE COURT: Okay.

17 MR. DASKAS: Obviously we're opposed to the continuance. But we
18 recognize that to a certain extent the Court's hands are tied much like ours are.

19 THE COURT: Uh-huh.

20 MR. DASKAS: We're ready -- we've been ready every trial setting. We'll be
21 ready the next trial setting. And the defense has made representations in the past
22 that -- where they assured this court the November trial date would stand, yet it
23 hasn't. And so, whatever the new date is we'll be ready and we hope the defense is
24 ready as well.

25 THE COURT: Yes.

1 MR. MODAFFERI: Mr. Belcher has been insistent that I talk about his
2 discovery motions. Judge, we are going to put what has already been determined
3 on record. He has made requests and the Court has ruled on several of them. But
4 there hasn't been a final on the record determination about several things, based in
5 what Mr. Belcher believes. And that would be certain requests for DNA and a
6 second suspect and investigative notes concerning a second suspect. We will put
7 that on the record and we would move it on for a further hearing if necessary.

8 THE COURT: Well, I mean, you --

9 MR. MODAFFERI: But we've had informal conversations with Mr. Daskas
10 that there were no investigations and that there were no indications within the
11 investigators notes or no DNA or forensic comparisons with a second suspect or
12 second shooter.

13 THE COURT: That's my understanding, and I think that was part of your
14 discovery motion that I did rule on, and State said they didn't have anything.

15 MR. DASKAS: That's correct, Your Honor. And in fact I reached out and
16 spoke to the lead homicide detective on this case. What happened was the -- there
17 was a surviving victim in the home --

18 THE COURT: Uh-huh.

19 MR. DASKAS: -- who suggested --

20 THE COURT: Right.

21 MR. DASKAS: -- that he may have heard and as a result of that believed
22 there could have been a second suspect. That was the extent of the information.
23 But pursuant to the defense request I reached out the homicide detective and that is
24 the extent of the information regarding a second suspect. There are no fingerprints.

25

1 There's no forensics evidence. There are no interviews. That's the extent of the
2 information. And you're right that was put on the record before, Judge.

3 MR. MODAFFERI: Just so the record is clear the basis for those requests
4 were page 4 of the telephonic affidavit in support of search warrant, where the
5 detective swore under oath that Nicholas Brabham told him that there were two
6 people on scene, both wearing masks when the gunshot was made.

7 THE COURT: Right, right.

8 MR. MODAFFERI: Not that it just was something that was heard in the
9 house. This is what Brabham saw according to the detective in his sworn affidavit,
10 so that was the basis.

11 THE COURT: Sure. No I understand why you were asking about it, makes
12 sense. But, I mean, I assume that you have not only reviewed the DA's file but that
13 you've scheduled to review the detective's file. Have you done that?

14 MR. MODAFFERI: We have scheduled to see the DA's file. And in fact we
15 compiled a list of everything we have and we gave it to the DA and asked them to
16 compare it to what they have.

17 THE COURT: Uh-huh.

18 MR. MODAFFERI: And they essentially said we have nothing more than what
19 is there.

20 THE COURT: Okay.

21 MR. MODAFFERI: I -- you know, Judge, I have not gone to see --

22 THE COURT: You might want to meet with the detective.

23 MR. MODAFFERI: -- the detective's file.

24 THE COURT: I assume you can schedule that?

25 MR. DASKAS: Absolutely, Your Honor.

1 MR. MODAFFERI: Thank you.

2 THE COURT: Just to make sure, you know, and --

3 MR. MODAFFERI: Thank you, yes I appreciate that.

4 THE COURT: Okay. No problem. Let's talk about then trial continuation
5 then. Have you looked at dates that work for you guys?

6 MR. WHIPPLE: Your Honor, let me speak that issue if I can. Just
7 overhearing what the Court had said this morning.

8 THE COURT: There's --

9 MR. WHIPPLE: We're pretty packed.

10 THE COURT: There's a bunch of murder trials on every stack.

11 MR. WHIPPLE: Yes, I --

12 THE COURT: Unfortunately that's life.

13 MR. WHIPPLE: That seems to be the situation. We were looking at
14 potentially July of next year.

15 THE COURT: Uh-huh.

16 MR. WHIPPLE: But apparently you're full, you know, --

17 THE COURT: Right, and so I just put one on July 21st over the top --
18 potentially over the top of the end of the Justin Porter case.

