IN THE SUPREME COURT OF THE STATE OF NEVADA

LESEAN COLLINS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 69269

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 25th day of July, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LESEAN COLLINS, Petitioner, vs. **EIGHTH JUDICIAL DISTRICT COURT JUDGE, THE HONORABLE KATHERINE DELANEY** Respondents, and **THE STATE OF NEVADA**, Real Party in Interest.	Supreme Court No. _____ District Court No. C-09-252804-1 **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION AND EMERGENCY MOTION UNDER NRAP 27(e)TO STAY DISTRICT COURT PROCEEDINGS** Action is necessary by August 29, 2014.

Petitioner Lesean Collins, by and through his counsel David Schieck and Michael Hyte, moves this Court for a Writ of Mandamus, or in the alternative, a

Writ of Prohibition pursuant to NRAP 21, Article 6 §4 of the Nevada Constitution, NRS 34.160 and NRS 34.320. He asks this Court to prohibit the district court from admitting evidence of the prior arson conviction of Collins and the facts surrounding said conviction under the guise of other bad acts because the district court was clearly erroneous and the prejudicial impact far outweighs the questionable probative value of the evidence. Additionally the District Court was clearly erroneous in denying Collins Motion to Disqualify the District Attorneys Office for conflict of interest as two members of that office were Collins' defense attorneys during the previous arson case which is the subject of the related grounds raised herein.

Petitioner has satisfied the procedural requirements of verification and proof of service. See Exhibits 1 and 2.

Petitioner Lesean Collins also moves this Court for a stay of the trial currently schedule to commence on September 2, 2014 before The Honorable Kathleen Delaney pending the resolution of the instant Writ of Mandamus, or in the alternative, Writ of Prohibition. The motion is made and based on NRAP 8 and 27(e) and the Declaration attached hereto. See Exhibit 3.

I. Parties and Statement Of The Case

Petitioner Lesean Collins is the defendant in the case of State of Nevada v.

Collins Eighth Judicial District Court, case number C-09-252804-1.

Real Party in Interest State of Nevada, by and through the Clark County District Attorney, which is the entity prosecuting Petitioner Lesean Collins and is the party which has the conflict of interest and which has obtained a ruling allowing admission of the challenged arson related evidence.

II. Synopsis of the Legal Arguments

Petitioner Collins submits that the district court erred in ruling that the State would be allowed to introduce evidence of Collins arson case and facts surrounding same and erred in denying the Motion to Disqualify District Attorneys Office without holding an evidentiary hearing.

III. A Writ of Mandamus Is The Appropriate Remedy

Petitioner Collins does not have any other remedy available to him because to force him to undergo a trial with evidence that should not be admitted and prosecuted by the same office that now employs his previous defense counsel in the very case that the State now attempts to use against him at trial is a denial of fundamental fairness and due process under the 14th Amendment and the Nevada Constitution, and further infringes upon the right to counsel under the Sixth Amendment in the instant case and the ability of Collins to challenge the effectiveness of counsel in the previous arson trial by way of pending post

conviction habeas proceedings.

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously. The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. This Court considers whether judicial economy and sound judicial administration militate for or against issuing the writ. The decision to entertain a mandamus petition lies within the discretion of this court." Redeker v. Eighth Judicial Dist. Court, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006) (citing NRS 34.160, NRS 34.170, Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981); Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989); State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990)).

"Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification." Redeker, 127 P.3d at 522 (citing State v. Dist. Ct. (Epperson), 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004)). This Court has recognized that a writ may be proper where the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law. Buckwalter v. Eighth Judicial Dist. Court, 126 Nev. Ad.Op.21,

234 P.3d 920 (2010).

Based upon the principles stated in Buckwalter and Redeker, this Court should entertain the instant petition. Petitioner Collins has no other plain, adequate or speedy remedy at law. Moreover, judicial economy and sound judicial administration warrant issuance of the writ and this case presents an issue of constitutional magnitude.

The District Attorney has hired Collins' defense counsel who previously filed a Declaration that they were not ready to fully and adequate defend the arson case (See Appendix pgs. 77-160) and now have been granted permission to admit the arson conviction against him. This is despite the pendency of post conviction proceedings that challenge the effectiveness of defense counsel under the Fifth, Sixth, and Fourteenth Amendments.

IV. Request for Relief

Wherefore, based on the foregoing and the accompanying Points and Authorities, Petitioner Collins respectfully requests that this Court issue a Writ of Mandamus or in the alternative Prohibition compelling the District Court to preclude the State from introducing facts of the arson case and conviction and an Order disqualifying the District Attorney from prosecuting this case. Further Petitioner requests that this Court enter a Stay of Proceedings until such time as

the Writ may be fully heard and considered. At this point the District Court record does not contain minutes of the evidentiary hearing, no transcripts have been prepared and the written order not prepared, filed and served upon Collins with respect to the other bad acts to be admitted. The inability to provide these items is not attributable to Collins and should not be the basis to deny relief or a stay of the proceedings.

Dated this 26th day of August, 2014.

SPECIAL PUBLIC DEFENDER
DAVID M. SCHIECK

/s/ DAVID M. SCHIECK

_____

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POINTS AND AUTHORITIES IN SUPPORT OF WRIT

V. Procedural History

Arson Case:

Tierra Jones and Abigail Frierson (nee Parolise), now employed as Clark County deputy district attorneys, were previously employed as Clark County deputy public defenders. During their employment with the public defender's office, Jones and Frierson represented Lesean Collins in case number C253455. In that case, on April 8, 2009, Collins was indicted by the Clark County Grand Jury on charges of First Degree Arson, Burglary and Malicious Injury to Vehicle. The case was originally set for trial for August, 2009, however, defense counsel at Calendar Call on August 12, 2009, requested that the case be continued. The case was continued to Calendar Call and a firm setting for October 28, 2009, at which point defense counsel announced that they were not ready to go to trial. Nonetheless the case was sent to Overflow. On October 29, 2009, defense counsel again announced not ready and asked for a continuance. The request was again denied. On November 2, 2009, defense counsel filed an untimely Notice of Alibi. Jury trial commenced on November 4, 2009 and concluded on November 6, 2009, with Collins being convicted on all three counts. See Appendix, pgs. 6-23.

The Judgment of Conviction in Case No. C253455 was filed on March 4,

2010 (see Appendix, pgs 4-5).

On November 6, 2009, counsel filed a "Defense Offer of Proof Regarding Denial of Defense Motion to Continue." See Appendix, pgs. 80-83.

Collins timely pursued a direct appeal to the Nevada Supreme Court represented by the Public Defender's Office. The conviction was affirmed and Remittitur issued on March 12, 2012. Collins v. State, No. 55716. Collins timely filed a Proper Person Petition for Writ of Habeas Corpus on February 15, 2013. On May 2, 2013, attorney Blaine Beckstead was appointed to represent Collins. Beckstead missed numerous briefing schedules and was removed as counsel, and attorney Matthew Carling was appointed on May 8, 2014. No additional pleadings have been filed to date on behalf of Collins in Case No. C253455. " See Appendix, pages 6-23.

