


IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FELDER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37295

FILED

FEB 8 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant James Felder's post-conviction petition for a writ of habeas corpus.

On May 31, 1989, Felder was convicted, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. Felder filed a direct appeal, and this court affirmed his conviction.¹ The remittitur issued on October 23, 1991.

On April 7, 1993, Felder filed a post-conviction petition for a writ of habeas corpus, alleging that his trial counsel was ineffective. The district court appointed counsel, and Felder filed a supplemental petition. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition.

Our review of the record on appeal reveals that Felder's petition was untimely because it was filed approximately one and one-half years after this court issued the remittitur in the direct appeal.² Because Felder's petition was untimely, it is procedurally barred absent a showing

¹Felder v. State, 107 Nev. 237, 810 P.2d 755 (1991).

²See NRS 34.726(1).

of both good cause for the delay and prejudice.³ Although Felder acknowledged that his petition was untimely, he alleged good cause in that he “incorrectly believed that after the Nevada Supreme Court denied his appeal, his proper remedy was to file in federal court” and consequently, filed a post-conviction petition in federal district court. Although Felder was pursuing relief in federal court after his direct appeal, this court has rejected the proposition that pursuit of federal habeas relief constitutes good cause for filing an untimely petition.⁴ Because Felder failed to establish good cause for his untimely petition, it is procedurally barred, and we explicitly conclude that the petition should have been denied on that basis.⁵

We note, however, that the district court correctly determined that Felder’s petition lacked merit, and we affirm the district court’s ruling on that separate, independent ground.⁶ The district court found that counsel was not ineffective. The district court’s factual findings regarding a claim of ineffective assistance of counsel are entitled to

³See *id.*; Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (holding that good cause for purposes of excusing procedural default must be an impediment external to the defense that prevented defendant from complying with procedural rule).

⁴See Colley v. State, 105 Nev. 235, 773 P. 2d 1229 (1989).

⁵See generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of claim on the merits unless state court rendering judgment relied “clearly and expressly” on procedural bar) (citation omitted).


⁶Id. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, “a state court need not fear reaching the merits of a federal claim in an alternative holding.”).


deference when reviewed on appeal.⁷ Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Attorney General/Carson City
Clark County District Attorney
David M. Schieck
Clark County Clerk

⁷See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Filed
1-8-01

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DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,
8 Plaintiff,

9 -vs-

10 JAMES L. FELDER,
11 #0921958
12 Defendant.

Case No. C85183
Dept. No. Sr. Judge

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: 12/04/00
TIME OF HEARING: 9:00 A.M.

13 THIS CAUSE having come on for hearing before the Honorable JOSEPH
14 PAVLIKOWSKI, Chief District Judge, on the 4th day of December, 2000, the Petitioner being
15 present, represented by DAVID M. SCHIECK, ESQUIRE, the Respondent being represented
16 by STEWART L. BELL, District Attorney, by and through H. LEON SIMON, Deputy District
17 Attorney, and the Court having considered the matter, including briefs, transcripts, arguments
18 of counsel, and documents on file herein, now therefore, the Court makes the following findings
19 of fact and conclusions of law:

20 FINDINGS OF FACT

- 21 1. On September 13, 1988, James Felder, hereinafter Defendant, was charged by way of
22 Information with the crime of Murder with Use of a Deadly Weapon (Felony-NRS 200.030,
23 200.010, 193.165) for the August 2, 1988, killing of Gracie Windholz.
24 2. On September 20, 1988, Defendant entered a plea of not guilty. Thereafter, a jury trial
25 ensued wherein Defendant was found guilty of Murder of the First Degree with Use of a Deadly
26
27
28