19 MR. WHIPPLE: We firmly believe and hope and intend to be ready to go. We
20 wanted to be ready this time, Your Honor. We just want to make sure that obviously
21 that we're all prepared and ready to go. September, I hate to say that it's almost a
22 full year away but that is when the next availability is.

23 THE COURT: It looks a little easier for me. Like -- and I probably should
24 know by now with the reschedulings we've done. Are we looking at 2 weeks on this
25 or --

1 MR. DASKAS: I think 2 weeks sounds reasonable, Your Honor.

2 THE COURT: So, I could put this in like September 22 if that works for you
3 guys.

4 MR. DASKAS: That works for the --

5 MR. DRASKOVICH: Do you have any --

6 THE COURT: That gives me a couple weeks.

7 MR. DASKAS: That works for the State, Your Honor.

8 MR. DRASKOVICH: I have a firm trial setting September 22nd in front of
9 Judge Walsh on a three year old case.

10 THE COURT: Okay.

11 MR. DRASKOVICH: Is there anything earlier in the month? It's --

12 THE COURT: Earlier in the month -- well I've got -- I have a murder case set
13 September 8th, whether it will go or not I don't know. But I was putting it back to be
14 after that. But, you know, I could put it over the top and, you know.

15 MR. DRASKOVICH: If we could do that I'd appreciate it.

16 THE COURT: I mean, that one is not a 250 case and may or may not resolve.
17 I don't know. All right, so then we're talking about September 8th of next year. Is
18 that available as well for you guys?

19 MR. DASKAS: We'll take that, Your Honor.

20 THE COURT: All right, let's put it on September 8th.

21 THE CLERK: Yes, Your Honor. Calendar call September 3rd, 2014, 9:30; jury
22 trial September 8, 10 a.m.

23 MR. DRASKOVICH: Thank you.

24 MR. MODAFFERI: Thank you, Judge.

25

1 THE COURT: Do we need a status check in advance to see how things are
2 going?

3 MR. DRASKOVICH: If there's an issue we'll put it on calendar.

4 THE COURT: You guys will put it on if there's a problem.

5 MR. DRASKOVICH: Absolutely.

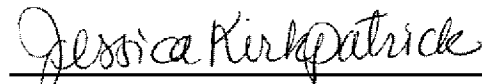
6 MR. MODAFFERI: Thank you, Judge.

7 THE COURT: Okay. Thank you.

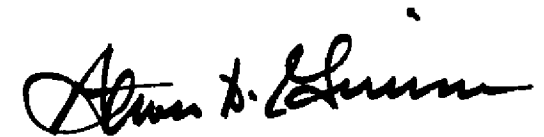
8 [Hearing concluded at 9:18 a.m.]

9 *****

10 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video
11 proceedings in the above-entitled case to the best of my ability.

12 

13 Jessica Kirkpatrick
14 Court Recorder/Transcriber



CLERK OF THE COURT

ROBERT DRASKOVICH, ESQ.

Nevada Bar No.: 6275

GARY A. MODAFFERI, ESQ.

Nevada Bar No. 12450

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Las Vegas, Nevada 89101

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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

NORMAN BELCHER,

Defendant.

CASE NO.: C270562

DEPT. NO.: VI

**DEFENDANT'S MOTION FOR DISCOVERY AND FOR DISCLOSURE OF ALL
EXCULPATORY EVIDENCE AND INCORPORATED STATEMENT OF AUTHORITY**

COMES NOW, Defendant, NORMAN BELCHER, by and through **ROBERT M. DRASKOVICH, ESQ., and GARY A. MODAFFERI, ESQ., of TURCO & DRASKOVICH, LLP.**, and hereby move this Honorable Court for an Order Disclosing all Exculpatory Evidence and Incorporated Statement of Authority in the above-referenced matter.

This Motion is made and based upon the papers and pleadings on file in this matter, and all oral argument adduced at the time of hearing.

DATED this 15th day of April, 2013.

By: /s/ GARY A. MODAFFERI
Gary A. Modafferi, Esq. (12450)
Robert M. Draskovich, Esq. (6275)
Attorneys for Defendant

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NOTICE OF MOTION

TO: Steven Wolfson, District Attorney Clark County, Nevada;

**DEFENDANT’S MOTION FOR DISCOVERY AND FOR DISCLOSURE OF ALL
EXCULPATORY EVIDENCE AND INCORPORATED STATEMENT OF AUTHORITY**

will be heard on the 29 day of april, 2013, at 8:30a a.m./p.m. in Department
VI.

DATED this 15th day of April, 2013.