Homicide Case

On November 7, 2008, Collins was charged by way of a criminal complaint with murder and robbery concerning the death of Brandi Payton. The Special Public Defender's Office was appointed and a Preliminary Hearing held on March 10,162 2009, after which Collins was bound over to District Court. The Information was filed March 25, 2009. See Appendix, pgs 1-2.

Collins was arraigned on March 26, 2009, and thereafter pursued a Writ of

Habeas Corpus waiving his right to a speedy trial. See Appendix, page 161. The Writ was denied on June 8, 2009. See Appendix, page 162. The trial date has been continued several time and trial is currently set to commence on September 2, 2014.

As pertinent to this Writ, Collins filed a Motion to Exclude Other Evidence of Arson Charges and any Allegations Related Thereto as Bad Act Evidence or Irrelevant Prior Criminal Activity on July 18, 2014. See Appendix, pgs 24-33. Also filed was a Motion to Disqualify the Clark County District Attorney's Office on July 17, 2014. See Appendix, pgs 6-23. The State filed an Opposition to the Other Evidence Motion on July 25, 2014. See Appendix, pgs. 34-51 and an Opposition to the Motion to Disqualify the Clark County District Attorney on August 7, 2014. See Appendix, pgs 52-69. The State did not and has not yet filed a Motion to Admit Other Bad Acts against Collins. Nor have they specified in writing what evidence they propose to introduce in relation to the arson.

The Court heard argument on both motions on August 18, 2014. No minutes have yet been entered on the hearing. See Register of Actions in the Appendix, pg170. The Court denied the Motion to Disqualify the District Attorney and requested Affidavits to support the Court's ruling. Affidavits were not filed until Calendar Call on August 25, 2014. See, Appendix, pages 70-75.

No evidentiary hearing was held on the issues raised by Collins, and no chance provided by Collins to contest the ex post facto self-serving Affidavits. Of note is that the Affidavit of Collins previous trial counsel Tierra Jones only specifies that she has not discussed the murder case with the current prosecutors. See Appendix, pg. 71. It can be implied that therefore she has discussed her representation during the arson case, which is the very case that the State is now seeking to introduce. However, having been denied an evidentiary hearing, Collins was unable to contest the validity or contents of the Affidavits.

With respect to the Motion to Exclude Arson Bad Acts, on August 18, 2014, the Court ordered that a Petrocelli hearing be held on August 20, 2014. Collins objected that the State had not filed a Motion to Admit Bad Acts and set forth the evidence to be proffered, however, the Court chose to treat the Opposition filed by the State as a Motion to Admit. (No minutes entered in Odyssey for the hearing on August 18, 2014. See Register of Actions, Appendix, pg. 170). The Petrocelli hearing was held on August 20, 2014. No transcript or minutes relating thereto have been prepared. The Court directed the District Attorney to prepare a Written decision. No written Order has been filed or served on Collins.

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VI. Statement of Facts

Homicide Case

On September 6, 2008 a deceased human body was reported in the desert area south of State Route 156 near mile marker 12. The deceased was a female in an advanced state of decomposition. The next day, the Clark County Coroner identified the deceased as Brandi Payton.

Gloria Payton is the sister of Brandi Payton and was close to her sister and spoke to her often. The last time Gloria spoke to Brandi was the afternoon of September 2, 2008 over the phone. The call was a brief one and Brandi was supposed to call her right back, but never did call again. Worried about her sister's well-being, Gloria began contacting the police on September 4, 2008 and Gloria filled out a missing persons report with the North Las Vegas police. Gloria listed the car her sister was driving as beige Hyundai Sonata, rented from a local rental office.

On September 7, 2008 Dr. Lary Simms conducted the autopsy of Brandi. He classified the decomposition of her body as severe with significant insect activity that caused noticeable tissue loss. Simms identified a laceration on the left side of the victim's scalp toward the rear of the head. He classified the wound as anti-mortem and consistent with blunt force trauma, as opposed to an incised

wound. Such a wound would be expected to have had a significant blood loss, and could render an individual unconscious. Dr. Simms also found a small wound above the left ear of the deceased as well as another small laceration above the right ear. There was tissue loss in many areas of the body from insect activity. Specific areas included the right arm, right lateral abdomen and left leg.

Dr. Simms ruled out the following as the cause of death (1) gunshot wound, (2) stab wound, (3) strangulation, (4) disease, (5) drug overdose, and (6) natural causes. Simms could not rule out asphyxiation. If there was any evidence of manual strangulation injury around the mouth of the victim, it would probably have been obstructed by the decomposition of her body.

In September, 2008, Shalana Eddins was living at 1519 Laguna Palms in North Las Vegas with her four children. Collins is the father of the four children and would stay at the Laguna Palms residence with Eddins. On the morning of September 2, 2008, Collins drove Eddins to work in her red Ford Expedition, where he dropped her off. When she left the home there were no other vehicles parked at the house. Eddins worked a full day and at the end of her shift, Collins and the four kids picked her up around 5:30 PM. Collins was driving the red Expedition. Collins and the kids had birthday gifts for Eddins including balloons, a card, and some jewelry. Eddins described the jewelry was a bracelet and

necklace designed in the pattern of Rolex watch bands. Collins told her that he got the jewelry at a pawn shop and paid $2,000. Eddins refused the jewelry and gave it back to Collins.

Once they returned home Eddins noticed that there was a gold colored Hyundai Sonata parked inside the garage. Collins told her it was a rental and that Brandi had rented it for him. Prior to walking into the residence Collins told Eddins there was a bleach stain on the carpet in the laundry room from an oil stain that he had used bleach to try to get out of the carpet. After they were inside the house Eddins noticed a broken women's fingernail that was multi-colored. Collins, when asked, told her that the fingernail belonged to Brandi. Eddins also noticed dark spatter on the wall in the laundry room.

Later the same evening, Collins received a phone call and told Eddins that he needed to go see his friend, "Tidy" to pick up the garage door opener. Collins left driving the gold Sonata. While he was gone, Eddins called Collins on his cell phone and Collins told her that he was driving to Stateline to meet his uncle. Collins returned home around 10:30. Later he washed the Sonata in the driveway while listening to the radio. At some point Eddins looked out the window when she did not hear the music playing any longer and saw Collins asleep in the driver's seat of the car. Eddins took her mother to work in the early morning

hours of September 3rd and when she left Collins was still asleep in the Sonata in the driveway. On her way home from dropping her Mom off at the bus station, Eddins received a call from her son at around 2:25, stating that the police were chasing Collins. Shortly thereafter Collins called and told her that he was being chased by the police and to come and he get him. She then dropped him off at the gold Sonata which was parked just down the street. Later that morning, Eddins was at work and saw the Sonata when Collins drove the car to her work and told her that he needed to return the car to the rental company. Eddins never saw the car again.

