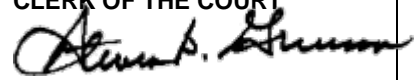


IN THE SUPREME COURT OF THE STATE OF NEVADA

Michael Lee, Petitioner	)	Supreme Court Case No: 84328
)	
	)	Electronically Filed
vs.	)	Mar 09 2022 08:07 a.m.
	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
The Eighth Judicial District Court of)	
the State of Nevada, in and for the)	
County of Clark, and the Honorable D.)	
Barker, Senior District Judge,	)	PETITIONER'S SUPPLEMENTAL
Respondent,	)	APPENDIX INDEX
	)	Bates 168-221
and)	
)	
The State of Nevada,)	
Real Party in Interest.)	
_____)	

Supplemental Appendix Index

<u>Document Name</u>	<u>Date</u>	<u>Bates No.</u>
Transcripts, Defendant's Motion to Disqualify District Attorney's Office and Appoint Special Prosecutor	02-25-2022	168-217
Order Denying Defendant's Motion to Disqualify District Attorney's Office and Appoint Special Prosecutor	03-07-2022	218-221



TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

STATE OF NEVADA,)	
	)	CASE NO. C-11-277650-1
Plaintiff,)	
)	
vs.	)	DEPT. NO. IX
)	
MICHAEL ALAN LEE,)	
	)	Transcript of Proceedings
Defendant.)	
)	

BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE

**STATE'S NOTICE OF MOTION AND MOTION TO ADMIT PRIOR SWORN
TESTIMONY OF MERRIDEE MOSHIER; DEFENDANT'S MOTION TO
DISQUALIFY DISTRICT ATTORNEY'S OFFICE AND FOR APPOINTMENT
OF SPECIAL PROSECUTOR**

FRIDAY, FEBRUARY 25, 2022

APPEARANCES:

For the State: JOHN GIORDANI, ESQ.
[Via Video/Telephone Conference]
Deputy District Attorney

For the Defendant: KELSEY BERNSTEIN, ESQ.
FIKISHA MILLER, ESQ.

RECORDED BY: GINA VILLANI, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript
produced by transcription service.

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FRIDAY, FEBRUARY 25, 2022 AT 2:39 P.M.

THE COURT: 277650, *State of Nevada versus Michael Lee.*

MS. MILLER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Mr. Lee, can you hear me?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you. I have Ms. Miller in the room.

MS. BERNSTEIN: And Kelsey Bernstein, bar number 13825.

THE COURT: Ms. Bernstein as well. Do I have a prosecutor in this effort?

Yes. Good afternoon, Your Honor. John Giordani on behalf of the State.

THE COURT: Thank you, Mr. Giordani.

Time set State's Motion to Admit Prior Sworn Testimony and Defendant's Motion to Disqualify District Attorney's Office and Appoint a Special Prosecutor. Let's take the last first.

MS. BERNSTEIN: Your Honor, before we do that, I'd like to approach. For the record, we did attempt to contact Mr. Giordani via e-mail. We also put a message in the chat at this point probably an hour ago, saying that we

1 needed to approach on something specific related to this
2 hearing.

3 THE COURT: Okay.

4 MS. MILLER: And we need to have a District
5 Attorney and have this portion off of the record --

6 THE COURT: Okay.

7 MS. MILLER: -- for those purposes. So, I also
8 asked Mr. Giordani -- or, I had my staff reach out to him,
9 to see if any of the District Attorneys who were present in
10 the courtroom could facilitate that or if he could come
11 over to do that, because we do need to discuss something
12 before we go into the substance.

13 THE COURT: Mr. Giordani, can you come over?

14 MR. GIORDANI: No. I received a message, Your
15 Honor. Considering all the shenanigans that's gone on, I'd
16 prefer everything to be on the record at this point.

17 THE COURT: All right.

18 MS. MILLER: Your Honor, I would -- if the Court
19 will not prevent me to have leave to approach so that I can
20 discuss these matters -- I understand the State's position.
21 You can tell by the pleadings, Your Honor, that this is
22 contentious. But, I think, given the substance that the
23 Court is aware of, not only of our original Motions of
24 these issues, but our supplemental report --

25 THE COURT: I can't -- I can't go ex parte. The

1 rules don't permit me to go to ex parte. If both sides
2 don't agree to go ex parte, I -- the only direction I have
3 is to remain on the record.

4 MS. MILLER: Okay. Yes, Your Honor. Then I will
5 make my motion on the record.

6 Part of the basis of the motion -- my motion would
7 be to exclude Ms. Opie from this hearing. Part of the
8 basis for that is pretty evident from the filings. We
9 believe that Ms. Opie is working in a legal capacity that
10 has been nondisclosed to the defense. The basis for that
11 is in our response that we filed yesterday, Your Honor.
12 And, based on that, we're asking that she be excluded from
13 these proceedings.

14 THE COURT: State, your response?

15 Did you -- you said you filed a Reply yesterday?

16 MS. MILLER: Yes. Yes, Your Honor. Does the
17 Court have it?

18 THE COURT: I have a Declaration for Opie that I
19 printed. I don't have the Reply. Now I have a Reply.

20 MS. MILLER: Okay.

21 THE COURT: Unfiled -- not filed.

22 MS. MILLER: No. It was --

23 MS. BERNSTEIN: Your Honor, I did file it. And,
24 then, I also sent a courtesy copy to your Clerk.

25 THE COURT: All right. So, I'm looking at the

1 courtesy copy.

2 MS. BERNSTEIN: But the courtesy copy that I sent
3 was not file stamped.

4 MS. MILLER: And I have file stamped copies of
5 both, Your Honor, for the Court to review.

6 THE COURT: Mr. Giordani, you've heard the
7 statement on the record. And it's a Motion to Direct that
8 Ms. Opie be removed from this effort.

9 MS. MILLER: From the BlueJeans, Your Honor.
10 She's on BlueJeans.

11 THE COURT: Okay. What is your Reply?

12 MR. GIORDANI: I don't really have a position on
13 that, Your Honor. I mean, she has a right to be here like
14 anyone else. It's a public courtroom. I believe the
15 deceased little boy's mother is also on if I can see that
16 correctly. I mean, if this is a substantive argument --

17 MS. MILLER: It is.

18 MR. GIORDANI: -- that has to do with Ms. Opie, --

19 MS. MILLER: It is.

20 MR. GIORDANI: -- I mean, I guess I could see why
21 they might not want her observing this. But --

22 THE COURT: Well, I hear no objection. She's a
23 potential witness in the -- in a decision that's -- that
24 the Court must make. So, I'm going to grant -- Ms. Opie?
25 First, Mr. Giordani, do you have contact information for

1 her?

2 MR. GIORDANI: Yes.

3 THE COURT: All right. Then I'm going to grant
4 the motion. The witness is excused from the effort at this
5 point. Ms. Opie, I need you to basically step away from
6 the action. I would put you out in the hallway now if you
7 were physically present here, with the ability of the
8 prosecutor to reach out to you as circumstances might
9 require.

10 MS. OPIE: I understand, Your Honor. If I may,
11 just for the record? I know that there's a position taken
12 by the defense that I'm operating in a legal capacity here.
13 That is not the case. I've never rendered any legal advice
14 or served as legal counsel for anybody in connection with
15 this action. And I've repeatedly advised the defense
16 counsel of my position.

17 THE COURT: Okay.

18 MS. OPIE: But I understand Your Honor's -- I
19 understand the decision.

20 THE COURT: All right. I appreciate that. You're
21 excused at this time.

22 Let's move forward. Again, this is a pending
23 Motion to Disqualify the District Attorney's Office.

24 MS. MILLER: You'd rather proceed with that one
25 first? Yes, Your Honor.

1 THE COURT: Yeah.

2 MS. MILLER: Your Honor, have you had an
3 opportunity to read the Reply?

4 THE COURT: Mm-hmm.

5 MS. MILLER: Yeah? Okay.

6 THE COURT: Well, I've read it to the extent that
7 it's been granted to let her out. Any -- have I read your
8 10-page Reply as I'm sitting here? No.

