

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON JEFFERSON,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 70732

RESPONDENT'S APPENDIX

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Counsel for Respondent

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 6th day of February, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Employee, Clark County
District Attorney's Office

KDB/John Niman/jg

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

OCT 19 2011

John L. Hill
CLERK OF COURT

STATE OF NEVADA

Case No.:

C268351

Plaintiff,

Dept. No.:

II

vs.

Docket No.:

BRANDON JEFFERSON

Defendant

2508991

MOTION TO DISMISS COUNSEL
AND APPOINT
ALTERNATE COUNSEL

COMES NOW THE DEFENDANT, BRANDON JEFFERSON,
AND MOVES THIS HONORABLE COURT TO DISMISS COUNSEL
BRYAN COX AND APPOINT OTHER COUNSEL TO
REPRESENT THIS DEFENDANT.

THIS MOTION IS BASED UPON ALL PAPERS, PLEADINGS
AND DOCUMENTS ON FILE. FACTUAL STATEMENTS SET FORTH
IN THE POINTS AND AUTHORITIES CONTAINED THERE IN DATED
THIS DAY 10TH OF OCTOBER 2011

CLERK OF THE COURT

OCT 18 2011

RECEIVED

C-10-268351-1
MDC
Motion to Dismiss Counsel
1660639



RA 000001

POINTS AND AUTHORITIES

IT IS RESPECTIVELY REQUESTED OF THIS COURT TO
DISMISS COUNSEL BRYAN COX FOR THE REASONS LISTED
BELOW:

I. PROCEDURAL BACKGROUND

SINCE BRYAN COX WAS APPOINTED COUNSEL SEP. 30 2010
BRANDON JEFFERSON HAS BEEN PREJUDICED AND
SUFFERED MANIFEST INJUSTICE BASED ON COUNSEL'S
REFUSAL OR FAILURE TO:

1. BE AVAILABLE
2. DOES NOT TAKE ANY OF MY REQUESTS
3. TALK TO THE DEFENDANT (AT ANY LENGTH) AS FAR TO
MYSELF THE DEFENDANTS FEELINGS
4. TELL DEFENDANT TRUTHS
5. THOROUGHLY INVESTIGATE MEASURES IN THIS CASE AND
SUBSEQUENTLY NOT USING ALL AVAILABLE RESOURCES TO
ASSIST IN OBTAINING A "FAIR" SENTENCE FOR DEFENDANT,
OR TO ATTEMPT AT FINDING FACTUAL BASIS AS TO
DEFENDANTS "FELONIES" CLAIM
6. ANNOUNCE HIS DEALINGS IN MY CASE
7. NO INVESTIGATING WORK
8. DEVOTE TIME TO MY CASE (NO NEGOTIATING EFFORT.)
9. REPRESENT ME AT MY PRELIMINARY HEARING (TOLD ME TO
WAIVE IT, PEOPLE SHOULDN'T HEAR MY ACCUSER TESTIFY, NOW
I HAVE NOTHING TO STAND ON, POST-TRIAL HEARING(S) ASKED
TO REMAIN SEATED DURING ARGUMENTS, AND EVEN READ A BOOK.)

1 10. TO BE PREPARED TO REPRESENT ME (SAYS MY CASE IS
2 UNIQUE, "TOO MUCH WORK" GRAND LARCENY IS EASIER.)

3 ARGUMENT

4 DEFENDANT BRANDON JEFFERSON ASSERTS HE IS
5 BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION
6 DUE TO OVERALL INADEQUATE ACTIONS OF HIS PUBLIC
7 DEFENDER. FURTHER, COUNSEL'S INADEQUATE ACTIONS
8 COMPORT TO NOTHING MORE THAN A VIOLATION OF
9 DEFENDANT'S DUE PROCESS RIGHTS.

10 COUNSEL CONSTANTLY IGNORES MY VIEWS AND WENT
11 AS FAR TO INFORM ME, THAT THE ONLY OPTION I HAVE
12 IS TO TESTIFY OR NOT. IF I DON'T HAVE CLOTHES FOR
13 TRIAL HE'D GET SOME, AND TOOK MY SIZES!