1 Weapon. The facts adduced at trial include that: Felder had met the victim, Gracie Windholz,
2 a slot supervisor, and became friendly with her and her female companion, Brenda Schmitberger,
3 on a series of gambling trips he had made to Las Vegas from his home in South Carolina. At
4 the time of the murder, Felder was deeply in debt and on his last trip to Las Vegas he had
5 borrowed a .25 caliber semi-automatic pistol, later positively identified as the murder weapon,
6 from the sister of his friend, companion, and cousin, Kerry Durr, in South Carolina and brought
7 the gun to Las Vegas. The murder weapon was found in Felder's hotel room after the murder
8 along with a pair of shoes with human blood spots which Felder claimed was fish blood he had
9 gotten on the shoes while fishing. On the day of the murder Felder picked Brenda up from her
10 place of employment claiming he couldn't awaken Gracie and took Brenda to the home Gracie
11 and Brenda shared. When Felder opened the door Brenda saw blood on the floor. Felder
12 entered the house and brought out a ransom note demanding \$200,000.00 for Gracie's safety.
13 Felder asked Brenda to raise half of the ransom. It was determined that the ransom note was
14 printed on the same type of printer and paper owned by Felder and a handwriting expert
15 positively identified hand written insertions on the purported ransom note as being in Felder's
16 handwriting.

17 3. On May 25, 1989, Defendant was sentenced to two (2) consecutive sentences of Life with
18 the Possibility of Parole on the First Degree Murder and Use of a Deadly Weapon convictions.
19 A Judgment of Conviction was filed May 31, 1989.

20 4. On April 30, 1991, the Nevada Supreme Court concluded that the Defendant's
21 contentions on appeal were without merit and affirmed Defendant's conviction. Felder v. State,
22 107 Nev. 237, 810 P.2d 755 (1991). Thereafter, Defendant filed with the United States Supreme
23 Court a Petition for Writ of Certiorari. Defendant's writ was denied on October 7, 1991.
24 Defendant then filed a Petition for a Writ of Habeas Corpus in the United States District Court
25 for the District of Nevada.

26 5. On December 30, 1992, U.S. District Court Judge Edward C. Reed issued an order
27 recommending that Defendant voluntarily dismiss his petition due to the fact that it contained
28 both exhausted and unexhausted claims. Justice Reed also urged Defendant to proceed through

1 the Nevada State court system in order to exhaust his unexhausted claims. (United States District
2 Court Order, filed January 4, 1993). Consequently, on January 15, 1993, Defendant filed a
3 motion with the U.S. District Court to voluntarily dismiss his petition. On February 12, 1993,
4 the United States District Court granted Defendant's Motion to Voluntarily Dismiss his Writ of
5 Habeas Corpus.

6 6. On April 2, 1993 Defendant filed a Petition for Writ of Habeas Corpus to which the State
7 responded. After a lengthy delay, Defendant filed a supplemental petition in support of his
8 Petition for Writ of Habeas Corpus which was received on October 28, 1997. The State
9 responded on January 14, 1998. Defendant then filed Reply Points and Authorities on April 22,
10 1998.

11 7. An Evidentiary Hearing was held over several months and testimony was taken on
12 September 7, 1999, December 20, 1999, February 15, 2000, and April 5, 2000. Defendant filed
13 a Post Hearing Brief on October 17, 2000.

14 8. Defendant testified at the evidentiary hearing that he had met a person named Rick Bogart
15 before the murder of Gracie Windholz. Probably around 1986, Brenda Schmitberger (Brenda)
16 introduced Rick Bogart (Bogart) to Defendant as her business partner or her investment partner.

17 Brenda would ask Defendant his opinion on some of the things Bogart was doing. Defendant
18 gave a statement regarding Brenda and Bogart to Detective Thomas Dillard the day of Gracie
19 Windholz's murder. Additionally, Defendant gave a statement to Jerry West of the FBI
20 regarding Brenda and Bogart. Defendant testified that he told his trial attorney, Steven Dahl,
21 about Bogart's investment scams and Brenda's involvement. Defendant told Mr. Dahl that
22 Bogart lived at the Jockey Club, he didn't work, he gambled, and he had gotten Brenda to take
23 money outside of the United States. Finally, Defendant testified that in 1991 he found out that
24 Bogart was really Phillip Cohen.

