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1 Case No. CR-1208084

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LINDA F. BIRLEIGH
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3 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
4
5 IN AND FOR THE COUNTY OF WHITE PINE

6 * * * * *

7 THE STATE OF NEVADA,
8 Plaintiff,

9 vs.

10 MIKE FIXER NEWCASTLE,
11 Defendant.

AMENDED MOTION FOR A NEW TRIAL
BASED UPON JURY MISCONDUCT
AND CONFLICTING EVIDENCE¹

12 FACTUAL AND PROCEDURAL HISTORY

13 On October 18, 2013, after a four day trial by jury, a verdict of guilty for the crime
14 of battery by an inmate with the use of a deadly weapon causing substantial bodily harm
15 was rendered against the defendant, MIKE FIXER NEWCASTLE ("Mr. Newcastle").
16 Testimony in the record showed that the victim sustained critical life threatening injuries
17 as a result of the battery sustained.

18 During trial, the state's main witness, Ely State Prison Correctional Officer
19 Cortney Green, testified that he saw Mr. Newcastle standing over the victim with the
20 weapon raised over his head in a striking fashion. Evidence also showed that Mr.
21 Green's testimony changed several times during the course of the investigation,

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24 ¹ Amended to correct a factual error in original motion fn21.

1 preliminary hearing and trial.² In addition, there was testimony that Mr. Green was
2 "rattled" and in a state of shock during and immediately after observing the victim's
3 injuries. Defense counsel argued that Mr. Green's testimony should be mistrusted
4 pursuant to the jury instructions because of how inconsistent it had been throughout the
5 case. In addition, defense counsel argued Mr. Green's emotional state could have
6 affected his perception and memory of the events and that Mr. Green was testifying to
7 what he thinks he saw instead of what he actually saw.

8 The State's DNA expert, Monica Siewertsen, testified that DNA found on the
9 weapon matched the victim and second or third trace contributors who could not be
10 identified. Ms. Siewertsen also testified that the method she used to collect DNA from
11 the weapon destroyed any possibility of lifting fingerprints from its surface. Finally, Ms.
12 Siewertsen testified that the DNA found on Mr. Newcastle's jumpsuit and on his shoe
13 matched the DNA of the victim.

14 Defense expert, Jeff Saviano, testified that he examined the blood splatter found
15 in the room and on Mr. Newcastle's jumpsuit. After examining the directionality and the
16 placement of the blood splatter, Mr. Saviano explained that the splatter on the front of
17 the jumpsuit was deposited onto the article when Mr. Newcastle was facing the source
18 of the splatter. He further explained that the size, location and directionality of the
19 splatter on the rear of the jumpsuit showed that Mr. Newcastle must have had his back
20 turned to the source of the splatter. In conclusion, Mr. Saviano proffered the opinion

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22 ² As a result of a very late disclosure of potentially exculpatory evidence, the parties
23 stipulated to a jury instruction that Mr. Green's testimony was to be mistrusted.
24 However, the Court only permitted the introduction of Mr. Green's preliminary testimony
25 transcript as evidence of the changes to his testimony. In addition, on the record, the
Court considered striking Mr. Green's testimony in its entirety.

1 that Mr. Newcastle could not have been the perpetrator who struck the blow which
2 deposited splatter onto the rear portion of his jumpsuit.

3 The jury could have returned three possible verdicts in this case. First, that Mr.
4 Newcastle was guilty of attempted murder; second, that Mr. Newcastle was not guilty of
5 attempted murder, but guilty of battery by an inmate with a deadly weapon causing
6 substantial bodily harm; and third, that Mr. Newcastle was not guilty. The jury spent
7 approximately two to three hours deliberating before returning with its verdict. After the
8 conclusion of the trial, defense counsel had the opportunity to discuss the case with
9 several jurors.

10 Juror Josie Jensen ("Ms. Jensen") told defense counsel that a couple of jurors
11 voiced a belief that that Mr. Newcastle was guilty of attempted murder. In addition, Ms.
12 Jensen indicated that there were jurors who voiced that the evidence was insufficient to
13 show that Mr. Newcastle attempted to murder the victim. Finally, Ms. Jensen indicated
14 that during deliberations at least one or two other jurors voiced doubt about Mr.
15 Newcastle's guilt and that after deliberations, the jury compromised on a verdict of guilty
16 to the alternate charge.

