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Real Party In Interest.

EMERGENCY PETITION FOR WRIT OF PROHIBITION/MANDAMUS

Counsel for Respondent

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Real Party In Interest.

(District Ct. No. C14-296234-1

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This Petition is based upon the Memorandum of Points and Authorities, as well as the Appendix attached hereto.

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[illegible]

NANCY M. LEMCKE, being first duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Nevada and is the Deputy Clark County Public Defender assigned to represent the Defendant, LUIS PIMENTEL, in this matter.

2. That LUIS PIMENTEL authorized me to file the instant Petition for Writ of Prohibition/Mandamus.

3. That this is a murder case in which Mr. Pimentel is challenging the propriety of one of two first degree murder liability theories.

4. That, as set forth more fully in Mr. Pimentel's Petition for Writ of Mandamus/Prohibition, the District Court sustained the murder charge to which a Justice of the Peace held Mr. Pimentel to answer. That charge alleges that Mr. Pimentel committed first degree murder in either of two ways: by premeditating/deliberating the killing and/or by occasioning death pursuant to a 'challenge to fight'.

5. That 'challenge to fight' is a crime separate from first degree murder; not a theory of first degree murder liability. Accordingly, Mr. Pimentel petitioned the District Court to strike the 'challenge to fight' allegation from the Information. The District Court denied the request.

6. That as set forth in Mr. Pimentel's Mandamus Petition, he does not have a plain, speedy, and adequate remedy at law for the statutory violation(s) to which the 'challenge to fight' allegation gives rise.

7. Any inconvenience and/or prejudice to the government posed by prosecution of the instant Mandamus Petition is minimal when balanced against Mr. Pimentel's right to have this matter appropriately adjudicated.

8. Adjudication of the instant Petition is requested on an emergent basis given that the trial of this matter is scheduled to commence on September 15, 2014.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

/s/ Nancy M. Lemcke
NANCY M. LEMCKE

SUBSCRIBED and SWORN to before me

This 18th day of August, 2014.

/s/ Carrie M. Connolly, Exp. 10/11/17 – Cert. No: 94-2602-1
NOTARY PUBLIC in and for said
County and State

1 **POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF THE ISSUE**

4 Whether the crime of 'challenge to fight' may be plead as a liability theory of first degree
5 murder?
6

7 **II.**

8 **STATEMENT OF FACTS**

9 In the early morning hours of December 2013, an argument ensued between Robert "Bobby"
10 Holland, III, and his girlfriend, Amanda Lowe, at Arizona Charlie's. After Bobby became
11 physical with Amanda, hotel security escorted him from the property. PHT p. 75; 97, attached
12 hereto as Exhibit A. Instead of leaving, Bobby, having ingested lethal quantities of
13 methamphetamine, paced back and forth in the parking lot, waiting for Amanda to leave the
14 hotel. PHT p. 44-47; 65; 97.
15

16 While Bobby was pacing in the parking lot, his friend Timothy Hildebrand pulled up with
17 Timothy's fiancé, Shannon Salazar. Since all were friends, Bobby asked Timothy and Shannon
18 to find Amanda inside the casino and ask her to come out and speak with him. PHT p. 97; 64.
19 Timothy and Shannon found Amanda playing keno the instant defendant, Luis "Lorenzo"
20 Pimental. PHT 64-65; 97. Timothy explained to Amanda that Bobby was outside wanting to
21 speak with her. PHT p. 65. Amanda eventually agreed to go outside and speak with Bobby.
22 PHT p. 65; 100. While she was doing this, Timothy and Lorenzo went to Lorenzo's hotel room
23 to gather his belongings. PHT p. 65-66. About the time the two men were ready to leave the
24 room, Amanda showed up. PHT p. 103. They exited the hotel room to find Bobby outside
25 being removed from the property by hotel security. PHT p. 103. At that point, Bobby and
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1 Lorenzo began "arguing back and forth about kicking each other's ass." PHT p. 103.
2 According to Timothy, Lorenzo appeared as though he wanted to fight, and told Bobby "kind of
3 meet me at my house." PHT p. 74. Timothy then went to get his car while Lorenzo checked out
4 of the room, and the two men then left with Amanda and Shannon to leave. PHT p. 66-67. All
5 four individuals drove to Lorenzo's apartment at a nearby Siegel Suites. PHT p. 67.