25 9. Private Investigator, Ralph Dymont, testified that he was hired by Defendant to
26 investigate Rick Bogart a/k/a Philip Cohen. Dymont received documents from Beneficial Life
27 Insurance Company showing that Bogart was issued a life insurance policy. The Life Insurance
28 policy listed several beneficiaries including Brenda.

1 10. Paul Chidester, a life and health insurance salesman, testified that he maintained a
2 continuous license in the State of Nevada since 1981. Chidester was writing policies for
3 Beneficial Life Insurance Company and Chidester issued Rick Bogart a life insurance policy in
4 1985. Bogart listed a number of beneficiaries on his policy including Brenda Schmitberger.
5 Bogart requested Chidester correspond with the listed beneficiaries to give them notice of their
6 interest in the insurance policy. A letter from Chidester to one beneficiary, Martin Hennessy,
7 was admitted into evidence for the sole purpose of showing that Mr. Hennessy received a letter.
8 Chidester had no recollection nor a record indicating that he sent Brenda a similar letter.
9 Chidester noted that he would have had Bogart's file in 1988 but he doesn't remember if he sent
10 a letter to Brenda.

11 11. Martin Hennessy, Director of Tennis at the Desert Inn for twenty-five years, testified that
12 he knew and was a friend of Rick Bogart since the early 1980's. (approximately nine years).
13 Hennessy invested with Bogart sometime between 1982 and 1984. Hennessy said that Bogart
14 was a very likeable person, very bright and he trusted him. Bogart was the secretary/treasurer
15 of the Nevada Tennis Association which is a voluntary, non-paid position. Hennessy visited
16 Bogart's residence at the Jockey Club and he knew that Bogart had a computer and a printer but
17 did not know what type. Hennessy declared that if anyone had asked him to testify regarding
18 Bogart in 1988 or 1989 that he would have. However, Hennessy also testified that if he was
19 interviewed in 1988 he would not have had anything bad to say about Bogart. Bogart
20 disappeared in 1990 and at this point Hennessy found him in Reno. Hennessy knew Bogart did
21 a lot of sports betting and Bogart was investing in oil futures for him. Hennessy knew nothing
22 of Bogart being involved in drug dealing nor money laundering. Bogart had bragged to
23 Hennessy that he grew up with John Gotti.

24 12. Mary Doose-McIntyre (Doose) testified that she was friends with both Gracie and Brenda.
25 Doose said that about a year before Gracie's murder in August of 1988, Brenda indicated that
26 she had problems with her relationship with Gracie. Brenda said Rick Bogart wanted to marry
27 her, he bought her expensive gifts and they wanted to get married but didn't know how to tell
28 Gracie. Brenda had intentions of leaving Gracie and marrying Rick Bogart. Doose had

1 conversations with Gracie regarding Brenda's investments with Bogart and Gracie had invested
2 a lot of money with Brenda. Although, Gracie never met Rick Bogart nor did she herself invest
3 with him. In Doose's opinion the relationship between Gracie and Brenda in August of 1988
4 was "shaky."

5 13. Brenda testified that she and her significant other, Gracie, were not having problems with
6 their relationship before Gracie's death. She knew Bogart for a couple of years prior to Gracie's
7 death. Additionally, Brenda testified that she did not invest money with Bogart nor did she ever
8 date Bogart. Brenda also testified that she did not remember discussing Bogart with Mary Doose
9 nor did she try to get Mrs. Doose to invest with Bogart.

10 14. Katherine Fredi was a friend of Brenda and Gracie since 1980. Neither Brenda nor
11 Gracie ever indicated to Mrs. Fredi that there was a problem with their relationship. Mrs. Fredi
12 added that she also did not notice any appearance of problems with Brenda and Gracie's
13 relationship.

