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**FILED**

JAN 12 1 37 PM '04

*Shirley S. Langston*  
CLERK

15 DISTRICT COURT  
16 CLARK COUNTY, NEVADA

17 THE STATE OF NEVADA, Case No. C161663  
18 Plaintiff, Dept: VI  
19 v.  
20 RICHARD BENNETT TABISH and  
21 SANDRA RENEE MURPHY,  
22 Defendants.

23 **OPPOSITION TO STATE'S MOTION TO DECLARE**  
24 **WAIVER OF ATTORNEY-CLIENT PRIVILEGE**

25 DATE OF HEARING: 02-13-04  
26 TIME OF HEARING: 9:30 A.M.

27 COMES NOW defendant RICHARD BENNETT TABISH, by and through  
28 his attorneys, and hereby submits the attached argument in  
opposition to the State's motion to declare waiver of attorney-  
client privilege in the within matter.

This opposition is based upon pleadings on file herein,  
the attached argument in support hereof, and oral argument to be  
presented at the time of the Hearing.

**RECEIVED**  
**JAN 12 2004**  
**COUNTY CLERK**



1 petition for writ of habeas corpus.

2 II.

3 THE STANDARD TO DETERMINE WHETHER A PETITION IS TO  
4 BE DISMISSED IS MERELY WHETHER CAUSE FOR FAILING TO  
5 PRESENT THE ISSUES PREVIOUSLY AND PREJUDICE TO THE  
DEFENDANT EXIST.

6 When a petitioner raises issues in a petition for writ of  
7 habeas corpus which were not previously raised, the petitioner  
8 need only show that good cause exists for the failure to raise  
9 any grounds in an earlier petition and that he will suffer  
10 actual prejudice if the grounds are not considered; or if no new  
11 grounds for relief are asserted, that the previous petition was  
12 not decided on its merits. Phelps v. Director, Nev. Dep't of  
13 Prisons, 104 Nev. 656, 764 P.2d 1303 (1988), superseded by  
14 statute as stated in State v. Haberstroh, 119 Nev.Adv.Rep.23, 69  
15 P.3d 676 (2003), on other grounds.

16 Here, petitioner submitted an affidavit under penalty of  
17 perjury explaining why the issues were not previously raised  
18 during his direct appeal, which is sufficient for the low  
19 threshold required by law in determining whether cause exists.  
20 The State's analysis is misguided in that at no time does Mr.  
21 Tabish assert that his appellate lawyer was ineffective, and a  
22 delving into the attorney-client privilege is misplaced,  
23 unwarranted and brinking on a violation of Mr. Tabish's Sixth  
24 Amendment right to counsel and due process rights.

25 Furthermore, the Nevada Supreme Court in Stewart v.  
26 Warden, 92 Nev. 588, 589 (1976), has already ruled in the exact  
27 situation as presented here. The Court ruled that when an  
28 appellant requested his then attorney to raise certain claims of

1 error for his direct appeal, and the attorney neither presented  
2 those claims of error to the supreme court nor offered any  
3 reason or explanation for his failure to do so, these  
4 circumstances constitute both a reasonable explanation and good  
5 cause, for appellant's failure to present the issues on direct  
6 appeal.

7           The Nevada Supreme Court further ruled that the omissions  
8 of appellant's former attorney may not be relied upon by a  
9 district court to penalize appellant. Stewart v. Warden, supra  
10 citing Entsminger v. Iowa, 386 U.S. 748, 751 (1967). The  
11 implied general authority of an attorney does not include any  
12 power or authority to dispose of the client's substantive  
13 rights. Stewart citing Gagnon Company v. Nevada Desert Inn, 289  
14 P.2d 466, 474-475 (Cal. 1955).

15           Here, it has been established through Mr. Tabish's  
16 affidavit that he requested his then-appellate counsel to raise  
17 the issues presented in his petition for writ of habeas corpus  
18 in his direct appeal, which were not done. Furthermore, these  
19 issues presented in the petition were never decided on its  
20 merits, and prejudice ensued since the arguments and grounds set  
21 forth in the petition for writ of habeas corpus were "not merely  
22 that the errors of trial created a possibility of prejudice, but  
23 that they worked to his actual and substantial disadvantage, in  
24 affecting the state proceedings with error of constitutional  
25 dimensions." See, Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d  
26 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152,  
27 170, 71 L.Ed.2d 816, 102 S.Ct. 1584 (1982)).