14 DEFENDANT HAS AN UNQUALIFIED RIGHT TO LEGAL
15 ASSISTANCE OF COUNSEL. "COYLER V. SULLIVAN 100 S.C.T
16 1708 (1980) AND FRAZIER V. U.S 18 F.3d 778 (9th Cir.
17 1994) THUS THE ADVERSARIAL PROCESS PROTECTED
18 BY THE SIXTH AMENDMENT REQUIRES THAT THE
19 ACCUSED HAVE "COUNSEL ACTING IN THE ROLE OF
20 AN ADVOCATE." ANDERS V. CALIFORNIA 87 S.C.T. 1396
21 AND 1480 (1967) NOT INTIMIDATING ME WITH THE
22 OPTION IF I DON'T TESTIFY WHAT DO I THINK WOULD
23 HAPPEN.
24
25

1 A PARTY WHOSE COUNSEL IS UNABLE OR UNWILLING
2 TO PROVIDE EFFECTIVE OR ADEQUATE ASSISTANCE
3 IS NO BETTER THAN ONE WHO HAS NO COUNSEL AT ALL;
4 AND ANY APPEALS WOULD BE FUTILE IN GESTURE.

5 EVITTS V. LUCEY 105 S.CT. 830 (1985.)

6 DOUGLAS V. CALIFORNIA 83 S.CT. 814 (1963) APPOINTED
7 COUNSEL FOR THIS DEFENDANT HAS DONE LITTLE
8 TO FAIRLY/PROPERLY REPRESENT HIM. COUNSEL JUST
9 GOES THROUGH THE MOTIONS, HE DOES NOT FOLLOW
10 THROUGH, NOR BACK MY REQUESTS, MAKING EVERYTHING
11 HE STARTS FRIVOLOUS, THIS ALONE IS A VIABLE CLAIM TO
12 INEFFECTIVE COUNSEL CRANDELV. BYNELL NO. 92.5530 DC NO
13 CV-90-6419 WURGL; FILED MAY 25, 1994 (9th Cir.)

14 THEREFORE DEFENDANT CONTENTS THAT ALTHOUGH
15 COUNSEL HAS BEEN APPOINTED IN THIS CASE, THE
16 ACTIONS OF COUNSEL OR LACK THEREOF, HAVE CREATED
17 UNFAIR PREJUDICE AND OBSTACLES WHICH DO NOT COMPORT
18 THE FAIR PROCEDURES OWED TO THE DEFENDANT.

19 MOST CERTAINLY THE PLURALITY OPINION IN EVITTS
20 AND DOUGLAS 105 S.CT. AT 842; 83 S.CT. AT 81647 MAKE
21 THIS VERY CLEAR, NOT WITHSTAND THE VERY STRONG
22 POLICY FAVORING AUTONOMY. ETHICAL, PROFESSIONAL AND
23 CONSTITUTIONAL PRINCIPALS ESTABLISH COUNSEL'S
24 STANDARDS OWED TO HIS CLIENT.
25

1 SO, CLEARLY A CONFLICT OF INTEREST NOW EXISTS
2 BETWEEN MR. COX (COUNSEL) AND BRANDON JEFFERSON
3 (CLIENT.)

4 AS ALL FAITH AND TRUST HAS BEEN DIMINISHED
5 AS A RESULT OF COUNSEL'S ACTIONS OR LACK THEREOF,
6 AND "SHOWING" OF CONFLICT OF INTEREST REQUIRES
7 NO "ACT" OF PREJUDICE. CUYLER V. SULLIVAN 100 S.C.T.

8 AT 1717 THE LAW ADDRESSES ITSELF TO ACTUALITIES
9 ABJUDICATION IS NOT A MERE MECHANICAL PROCESS.

10 NOR DOES IT COMPEL ANY EITHER (OR
11 DETERMINATION.) GRIFFIN V. ILLINOIS 76 S.C.T. 505
12 592-594 (1956.)

13 THEREFORE FUNDAMENTAL FAIRNESS REQUIRES THE
14 ABOLITION OF PREJUDICE WHICH BRANDON JEFFERSON
15 (DEFENDANT.) IS PRESENTLY SUFFERING. THIS IS
16 ACTUALITY THAT THE LAW ADDRESSES, ANYTHING
17 SHORT OF ABDICATION WOULD FURTHER A
18 MANIFEST OF INJUSTICE. "THE EFFECTIVENESS (IN
19 ASSISTANCE) OF COUNSEL" IS AN INDIVIDUALS
20 MOST FUNDAMENTAL RIGHT. FOR WITHOUT IT,
21 EVERY OTHER RIGHT DEFENDANT HAS TO ASSERT
22 BECOMES AFFECTED.