14 15. Defendant's trial attorney, Steven Dahl, testified. Dahl was the head of the murder unit
15 for the Public Defender's Office from 1988 to 1995. Dahl and Defendant had a good working
16 relationship and Dahl kept Defendant apprised of any investigation results. Dahl explained that
17 Defendant's theory of the case from the beginning was that Brenda and Rick Bogart were
18 involved in investment schemes and that the murder of Gracie had been done by Mr. Bogart.
19 Defendant had told Dahl that Bogart lived at the Jockey Club, had no other job, and was like a
20 tennis pro. Dahl verified Bogart's residence at the Jockey Club. Dahl verified Bogart's tennis
21 affiliations with one of Dahl's co-workers who knew Bogart personally and through other
22 sources but found nothing negative. Dahl testified that some two years after Defendant's trial
23 he found out that Bogart was charged with several felonies involving embezzlement and
24 investment fraud. Dahl then found out that Bogart's real name was Phillip Cohen. Bogart did
25 testify at Defendant's trial but Dahl had nothing to impeach Bogart with. Dahl had ran a scope
26 report on Bogart and the report was negative. Dahl also sent investigators to research Bogart and
27 anyone that knew him. Dahl interviewed Brenda and she denied any investment with Bogart.
28 All research came up negative and no one had anything bad to say about Bogart. Dahl contacted

1 and talked with Mary Doose. Dahl knew that the ransom note was produced on a Tandy
2 computer but didn't know if Bogart owned a computer or printer. Additionally, Dahl admitted
3 that one of the State's key pieces of evidence was that the ransom note had handwritten notes
4 on it and a handwriting expert claimed the handwriting was Defendant's.

5 16. Another of Defendant's theories was that he was laundering money for the mob and the
6 mob was involved in Gracie's death. Defendant gave names to Dahl regarding individuals but
7 they would not admit they were involved in money laundering. Thus, Dahl had no corroborating
8 information that Defendant was involved in money laundering. Defendant told Dahl that he had
9 full power of attorney for his parents but Dahl did not present a copy of the power of attorney
10 to the jury. However, Dahl made two trips to South Carolina, Defendant's home, to investigate
11 Defendant's financial situation and Defendant's claims. On one trip, Defendant's parents
12 admitted Defendant had taken money from them without their permission. A copy of the written
13 power of attorney was admitted in the evidentiary hearing.

14 17. Dahl testified that after Defendant's trial he spoke directly with the members of the jury.
15 The jury did not like the District Attorney's posture at trial and they resented him for it. Also,
16 the jury had a lot of unanswered questions but focusing on Defendant, they had no problem
17 returning the conviction.

18 18. Defendant has failed to meet his burden of proof that his trial counsel was ineffective.

19 19. The district court did not abuse its discretion by refusing to allow Defendant to enter
20 testimony regarding an alleged break-up between Gracie Windholz and Brenda Schmitberger.

21 20. The only new evidence adduced at the evidentiary hearing which was not before the jury
22 at the time of trial was that Rick Bogart was actually Phillip Cohen and was perpetrating
23 investment fraud. However, this was not known at the time of trial; defense counsel made
24 reasonable efforts to investigate Rick Bogart prior to trial; and even if this information had been
25 discovered and presented to the jury at the time of trial it is highly unlikely that the result of the
26 trial would have been different considering the overwhelming evidence of Defendant's guilt.

27 CONCLUSIONS OF LAW

28 1. Claims of ineffective assistance of counsel must be reviewed under the "reasonably

1 effective assistance” standard and require a defendant to show counsel’s assistance was
2 “deficient” and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S.
3 668, 687, 104 S.Ct. 2052, 2064 (1984); Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676,
4 682 (1995).

5 2. The only new evidence introduced at the evidentiary hearing was that after Defendant was
6 convicted and his appeal decided, it came to light that Rick Bogart was really “con-artist” Phillip
7 Cohen. Over two years after Defendant’s trial and conviction, Defendant learned that Rick
8 Bogart was arrested for investment fraud. However, at the evidentiary hearing Defendant failed
9 to show how this new evidence would have effected the trial verdict. The new evidence did not
10 show that Brenda committed perjury at Defendant’s trial, that Brenda and Bogart had a romantic
11 relationship, that Brenda and Bogart were involved in investment scams, or that anyone other
12 than himself, committed the murder of Gracie Windholz.