9 MS. MILLER: Not if you just got it. Okay, Your
10 Honor. I can -- I would be more brief. But I'll be a
11 little bit more detailed --

12 THE COURT: Okay.

13 MS. MILLER: -- with that statement.

14 So, Your Honor, basically, our Motion -- our
15 original Motion to Disqualify the State's participation and
16 the entire office's participation is based on the Court's
17 filing of the complete defense theory, that it was
18 published not only to the State, but it was also published
19 to Ms. Opie, who is now no longer present in this hearing.

20 And, for the Court's reference, as you were
21 sitting for Judge Silva, I guess, three weeks ago, February
22 7th, you executed the Order, two sets of Orders, granting
23 our Ex Parte Applications, one regarding Ms. Moshier, the
24 grandmother's nursing records. The other Application that
25 was granted was regarding Ms. Opie and some discovery

1 issues that we wanted to basically support our beliefs
2 about some things that were going on in the case.

3 The Court granted those Applications. The Court
4 signed those Orders. Unfortunately, with the change in the
5 system, my understanding is that the Court -- and this
6 would be you, Judge, did not file them under seal. So,
7 when you granted our Orders, not only was the Order sent to
8 all of the parties that were listed in the Certificate of
9 Service, the initial Application was also submitted to all
10 of the parties, including, I believe, five e-mail addresses
11 to the District Attorney's Office, the witness that was
12 just excused, Ms. Opie.

13 And, for the Court's edification, that was a more
14 substantial Application than we had initially filed. At
15 the request of Judge Silva, we actually had some -- at her
16 direction, that she wanted to know more about our defense
17 theory and why we wanted to have these specific subpoena
18 duces tecums issues. We supplemented it with our entire
19 defense strategy. And, so, when the Court signed the
20 Order, it sent everything in the Application, the strategy,
21 the Supplement. The State now knows our entire defense, as
22 does Ms. Opie. Because -- and this is the really nuanced
23 and weird part about this case, Your Honor. Ms. Opie, she
24 just said she's just a witness, she has no -- she's said
25 repeatedly she has no legal authority in this case. She's

1 basically saying, I'm just a witness, I have nothing to the
2 --

3 THE COURT: She's the daughter of the -- as I
4 understand it, and correct me if I'm wrong, --

5 MS. MILLER: Absolutely.

6 THE COURT: -- she's related to the witness who
7 testified in the previous action. Is that insufficient or
8 incorrect?

9 MS. MILLER: That is insufficient, Your Honor.

10 THE COURT: Okay.

11 MS. MILLER: Let me explain to you exactly who all
12 of these parties are.

13 THE COURT: Okay.

14 MS. MILLER: So, Ms. Opie, who was just excused,
15 is a licensed attorney here in Nevada.

16 THE COURT: Okay.

17 MS. MILLER: She is also the sister of the other
18 potential suspect in the homicide. That would be Ms.
19 Foster. Ms. Foster, who is still currently on right now,
20 that the State has named as the victim's mother as a victim
21 herself. Whereas the defense theory is there's only two
22 possible perpetrators of the crime: Our client, Mr. Lee,
23 and Ms. Foster.

24 Not only did Ms. Opie -- literally was present
25 during some of the questioning by the police, which caused

1 my initial concern, some of the behavior during the course
2 -- and I've only been involved in this case for about 90
3 days, Your Honor, some of the things that I've observed
4 caused me great concern, caused me -- definitely sparked my
5 need to pursue discovery.

6 So, it basically bifurcates between two separate
7 issues. In this Disqualification Motion, the original
8 Motion was based on this disclosure that's not John -- Mr.
9 Giordani's fault. It came from the Court. He did not
10 control it. He did not participate in it, to the extent
11 that the documents were issued.

12 Now, thankfully, I was at my office, I always have
13 my computer screen on. Within 30 to 45 minutes, I had
14 contacted the Department. The Department had those records
15 sealed and, then, spent numerous hours trying to figure out
16 if we could recall the service of all those documents
17 through the Clerk's Office, through IT, through everyone.
18 But the cat was out of the bag.

19 THE COURT: Okay.

20 MS. MILLER: And, so, those links were still
21 active. Ms. Opie had access to everything. Mr. Giordani
22 had access to everything. And, at least -- and, actually,
23 by the way the service was sent, every single prosecutor in
24 the District Attorney's Office had access to the criminal -
25 - our criminal defense theory, not in part, but in total,

1 Your Honor.

2 That is the reason why we initially filed the
3 Motion to Disqualify the District Attorney's Office. It's
4 not for bad behavior or anything else. Just as a
5 procedural due process protection, the Clark County
6 District Attorney's Office can no longer participate in
7 this prosecution from the defense's perspective. So,
8 that's where we were.

9 And, then, as the same time we're concomitantly
10 fighting the District Attorney's desire to not have an
11 eyewitness, the grandmother, Ms. Moshier, the nurse, Ms.
12 Moshier, to use her previous testimony. We're fighting
13 those on both fronts. So, we're litigating both of those
14 issues.

15 In the process of us doing that, the subpoena
16 that's served on Ms. Opie, there's some issues with the way
17 that she responded with it. But I'll deal with it in that
18 motion. But part of the documents that she did turn over
19 and that were provided as Exhibits to the Reply showed that
20 my concerns -- our concerns were more well-founded than we
21 thought.

22 And, so, the District Attorney's responded with a
23 very, very bare bones Motion. I think it was a 15-page
24 Motion to our Motion to Disqualify --

25 MS. BERNSTEIN: It was the Opposition.

1 MS. MILLER: The Opposition was 14 pages, 15
2 pages. Thirteen and a half of them were just facts of the
3 case. Their substantive portion cites no law, cites no
4 authority, and just says that there's not a conflict and
5 the Motion should be dismissed. This is a delay tactic.

6 I immediately notified Mr. Giordani through my
7 staff. That's attached as Exhibit 1, I believe, that his
8 filing was not responsive, that, actually, he should file
9 two separate responses, of which there's no response in
10 writing. There's no new filing. There's nothing to
11 supplement the State's original position, which has neither
12 law, facts, or arguments that support the denial of our
13 Disqualification Motion.

14 So, at the same time that we were trying to buffer
15 out all these issues, the one thing that the State does do
16 in his Opposition is it says that there's no conflict of
17 interest between -- in the State's prosecution of the case.
18 That is where the Reply gets much more specific. Not only
19 do we believe that the Motion to Disqualify should be
20 granted in whole, procedurally, because of the State's
21 failure to respond in a legally adequate way. We buffered
22 that by notifying the State that they had not responded in
23 a legally appropriate way.

24 And, so, in our Reply in Support of our Motion to
25 Disqualify, we say, procedurally, the State should be

1 disqualified for not responding in an appropriate and legal
2 fashion. But, assuming in argument that the Court is not
3 going to procedurally grant the Motion to Disqualify
4 because I know it is a disfavored procedural rivety, we
5 then substantiated our basis of conflict, particularly with
6 regards to Mr. Giordani, and particularly satisfying all
7 the prongs of different natures of conflict.