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16 DATED THIS 10TH day of OCTOBER, 2011.

17 I, BRANDON M. JEFFERSON, do

18 solemnly swear, under the penalty of perjury, that

19 the above REQUEST / STATEMENT is accurate,

20 correct, and true to the best of my knowledge.

21 NRS 171.102 and NRS 208.165.

22 Respectfully submitted,

23 **BRANDON M. JEFFERSON**

24
25 Defendant

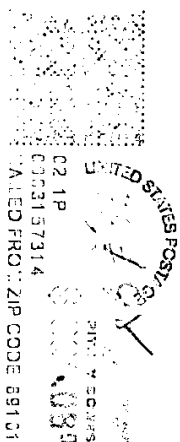
RA 000006

BRANDON JEFFERSON #2508991

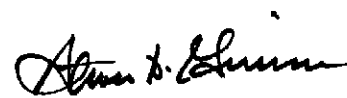
C.C.D.C.

330. S. CASINO CENTER BLVD

LAS VEGAS, NEVADA 89101



RA 000007


CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C268351-1
)	DEPT. NO. 2
vs.)	
)	
BRANDON MONTANE JEFFERSON,)	
)	
Defendant.)	

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT JUDGE
TUESDAY, NOVEMBER 1, 2011 AT 9:00 A.M.

**RECORDER'S TRANSCRIPT RE:
DEFT'S PRO SE MOTION TO DISMISS COUNSEL AND APPOINT
ALTERNATE COUNSEL
EVIDENTIARY HEARING: DEFT JEFFERSON'S MOTION IN LIMINE TO
PRECLUDE INADMISSIBLE 51.385 EVIDENCE**

APPEARANCES:

FOR THE STATE:	WILLIAM "JAKE" MERBACK Chief Deputy District Attorney
FOR THE DEFENDANT:	BRYAN A. COX Deputy Public Defender

Recorded by: LISA A. LIZOTTE, COURT RECORDER

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(TUESDAY, NOVEMBER 1, 2011 AT 9:00 A.M.)

THE COURT: Top of Page 4, State versus Brandon Jefferson, C268351-1. Record shall reflect Mr. Merback for the State, Mr. Cox for the Defense, Mr. Jefferson is in custody and is being brought into the courtroom.

MR. COX: Good morning, Your Honor.

THE COURT: Good morning. And Mr. Jefferson is now present. This matter's on calendar for a couple of different reasons. We have a Defendant's pro se motion to dismiss counsel and appoint alternate counsel. It came as a surprise to me because we're just a couple days in advance of the calendar call. Were you aware of that, Mr. Cox?

MR. COX: Judge, I can't say I'm surprised. I can tell you that there's been some concerns Mr. Jefferson has expressed to myself, and so I think – what was the date on that? It's been a little while. I think there was some delay on it getting on calendar. I didn't file it myself.

THE COURT: No. It's his pro per motion, and I'm –

MR. COX: Notwithstanding any allegations against me, you know, I want what's best for my client. So, you know, it's his motion. It's his to argue, but –

THE COURT: Mr. Jefferson, did you wish to proceed on your motion?

THE DEFENDANT: Yes.

THE COURT: You may be heard.

THE DEFENDANT: I just – I've asked Mr. Cox to do some things for me and he hasn't – he hasn't – he hasn't come through, and I mean I don't

1 have my full discovery yet. I just – just things he said to me, I just – I don't feel
2 comfortable with him.

3 THE COURT: What is it that he has not done?

4 THE DEFENDANT: Well, I've asked him to subpoena for some –
5 my work records from my job and he hasn't done that. I've asked him to make
6 some phone calls to my family and he hasn't done that. And I've asked for my
7 full discovery. I've been here for almost 14 months and I still don't have my full
8 discovery.