7 Amanda and Shannon dropped Lorenzo and Timothy off at Lorenzo's apartment. PHT p.
8 68-70. After the girls drove off to a nearby bar, Lorenzo and Timothy noticed Bobby standing
9 atop the stairs outside of Lorenzo's third floor apartment. PHT p. 68-71. Apparently, Bobby
10 called his father, Robert Holland, III, and requested a ride from Arizona Charlie's to Lorenzo's
11 apartment in order to find Amanda. PHT p. 129; 145. Bobby came down the stairs and
12 approached Lorenzo. PHT p. 107. The two men started arguing. PHT p. 107. At some point
13 during the verbal exchange, Bobby told Lorenzo he did not want to fight; then he drew back and
14 punched Lorenzo in the face. PHT p. 77; 107; 110. Lorenzo, a disabled combat veteran,
15 staggered back and, according to Timothy, pulled a gun from his waist. PHT p. 77-78. Lorenzo
16 pulled the trigger but the gun misfired. PHT p. 78. Bobby responded by threatening: "What are
17 you gonna do, shoot me dude?" PHT p. 79. Lorenzo then shot Bobby in the stomach area.
18 PHT p. 79. Bobby fell to the round. PHT p. 79. According to Timothy, Lorenzo then
19 approached Bobby and fired a second shot into his backside. PHT p. 86. Bobby died as a result
20 of his wounds.

23 Based on the foregoing, prosecutors charged Luis Pimentel with Murder With Use of a
24 Deadly Weapon. At the conclusion of the preliminary hearing, prosecutors motioned the Justice
25 of the Peace to amend the Complaint to add a First Degree Murder liability theory of 'challenge
26 to fight.' PHT p. 149-55. Over defense objection, the Justice of the Peace granted the request.
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1 PHT p. 149-55. Accordingly, the Information to which Mr. Pimentel plead 'not guilty' charges
2 that he committed Murder With Use of a Deadly Weapon by: "...wilfully, unlawfully,
3 feloniously, with premeditation and deliberation and with malice aforethought, *and/or after*
4 *challenging ROBERT HOLLAND to a fight*, kill the said ROBERT HOLLAND...."
5 (emphasis added). See Criminal Information, attached hereto as Exhibit B. The matter is
6 currently set for trial (first setting) on September 15, 2014.

8 III. PROCEDURAL HISTORY

9 On July 9, 2014, Mr. Pimentel petitioned the lower court for a Writ of Habeas Corpus
10 challenging the 'challenge to fight' liability theory of first degree murder. Pre-Trial Petition for
11 Writ of Habeas Corpus, attached hereto as Exhibit C. Mr. Pimentel argued, *inter alia*, that
12 'challenge to fight' is a crime separate from first degree murder and, accordingly, cannot be
13 plead as a first degree murder liability theory. On August 11, 2014, the lower court denied the
14 Petition. See Court Minutes of August 11, 2014, attached hereto as Exhibit D. The instant
15 Petition for a Writ of Mandamus/Prohibition follows.