/s/ GARY A. MODAFFERI

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

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1. Defendant Belcher requests the complete files of any and all law enforcement and prosecutorial agencies involved in the investigation of these offenses. The term “file” includes the defendant’s statements, any putative co-Defendant’s statements, witness statements and investigating officer’s notes. Please reveal and disclose every transcription or recordation of any type of all statement(s) made by the defendant, or by any person whom the State contends is an agent of the defendant. The defendant further requests that the State reveal and disclose the substance of any oral statement made by the defendant in response to questioning by any person then known by the defendant to be a State agent, regardless of whether the statement was made before or after arrest. With regard to the foregoing requests, the defendant specifically contends that NRS 174.235 encompasses statements of the defendant that are made directly to an agent of the State, or to a third party who then makes a statement to an agent of the State in which the defendant’s remarks are attributed and included within the third party’s statement. The defendant further contends that any statement of an alleged co-conspirator or co-defendant concerning any activity connected with the crime(s) should be also be disclosed under NRS 174.235.

1 2. Reveal and disclose the nature, results and reports of any scientific tests, physical
2 or mental examinations or tests, or measures or experiments made in connection with this case,
3 whether completed or not, including, but not limited to, analysis, DNA analysis, gunshot or
4 firearm analysis, gunshot residue analysis, hair and/ or fiber analysis, fingerprint analysis,
5 analysis of tape recordings or wiretaps, handwriting analysis, fingerprint comparisons and/or
6 voice identifications. The Defendant requests all cell phone data records including those records
7 that might be used to establish the Defendant's presence or absence through cell phone tower
8 triangulation.
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11 The defendant also requests that the defendant or the defendant's representative(s) be permitted
12 to personally examine, inspect and photograph all pieces of physical evidence that were obtained
13 during the State's investigation of this case and that have been scientifically examined on behalf
14 of the state. The defendant further specifically reserves the right to move this court to have a
15 competent expert of the defendant's own choosing perform scientific testing on any of the
16 physical evidence scientifically examined by the State if the defendant deems it desirable or
17 necessary, under appropriate and reasonable safeguards imposed by the Court.
18

19 3. Permit the defendant's attorney(s) to inspect and copy or photograph all books,
20 papers, documents, photographs, videotapes, motion pictures, mechanical or electronic
21 recordings, buildings and places, crime scene(s) or tangible objects and all copies and portions
22 thereof which are within the possession, custody or control of the State and which are material to
23 the preparation of the defendant's defense, or might possibly be used by the State as evidence
24 during the presentation of its case-in-chief or its rebuttal case, or which were obtained from or
25 belonged to the defendant. The Defendant specifically requests that all intercepted jail house
26 recordings and or writings be presented immediately for review by the Defendant.
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1 4. Please reveal and disclose a complete and exact copy of the defendant's entire
2 criminal record, both as an adult and juvenile.

3 5. Please reveal and disclose a complete and exact copy of any of the alleged
4 victim's entire criminal record, both as an adult and juvenile.

5 6. Please reveal and disclose whether there has been any electronic surveillance,
6 eavesdropping, and interceptions of communications, wiretapping, listening or any similar
7 investigative techniques used in the investigation of this case. If such techniques have been used,
8 the defendant requests that the State afford the defendant's attorney(s) with a true, complete and
9 correct copy of any such recordings or interceptions, together with an accurate transcript thereof,
10 and with any log reflecting the date that the recordings or interceptions were made, the names of
11 the State agents who participated in the recordings or interceptions and the identity of all
12 speakers on the recordings or interceptions.

13 7. Please reveal and disclose whether any conversation entered into by the defendant
14 has been electronically recorded. If so, the defendant specifically requests the following:

15 a) An exact and complete copy of such tape recording.

16 b) The authority for making such interception or recording; and

17 c) The date that the recording was made and identity of all speakers therein.

18 8. Please reveal and disclose the date, place, circumstances and names of all
19 individuals involved in any identification procedures (photographic, corporeal or any other type),
20 interrogations, searches or seizures of any type that were conducted in connection with the
21 investigation of this case.

22 9. Please reveal and disclose any evidence that the State has within its possession,
23 custody or control, or the existence of which is known, or can become known through the
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1 exercise of due diligence, to the State, concerning any identification procedure, interrogation
2 search or seizure conducted by the State, its agents or employees that tends, however slightly, to
3 taint or make illegal the identification procedure, interrogation, search or seizure.
4

5 10. Please reveal and disclose the names, addresses, telephone numbers, backgrounds
6 and criminal records of all witnesses to be presented on the witness stand during the trial of this
7 case by the State.

