

IN THE SUPREME COURT OF THE STATE OF NEVADA

COLE DUANE ENGELSON

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 82691

Appeal From A Judgment of Conviction (Jury Trial)
Fifth Judicial District Court
The Honorable Robert Lane, District Judge
Court No. CR9226

APPELLANT'S APPENDIX VOLUME 6 OF 22

Ronni Boskovich
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Elizabeth A. Brown
Clerk of Supreme Court

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NYE COUNTY DISTRICT ATTORNEY
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COPY

FILED
FIFTH JUDICIAL DISTRICT

OCT 29 2020

Nye County Clerk
Judy Ayotte Deputy

Case No. CR9226

Department 2

*The undersigned affirms that
this document does not contain
the social security number of
any person.*

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON

Defendant. /

OPPOSITION TO DEFENDANT'S
MOTION TO DISQUALIFY
THE NYE COUNTY DISTRICT
ATTORNEY'S OFFICE

COMES NOW, the State of Nevada, by and through Nye County District Attorney, CHRIS ARABIA, and Deputy District Attorney Christi M. Kindel, and files this Opposition to Defendant's Motion to Disqualify the Nye County District Attorney's Office.

This Opposition is based upon the attached points and authorities, the declaration of counsel, the pleading and papers on filed herein and the testimony, evidence and argument the county may entertain at any hearing on this matter.

DATED this 29th day of October, 2020.

CHRIS ARABIA
NYE COUNTY DISTRICT ATTORNEY

By Christi M. Kindel
CHRISTI M. KINDEL
Deputy District Attorney

POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Defendant's Motion to Disqualify is a meritless attempt to derail the criminal murder trial currently set to begin on November 4, 2020 and should be denied.

ARGUMENT

- I. DISQUALIFICATION IS A DRASTIC MEASURE, PERMITTED ONLY IN EXTREME CIRCUMSTANCES, WHICH ARE NOT PRESENT HERE.

Motions for disqualification are discouraged and should be subjected to "Particularly strict scrutiny" because of their potential for abuse. *Optyl Eyewear Fashion Int'l Corp. v. Style Cos. Ltd.* 760 F.2d 1045, 1050 (9th Cir. 1985). Courts must be vigilant in preventing "parties from misusing motions for disqualification as 'instruments of harassment or delay'" *In-N Out Burger v. In & Out Tire & Auto, Inc.* 2008 WL 2923794 at 3 (D. Nev July 24, 2008) (citation omitted); *United States v. Titan Pac Constr. Corp.*, 637 F. Supp. 1556, 1562 (W.D.Wash 19086) (disqualification is a "drastic measure" that courts should not impose except when "absolutely necessary." (citation omitted).

Defendant cites *Collier v. Lagakes* 98 Nev 307 (1982), to support his position the District Attorney's Office should be disqualified because there is an appearance of impropriety. However, Defendant fails to alert the Court that *Collier* was subsequently overruled in part by *State v. Eighth Judicial Dist. Court of the State*, 130 Nev. 158 (2014) on that exact issue. In *State v. Eighth Judicial Dist. Court of the State*, 130 Nev. 158 (2014) the Court stated:

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1 We are not convinced that appearance of impropriety is the
2 appropriate standard for determining whether an individual
3 prosecutor's conflict should be imputed to an entire office. First,
4 that standard is not implicit in the current Nevada Rules of
5 Professional Conduct. Second, there are several policy
6 arguments in favor of a test that limits the disqualification of an
7 entire district attorney's office: there is a large cost to the county in
8 paying for a special prosecutor to prosecute the case; an attorney
9 is presumed to perform his ethical duties, including keeping the
10 confidences of a former client; and courts should not
11 unnecessarily interfere with the performance of a prosecutor's
12 duties. ([T]he rules governing lawyers presently or formerly
13 employed by a government agency should not be so restrictive as
14 to inhibit transfer of employment to and from the government.
15 The government has a legitimate need to attract qualified lawyers
16 as well as maintain high ethical standards. (citations omitted) *Ibid*
17 at 164

18 In *State v. Eighth Judicial Dist. Court of the State*, 130 Nev. 158 (2014), the
19 Court continued:

20 Using a standard that is as ambiguous as the appearance-of-impropriety
21 standard...could result in in many unnecessary disqualifications, limit mobility from
22 private practice and restrict the assignment of counsel when no breach of confidences
23 has occurred. For these reasons we overrule *Collier* to the extent that it relies on
24 appearance of impropriety to determine when vicarious disqualification of a
prosecutor's office is warranted (citations omitted) (emphasis added) *Ibid* at 164.

Defendant next argues that the District Attorney's Office should be disqualified based
on the Nevada Rules For Professional Conduct (NRPC). Defendant's argument is
misguided and must fail. The NRPC specifically provide that when adequate
screening measures are in place, an entire firm does not have to be disqualified.

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1 Under NRPC 1.12(c), a law firm (such as the Nye County District Attorney's
2 Office) will not be disqualified if adequate screening measures (typically called a
3 'Chinese Wall' are in place. *Ryan's Express Transp. Servs. Amador, State Lines, Inc.*,
4 128 Nev. 289, 297(July 2012). Sufficiency of screening mechanisms include, but are
5 not limited to, instructions given to ban the exchange of information between the
6 disqualified attorney and other members of the firm; restricted access to files and other
7 information about the case; timing of the screening measures; and the likelihood of
8 contact between the quarantined lawyer and other members of the firm. *Ibid* 297-298
9 In the instant matter, the following screening mechanism have been put in place to
10 uphold the highest ethical standards and ensure no disqualification is necessary:

- 11 1. All District Attorney staff was advised before and after October 26, 2020, that no
12 one was to discuss the Engelson matter with and/or in front of him and the was not
13 to view any documents related to the case. See, Declaration of Renne McKeen,
14 attached hereto as Exhibit A.
- 15 2. Mr. Percival has had no access to the District Attorney's Office online case
16 management system, Justware. See, Declaration of Vanessa Maxfield, attached
17 hereto as Exhibit B.
- 18 3. Mr. Percival is currently on Administrative Leave and not in the District Attorney's
19 Office. Therefore, there is no possibility of contact between Mr. Percival and the
20 lawyers prosecuting the instant matter. See, Declaration of Chris Arabia, attached
21 hereto as Exhibit C.
- 22 4. Mr. Percival was and is aware of his ethical obligations and these screening
23 mechanisms. See, Affidavit of Brent D. Percival, attached hereto as Exhibit D.

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CONCLUSION

For the foregoing reasons the Defense's Motion should be denied.

DATED this 29th day of October, 2020.

**CHRIS ARABIA
NYE COUNTY DISTRICT ATTORNEY**

By Christi M. Kindel
CHRISTI M. KINDEL
Deputy District Attorney

NYE COUNTY DISTRICT ATTORNEY
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EXHIBIT A

**DECLARATION OF RENNE McKEEN IN LIEU OF AFFIDAVIT
AS CONTEMPLATED BY NRS 253.045**

STATE OF NEVADA)
)
COUNTY OF NYE) ss.

I, Renne McKeen, Executive Legal Secretary III, do hereby declare under pain and penalty of perjury that the following is true and correct to the best of my knowledge and recollection:

1. I, Renne McKeen, am an Executive Legal Secretary III in the Nye County District Attorney's Office.
2. I advised all Secretarial staff and the Investigators prior to Brent Percival starting with the Nye County District Attorney's Office and again when he started that no one is to discuss the Engelson matter with and/or in front of him, and that he is not to view any documents pertaining to this matter.
3. To date, as far as I am aware, Mr. Percival has not accessed our Case Management System, JustWare.
4. Brent Percival has been walled off from the Engelson case, as such, he does not have access to any case materials.

Further declarant sayeth NAUGHT.

DATED this 28th day of October, 2020.



Renne McKeen

NYE COUNTY DISTRICT ATTORNEY
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EXHIBIT B

DECLARATION OF VANESSA MAXFIELD IN LIEU OF AFFIDAVIT
AS CONTEMPLATED BY NRS 253.045

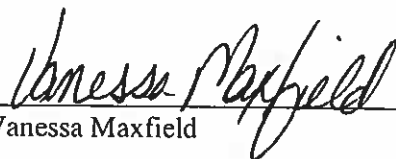
STATE OF NEVADA)
)
COUNTY OF NYE) ss.

I, Vanessa Maxfield, do hereby declare under pain and penalty of perjury that the following is true and correct to the best of my knowledge and recollection:

1. I am the Supervising District Attorney Administrator for the Nye County District Attorney's Office. One of my duties is adding users to JustWare, our case management system.
2. On October 16, 2020 I created a name profile and added Brent Percival as a user. On October 28, 2020 I deactivated his user account. Attached hereto as Exhibit 1 is a screenshot showing those actions.
3. Mr. Percival started employment in our office on October 26, 2020. To date he has not accessed or logged in to JustWare. Attached hereto as Exhibit 2 is the report showing his lack of access, along with a copy of my report of log ins/ access for comparison purposes.

Further declarant sayeth NAUGHT.

DATED this 28th day of October, 2020.