17 Juror James Nelson ("Mr. Nelson") told defense counsel that during deliberations
18 he declared that Mr. Newcastle was in prison for a reason; clearly suggesting that Mr.
19 Newcastle was guilty simply because he was incarcerated. Juror Amanda Reieher
20 ("Ms. Reieher") told defense counsel that during deliberations, jurors discussed Ely
21 State Prison, the fact that Mr. Newcastle was in the room at the time of the battery and
22 that they "knew he was involved with the battery somehow."
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1 Juror Kelly Ernest ("Mr. Ernest") told defense counsel that during deliberations,
2 jurors commented on the fact that Mr. Newcastle was an inmate at Ely State Prison and
3 that jurors stated that everyone knows that the inmates are at Ely State Prison, in
4 particular, for a reason. In addition, Mr. Ernest told defense counsel that the jury
5 discussed convicting Mr. Newcastle because they knew he was involved in the offense
6 in some way because he had the victim's blood on his jumpsuit. Mr. Ernest further
7 stated that the jury opined that he may have been in the room to assist the individual
8 who was actually delivering the blows to the victim.

9 DISCUSSION

10 A. Motion for a New Trial

11 1. Juror Misconduct

12 A criminal defendant must file a motion for a new trial (for reasons other than
13 those specifically enumerated in N.R.S. §176.515(1)) within seven days after a verdict
14 or finding of guilt.³ Jury misconduct may be grounds to grant a new trial; however, "Not
15 every incidence of juror misconduct requires the granting of a motion for [a] new trial"⁴

16 "Juror misconduct falls into two categories: (1) conduct by jurors contrary to their
17 instructions or oaths, and (2) attempts by third parties to influence the jury process."⁵

18 The first category includes considering information not admitted during the trial,
19 instances of jurors specifically ignoring the law as instructed to them by the court, and
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21 ³ N.R.S. § 176.515(4) (2013).

22 ⁴ Barker v. State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979).

23 ⁵ Meyer v. State, 119 Nev. 554, 561, 80 P.3d, 447, 453 (2003) (internal quotations
24 omitted).

1 lying or concealing information during voir dire examination.⁶ The second category is
2 not alleged and will not be discussed here.

3 To determine if a new trial is warranted, the Court must conduct a very fact-
4 intensive analysis, considering the nature and the extent of any misconduct and the
5 pervasiveness of any prejudice possibly resulting.⁷ The Court may only consider
6 objective evidence based upon overt conduct and may not delve into the deliberative
7 thought process of the jury at any time.⁸ Whether or not intrinsic jury misconduct
8 occurred and the extent of any resulting prejudice are questions of fact to be determined
9 by the district court. Such findings will be reviewed only for an abuse of discretion.⁹
10 Whether or not the jury considered extraneous evidence is an issue which implicates
11 the confrontation clause and is, therefore, reviewed de novo.¹⁰

12 Evidence obtained from a juror regarding deliberations is only admissible if it can
13 be established through objective facts and overt conduct without regard to the state of
14 mind and the mental processes of any one juror.¹¹ Objective facts can include those
15 things which are readily observable, including specific statements made by jurors.¹²

16 ⁶ Id.

17 ⁷ Id.

18 ⁸ Id., at 562, 80 P.3d at 453 (interpreting N.R.S. § 50.065(2)).

19 ⁹ Walker v. State, 95 Nev. 321, 323, 594 P.2d 710, 711 (1979).

20 ¹⁰ Meyer, at 567, 89 P.3d at 457.

21 ¹¹ Id.

22 ¹² Id. The court allowed actual statements made aloud by the jurors during
23 deliberations. However, the Court struck any statements made by jurors which
24 addressed the impact or effect those statements had on the mental processes or
25 decision making of the jurors.