28

1           Specifically, Mr. Tabish's memorandum in support of his  
2 petition sets forth a detailed argument, which were also  
3 supported at length by the trial transcripts and exhibits, that:  
4 (a) the prosecution knowingly proffered a fabricated motive for  
5 the alleged kidnaping and extortion of Leo Casey (i.e., Tabish  
6 allegedly kidnaped and extorted Leo Casey in an effort to obtain  
7 the mining rights to the Jean Sandpit). This was false because  
8 the records and exhibits showed that at the time of the alleged  
9 kidnaping and extortion on July 28, 1998, Leo Casey did not have  
10 any legal ownership rights to the Jean Sandpit, which could have  
11 been extorted; (b) the prosecution elicited and failed to  
12 correct materially false statements from its witnesses, thereby  
13 knowingly presenting perjured testimony, i.e., the prosecution  
14 knew or should have known prior to trial, through voluminous  
15 legal documents, that Leo Casey did not own any mining rights at  
16 the Jean Sandpit after 1996; (c) without the improperly  
17 presented evidence and arguments due to the prosecution's  
18 misconduct, there was insufficient evidence to warrant  
19 convictions regarding the Casey counts; and (d) that this  
20 prosecutorial misconduct infected the trial so prejudicially and  
21 unfairly against Mr. Tabish as to make any resulting convictions  
22 a denial of due process.

23           Here, good cause exists for petitioner's failure to raise  
24 these issues in his direct appeal; petitioner will suffer actual  
25 prejudice if the grounds are not considered; and none of these  
26 issues presented were decided on its merits.

27           The State's endeavor to seek a waiver of the attorney-  
28 client privilege is misplaced, since the low threshold required

1 by law is merely whether good cause exists for the omission of  
2 said arguments from the direct appeal, which has been  
3 substantiated by Mr. Tabish's affidavit.

4 III.

5 NO WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE IS  
6 WARRANTED.

7 The State seeks a complete waiver of the attorney-client  
8 privilege and wishes this Court to allow the State to "inquire  
9 of the Defendant's prior attorneys regarding the preparation of  
10 the Defendant's direct appeal. This inquiry would surely  
11 include the strategies employed on appeal, the reasons for the  
12 inclusion or omission of certain issues as well as statements  
13 made by the Defendant relative to these issues." See State's  
14 motion at page 4. The State's proposition is contradictory to  
15 law.

16 First, as argued above, this inquiry is unwarranted,  
17 without merit since Mr. Tabish does not even assert ineffective  
18 assistance of counsel, and breaches on a violation of  
19 defendant's Sixth Amendment right to counsel.

20 Although the attorney-client privilege has been termed  
21 merely a rule of evidence and not a constitutional right,  
22 government interference with the attorney-client relationship  
23 may implicate Sixth Amendment rights. Manley v. State, 115 Nev.  
24 114, 121, 979 P.2d 703 (1999) citing Clutchette v. Rushen, 770  
25 F.2d 1469, 1471 (9<sup>th</sup> Cir. 1985) (citing Weatherford v. Bursey,  
26 429 U.S. 545, 51 L.Ed.2d 30, 97 S.Ct. 837 (1977)). In Manley,  
27 the Nevada Supreme Court held that the prosecutor's questioning  
28 of the defendant about what he told his lawyers was a violation

1 of defendant's Sixth Amendment right to counsel, because the  
2 prosecution's examination damaged defendant's credibility by  
3 implying that the defendant had been untruthful.

4 The Manley court further held that a mere acknowledgment  
5 that a subject matter had been discussed with an attorney does  
6 not waive the attorney-client privilege. Manley, supra at 121.  
7 Where a client voluntarily reveals portions of the  
8 communications with his client, those revelations amount to a  
9 waiver of the attorney-client privilege as to the remainder of  
10 the conversation or communication about the same subject matter.  
11 Lisle v. State, 113 Nev.679, 941 P.2d 459, 473 (1997). However,  
12 for the waiver to occur, the witness's answers must be "wide  
13 enough in scope and deep enough in substance to constitute a  
14 significant part of the communication". Id. Merely  
15 acknowledging the fact that the witness discussed a subject with  
16 his attorney does not waive the privilege. Id.

17 In Manley, the high court determined, that the defendant  
18 in that case did not disclose a "significant part" of his  
19 communications with his attorney because he only testified on  
20 direct examination that his attorney told him not to say  
21 anything, his attorney was upset when the defendant telephoned  
22 him, and the defendant did not tell his attorney where he was.  
23 The Court held that this was a minimal disclosure which did not  
24 constitute a waiver of the attorney-client privilege. Manley,  
25 supra at 121. Manley also cited a California case, People v.  
26 Kor, 129 Cal.App.2d 436, 277 P.2d 94, 99-1000 (Cal.Ct.App.  
27 1954) (holding that defendant's statements on direct examination  
28 that he told his attorney what had happened were general

1 any inquiry would be extremely limited and not a complete and  
2 vast waiver as the State seeks. A district court's grant of a  
3 limited waiver of the attorney-client privilege is proper when a  
4 movant's claims put privileged information at issue. See, Home  
5 Indem. Corp. v. Lane Powell Moss and Miller, 43 F.3d 1322, 1326  
6 (9<sup>th</sup> Cir. 1995).

7 Mr. Tabish does not concede that a waiver of his attorney-  
8 client privilege is warranted, however, should this Court should  
9 proceed in that fashion, only a limited waiver is authorized by  
10 law. Furthermore, if this Court should order a full and  
11 complete waiver of the attorney-client privilege, Mr. Tabish  
12 will withdraw his affidavit.

13 CONCLUSION


14 Based on the foregoing, the state's motion should be  
15 denied.

16 Dated: January 9, 2004

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