Vanessa Maxfield

NYE COUNTY DISTRICT ATTORNEY
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EXHIBIT 1

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EXHIBIT 2

Agency User Logging

Agency: Nye County District Attorney

User: BRENT D. PERCIVAL

Usage Between: 10/16/2020 - 10/30/2020

0763

Agency User Logging

Agency: Nye County District Attorney

User: VANESSA MAXFIELD

Usage Between: 10/16/2020 - 10/30/2020

Application Person

Case

Case Agency

Case Attribute

Case Involved Person

Case Notes Plain Text

Event

File Transfer Request

Name

Name Attributes

Number

Reminder

0764

User Access

Access Date	NameID	Full Name	AppPersonID	Username	IP Address	Notes	Type	Success
10/28/2020 8:00 AM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logon Successful.	Logon	P
10/27/2020 4:59 PM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logoff Successful.	Logoff	P
10/27/2020 10:01 AM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logon Successful.	Logon	P
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10/21/2020 10:59 AM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logoff Successful.	Logoff	P
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10/20/2020 5:01 PM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logoff Successful.	Logoff	P
10/20/2020 8:44 AM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logoff Successful.	Logoff	P
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10/16/2020 1:18 PM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logoff Successful.	Logoff	P
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10/16/2020 7:51 AM	18620	Vanessa Maxfield	306	NYE\vmxfield	10.77.2.195	Logon Successful.	Logon	P

0765

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EXHIBIT C

**DECLARATION OF CHRIS ARABIA IN LIEU OF AFFIDAVIT
AS CONTEMPLATED BY NRS 253.045**


STATE OF NEVADA)
)
COUNTY OF NYE) ss.

I, Chris Arabia, do hereby declare under pain and penalty of perjury that the following is true and correct to the best of my knowledge and recollection:

1. Brent Percival has been walled off from the Engelson case and will not have access to information about the case once he is logged into the case management system.
2. Mr. Percival has currently not ever logged into the JustWare case management system.
3. Brent Percival has been placed on administrative leave, effective this date.
4. I did not hire Brent Percival to obtain any information or anything else about the Engelson case. No employee of my office has obtained any information or anything else about the case from Percival.
5. As far as I am aware, nobody else in the office has obtained any information or anything else about the Engelson case from Brent Percival and the people working on the case are aware that they should not discuss the case with Mr. Percival.
6. I was in favor of Mr. Percival beginning his employment with the Nye County District Attorney's Office as soon as possible because he is an excellent attorney of stellar character and experience, and because expediting his start would minimize the number of cases where he would be replaced by the successor Public Defender. This would benefit the courts, the DA's Office, and any successor Public Defender. The expedited transition process had absolutely nothing to do with the Engelson case.
7. Mr. Percival has not participated in any of the planning, strategizing, and preparation for the State's prosecution of the Engelson case. He will not participate in any aspect of the case or trial going forward.
8. Mr. Percival is an attorney of great honor and integrity and has never provided or offered to provide information or anything else about the Engelson case to the Nye County District Attorney's Office, to me, or to any of DAO's employees.

Further declarant sayeth NAUGHT.

DATED this 28th day of October, 2020.



Chris Arabia

NYE COUNTY DISTRICT ATTORNEY
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EXHIBIT D

AFFIDAVIT OF BRENT D. PERCIVAL, ESQ.

STATE OF NEVADA }
COUNTY OF CLARK } ss.

COMES NOW BRENT D. PERCIVAL, ESQ., being first duly sworn and under oath, and subject to the penalties of perjury of the laws of the State of Nevada deposes and states as follows:

1. Your affiant is an attorney, duly licensed to practice law before all of the courts of the state of Nevada, and the federal courts located within the states of Nevada and Kansas.

2. That until October 26, 2020, your affiant was employed as an independent contractor with Nye County, Nevada, serving as a Public Defender for Nye County, Nevada.

3. During my tenure as a Public Defender for Nye County, Nevada, I served as counsel for the Defendant Cole Engelson, who is presently before this court. I was Mr. Engelson's Public Defender from July 1, 2018 to Approximately February, 2020. At that point, I was replaced as counsel for Mr. Engelson by Dan Martinez and Ronnie Boskovich, who currently are serving as counsel for Mr. Engelson.

4. That in late September, 2020, I was offered a position with the Nye County District Attorney's office, which I opted to accept. I gave my notice to terminate my role as a Nye County Public Defender on September 26, 2020, which notice became effective on October 26th, 2020.

5. That since the time when I was last employed as public Defender for Mr. Engelson, I have not had any conversations with anyone in the Nye County District Attorney's office pertaining to this case, except to affirm my agreement and understanding with Mr. Arabia and the Nye County District Attorney staff that I was not to speak with any of them regarding the State of Nevada vs. Engelson matter.

6. That Since February of 2020, I have not had any conversations with any member of the District Attorney's office concerning this (State v. Engelson) case. I have not spoken with or corresponded with any member (attorney or administrative staff) of the Nye County District Attorney's office regarding this case, or any facet of this litigation.

7. Further, I have not reviewed, nor have I been asked to review any documents pertaining to the State vs. Engelson case, by either counsel for the Defense, or Counsel for the State. I am aware of my continuing responsibilities to the Defendant herein, and have in no way breached my responsibilities to him, or my duties under the Code of Professional Responsibility.

10. In short, I have had no communication, whether in writing, via electronic communication, or verbally with any attorney, member of the administrative staff, investigator, police officer, or any other agent of the County of Nye or State of Nevada concerning this litigation, the allegations giving rise to it, or the operative facts of the case since the date that the responsibility for Defendant Engelson's Defense was passed from my office to Mr. Daniel Martinez and Ms. Ronnie Boskovich.

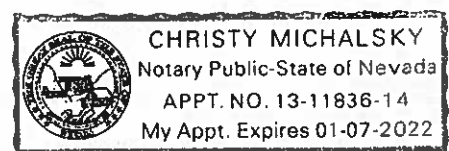
11. In this respect, your affiant is willing and ready to appear and testify concerning this subject matter at any time that the Court may direct, and I will do my absolute utmost to place everyone's mind at ease concerning the issue of communications between myself and representatives of the State of Nevada over the State v. Cole Engelson litigation.

FURTHER YOUR DECLARANT SAYETH NAUGHT.


BRENT D. PERCIVAL, ESQ.

SUBSCRIBED and sworn to before me
this 21st day of October, 2020.


NOTARY PUBLIC



NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

CERTIFICATE OF SERVICE

I, Renne McKeen, Executive Legal Secretary, Office of the Nye County District Attorney, Post Office Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

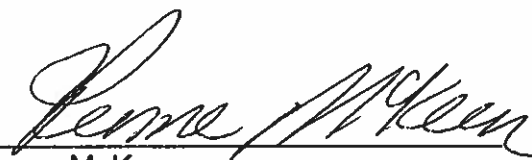
**Opposition to Defendant's Motion to Disqualify.
5TH JDC Case No. CR9226
STATE v. COLE ENGELSON**

upon said Defendant herein by personally delivering a true and correct copy thereof on

10/29/2020 to the following:

DANIEL MARTINEZ
daniel@danielmartinezlaw.com

RONNI BOSKOVICH
boskovichlaw@gmail.com


Renne McKeen

FILED
FIFTH JUDICIAL DISTRICT

FEB - 3 2021


Nye County Clerk
Deputy

No. CR0009226

Dept. No. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE HONORABLE ROBERT W. LANE, DISTRICT JUDGE

-oOo-

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

COLE DUANE ENGELSON,

Defendant.

)
) TRANSCRIPT OF PROCEEDINGS
) MOTION TO DISQUALIFY THE
) NYE COUNTY DISTRICT ATTORNEY'S
) OFFICE
)
)
) OCTOBER 29, 2020
) 3:00 P.M.
) PAHRUMP, NEVADA
)

APPEARANCES:

For the State:

KIRK D. VITTO, ESQ.
CHIEF DEPUTY DISTRICT ATTORNEY
Nye County Courthouse
Pahrump, Nevada 89060
Also Present: CHRIS ARABIA, ESQ.
DISTRICT ATTORNEY

For the Defendant:

DANIEL MARTINEZ, ESQ.
DEPUTY PUBLIC DEFENDER
552 East Charleston Boulevard
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RONNI BOSKOVICH, ESQ.
DEPUTY PUBLIC DEFENDER
3190 South Highway 160, Ste. H
Pahrump, Nevada 89048

The Defendant:

COLE DUANE ENGELSON

Reported by: CECILIA D. THOMAS, RPR, CCR No. 712

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

1 PAHRUMP, NYE COUNTY, NEVADA, THURS., OCTOBER 29, 2020

2 3:00 P.M.

3 -oOo-

4 P R O C E E D I N G S

5
6 THE BAILIFF: All rise.

7 THE COURT: Thank you. Good afternoon.

8 Please be seated.

9 MR. VITTO: Thanks, Judge.

10 THE COURT: Thank you.

11 This is Case No. 9226, State versus
12 Cole Engelson. Time and place set for a Defense
13 Motion To Disqualify the Nye County District
14 Attorney's Office. We'll hear from the Defense, then
15 Mr. Vitto.

16 MR. VITTO: Thanks, Judge.

17 MR. MARTINEZ: Thank you, Judge.

18 Your Honor, I know the Court's familiar
19 with the facts of this case, both the underlying
20 accusations and the procedural history here.