1 A defendant has the burden of proving that misconduct occurred and that the
2 misconduct was prejudicial.¹³ "To justify a new trial, the defendant must, through
3 admissible evidence, demonstrate the nature of the misconduct and that there is a
4 reasonable probability that it affected the verdict."¹⁴ When determining whether or not
5 misconduct affected the verdict, the Court must consider:¹⁵ the timing of the misconduct;
6 the materiality of the issue; the possible admissibility of any extrinsic evidence
7 considered including the background of the parties, prior bad acts, crimes not charged;
8 the influence the misconduct might have had in light of the entire trial;¹⁶ how long the
9 jury discussed the extrinsic material; when the discussion occurred in relation to the
10 verdict; the specificity or the ambiguity of the information;¹⁷ whether the issue of guilt or
11 innocence is close; the quantity and character of the error; and the gravity of the crime
12 charged."¹⁸

13 a. Failure to Follow the Instructions of the Court

14 It is the duty of a juror to fully and completely follow the instructions given to him
15 by the district court and any failure to do so is juror misconduct.¹⁹ Where it is shown
16 that a jury failed to follow its instructions, a new trial must be granted unless it is clear,

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18 ¹³ Maestas v. State, 128 Nev. ____, ____, 275 P.3d 74, 84, (2012).

19 ¹⁴ Zana v. State, 125 Nev. 541, 547, 216 P.3d 244, 248, (2009) (internal quotations omitted).

20 ¹⁵ Not an exhaustive list.

21 ¹⁶ Valdez v. State, 124 Nev. 1172, 1186-87, 196 P.3d 465, 475 (2008).

22 ¹⁷ Zana, at 541, 216 P.3d at 248.

23 ¹⁸ Id., (citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

24 ¹⁹ Valdez, at 1187, 196 P.3d at 475 (2008).

1 beyond a reasonable doubt, that no prejudice resulted.²⁰ The burden is on the
2 defendant to prove that the jury misconduct occurred and that there is a reasonable
3 possibility that the misconduct affected the verdict.²¹

4 In the case at hand, there is an abundance of objective evidence showing that
5 the jury failed to follow this court's instructions. Juror Nelson blatantly admitted to
6 defense counsel that he introduced into deliberations conversation regarding Mr.
7 Newcastle's present placement at Ely State Prison. In addition, Jurors Ernest and
8 Reieher indicated that thorough discussions took place during deliberations concerning
9 Mr. Newcastle's incarceration and the character of inmates at Ely State Prison (i.e. the
10 propensity of those who are at Ely State Prison to commit violent offenses.) Juror
11 Jensen's statements provide objective evidence that the issue of guilt or innocence was
12 close and that the conviction was not the result of overwhelming evidence.

13 In this case, Mr. Newcastle was clearly prejudiced when the jury considered his
14 present incarceration. The objective evidence demonstrates that the jury was or could
15 have been influenced by their discussion of and consideration of the fact that Mr.
16 Newcastle is incarcerated, not only in the Nevada Department of Corrections, but in Ely
17 State Prison in particular. In this instance, the prejudice which resulted is the clear
18 implication a reasonable juror could make that because inmates are housed at Ely State
19 Prison, they are inherently violent, and therefore are guilty of any violent crime with
20 which they are charged.

21 In this case, the parties involved attempted to ensure that Mr. Newcastle was on
22 trial for the crime he was charged with, instead of being tried and punished again for

23 ²⁰ Id.

24 ²¹ Id.

1 that crime which he was previously convicted.²² The Constitution guarantees that Mr.
2 Newcastle be given a fair trial and that he be presumed innocent until proven guilty.
3 The evidence is, however, that the jury in this case, presumed him guilty because he is
4 incarcerated for another crime.

5 b. Extrinsic Evidence

6 i. Consideration of a crime not charged

7 Here, the jury substituted elements into the court's instructions in order to convict
8 Mr. Newcastle of this offense. In essence, they convicted Mr. Newcastle simply for
9 being in the room because they "knew he must have been involved somehow."