13 3. The information regarding Bogart’s involvement in investment fraud was not known until
14 over two years after Defendant’s conviction. There was no evidence presented that anyone knew
15 of Bogart’s activities at the time of Defendant’s trial or that these activities could have
16 reasonably been discovered. Additionally, there was no showing that if this information was
17 found during Defendant’s trial the result would have been different due to the overwhelming
18 evidence presented against Defendant.

19 4. Defendant’s trial attorney, Steven Dahl, investigated Defendant’s case thoroughly. Mr.
20 Dahl had Bogart investigated and the investigation came up negative. Not one person had
21 anything bad to say about Bogart at the time of Defendant’s trial. Additionally, Mr. Dahl
22 traveled to South Carolina, Defendant’s home, twice to investigate Defendant’s theories of the
23 case. However, both extensive investigations uncovered nothing to corroborate Defendant’s
24 theories. On the contrary, Mr. Dahl uncovered evidence that affirmed the State’s theory of the
25 case.

26 5. The State provided overwhelming evidence to the jury of Defendant’s guilt. First, was
27 the ransom note. The ransom note had two handwritten notes on it and a handwriting expert
28 testified that after comparing examples of Defendant’s handwriting, Defendant wrote the

1 notations on the ransom note. The paper used to type the ransom note matched the printer
2 owned by Defendant. Additionally, after Gracie's murder, Defendant called his companion and
3 relative Kerry Durr, and told him to get rid of his computer. Second, Terry Cook, a serologist,
4 testified that the blood, found on Defendant's shoe was not fish blood as Defendant contended,
5 it was not Defendant's blood and that it matched the blood type of Gracie Windholz who had
6 a very distinctive blood type. Third, the murder weapon was found in Defendant's hotel room.
7 The .25 caliber gun was smuggled to Las Vegas by Defendant when he wrapped it in tin foil and
8 put it in his suitcase. Fourth, Defendant was in serious financial debt. Defendant owed over
9 \$200, 000 in credit card debt and the ransom note requested \$200,000. Fifth, Defendant made
10 feeble attempts after Gracie's murder to cover his tracks. The day after his arrest Defendant
11 called Mary Doose and told her that he bought a gun in South Carolina and Kerry Durr mailed
12 it to Gracie to give to Brenda. Defendant also called Kerry Durr and told him to tell the same
13 story.

14 6. In light of the lack of compelling new evidence adduced at the evidentiary hearing and
15 the strength of the evidence introduced against Defendant at trial, Defendant has not met the first
16 prong of Strickland, requiring that trial counsel's failure to investigate Rick Bogart amounted
17 to deficient performance. Strickland, supra. As such, Defendant has failed to overcome his
18 burden to show ineffective assistance of his counsel. Strickland, supra.

19 7. Defendant's argument that the district court abused its discretion in barring hearsay
20 testimony regarding an alleged break-up between Gracie and Brenda is without merit.

21 8. A prior inconsistent statement can be used not only to impeach a witness, but may also
22 be used as substantive evidence and will not be considered hearsay. See generally NRS 51.035
23 (2)(a). However, "[t]he decision to admit or exclude evidence is within the sound discretion of
24 the district court." Johnson v. State, 113 Nev. 772, 942 P.2d 167, 170 (1997) citing Greene v.
25 State, 113 Nev. 157, 166, 931 P.2d 54, 60 (1997).

26 9. At trial, there was testimony from Mary Doose and Defendant regarding an alleged
27 relationship between Brenda and Bogart. Trial counsel had more than ample opportunity to
28 cross examine Brenda and Bogart regarding prior inconsistent statements and make the jury fully

1 aware of any inconsistencies. Trial counsel did question both Brenda and Bogart regarding a
2 romantic relationship and they both denied the accusation. Furthermore, the prior inconsistent
3 statement alone would not have served to exculpate Defendant as ample other direct evidence
4 was produced at the trial implicating Defendant as the murderer of Gracie Windholz.