8 So, just very briefly, Your Honor, because I know
9 this is sort of longer than I planned, there's three
10 different arguments that show why there is a conflict of
11 interest, particularly to Mr. Giordani. The first is that
12 Mr. Giordani, particularly in the prosecution of this case,
13 and, I guess, I forgot who originally tried it with him,
14 and now Ms. Rinetti, is that he -- there's been a showing
15 of a lack of objectivity toward Mr. Lee. Part of it comes
16 with the bail arguments. Originally, once the case was
17 reversed, that Mr. Giordani acknowledged on the record that
18 the evidence in the record was only second -- was only
19 sufficient for second degree. Those minutes -- that's
20 actually reflected in the Court minutes. That's provided
21 as Exhibit 2.

22 Despite the fact that he acknowledges what the
23 proof can establish, he is continued to no offer the case,
24 continued to proceed on the case as a first-degree case,
25 even though he stated and should be collaterally estopped

1 from proceeding on a first-degree case once he said that it
2 only amounts to second degree. He's no offered the case.
3 He's also argued against bail. And we were very clear that
4 the only cases where there should be no bail are first
5 degree homicide cases.

6 It -- that's not enough, though. Right? It just
7 shows a little bit of -- a lack of objectivity. It shows
8 some level of lack of fairness. But we didn't think that
9 was substantial enough. So, we gave a second reason for
10 showing that there's a conflict of interest, specifically
11 with Mr. Giordani.

12 The second reason is that the communications
13 between him and Ms. Opie at the time, December, our last
14 trial setting, are -- I'm not even sure if I have the right
15 words. I'm trying to be as sensitive to everybody's
16 emotions because it is a murder case. And I know Mr.
17 Giordani's been involved in this case for a very, very long
18 time. But he makes an allegation that the defense is
19 fabricating reasons for trial continuances. And he doesn't
20 make it, like, orally. He makes it in writing, in a text
21 message, to a witness, that witness being Alayne Opie. The
22 same witness that is an attorney. The same witness that
23 her sister is still currently on the line. He says the
24 defense is fabricating reasons for continuances, which is
25 objectively false.

1 What had really happened was that we had requested
2 additional discovery. All of this is fact in the Motion.
3 Three weeks before trial, we requested a very small subset
4 of discovery. Just some metadata on photos so we could
5 figure out when and where those photographs were taken.
6 And, instead of a response to that discovery, they
7 responded with a 90-gig dump of data. That was my very
8 first week in this office.

9 MS. BERNSTEIN: Can I add a little bit to that?

10 MS. MILLER: Yes.

11 MS. BERNSTEIN: So, Your Honor, just to kind of
12 clarify the scope of the discovery issue. We had asked the
13 State for a copy of everything that they had, because this
14 case had been passed through several attorneys' offices.
15 We didn't know if we had a complete file. So, I asked the
16 State for a complete, new set of full discovery. And they
17 did. The State gave us a hard drive that had 1,711 files
18 on it. It was about 3.2 gigabytes, standard size for a
19 file of this nature.

20 A week before trial, or, a couple weeks before
21 trial, my office makes a very simple discovery request, as
22 Ms. Miller stated. We only asked for metadata of some of
23 the photographs that showed date, location, time, of the
24 photographs that were taken. That is all that we asked
25 for. In response, a week before trial, the State gives us

1 a thumb drive that has over 8,000 new files on it. And,
2 then, continuously -- continued to still oppose our request
3 for a continuance, despite the fact that the State gave us
4 a new set of discovery that was eight times the size --

5 MS. MILLER: Seven.

6 MS. BERNSTEIN: I'm sorry. Seven times the size
7 of the entire set of discovery that it had previously
8 represented was everything in its file for the last two
9 years. So, that was the fabricated reason for a
10 continuance that the State told to Ms. Opie.

11 MS. MILLER: So that the Court is very clear, this
12 is reflected in Exhibit 4. It is a text message that has
13 been produced by Ms. Opie that is purported to be from Mr.
14 Giordani. The conversation is between the two of them.
15 And, if I -- I'm reading it -- Mr. Giordani, of course, has
16 access to this text. They're from him. It says, from Mr.
17 Giordani:

18 I think they're going to file a Motion to
19 Continue. But we're no longer on speaking terms, so I
20 guess we'll see you in court on Friday.

21 Ms. Opie's response -- Attorney Opie responds:

22 Fuck them. Jesus. What's the reason for the
23 continuance?

24 Mr. Giordani: Fabricated discovery, in quotes,
25 issues. But I'm not sure that the Judge would even

1 grant it. I'll know by Friday.

2 And, so, criminal defense attorneys already have a
3 bad name. That's fine. When you are speaking to a
4 material witness in a first-degree murder case, it is res
5 ipsa loquitur that you do not talk about defense counsel
6 that's -- this way, that you don't imply that we are acting
7 in an improper motive. Those two things alone are the
8 very, very appearance of impropriety, Your Honor.

9 But we didn't still think that that was enough.
10 So, those were the first two bases showing that there is a
11 conflict, particularly with this prosecutor, in this -- in
12 this prosecution. Then, finally, Your Honor, it gets even
13 worse, particularly with Ms. Opie.

14 As we were starting to review, -- and she only
15 provided a very few number of text messages. As we're
16 starting to review it, the bigger picture comes into focus.
17 So, as we're approaching trial -- and the reason why the
18 other Motion, the State's Motion to Admit Ms. Merridee
19 Moshier, who is the grandmother of the deceased child, to
20 admit her testimony. When the State files that Motion, it
21 is based on Ms. Opie's representations that her mother is
22 incompetent, Ms. Opie's representations that her mothers
23 [sic] has Lewy body dementia, Ms. Opie's representations
24 that she can't --

25 MS. BERNSTEIN: Can't work and she can't drive.

1 MS. MILLER: -- can't work and she can't drive.
2 Not -- those aren't representations that are made into the
3 ether. Those are representations that are verified both in
4 text messages, which are produced as Exhibits, as well as
5 an Affidavit that is executed by Ms. Opie, delivered to Mr.
6 Giordani, and then delivered to defense counsel, which is
7 also included. So, she makes very specific allegations
8 that she has these diagnoses. And she's so severely
9 incapacitated that she's incompetent. That's the assertion
10 that's made by Ms. Opie, a licensed attorney in her
11 Affidavit.

12 And I understand why Mr. Giordani would have taken
13 that with weight. But, as attorneys, we have the
14 obligations of diligence and we have the obligations of
15 reviewing every single thing that is produced.

16 So, after Mr. Giordani files the Motion to Admit
17 her Prior Testimony, on the day of that hearing, Mr.
18 Giordani provides the medical records that he relies on.
19 Since they were handed to us at a hearing, we asked for a
20 two-day continuance so we could review the records.

21 And, Your Honor, the records don't say what the
22 State purports for them to say. That's why we provided
23 those records independently to chambers so that the Court
24 could read for itself that Ms. Opie's assertion as to what
25 her diagnosis is, is actually the exact opposite of what

1 the doctors come to. They say that the patient has these
2 concerns, that the patient has these issues. We think it's
3 premature, it needs to be watched. They do full CAT scans.
4 They do a full mental evaluation of her. Nowhere is there
5 a diagnosis of the dementia that they speak of. Nowhere is
6 it as debilitating as Ms. Opie has described.

7 And, in fact, this evaluation that is performed
8 almost 30 days to the day, prior to the execution of the
9 Affidavit, but after Ms. Opie and Mr. Giordani have this
10 conversation, the records say that Ms. Moshier is still
11 working as a nurse, currently occupied as a nurse.
12 Driving, working, the opposite of what Ms. Opie said in her
13 Affidavit.

14 Seeing as those are completely opposite
15 contradictions, and only having 48 hours to respond to this
16 new information provided by the State, I did what any
17 diligent attorney would do. I go to my public records
18 search. Ms. Moshier is a nurse. Nurses, like lawyers,
19 have Boards that guide them. And I know nurses have to
20 register every two years. They have to take continuing --
21 we call it continuing legal education. But they have to
22 take continuing education.