10 When misconduct involves the introduction of extrinsic evidence including the
11 consideration of a crime not charged, the confrontation clause is implicated.²³ If a juror
12 has independent knowledge of any issue involved with the trial, communicating that
13 knowledge to other jurors introduces extrinsic evidence and is misconduct.²⁴ "Likewise,
14 if a juror considers and communicates a past personal experience that introduces totally
15 new information about a fact not found in the record or the evidence, this would
16 constitute extrinsic evidence and improper conduct."²⁵ A juror may express an opinion
17 or interpret evidence based upon his own life experiences, but may not introduce facts

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19 ²² For instance, Mr. Newcastle was allowed to wear his own clothing. In addition, Mr.
20 Newcastle was escorted to and from the Courtroom outside of the presence of the jury.
21 Finally, Mr. Newcastle arrived at the Courthouse at least an hour before jurors were
22 scheduled to arrive in order to change from his orange jumpsuit and restraints into his
23 personal clothing to lower the chance that a juror might see him restrained.

22 ²³ Meyer, at 572, 80 P.3d at 460.

23 ²⁴ Id. at 568, 80 P.3d at 458.

24 ²⁵ Id.

1 essential to the case, which are not in evidence.²⁶ “The unsworn testimony of a juror as
2 to a fact which is relevant to the determination of an issue before the jury constitutes
3 misconduct in itself.”²⁷

4 When “determin[ing] whether the jury’s exposure to [extrinsic] material resulted in
5 prejudice to the defendant, the district court is required to objectively evaluate the effect
6 it may have had on the jury and determine whether it would have influenced the
7 “average hypothetical juror.”²⁸ This evaluation must include a consideration of whether
8 or not the misconduct influenced the *offending* juror.²⁹

9 In Rowbottom v. State, a juror engaged in misconduct by conducting an
10 independent investigation, communicating with third parties about the trial and relaying
11 her findings to the jury.³⁰ The trial court found misconduct had occurred, but that
12 prejudice had not resulted in the guilt phase because the juror did not relay any of the
13 information until after the penalty phase had begun. However, the Nevada Supreme
14 Court disagreed. The Court said that the juror who engaged in the misconduct
15 “returned to and participated fully in the jury deliberations while being influenced, in
16 whole or in part, by her... [misconduct].” In that case, the Court held that it could not be
17 said beyond a reasonable doubt that she had not injected the opinions she developed
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19 ²⁶ Maestas, at ____, 275 P.3d at 84.

20 ²⁷ Barker, at 312-13, 594 P.2d at 722.

21 ²⁸ Zana, at 541, 216 P.3d at 248.

22 ²⁹ Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 943 (1989) (overruled on
23 other grounds, emphasis added).

24 ³⁰ Id.

1 as a result of her misconduct into the deliberations, thereby creating prejudice to the
2 defendant.³¹

3 In Meyer, the defendant alleged that two jurors committed misconduct.³² The
4 first juror read a *Physician's Desk Reference* book regarding the side effects of a certain
5 medication and reported her findings to the jury. The Court found that "[e]ven if she had
6 simply relied on her own memory, this would be outside information beyond the scope
7 of the evidence. This clearly amounted to an extraneous influence upon the jury."³³
8 The second juror worked as a nurse and opined to the jury that the injuries the victim
9 sustained were consistent with domestic violence. The Court said that her actions did
10 not amount to misconduct because she used her everyday experiences as a nurse in
11 reaching her opinion. However, the Court went on to say that if a juror "introduces
12 totally new information about a fact not found in the record or evidence, this would
13 constitute extrinsic evidence and improper conduct."³⁴

14 The fact that a juror indicated that because Mr. Newcastle must be guilty
15 because he is an inmate at Ely State prison clearly show that Mr. Newcastle was not
16 given a fair trial by an impartial jury. Mr. Newcastle clearly suffered prejudice as a result
17 of the misconduct in this case. Furthermore, this constituted a consideration of evidence
18 not introduced or admitted before the jury in defiance of Jury Instruction number 4. Mr.
19 Newcastle's prior criminal behavior, his placement in Ely State Prison, possibilities of
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21 ³¹ Id.

22 ³² Meyer, at 568-69, 80 P.3d at 458.

23 ³³ Id.