8 11. Please reveal and disclose names, addresses, telephone numbers, backgrounds and
9 criminal records of all persons who have any knowledge whatsoever regarding this case and/or
10 were interviewed by any state employee or agent in connection with this case.
11

12 12. Please reveal and disclose whether any person has been videotaped in connection
13 with the investigation of this case.

14 13. Please reveal and disclose the names, addresses, background and entire criminal
15 record of any informants, special employees, alleged co-conspirators (whether indicted or
16 unindicted), alleged accomplices (whether indicted or unindicted), alleged aider and abettors
17 (whether indicted or unindicted) and special investigators used in the investigation of this case or
18 whom may be called as witnesses by the State during any phase of the trial of this case, and
19 reveal and disclose the same information regarding any persons hired, directed, requested and/or
20 paid by the state to investigate, "snoop" or otherwise obtain information in any manner
21 whatsoever in the investigation of this case.
22

23 14. Please reveal and produce a copy of any Las Vegas Metropolitan Police
24 Department, Federal Bureau of Investigation or other investigative agency departmental rules or
25 regulations pursuant to which any informant, special employees, alleged co-conspirator (whether
26 indicted or unindicted), alleged accomplice (whether indicted or unindicted), alleged aider or
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1 abettor (whether indicted or unindicted) or snoop was hired, employed or requested to participate
2 in the investigation of this case.

3 15. Please reveal and disclose the total amounts of money paid out to any informant,
4 special employee, alleged co-conspirator (whether indicted or unindicted), alleged accomplice
5 (whether indicted or unindicted), alleged aider or abettor (whether indicted or unindicted) tipster
6 or snoop who was interviewed in connection with this case or who may be called as a witness by
7 the State during any phase of the trial of this case, together with the dates of payment, where
8 made, to whom made and the reasons for payment of such sums. This request specifically
9 embraces any payment made under any so-called witness protection program. The defendant
10 further requests the disclosure of all receipts, vouchers, or other books and records concerning
11 money expended for, to or on behalf of the above class of persons.
12

13 16. Please reveal and disclose all transcriptions of any kind, whether recorded or
14 written, regarding any conversations with, discussions with or statements made by informants,
15 special employees alleged co-conspirators (whether indicted or unindicted), alleged accomplices
16 (whether indicted or unindicted), alleged aider and abettors (whether indicted or unindicted),
17 tipsters or snoops of the State who have been involved in any manner whatsoever in the
18 investigation of this case or who may be called as witness during any phase of the trial of this
19 case.
20

21 17. Please state the names and classification of any and all Las Vegas Metropolitan
22 Police Department, Clark County District Attorneys, Federal Bureau of investigation Agents,
23 United States Attorneys or other State employees who met with, talked to or who were present at
24 any meeting, telephone conversation or discussion held with any informants, special employees
25 or snoops of the State during the investigation of this case.
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1 18. Please reveal and disclose all expert conclusions and analysis concerning any
2 records, papers, documents or physical evidence that may have been seized or obtained by the
3 State in connection with its investigation of this case.

4
5 19. Please reveal and disclose the name, address and qualifications of any expert
6 witness intended to be called by the State either during its case-in-chief or its rebuttal.

7 20. Please reveal and produce immediately all statements, memoranda, and/or
8 documents producible under NRS 174.335 or 18 U.S.C.A. §3500.

9
10 21. Please reveal and produce a copy of all original notes, statements and memoranda
11 (whether handwritten, recorded or otherwise) that were made by any and all agents of the State
12 investigating this case, including any person who was acting as an informer, special employee,
13 tipster, snoop or in an undercover capacity.

14 22. Please reveal produce any notes, documents or recordings relating to the
15 investigation of this case that were made by the agents of the State, including any person who
16 was acting as an informer, special employee, alleged accomplice (whether indicted or
17 unindicted), alleged co-conspirator (whether indicted or unindicted), tipster, snoop or in any
18 undercover capacity, have been totally or partially destroyed or altered, and, if so, reveal the
19 following with reference thereto:
20

21 a) The substance of the note, document or recording that was destroyed;

22 b) The substance of the alteration;

23 c) The name, address, and telephone number of all persons involved in the
24 destruction or alteration;

25 d) The reason for the destruction or alteration;

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1 e) Whether the note, document or recording was destroyed or altered pursuant to
2 an existing policy, federal regulation or for some other reason;