Detective Cliff Mogg responded to the scene where the body was found and noted several things including that it appeared as though the body of the victim had been dragged through the path from the center of the roadway to where she was discovered and that there were two fingernails found, each one approximately one inch long, which were multi colored but predominantly blue in color. Mogg was present at the autopsy and noticeable was that the deceased was missing three (3) of her fingernails. The fingernails recovered at the scene were similar to the description provided by Eddins of the fingernail that was found at her house.

Mogg interviewed Eddins on October 2, 2008 and showed her photographs of Brandi while she was alive. Eddins thought she recognized the jewelry the

victim was wearing as the items Collins had attempted to give her for her birthday. After the interview Mogg obtained a search warrant for the Laguna Palms home and found what appeared to be small droplets of blood spatter on the wall in the doorway leading to the laundry room.

Through his investigation, Mogg was able to identify cellular telephone numbers for Payton and Collins. There were numerous calls between Collins and Payton. Between the early morning hours of August 31 and September 2, seventy-eight calls were placed between Brandi's and Collins' phones. After September 2 there were no phone calls made from Brandi's phone.

In looking specifically at Collins' cell phone records for the evening hours of September 2, 2008, Mogg testified at the Preliminary Hearing that at 9:42 the phone was near the Laguna Palms address, and at 10:03 was near State Road 157 and US 95 and at 10:04 a call routed to a tower near the location where Brandi's body was discovered.

The gold Hyundai Sonata was recovered on October 1, 2008 near 1913 Alwill Street. According to Mogg cell phone tower records for Collins' phone place him in the same area on September 4, 2008,

DNA testing indicated that the blood spatter discovered on October 1, 2008 in the laundry room hallway at the Laguna Palms residence belonged to Brandi

Payton. Additional forensic testing done on the Sonata after it was recovered on October 1, 2008 showed DNA belonging to Brandi on the trunk floor mat of the vehicle.

Arson Case

Collins was convicted of First Degree Arson, Burglary and Malicious Injury to Vehicle in Case No. C253455. The convictions were affirmed on Direct Appeal on March 12, 2012. Collins v. State, No. 55716. Collins timely filed a Post Conviction Habeas Corpus Petition challenging his conviction based on, inter alia, ineffective assistance of trial counsel. The underlying facts as presented during the Arson trial were as follows:

The arson was alleged to have occurred on September 30, 2009, some four weeks after the alleged homicide.

In 2008, Collins, Shalana Eddins and their four children lived together at 1519 Laguna Palms, North Las Vegas. They had been together for over ten years. Their relationship in July, 2008 was okay but by August, Shalana felt things had changed. In mid-August, Shalana told Collins that she wanted to end their relationship, but she wanted him to continue to be a father to their children. Collins was not happy because he wanted to keep the family together.

Shalana was not comfortable sleeping at the Laguna Palms residence, so

she and the kids began sleeping at a friend's house, but Collins would pick the children up from school most days and stay with them until Shalana got off of work. Collins had a remote control which allowed him to enter the house through the garage door.

On September 29, 2008, Shalana decided to spend the night at the Laguna Palms residence because she wanted to clean up the house and get laundry done. She unplugged the garage door opener so Collins would not be able to enter the house with his remote. Collins came over to the house later that night. When he could not get in the garage he called her and banged on the door and she eventually let him in the house. Collins entered the house and began looking around and located his son's backpack and took a house key. Collins then left and Shalana followed and observed that two of the tires on her vehicle were flat, which enraged her and she threw a rock which smashed the window in Collins' vehicle.

The next day, September 30, 2008, Shalana dropped the children off at school and went to the courthouse to get a restraining order. Collins called Shalana several times that morning and during one of the calls left a voice message demanding the return of his belongings. Later that day Collins showed up at Shalana's work and during her absence from her desk took her cell phone.

Shalana went outside and noticed that all four tires on her vehicle had been flattened. Shalana called the house and was told that Collins had left, and she told the kids to go to the next door neighbor's house. Shalana then called her father, Robert Eddins, to help with her vehicle.

The children arrived at the neighbor, Darlene Heers' house at approximately 5:00 PM. Around 6:30 – 6:45, one of the kids noticed Collins at the house. Heers went outside to ask Collins what he was doing. Collins told her that he was waiting for his wife to get home from work, and then later that he had a gun and when she got home he planned to kill her. Heers told Collins to leave and returned to her house. She did not see Collins enter or exit the house, nor did she see a gun, and she watched him drive away and then she called 9-1-1. The house was not on fire when he drove away.

Vivian Furlow was called by Robert Eddins at about 6:40 to go pick up the kids from the Laguna Palms residence. She arrived about 15 minutes later and saw Collins driving away from the house, and Heers standing in the driveway on the phone. She saw no indication of a fire. She was there for about 30 to 40 minutes before the police arrived. Furlow planned to enter the house to get clothes for the children but smelled smoke and the police officer touched the door and it was warm and would not allow her to enter the house. Shortly thereafter she saw

smoke coming from the house. Furlow claimed to have called Collins on his cell phone at 8:00 PM on a number that she got from someone named Anitra and allegedly heard a voice message greeting from Collins referencing a burning house. The alleged recording was never produced at trial.

Officer Vital was dispatched on the Heers phone call and when he arrived there had been no report of a house fire. He became aware of the fire at 7:05. He did not see Collins in the neighborhood or leaving the scene.

Jeffrey Lomprey of the NLV Arson investigation unit determined that the fire had been intentionally set and that it had three separate points of origin. Lomprey also participated in the arrest and interrogation of Collins on October 2, 2008. Collins admitted slashing Shalana's tires but did not admit to setting a fire.

VII. Argument In Support Of The Writ And Motion To Stay District Court Proceedings.

A. The District Court Erred In Granting The State Permission To Introduce Evidence Of The Arson Conviction And Acts Related Thereto

Initially it must be noted that the State at no point filed a Motion to Admit Bad Act testimony as required under Petrocelli and its progeny. Instead, Collins in anticipation that the State would attempt to tender the testimony without filing the appropriate Motion, filed a Motion to Preclude Admission of the testimony.

See Appendix, pgs. 24-33. The State filed an Opposition. See Appendix, pgs. 34-51. At the time of the argument of the Motion the District Court indicated that a Petrocelli hearing should be held, to which Collins objected as the State had yet to file a Motion as to the evidence it sought to introduce. In that respect Collins was speculating as to how the State intended to offer this questionable evidence. Instead of filing a Motion, the State asked the Court to consider its Opposition to Collins' Motion as its Motion. The problem was still not cured as the State's Opposition (nee Motion) still did not detail the evidence the State proposed to introduce. The State seemed to believe that a copy of the Judgement of Conviction would be sufficient to introduce at trial. (No minutes have been entered for the hearing.) The State's theory for the admissibility of the evidence was that the fire was started to conceal the evidence of the homicide from four weeks earlier. At the arson trial, the State did not present that motive, rather that the fire was an act of revenge against Shalana.