24 ³⁴ Id.

1 others involved who could have delivered splatter causing blows to the victim, and that
2 the blood on the back of Mr. Newcastle's jumpsuit was caused by a third party involved
3 in the crime were items which were not in evidence.

4 Additionally, the jury engaged in guess work and speculation during deliberation
5 in defiance of Jury Instruction number 1³⁵ when jurors speculating that Mr. Newcastle
6 was an accomplice to the battery. It is not reasonable, from the facts in the record, for
7 the jury to have inferred that Mr. Newcastle was an accomplice and that as a result, he
8 is guilty of battery by an inmate with a deadly weapon causing substantial bodily harm.

9 2. Conflicting Evidence.

10 A trial court may grant a new trial based upon conflicting evidence if, after the
11 verdict has been rendered, the judge disagrees with the jury's decision. The decision to
12 grant or deny a motion for a new trial based upon conflicting evidence is within the trial
13 court's discretion. Such a decision will be reviewed only for an abuse of discretion.

14 "Historically, Nevada has empowered the trial court in a criminal case where the
15 evidence of guilt is conflicting, to independently evaluate the evidence and order
16 another trial if it does not agree with the jury's conclusion that the defendant has been
17 proven guilty beyond a reasonable doubt."³⁶ Conflicting evidence is distinctly different
18 from insufficient evidence.³⁷ Where there is conflicting evidence, there is evidence in
19 the record supporting the allegations, but there is also evidence supporting an

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21 ³⁵ (Instructions at 3.)

22 ³⁶ Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (citing State v.
23 Busscher, 81 Nev. 587, 407 P.2d 715 (1965)).

24 ³⁷ State v. Purcell, 110 Nev. 1389, 1395, 887 P.2d 276, 280 (1994).
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1 alternative result.³⁸ Where there is insufficient evidence, the state has failed to present
2 evidence supporting the charges.³⁹

3 In Washington v. State, the Nevada Supreme Court held that the decision to
4 grant a new trial based upon conflicting evidence is permissive and entirely within the
5 trial court's discretion.⁴⁰ There, the Court delineated the difference between conflicting
6 evidence and insufficient evidence. In dicta, it said that insufficient evidence is distinctly
7 different from conflicting evidence because, when insufficient, there is *not enough*
8 evidence to support a conviction.⁴¹

9 In State v. Purcell, the Nevada Supreme Court again discussed the difference
10 between conflicting evidence and insufficient evidence.⁴² In that case, the state
11 appealed the trial court's decision to grant a new trial, arguing that the law allows a trial
12 court unfettered discretion with which he may vacate a jury's verdict. The Supreme
13 Court disagreed saying, "a conflict of evidence occurs where there is sufficient evidence
14 presented at trial which, if believed, would sustain a conviction, but this evidence is
15 contested and the district judge, in resolving the conflicting evidence differently from the
16 jury, believes the totality of evidence fails to prove the defendant guilty beyond a
17 reasonable doubt."⁴³

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19 ³⁸ Id.

20 ³⁹ Id.

21 ⁴⁰ Washington, at 604, 655 P.2d at 532.

22 ⁴¹ Id. (emphasis added).

23 ⁴² 110 Nev. 1389, 887 P.2d 276.

24 ⁴³ Id. at 1394, 887 P.2d 278 (citing State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2
(1993)).

1 Here, there is an abundance of conflicting evidence. Mr. Green's account of the
2 events changed a number of times. His statements regarding the manner in which he
3 allegedly escorted Mr. Newcastle from the room, the placement of the weapon, the
4 arrival of other officers, and his account of the location and behavior of other inmates
5 changed at least one to three times; therefore the weight they can be afforded is slight,
6 at best. Mr. Green saw Mr. Newcastle in the room where the battery occurred. There
7 was blood on Mr. Newcastle's jumpsuit. Mr. Newcastle was later located a fair distance
8 from the room the battery occurred. Another inmate was located close to the room of
9 the battery. Mr. Newcastle's jumpsuit had blood transfer, apparently transferred from a
10 boot or other bloodied object. Mr. Newcastle's jumpsuit had blood splatter from the
11 victim on the front of it, indicating he was in the room when one of the blows was
12 rendered, and that he was facing the source of the blood. In addition, however, Mr.
13 Newcastle's jumpsuit had blood on the back of it, indicating he was in the room when
14 one of the blows was rendered and that he was facing away from the source of the
15 blood, thereby being nearly incapable of rendering that blow. There is no evidence or
16 suggestion in the record that Mr. Newcastle acted in cahoots with another person.