3 f) When the destruction or alteration occurred; and

4 g) Whether it is the policy and the custom of such agent(s) to destroy or alter such
5 notes and memoranda, and, if so, who initiated such policy.
6

7 23. Please reveal and disclose whether any person in connection with the State's
8 investigation of this case has been given a polygraph examination, and, if so, list the name of the
9 person(s) examined; the name and address of the operator; the date of the examination; and
10 furnish the defendant with copy of the questions and answers posed and the results and
11 interpretation thereof.
12

13 24. Please reveal and disclose any information or knowledge in the hands of the State
14 that would in any manner show that any of the State's potential witnesses may be suffering from
15 delusion, emotional difficulty, alcoholism, narcotics addition, the abuse or use of controlled
16 substances of any type, psychological or psychiatric imbalance or any other physical or mental
17 disability that might possibly affect, impair or influence the quality of competency of his of her
18 testimony or that in any way could reasonably affect his or her credibility or memory.
19

20 25. Please reveal and disclose whether any person who has been interviewed in
21 connection with this case has undergone hypnosis, age regression or a similar procedure, and if
22 so, list the name and address of the hypnotist or psychologist administering such person; the date
23 that he or she underwent the procedure; and the results thereof.
24

25 26. Please reveal and disclose whether any State agent or any one acting at the
26 direction or behest of the State (be designated as informant, special employee, snoop, prison
27 inmate or otherwise) has communicated with the defendant in order to attempt to obtain any
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1 information or facts from the defendant pertaining to this case or his defense thereof, and if so,
2 give the name, address and telephone number of such agent, informant, special employee, snoop
3 or prison inmate, together with all of the facts and circumstances pertaining thereto.
4

5 27. Please reveal whether the State has paid money or the like for any piece of
6 tangible or physical evidence that may be used in connection with this case, and, if so, state the
7 name, address and telephone number of the person to whom payment was made; the amount
8 thereof; the date thereof; and the tangible or physical evidence obtained.
9

10 28. Please reveal all persons who will testify for the State during its case-in-chief or its
11 rebuttal case, or whose testimony has been used before the grand jury to obtain the present
12 indictment, or whose sworn testimony or statements may be used in trial, or who has been
13 contacted with regard to the investigation of this case, the following specific and detailed
14 information is requested:
15

16 a) The existence, substance and manner of executioner fulfillment of any
17 promises, agreements, understandings and arrangements, either verbal or written, between the
18 State and any such person or his or her attorney(s), agent(s), or representative(s) wherein the
19 State has agreed, wither expressly or impliedly, as follows:
20

21 (i) not to prosecute the person for any crime or crimes;

22 (ii) not to prosecute a third party for any crimes or crimes;

23 (iii) to provide a formal grant of statutory immunity, or to provide an
24 informal assurance that the person will not be prosecuted in connection with any testimony given
25 by him or her;

26 (iv) to recommend leniency in sentencing for any crime
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1 (v) to recommend a particular sentence for any crime or crimes for which
2 the person is convicted;

3 (vi) to provide favorable treatment or consideration, that is, money or the
4 like, to the person or to friends or relatives of the person in return for the person's cooperation
5 and testimony;

6 (vii) to compromise or diminish, or to recommend the compromise or
7 diminution of any federal, state or local taxes which the person or friends or relatives of the
8 person owe claim to owe and;

9 (viii) to make any other recommendation of any benefit, however slight, or
10 to give any other consideration to the person friends relatives of the person.

11
12 29. Please reveal and disclose whether the State has made any attempt or has in fact
13 gained any information from the defendant since the return of the above-styled indictment by
14 sending, counseling, or advising person (whatever their classification may be) to talk with the
15 defendant or his counsel, and, if so, describe all of such activity in detail and the authorization, if
16 any, for such a procedure.

17
18 30. Please permit the defendant to copy any document or statement that might be
19 arguably admissible under NRS 51.035 or Fed. R. Evid. 801(d)(1)(B) to rebut an express or
20 implied charge against any State witness of recent fabrication or improper influence or motive.
21 These documents or statements are required to be produced because they are evidence to the
22 issue of credibility. This request includes any documents that might reasonably be foreseen for
23 using during State's case-in-chief or its rebuttal case.