21 Our Motion to Disqualify is based on
22 Mr. Engelson's prior Counsel Brent Percival taking a
23 job with the Nye County District Attorney's Office.
24 He's taken that job. He started on Monday. What the
25 State has put in their Opposition in an affidavit is

1 that yesterday after we filed our Motion, they placed
2 Mr. Percival on administrative leave. So we filed --
3 Mr. Percival clearly -- I don't think there's any
4 question that Mr. Percival has a conflict on the case
5 and would obviously not be able to be any part of it
6 from the prosecution side. The question is whether or
7 not that conflict is imputed to the rest of the office
8 so much so that they would have to be disqualified
9 from prosecuting the case and the Court has to appoint
10 a special prosecutor.

11 In my Motion, I argued the appearance of
12 impropriety. Is there -- the State correctly pointed
13 out that the case that I argued that I relied on has
14 since been overturned, and has stated that that's no
15 longer the standard we're supposed to look at. That
16 is obviously my mistake, Your Honor. When this issue
17 became apparent when Ms. Boskovich and myself spoke,
18 we wanted to get something filed rather quickly, and I
19 rushed through it and didn't shepardize my case.

20 However, there is another case, State
21 versus Eighth Judicial District Court of Nevada, 220
22 Nevada unpublished Lexis 961, that they talk about the
23 appearance of impropriety there. The standard in
24 Nevada is whether or not the conflict in the whole
25 office creates a situation where the defendant does

1 not get a fair trial. That unpublished case goes on
2 to state that the appearance of impropriety, if it is
3 so extreme, can certainly create an unfair trial for
4 the defendant.

5 The case that said that, the case that laid
6 out the standard of whether or not there was an unfair
7 trial cited to a couple of out-of-state cases in which
8 they kind of defined what that would mean. They said
9 that what a trial court should focus on is whether
10 disqualification appeared reasonably necessary to
11 ensure the integrity of the fact-finding process, the
12 fairness or appearance of fairness of trial, the
13 orderly or efficient administrative justice, or public
14 trust or confidence in the criminal justice system.

15 The appearance of fairness of trial is kind
16 of what I'm hanging my hat on here, Your Honor. We
17 have a situation where Mr. Engelson's former counsel,
18 who was privy to all of the discovery, privy to
19 privileged communications, stopped being a public
20 defender and took a job with the District Attorney's
21 Office. That in and of itself is not a problem.

22 We know that out of Clark County, the
23 District Attorney in Clark County, the elected
24 District Attorney, was formerly a defense attorney,
25 Steve Wolfson. When he was elected and he went there,

1 his entire office doesn't need to conflict off all of
2 the cases where he previously represented the
3 defendants. We're not talking about that here where
4 it's a case where Mr. Percival previously represented
5 Mr. Engelson on a different matter that's completely
6 unrelated. He represented Mr. Engelson on this
7 matter.

8 What adds to that appearance of impropriety
9 is the fact that under our public defender contracts,
10 when we are vacating, when we are giving up those
11 contracts, we need to give 90 days notice that we
12 intend to do that. And Mr. Percival did do that.
13 However, he also said, "I would like to get out of my
14 contract early, because I would like to start by
15 November 1st at the latest with the District
16 Attorney's Office, just a few days before we were set
17 to start trial.

18 When the County Commission heard that, the
19 Board of Commissioners heard that, the elected
20 District Attorney here, Chris Arabia, made a statement
21 and encouraged them to let Mr. Percival out of his
22 contract early so he could start early with the
23 District Attorney's Office, and he did start early.
24 He started just this past Monday on October 26th, and
25 that creates that entire appearance of impropriety.

1 If someone's looking at this from the
2 outside, they're going to ask the rhetorical question
3 of what was the rush to get Mr. Percival over to that
4 office just a week before this big case is supposed to
5 start, this Murder case is supposed to start that
6 Mr. Percival was previously the attorney for the
7 defendant. The answer to that rhetorical question,
8 again, could lead to one of unfairness where the
9 defendant is not going to get a fair trial.

10 I note that the State has taken precautions
11 there, that they've walled off Mr. Percival so he's
12 going to have no involvement. Since we've filed our
13 Motion, they've even gone so far as to place
14 Mr. Percival on administrative leave.

15 And, Your Honor, the first statement in the
16 State's Opposition is that our Motion to Disqualify is
17 a meritless attempt to derail the criminal Murder
18 trial currently set to begin on November 4th, 2020. I
19 think the fact that they placed Mr. Percival on
20 administrative leave shows that there's at least some
21 merit to our motion, Judge. It shows that from the
22 State's perspective as well, they realize that there
23 is at least an appearance of impropriety. The
24 question is whether or not it rises to the extreme
25 level that there is the appearance that Mr. Engelson

1 is not going to get a fair trial, and that
2 necessitates the State, the Nye County District
3 Attorney's Office to be disqualified from the case and
4 the Court to appoint a special prosecutor.

5 And, Your Honor, I think that it does, and
6 that's what we're asking the Court to do today, is to
7 disqualify their office because there's no way to get
8 around that extreme appearance of impropriety that's
9 happened here with Mr. Engelson's former counsel going
10 to the other side and going to the prosecution and
11 everything being rushed through and forced through in
12 just a week before we were slated to start trial.

13 THE COURT: Thank you, sir.

14 Mr. Vitto.

15 MR. VITTO: I'm sorry. We're supposed to
16 have an evidentiary hearing; I was waiting for some
17 evidence. This Motion is so DOA. It was DOA before
18 the Defense presentation, and it didn't get any
19 better. This is specious. It is speculative. They
20 reference a case that if you pull it up on Lexis,
21 there's a big red stop sign. And we all know what
22 that means. So they come in, and then they reference
23 an unpublished case. Well, I've got a published case
24 for you, State v. Eighth. That's the case with
25 Steve Wolfson.

1 The authority for their position is old and
2 expressly overruled. With the advantage of Lexis, you
3 don't even have to shepardize, Judge, the way you and
4 I had to do. It's right there in front of you. The
5 primary authority for their position, the case
6 expressly overruling there's is of course State v.
7 Eighth Judicial District Court dealing with
8 Mr. Wolfson, the Clark County District Attorney.

9 In that case he had specifically
10 represented or had conversations with, confidential
11 communication with a person that his office was now
12 prosecuting, and the Court found that there was no
13 problem with the Clark County District Attorney's
14 Office going forward. There was no example of
15 anything that was extreme. And the Defense here is
16 correct that's the standard, and you've heard nothing
17 to support this being that kind of extreme case.

18 More importantly, Nevada has specifically
19 included, specifically provided for in the ethical
20 rules they have adopted, provision for exactly this
21 scenario. And why? Because the government is
22 entitled to avail themselves of the very best legal
23 professionals available. You clearly are vested with
24 the discretion to decide this matter. What you have
25 before you, Judge, is by no stretch of any imagination

1 any kind of, quote-unquote, extreme case that would
2 warrant recusal of the entire Nye County District
3 Attorney's Office. The Defense here today right now
4 is the moving party. They have the burden of showing
5 you that the measures in place are inadequate. And
6 they can't do that; they haven't done that.

7 If convicted, this will have no traction on
8 direct appeal. Having brought the matter before you
9 now, it can't be game said that they were ineffective
10 for not bringing it, and the issue will fail at PC
11 should the defendant be convicted at trial. They are
12 the moving party. There's no presumption here.
13 There's no presumption that the DA's Office should be
14 completely disqualified. There's nothing that we have
15 to rebut. They haven't brought forth an extreme case
16 that we would have to rebut. They haven't brought you
17 anything that would support a finding that this was
18 the extreme case where you had to disqualify the
19 entire Nye County District Attorney's Office.

20 There is no valid appearance of impropriety
21 that is expressly overruled. We have our affidavits
22 attached to our Opposition that outline the measures
23 that have been taken. They are completely, expressly
24 inline with the ethical rules of exactly what you're
25 supposed to do, what every case talks about as far as

1 that specific attorney being walled off. We've done
2 that. It's allowed. It's proscribed how you do that.
3 We have done that, as our Affidavits attest.

4 And, Judge, we had our witnesses ready if
5 the Defense were going to present a case, some
6 evidence, with witnesses that we would have to rebut.
7 We have Vanessa, Renne, Chris Arabia, and
8 Brent Percival ready to testify. They'll testify
9 consistent with their affidavits. If that's enough
10 for you, that's fine. If you want to hear from them,
11 the case law that explains these situations says that
12 this is solely within your discretion after listening
13 to a totality of the circumstances at an evidentiary
14 hearing. I'm here ready to present evidence.

15 The point is that I'm trying to make here
16 now is that there's no evidence to counteract any
17 evidence that the Defense has presented, because they
18 haven't presented any evidence that this is an extreme
19 case; that we shouldn't just follow the rules, follow
20 the case law, which we've done to the letter
21 completely, exactly. We're fine here. This isn't an
22 appellate issue. It's now no longer a post conviction
23 issue should there be a conviction.

24 The appearance of impropriety fails as a
25 standard. It's been expressly overruled, because the

1 societal impact with keeping out lawyers, governing
2 lawyers, not allowing lawyers to move into government
3 practice, that kind of thing, and not getting trials
4 completed because of these kinds of motions outweighed
5 it. It's gone. It's no longer a part of this
6 exercise, expressly overruled.