17 The role of a jury is to act as a fact finder, evaluating the weight and credibility of
18 the evidence presented to them. Here, the jury deliberated and speculated for two to
19 three hours before rendering a verdict. The evidence in this case is so conflicting, that
20 there is sufficient cause for the Court to grant a motion for a new trial, especially in light
21 of the misconduct outlined above.

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Conclusion:

In this case, significant jury misconduct occurred. Jurors considered evidence not in the record including Mr. Newcastle's prior bad acts, and in essence, convicted him based upon a theory not charged, that of aiding or being an accomplice to battery. The issue of guilt or innocence in this case was too close and the jury misconduct too incredible to say definitively that the misconduct could have had no effect on a reasonable juror. As a result, the court must grant a new trial.

RESPECTFULLY submitted this 30 day of October, 2013.

KARIN L. KREIZENBECK, ESQ.
Nevada State Public Defender



JAMIE N. BEDWELL
Nevada Bar No. 13036C
Deputy Nevada State Public Defender
For: CHARLES H. ODGERS, ESQ.
Nevada Bar No. 8596
P.O. Box 151690
Ely, Nevada 89315

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AFFIDAVIT

STATE OF NEVADA)
) ss
COUNTY OF WHITE PINE)

CHARLES H. ODGERS, ESQ., being first duly sworn, deposes and says:

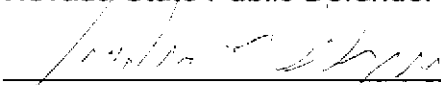
1. That I am an attorney licensed to practice law in the State of Nevada, employed by the Office of the Nevada State Public Defender, assigned to represent Mr. MIKE FIXER NEWCASTLE in the above-referenced matter;
2. That the facts alleged in this Motion are true and correct to the best of my knowledge as articulated in post-trial interviews of jurors, during trial, as well as the preliminary hearing and discovery provided in this matter;
3. That I spoke with jurors Kelly Ernest, James Nelson, Josie Jensen and Amanda Reieher and that the representations made in this motion are true and correct as reported to me by those jurors to the best of my knowledge;
4. That this motion is made in good faith and not for the purposes of delay; and

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DATED this 30 day of OCTOBER, 2013.

KARIN L. KREIZENBECK, ESQ.
Nevada State Public Defender

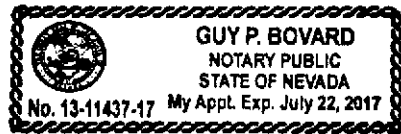


CHARLES H. ODGERS, ESQ.
Deputy Nevada State Public Defender
Nev. Bar No. 8596
P.O. Box 151690
Ely, Nevada 89315

SUBSCRIBED AND SWORN to before
me this 30 day of October, 2013.



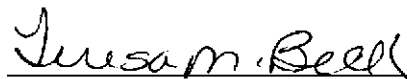
NOTARY PUBLIC FOR SAID
COUNTY AND STATE



1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the Nevada State Public Defender's Office and that on
3 this 30 day of October, 2013, I served the foregoing reply by hand-delivering a true and correct
4 copy of the same to:


5 Nevada State Attorney General's Office
6 1539 Avenue F, #2
7 Ely, NV 89301

8 
9 An employee of the Public Defenders Office

10 **AFFIRMATION Pursuant to N.R.S. § 239B.030**

11 The undersigned does hereby affirm that the preceding document, filed in this
12 Court in STATE v. NEWCASTLE, does not contain the social security number of any
13 person.

14 DATED this 30 day of OCTOBER, 2013.

15 
16 JAMIE N. BEDWELL, ESQ.
17 Deputy Nevada State Public Defender