9 THE COURT: Making calls to family members would be a courtesy.
10 It's not part of his job duties. There is some discovery that's recently arrived that
11 I was going to address with counsel today, but Mr. Cox, as to the discovery that
12 you have been provided by the State, has that been shared with Mr. Jefferson?

13 MR. COX: Judge, there's been lots of visits. As far as any specific
14 item I'd have to look at it, and sometimes my memory fails but I do have my
15 discovery generally with me when I visit my client for him to view at any time. I
16 can tell you I am hesitant to simply give copies of things to just leave in the jail
17 simply because all my clients are generally in the same module, and
18 unfortunately just recently I've had two cases I had to get off of because people
19 see each other's discovery and then, you know, there's allegations made.

20 So I'd like to make the discovery available. I'm very hesitant to
21 drop things off because I feel sometimes it creates a conflict, but I'll obey the
22 Court's order on this.

23 THE COURT: So it's your standard operating procedure to meet
24 with your client –

25 MR. COX: Yes.

1 THE COURT: -- and to review it --

2 MR. COX: Yes.

3 THE COURT: -- together with them --

4 MR. COX: Yes.

5 THE COURT: -- in the jail --

6 MR. COX: Yes.

7 THE COURT: -- but not to provide them a copy?

8 MR. COX: I am -- you know, ultimately it's his discovery. He wants
9 me to just Xerox everything and drop it off, I'll do it but I'm reluctant to do it for
10 that reason. Nothing is private in the jail. Nothing is -- you know, it doesn't
11 matter how secret you think anything is. You know, everybody's going to look at
12 your stuff, they're going to steal your soup, they're going to steal your candy bar
13 and they're going to know everything about your case. In fact, sometimes they
14 even just sit down and have discussions about their cases.

15 Unfortunately, there's problems that can develop from that,
16 and, you know, ultimately if he wants the discovery fine, but anybody that thinks
17 there's privacy in the jail is mistaken because there is none.

18 THE COURT: Yeah. There's no lockbox or safety deposit box or --

19 MR. COX: No, there's no privacy.

20 THE COURT: -- anything that's private to lock up and --

21 MR. COX: Your cell is not private in there.

22 THE COURT: -- you've got to go to the bathroom and you've got to
23 -- you got to eat, and there's times when you're going to be coming and going
24 and anybody can go through your stuff.

25

1 MR. COX: So for that reason, Judge, I'm reluctant. If he says, you
2 know what, I don't care, bring me a copy of everything, I'll do it. That's fine. It
3 just takes me a half hour at the copy machine and I can run everything off. As far
4 as discovery goes, I didn't see that as an overwhelming issue. I have been to
5 see him about witnesses and whatnot. You know, I thought that I had an
6 understanding of who was there and who wasn't available, you know, for the
7 Defense.

8 But, you know, unfortunately there's aspects here that I'm not
9 willing to share because it goes to our relationship in matters that I don't think I
10 should share with the State at this point.

11 THE COURT: Which makes sense to me. Have you asked your
12 investigator to track down his work records?

13 MR. COX: Judge, quite frankly, I didn't see the work records as
14 being key to the case here. I'm sorry. I just didn't see it. I – you know, I have
15 my reasons. I don't want to go into too much discussion about the case but I
16 didn't see that as being an issue, but -- I just didn't see it as being an issue in the
17 case.

18 THE COURT: So he had requested that but you didn't see –

19 MR. COX: Quite frankly, I made a note in my last visit, you know,
20 Brandon, do you have any other witnesses or things you want me to investigate,
21 and I have a specific note here that says, no, I don't, Mr. Cox, and I made a note
22 of that because it's important for me to know whether or not I'm missing anything.
23 Quite frankly, I wasn't – I didn't remember -- I think we've talked about work
24 records but I think I told him why I didn't think it was really important because we
25 don't have an alibi, so – and generally these cases just don't. We generally don't

1 have alibis in our general lives unless it's a very specific matter. There is a
2 specific timeframe which we don't have here. I didn't realize his work records
3 was a hanging point, and for that that's why – another reason why I just didn't get
4 them.