18 IV.

19 JURISDICTION

20 Pursuant to NRS 33.170, "a writ of mandamus shall issue in all case where there is not a
21 *plain, speedy and adequate remedy* in the ordinary course of law."¹ A writ of mandamus is
22 available to compel the performance of an act which the law requires as a duty resulting from an
23 office, trust or station² or to control an arbitrary or capricious exercise of discretion.³

25 Mr. Pimentel does not have a plain, speedy and adequate remedy in the ordinary course
26 of law for the district court's erroneous denial of his Pre-Trial Petition for a Writ of Habeas

27 ¹ NRS 33.170, emphasis added

28 ² See NRS 34.160

³ See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

1 Corpus. This Honorable Court does not require unanimity as to a liability theory of first degree
2 murder. See Crawford v. State, 121 Nev. 746, 749 (2005), citing Schad v. Arizona, 501 U.S.
3 624, 632 (1991) (plurality opinion) (internal citations omitted) (“[T]here is no general
4 requirement that the jury reach agreement on the preliminary factual issues which underlie the
5 verdict.”). Accordingly, should Mr. Pimentel suffer a first degree murder conviction based on
6 the current Information, he will not be able to ascertain in the post-trial setting the extent to
7 which jurors relied upon the improper ‘challenge to fight’ liability theory. As such, this
8 Honorable Court must hear the instant matter pre-trial in order to resolve the critical issue at bar.
9 Expedited resolution of this matter is requested given the currently-scheduled trial date of
10 September 15, 2014.
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13 V.

14 ARGUMENT

15 A. ‘CHALLENGE TO FIGHT’ IS NOT A STATUTORILY PROSCRIBED THEORY
16 OF FIRST DEGREE MURDER LIABILITY. THE CONVERSION OF THIS
17 SEPARATE CRIME INTO A LIABILITY THEORY RESULTED IN A
18 CONSTITUTIONALLY INFIRM MURDER CHARGE. ACCORDINGLY, THE
19 LOWER COURT ABUSED ITS DISCRETION BY DENYING MR. PIMENTEL’S
20 PETITION FOR A WRIT OF HABEAS CORPUS.

21 1. “Challenge to fight” is not a statutory theory of first-degree murder under NRS
22 200.030.

23 Prosecutors have charged Luis Pimentel with Murder with Use of a Deadly Weapon, a
24 crime defined by NRS 200.030. NRS 200.030 defines First Degree Murder as murder which is:

25 (a) Perpetrated by means of poison, lying in wait or torture, or by any
26 other kind of willful, deliberate and premeditated killing;

27 (b) Committed in the perpetration or attempted perpetration of sexual
28 assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse
of a child, sexual molestation of a child under the age of 14 years, child abuse or
abuse of an older person or vulnerable person pursuant to NRS 200.5099;

1 (c) Committed to avoid or prevent the lawful arrest of any person by a
2 peace officer or to effect the escape of any person from legal custody;

3 (d) Committed on the property of a public or private school, at an
4 activity sponsored by a public or private school or on a school bus while the bus
5 was engaged in its official duties by a person who intended to create a great risk
6 of death or substantial bodily harm to more than one person by means of a
7 weapon, device or course of action that would normally be hazardous to the lives
8 of more than one person; or

9 (e) Committed in the perpetration or attempted perpetration of an act of
10 terrorism.

11 These five theories are the exclusive means by which the legislature has authorized the
12 prosecution of a violation of **NRS 200.030**. There is no statutory authority to prosecute a
13 violation of **NRS 200.030**, Nevada's first-degree murder statute, under a "challenge to fight"
14 theory.

15 **NRS 200.450(1)** makes it unlawful for a person "...upon previous concert and
16 agreement, [to] fight with any other person or give, send or authorize any other person to give or
17 send a challenge verbally or in writing to fight any other person..." **NRS 200.450(3)** provides
18 that, "should death ensue to a person in such a fight, or should a person die from any injuries
19 received in such a fight, the person causing or having any agency in causing the death, either by
20 fighting or by giving or sending for himself or herself or for any other person, or in receiving for
21 himself or herself or for any other person, the challenge to fight, is guilty of murder in the first
22 degree which is a category A felony and shall be punished as provided in subsection 4 of **NRS**
23 **200.030** [defining first degree murder]."