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25 31. Reveal and disclose any statements of any type whatsoever made by any
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1 individuals who were contacted in connection with or involved in the investigation of this case
2 that may inconsistent, in whole or in part, with any other statement made by the same individual;
3 and any statements made by such individuals that are inconsistent, in whole or in part, with
4 statements made by other individuals who have given statements relevant to the charge(s) against
5 the defendant or with any knowledge held by such individuals.
6

7 32. Reveal and disclose:

8 (a) The names, addresses and telephone numbers of all witnesses appearing before
9 any grand jury that may have been held in connection with the investigation of these charges;
10

11 (b) The names, addresses, and telephone numbers of all persons whose testimony
12 may given to the grand jury by or through someone else in connection with the return of said
13 indictment;
14

15 (c) Copies of all documents and exhibits presented to the grand jury;

16 (d) Transcripts of the testimony of all witnesses appearing before the grand jury,
17 and if no minutes exist, then reveal and disclose any notes or summaries regarding the testimony;

18 (e) Summaries and copies of all statements of witnesses potentially relevant to the
19 charge(s) in issue in this case not presented or conveyed to the grand jury;
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21 (f) Copies of all documents, notes, transcripts or memoranda that are in
22 possession, custody or control of the State and are potentially relevant to the charges in the
23 indictment and which the State did not present to grand jury at the time that this case was
24 presented for grand jury consideration;

25 (g) A list of the names and titles of all State employees or other persons, other
26 than the grand jurors, who were present in the grand jury room during the taking of any
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1 testimony (other than his or her own) or who were present during any other portion, including
2 deliberation, of the grand jury proceedings.

3 (h) A list of the names and titles of each State employee or agent who, prior to the
4 return of the indictment herein, examined out of grand jury's presence any witness, document or
5 other item obtained by means of any grand jury subpoena;

6 (i) A copy of any letter or other documents authorizing the examination of the
7 grand jury materials by any of the State employees or agents mentioned above;

8 (j) A list of all grand jury subpoenas issued for documents and/or testimony in this
9 case;

10 (k) The existence of any orders issued pursuant to Fed. R. Crime. P. 6(e) relating
11 to grand juries that met concerning this matter;

12 (l) The name of any person offering any immunity, whether legally valid or not,
13 of any type whatsoever to any person requested to appear before the grand jury or to talk with
14 any State agent or representative involved in the investigation of this case;

15 (m) The transcripts of any and all statements made to the grand jury by any
16 United States Attorney, Assistant United States attorney or any presentation of evidence to the
17 grand jury in this case. This request concerns, but is not limited to, any instructions regarding the
18 law relevant to this case or pertaining to legal advice that were given by the aforementioned class
19 persons; and

20 (n) All records and logs reflecting when the grand jury involved in the
21 investigation of this case or in the handing down of the bill of indictment in this case met, and all
22 records and logs reflecting the composition of each such grand jury (or grand juries).

1 33. Please reveal and disclose all consideration or promises of consideration given to
2 or on behalf of any witness by the State, or expected or hoped for by the witness.

3 “Consideration” refers to absolutely anything of value or use, including, but not limited to,
4 criminal, civil or tax immunity grants; relief from forfeiture; assistance or favorable treatment or
5 recommendations with respect to any criminal, parole, probation, civil, administrative or other
6 legal dispute with the State or any other parties; payments of money or fees; witness fees and
7 special witness fees; provisions of food, clothing, shelter, transportation or other like benefits to
8 the witness, his or her family or other associate; placement in a “witness protection program” or
9 anything else that could arguably reveal an interest or bias of the witness in favor of the State or
10 against the defense or act as an inducement to testify or to color testimony.
11

12 34. Please reveal and disclose all threats, express or implied, made against any person
13 interviewed by the State in connection with this case or any potential witness for the State in this
14 case of criminal prosecutions or investigations relating to any probationary or deferred
15 prosecution status or any civil, administrative or other pending or potential legal disputes or
16 transactions with the State.
17

18 35. Please reveal and disclose the existence and identification of each occasion on
19 which each potential witness for the State has testified before any court, grand jury or other
20 tribunal or body with regard to the defendant or the investigation of this case.
21

22 36. Please reveal and disclose the existence and identification of each occasion in
23 which a witness or potential witness for the State, especially a witness who is an accomplice, co-
24 conspirator or expert, has testified before any court, grand jury, other tribunal, stenographer or
25 court reporter.
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1 37. Please reveal and disclose any and all personnel files for any witness who may
2 potentially be called by the State in this case and the existence and identity of all State files for
3 the witness.