5 THE COURT: Okay. So it doesn't appear that they have any
6 relevance?

7 MR. COX: Judge, you know, I don't think I'm showing my hand
8 here, but, you know, I didn't see it as being relevant, a thing that's really going to
9 substantively, you know, defend the case in any way. You know, I don't think it's
10 in dispute he had a job. The State and the State's witnesses have not made a
11 specific date or time when these things have said to have taken place.

12 MR. MERBACK: He actually indicated in his statement to the police
13 that he had lost his job. That was part of the reason that he was home when
14 these events occur is because he had been employed and then he became
15 unemployed. So I mean that's from his statement, and obviously that's just my
16 recollection, but I recall that very specifically from his statement he indicated that
17 he had lost his job and that was making it difficult for him.

18 THE COURT: It appears that the relief sought is not warranted and
19 the Court, therefore, denies the motion. The Court will ask that the State prepare
20 the order. We have –

21 MR. COX: Judge, I do have an issue with our trial date and I want
22 to bring it up now rather than calendar call. My issue is it is a short week and I
23 have retained Mr. Mark Chambers. I had sent the State a notice of that. We do
24 have – the State does intend to argue in its case in chief that my client made
25

1 incriminating statements. I did feel that it's essential to have Mr. Chambers as a
2 witness to talk about the dynamics of interrogation. Mr. Merback's aware of that.

3 From talking to Mr. Chambers, unfortunately this short week – I
4 don't know if you can really get it done in four days anyway, but in this short
5 week that's the one week he's not available, however, he is available thereafter.
6 And so – and I'm not trying to, you know, delay the case. I just need a different
7 day. I can pretty much go – you know, unfortunately the next week is really the
8 only full week we have and then you have the Thanksgiving Holiday. You know,
9 I guess I was thinking more like maybe like December 5th maybe we could go or
10 something like that if the State's available, but I just can't go the day we have.
11 I'm sorry, Judge. I'm not trying to delay the case, but I need this expert and
12 that's just the one week he's not available.

13 THE COURT: We have the week of November 14th a full week, the
14 week of November 28th a full week and the week of December 5th a full week. I
15 know that we've already got some other trials set in there, but I'm not –

16 MR. COX: I would prefer December 5th just because, you know,
17 when you're that close to a holiday weekend things just don't seem to work out
18 so well, but I'll submit it. I don't know what the State would think, but –

19 MR. MERBACK: That's fine.

20 MR. COX: -- I think December 5th gives us a full week with – you
21 know, it's not really in close proximity to either holiday and I think we'll both be in
22 a position to –

23 THE COURT: But if it goes longer than a week, it's going to be a
24 problem.

1 MR. COX: Judge, I don't see this going over a week but I think four
2 days is pressed.

3 MR. MERBACK: I don't see any way this case goes over a week. I
4 mean it just isn't going to take that long to try. December 5th is fine, Judge. I
5 have another trial set that week. I have trials set most weeks, though, so I don't
6 know whether my trial's going to go or not go.

7 THE COURT: Do you have a trial set November 28th?

8 MR. MERBACK: I don't believe I have one set that week, Judge,
9 but my December 5th trial there's a bunch of discovery issues right now. I mean I
10 don't know that it's going to go that day. I would not set it then because of my
11 other trial.

12 THE COURT: What do we already have set those two weeks?

13 MR. COX: Which day is that? I'm sorry.

14 THE COURT: November 28th and December 5th.

15 MR. COX: November 28th. Judge, that's – I mean that's – I have
16 that week open. It's just immediately after Thanksgiving. I have that week open,
17 though.

18 THE COURT: We have seven set the week of the 28th and eight set
19 the week of the 5th.

20 MR. COX: Well –

21 MR. MERBACK: Well, this case could go to overflow. This is
22 eligible to go there if it needs to, but I mean the 5th is fine with the State if that's
23 the best for Defense.

24 MR. COX: Yeah, that's fine.

25 THE COURT: The 28th or the 5th?

1 MR. COX: Either day. I can go either day. The State's saying the
2 5th and that's fine with me.

3 THE COURT: Well, he's already got one set the 5th, so I have one
4 less on the 28th so I'd rather put it the 28th. So it's a Defense motion to continue,
5 no opposition by the State and Defendant's previously waived speedy trial rights,
6 correct? Correct, Mr. Cox?