A Petrocelli hearing was conducted on August 20, 2014, and the State called three witnesses: Robert Eddins, Homicide Detective Mogg and North Las Vegas Fire Investigator Jeffrey Lomprey. Collins has requested a transcript of the hearing and one has not yet been prepared. No Minutes have been entered by the Court. At the conclusion of the hearing, the Court determined that the State would

be allowed to introduce the arson evidence during the State's case in chief and directed the State to prepare the written order. The State has failed to produce a written order. The failure to prepare a written order was brought up at calendar call on August 25, 2014, and the response was that the task had been assigned to a law clerk and was not yet completed. Minutes of the hearing were not entered in Odyssey as of the filing of the instant Writ. Collins is therefore forced to file this Writ without the benefit of minutes, a transcript of the hearing, and without a written Order.

As a general proposition, evidence of prior crimes and other bad acts of a criminal defendant is inadmissible character evidence unless it falls within certain specific exceptions. See, NRS 48.045. Reference to a prior criminal history of a defendant is reversible error. Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988). The test for determining whether a reference to criminal history occurred is whether "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." Manning v. Warden, 99 Nev. 82, 659 P.2d 847 (1983), citing Commonwealth v. Allen, 292 A.2d 373, 375 (Pa 1972).

The court in Manning, supra, detailed a number of different cases where in indirect references to prior acts were found to be references to criminal history. See e.g. Gehrke v. State, 96 Nev. 581, 613 P.2d 1028 (1980); Reese v. State, 95

Nev. 419, 596 P.2d 212 (1979); Geary v. State, 91 Nev. 784, 544 P.2d 417 (1975); Founts v. State, 87 Nev. 165, 483 P.2d 654 (1971). Most interestingly, the State in Manning, supra, conceded that in a majority of jurisdiction, an improper reference to criminal history is a violation of due process since it affects the presumption of innocence. Id at 87.

Many years ago the Nevada Supreme Court well summarized the position of Defendant Collins:

> The danger of allowing prejudicious remarks and testimony during a trial is not confined to their momentary effect upon the juror. Trial tactics are influenced immeasurably. Counsel is forced to object and argue repeatedly. Defendant may be compelled to testify when it is his right not to do so. Ibsen v. State, 83 Nev. 42, 422 P.2d 543 (1967).
>
> This reversal for a new trial is a hard burden to bear because Walker is a confirmed criminal. But it is a proud tradition of our system that every man, no matter who he may be, is guaranteed a fair trial. As stated by Chief Justice Traynor in People v. Cahan, 282 P.2d 905 at 912 (Cal. 1955) 'Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated.'
>
> The requisites of a trial free of prejudicial atmosphere are too deeply implanted to require repetition; for when the death penalty is executed, its consequences are irretrievable. A fair trial therefore is a very minimal standard to require before its imposition."

Walker v. Fogliani, 83 Nev. 154, 157, 425 P.2d 794 (1983)

As shown by the documents submitted herewith, the State at the arson trial contended incessantly that Collins was guilty of arson and his motive was revenge or spite against his on-again-off-again romantic interest and mother of his five children, Shalana Eddins. See Appendix, pgs 77-160. No evidence exists that Collins committed the arson with the intent to dispose of evidence of the homicide that occurred four weeks earlier. The homicide detective identified a location where blood evidence was found and where a stain occurred on a section of carpeting. Both areas were unaffected by the fire because the source of the fires in the house were distant from the location of the purported homicide evidence. Additionally, the testimony presented by Robert Eddins was that Collins had engaged in conduct to "get even" with Shalana for breaking the window in his vehicle. Whether or not Collins started the fires in the house, the fires were not related to the homicide and did not show either a consciousness of guilt or plan. If that were the case the fires would have been started at the time of the homicide or close to said time, and would have been started at the location of the claimed evidence. Nonetheless, the Court found the arson showed consciousness of guilt and plan.

Further, the State has indicated that it intends to introduce the actual judgment of conviction at trial. There is no precedent for the use of the bare

conviction for other bad acts. The State intends apparently to sanitize the facts to omit the background of the domestic situation that resulted in the fire to the house, thus forcing Collins into the Hobson's choice of introducing evidence that he started the fires out of the domestic motives, thereby introducing other bad acts to disprove the claim that the arson was related to the homicide and directly contrary to the proceedings pending in the arson post conviction habeas case. It was improper for the Court to allow admission the arson evidence in the homicide case.

B. The District Court Erred In Denying The Motion To Disqualify The District Attorney Without Conducting An Evidentiary Hearing And Erred In Denying The Motion When Members Of The District Attorney's Office Represented Collins During The Arson Trial And Are Named As Potential Defense Witnesses.

"District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case." Leibowitz v. Eighth Judicial Dist. Court, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003) (quoting Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000)). The district court's decision should not be set aside absent a manifest abuse of that discretion. Nevada Yellow Cab Corporation v. Eighth Judicial Dist. Court, 123 Nev. 44, 54, 152 P.3d 737, 743 (2007) (citing Waid v. Dist. Ct., 121 Nev. 605 at

609, 613, 119 P.3d 1219 at 1222, 1225 (2005)). The district court's discretion includes the disqualification of a prosecutor's office. Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982), overruled in part on other grounds by State v. Eighth Judicial Dist. Court (Zogheib), ___ Nev. ___, 321 P.3d 882 (2014) (citing Tomlin v. State, 81 Nev. 620, 407 P.2d 1020 (1965) and Hawkins v. Eighth Judicial Dist. Court, 67 Nev. 248, 216 P.2d 601 (1950)). "Attorney disqualification of counsel is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship which is necessary to maintain public confidences in the legal profession and to protect the integrity of the judicial process." Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1576 (D.C. Cir. 1984) (quoted with approval in Ciaffone v. Eighth Judicial Dist. Court, 113 Nev. 1165, 1169, 945, 952 P.2d 950 (1997), overruled in part on other grounds by Leibowitz v. Eighth Judicial Dist. Court, 119 Nev. 523, 78 P.3d 515 (2003)). When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (citing Cronin v. Eighth Judicial Dist. Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989), overruled in part on other grounds by Nevada Yellow Cab Corporation v. Eighth Judicial Dist. Court, 123 Nev. 44, 54, 152 P.3d 737, 743 n.

26 (2007)). Doubts regarding conflicts should generally be resolved in favor of disqualification. Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (citing Cronin v. Eighth Judicial Dist. Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989), overruled in part on other grounds by Nevada Yellow Cab Corporation v. Eighth Judicial Dist. Court, 123 Nev. 44, 54, 152 P.3d 737, 743 n. 26 (2007)).