23 And, then, they also have to certify for fitness
24 every two years, which is why I wanted to go to the Board
25 of Records to figure out exactly what Ms. Moshier had said

1 about her own mental health at the same time as Ms. Opie is
2 saying that she is so debilitated.

3 And, as of 2020, she says: I have no problems
4 with my mental health, I am not suffering from a defect, I
5 am not suffering from anything that impairs my ability to
6 practice my profession, which is, in fact, nursing. That
7 is also provided, not as an exhibit. We provided that
8 because, per confidentiality purposes, and at the request
9 of the Board of Nursing, that we just provide that
10 particularly to the Court. I do have the hard copies as
11 mentioned in our Motion, to file under seal for the record.
12 But we did want the Court to have the ability to look at
13 that.

14 So, trying to be objective -- and having been a
15 former prosecutor myself, trying to be objective, I see why
16 Mr. Giordani filed the Motion. I see why, actually, one of
17 the text messages, he gives her a sample of the type of
18 letter that he needs from the doctor to sort of buffer up
19 this idea that her mother's incompetent and can't testify.
20 I don't know what that communication is afterwards because
21 Ms. Opie has now invoked her law firm and is directing me
22 to subpoena her law firm for these records, even though you
23 heard her say to you that she is not acting as legal
24 counsel in this matter. She's saying that she can't
25 provide the records that I've requested and this Court has

1 ordered because they are in possession of her law firm.

2 It is totally a shell game, Your Honor, regarding
3 Ms. Opie, exactly what her capacity is, exactly what her
4 involvement is, not only in the last two years but, also,
5 initially in the case. Because, remember, Your Honor, she
6 is present when she -- when her sister is getting
7 questioned about this homicide.

8 So, as a neutral person looking at it, you just
9 have to have questions. And this District Attorney has
10 shown no, no intellectual questioning of anything that has
11 been said by these witnesses. None. It's not evidenced in
12 either his responses to her inappropriate offers of
13 benefits, personal benefits for him. He doesn't respond to
14 that. That's also in the text chain and also provided as
15 an Exhibit.

16 And, so, when we look at the State's request that
17 there is no conflict of interest that can be associated
18 with Mr. Giordani, or the case, or why the District
19 Attorney's Office should be removed. Your Honor, we have
20 clear, substantive, documented proof of bias, of unfair
21 treatment, alignment of counsel, misalignment with a
22 witness, as well as not only the lack of avoiding the
23 appearance of impropriety.

24 But Mr. Giordani, in one of these text messages,
25 is given a clear window when Ms. Opie offers him a benefit

1 to reestablish the attorney-witness relationship. And to
2 say that's inappropriate, and to do the things that we are
3 supposed to do as lawyers, to make sure that even the
4 witness doesn't think that we are giving them favors or
5 doing something special with them and we're just supposed
6 to be doing our jobs. And, given that opportunity to show
7 that he has no conflict, that he is going to be totally
8 neutral, Mr. Giordani doesn't respond. He doesn't reject
9 the offer for the benefit. Or, if he does, we weren't
10 provided that response.

11 And, so, stepping away from it as just a neutral
12 person looking at it, it doesn't look good. That is the
13 appearance of the impropriety on every single facet.

14 So, going back to our initial argument, I believe
15 the Court has three different ways that it can handle this.
16 I believe that there -- that the Court can, procedurally,
17 based on its own actions and the disclosures of the
18 criminal defense theory, can stop right there and
19 procedurally say that's enough, we're -- this is definitely
20 going to be a due process violation, agree to appoint a
21 special prosecutor, remove the entire Clark County DA's
22 Office, and we can proceed to get Mr. Lee a fair trial,
23 which is the only thing that we have ever wanted. That's
24 option one.

25 Option two is that the Court does not find that

1 its own disclosure was enough to merit the removal of the
2 District Attorney's Office, even without -- if the Court
3 doesn't think that its action was enough to cause a
4 disqualification of the District Attorney's Office, clearly
5 this District Attorney has shown enough to show that he
6 should not be involved in this prosecution anymore.

7 But, then, we get to the position that now that
8 the defense is aware of the unusual relationship and the
9 unusual conversations that are happening between Ms. Opie
10 and Mr. Giordani, we would be in a position of malpractice
11 if we did not investigate and delve further into that
12 relationship.

13 And, so, therefore, Mr. Giordani had -- becomes a
14 potential witness. His -- theoretically, his -- I mean, I
15 don't want to go here. This is not something that I am at
16 all interested in. I don't believe in subpoenaing
17 attorneys' records or subpoenaing attorney cell phones.
18 But, given what I know and the limited disclosures that I
19 have, I would be remiss as a criminal defense attorney if I
20 did not do further investigation as into the communications
21 between these two parties, and the true and effective truth
22 about what Ms. Opie has done during the full prosecution of
23 this case.

24 And I think -- have I covered?

25 MS. BERNSTEIN: Almost. Your Honor, I did want to

1 go -- just very briefly, I did want to go into a little bit
2 of detail.

3 So, Ms. Opie has indicated to Your Honor that she
4 is not a legal representative of the other suspect and
5 witness in this case, Ms. Foster. I wanted to kind of go
6 into detail as to why we believe that assertion is
7 questionable.

8 So, we have a couple of different things. Ms.
9 Opie used her law firm credentials to add herself to e-
10 service on this case. That is how she was also served with
11 the Ex Parte Sealed Applications that contained our entire
12 defense strategy. She added herself to e-service using her
13 law firm's address, phone number, and their legal account.
14 She's also been introducing herself on BlueJeans with her
15 attorney from her law firm and her bar number. And we did
16 include screenshots of that.

17 In the State's Notice of Witness List, the other
18 witness, Ms. Foster, her contact information is listed care
19 or Alayne Opie at Ms. Opie's law firm address. Add that to
20 the fact that Ms. Opie was present with Ms. Foster when Ms.
21 Foster was being questioned by law enforcement in relation
22 to the homicide, as Ms. Miller stated.

23 If you look at the totality of circumstances, she
24 can say it's not a legal capacity relationship, but it
25 really is starting to look like one. She is acting as a

1 legal representative for -- sorry. Let me rephrase this.

2 We have a key witness in a first-degree murder
3 trial, appearing to act as a legal representative for other
4 witnesses in this same first-degree murder trial. The
5 situation is entirely bizarre. But there has been no
6 action taken on it. There has been no effort to clean it
7 up by the State. And, in essence, the State has acquiesced
8 to this because Ms. Opie has informed the State to use her
9 as a point of contact for the other witnesses in the case.
10 And the State has done that. The State is relaying things
11 about trial dates, witness information, only to Ms. Opie,
12 who is then responsible for then disseminating that
13 information to the other witnesses.

14 If you look at simply that by itself, that is, in
15 our opinion, defense's opinion, a clear conflict of
16 interest in this case to have one witness serve as a legal
17 representative for others and the State to abide by that
18 relationship.

19 And, so, that is one of the main reasons that we
20 feel the District Attorney's Office should be disqualified
21 from this case. And a new, objective prosecutor appointed
22 that does not have this preexisting relationship with all
23 of the witnesses in the case and who can treat these
24 witnesses as witnesses. This is a first-degree murder
25 trial. This is reverse on remand from the Supreme Court,

1 who reversed on the sufficiency of the evidence.

2 THE COURT: They reversed on one instruction.

3 MS. BERNSTEIN: Where one instruction because that
4 instruction went to the heart of the case, --

5 THE COURT: Right. Well, --

6 MS. BERNSTEIN: -- whether he did this or whether
7 he's -- it was neglect. Whether he saw it and did nothing.

8 THE COURT: Right. Right. Right.

9 MS. BERNSTEIN: So, it's the difference between a
10 maximum of eight years and life without the possibility of
11 parole. When we're dealing with stakes that high, it
12 simply does not make any sense to allow the current course
13 to continue.