7 MR. COX: That's correct, Judge.

8 MR. MERBACK: Wait, is that – may we approach, Judge?

9 THE COURT: Yes.

10 (Whereupon, an off-the-record discussion was had.)

11 THE COURT: On further reflection the parties would jointly prefer
12 the week of December 5th, so the Clerk will so reset. Defense's motion is
13 granted. The November trial date and calendar call dates vacate.

14 MR. MERBACK: Judge, I also know that today was supposed to be
15 a hearing on the 51.385 statement.

16 THE COURT: Let her reset first and then we'll go to the next item.

17 THE CLERK: Calendar call December 1st at 9:30, jury trial
18 December 5th, 10:30.

19 THE COURT: The discovery I was referencing earlier is that the
20 Defendant's children's CPS records arrived. He is the biological father. I
21 reviewed them and made copies of them, and counsel may approach.

22 We can stay on. There's a couple of things that I would like to
23 show you if you would come back to sidebar, please. Since he is the biological
24 father of the children involved I believe, then, he has access to their records.
25 The records came in a sealed envelope which I opened and reviewed. They

1 were double-sided and I photocopied them single-sided. I did not find anything in
2 them that I believed the Defendant was not entitled to, so there was nothing to
3 redact.

4 However, the copy that I have of some of the records is not
5 perfect. There are Pages 1 to 4 of some report summaries and then Pages 1 to
6 4 of another report summary, and then there is a record that has a number
7 across the top which correlates to the next page. That number is showing as like
8 a file number on this report. Then there's the Defendant's SCOPE with a note on
9 it that my copy is not very good, the note is kind of faint, but it appears to be a
10 female who is referenced in the other record. So I think she was somebody in
11 the Family Division who had ordered the SCOPE and put her name on there.

12 And then there's some records from the hospital and a
13 handwritten note –

14 MR. COX: And yours isn't any better than mine.

15 THE COURT: -- which is the -- it appears is a required person's
16 report.

17 MR. COX: Your copy is equally undecipherable as mine. Can you
18 read yours at all?

19 THE COURT: I can read part of it.

20 MR. COX: Mine is really bad.

21 THE COURT: I think I'll take us off the record for that, though.

22 (Whereupon, an off-the-record discussion was had.)

23 THE COURT: The record shall reflect that I did not do any
24 redactions on the records from CPS, that they are confidential and pertain to the
25 victim and another sibling of the victim, that they are confidential records and

1 they relate to confidential medical records as well. The Court sua sponte is going
2 to order them sealed and they'll be marked as Court's Exhibit 1, and the Court
3 finds that there is a compelling issue for confidentiality which outweighs the
4 public access to these records concerning the juveniles.

5 So that's turned over to the Clerk, and the Court ask that the
6 State prepare a written order that complies with the new Supreme Court Rule on
7 sealing from the ADKT 410 filed December 27th, 2010 and what is now Part 11 of
8 the Supreme Court Rules. And the record should reflect that the sealed
9 envelope came from Mr. Merback's office, I believe, in response to a subpoena
10 duces tecum that he had sent to CPS.

11 MR. MERBACK: It was actually, Judge, if I remember correctly, an
12 order we prepared that the Court signed that we took down to CPS.

13 THE COURT: Okay. Thank you.

14 It's a number of pages that are paper clipped together. And
15 then the last thing is what Mr. Merback had started to address with regard to the
16 evidentiary hearing.

17 MR. MERBACK: Judge, if the Court recalls, when this hearing was
18 set the idea was we would have it close to the trial date and bring those
19 witnesses in at basically the same time. Because of that and because of the
20 pending motion –

21 THE COURT: I thought we just had one. I just thought it was going
22 to be Caitlin.

23 MR. MERBACK: No. It's a 51.385 hearing, which we'll hear from
24 the two people who Caitlin made statements to, the Detective and the mother.
25 That's who she made statement to, so then the Court can make a ruling in

1 regards to whether those – the statements made to those two individuals qualify
2 for 51.385, and because of the pending –

3 THE COURT: No. I thought from a prior hearing that you wanted
4 me to determine if Caitlin was going to be competent to testify, and if she was
5 going to testify then the hearsay issue would not ripen.