4 38. Please reveal and disclose any and all records, criminal or otherwise, or
5 information that can arguably be helpful or useful to the defense in impeaching or otherwise
6 detracting from the probative force of any potential State witness or of the State's evidence or
7 that can arguably lead to any records or information that might be used to so impeach.

8 39. Please reveal and disclose whether any information, irrespective of how remote or
9 inconsequential it may seem to be, had been obtained by the State from the defendant, the
10 defendant's attorney(s) or such attorney(s)' agents that might arguably or potentially be in
11 violation of the attorney/client privilege. If the answer to this inquiry is in the affirmative, state in
12 detail how this information was obtained and the names, addresses, and telephone numbers of all
13 State representatives involved in obtaining this information.

14 40. Please reveal and disclose whether the State or any of its agents or attorneys has
15 attempted to obtain information from potential witness arguably in violation of the
16 attorney/client privilege in connection with the investigation of this case. If the answer to this
17 inquiry is in the affirmative, state in detail when, where and how such attempt took place, and the
18 names, addresses and telephone numbers of all individuals involved in the attempt.

19 41. Please reveal and disclose all evidence of transactions or conduct of the defendant
20 and his or her agents or co-defendant and his or her agents or any alleged co-conspirator and his
21 or her agents that is not the subject matter of the indictment in the instant case, but which the
22 State might offer evidence on the questioned motive, opportunity, intent, preparation, plan,
23 knowledge, identity or absence of mistake or accident.

1 42. Please reveal and disclose all recorded, written or oral statements made by any
2 alleged co-conspirators or co-defendants of the defense in this case, whether incriminating or
3 otherwise.
4

5 43. Please reveal and disclose any evidence or information obtained in connection
6 with the investigation of this case that establishes the defendant's good character or his lack of
7 reputation for committing the act(s) that constitutes the crimes(s) in question in this case.
8

9 44. Please reveal and disclose any evidence or information tending, however slightly,
10 to link the commission of the crime(s) in question in this case to someone other than the
11 defendant.
12

13 45. Please reveal and disclose any and all evidence seized or secured from the
14 defendant or from any other individual or from any location or premises at any time that the
15 State may be possibly attempt to introduce into evidence during any phase of the trial in this
16 case. This request includes, but is not limited to, all evidence seized or secured from the
17 defendant's person or from any other individual's person or from any locations or premises
18 during an arrest of the defendant or any other person; all evidence seized or secured from the
19 defendant's person or from any other individual's person or from any locations or premises
20 during any other type of search, whether conducted pursuant to a warrant or otherwise. This
21 request also applies to any seizure, regardless of how temporary or permanent it may have been.
22

23 46. Please reveal and disclose any and all evidence of any type which the State is
24 aware of, or which the State could become aware of by the exercise of reasonable diligence that
25 indicated that any of the individuals whom it has interviewed, debriefed or contacted in
26 connection with the investigation of this case or who may be called as witnesses by the State
27 during any phase of the trial of this case has been involved, however, remotely, in any criminal
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1 conduct, at any time up to the present date, whether or not this conduct resulted in criminal
2 charges being brought against the individual. This request applies, but is not limited to, any and
3 all informers, special employees, alleged accomplices, (whether indicted or unindicted), alleged
4 conspirators (whether indicted or unindicted), alleged aiders and abettors (whether indicted or
5 unindicted), tipsters, snoopers or individuals acting in any undercover capacity who may testify in
6 this case or who possesses information that is relevant or related to this case, as well as to all
7 other individuals of any type who were involved in any manner, regardless of how remote it may
8 be, in the investigation of this case.
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11 47. Please reveal, disclose and allow the inspection and photocopying of any and all
12 search warrants and underlying affidavits that concern or were directed at any individual who has
13 acted in any capacity as an informant, special employee, alleged co-conspirator (whether indicted
14 or unindicted), alleged accomplice (whether indicted or unindicted) alleged aider and abettor
15 (whether indicted or unindicted, tipster, snoop or investigator in this case, or who may be called
16 as a witness by the State during any phase of the trial of this case. This request applies to all
17 search warrants—whether executed or unexecuted—that have existed at any time.
18

19 48. Please reveal, disclose and allow the inspection and re-recording or photocopying
20 of any and all mechanical or electronic recordings or transcriptions thereof that involved any
21 individual who has acted in any capacity as an informant, special employee, alleged co-
22 conspirator (whether indicted or unindicted), alleged accomplice (whether indicted or
23 unindicted), alleged aider and abettor (whether indicted or unindicted), tipster, snoop or
24 investigator in this case or who may be called as a witness by the State during any phase of the
25 trial of this case. This request is not limited to mechanical or electronic recordings or transcripts
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1 or any type that involve the defendant, but seeks the disclosure of all recordings or transcripts or
2 any type that involve the aforementioned class of persons.