14 THE COURT: All right. I --

15 MS. BERNSTEIN: And, so, for those reasons is why
16 we're asking for the appointment of a special prosecutor.

17 THE COURT: Mr. Giordani, State's position?

18 MR. GIORDANI: Thank you, Your Honor.

19 So, going back to the original factual scenario,
20 this is a case in which a two-year-old baby boy was beaten
21 to death. I think both sides agree there are only two
22 possible authors of those injuries: Arica Foster, the
23 victim's mother, and the Defendant, who was her boyfriend
24 at the time.

25 There were issues, factually, in the trial, that

1 caused us to need to provide a timeline of Brodie, the
2 victim, when he was healthy and when he began to be
3 symptomatic of the injury. That was approximately three
4 days -- I want to say three days prior, when Merridee
5 Moshier and Alayne Opie become relevant to the
6 investigation. Those two gave little Brodie a bath -- I
7 want to say three days and I don't want to misspeak. But
8 it's a few days prior that they kind of provide our bookend
9 of the timeline. That's when they become relevant as
10 witnesses.

11 Ultimately, Ms. Opie and Ms. Moshier testify at
12 the initial trial. They provide, you know, their
13 testimony, the Defendant is convicted, and then we sit for
14 a while before the Supreme Court reverses the case, for
15 ineffective assistance, by the way. Since then, I've been
16 informed by Ms. Opie that her mother's not doing well.
17 There's -- obviously, text messages will all speak for
18 themselves. There's an Affidavit.

19 We provided a full neuropsychological evaluation
20 of Ms. Moshier to the Court. And all of that information
21 essentially establishes that she has dementia, chronic
22 psychiatric illness, possible neurodegenerative disease. And
23 Defense Exhibit that they provided this morning indicates
24 prominent visual and auditory hallucinations.

25 So, these -- according to the records even the

1 defense [inaudible], these symptoms developed long after
2 she [inaudible] --

3 MS. MILLER: I'm sorry, Your Honor. I can't --

4 THE COURT: You're breaking up, Mr. Giordani.

5 MR. GIORDANI: Can I turn my video off? And maybe
6 that'll make my audio feed a little better here, Your
7 Honor?

8 THE COURT: That'd be fair.

9 MR. GIORDANI: Can you hear me? Is this okay?

10 THE COURT: Yes.

11 MR. GIORDANI: The -- I don't know where it cut
12 off. But, essentially, the records that the defense
13 provided, I believe it was today or maybe yesterday, those
14 say the same thing. She has dementia, chronic psychiatric
15 illness, possible neurogenerative disease, and prominent
16 visual and auditory hallucinations. No one in the
17 courtroom would rather have Ms. Moshier testify more than
18 me. I would love for her to testify. But, at this point
19 in time, it appears that she's not only creating false
20 memories, but also forgetting a lot, essentially.

21 So, that information, of course, was conveyed to
22 be -- to me by Ms. Opie. And I don't want to get involved
23 in whether she's a lawyer for this family or not. To the
24 extent that they claim that she's a point of contact for
25 the State and that's somewhat -- I don't know. I guess

1 that somehow makes me or her biased, that's ridiculous.

2 This is a sister of a woman whose little boy was
3 killed. She literally woke up, felt her boy's back, and he
4 was ice cold to the touch. And she's been put through a
5 whole trial where she testified and now a reversal. The
6 fact that she doesn't want to be bothered every time
7 there's a trial date is completely fair and reasonable.
8 Ms. Opie is not acting as their lawyer, in my opinion.
9 She's acting as a point of contact because she's offered to
10 accept their subpoenas and she'll communicate the relevant
11 dates. So, that's -- I guess that's an aside.

12 As to the document that was filed and potentially
13 by the Court not sealed, that's a whole other issue. I
14 mean, I might have clicked on that. I don't know if I
15 opened it when I received it. But I can tell the Court
16 right now that I don't know what their trial strategy is.
17 I don't care what it is. I'm assuming it's they're going
18 to blame anyone else who had access to Brodie. Because
19 that's kind of the only thing they can do at this point.
20 But that's certainly not grounds to disqualify my office
21 nor myself. So, that's one thing. That's why my initial
22 response was so terse, is that they didn't provide any
23 proof that we were -- that my office was somehow affected
24 by this inadvertent filing.

25 Now, they file this Reply that includes these text

1 messages. It includes nursing records and some other
2 documents. There was a note -- or, a statement made by Ms.
3 Miller that I -- me, myself, have shown a lack of
4 objectivity to Mr. Lee, and I no offered the case, and
5 there's been these discovery allegations. Look, I'm doing
6 my job, Your Honor. This is a 22-time felon at the time he
7 killed a baby boy. Am I vigorously advocating that we go
8 to trial and am I refusing to give him a benefit because of
9 a Jury Instruction issue? Yes. Do I think that any other
10 prosecutor would act differently in my office? No.

11 Considering the facts and circumstances and how
12 this is gone down, the offer was: Yes, he can plead
13 straight up to first degree murder. We can argue for a
14 penalty. You can ask for leniency. I'll ask for life
15 without parole. And, you know, otherwise, we can go to
16 trial. It is what it is. To the extent I'm not showing
17 objectivity, I think that's ridiculous. I'm vigorously
18 advocating for my case.

19 To the extent that these text messages are some --
20 are supposed to be damning or show some kind of bias, I
21 just disagree. I reviewed those text messages in the
22 Reply, Opposition that was filed. Am I conveying
23 information about court dates, when to log on, why I think
24 it's going to be continued? Absolutely. Is that something
25 I would convey over the phone when the family of a victim

1 calls me and tells me -- or asks me about the status of the
2 case? Absolutely.

3 So, I don't know how else to respond to that. If
4 the Court has any questions, I'm certainly willing to
5 answer those. And I will submit it.

6 THE COURT: All right.

7 MR. GIORDANI: And I do have further argument,
8 though, as to Ms. Moshier and her --

9 THE COURT: We're not there yet. Right now, all
10 I'm trying to decide is whether or not I should grant the
11 Motion to Disqualify your office, you and your office.
12 That's where -- that's where my mind is.

13 The question I have to you, --

14 MS. MILLER: Yes, Your Honor.

15 THE COURT: -- before I give you an opportunity to
16 reply, is, as I generally understand, it was an alternate
17 suspect theory in the original trial. Is that not correct?

18 MS. MILLER: No.

19 MS. BERNSTEIN: Your Honor, so trial counsel --
20 let me start over.

21 We alleged numerous instances of ineffective
22 assistance of counsel. The Supreme Court saw the Jury
23 Instruction issue and then said, because we were ruling on
24 that, we're not going to address the remaining. But one of
25 the other instances of ineffective assistance was alleging

1 both an accidental death and an intentional death.
2 Entirely inconsistent defenses were presented in the first
3 trial. And, so, that's one of the main issues that we have
4 is you can't allege at the same time or argue that a death
5 is accidental or intentional.

6 THE COURT: Okay.

7 MS. BERNSTEIN: I don't believe -- and I may be
8 incorrect. I have not had a chance to read all of the
9 original trial transcripts. But I do not believe that Ms.
10 Foster was vigorously questioned or cross-examined as a
11 potential suspect, despite the other evidence that exists,
12 both some of which existed at the original trial and some
13 of which we have uncovered recently, that would indicate it
14 is Ms. Foster that committed these crimes.

15 THE COURT: Mr. Giordani, how do you respond to
16 that concern or that question? You were the trial counsel?

17 MR. GIORDANI: Yes. As I recall it, Judge, there
18 was never an allegation of neglect or a defensive neglect.
19 It was -- there was a car accident that I believe that they
20 attempted to provide as the author of the injury, the
21 stomach injury that ultimately killed Brodie.