6 MR. MERBACK: No. My understanding was was that – I could be
7 wrong, but my understanding was that we filed a 51.385 notice and then the
8 Defense filed a motion –

9 THE COURT: To preclude inadmissible evidence.

10 MR. MERBACK: -- that evidence and the Court wanted to hear the
11 51.385 evidence to determine whether or not it was – I mean we have to have a
12 51.385 hearing anyways. Whether or not the Defense had filed a motion or not
13 we have to have that hearing. The Court has to hear from the people who took
14 statements from the victim. They have to testify in regards to the nature of the
15 disclosure, all the factors that are listed in 51.385. The Court was going to hear
16 from those witnesses and then determine whether or not those statements made
17 by the victim to those witnesses were going to be admissible. That was my
18 understanding, and I apologize if I misunderstood.

19 THE COURT: Because my note says to hold the hearing outside
20 the presence of the jury before she testifies and if she testifies the *Crawford*
21 issues go away, and all indications are that she will testify, so if you're intending
22 not just to present it through her but to also present her statement to other people
23 through the other people, then there would be a hearsay analysis that would
24 need to be done.
25

1 MR. MERBACK: Well, and that's actually what 51.385 allows. It
2 allows the statements made by an individual who's under 10 -- statements made
3 in regards to sexual abuse or physical abuse by a child under 10 to an individual,
4 it allows that individual to come and testify to the jury about what that child said,
5 but prior to them being able to do that there has to be a hearing outside the
6 presence of the jury where the Court listens to that individual's testimony about
7 what the victim said and makes a determination as to whether or not it meets the
8 requirements under 51.385.

9 MR. COX: And, Judge --

10 MR. MERBACK: And then if the victim -- there's also some specifics
11 there as to whether or not it's allowable depending if the victim testifies or doesn't
12 testify. In this case we fully expect the victim to testify, fully expect her to be
13 determined to be competent. I don't know that the Defense has ever brought that
14 issue up, that she's not going to be competent. I mean she testified -- she gave a
15 statement to the police. I don't know if they ever brought that issue up.

16 MR. COX: We're not waiving any issues, and at a hearing, Judge,
17 we would be prepared -- we would be prepared to argue that such statements
18 should not be admissible from another party other than the child.

19 THE COURT: I have her age noted as 10. Most 10-year-olds are
20 able to be qualified as competent, a 2-year-old, not so much, but it appears we're
21 not having the hearing today.

22 MR. MERBACK: The Defense had -- the Defendant had filed that
23 particular motion, then Mr. Cox informed he was going to continue the case, so I
24 didn't bring the witnesses in.

1 MR. COX: I did call Mr. Merback and give him a heads-up that I do
2 have an issue with Mr. Chambers regarding the week of trial, and so in that
3 regards, Judge, you know – and, you know, it is an essential witness, so I did
4 believe that there was an expectation that perhaps we'd need a different week for
5 the trial.

6 THE COURT: Okay. So now that we know that the trial date has
7 been set for December 5th, did you want to do it the Thursday before --

8 MR. MERBACK: That's fine, Judge. We can do that Thursday
9 before.

10 THE COURT: -- which is December 1st?

11 MR. MERBACK: That's fine.

12 THE COURT: I'll ask the Clerk to look --

13 MR. COX: December 1st, that's the calendar call date, correct?

14 THE CLERK: Correct.

15 MR. COX: Yeah. Calendar call and the hearing the same day.

16 THE COURT: How long is this hearing going to take?

17 MR. MERBACK: An hour, I think. I don't think much more than that.

18 THE COURT: Okay. All right. Put December 1st at 10:30.

19 THE CLERK: December 1st, 10:30

20 THE COURT: Is there anything further?

21 MR. COX: I don't believe so, Judge.

22 THE COURT: Thank you.

23 MR. COX: Thank you.

24 (Whereupon, the proceedings concluded.)

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

A handwritten signature in cursive script, reading "Lisa A. Lizotte", followed by a horizontal line.

LISA A. LIZOTTE
Court Recorder