3 49. Please reveal and disclose any and all inculpatory evidence of any type that
4 concerns or relates to any individual who has acted in any capacity as an informant, special
5 employee, alleged co-conspirator (whether indicted or unindicted), alleged accomplice (whether
6 indicted or unindicted), alleged aider or abettor (whether indicted or unindicted), tipster, snoop or
7 investigator in this case or who may be called as a witness by the State during the trial of this
8 case. This request specifically includes, but is not limited to, any charges which were the subject
9 of any plea bargains, or any prosecutorial proceedings of any nature involving the
10 aforementioned class of persons.
11

12 50. Please list and reveal the date, place and the names and addresses of all persons
13 present when the informer, special employee, alleged accomplice (whether indicted or
14 unindicted), alleged co-conspirators (whether indicted or unindicted), alleged aider and abettor
15 (whether indicted or unindicted), tipster, snoop or individual acting in an undercover capacity
16 who has been involved in any capacity in the investigation or preparation of this case or who
17 may be called as a witness by the State during any phase of the trial of this case given sworn
18 testimony (whether during a trial or during pre-trial proceedings) or has given sworn statement of
19 any type. These sworn statements include, but are not limited to, affidavits, tax returns, firearms,
20 records, and loan applications.
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22 51. Please reveal and disclose, in addition to all of the items specifically mentioned
23 and listed herein, any and all evidence, whatever the type or kind, that is within possession,
24 custody or control or the existence of which is known or through the exercise of due diligence
25 could become known to it, that may be materially favorable to the defendant, either directly,
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1 indirectly or in an impeaching manner, within the purview of Brady, Giglio, and their progeny.
2 The Defendant specifically requests all evidence that may establish the identity of an alleged
3 second intruder, other than Norman Belcher, as previously described by percipient witnesses
4 Nicholas Brabham and Ashley Riley. Please include witness statements, forensic evidence,
5 investigative reports and notes, and forensic analysis done or not done to establish or debunk the
6 identity of an alleged second intruder present at the time of these alleged offenses.
7

8 52. Reveal and disclose any and all caller assisted dispatch tapes or otherwise
9 designated 911 or 311 telephone contact dispatching police to investigation.
10

11 53. Reveal and disclose any and all biographical and contact information for any
12 alleged citizen-informant.

13 54. Copies of all police reports, medical reports in the actual or constructive
14 possession of the District Attorney's Office, the Las Vegas Metropolitan Police Department,
15 Nevada Department of Corrections, the Clark County Sherriff's Office, and any other law
16 enforcement agency that relate to this instant case.
17

18 55. Copies of all photographs and/or electronic images taken at the crime scene or
19 any other connected scene of investigation.

20 56. All pertinent cell phone triangulation records, including any GPS (global
21 positioning system) records obtained or used in this investigation.
22

23 57. Any and all telephonic search warrants, orders and/or applications in support
24 thereof.

25 58. All reports of first responders and EMT's generated in this investigation.
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1 This Motion for Discovery and for the Disclosure of Exculpatory Evidence is continuing in
2 nature.

3 Respectfully submitted this 15th day of April, 2013.
4

5 /s/ Gary A. Modafferi

6 **GARY A. MODAFFERI, ESQ. (12450)**
7 **ROBERT M. DRASKOVICH, ESQ.**
8 *Attorneys for Defendant*
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Attorney for Defendant

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)
10) CASE NO.: C270562
Plaintiff,) DEPT. NO.: VI
11)
12 v.)
13)
NORMAN BELCHER,)
14)
Defendant.)
15)
16)

17 **CERTIFICATE OF SERVICE**

18 I HEREBY CERTIFY that on the 16th day of April, 2013, I served a true and correct copy
19 of the foregoing **DEFENDANT'S MOTION FOR DISCOVERY AND FOR DISCLOSURE**
20 **OF ALL EXCULPATORY EVIDENCE AND INCORPORATED STATEMENT OF**
21 **AUTHORITY** upon the following:

22
23 Robert Daskas, Esq.
24 Chief Deputy District Attorney
25 robert.daskas@clarkcountyda.com

26 /s/ Erika W. Magana

27 An Employee of Turco & Draskovich, LLP.
28