Recently, this Court examined the issue of whether a conflict of interest should be imputed to and require disqualification of the entire prosecutor's office. See State v. Eighth Judicial Dist. Court (Zogheib), ___ Nev. ___, 321 P.3d 882 (2014). In Zogheib, the defendant moved to disqualify the Clark County District Attorney's Office due to a conflict of interest because Zogheib was represented by a Patrick McDonald, an attorney in District Attorney Steven Wolfson's office, while Wolfson was a criminal defense lawyer prior to becoming District Attorney. Zogheib at ___, 883-84. Several evidentiary hearings were held regarding the motion to disqualify, and the district court determined that although Wolfson was not Zogheib's attorney, McDonald and Wolfson spoke frequently about the case. Id. The district court in Zogheib further noted that Wolfson testified that after accepting the position of District Attorney, he never made an appearance on the case, never obtained or reviewed additional discovery, and never discussed the

case with the deputy district attorney assigned to prosecute the case. Id. The district court ultimately ruled that the Clark County District Attorney's Office should be disqualified due to a conflict of interest between Wolfson and Zogheib, and that the conflict should be imputed to the prosecutor's office because there was an appearance of impropriety so great that it warranted vicarious disqualification even though Wolfson had been effectively screened from participating in the case. Id. at ___, 884. The State thereafter filed a petition for writ of mandamus challenging the district court's ruling to grant defendant's motion, and this Court granted the petition, finding that the district court abused its discretion by granting defendant's motion. Id. In granting the State's petition, this Court overruled Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982), to the extent that it relied on the appearance-of-impropriety standard, and held instead that the proper standard is whether the individual lawyer's conflict would render it unlikely that the defendant would receive a fair trial unless the conflict were imputed to the prosecutor's office. Zogheib at ___, 883.

1. Tierra Jones' and Abigail Frierson's prior representation of Collins creates a conflict of interest.

The first issue presented here is whether Tierra Jones' and Abigail Frierson's prior representation of Collins creates a conflict of interest. The general

rule is that "a client must be secure in the knowledge that any information he reveals to counsel will remain confidential." United States v. Schell, 775 F.2d 559, 565 (4th Cir. 1985) (quoted with approval in Ciaffone v. Eighth Judicial Dist. Court, 113 Nev. 1165, 1169, 945, 952 P.2d 950 (1997), overruled in part on other grounds by Leibowitz v. Eighth Judicial Dist. Court, 119 Nev. 523, 78 P.3d 515 (2003)). Additionally, "disqualification is not warranted absent proof of a reasonable probability that counsel actually acquired privileged, confidential information." Liapis v. Second Judicial Dist. Court, ___ Nev. ___, 282 P.2d 733, 738 (2012) (quoting Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1202, 14 P.3d 1266, 1267 (2000)).

Here, as Collins' trial counsel in the arson case, there is a reasonable probability that Jones and Frierson obtained privileged, confidential information from Collins. Further, conflicts of interest involving current clients is governed by Nevada Rules of Professional Conduct (RPC) 1.7, as follows:

> Rule 1.7. Conflict of Interest: Current Clients.
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

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

(2) The representation is not prohibited by law;

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

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

Additionally, duties owed to former clients is set forth in RPC 1.9, as follows:

Rule 1.9. Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) Whose interests are materially adverse to that person; and

(2) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

(3) Unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

> (2) Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Here, no reasonable argument can be made that Jones' and Frierson's representation of Collins at the arson trial does not create a conflict. Even in Zogheib, where Wolfson's dealings with the defendant were remarkably less substantial than Jones and Frierson's involvement with Collins in the arson case, the State nonetheless conceded that Wolfson had a conflict that disqualified him from representing the State against the defendant in the underlying criminal prosecution. Zogheib at ___, 884. Accordingly, Tierra Jones' and Abigail Frierson's prior representation of Collins creates a conflict of interest.

2. Unless the conflict is imputed to the prosecutor's office, it is unlikely that Collins could get a fair trial.

The second issue presented here is whether it is unlikely that Collins could get a fair trial unless the conflict created by Jones' and Frierson's prior representation of Collins is imputed to the prosecutor's office. Since Jones and Frierson are government employees, the question of imputation of conflicts is governed by RPC 1.11, rather than 1.10, as summarized in Zogheib:

> Generally one attorney's conflict of interest under Nevada Rule of Professional Conduct 1.9 is imputed to all other attorneys in the disqualified attorney's law firm. RPC 1.10. But that general rule does not apply to lawyers working in government offices. The disqualification of lawyers who are government officers and

employees based on a conflict of interest is governed by Nevada Rule of Professional Conduct 1.11, not 1.10. Paragraph (d) of Rule 1.11 addresses lawyers who are current government officers and employees and "does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, unless ordinarily it will be prudent to screen such lawyers." Model Rules of Prof'l Conduct R. 1.11 cmt 2 (2012).

Id. at ___, 884.

Accordingly, RPC 1.11 sets forth the relevant rule as follows:

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.
(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
(1) Is subject to Rule 1.9(c); and
(2) Shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
(1) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.
(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests

are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) Is subject to Rules 1.7 and 1.9; and

(2) Shall not:

(I) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) Negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by, and subject to the conditions stated in, Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

Prior to this Court's opinion in Zogheib, the relevant inquiry for determining imputation of conflicts to the district attorney's office was the

appearance-of-impropriety test, as enunciated in Collier. However, in Zogheib, this Court rejected that test and set forth the new test, as follows:

> There is, however, a broader concern in criminal cases that cannot be overlooked: the defendant's right to a fair trial. Based on that concern we agree with Collier that an individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office in extreme cases. But rather than making that determination based on an appearance of impropriety, we conclude that the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case. This approach strikes the correct balance between the competing concerns of the State and the right of the defendant to a fair trial.

Zogheib at ___, 886 (internal citations omitted).

Here, there are several reasons why it is unlikely that Collins could receive a fair trial unless the conflict is imputed to the district attorney's office.

First, it is important to distinguish the conflicts raised in the case at bar from those discussed in Zogheib. In Zogheib, after holding an evidentiary hearing on disqualification, the district court concluded that although Wolfson, while working a defense attorney, was involved in discussions regarding the defendant's case, that Wolfson was not in fact Zogheib's attorney. Id. at ___, 883. Conversely, no court could reasonably conclude here that Jones and Frierson were never in fact Collins' attorneys in the arson case.

Second, the conflicts in this case are distinguishable from those discussed in

Zogheib due to the present posture of Collins' arson case. In Zogheib, this Court noted testimony from the evidentiary hearing before the district court in which it was represented that, subsequent to accepting appointment as District Attorney, Wolfson made no further appearances on the defendant's case. Zogheib at ___, 884. Such is not the case here, where post-conviction hearings in the arson case will likely still require Jones and Frierson to appear as witnesses to testify regarding their representation of Collins. Accordingly, unlike Wolfson in Zogheib, Jones and Frierson are necessarily still involved in Collins' arson matter, despite their employment in the district attorney's office.