24 **NRS 200.450** amounts to an independent crime separate and distinct from first degree
25 murder. It is not a liability theory. So there is no statutory authority for prosecutors to charge a
26 violation of **NRS 200.030** by relying on **NRS 200.450**. Additionally, **NRS 200.450** contains
27 specific elements prosecutors must prove beyond a reasonable doubt, e.g., a prior appointment
28

1 or agreement and the existence of a dangerous weapon. The Information fails to allege these
2 material elements. Correlatively, the Information fails to allege facts supporting those
3 elements. Since the 'challenge to fight' allegation is not a statutorily proscribed First Degree
4 Murder theory under NRS 200.030 but, rather, *a separate crime with separate elements* for
5 which the *punishment* happens to be the same as First Degree Murder, it must be dismissed.
6

7 **2. The 'challenge to fight' allegation fails to provide notice of the essential facts**
8 **constituting the charged theory.**

9 The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right
10 to be informed of the nature and cause of any and all accusations against him/her. U.S.C.A. VI,
11 XIV. Codifying this, NRS 173.075(1) requires that an indictment or information contain a
12 "plain, concise and definite written statement of the essential facts constituting the offense
13 charged." See also Sheriff v. Levinson, 95 Nev. 436 (1979). The Nevada Supreme Court has
14 long warned of the "...threats to due process that indefinite indictments necessarily pose."
15 Simpson v. Eighth Judicial District Court, 88 Nev. 654, 655 (1972). Not surprisingly, the
16 Court has held that a charging document "...which alleges the commission of the offense solely
17 in the conclusory language of the statute is insufficient." Sheriff v. Levinson, 95 Nev. 436, 437
18 (1979).
19
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21 Elaborating on the pleading requirements necessary for an Indictment to meet
22 constitutional muster, the Simpson Court held that:
23

24 Whether at common law or under statute, the accusation must include a
25 characterization of the crime and such description of the particular act alleged to
26 have been committed by the accused as will enable him properly to defend
27 against the accusation, and the description of the offense must be sufficiently full
28 and complete to accord to the accused his constitutional right to due process of
law.

1 Id. At 660 (quoting 4 R. Anderson, Wharton's Criminal Law and Procedure, Section 1760, at
2 553 (1957)). The Simpson Court further noted that the fact an accused has access to transcripts
3 of the proceedings before the Grand Jury does not eliminate the necessity that an Indictment be
4 definite. Id. The Court reasoned that such indefinite pleading would necessarily allow the
5 prosecution absolute freedom to change theories at will, thus denying an accused the
6 fundamental rights the Nevada legislature intended a definite Indictment to secure. Id.

7
8 The Information filed here fails to articulate a plain, concise, and definite written
9 statement of the essential facts giving rise to the 'challenge to fight' liability theory. The
10 Information merely charges that Bobby's death occurred pursuant to a 'challenge to fight.' The
11 Information fails to allege any facts supporting that claim. As Simpson, supra, made clear, Mr.
12 Pimentel's awareness of the testimony presented at the preliminary hearing does not obviate the
13 government's responsibility to plead the allegation with sufficient specificity to give him notice
14 of the charged [mis]conduct. Accordingly, the 'challenge to fight' allegation fails to provide the
15 constitutionally required notice of the prohibited conduct and, as such, cannot stand.
16
17

18 **B. PROSECUTORS PRESENTED INSUFFICIENT EVIDENCE TO HOLD MR.**
19 **PIMENTEL TO ANSWER ON THE 'CHALLENGE TO FIGHT' THEORY OF**
20 **FIRST DEGREE MURDER. ACCORDINGLY, THE TRIAL COURT'S**
21 **REFUSAL TO STRIKE THE 'CHALLENGE TO FIGHT' ALLEGATION**
22 **AMOUNTS TO AN ABUSE OF DISCRETION.**

23 NRS 171.206 requires a finding that "... there is probable cause to believe that an offense
24 has been committed and that the defendant has committed it..." in order for a defendant to be
25 held to answer a criminal charge. This Court has held that, although the government's burden at
26 a preliminary hearing is "slight, it remains incumbent upon the state to produce some evidence"
27 that an offense has been committed and the defendant committed it. Woodall v. Sheriff, 95
28 Nev. 218, 220 (1979); See also Marcum v. Sheriff, 85 Nev. 175, 178 (1969) ("The state must

1 offer some competent evidence on those points to convince the magistrate that a trial should be
2 held"). If the State fails to meet its burden, "an accused is entitled to be discharged from
3 custody under a writ of habeas corpus." State v. Plas, 80 Nev. 251, 252 (1964).