7 Judge, if you want to hear from Vanessa,
8 Renne, Mr. Arabia, and Mr. Percival, I'm ready to call
9 them to the stand. I don't think it's necessary.

10 THE COURT: Thank you, sir.

11 Mr. Martinez?

12 MR. MARTINEZ: Briefly, Judge. I know
13 Mr. Vitto had said that we have not presented any
14 evidence today, and we haven't. The purpose of an
15 evidentiary hearing with witnesses is when the facts
16 are an issue. I don't believe the facts are an issue
17 here. The State hasn't rebutted any of the facts that
18 we've said in our affidavit about what has happened
19 for Mr. Percival to take a job. I'm not rebutting any
20 of the evidence that they've said in their affidavit.
21 I firmly believe that that's everything that they've
22 done to wall Mr. Percival off and make sure that he's
23 not going to have anything to do with this case.

24 The question is we know what the law is, we
25 know what the facts are. Have the facts reached that

1 level of being so extreme that the State's office
2 needs to disqualify themselves. I believe that they
3 do, Judge, and I'm asking the Court to issue an order
4 disqualifying them.

5 THE COURT: Thank you, sir.

6 What we're doing today is not a unique
7 case. As you noted, when Wolfson became the DA of
8 Clark County, there was a multitude of cases. And in
9 the last 27 years I've been practicing in this
10 jurisdiction, there's been a multitude of cases. It's
11 quite common.

12 As we all know, Nate Gent comes and goes
13 and Percival and a whole bunch of other attorneys come
14 and go from the DA's Office. And each time they do,
15 there's a series of motions filed to recuse them from
16 the case. And each case is fact specific.

17 Ninety-nine percent of the time it's going
18 to be denied, because it's just a standard they hire a
19 Defense attorney and they put up a screen or a Chinese
20 wall as it's called. And the State comes in and says,
21 "Yeah. We put up the Chinese wall, and it's
22 perfunctory; there's nothing there."

23 In this case, having read your brief and
24 listened to your argument today, so far as I can tell,
25 you're saying the stipulated facts that merit this

1 case being the exception is (1) in your brief -- that
2 you didn't mention in argument to my surprise, because
3 I thought it was what you were going to mainly hang
4 your hat on -- and that is that you said in your brief
5 that when Mr. Percival represented Mr. Engelson in the
6 past, that he violated the attorney-client
7 relationship and shared privileged communication.
8 That was news to me.

9 When I took Mr. Percival off of
10 Mr. Engelson's case and appointed you two, it was for
11 the health reasons because I thought you two would do
12 a better job than Mr. Percival for such an important
13 case. I don't have any recollection of me making a
14 finding that it was because he shared and violated
15 that attorney-client duty privilege.

16 And I was thinking and hoping maybe you
17 would come in today and tell me, "Look, we have an
18 example of Mr. Percival violating that and sharing
19 confidential information with the DA or a cop or
20 somebody. And of course, if you had such information,
21 such evidence, then I would say, "Oh, maybe
22 Mr. Percival is not to be trusted. He went to the
23 DA's Office, maybe he's sharing information there."
24 That was the first hook on the wall you hang your hat
25 on.

1 The second one was, that you argued today,
2 was this an unusual circumstance, and we both
3 stipulate because Mr. Percival was hired the week
4 before the trial and it was sped up. It should have
5 been around January 1st or something, but for some
6 mysterious reason we can speculate on, they hired him
7 right before the Engelson trial, and even went out of
8 the way to go to the Commissioners and ask them to
9 speed it up, and so forth.

10 And in conjunction with that, you said,
11 "And now suddenly today or yesterday or some recent
12 time, they put him on administrative leave, adding
13 further evidence to the fact that this isn't the
14 normal case," and so forth.

15 MR. VITTO: Judge, let me --

16 THE COURT: However, when you talk about
17 that situation of they hired him the week before, they
18 put him on administrative leave, it seems speculative
19 to me. Not quite sure what that is evidence of.

20 You can ask -- you can call witnesses too,
21 and you can ask the state, the DA or someone -- to
22 take the stand, "Why did you hire him so quickly? Why
23 did you put him on administrative leave?" I don't
24 think Mr. Vitto addressed that in his argument, and he
25 wants to right now and he's goings to in a moment.

1 But those are the only two things I see you hanging
2 your hat on that takes us outside of knowing every
3 case where I might contemplate granting your request.

4 But right now it's speculative. I haven't
5 seen any evidence that I made a finding that he shared
6 privileged communication in the past, and I am only
7 speculating on the administrative aspect. So is there
8 anything you would like to add or supplement to what I
9 just said in summarizing the case?

10 MR. MARTINEZ: And, Judge, you did not make
11 a finding that he shared any sort of privileged
12 communication. That was -- as the Court knows,
13 Mr. Engelson did ask the Court to remove Mr. Percival
14 at one point on the case and proceed pro se. That was
15 one of the reasons why was he believed Mr. Percival
16 was sharing that privileged communication. Solely, it
17 was an accusation from Mr. Engelson. And like I said,
18 there was no --

19 THE COURT: You could put him on the stand
20 to say, "Here's the evidence I have he shared
21 privileged information."

22 MR. MARTINEZ: Well, of course, Judge.
23 And, Judge, to be blunt, you're absolutely right.
24 That is speculative. It's the appearance of
25 impropriety, and I will --

1 THE COURT: What's impropriety?

2 MR. MARTINEZ: Understood, Judge. And I
3 guess, I'm a big sports fan, Judge. I know your
4 marshal is too, and I know Mr. Vitto as well,
5 especially with the NFL.

6 Every week in the NFL, you will have teams
7 who pick up a player off a practice squad of a team
8 that they're not playing. They can bring that player
9 in, they can talk to them, find out what the other
10 team's plays are, audibles, and their secrets are.
11 Then they play the other team, they use it, and then
12 they fire that person.

13 This is kind of that situation from where
14 I'm seeing it, and you're absolutely right, Judge. It
15 is speculation. I'm not going to have any hard
16 evidence of that. I don't have anything to back it
17 up. But when I'm looking at this person from the
18 outside, when I see what's going on, it doesn't pass
19 as nothing.

20 THE COURT: But do you not want to call a
21 witness to come up and say, "Why why did you put him
22 on administrative leave yesterday?" or "Why did you
23 hire him right before the Engelson case?" You don't
24 want to do that?

25 MR. MARTINEZ: Judge, I know when an

1 employee from the DA's Office gets placed on
2 administrative leave, we're just told that they get
3 placed on administrative leave. And I don't know if
4 we're going to be violating any sort of duty or if
5 there's any duty to be violated there if we do put an
6 employee from the District Attorney's Office on the
7 stand.

8 THE COURT: Perhaps you can make the
9 question in an affirmative context, "Don't tell me why
10 you put him on administrative leave. Did it have
11 anything to do with the Engelson case? Was he sharing
12 information," and so forth.

13 MR. MARTINEZ: Judge, if that's the case, I
14 think we need to call Mr. Arabia to the stand.

15 THE COURT: Let's hear from Mr. Vitto
16 first, and we'll call him if needed.

17 MR. MARTINEZ: All right.

18 MR. VITTO: Can I have your indulgence just
19 one moment, Judge?

20 THE COURT: Thank you, sir.

21 MR. VITTO: Judge, yeah, real succinctly,
22 it's their burden. These are unsupported statements
23 of counsel. There's no affidavit. Mr. Percival was
24 put on administrative leave yesterday. As we
25 discussed the Defense motion, it was simply and purely

1 and 100 percent done out of an abundance of caution.

2 If anybody is look -- he's not here. We
3 sent him home. If anybody thinks, worries, whatever,
4 that's the only reason it was done, the only reason it
5 was done. I was sitting in the room at the time. If
6 I'm not mistaken, there were at least two trial
7 dates -- I could be wrong. My recollection is that
8 there were two trial dates that were vacated with new
9 counsel.

10 My point is that if we were going to try to
11 manipulate something, wouldn't we have hired Percival
12 then. I mean why now? But anyway, I can't remember
13 exactly how many trial dates were vacated. But,
14 Judge, look, the bottom line is this. They're
15 supposed to carry the day and they haven't; they've
16 fallen woefully short. This motion should be nothing
17 but denied.

18 THE COURT: Thank you, sir.

19 Anything else?

20 MR. MARTINEZ: Since Ms. Boskovich and I
21 have been on the case, Judge, one trial date has been
22 vacated. It's the trial dates that we had set in
23 August. It was vacated due to Covid, not to our
24 motion.

25 MR. VITTO: Thank you, Counsel.

1 THE COURT: Thank you sir.

2 I was listening when you said earlier that
3 Mr. Percival could have been hired by them and shared
4 information. And in my head I was thinking, "Well, he
5 could have shared information anytime. It didn't have
6 to be the day he was hired and came on board or the
7 day he was put on administrative leave he stopped.
8 That's all speculative also. It could have been any
9 time.

10 If neither side is calling witnesses, then
11 I would have to say that the burden has not been met.
12 And we're into the standard case of besides
13 speculation of the fact that the DA hired a PD, as
14 long as Mr. Percival, as an attorney as is his ethical
15 duty is stating in his affidavit and/or testimony that
16 he is not and has not shared any information with the
17 State, and that screen or Chinese wall is up, then the
18 motion will be denied.