Third, additional concerns are raised by the candor of the testimony that could be expected from Jones and Frierson while testifying at post-conviction proceedings regarding the quality of their representation of Collins in the arson matter. Under RPC 1.7(a)(2), a concurrent conflict of interest between Collins and Jones and Frierson exists because "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Absent Collins' informed consent waiving the conflict, confirmed in writing, the conflict remains. RPC 1.7(b)(4). Without any intent to impugn Jones' or Frierson's character or integrity, a legitimate question remains whether, in a

post-conviction hearing, Jones' and Frierson's testimony might be influenced by the expected, quintessential personal interests for job security and advancement within the district attorney's office. In other words, given their current employer's interest in obtaining a guilty verdict for Collins in the case at bar, coupled with their current employer's interest in seeing that Collins' arson case conviction is upheld, Collins asserts it is unreasonable to expect that Jones and Frierson would be entirely free of those pressures and their sense of responsibility to the district attorney's office, and it is therefore unlikely that Collins could receive a fair trial unless the prosecutor's office is disqualified. These pressures were not present in the Zogheib case, since upon joining the district attorney's office, Wolfson became the head of the office and was therefore not subject to internal pressures regarding job security and advancement within the office. The likely prejudice to Collins is further compounded by the fact that both of Collins' attorneys in the arson case are now employed by the district attorney's office. If only one of them were so employed, an argument could be made that the conflict could be adequately addressed because an attorney not employed by the district attorney's office would still be available to testify at a post-conviction hearing regarding representation in the arson case, without the pressures of testifying contrary to the current employer's position. Such is not the case here.

Fourth, the difference between the relative "hands on" responsibility of deputies assigned to prosecute cases, versus Wolfson's primary responsibility as policy-maker for the office and his distance from the day-to-day handling of cases as head of the office, was one factor relied upon in Zogheib in determining that the conflict did not need to be imputed to the entire office. Zogheib at ___, 886-87. Here, Jones and Frierson are not removed from the direct involvement in cases, and they will likely have significant, direct involvement in post-conviction proceedings in Collins' arson case.

Fifth, although all criminal cases require scrupulous protection of a defendant's rights, because the instant case concerns a murder charge that places the rest of Collins' life at jeopardy, the potential prejudice that could inure to Collins by failing to disqualify the district attorney's office is far greater than the potential prejudice faced by the defendant in Zogheib, which involved charges related to check and marker fraud.

Finally, due to the circumstances of this case, including the fact that both of Collins' defense attorneys at the arson trial are now prosecutors with the district attorneys office, as well as the fact that Jones and Frierson will likely be required to participate to a significant degree in the post-conviction matter, Collins argues that this is an "extreme" case under the Zogheib analysis and requires that the

conflict be imputed to the district attorney's office. Further, although this case qualifies as "extreme" for purposes of imputing conflicts, Collins' request in itself is not extreme. Indeed, the framework for a remedy has been provided for under NRS 251.100, in which the legislature foresaw such conflicts and directed the district courts to appoint a special prosecutor to assume the prosecutorial duties of a disqualified district attorney. See Attorney General v. Eighth Judicial Dist. Court (Morris), 108 Nev. 1073, 1075-76, 844 P.2d 124, 125 (1992). Whatever arguments or policy considerations the State might advance here against disqualification, such as financial costs of a special prosecutor or interference with a district attorneys office, see e.g. Zogheib at ___, 886, those arguments must fall short here, when balanced against the prejudice that would inure to Collins if the district attorney's office is not disqualified, including Collins' fair trial guarantees. See Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (holding that the district court must balance the prejudices that will inure to the parties as a result of its discretion); Zogheib at ___, 886 (holding that a defendant's right to a fair trial should be balanced against any competing concerns the State may have). Ultimately, when in doubt regarding conflicts, a district court should generally resolve the matter in favor of disqualification. Brown at 1205, 1270. Accordingly, it is unlikely that Collins could receive a fair

trial unless the conflict between him and Jones and Frierson is imputed to the district attorney's office.

3. The State Did Not Comply With Screening And Notice Requirements.

The State did not comply with screening and notice requirements as required under RPC 1.11. In Zogheib, both the district court and this Court discussed the sufficiency of screening procedures that had been put in place to ensure that Wolfson had no involvement in the prosecution of the defendant. Zogheib at ___, 886-87. Here, as the time of the argument on Collins' Motion, the State had not provided notice regarding any screening procedures that might exist to address the conflict based on Jones' and Frierson's prior representation of Collins. As set forth in Comment 7 to the identically numbered ABA Model Rule 1.11, "[n]otice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent."[1] Both Jones and Frierson have been employed with the Clark County district

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1."Rule 1.11 is based on the identically numbered ABA Model Rule. As provided in Nevada Rule of Professional Conduct 1.0A, the "comments to the ABA Model Rules of Professional Conduct . . . may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the . . . comments." Zogheib at ___, 884 n. 3.

attorney's office for a significant amount of time. Even though the need for screening and notice should have been apparent since the inception of their employment with the district attorney's office, Collins, at the time of argument on his Motion, had received no such notice, and was therefore unable to ascertain compliance with the Nevada Rules of Professional Conduct.

4. An Evidentiary Hearing Was Required To Determine Whether The District Attorney's Office Should Be Disqualified.

In order for the district court to determine whether the conflict of interest requires disqualification of the district attorney's office, including the existence and adequacy of any screening procedures that might have been put in place, an evidentiary hearing should have been held, which is required before the district attorney's office could be disqualified. See Attorney General v. Eighth Judicial Dist. Court (Morris), 108 Nev. 1073, 1075, 844 P.2d 124, 125 (1992) (stating that "district courts may only disqualify district attorney's offices after conducting a full evidentiary hearing and considering all the facts and circumstances") (citing Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982), overruled in part on other grounds by State v. Eighth Judicial Dist. Court (Zogheib), ___ Nev. ___, 321 P.3d 882 (2014)).

On August 18, 2014, argument was heard in the district court on Collins'

Motion To Disqualify The District Attorney's Office, in which Collins made the aforementioned arguments in support of his Motion. Additionally, Collins argued at the hearing that the State had made bare, unsupported assertions in its Opposition that Jones and Frierson had been screened from the murder case, that there was no evidence before the court that screening and notice requirements had been satisfied, and that therefore an evidentiary hearing was necessary. The district court denied Collins' Motion, including his request for an evidentiary hearing, and directed the State to prepare affidavits regarding its screening and notice relevant to Collins. Thereafter, on August 25, 2015, the State filed affidavits from Jones and Frierson, as well as from Jacqueline Bluth and Lisa Luzaich, the two deputy district attorneys currently prosecuting Collins in the murder case. See Appendix, pgs. 70-75. Accordingly, the district court's ruling pre-dates the evidence upon which it was prospectively based by approximately one week. The district court abused its discretion in denying Collins' request for an evidentiary hearing, and by basing its decision on sworn statements that had yet to be created at the time of the court's ruling.

Additionally, the affidavits that were ultimately produced by Luzaich, Bluth, Jones, and Frierson contain insufficient detail to satisfy the Nevada Rules of Professional Conduct. As set forth above, the Rules require that the notice

include a description of the screened lawyer's prior representation, a description of the screening procedures employed, and generally should be given as soon as practicable after the need for screening becomes apparent. Instead of containing a "description of the screening procedures employed", the affidavits include only conclusory statements that Jones and Frierson have been "screened" and "walled off". To declare that screening has been effected, without a description of the screening procedures employed, is insufficient under the Rules. Had Collins been granted an evidentiary hearing, he would have had an opportunity to ascertain, through witnesses, a description of the screening procedures employed.