4 The challenge to fight allegation presumably derives from Timothy Hildebrand's testimony
5 that, while at Arizona Charlie's, Bobby and Lorenzo began "arguing back and forth about
6 kicking each other's ass." PHT p. 103. Timothy testified that Lorenzo appeared as though he
7 wanted to fight, and told Bobby "kind of meet me at my house." PHT p. 74. In this regard,
8 Timothy indicated:
9

10 Q: Okay. And what is it that -- so Lorenzo said that he wanted to fight
11 Bobby; is that right?

12 A: Yeah, he kept telling him, kind of meet me at my house.

13 Q: Okay. How many times do you think he told that to Bobby?

14 A: Like ten.

15 Q: What was Bobby saying in return?

16 A: Yeah, Yeah, I'll meet you there, I'll meet you there.

17 Q: Okay. Did it appear to you that Bobby was asking where Amanda was?

18 A: Yeah, he was looking for -- he knew where she was. She wouldn't -- she
19 wouldn't come out and talk to him, and I think security asked him [Bobby] to
20 leave because they [Bobby and Amanda] got in an argument --

21 PHT p. 74-75. When Timothy and Lorenzo arrived at Lorenzo's apartment later that morning,
22 Bobby was there. According to Timothy, Bobby appeared as though he was looking for
23 Amanda (and not Lorenzo). PHT p. 73. Apparently, Bobby called his father and requested a
24 ride from Arizona Charlie's to Lorenzo's apartment in order to find Amanda. PHT p. 129; 145.

25 Since the Information fails to articulate the elements of, and the factual basis for, the
26 charged 'challenge to fight' allegation, it is difficult to analyze the above-referenced evidence as
27 it relates to NRS 200.450. However, NRS 200.450 requires a previous concert and agreement to
28 fight that is ultimately acted upon. The evidence presented at preliminary hearing disclosed that

1 Mr. Pimentel and Bobby exchanged threats, but never specifically agreed to meet at a particular
2 location and time for the exclusive purpose of fighting. Indeed, the preliminary hearing
3 testimony revealed that Bobby was trying to locate Amanda, not fight Lorenzo, when he went to
4 Lorenzo's apartment following the encounters at Arizona Charlie's. This fails to amount to
5 sufficient evidence of the 'previous concert *and agreement* to fight' required by **NRS 200.450**.
6 Accordingly, the instant 'challenge to fight' allegation cannot stand.
7

8
9 V.

10 **CONCLUSION**

11 For the reasons set forth above, Petitioner LUIS PIMENTEL respectfully requests that
12 the instant Writ issue, and that this Honorable Court enter an Order directing the lower court
13 enforce the provisions of **NRS 200.030** and grant Mr. Pimentel's Pre-Trial Petition for a Writ of
14 Habeas Corpus
15

16 DATED this 18th day of August, 2014.
17

18 PHILIP J. KOHN PHILIP J. KOHN
19 CLARK COUNTY PUBLIC DEFENDER CLARK COUNTY PUBLIC DEFENDER
20

21
22 By /s/ Nancy M. Lemcke By /s/ Conor M. Slife
23 NANCY M. LEMCKE CONOR M. SLIFE
24 NEVADA BAR #5416 NEVADA BAR #11277
25 DEPUTY PUBLIC DEFENDER DEPUTY PUBLIC DEFENDER
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CATHERINE CORTEZ MASTO
STEVEN B. WOLFSON

Honorable Carolyn Ellsworth
District Court, Department V
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