22 THE COURT: Okay.

23 MR. GIORDANI: But the only other defense that I
24 recall was them saying: The State can't prove it was
25 Michael Lee. And: The State can't prove it was Arica

1 Foster who authored these injuries.

2 And, so, all along when we've argued bail in front
3 of Your Honor or, I guess, multiple prior judges, I've
4 said: I don't think anyone ever offered a defense or an
5 argument that this was a neglect-related death. So, the
6 fact that the Jury Instruction provided some -- I guess,
7 some way for a jury to interpret that you could get to a
8 first-degree murder on a neglect theory, even if it did, it
9 was irrelevant in the trial.

10 THE COURT: Okay.

11 MR. GIORDANI: No one was arguing neglect.

12 THE COURT: All right. Back to where -- I've got
13 -- I'm waiting for reply on State's argument.

14 MS. MILLER: Okay. So, first of all, I -- Your
15 Honor, I want to make sure that I understood the State's
16 representations about what the medical records say. I do
17 not see what Mr. Giordani believes that these records say.

18 And, so, I want to be very specific to references
19 for the Court that I do -- I don't see any, any diagnosis
20 of dementia. In fact, in the neurological, referring to
21 page -- that looks like 10, starting at the beginning of
22 the bottom of page 9 of the Evaluation, it says:

23 As stated, my conceptualization of her symptoms
24 possibly being related to something such as emergent
25 Lewy body dementia versus something like vascular

1 dementia may certainly be premature. However, in the
2 context of overall decline, I'm quite concerned that
3 there is an underlying pathology.

4 Which is why we go into the full pathological
5 examination, the full medical scan of her brain, which
6 shows everything is normal. That's the other part of the
7 medical records.

8 And, for the Court's reference, these aren't
9 medical records that we found or discovered. These are the
10 medical records and the only support that's been provided
11 by the State. And, remember, Your Honor, the State
12 specifically asked Ms. Opie, in whatever capacity its
13 willing to admit Ms. Opie's acting as, they gave her
14 presentation of the letter, what a doctor's diagnosis
15 letter needs to look like. And there has been no provided
16 discovery that that was ever provided by Ms. Opie, or Ms.
17 Moshier, or anybody else in the family, saying that her
18 mental health has declined.

19 Now, Your Honor, this Report, this Evaluation says
20 that it -- mild dementia and that the evaluation is
21 incomplete. There is no fundamental finding that she is
22 mentally corrupt. She is reporting that she is working and
23 driving at the time of this evaluation. She is still, to
24 this day, I verified it this morning right before I walked
25 over, that she is still a licensed registered nurse, not

1 only in the state of Nevada but, also, in the states of
2 California and Washington state.

3 She's still -- and, Your Honor, on top of that,
4 Ms. Moshier understands that the whole time that Mr.
5 Giordano's been speaking, you never hear him refer to a
6 conversation that he's had with Ms. Moshier, or his
7 independent evaluation, or anything he's done to buffer the
8 idea that she is mentally infirmed. He has relied solely
9 on these Reports that do not say what he thinks they say,
10 and Ms. Opie's representations.

11 If you go to Ms. Moshier herself, if you go to
12 what she says to her doctors, she is working, she is
13 driving, she is dispensing medication as a nurse. That's
14 the same thing that Ms. Moshier has reported to the State
15 of Nevada Board of Nursing. So, with regards to Mr.
16 Giordani's interpretation of the records and what they
17 mean, I think that they're very plain not to mean what he
18 thinks they mean.

19 Then, to go to that the text messages speak for
20 themselves. That's exactly right, Your Honor. And Mr.
21 Giordani has not addressed the text message that is
22 provided, where Ms. Opie offers him a personal benefit that
23 he does not reject outright, that he does not respond to in
24 writing, and it appears in the chain -- I don't know, but
25 it appears in the chain that they actually have a phone

1 call. But there's no rejecting of this benefit.

2 And, beyond that, Your Honor, I think one of the
3 things when you parse things out, and there's so many
4 issues, and it's so complicated and convoluted, that's it's
5 really hard to just step back and just look. But if you
6 just step back and look at these text messages, he says the
7 nature of his relationship is because of the long -- the
8 length of the trial and that this is a grieving family.
9 Yeah. I get that. It's a murder case. There's a dead
10 child. It's very serious. That is not what we are here or
11 talking about. It is the due process aspect --

12 THE COURT: Right.

13 MS. MILLER: -- and how everybody else is going to
14 look at this case.

15 The fact that the case has already been reversed
16 once for ineffective assistance of counsel, there is no way
17 that we are not going to litigate every single thing that
18 we can to make sure that Mr. Lee has his right to a fair
19 trial with due process in every single vein.

20 Then, finally, Your Honor, the last thing that I
21 wanted to address was Mr. Giordani's position that he did
22 not -- he doesn't know the defense theory. He doesn't --
23 it might have been sent to me. It might -- I don't know.
24 He hasn't made an affirmative statement about what he
25 reviews or what he knows about the defense theory.

1 I did want to correct the Court's understanding.
2 I don't think the original defense attorney -- and, bless
3 her, I like her as a person very much so. But there was no
4 conception -- conceptual truth. As a criminal defense
5 attorney for 20 years, there was no constructive theme,
6 theory, or process of this case. And the idea that it
7 would either be Ms. Foster or Mr. Lee is belied by the
8 initial interview of Ms. Foster, where she indicates it
9 could have been maybe Ms. Moshier who caused the injuries.
10 I mean, that's a factual basis that does not substantiate
11 the State's position today.

12 In the actual, factual procedure of the case,
13 initially, Ms. Foster said she didn't know how the child
14 had been injured, maybe her grandmother did it. And, so,
15 this is not where, you know, it's always been one -- it's
16 been -- it's the only idea is that there's been one or the
17 other and the State's elected to choose Mr. Lee.

18 The other thing that the Court should be aware of
19 is, not being that familiar with the details of the case,
20 is that the injuries of the child clearly show fingernail
21 marks, not -- fake fingernail marks, acrylic fingernail
22 marks, Your Honor. Such -- ones that a man would not have,
23 that a woman would have. And that the police actually took
24 pictures of her fingernail marks because the injuries were
25 so consistent of her finger -- with her fingernails.

1 So, when we talk about how Mr. Giordani has
2 proceeded in this case, he's a prosecutor, he can do what
3 he wants. Right?

4 THE COURT: Right.

5 MS. MILLER: But when you look at how we look at
6 it from the outside, and the choices that the State has
7 made in this prosecution, we believe that we've met the
8 standard for the Court to excuse the entire Clark County
9 District Attorney's Office.

10 With regards to his position that, I don't know
11 who opened it, I don't know what the theory is. Your
12 Honor, the rules of ethics are very, very clear, that if
13 there's an inadvertent disclosure, you acknowledge that
14 disclosure to the person who inadvertently disclosed it.
15 He never did that.

16 We, as a defense team, sent a notice to Mr.
17 Giordani, and to everybody who had received service, that
18 this was an inadvertent disclosure, do not open. Destroy
19 immediately. Do not distribute in any manner, form, or
20 means. Mr. Giordani doesn't even respond to that. He
21 doesn't acknowledge that he opened it, received it, didn't
22 receive it, now knows not to. He hasn't done the things
23 that lawyers -- we've been practicing a long time. We know
24 what we need to do to make sure that we at least appear to
25 be impartial. And none of that has happened in this case.

1 So, I would renew to conclude that, first, the
2 State did not properly respond to our Motion to Disqualify.
3 They cited no facts. They cited no law. They cited no
4 legal argument on a full Motion to Disqualify the District
5 Attorney's Office. It is a one-paragraph response. And,
6 given all of the other substantive problems in the case,
7 they should no longer be responsible for the prosecution of
8 it, in order to ensure that Mr. Lee has a fair trial.

9 And, with that, I'd submit.

10 THE COURT: All right. I've listened -- and,
11 frankly, I need more -- I want more time to read and
12 understand these text messages. I hadn't seen the Reply.
13 So, I'm going to withhold my decision on the effort.
14 You've got a calendar call next week.

15 MS. MILLER: Yes, Your Honor.

16 THE COURT: All I can do is pass this for decision
17 to the calendar call date.

18 MS. MILLER: Yes, Your Honor.

19 THE COURT: All right. Mr. Giordani, I'm passing
20 this to the 4th.

21 MS. MILLER: And --

22 MR. GIORDANI: Yes, Your Honor.

23 MS. MILLER: Your Honor, do you want to hold off
24 on the Moshier matter as well? I agree with the Court's
25 decision that the disqualification is the priority. But I

1 don't know if the Court wants to trail it -- the finding on
2 the other matter. If the Court would like longer to review
3 the records.

4 THE COURT: I have reviewed the records. And I --
5 frankly, I'm more comfortable on that than I was -- than I
6 am right now on the disqualification. So, let's at least
7 make that decision.

8 MS. MILLER: Okay.

9 THE COURT: I have an -- I have a direction, a
10 tentative direction that I think I'm headed. But I want to
11 build a record on it.

12 So, Mr. Giordani, this is your Motion to Admit
13 Prior Sworn Testimony of Merridee Moshier. So, I'm going
14 to let you build your record.

15 MR. GIORDANI: Thank you, Your Honor. I'll be
16 relatively brief. Did the Court receive the Supplemental -
17 - I guess, the Medical Evaluation that the defense provided
18 this morning or yesterday?

19 THE COURT: That has been my primary -- that has
20 been my primary focus. In fact, let's cut to it.

21 MS. MILLER: Okay.

22 MR. GIORDANI: Okay.

23 THE COURT: I see a neuropsychiatric symptoms
24 present:

25 She will sometimes see rats on the cupboards. Can

1 hear eating -- them eating dog food. She can hear her
2 grandmother and mother yelling at her. Sometimes see
3 grandmother in the kitchen who tells her she is slow
4 and stupid.

5 MS. MILLER: Your Honor, I'm so sorry to interrupt
6 you. I don't know where you are in the Report.

7 THE COURT: I'm on -- and my copies are not --

8 MS. MILLER: Numbered.

9 THE COURT: -- numbered.

10 MS. MILLER: Okay. Can you give me the first four
11 --

12 THE COURT: So, how about we look at the bottom of
13 the page.

14 MS. MILLER: Okay.

15 THE COURT: Left-hand corner. It -- the last
16 paragraph starts: Past surgical history. And it should be
17 one, two, three, four, five, six from the back.

18 [Colloquy at counsel table]

19 MR. GIORDANI: Page 9, I believe.

20 THE COURT: Okay. I'm going to mark that as 9 if
21 all agree. Then we'll kind of work backwards from there.

22 MS. MILLER: Court's indulgence?

23 THE COURT: It's her past medical history. And
24 it's just a -- look to the bottom right-hand corner of the
25 pages. Because that's where I'm looking.

1 MS. BERNSTEIN: You said, the bottom right?
2 MS. MILLER: Yeah.
3 THE COURT: Bottom right.
4 MS. BERNSTEIN: I was looking at the top. I'm
5 sorry.
6 MS. MILLER: All right.
7 THE COURT: That's fine.
8 MS. MILLER: And you said it's of the
9 Neuropsychological Evaluation?
10 THE COURT: Yeah. It's the -- the last paragraph
11 is: Past surgical history.
12 MS. MILLER: Okay.
13 MS. BERNSTEIN: I found it.
14 MS. MILLER: Okay.
15 THE COURT: All right.
16 MS. MILLER: Oh, gotcha.
17 MS. BERNSTEIN: This one.
18 THE COURT: Lawyers, where I'm at on this, and
19 tell me if this is a direction. You -- defense requests an
20 IME on State's Motion to Admit. I'm not inclined to do an
21 IME. I am inclined to have an evidentiary hearing and put
22 her, you know, through BlueJeans on the record and see if
23 she meets the, in the Court's mind, the ability to -- it's
24 been a long afternoon already.
25 MS. MILLER: I hear you, Your Honor.

1 THE COURT: If she's able to -- what's the word?

2 MS. BERNSTEIN: Testify.

3 MS. MILLER: Testify.

4 THE COURT: Well, yeah. That's where we're
5 headed. But there's another word I'm looking for.

6 MS. MILLER: Whether or not she's competent to
7 testify. Okay.

8 THE COURT: She's competent to testify. Right?
9 Can meet minimum foundational requirements and competency.

10 MS. MILLER: I think that's a good --

11 THE COURT: More to the point. Mr. Giordani,
12 that's where I'm headed. Tell me I'm -- give me your
13 impression.

14 MR. GIORDANI: Well, I respect the Court's
15 decision if that's where you want to go. I think there's
16 plenty in here that should cause concern for her testifying
17 and here's why.

18 THE COURT: I got to tell you -- I've got to tell
19 you, this is your motion. It goes both ways. She's still
20 working by -- the defense is correct. I look at this and I
21 see the page before, which would be page 8, --

22 MS. MILLER: Eight.

23 THE COURT: -- she's still under a visuospatial.
24 She's still driving, relying more on GPS, even in the small
25 town where she grows up. It sounds like she's still

1 working, she's still driving.

2 She is currently working in the house for
3 developmentally disabled people. Sometimes she's doing
4 tech work, sometimes nursing work, where she's in
5 charge of dispensing the right medications to the right
6 persons. She worked two nights ago and had to use her
7 GPS to get home.

8 So, that cuts both ways.

9 MR. GIORDANI: Absolutely.

10 THE COURT: Then I'm on page 9. It cuts both
11 ways. And 10, too, cuts both ways.

12 So, I think the easiest way for a fair decision to
13 be made on the effort is to have a BlueJeans examination of
14 the witness on competency issues. And, then, we can make a
15 decision -- I'll make a decision once we're done there.

16 MR. GIORDANI: That's fair enough, Your Honor. If
17 I could just make a brief record?

18 THE COURT: I'm not here Friday. I'm not here
19 next week. I am not here next week. I am already -- I'm
20 out of the jurisdiction.

21 MR. GIORDANI: Actually, I'm starting a trial on
22 Monday, as well. So, I'll probably still be in trial on
23 Friday.

24 I just -- can I just make a brief record about Ms.
25 Moshier, though?

1 THE COURT: Yes.

2 MR. GIORDANI: So, it does cut both ways and its
3 cut both ways all along. And I certainly relied upon Ms.
4 Moshier's statements and, then, subsequent Affidavit in the
5 records I've looked at. The State's main concern is this.

6 It's one thing to have a poor memory. Because,
7 right, if she gets on the witness stand and she can't
8 recall certain things she testified to back at the first
9 trial, I can move to admit her prior transcript then.
10 That's one thing. The State's big concern with this is
11 that she apparently creates memories, visual and auditory
12 hallucinations. What I don't want is you're in front of a
13 jury, no one can control what she says, and she comes in
14 and says: Yeah, I saw a dragon come in and bite Brodie. I
15 mean, in front of the --

16 THE COURT: Well, you can't control the witness.
17 And rightly so.

18 MR. GIORDANI: Sure.

19 THE COURT: That's the -- I'm going to say -- and
20 I don't mean to be flip here. But that's the magic and the
21 mystery and the importance of a jury trial --

22 MR. GIORDANI: Right.

23 THE COURT: -- and direct testimony of the
24 witness.

25 MR. GIORDANI: And, in any other scenario, I would

1 agree and just say we put her up or we don't and it is what
2 it is. But when you have someone who was vigorously cross-
3 examined, close in time to the event, and you meet the
4 criteria for admission of prior testimony, of course you're
5 going to file a Motion. And of course, it should be
6 considered on its merits.

7 THE COURT: Correct. So, I understand that. I
8 think a lot of these questions, at least, I believe, should
9 be answered by way of an evidentiary hearing with the
10 witness who is testifying.

11 Anything else on the defense side?

12 MS. MILLER: Timing, Your Honor. That's the only
13 -- that's what I --

14 THE COURT: That's the timing. Mr. Giordani, your
15 calendar call is next week. You've got a trial date for
16 the 14th of March. There's a lot of moving parts in this
17 right now. Parties' thoughts? I am -- I cannot be here
18 next week. I don't know who's here. I know Judge -- I
19 don't believe Judge Silva is back.

20 THE CLERK: It's Ellsworth.

21 THE COURT: Ellsworth next week.

22 MS. MILLER: Well, Mr. Giordani's not going to be
23 available next week, Your Honor. I -- defense is open.
24 This is a priority for me and my office. So, we are as
25 flexible as the Court needs us to be. Of course,

1 everybody's heavily in trial calendar. But we will do what
2 the Court needs us to do.

3 MR. DIGIACOMO: I'll cover it next Friday.

4 MR. GIORDANI: Okay. Hold on. Judge, if I may?

5 THE COURT: Yeah.

6 MR. GIORDANI: I have someone here, Mr. DiGiacomo
7 has been on BlueJeans. He can cover next Friday. It's
8 been my position all along that the defense is trying to
9 find reasons to continue this. And it's prejudicing my
10 case. And I don't want to put the victim's mother through
11 this again. So, if we can get this resolved on Friday and
12 go to trial on Monday, whether it's with me, or DiGiacomo,
13 or somebody else, that would be the State's preference.

14 THE COURT: I'm not here next Friday. But I'm not
15 your Trial Judge either.

16 MR. GIORDANI: Right.

17 THE COURT: In fact, we don't know who your trial
18 judge is going to be, under the current system.

19 MR. DIGIACOMO: [Inaudible] recusal, we can handle
20 the evidentiary hearing at the time. The witness, either
21 she passes competency outside the presence, or she doesn't.

22 THE COURT: That's actually not a bad way to go.

23 MS. MILLER: I like it, Your Honor.

24 THE COURT: All right. So, as to the Motion to
25 Disqualify the District Attorney's Office, I'm going to

1 take that under advisement. I'm going to issue a decision
2 -- a written decision before your calendar call date.

3 MS. MILLER: Thank you, Your Honor.

4 THE COURT: As to the Motion to Admit Prior
5 Testimony, I think the appropriate direction is to allow
6 the Trial Judge to examine the witness. However that
7 witness presents prior to the State seeking admission --
8 or, seeking her in their case in chief, making a decision
9 on competency, whether that she can meet the minimum
10 criteria foundationally for competency. And, then, can
11 decide on whether it's appropriate to publish. All right?

12 MS. MILLER: Thank you, Your Honor.

13 MS. BERNSTEIN: Thank you, Your Honor.

14 THE COURT: Does that work?

15 MR. GIORDANI: Thank you, Your Honor.

16 One final question. Did you mention Ellsworth --
17 Judge Ellsworth is our Trial Judge?

18 THE COURT: No. I don't know who your trial judge
19 is.

20 MR. GIORDANI: Okay.

21 THE COURT: Under our current -- as you lawyers
22 probably appreciate more than I do, we're under what I call
23 the California system right now, where you roll into
24 central trial calendar call and you get who you get. So,
25 you get who you get. All right?

1 MR. GIORDANI: Fair enough.

2 MS. MILLER: One last housekeeping matter, Your
3 Honor. In our Motion, we did say that we were going to
4 file our Exhibits, paper copies in court, to have them
5 filed under seal for the confidentiality purposes.

6 THE COURT: Okay.

7 MS. MILLER: I'm just going to hand those forward
8 to the Clerk. They're already marked the same way they
9 were provided to the Court and the State.

10 THE COURT: All right. And they're marked under
11 seal.

12 MS. MILLER: Under seal, please. Thank you, Your
13 Honor.

14

15 PROCEEDING CONCLUDED AT 3:39 P.M.

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1 **CERTIFICATION**

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3

4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

13

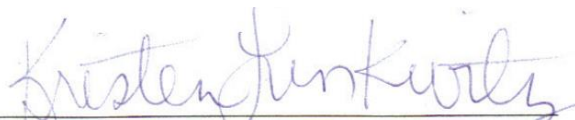
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20 KRISTEN LUNKWITZ

21 INDEPENDENT TRANSCRIBER

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~~ORDER~~ ODM
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Nevada Bar #001565
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Nevada Bar #012381
200 Lewis Avenue
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

MICHAEL ALAN LEE,
#1699107

Defendant.

CASE NO: C-11-277650-1

DEPT NO: IX

**ORDER DENYING DEFENDANT'S MOTION TO DISQUALIFY THE DISTRICT
ATTORNEY'S OFFICE AND APPOINTMENT OF A SPECIAL PROSECUTOR**

DATE OF HEARING: 02/25/2022
TIME OF HEARING: 1:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the
25th day of February, 2022, the Defendant being present, represented by FIKISHA
MILLER,ESQ., the Plaintiff being represented by STEVEN B. WOLFSON, District
Attorney, through JOHN GIORDANI, Chief Deputy District Attorney, and the Court having
heard the arguments as well as having reviewed the pleadings and good cause appearing
therefor,

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1 Factually, Defense counsel filed two separate Ex-Parte Applications for Records
2 requesting that the effort proceed under seal. The Ex-Parte Orders were signed and processed
3 electronically, but unsealed for approximately one hour prior to the Court becoming aware of
4 the error, and subsequently sealing the documents. When the Ex-Parte Orders were processed,
5 they were also served to all parties, including the District Attorney. Defense counsel
6 acknowledges that the error was through no fault of theirs or the District Attorney, but
7 nonetheless seeks to disqualify the District Attorney arguing that their Defense strategy has
8 been disclosed, and that the individual Prosecutor assigned to the case is not objective or fair.
9 The Court looks to State v. Eighth Judicial Dist. Ct. (Zogheib), 130 Nev. 158 (2014) for
10 direction and notes the test is whether the conflict(s) would render it unlikely that the
11 Defendant would receive a fair trial unless the office is disqualified from prosecuting the case.
12 The Court finds that it is not likely that the Defendant's trial will be unfair. The case is
13 approximately eleven (11) years old and set for retrial; the evidence can be weighed a fair
14 result on the merits can be found without this extreme remedy.

15 Therefore, IT IS HEREBY ORDERED that the Defendant's Motion to Disqualify the
16 District Attorney's Office and Appointment of a Special Prosecutor is hereby DENIED.

17
18 ~~DATED this _____ day of March, 2022.~~ Dated this 7th day of March, 2022

19 

20 For: Sr. DISTRICT JUDGE David Barker EC
21 288 2A1 B58D ADEE
22 Carolyn Ellsworth
District Court Judge

21 STEVEN B. WOLFSON
22 Clark County District Attorney
Nevada Bar #001565

23
24 BY /s/ John Giordani
25 JOHN GIORDANI
26 Chief Deputy District Attorney
27 Nevada Bar #012381

28 11FH1653X/sj/MVU

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 State of Nevada

CASE NO: C-11-277650-1

7 vs

DEPT. NO. Department 9

8 Michael Lee
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Denying Motion was served via the court's electronic eFile
13 system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 3/7/2022

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