Further, although the affidavit of Lisa Luzaich states that she has had no conversations with Jones and Frierson regarding "the prosecution of Lesean Collins at any point in time", see Appendix, pgs. 72-73, the affidavit of Bluth states only that she has had no conversations with Jones and Frierson regarding "my current prosecution of Lesean Collins". Further, Bluth's affidavit does not indicate whether she has ever discussed with Jones and Frierson the subject of the arson case. See, Appendix, pg 70. Similarly, the affidavits of Jones and Frierson set forth that they have had no conversations with "the deputies handling the case, regarding the murder prosecution at any point in time after I became a Clark County District Attorney", see Appendix, pgs. 71; 74-75, but leave unanswered

whether Jones or Frierson have had any discussions with Luzaich or Bluth regarding the arson case. Additionally unanswered by the affidavits is whether Jones or Frierson have had conversations with any other employees within the district attorney's office, aside from Luzaich and Bluth, regarding either the murder or arson cases. Had Collins been granted an evidentiary hearing, he would have had an opportunity to question the witnesses to seek answers to these questions.

Moreover, although the affidavits identify conversations that have not occurred as a result of screening, no other screening procedures are discussed. The Rules proscribe more than just conversations that should not occur within an office. The Rules also contemplate other safeguards to protect client confidences, such as ensuring that screened attorneys not have access to the client's file. There is no description in the affidavits regarding any of these procedures, and without an evidentiary hearing, the questions remain unanswered.

Similarly, although much of Collins' Motion focused on the conflict that Jones and Frierson may have as a result of their involvement in post-conviction matters on the arson case, none of the affidavits address at all whether Jones and Frierson have spoken with Collins' counsel on the post-conviction matter, whether they have been asked to turn over to post-conviction counsel anything related to

their representation of Collins, whether they expect to testify in post-conviction proceedings, or any other facts which might illuminate their involvement in the post-conviction case. Had an evidentiary hearing been granted, Collins would have had an opportunity to seek answers to these questions through the witnesses.

Finally, compliance with the requirement that notice generally "should be given as soon as practicable after the need for screening becomes apparent" is indeterminable from the affidavits that were filed. None of the affidavits specify when the need for screening became apparent. Instead, each of them generically state that the administration was made aware of the conflict and that Jones and Frierson were screened off from the case from that point forward. Jones' affidavit indicates she has employed with the district attorney's office for one year. Frierson's affidavit indicates that she has been employed with the district attorney's office since May 2013. It is unclear from the affidavits whether Jones and Frierson remained unscreened for a period of days, weeks, months, or even a year or more. Did the screening occur at the commencement of their employment, upon the filing of Collins' Motion To Disqualify The District Attorney's Office, or at some other time? If Collins had been granted an evidentiary hearing, he would have asked the witnesses questions to ascertain when the need for screening became apparent and, similarly, for how long Jones and Frierson remained

unscreened.

C. This Court Should Grant A Stay Of The District Court Proceedings So This Issue May Be Decided.

Nevada Rules of Appellate Procedure, Rule8 states in pertinent part:

> (a) *Motion for stay.*
>
> (1) *Initial motion in the district court.* A party must ordinarily move first in the district court for the following relief:
>
> > (A) a stay of the judgment or order of, or proceedings in, a district court pending appeal or resolution of a petition to the Supreme Court for an extraordinary writ;
> >
> > . . .
>
> (2) *Motion in the Supreme Court; conditions on relief.* A motion for the relief mentioned in Rule 8(1)(1) may be made to the Supreme Court or to one of its justices.
>
> > (A) The motion shall:
> >
> > . . .
> >
> > (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.
> >
> > (B) The motion shall also include:
> >
> > (I) the reasons for granting the relief requested and the facts relied on;
> >
> > (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
> >
> > (iii) relevant parts of the record.

At calendar call on August 25, 2014, Collins made an Oral Motion to Stay

Proceedings which was denied by the District Court. A Written Order prepared by Collins was signed and filed in open court during the proceedings. See, Appendix pg. 76. A stay is warranted because the issue in this case will evade review if the stay is not granted.

Petitioner Collins requests this Court grant the Motion to Stay the District Court Proceedings Pending Resolution of the Writ. Collins respectfully asks this Court to grant a stay before September 2, 2014 pursuant to NRAP 27(e). See Exhibit 3.

Dated this 26th day of August, 2014.

SPECIAL PUBLIC DEFENDER
DAVID M. SCHIECK
/s/ DAVID M. SCHIECK

_____

DAVID M. SCHIECK
Special Public Defender
Nevada Bar No. 0824
MICHAEL HYTE
Deputy Special Public Defender
Nevada Bar No. 10088
330 South Third Street, 8th Floor
Las Vegas, NV 89155-2316
(702) 455-6265
Attorneys for Petitioner Collins

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID M. SCHIECK being first duly sworn, deposes and says:

1. That he is an attorney duly licensed to practice law in the State of Nevada and one of the attorneys representing Mr. Collins.

2. That Counsel has read the foregoing Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition and knows the contents therein and as to those matters they are true and correct and as to those matters based on information and belief he is informed and believes them to be true.

3. That Mr. Collins has no other remedy at law available to him and that the only means to address this problem is through the instant writ.

4. That Counsel signs this verification on behalf of Mr. Collins, under his

. . .

EXHIBIT 1

direction and authorization and further states that Mr. Collins is currently in custody of the Nevada Department of Prisons.

Further your Affiant sayeth naught

/s/ DAVID M. SCHIECK

_____

DAVID SCHIECK

SUBSCRIBED AND SWORN to before me
this 26th day of August, 2014.
/s/ KATHLEEN FITZGERALD

_____

NOTARY PUBLIC, in and for the County
of Clark, State of Nevada APPT 92-1867-1
MY APPT EXPIRES 05-10-15

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 26TH day of August, 2014, a copy of the foregoing Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition and Emergency Motion to Stay District Court Proceedings was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

BY HAND DELIVERY TO

The Honorable Kathleen Delaney
District Court Judge, Dept. 25
RJC, 200 Lewis Ave.
Las Vegas NV 89155

/s/ DAVID M. SCHIECK

_____

DAVID M. SCHIECK

EXHIBIT 2

NRAP 27(e) CERTIFICATE

DAVID M. SCHIECK makes the following declaration:

1. I am the Special Public Defender for Clark County and one of the attorneys representing Mr. Collins in the case of State of Nevada v. Collins, Eighth Judicial District Court, case number 09C252804-1.

2.

David M. Schieck	Steven Wolfson
Special Public Defender	District Attorney
Michael W. Hyte	Jacqueline Bluth
Deputy Special Public Defender	Deputy District Attorney
330 S. Third Street, 8th Floor	200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155	Las Vegas NV 89155
	Catherine Cortez-Masto
	Nevada Attorney General
	100 N. Carson Street
	Carson City, NV 89701
Attorneys for Petitioner	Attorneys for Respondent

3. I informed the State and the Court on August 25, 20114, that we would be filing the instant PETITION. Service will be made by electronic delivery on the State and by Hand Delivery on Judge Delaney.