5 10. Defendant contended that Mary Doose's testimony regarding Gracie's investments should
6 have been permitted to impeach Brenda. However, as the trial court ruled, Mary Doose's
7 statement regarding Gracie would have been inadmissible hearsay. Mary Doose was testifying
8 to what Gracie had told her not what Brenda had told her and that was clearly hearsay. See,
9 Browne v. State, 113 Nev. 305, 933 P.2d 187 (1997). Mary Doose's testimony regarding
10 Gracie's investments would not serve to impeach Brenda. There was no evidence presented
11 connecting Brenda to Gracie's alleged investments. Mary Doose's statement was inadmissible
12 hearsay and was not proper impeachment testimony.

13 11. Alternatively, Defendant contends that Mary Doose's testimony regarding Gracie's
14 investments should have been permitted to establish Brenda's motive to have been involved with
15 Gracie's murder. Defendant wished to illicit from Mary Doose statements made by the
16 deceased, Gracie, to her regarding her investments with Bogart and her concerns with the
17 investments.

18 12. NRS 51.105(1) which permits into evidence a statement of the declarant's then existing
19 state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design,
20 mental feeling, pain or bodily health. The Hillmon doctrine¹ provides that:

21 [W]hen the performance of a particular act by an individual is an
22 issue in a case, his intention (state of mind) to perform that act
23 may be shown. From that intention, the trier of fact may draw the
24 inference that the person carried out his intention and performed
the act. Within this conceptual framework, hearsay evidence of
statements by the person which tend to show his intention is
deemed admissible under the state of mind exception.

25 Lisle v. State, 113 Nev. 679, 691, 941 P.2d 459, 467 (1997) (citations omitted).

26 13. Under NRS 51.105(1) Defendant may properly admit testimony from Bogart to show
27 Bogart's state of mind. Defendant may not illicit testimony regarding Gracie's state of mind to

28 ¹ Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909 (1892).

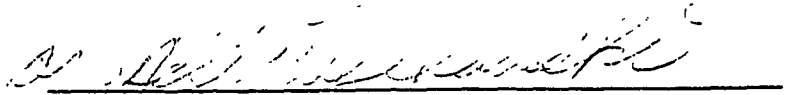
1 prove Bogart's state of mind. Any admissible hearsay testimony regarding Bogart's intent or
2 motive must be testimony that was from Bogart. Defendant was attempting to transfer Gracie's
3 alleged intent regarding Bogart's investment scams to Bogart's motive to kill Gracie. Mary
4 Doose cannot testify to Bogart's motive through the thoughts and feelings of another person such
5 as Gracie. The record is devoid of any evidence showing that Bogart was aware of Gracie's
6 alleged anger about his investment scams. Accordingly, the hearsay testimony is inadmissible
7 hearsay.

8 14. In order to demonstrate ineffective assistance of counsel, the defendant must show 1) that
9 counsel's performance was deficient; and 2) that he was prejudiced by such deficiency.
10 Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). As discussed
11 previously, Defendant's counsel was effective but even if counsel was somehow not effective,
12 Defendant clearly did not meet the prejudice prong of Strickland. Even with the new "con-man"
13 evidence regarding Rick Bogart a/k/a Phillip Cohen, it is not at all likely that the result of
14 Defendant's trial would not have been different because of this new information due to the
15 overwhelming evidence implicating Defendant as the murderer of Gracie Windholz.

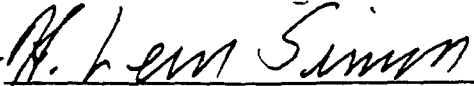
16 ORDER

17 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
18 shall be, and it is, hereby denied.

19 DATED this _____ day of January, 2001.

20
21 
22 _____
DISTRICT JUDGE

23 STEWART L. BELL
24 DISTRICT ATTORNEY
Nevada Bar #000477

25
26 BY 
27 H. LEON SIMON
Deputy District Attorney
28 Nevada Bar #000411