19 MR. VITTO: Thanks, Judge.

20 THE COURT: Anything else?

21 MR. MARTINEZ: No, Judge. Thank you.

22 THE COURT: By the way, gentleman and
23 ladies, we are having a trial start on Wednesday, I
24 believe at nine o'clock. We're going to start pulling
25 the jury. And I think I usually, my standard

1 procedure is to say, "And we will meet at 8:30 to do
2 any pretrial motions we need to do before we call the
3 jury."

4 Anything in mind currently that we need to
5 meet at 8:30 for?

6 MR. MARTINEZ: Not on that day, Judge.

7 MR. VITTO: No, Judge.

8 THE COURT: You'll let us know if you do.

9 MR. MARTINEZ: Of course. Thanks, Judge.

10 THE BAILIFF: All rise.

11 -oOo-

12

13 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE
14 PROCEEDINGS.

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17

Cecilia D. Thomas

18

Cecilia D. Thomas
RPR, CCR No. 712

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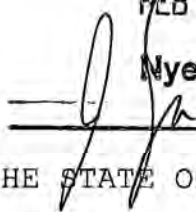
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No. CR-9226

Dept. No. 2

FILED
FIFTH JUDICIAL DISTRICT

FEB 05 2021


Nye County Clerk
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE HONORABLE ROBERT W. LANE, DISTRICT JUDGE

-oOo-

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON,

Defendant.

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 1

NOVEMBER 4, 2020

10:25 A.M.

PAHRUMP, NEVADA

APPEARANCES:

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The Defendant:

COLE D. ENGELSON

Reported by: CECILIA D. THOMAS, RPR, CCR No. 712

1 PAHRUMP, NYE COUNTY, NEVADA, WEDNESDAY, NOVEMBER 4, 2020

2 9:05 A.M.

3 -oOo-

4 P R O C E E D I N G S

5

6 THE BAILIFF: All rise.

7 THE COURT: Good morning. Thank you.

8 Please be seated.

9 MR. VITTO: Thank you, Your Honor. Good
10 morning, Your Honor.

11 MR. ARABIA: Good morning, Your Honor.

12 THE COURT: Okay. Where are we? What's
13 going on? Welcome to the Fifth Judicial District
14 Court, Department 2. Time and place set for -- is it
15 working now? Oh, okay.

16 I'm Judge Lane. Today we're going to begin
17 a trial by starting to pull a jury on Case No. 9226,
18 State versus Cole Engelson. All the officers of the
19 court and citizens for the jury are present. The
20 State's ready. Defense has declared ready. We're
21 going to invoke the exclusionary rule.

22 Good morning, ladies and gentlemen. You've
23 been summoned to Department 2 of the Fifth Judicial
24 District Court of the State of Nevada to serve as
25 jurors in a criminal case. This case is scheduled to

1 last about three weeks. This isn't as fun when
2 they're wearing masks. I can't see the shocked look
3 on their faces. I don't think it will last that long,
4 but we scheduled it to last three weeks depending on
5 the number of witnesses and so forth.

6 It involves allegations about First-Degree
7 Murder, which we'll give you more information about
8 shortly. It should be a unique learning experience
9 for you and perhaps an enjoyable one. I sat on a jury
10 once about 40 years ago, and I enjoyed it. Hopefully,
11 you'll enjoy it.

12 If there was anybody summoned to come in
13 today to be a juror and they failed to appear and they
14 were not previously excused by me, they will be
15 ordered into Court and may be fined up to \$500 if they
16 fail to show cause of why they didn't appear for jury
17 service. So with the election and Covid and
18 everything else, let me sincerely thank all of you for
19 coming in today to do your civic duty. Obviously, the
20 system wouldn't work if we didn't have good, neutral
21 citizens willing to sit and hear the evidence and make
22 decisions. On behalf of the District Attorney's
23 office and the Public Defenders and the defendant and
24 myself, thank you all very much for coming in.

25 The first part of the trial that we're

1 beginning today is called the "voir dire," which means
2 to learn the truth. This Court, the lawyers and
3 everyone involved in this case are deeply interested
4 in having this matter tried by a jury composed of 12
5 open minded people who are completely neutral and who
6 do not have any personal prejudice for or against
7 either side.

8 In order to accomplish this desired result,
9 it's going to be necessary for us to ask you some
10 questions. We do not mean to pry into your personal
11 lives. Our only objective is to determine whether or
12 not there's any reason that any of you cannot sit as a
13 fair and impartial juror in this case. The questions
14 of the jury at the start of the trial are done under
15 oath. So I'm going to ask all potential jurors to
16 stand up and raise your right hand and be sworn.
17 Whereupon,

18 THE JURY PANEL,
19 is sworn to well and truly answer all questions put to
20 them touching upon their qualifications to serve as
21 jurors in the case now pending before them in this
22 court.

23 THE COURT: Thank you. Have a seat. It's
24 important that you know the significance of full,
25 complete, and honest answers to all of the questions

1 you are asked. I caution you not to try and hide or
2 withhold anything which might indicate bias or
3 prejudice of any sort by any of you. Should you fail
4 to answer truthfully, or if you hide or withhold
5 anything touching upon your qualifications, that fact
6 may tend to contaminate your verdict, subject you to
7 further inquiry after you're discharged as jurors. We
8 may bring you back to ask more questions. And
9 additionally, it could cause the repeat of a trial.

10 I'm going to ask some general questions of
11 the whole panel, and if you have an affirmative answer
12 to it and you raise your hand and say you want to talk
13 to me, I'm going to ask you to stand up and say your
14 name real loud because our court reporter is recording
15 every word of this. And I think we're also recording
16 it by tape. And then I will ask you your name, and
17 we'll get the answer to the question.

18 So let's begin with the general questions.
19 Is there anybody here today who does not have
20 sufficient knowledge of the English language to sit as
21 a juror?

22 Is there anyone who is not a legal resident
23 of the United States, Nevada, or Nye County?

24 Is there anyone who is lawfully or
25 unlawfully using a fictitious address? An example of

1 that is you might be a Delaware Corporation or
2 something, and you're using a Nevada address or
3 Delaware, and you don't really live here, but you're
4 using a fictitious address. Anybody like that? All
5 right.

6 Is there anybody over 70 years old who
7 would like to be excused? The Nevada statutes say
8 that if you're over 70, you don't have to serve on a
9 jury.

10 Is there anybody who is over 65 years old,
11 but lives more than 65 miles from the courthouse?

12 Is there anybody who cannot be here due to
13 public necessity? An example of that is you may not
14 know this, but there is a water main that runs down
15 Main Street. It's broken, it's gushing water, And
16 you're the only person in town that knows how to fix
17 that water main. That's a public necessity. Anybody?
18 Okay.

19 THE COURT REPORTER: There's a hand.

20 THE COURT: Yes, sir. Your name?

21 PROSPECTIVE JUROR DEFRIEZ: Stephen Defriez.

22 THE COURT: All right.

23 PROSPECTIVE JUROR DEFRIEZ: I'm a physical
24 therapist. I'm the only one that does the wound care
25 out here.

1 THE COURT: All right. We're going to get
2 to jobs in just a minute. And then half of you are
3 going to raise your hands and say, "I have to work and
4 make a living." Right now we're just looking at
5 public necessity.

6 All right. Is there anybody here who
7 believes that they cannot serve because you yourself
8 suffer from a sickness or physical infirmity?

9 All right. We've already excused two.
10 Let's start with this person.

11 PROSPECTIVE JUROR LINDSEY: My name is
12 Loyd Lindsey, and I've got brain damage. And I get
13 temporary memory loss sometimes. So I can't
14 remember -- I may not remember being here today
15 tomorrow --

16 THE COURT: All right.

17 PROSPECTIVE JUROR LINDSEY: -- because of
18 my brain damage.

19 THE COURT: Okay. Whenever a citizen says
20 to me that they have something like that, that's legit
21 and we can let you go. We just need a note from your
22 doctor or something confirming it; okay?

23 PROSPECTIVE JUROR LINDSEY: I can probably
24 get one. I don't have one on me.

25 THE COURT: Yeah, otherwise, citizens come

1 in and say something like that just to get out of jury
2 duty. But if you have a note from your doctor saying
3 you have brain damage and short-term memory and so
4 forth, then we're okay.

5 PROSPECTIVE JUROR LINDSEY: When do I need
6 to bring it? I don't have it on me today.

7 THE COURT: Louise, how long does it take
8 until we hold the sanction hearings?

9 COURT STAFF: A couple of weeks. A couple
10 of weeks.

11 THE COURT: A couple weeks good?

12 COURT STAFF: Yeah. Did you get his name?

13 THE COURT: Just bring it by the office --
14 the doctor's note, and we'll take a look at it, and
15 you should be good to go.

16 COURT STAFF: He can go; correct?

17 THE COURT: Correct. Thank you, Loyd, for
18 coming in.

19 The next hand? Yes.

20 PROSPECTIVE JUROR OSTRENGER: Name is
21 Dakota Ostrenger, Type 1 diabetic. Just constantly
22 having food on me in the courtroom, possibly
23 (inaudible) going up. I don't want to, say --

24 COURT REPORTER: I can't hear him.

25 PROSPECTIVE JUROR OSTRENGER: I don't want

1 to say, my blood sugar to drop low and have to eat in
2 the middle of the court or anything like that and
3 cause a distraction. Or say, my blood sugar is going
4 high. Just (inaudible) maybe causing a distraction in
5 the courtroom.

6 THE COURT: All right. The distraction
7 wouldn't bother me, but let me see if either of the
8 attorneys have objections to you. If you have to eat
9 a candy bar or something in the middle of the court,
10 it's fine with me.

11 Any attorneys have any concerns or
12 objections?

13 MR. ARABIA: No.

14 THE COURT: All right. You'll be okay.

15 PROSPECTIVE JUROR OSTRENGER: All right.
16 If it's low, it's not going to affect my decision or
17 anything like that with you guys.

18 THE COURT: No. You'll be fine. Over the
19 last 20 years I've been doing this, occasionally we
20 have diabetics and everything has worked out fine so
21 far.

22 Sir?

23 PROSPECTIVE JUROR KENNY: Yeah, I have
24 breathing problems, and I got doctors' appointments to
25 take scans and x-rays and stuff the next three to four

1 days and next week.

2 THE CLERK: And your name?

3 PROSPECTIVE JUROR KENNY: Dave Kenny.

4 THE COURT: All right. Dave, you let my
5 staff get copies of that proving that you have those
6 appointments for the scans and doctors, and we'll let
7 you go.

8 PROSPECTIVE JUROR KENNY: Okay.

9 THE COURT: You can give it to Louise
10 there.

11 MR. ARABIA: What was the last name?

12 THE CLERK: Kenny, K-e-n-n-y.

13 THE COURT: K-e-n-n-y.

14 Yes, sir?

15 UNIDENTIFIED PROSPECTIVE JUROR: Yeah, I
16 have chronic silicosis of the lungs. I would like to
17 participate, but if I am forced to put the mask over
18 my nose, I start sweating and I will pass out and I
19 can't breathe.

20 THE COURT: You can have your mask off your
21 nose.

22 UNIDENTIFIED PROSPECTIVE JUROR: Can I have
23 it like this?

24 THE COURT: Yeah.

25 UNIDENTIFIED PROSPECTIVE JUROR: Then I'm

1 good.

2 THE COURT: All right.

3 UNIDENTIFIED PROSPECTIVE JUROR: Thank you.

4 THE COURT: Yes? Your name?

5 UNIDENTIFIED PROSPECTIVE JUROR: My name?

6 THE BAILIFF: Stand up and say your name,
7 please.

8 THE COURT: You don't have to stand up if
9 you have an ailment.

10 PROSPECTIVE JUROR TWO: Yeah, I have the
11 same thing kind of with low blood sugars, so I may
12 have to be eating during meeting too. I just wanted
13 to let you know.

14 THE COURT: I appreciate that. Thank you.
15 That's fine.

16 Anyone else? Yes, sir?

17 PROSPECTIVE JUROR WARESK: Ken Waresk. My
18 other half has doctors' appointments for cancer,
19 (inaudible), stuff like that. She's got an
20 appointment on the 11th and the 17th for a surgery.
21 And I'm the only person that takes her back and forth.

22 THE COURT: In this case right now, what
23 you're saying -- and in the next couple of questions
24 we're going to have citizens say that they have a
25 situation where it would be much more convenient for

1 them to be excused. And on each one, I'm going to say
2 to you, "Let me see what I can do." If we have enough
3 jurors at the end of the jury draw that I can excuse
4 you and put somebody else on, I will do it.
5 Our problem is, as you can all imagine, a three-week
6 trial for a charge of Murder during Covid and so forth
7 is really limiting our jurors. We thought we drew an
8 excessive number, and it turns out after we've done
9 the math that it's going to be very tight and we have
10 to be able to sit a jury. So I'm going to try and let
11 you go, but not right at this moment. All right.

12 Can somebody jot his name down for me so
13 that -- very good. And the reason.

14 THE BAILIFF: What was your name again?

15 PROSPECTIVE JUROR WARESK: Ken Waresk.

16 THE COURT REPORTER: I didn't hear it.

17 What?

18 PROSPECTIVE JUROR WARESK: Ken Waresk.

19 COURT STAFF: Ken --

20 PROSPECTIVE JUROR WARESK: Ken Waresk

21 COURT STAFF: -- Waresk.

22 THE COURT: Ken Waresk, W-a-r-e-s-k.

23 Anybody else with a physical infirmity or
24 sickness? All right.

25 Now, the next question on the list is what

1 Ken just addressed, which is do you have a family
2 member at home with a physical ailment or sickness
3 that you have to be home for? If you stand up and
4 tell me it's this or that, I'll probably say to you
5 what I said to Ken which is, "I will try and let you
6 go if we have enough jurors at the end." Anybody else
7 has a family member with a sickness or physical
8 infirmity that you need to be excused for, besides
9 Ken? All right. Very good.

10 Is there anyone who has a serious illness
11 or death in your immediate family?

12 All right. The next one is for jobs. It
13 says, "Is there anyone who cannot serve today for this
14 jury because it would cause you undue hardship or
15 extreme inconvenience? That's the work one where you
16 say you have to work. Why don't you go first again.
17 We'll write your name down and write it.

18 PROSPECTIVE JUROR DEFRIEZ: My name is
19 Stephen Defriez. I'm a physical therapist. I see
20 wound care patients. I'm the only one that does that.

21 THE COURT: All right. Did you get
22 Stephen's name?

23 All right. Steven, same thing. If we're
24 down to the last person and we can't do the trial
25 without you, you'll have to stay. But if we have

1 other jurors that can step in and take your place, I
2 will see what I can do to let you go.

3 PROSPECTIVE JUROR DEFRIEZ: It's my
4 patients as well.

5 THE COURT: Yes, I understand. You will
6 have a high priority to be cut loose if we can.

7 PROSPECTIVE JUROR PINTO-DEALCARAZ: Yeah,
8 my name is Fani Pinto, and I'm the only provider for
9 my household. I have five dogs that I have to take
10 care of. I live by myself, and if I don't work, I
11 don't get paid. And I can't afford not to work.

12 THE COURT: All right. How do you spell
13 your last name?

14 PROSPECTIVE JUROR PINTO-DEALCARAZ: Pinto,
15 P-i-n-t-o, Dealcaraz. I just got divorced last year,
16 and I don't have alimony. I'm on my own.

17 THE COURT: All right. And again, when
18 citizens stand up and say stuff like you just said, my
19 heart goes out to you. If I could right now, if I had
20 70 more jurors, I would kick you loose.

21 By the way, ladies and gentlemen, because
22 of Covid, we would normally do this in the courthouse,
23 and we would normally have all the jurors show up at
24 once. We're doing it in panels. You're the first
25 panel. After lunch, we're going to have a second

1 panel of whole new people, and tomorrow morning we're
2 going to have a third panel.

3 Sounds like a lot to you, but we're going
4 to draw 16 jurors, and we have 20 peremptories. And
5 lot of people are going to stand up and say Covid or
6 work and so forth. I'm hoping by lunchtime tomorrow
7 we'll be able to sit 16 jurors and let you go and let
8 you go, or sooner. But I'm worried that we may not
9 have enough jurors; so we'll see how it goes. I will
10 see if I can kick you loose.

11 PROSPECTIVE JUROR PINTO-DEALCARAZ: Thank
12 you.

13 THE COURT: Young lady?

14 PROSPECTIVE JUROR STUMNE: Ginger Stumne.
15 I'm the public administrator. So I could possibly do
16 it, but it's going to take me a few days to see if
17 there's somebody else that can take hold.

18 THE COURT: All right. Ginger is the
19 public administrator. She comes in court in front of
20 me regularly and angers me; so you have to stay on the
21 jury.

22 PROSPECTIVE JUROR STUMNE: I was prepared
23 for that.

24 THE COURT: We'll see what we can do to
25 kick you loose, Ginger.

1 PROSPECTIVE JUROR RANOWEL: I'm
2 self-employed. I work at home in Las Vegas after
3 (inaudible). And the people I have to have the work
4 done for have Covid. And I'm the only one.

5 THE COURT: All right. Let me get your
6 name again and your last name.

7 PROSPECTIVE JUROR RANOWEL: Jeff Ranowel.

8 THE COURT: Thank you. Jeff, same thing.
9 We're going to prioritize. Like we'll probably kick
10 the guy with patients out first and then the young
11 lady who is struggling, but if we can kick you loose
12 too, we'll do it.

13 Anybody else? Undue hardship or extreme
14 inconvenience, something like that, the question was.
15 Anybody? All right. Very good.

16 Is there -- these next couple of questions
17 I'm going to ask you are -- it's fine with me if you
18 tell me publicly. Three minutes after you leave, I
19 will forget all about it, and I imagine most people
20 will. But if you're shy and you don't want to answer
21 publicly, just let my bailiff Jamele know or the top
22 legal secretary in the State of Nevada. What do they
23 call that position?

24 THE CLERK: Louise.

25 THE COURT: Administrative assistant or

1 something -- anyway, Louise. Let Jamele or Louise
2 know the answer to these next two questions. If
3 there's anybody who has been convicted of a felony,
4 treason, or other infamous crime and cannot serve,
5 please tell the bailiff or staff.

6 Lastly, same thing, if there's anybody here
7 who is incapable of being a juror because of a mental
8 infirmity, paranoia, schizophrenia, whatever, just let
9 my staff know if you're too shy to tell me publicly.

10 All right. We're going to take a break in
11 about an hour-and-a-half to give everybody a chance to
12 go to the restroom, and so forth. But if there's an
13 emergency, you need to be excused, just raise your
14 hand and let me know to go to the restroom. We can't
15 have you get up and leave just in the middle of court,
16 because we're all going to be asking questions and you
17 need to hear every question that's going to be asked.

18 A lot of the questions are going to be
19 redundant. And after we ask the first ten jurors the
20 same questions, we might turn to Juror No. 11 and say,
21 "Anything you want to say?" And if you don't hear all
22 of the questions, you might not know the answers.

23 We're going to start calling the jurors
24 now. We've numbered the seats, and we'll try and be
25 patient about it and say Juror No. 1, Juror No. 2, and

1 ask you to sit in the appropriate seats.

2 And then the attorneys are going to begin
3 asking some -- they will ask a general question of the
4 whole panel. Then we'll start with the individual
5 jurors, one through 16, and ask questions. Please pay
6 attention to all of the questions. Let's see what
7 else. All right. Let's go ahead and call the first
8 16 jurors.

9 THE CLERK: Daryl Fernandez.

10 THE COURT: Daryl, if you'll come on down
11 here to seat No. 1 in the front row.

12 Also, ladies and gentlemen of the jury, if
13 you have a physical ailment or can't hear good or
14 something, let us know. We can move you around if we
15 need to. We'll put Daryl in No. 1.

16 THE CLERK: No. 2, Fani Pinto-Dealcaraz.

17 THE COURT: Fani Pinto-Dealcaraz, Juror
18 No. 2.

19 Juror No. 3?

20 THE CLERK: Nancy Bieberdorf.

21 THE COURT: Nancy, right there.

22 THE CLERK: Roy Archuleta, No. 4. No. 5,
23 Jana Oxborrow. No. 6, Dana Hall. No. 7,
24 Gregory Dann. No. 8, Linda VanHuisen. No. 9,
25 Richard Sandoval, Jr. No. 10,

1 Rowena Charfauros-Spadt. No. 11, Curtis Perry.
2 No. 12, Michael Ritter. No. 13, Kay Payton. No. 14,
3 Virginia Sells. No. 15, Lori Barton. And No. 16,
4 Kohli Perry Theresa Rose.

5 THE COURT: I'm going to ask some -- this
6 isn't my normal courtroom. There's some general
7 questions I'm going to ask of the panel, of the 16
8 again. Raise your hand if you want to answer it
9 affirmatively.

10 Is there anybody who can't be here due to a
11 hardship to your business?

12 Is there anyone who can't be here because
13 of neck, back, hearing, dental problems?

14 We handed a handout to each of you on the
15 sheet with a whole bunch of names on it. It shows the
16 parties. So let me introduce them real quick. The
17 handsome, young man here is our District Attorney
18 Chris Arabia. The handsome young man next to him
19 is -- Kirk, I can't remember, are you older than me?
20 I think you are.

21 MR. VITTO: A couple of months.

22 THE COURT: Deputy District Attorney
23 Kirk Vitto is the old guy sitting there. Public
24 Defender Dan Martinez. Public Defender
25 Ronni Boskovich. And the defendant is Mr. Engelson.

1 There's also a list of a whole bunch of
2 names, potential witnesses for today's trial. I need
3 you to take a minute, read through all of those names.
4 Because in a minute, we're going to ask you if know
5 anybody -- any of the parties we just introduced to
6 you or any of the parties on the list; do you know any
7 of them. Take a minute to read through that, and then
8 I'll start asking you questions.

9 I'm going to read through it real quick for
10 you. I'm just going to do it in English. If any of
11 you only speak fluent Chinese, I can't help you.
12 Ready?

13 David Boruchowitz, Alexandra Fernandes,
14 Corey Fowles, Scott Lewis, Michael Eisenloffel,
15 Tammy Carroll, Logan Gibbs, William Snow, James Rosen,
16 Max Santos, Kishanna Marquez, Christopher Sehnert,
17 Wes Fancher, Kevin Jensen, Jose Parra, Shawn Locascio,
18 Nicole Van Aken, Marlissa Collins, Luis Hernandez,
19 William Kehoe, Jr., Alex Cox, Christopher Pullen,
20 Natasha Ortiz, Tracy Bish, Matthew Smith, Steve Moody,
21 David Markwell, James Mercer, Yancey Camp,
22 Dr. Ahmed Moussa, Dwight Camp, Victoria Schlick,
23 Roann (Hamman) Hull, Dr. William Anderson,
24 Tammyla Blakeley, Nickole Robinson, Christine Francis,
25 John Hanson, Dr. Leonardo Roquero, John Lepore,

1 Steve Kafton, Joshua Teter, Christine Maloney,
2 Dr. Terri Haddix, Dr. Christina Kong, Kaitlyn Amaya,
3 Laura Labay, James Burke, Chris DeFonseka,
4 Carol Retamozo, Edward Plowey, Amanda Shum,
5 Christine Whittle, Brianne Huseby, Leah Groveman -- or
6 Leah Groveman, Colton Williams, Dakota Roth,
7 Crystal Barajas, Todd Arms, Cody Vigil,
8 Cole Elngelson, Alexa Chevalier Partain,
9 Yvette Chevalier, Sharon Sayre, Amanda Senger,
10 Ashley Castillo, Tammy McGill, Joe McGill,
11 Terrance Murphy, Greg Ash, and Kristin Greene.

12 All right. Let's tart start with the
13 questions. The first one is: Is there anybody who
14 has a relationship with the defendant,
15 Cole D. Engelson, where you're related by blood,
16 debtor-creditor, guardian-ward, master-servant,
17 employer-employee, family-partner, security or bond?
18 Does anybody have a relationship with the defendant?

19 Is there anybody who knows or has been
20 represented by the defense attorneys --
21 Ronni Boskovich and Daniel Martinez, or have a
22 relative represented by them?

23 Is there anyone who knows any of -- let's
24 start with the DA's Office -- anybody who knows the
25 DA; works with them; knows Mr. Vitto, Mr. Arabia; had

1 cases with them; and so forth?

2 Juror No. 7. Sir?

3 PROSPECTIVE JUROR 7: Yeah. I've been here
4 40 years. I spoke to Mr. Vitto on a case 30 years
5 ago. And that's -- and I think on election night, I
6 spoke with, when he got elected, a brief five second
7 conversation.

8 THE COURT: Thank you, sir.

9 PROSPECTIVE JUROR NO. 7: And that was it.

10 THE COURT: It's a small town and a lot of
11 us are acquainted with each other, but we need you to
12 make that record. As you answer all of this long
13 litany of questions I'm going to ask you, the
14 attorneys are taking notes. And if they want to ask
15 you more questions about it, they can. But you
16 basically told us you're acquainted. Thank you, sir.
17 All right. Going through the list of all
18 the witnesses now, is there anybody who knows any of
19 those witnesses, related to them, so forth: Let's
20 start with Juror No. 2.

21 PROSPECTIVE JUROR NO. 2: David Boruchowitz
22 and Alexandra Fernandes are both patients of the place
23 where I work.

24 THE COURT: They're both?

25 PROSPECTIVE JUROR NO. 2: They're patients

1 at the dental office where I work.

2 THE COURT: Very good. Thank you.

3 Juror No. 7.

4 MR. MARTINEZ: Judge, I apologize. Can we
5 go back to a that juror for a second?

6 THE COURT: Yes.

7 MR. MARTINEZ: I believe -- do you
8 recognize Ms. Boskovich; is she also a patient?

9 PROSPECTIVE JUROR NO. 2: She also was a
10 patient, but (inaudible). I was thinking of
11 (inaudible).

12 THE COURT: Thank you.

13 MR. MARTINEZ: Thanks, Judge.

14 THE COURT: Juror No. 7?

15 PROSPECTIVE JUROR NO. 7: Yeah. I've
16 spoken with Scott Lewis. I've spoken with
17 Eisenloffel. I've spoken with Logan Gibbs. I've
18 spoken with -- there's more -- Alex Cox. I've spoken
19 with Todd Arms. I've spoken with -- that's it.

20 THE COURT: Thank you, sir.

21 Next juror; anybody else? No. 16.

22 PROSPECTIVE JUROR NO. 16: Steve Moody, I
23 worked with his wife for a couple of years, and he
24 came into the facility and helped us with emergency
25 preparedness. And Christine Francis she was one of

1 the nurses at the facility that I worked at for a few
2 years.

3 THE COURT: Very good. Thank you.

4 The next few questions are going to have to
5 do about this case, and I'm going to read the
6 allegations to you so that you can specifically
7 address anything in the allegations. Later on, we're
8 going to read the whole Information to you. We're not
9 out of order on that; right?

10 So we'll read the Amended Information to
11 you later, but right now, I just want to read you the
12 charge because the next few questions have to do with
13 the charges. Well, let me read the whole thing.

14 Do you want to read it?

15 THE CLERK: You want me to read it?

16 THE COURT: Yeah, sure.

17 THE CLERK: Case No. CR-9226, in the
18 Fifth Judicial District Court of the State of Nevada,
19 in and for the County of Nye. State of Nevada,
20 Plaintiff, versus Cole Engelson, the Defendant.
21 Amended Information filed February 2019 by Nye County
22 Clerk Deputy.

23 Chris Arabia, District Attorney within for
24 the County of Nye, State of Nevada, informs the Court
25 that Cole D. Engelson, before the filing of this

1 Amended Information, did then and there, in
2 Nye County, Nevada, commit the following offense, to
3 wit:

4 FIRST DEGREE MURDER, in violation of NRS
5 200.010/NRS 200.030, a category 'A' felony, committed
6 in the following manner, to wit: That on or about
7 July 15th, 2017, in Pahrump Township, Nye County,
8 Nevada, said Defendant, without authority of law, did
9 willfully, unlawfully, and with malice aforethought,
10 either express or implied, kill and murder a
11 three-year-old female child (Date of birth:
12 January 6, 2014), said murder being committed during
13 the perpetration of child abuse, to wit: by beating
14 the child on the head and/or neck and/or body;

15 All of which is contrary to the form,
16 force, and effect of the statute in such cases made
17 and provided, and against the peace and dignity of the
18 State of Nevada. Dated this 7th day of February,
19 Chris Arabia, Nye County District Attorney. Signed by
20 Michael Vieta-Kabell, Deputy District Attorney. To
21 this Amended Information, the defendant pleads not
22 guilty.

23 THE COURT: Is there anybody who has heard
24 about this case, have any knowledge of it from TV,
25 newspapers, anything of that nature, prior to today?

1 Very good.

2 (The jury voir dire continues and was
3 reported, but not transcribed.)

4 (LATER IN THE PROCEEDINGS, 3:45 P.M.)

5 THE COURT: The attorneys and I had a panel
6 of 50 this morning and 50 this afternoon, and tomorrow
7 we're having 50 more. We're picking 36 jurors. We
8 picked 16 this morning and 14 today. That gives us
9 30. We need to pick six more jurors with the panel
10 that's coming in tomorrow morning.

11 MR. ARABIA: Your Honor, can we have a
12 sidebar?

13 THE COURT: Yes.

14 (A sidebar conference is held.)

15 THE COURT: You're admonished not to
16 converse among yourselves or with anyone else on any
17 subject connected with the trial; or to read, watch,
18 or listen to any report of or commentary of the trial
19 by any person connected with the case or by any medium
20 of information, including without limitation,
21 newspapers, television, radio, the Internet, et cetera.
22 We're asking you to return tomorrow to this
23 room for further deliberations at nine o'clock. What
24 did I tell the first group?

25 THE CLERK: 8:30.

1 THE COURT: 8:30, have you return here at
2 8:30. And with a little luck, after that we'll hear
3 opening arguments. So we'll see you at 8:30 in the
4 morning. You're excused. We're going to have the
5 attorneys stick around for a couple of motions.

6 UNIDENTIFIED PROSPECTIVE JUROR: So we are
7 jurors?

8 THE COURT: We're going to let you know
9 tomorrow. I need 16 jurors. Right now we have about
10 35 people or so. Tomorrow morning when we all come
11 in, we're going to kick some of you loose, including
12 the two guys who said, "Can you please kick me loose?
13 I've got things to do and places to go."

14 UNIDENTIFIED PROSPECTIVE JUROR:
15 (Inaudible) and I need to let my professors know.

16 THE COURT: You're the two that wanted to
17 be kicked loose? You're kicked loose. You're done.
18 You don't have to come back.

19 Oh, write their names down for me.

20 THE BAILIFF: Spell your name. Spell your
21 name out loud.

22 PROSPECTIVE JURORS: Terry Nespor,
23 N-e-s-p-o-r. Stearns, S-t-e-a-r-n-s, Jacob.

24 THE BAILIFF: Jacob Stearns, and that's Nes
25 (sic), Terry --

1 THE COURT: Juror No. 9 and Juror No. 15.
2 So we have 12 from this group, 16 from the previous
3 group, giving us a jury pool of 28. We need to sit
4 16. So we have 12 peremptories. The State indicated
5 on a sidebar that they were only going to use two, and
6 that gives the Defense their full compliment of ten
7 that they can use.

8 The Defense wants time to talk about it; so
9 we'll give them time. And tomorrow morning when we
10 come in, you can tell me which two you want and which
11 ten they want. The State gets to go first so they
12 will tell us a name, then the Defense, then the State
13 second name, then we'll finish up with all of the
14 Defense's.

15 The jurors will then show up at 8:30.
16 We'll kick loose all the ones that are peremptories,
17 and we will then send them over to the courthouse. I
18 think staff would prefer if we started at 1:15 with
19 opening arguments; is that correct? Could you guys be
20 ready at 10:30 or something?

21 What do you think, Counsel? You want to do
22 opening arguments at 10:30 or 1:15?

23 MR. VITTO: I would rather do opening at --
24 immediately and then call two witnesses.

25 THE COURT: All right. Kirk's got tickets

1 to Disney World. We'll move this trial along.

2 We'll do that then. We'll meet with the
3 jury. We'll get them done, kicked out of here, and
4 we'll see what time it is. And if we have time to go
5 over there and do opening statements, we will. We'll
6 play it by ear.

7 Mr. Martinez had a motion, a Batson Motion
8 he wanted to make; correct?

9 MR. MARTINEZ: Yes, Judge. While we're
10 here, we'll make a record. Judge, my motion was in
11 viewing the entire venire, that there are zero African
12 Americans in the venire.

13 I believe in my research that the
14 population of Nye County has -- there's a 3.7 percent
15 African American population. Mr. Engelson has a right
16 to a jury of his peers that's a cross section of the
17 community in which he lives. By my calculations and
18 my math, that means that we should have at least a
19 handful of people who are African American on the
20 venire. So based on that, it's not an adequate cross
21 section; so we would move to dismiss the entire
22 venire.

23 THE COURT: All right. Any response?

24 MR. ARABIA: Yes. Thank you, Your Honor.

25 I think you should deny the motion

1 primarily based on the case of Williams v. State.
2 It's 121 Nev. 934. Specifically, page 940 says that
3 to demonstrate a prima facie violation of the fair
4 cross section requirements, the Defendant must show
5 that (1) that the group alleged to be excluded is a
6 distinctive group in the community; (2) that the
7 representation of this group in venires from which
8 juries are selected is not fair and reasonable in
9 relation to the number of such persons in the
10 community; and (3) that this underrepresentation is
11 due to systematic exclusion of the group in the jury
12 selection process.

13 And you might be able to argue about 1 and
14 2, maybe, but there's been no evidence presented that
15 this was the result of a systematic exclusion in the
16 process used to select the panel.

17 THE COURT: Thank you, sir.

18 Anything to add?

19 MR. MARTINEZ: Submit, Judge.

20 THE COURT: Very good. I was hoping Louise
21 would be back. She's the jury commissioner, and she
22 would have testified that the panel is drawn randomly
23 by a computer program using DMV, Valley Electric,
24 voting rolls, and so forth, with no control by
25 anybody; and the people we get are people that are

1 representative of the community. She would have gone
2 through that, but she's not here. But based on that
3 knowledge, we're going to deny the motion.

4 MR. MARTINEZ: Thank you, Judge.

5 THE COURT: We'll meet back here at 8:00,
6 eight o'clock. And we're going to kick loose the
7 third panel.

8 MR. ARABIA: Should we make -- Your Honor,
9 I hate to be the wet blanket here, but is there any
10 way we cannot do that until we make sure everybody
11 shows tomorrow.

12 THE COURT: All right.

13 MR. MARTINEZ: That's fair.

14 THE COURT: They have not kicked them loose
15 yet; so we won't kick them loose.

16 MR. ARABIA: Right, just in case. Because
17 who knows; it's 2020.

18 THE COURT: Thank you.

19 (The proceedings concluded at
20 3:55 p.m.)
21
22
23
24
25

1 REPORTER'S CERTIFICATE

2 STATE OF NEVADA)
3) ss
4 COUNTY OF NYE)

5 I, Cecilia D. Thomas, official reporter of
6 the Fifth Judicial District Court of the State of
7 Nevada, in and for the County of Nye, do hereby
8 certify:

9 That I reported the taking of the
10 proceedings at the time and place aforesaid;

11 That I thereafter transcribed my said
12 shorthand notes into typewriting, and that the
13 typewritten transcript of said proceedings is a
14 complete, true, and accurate record of statements
15 provided by the parties at said time, to the best of
16 my ability.

17 I further certify that I am not a relative,
18 employee, or independent contractor of counsel of any
19 of the parties involved in said action; nor a person
20 financially interested in the action; nor do I have
21 any other relationship with any of the parties or with
22 counsel of any of the parties involved in the action
23 that may reasonably cause my impartiality to be
24 questioned.

25 IN WITNESS WHEREOF, I have hereunto set my
hand in the County of Nye, State of Nevada, this 5th
day of February 2021.

Cecilia D. Thomas

Cecilia D. Thomas,
RPR, CCR No. 712