4. Hearing of the Motion to Disqualify the District Attorney's Office was held on August 18, 2014. The Evidentiary Hearing on the Motion to Exclude Other Evidence of Arson Charges, was held on August 20, 2014.

The motions were denied.

Exhibit 3

At calendar call on August 25, 2014, an oral Motion to Stay Proceedings was made in district court, and the motion was denied.

All grounds in support of the motions were advanced in district court.

5. Immediate relief is requested to avoid irreparable harm.

6. Jury Trial is set for September 2, 2014. A stay is requested such that this Court can issue a decision on the relief requested in the Petition.

7. This motion complies with NRAP 8 and 27(e).

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

EXECUTED this 26th day of August, 2014.

/s/ DAVID M. SCHIECK

_____

DAVID M. SCHIECK

IN THE SUPREME COURT OF THE STATE OF NEVADA

LESEAN COLLINS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 66360

ORDER DENYING PETITION

This original petition for a writ of mandamus challenges district court rulings allowing the State to introduce prior bad act evidence related to petitioner Lesean Collins' prior arson conviction and denying his motion to disqualify the Clark County District Attorney's Office.[1] Collins is awaiting trial on charges of murder and robbery stemming from his alleged killing of Brandi Payton and taking of her car, cell phone, jewelry, and purse. He filed a pretrial motion to exclude evidence of his prior

[1]In the alternative, Collins seeks a writ of prohibition. Because the district court had jurisdiction to consider his motion to exclude evidence of his arson conviction and his disqualification motion, prohibition is inappropriate. *See* NRS 34.320.

conviction for arson. After an evidentiary hearing, the district court denied the motion. Collins also filed a motion to disqualify the Clark County District Attorney's (CCDA) Office because his two former attorneys who represented him in his arson case currently work for the CCDA's Office, creating a conflict of interest that will preclude him from receiving a fair trial in the murder prosecution unless the CCDA's Office is disqualified. The district court denied the motion. This original writ petition followed.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of mandamus will not issue, however, if petitioner has a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170. Further, mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

As to Collins' challenge regarding the admission of prior bad act evidence, he has an adequate remedy at law by way of an appeal should he be convicted, *see* NRS 177.015(3); NRS 177.045, and therefore writ relief is not appropriate. NRS 34.170. Accordingly, our intervention is not warranted on this ground.

As to Collins' challenge to the district court's denial of his motion for disqualification, this court has held that "mandamus is the appropriate vehicle for challenging attorney disqualification rulings." *State v. Eighth Judicial Dist. Court (Zogheib)*, 130 Nev. ___, ___, 321 P.3d 882, 884 (2014). "The disqualification of a prosecutor's office rests with the sound discretion of the district court," *Collier v. Legakes*, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982), *overruled on other grounds by Zogheib*, 130 Nev. at ___, 321 P.2d at 886, but "where the district court has exercised its discretion, mandamus is available only to control an arbitrary or capricious exercise of discretion," *Zogheib*, 130 Nev. at ___, 321 P.3d at 884. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. ___, ___, 267 P.3d 777, 780 (2011) (defining arbitrary or capricious exercise of discretion). We conclude that extraordinary relief is not warranted.

Collins argues that his former attorneys' representation of him in his arson case creates a conflict of interest due to their employment with the CCDA's Office and that conflict of interest must be imputed to the CCDA's Office. The core of his argument is that his former attorneys will likely participate in post-conviction proceedings related to his arson conviction that are currently pending in district court—namely by testifying at an evidentiary hearing—and that their employment with the CCDA's Office calls into question their credibility and bias because their testimony might be influenced by pressure to protect their jobs and career advancement given the CCDA's desire to secure a conviction at Collins' murder trial and efforts to ensure that his arson conviction is upheld.

We must first consider whether Collins has established that his former attorneys' employment with the CCDA's Office created a conflict of interest due to their prior representation of him in his arson case. We conclude that he has not. RPC 1.9(a) provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Collins has presented nothing establishing that the arson conviction is the "same or substantially related" to the murder prosecution. That the State intends to present evidence concerning his arson conviction is not a sufficient link to establish a conflict of interest under the rules. *See Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 610, 119 P.3d 1219, 1223 (2005) ("A superficial similarity between the two matters is not sufficient to warrant disqualification."). Because Collins has not satisfied his burden of establishing that his arson case is the "same or substantially related" to the murder prosecution, he cannot show that a conflict of interest and therefore disqualification of the CCDA's Office is unwarranted. *See Robbins v. Gillock*, 109 Nev. 1015, 1017, 862 P.2d 1195, 1197 (1993) (observing that burden of proving two matters are "same or substantially related" rests on party seeking disqualification and "that party must have evidence to buttress the claim that a conflict exists").

Even assuming that a conflict of interest exists, extraordinary relief is not warranted. As *Zogheib* instructs, "an individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office in

extreme cases," but "the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case." 130 Nev. at ___, 321 P.3d at 886. Collins has not made this showing. Again, the arson and murder prosecutions are unrelated and no argument he advances suggests that it is unlikely that he will receive a fair trial in his murder case simply because his former attorneys in his arson case are employed by the CCDA's Office and he has a pending post-conviction proceeding in which former counsel might participate as witnesses. Moreover, the impetus behind his disqualification motion—his former attorneys' credibility and bias relative to the post-conviction proceedings in his arson case—will exist even if the CCDA's Office is disqualified in this case. Disqualifying the CCDA's Office in this case will not remedy those concerns.[2] Issues of bias and credibility concerning his former

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[2]Collins argues that the district court erred by denying his disqualification motion without conducting an evidentiary hearing. We conclude that he failed to show that the district court manifestly abused its discretion in this regard, as he failed to make an adequate showing that disqualification was necessary such that an evidentiary hearing was warranted. He also argues that the CCDA's Office has not complied with the screening and notice requirements mandated by RPC 1.11. Because we conclude that Collins failed to show that his former attorneys had a conflict of interest, the screening and notice requirements under RPC 1.11, are irrelevant, assuming that provision applies here. We note that the record indicates that the CCDA's Office has undertaken screening measures and Collins' former attorneys have not communicated with the prosecutors involved in the murder prosecution about the murder case. We further reject Collins' contention that the district court manifestly

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attorneys are irrelevant to his murder prosecution and may be appropriately vetted in post-conviction proceedings related to his arson case.

Because we conclude that Collins has an adequate remedy at law to challenge the district court's evidentiary ruling and he has not demonstrated that the district court manifestly abused its discretion by denying his disqualification motion, we

ORDER the petition DENIED.[3]

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

. . . *continued*

abused its discretion by orally denying his disqualification motion before receiving affidavits confirming what it believed was true from the pleadings—that Collins' former attorneys had no contact with the prosecutors involved in the murder prosecution. Nothing in the district court's comments suggest that it would not have reconsidered its oral ruling had the affidavits revealed contact between former counsel and the prosecuting attorneys or some violation of the screening measures.

[3]We lift the stay of the trial imposed on August 29, 2014.

cc: Hon. Kathleen E. Delaney, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk