

Nevada Supreme Court Criminal Opinions Review Jan 2021 – April 2022



A Discussion With:
Chief Judge Kevin Higgins
Justice of the Peace
Sparks Justice Court

Nevada Judicial Leadership Summit
May 6, 2022





I. PRETRIAL

A. Indictments/Grand Jury

- *Martinez Guzman v. Second Judicial Dist. Ct.*, 496 P.3d 572 (2021)

B. Competency Evaluation

- *Kassa v. State*, 485 P.3d 750 (2021)
- *Goad v. State*, 488 P.3d 646 (2021)

C. Bail

- *Sewall v. Eighth Judicial Dist. Ct.*, 481 P.3d 1249 (2021)

D. *Faretta* Canvas

- *Miles v. State*, 500 P.3d 1263 (2021)



Martinez Guzman v. Second Judicial Dist. Ct., 496 P.3d 572 (2021)

- ▶ Defendant was charged with several counts of burglary and murder in Washoe County and Douglas County, and the charges were filed in Washoe County. District court denied defendant's motion to dismiss some charges for lack of territorial jurisdiction. Defendant filed a petition for writ of mandamus.
- ▶ The Supreme Court held as a matter of first impression, charging county, in which defendant obtained firearm used to commit murders and burglaries in another county, was not the proper venue in which to bring charges.

Petition granted.



***Kassa v. State*, 485 P.3d 750 (2021)**

- ▶ After defendant was found guilty but mentally ill (GBMI) on charges of first-degree felony murder and first-degree arson, he filed a motion to vacate the GBMI verdicts and find him not guilty by reason of insanity.
- ▶ Evidence supported trial court's denial of defendant's motion for judgment of acquittal under statute.
- ▶ Evidence showed that defendant understood the nature and capacity of his act in setting fire to home for purposes of *M'Naghten* test for "not guilty by reason of insanity" defense.
- ▶ Evidence showed that defendant appreciated that his conduct in setting fire to home was wrongful for purposes of *M'Naghten* test for "not guilty by reason of insanity" defense.

Denial of Motion Affirmed.



***Goad v. State*, 488 P.3d 646 (COA) (2021)**

- ▶ Defendant was convicted of murder with the use of a deadly weapon. Defendant appealed.
- ▶ The Court of Appeals held that:
 - Trial court's failure to order a competency hearing sua sponte violated defendant's due process rights.
 - An order vacating trial court's judgment and remanding with instructions for trial court to hold retrospective competency hearing, if feasible, was warranted.

Vacated and remanded.



Sewall v. Eighth Judicial Dist. Ct., 481 P.3d 1249 (2021)

- ▶ Following suppression of his confession, defendant charged with first-degree murder filed a motion for setting of reasonable bail. District court denied defendant's motion. Defendant filed a petition for writ of mandamus.
- ▶ The Supreme Court held that evidence was insufficient to defeat defendant's right to reasonable bail.

Petition granted; Writ issued.



Miles v. State, 500 P.3d 1263 (2021)

- ▶ Defendant was convicted of sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment, and he appealed.
- ▶ The Supreme Court held that:
 - Defendant's inability to state the elements of the charged offense of a sex trafficking did not nullify his right to try to defend himself.
 - Trial court's *Faretta* canvas of defendant was inadequate.
 - Defendant's waiver of the right to counsel was not knowing and voluntary.
 - Defendant's invalid waiver of the right to counsel was not subject to harmless-error analysis.
 - Trial court inappropriately disparaged the defendant's choice to waive counsel during *Faretta* canvas.

Reversed and remanded.





I. PRETRIAL (Cont.)

E. Statute of Limitations

- *Ramos v. State*, 499 P.3d 1178 (2021)
- *Wilson v. Las Vegas Metro. Police Dept.*, 498 P.3d 1278 (2021)

F. Venue

- *Martinez Guzman v. Second Judicial Dist. Ct.*, 496 P.3d 572 (2021)

G. Information by Affidavit

- *Bolden v. State (amended)*, 499 P.3d 1200 (2021)

H. Arrest Warrants

- *Sunseri v. State*, 495 P.3d 127 (2021)



***Ramos v. State*, 499 P.3d 1178 (2021)**

- ▶ Defendant was convicted of murder and sexual assault, and he appealed.
- ▶ The Supreme Court held that no statutory time limit on commencing prosecution applied to sexual assault charge pursuant to NRS 171.083(1).

Affirmed.



Wilson v. Las Vegas Metro. Police Dept., 498 P.3d 1278 (2021)

- ▶ Detainee, who was handcuffed after being stopped for an improper lane change, brought action against the police department and its officers, asserting claims for battery, false imprisonment, and negligence, after initially filing a citizen complaint with the police department's citizen review board. District court granted defendants' motion to dismiss as time-barred. Detainee appealed.
- ▶ The Supreme Court held that detainee's proceeding before citizen review board did not toll the two-year statute of limitations on his claims.

Affirmed.



Martinez Guzman v. Second Judicial Dist. Ct., 496 P.3d 572 (2021)

- ▶ Defendant was charged with several counts of burglary and murder. District court denied defendant's motion to dismiss some charges for lack of territorial jurisdiction. Defendant filed a petition for writ of mandamus.
- ▶ The Supreme Court held as a matter of first impression, charging county, in which defendant obtained firearm used to commit murders and burglaries in another county, was not the proper venue in which to bring charges.

Petition granted.



Bolden v. State (amended), 499 P.3d 1200 (2021)

- ▶ Defendant was convicted of attempted murder with use of deadly weapon, ownership or possession of firearm by prohibited person, discharging firearm at or into an occupied structure, and battery with use of deadly weapon. Defendant appealed.
- ▶ On denial of rehearing, the Supreme Court held that:
 - District court did not plainly err in considering the State's motion for leave to proceed by information, which was supported by a copy of the preliminary hearing transcript, as substantially compliant with the statute's affidavit requirement.
 - District court did not err in granting the State's motion for leave to file information by affidavit.
 - Evidence was sufficient to support convictions.

Affirmed.



Sunseri v. State, 495 P.3d 127 (2021)

- ▶ Defendant charged with robbery and ownership or possession of firearm by a prohibited person moved to withdraw his guilty plea. District court denied defendant's motion to withdraw. Defendant moved to dismiss the charges. District court denied defendant's motion and subsequently entered a judgment of conviction. Defendant appealed.
- ▶ The Supreme Court held that:
 - Delay in execution of the arrest warrant was presumptively prejudicial.
 - Delay in execution of the arrest warrant was caused by the State's gross negligence.
 - Defendant did not assert his right to a speedy trial in due course.
 - Delay in execution of the arrest warrant prejudiced defendant.
 - Defense counsel's failure to advise defendant that his right to a speedy trial might have been violated prejudiced defendant.
 - The State failed to rebut presumption that defense counsel's conduct constituted deficient performance.

Reversed in part, vacated in part, and remanded with instructions.





II. TRIAL

A. Evidence

I. Sufficiency of Evidence

- ❑ *Bolden v. State (amended)*, 491 P.3d 1200 (2021)

II. Prior Bad Acts

- ❑ *Chaparro v. State*, 497 P.3d 1187 (2021)

III. DNA

- ❑ *Chaparro v. State*, 497 P.3d 1187 (2021)
- ❑ *State v. Seka*, 490 P.3d 1272 (2021)
- ❑ *Anselmo v. State*, 55 P.3d 846 (2022)

IV. Rape Shield Law

- ❑ *James v. State*, 492 P.3d 1 (2021)



Bolden v. State (amended), 499 P.3d 1200 (2021)

- ▶ Defendant was convicted of attempted murder with use of deadly weapon, ownership or possession of firearm by prohibited person, discharging firearm at or into an occupied structure, and battery with use of deadly weapon. Defendant appealed.
- ▶ On denial of rehearing, the Supreme Court held that:
 - District court did not plainly err in considering the State's motion for leave to proceed by information, which was supported by a copy of the preliminary hearing transcript, as substantially compliant with the statute's affidavit requirement.
 - District court did not err in granting the State's motion for leave to file information by affidavit.
 - Evidence was sufficient to support convictions.

Affirmed.



***Chaparro v. State*, 497 P.3d 1187 (2021)**

- ▶ Defendant was convicted of sexual assault, battery with intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Defendant appealed.
- ▶ In a case of first impression, the Supreme Court held, en banc, that:
 - Sentencing hearing via videoconferencing during the COVID-19 pandemic did not violate defendant's right to be present.
 - Evidence of prior conviction for battery with intent to commit sexual assault was admissible to show intent and propensity.
 - Trial court acted within its discretion in limiting defendant's voir dire inquiries about specific evidence that would be presented at trial.
 - Inconclusive DNA evidence was relevant to show thoroughness of investigation and to complete the story of evidence already presented.

Affirmed.



Anselmo v. State, 55 P.3d 846 (2022)

- ▶ Prisoner petitioned for post-conviction DNA genetic marker analysis using a procedure that was not available at time of murder trial. District court dismissed the petition. Prisoner appealed.
- ▶ The Supreme Court held that:
 - A district court must assume that requested genetic marker analysis will produce exculpatory DNA evidence.
 - Reasonable possibility existed that prisoner would not have faced prosecution or conviction for first-degree murder if exculpatory DNA results had been obtained before trial.
 - State's inventory, which merely described packaging for some evidence, was insufficient.

Reversed and remanded.



***State v. Seka*, 490 P.3d 1272 (2021)**

- ▶ Following convictions for murder and robbery, district court granted the defendant's motion for new trial. The State appealed.
- ▶ The Supreme Court held that new DNA evidence was not favorable to defendant, thus defendant was not entitled to a new trial 19 years after the conviction.

Reversed.



James v. State, 492 P.3d 1 (2021)

- ▶ Inmate convicted of sexual assault of a minor, open or gross lewdness, and battery with intent to commit a crime filed post-conviction petition requesting a genetic marker analysis of DNA obtained from a rape kit and a postconviction petition for a writ of habeas corpus. District court denied the petitions and the inmate appealed.
- ▶ The Supreme Court held that:
 - Rape Shield Law did not necessarily preclude evidence that DNA contained in victim's rape kit matched another man's DNA.
 - Inmate demonstrated a reasonable possibility that he would not have been convicted if exculpatory results had been obtained through a genetic marker analysis of DNA contained in the victim's rape kit.

Reversed, vacated, and remanded.





II. TRIAL (Cont.)

B. Statutory Interpretation & Definitions

- *State v. Fourth Judicial Dist. Ct.*, 481 P.3d 848 (2021)

C. Juries

I. Right to a Jury Trial

- ❑ *Hildt v. Eighth Judicial Dist. Ct.*, 483 P.3d 526 (2021)

II. Jury Selection

- ❑ *Dean v. Narvaiza*, 502 P.3d 177 (2022)
- ❑ *Chaparro v. State*, 497 P.3d 1187 (2021)
- ❑ *Burns v. State*, 495 P.3d 1091 (2021)
- ❑ *Dixon v. State*, 485 P.3d 1254 (2021)



State v. Fourth Judicial Dist. Ct., 481 P.3d 848 (2021)

- ▶ In prosecution for a felon in possession of firearm, district court granted defendant's motion to consolidate multiple counts. The State then brought a petition for writ of mandamus.
- ▶ The Supreme Court held that:
 - The State's petition qualified for an extraordinary writ review, but as a matter of apparent first impression, the State properly charges a defendant with only a single violation of the felon-in-possession statute when the State alleges, without more, that the defendant is a felon who possessed any firearm, that is, one or more firearms, at one time and place.

Petition denied.



Hildt v. Eighth Judicial Dist. Ct., 483 P.3d 526 (2021)

- ▶ Petitioner sought a writ of mandamus ordering that his conviction for misdemeanor battery constituting domestic violence, entered without a jury trial, be vacated, and that he receive a jury trial.
- ▶ As a matter of first impression, the Supreme Court, en banc, held:
 - The constitutional rule providing a right to a jury trial attached to first-offense domestic battery was new, as would support retroactive application of rule.
 - Conviction was not final when new rule was announced, thus the new rule applied retroactively to petitioner.

Petition granted.



Dean v. Narvaiza, 502 P.3d 177 (2022)

- ▶ Following affirmance of conviction for attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon, and battery with the use of a deadly weapon resulting in substantial bodily harm, petitioner sought a writ of habeas corpus, alleging that counsel was ineffective for introducing racial issues into the trial. District court denied the petition, and petitioner appealed.
- ▶ The Supreme Court held that:
 - Counsel's comments suggesting that all African Americans, including petitioner, had attributes of being sneaky and violent constituted deficient performance.
 - Counsel's comments prejudiced petitioner and thus, amounted to ineffective assistance of counsel.
 - Counsel's inappropriate conduct of discussing harmful racial stereotypes warranted intervention by trial court.

Reversed and remanded.



***Chaparro v. State*, 497 P.3d 1187 (2021)**

- ▶ Defendant was convicted of sexual assault, battery with intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Defendant appealed.
- ▶ In a case of first impression, the Supreme Court held, en banc, that:
 - Sentencing hearing via videoconferencing during the COVID-19 pandemic did not violate defendant's right to be present.
 - Evidence of prior conviction for battery with intent to commit sexual assault was admissible to show intent and propensity.
 - Trial court acted within its discretion in limiting defendant's voir dire inquiries about specific evidence that would be presented at trial.
 - Inconclusive DNA evidence was relevant to show thoroughness of investigation and to complete the story of evidence already presented.

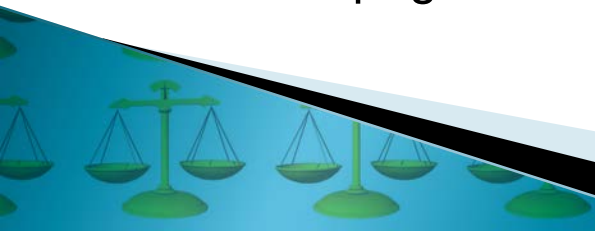
Affirmed.



***Burns v. State*, 495 P.3d 1091 (2021)**

- ▶ Defendant was convicted in district court of conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, robbery with use of a deadly weapon, murder with use of a deadly weapon, attempted murder with use of a deadly weapon, and battery with the use of a deadly weapon, and he appealed.
- ▶ The Supreme Court held that:
 - Sentencing was not part of “guilt phase of trial” as that phrase was used in parties’ mid-trial agreement in which defendant waived appellate rights stemming from guilt phase of trial.
 - Appellate court would construe the appeal waiver in parties’ mid-trial agreement against the government and conclude that defendant did not waive claim relating to jury selection.
 - The phrase “guilt phase of trial” encompassed defendant’s claims stemming from every part of the proceedings after the jury was impaneled up.
 - Defendant did not waive, for purposes of appeal, any errors that occurred during closing arguments.

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Burns v. State, 495 P.3d 1091 (2021)

- Defendant waived his right to appellate review of claims related to denial of his suppression motion pursuant to the parties' mid-trial agreement.
- Any error in jury deliberations fell within appeal waiver provision of parties' agreement.
- Defendant did not make prima facie case of racial discrimination with respect to State's peremptory challenge of Black juror.
- State gave race-neutral rationale for peremptory strike of Black juror.
- It was not prosecutorial misconduct for prosecutor to refer to non-testifying witness in is rebuttal closing argument.
- As a matter of **first impression**, defendant's stipulation to the sentence of life-without-parole for first degree murder precluded his argument on appeal that the sentence was unreasonable and unconstitutional.

Affirmed.



***Dixon v. State*, 485 P.3d 1254 (2021)**

- ▶ Defendant was convicted of fourth degree arson, and he appealed.
- ▶ The Supreme Court held:
 - The State's use of peremptory challenge to exclude prospective alternative juror because of his gender violated Equal Protection Clause.
 - In a matter of first impression, prosecution's discriminatory use of peremptory challenge to strike prospective alternative juror is subject to harmless error review.
 - Trial court's rejection of defendant's *Batson* objection was harmless error.

Affirmed.





II. TRIAL (Cont.)

III. Judicial Misconduct

- *Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)

IV. Jury Instructions

- *State v. Seka*, 490 P.3d 1272 (2021)

D. Guilty but Mentally III

- *Kassa v. State*, 485 P.3d 750 (2021)



Gunera-Pastrana v. State, 490 P.3d 1262 (2021)

- ▶ Defendant was convicted of two counts of each of sexual assault of a minor under 14 years of age and lewdness with a child under the age of 14 and sentenced to 35 years to life in prison. After denial of his motion for a new trial, defendant appealed.
- ▶ The Supreme Court held that:
 - District court's comment to the jury before opening statements that "defendant had been arrested by the police department" and "that the police department did not go out and select somebody at random to prosecute" constituted misconduct that undermined defendant's presumption of innocence.
 - Defendant was deprived of his ability to demonstrate that prejudice resulted from the jury's misconduct when a juror used the internet search engine to define the term "common sense" and shared the definition with other jurors that constituted extraneous dictionary definition.
 - As a matter of **first impression**, the prosecutor's remark in closing arguments that there were "two people that know what happened and the victim told you what happened" was an indirect reference to defendant's failure to testify in violation of the Fifth Amendment and constituted prosecutorial misconduct.

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***Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)**

- The issue of defendant's guilt was close, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- Judicial, juror, and prosecutorial misconduct that occurred in defendant's trial were so substantial that they undermined defendant's credibility and defense, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- The cumulative effect of errors caused by a judicial, juror, and prosecutorial misconducts denied defendant's due process right to a fair trial and warranted reversal of conviction

Reversed and remanded.



***State v. Seka*, 490 P.3d 1272 (2021)**

- ▶ Following convictions for murder and robbery, district court granted the defendant's motion for new trial. The State appealed.
- ▶ The Supreme Court held that new DNA evidence was not favorable to defendant, thus defendant was not entitled to a new trial 19 years after the conviction.

Reversed.



***Kassa v. State*, 485 P.3d 750 (2021)**

- ▶ After defendant was found guilty but mentally ill (GBMI) on charges of first-degree felony murder and first-degree arson, he filed a motion to vacate the GBMI verdicts and find him not guilty by reason of insanity.
- ▶ Evidence supported trial court's denial of defendant's motion for judgment of acquittal under statute.
- ▶ Evidence showed that defendant understood the nature and capacity of his act in setting fire to home for purposes of *M'Naghten* test for "not guilty by reason of insanity" defense.
- ▶ Evidence showed that defendant appreciated that his conduct in setting fire to home was wrongful for purposes of *M'Naghten* test for "not guilty by reason of insanity" defense.

Denial of Motion Affirmed.



III. CONSTITUTIONAL ISSUES



A. 4th Amendment Search and Seizure

- *Jim v. State*, 495 P.3d 478 (2021)

B. 6th Amendment

I. Right to a Jury Trial

- *Hildt v. Eighth Judicial Dist. Ct.*, 483 P.3d 526 (2021)

II. Right to a Speedy Trial

- *Sunseri v. State*, 495 P.3d 127 (2021)

III. Right to Counsel

- *Brass v. State*, 138 Nev. Adv. Op. 23 (2022)

C. New Constitutional Rule

- *Hildt v. Eighth Judicial Dist. Ct.*, 483 P.3d 526 (2021)



Jim v. State, 495 P.3d 478 (2021)

- ▶ Defendant pled guilty and was convicted of trafficking a schedule I controlled substance and possession of a firearm by a prohibited person. Defendant appealed.
- ▶ The Supreme Court held that the officer, who had planned to impound the vehicle defendant was driving without valid registration, was lawfully present in the vehicle where he observed the firearm and bags containing crystalline-like substance, and therefore the contraband was properly seized under the plain-view exception to the warrant requirement.

Affirmed.



Sunseri v. State, 495 P.3d 127 (2021)

- ▶ Defendant charged with robbery and ownership or possession of a firearm by a prohibited person moved to withdraw his guilty plea. District court denied defendant's motion to withdraw. Defendant moved to dismiss the charges. District court denied defendant's motion and subsequently entered a judgment of conviction. Defendant appealed.
- ▶ The Supreme Court held that:
 - Delay in execution of the arrest warrant was presumptively prejudicial.
 - Delay in execution of the arrest warrant was caused by the State's gross negligence.
 - Defendant did not assert his right to a speedy trial in due course.
 - Delay in execution of the arrest warrant prejudiced defendant.
 - Defense counsel's failure to advise defendant that his right to a speedy trial might have been violated prejudiced defendant.
 - The State failed to rebut presumption that defense counsel's conduct constituted deficient performance.

Reversed in part, vacated in part, and remanded with instructions.



***Brass v. State*, 138 Nev. Adv. Op. 23 (2022)**

- ▶ Defendant was convicted of multiple counts of lewdness with a child under 14, sexual assault of minor under age 14, and related charges. Defendant appealed.
- ▶ The Supreme Court held that:
 - On a motion to substitute retained counsel, trial court had to determine whether the motion was untimely and would result in the disruption of orderly processes of justice that would be considered unreasonable under circumstances of a particular case.
 - The motion to substitute retaining counsel on the eve of trial was timely, even though the case had been pending for two years.
 - Disruption of orderly processes of justice by granting the motion to substitute retained counsel, would not have been unreasonable, under the circumstances.
 - Trial court's abuse of discretion in denying the motion was a structural error warranting reversal of convictions and remand for a new trial.

Reversed in part, vacated in part, and remanded with instructions.



Hildt v. Eighth Judicial Dist. Ct., 483 P.3d 526 (2021)

- ▶ Petitioner sought a writ of mandamus ordering that his conviction for misdemeanor battery constituting domestic violence, entered without a jury trial, be vacated, and that he receive a jury trial.
- ▶ As a matter of first impression, the Supreme Court, en banc, held:
 - The constitutional rule providing a right to a jury trial attached to first-offense domestic battery was new, as would support retroactive application of rule.
 - Conviction was not final when new rule was announced, thus the new rule applied retroactively to petitioner.

Petition granted.





IV. Sentencing

A. Penalty Phase

- *Burns v. State*, 495 P.3d 1091 (2021)
- *Barlow v. State*, 138 Nev. Adv. Op. 25 (2022)

B. Sentence Credits

- *White-Hughley v. State*, 495 P.3d 82 (2021)

C. Aggravating Circumstances

- *Howard v. State*, 495 P.3d 88 (2021)

D. Victim Impact Statements / Marsy's Law

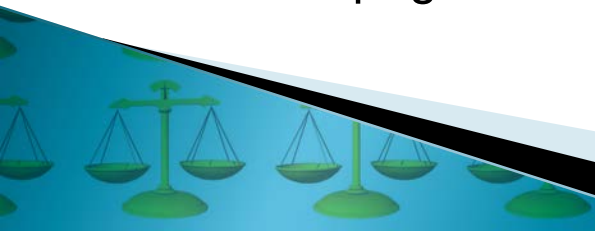
- *Aparicio v. State*, 496 P.3d 592 (2021)



***Burns v. State*, 495 P.3d 1091 (2021)**

- ▶ Defendant was convicted of conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, robbery with use of a deadly weapon, murder with use of a deadly weapon, attempted murder with use of a deadly weapon, and battery with the use of a deadly weapon, and he appealed.
- ▶ The Supreme Court held that:
 - Sentencing was not part of “guilt phase of trial” as that phrase was used in parties’ mid-trial agreement in which defendant waived appellate rights stemming from guilt phase of trial.
 - Appellate court would construe the appeal waiver in parties’ mid-trial agreement against the government and conclude that defendant did not waive claim relating to jury selection.
 - The phrase “guilt phase of trial” encompassed defendant’s claims stemming from every part of the proceedings after the jury was impaneled up.
 - Defendant did not waive, for purposes of appeal, any errors that occurred during closing arguments.

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Burns v. State, 495 P.3d 1091 (2021)

- Defendant waived his right to appellate review of claims related to denial of his suppression motion pursuant to the parties' mid-trial agreement.
- Any error in jury deliberations fell within appeal waiver provision of parties' agreement.
- Defendant did not make prima facie case of racial discrimination with respect to State's peremptory challenge of Black juror.
- State gave race-neutral rationale for peremptory strike of Black juror.
- It was not prosecutorial misconduct for prosecutor to refer to non-testifying witness in is rebuttal closing argument.
- As a matter of **first impression**, defendant's stipulation to the sentence of life-without-parole for first degree murder precluded his argument on appeal that the sentence was unreasonable and unconstitutional.

Affirmed.



***Barlow v. State*, 138 Nev. Adv. Op. 25 (2022)**

- ▶ Appeal from a judgment of conviction, pursuant to a jury verdict, of home invasion while in possession of a firearm, burglary while in possession of a firearm, assault with the use of a deadly weapon, and two counts of a first-degree murder with the use of a deadly weapon.
- ▶ A jury is considered “hung” in the penalty phase of a capital murder trial only when it cannot unanimously agree on the sentence to be imposed.
- ▶ A hung jury cannot impose a death sentence but must consider the other sentences that may be imposed.

Affirmed in part, reversed in part, and remanded for new penalty hearing.



***White-Hughley v. State*, 495 P.3d 82 (2021)**

- ▶ Defendant pled guilty to home invasion, and he appealed. The Court of Appeals, 476 P.3d 930, affirmed. Defendant's petition for review was granted.
- ▶ The Supreme Court held that defendant was entitled to pre-sentence confinement credit to both concurrent sentences up to the date his first sentence was imposed.

Vacated and remanded.



Howard v. State, 495 P.3d 88 (2021)

▶ After affirmance, 102 Nev. 572, 729 P.2d 1341, of prisoner's murder conviction and death sentence, prisoner filed successive petition(s) for habeas corpus relief, alleging that the single statutory aggravating circumstance supporting the death sentence was his prior out-of-state conviction for a felony involving use or threat of violence to another person, and that the prior conviction had recently been vacated and the charge had been dismissed. District court denied the petition as procedurally barred and as barred by statutory laches. Prisoner appealed.

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Howard v. State, 495 P.3d 88 (2021)

▶ The Supreme Court held that:

- The death sentence was no longer supported, for Eighth Amendment purposes, by sole statutory aggravating circumstance.
- Prisoner showed actual innocence with respect to death penalty, as grounds for overcoming procedural bars to habeas relief pursuant to untimely successive petition.
- Prisoner rebutted statutory presumption that the State was prejudiced.

Reversed and remanded for a new penalty hearing.



Aparicio v. State, 496 P.3d 592 (2021)

- ▶ Defendant pleaded guilty to two counts of driving under the influence resulting in death and one count of felony reckless driving.
- ▶ The Supreme Court held that:
 - Persons who wrote impact letters could only be considered “victims” if they were injured or directly and proximately harmed , or if they were family members.
 - Following objection, district court could consider impact letters from non-victims only if the court determined they were relevant and reliable.
 - The court’s error in considering all submitted letters as a victim impact statements was not harmless.

Conviction affirmed; sentence vacated; remanded for resentencing.





V. Post-Trial

A. Writ of Habeas Corpus

- *Dean v. Narvaiza*, 502 P.3d 177 (2022)
- *Chappell v. State*, 501 P.3d 935 (2021)
- *Howard v. State*, 495 P.3d 88 (2021)
- *Gonzales v. State*, 492 P.3d 556 (2021)
- *James v. State*, 492 P.3d 1 (2021)
- *Anselmo v. State*, 55 P.3d 846 (2022)
- *State v. Smith (In re Smith)*, 506 P.3d 325 (2022)

B. Writ of Mandamus

- *Sewall v. Eighth Judicial Dist. Ct.*, 481 P.3d 1249 (2021)
- *State v. Fourth Judicial Dist. Ct.*, 481 P.3d 848 (2021)



Dean v. Narvaiza, 502 P.3d 177 (2022)

- ▶ Following affirmance of conviction for attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon, and battery with the use of a deadly weapon resulting in substantial bodily harm, 2019 WL 398002, petitioner sought a writ of habeas corpus, alleging that counsel was ineffective for introducing racial issues into the trial. District court denied the petition, and petitioner appealed.
- ▶ The Supreme Court held that:
 - Counsel's comments suggesting that all African Americans, including petitioner, had attributes of being sneaky and violent constituted deficient performance.
 - Counsel's comments prejudiced petitioner and thus, amounted to ineffective assistance of counsel.
 - Counsel's inappropriate conduct of discussing harmful racial stereotypes warranted intervention by trial court.

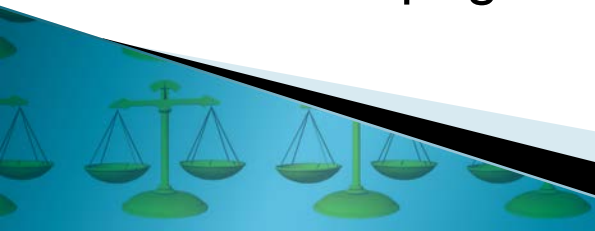
Reversed and remanded.



***Chappell v. State*, 501 P.3d 935 (2021)**

▶ After convictions and a death sentence were affirmed on direct appeal, 114 Nev. 1403, 972 P.2d 838, defendant filed a post-conviction petition for writ of habeas corpus. District court granted the petition in part, vacated sentence, and ordered new sentencing hearing. At resentencing, defendant was again sentenced to death, and he appealed. The Supreme Court, 125 Nev. 1025, 281 P.3d 1160, affirmed. Defendant then filed a second petition for writ of habeas corpus. District court denied the petition, and defendant appealed. The Supreme Court affirmed. Defendant then filed a third petition for writ of habeas corpus. District court dismissed the petition based on the determination that claims were procedurally defaulted, and that defendant failed to demonstrate good case and prejudice to excuse procedural bar. Defendant appealed.

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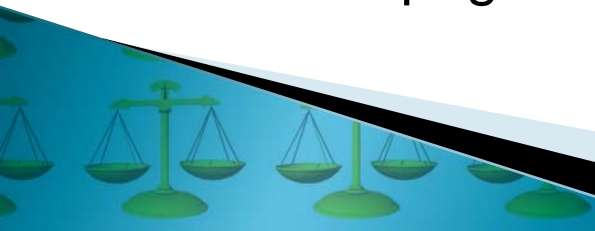


Chappell v. State, 501 P.3d 935 (2021)

▶ The Supreme Court held that:

- The alleged ineffectiveness of counsel who represented defendant in the first post-conviction petition was not good cause for procedural default of various habeas challenges to conviction arising out of the guilt phase of capital murder trial.
- Defendant did not have statutory right to appointed counsel on the second habeas petition, and thus, counsel's acts or omissions on the second petition did not provide good cause to excuse procedural default of the guilt-phase claims brought in the third petition more than one year after they became available.
- Defendant did not show good cause and actual prejudice necessary to excuse procedural default of the claims raised in the third petition based on unsupported, meritless claims of ineffective assistance of second post-conviction counsel.

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***Chappell v. State*, 501 P.3d 935 (2021)**

- Defendant waived habeas review of claims challenging constitutionality of Nevada's death penalty scheme.
- Defendant failed to demonstrate that he was actually innocent of burglary, robbery, and murder, as a basis for overcoming procedural default of claims raised in the third petition.
- Defendant did not demonstrate that he was ineligible for the death penalty, as a basis for excusing procedural bars to claims raised in the third petition.
- The third petition was barred by statutory laches.

Affirmed.



Howard v. State, 495 P.3d 88 (2021)

▶ After affirmance, 102 Nev. 572, 729 P.2d 1341, of prisoner's murder conviction and death sentence, prisoner filed successive petition(s) for habeas corpus relief, alleging that the single statutory aggravating circumstance supporting the death sentence was his prior out-of-state conviction for a felony involving use or threat of violence to another person, and that the prior conviction had recently been vacated and the charge had been dismissed. District court denied the petition as procedurally barred and as barred by statutory laches. Prisoner appealed.

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Howard v. State, 495 P.3d 88 (2021)

▶ The Supreme Court held that:

- The death sentence was no longer supported, for Eighth Amendment purposes, by sole statutory aggravating circumstance.
- Prisoner showed actual innocence with respect to death penalty, as grounds for overcoming procedural bars to habeas relief pursuant to untimely successive petition.
- Prisoner rebutted statutory presumption that the State was prejudiced.

Reversed and remanded.



Gonzales v. State, 492 P.3d 556 (2021)

- ▶ Defendant filed a petition for writ of habeas corpus after his conviction for aggravated stalking was affirmed, 2014 WL 6090812. District court denied the petition. Defendant appealed. The Court of Appeals, 476 P.3d 84, affirmed. Defendant appealed.
- ▶ The Supreme Court held that:
 - A guilty plea does not waive a habeas claim of ineffective assistance of counsel at sentencing.
 - The State breached its promise in plea agreement to recommend concurrent sentences.
 - Trial counsel was ineffective in not objecting to the State's breach of plea agreement.
 - The appropriate remedy for counsel's ineffectiveness was a new sentencing hearing.
 - Counsel's advice to plead guilty to aggravated stalking was not deficient performance.

Reversed and remanded.



James v. State, 492 P.3d 1 (2021)

- ▶ Inmate convicted of sexual assault of a minor, open or gross lewdness, and battery with intent to commit a crime filed post-conviction petition requesting a genetic marker analysis of DNA obtained from a rape kit and a postconviction petition for a writ of habeas corpus. District court denied the petitions and the inmate appealed.
- ▶ The Supreme Court held that:
 - Rape Shield Law did not necessarily preclude evidence that DNA contained in victim's rape kit matched another man's DNA.
 - Inmate demonstrated a reasonable possibility that he would not have been convicted if exculpatory results had been obtained through a genetic marker analysis of DNA contained in the victim's rape kit.

Reversed, vacated, and remanded.



Anselmo v. State, 55 P.3d 846 (2022)

- ▶ Prisoner petitioned for post-conviction DNA genetic marker analysis using a procedure that was not available at time of murder trial. District court dismissed the petition. Prisoner appealed.
- ▶ The Supreme Court held that:
 - A district court must assume that requested genetic marker analysis will produce exculpatory DNA evidence.
 - Reasonable possibility existed that prisoner would not have faced prosecution or conviction for first-degree murder if exculpatory DNA results had been obtained before trial.
 - State's inventory, which merely described packaging for some evidence, was insufficient.

Reversed and remanded.



State v. Smith (In re Smith), 506 P.3d 325 (2022)

- Parolee, whose parole had been revoked after he entered an *Alford* plea to a new charge of attempted burglary, filed an emergency petition for writ of habeas corpus, arguing the Parole Board had exceeded its authority by immediately returning parolee to the custody of the Nevada Department of Corrections (“NDOC”) after he was detained on the new charge but deferring the parole revocation hearing until he entered a plea, which was beyond the 60-day statutory period for holding the hearing. District court granted the petition and ordered that parolee receive sentence credit. The State appealed.
- ▶ The Supreme Court held that parolee’s return to the custody of NDOC, pursuant to retake the warrant issued by the Parole Board after parolee was arrested on new criminal charges, triggered the statutory 60-day period for the Parole Board to hold a parole revocation hearing.

Affirmed.





V. Post-Trial (Cont.)

C. Ineffective Assistance of Counsel

- *Sunseri v. State*, 495 P.3d 127 (2021)
- *Gonzales v. State*, 492 P.3d 556 (2021)
- *Barlow v. State*, 138 Nev. Adv. Op. 25 (2022)

D. Motion for New Trial

- *Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)
- *State v. Seka*, 490 P.3d 1272 (2021)



***Sewall v. Eighth Judicial Dist. Ct.*, 481 P.3d 1249 (2021)**

- ▶ Following suppression of his confession, 2020 WL 1903199, defendant charged with first-degree murder filed a motion for setting of reasonable bail. District court denied defendant's motion. Defendant filed a petition for writ of mandamus.
- ▶ The Supreme Court held that evidence was insufficient to defeat defendant's right to reasonable bail.

Petition granted; Writ issued.



State v. Fourth Judicial Dist. Ct., 481 P.3d 848 (2021)

- ▶ In prosecution for a felon in possession of a firearm, district court granted defendant's motion to consolidate multiple counts. The State then brought a petition for writ of mandamus.
- ▶ The Supreme Court held that:
 - The State's petition qualified for an extraordinary writ review, but as a matter of apparent first impression, the State properly charges a defendant with only a single violation of the felon-in-possession statute when the State alleges, without more, that the defendant is a felon who possessed any firearm, that is, one or more firearms, at one time and place.

Petition denied.



Sunseri v. State, 495 P.3d 127 (2021)

- ▶ Defendant charged with robbery and ownership or possession of firearm by a prohibited person moved to withdraw his guilty plea. District court denied defendant's motion to withdraw. Defendant moved to dismiss the charges. District court denied defendant's motion and subsequently entered a judgment of conviction. Defendant appealed.
- ▶ The Supreme Court held that:
 - Delay in execution of the arrest warrant was presumptively prejudicial.
 - Delay in execution of the arrest warrant was caused by the State's gross negligence.
 - Defendant did not assert his right to a speedy trial in due course.
 - Delay in execution of the arrest warrant prejudiced defendant.
 - Defense counsel's failure to advise defendant that his right to a speedy trial might have been violated prejudiced defendant.
 - The State failed to rebut presumption that defense counsel's conduct constituted deficient performance.

Reversed in part, vacated in part, and remanded with instructions.



Gonzales v. State, 492 P.3d 556 (2021)

- ▶ Defendant petition for writ of habeas corpus after his conviction for aggravated stalking was affirmed, 2014 WL 6090812. District court denied the petition. Defendant appealed. The Court of Appeals, 476 P.3d 84, affirmed. Defendant appealed.
- ▶ The Supreme Court held that:
 - A guilty plea does not waive a habeas claim of ineffective assistance of counsel at sentencing.
 - The State breached its promise in plea agreement to recommend concurrent sentences.
 - Trial counsel was ineffective in not objecting to the State's breach of plea agreement.
 - The appropriate remedy for counsel's ineffectiveness was a new sentencing hearing.
 - Counsel's advice to plead guilty to aggravated stalking was not deficient performance.

Reversed and remanded.



***Barlow v. State*, 138 Nev. Adv. Op. 25 (2022)**

- ▶ Appeal from a judgment of conviction, pursuant to a jury verdict, of home invasion while in possession of a firearm, burglary while in possession of a firearm, assault with the use of a deadly weapon, and two counts of a first-degree murder with the use of a deadly weapon.
- ▶ A jury is considered “hung” in the penalty phase of a capital murder trial only when it cannot unanimously agree on the sentence to be imposed.
- ▶ A hung jury cannot impose a death sentence but must consider the other sentences that may be imposed.

Affirmed in part, reversed in part, and remanded for new penalty hearing.



Gunera-Pastrana v. State, 490 P.3d 1262 (2021)

- ▶ Defendant was convicted of two counts of each of sexual assault of a minor under 14 years of age and lewdness with a child under the age of 14 and sentenced to 35 years to life in prison. After denial of his motion for a new trial, defendant appealed.
- ▶ The Supreme Court held that:
 - District court's comment to the jury before opening statements that "defendant had been arrested by the police department" and "that the police department did not go out and select somebody at random to prosecute" constituted misconduct that undermined defendant's presumption of innocence.
 - Defendant was deprived of his ability to demonstrate that prejudice resulted from the jury's misconduct when a juror used the internet search engine to define the term "common sense" and shared the definition with other jurors that constituted extraneous dictionary definition.
 - As a matter of **first impression**, the prosecutor's remark in closing arguments that there were "two people that know what happened and the victim told you what happened" was an indirect reference to defendant's failure to testify in violation of the Fifth Amendment and constituted prosecutorial misconduct.

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***Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)**

- The issue of defendant's guilt was close, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- Judicial, juror, and prosecutorial misconduct that occurred in defendant's trial were so substantial that they undermined defendant's credibility and defense, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- The cumulative effect of errors caused by a judicial, juror, and prosecutorial misconducts denied defendant's due process right to a fair trial and warranted reversal of conviction

Reversed and remanded.



***State v. Seka*, 490 P.3d 1272 (2021)**

- ▶ Following convictions for murder and robbery, district court granted the defendant's motion for new trial. The State appealed.
- ▶ The Supreme Court held that new DNA evidence was not favorable to defendant, thus defendant was not entitled to a new trial 19 years after the conviction.

Reversed.





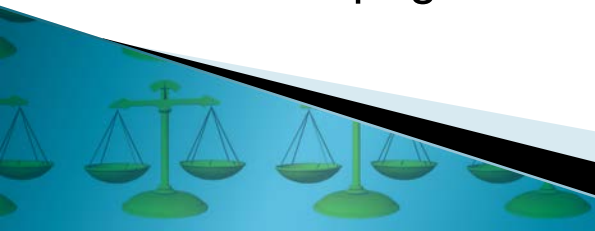
VI. Appeals

- ❖ *Burns v. State*, 495 P.3d 127 (2021)
- ❖ *Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)
- ❖ *Goad v. State*, 488 P.3d 646 (2021)

***Burns v. State*, 495 P.3d 1091 (2021)**

- ▶ Defendant was convicted of conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, robbery with use of a deadly weapon, murder with use of a deadly weapon, attempted murder with use of a deadly weapon, and battery with the use of a deadly weapon, and he appealed.
- ▶ The Supreme Court held that:
 - Sentencing was not part of “guilt phase of trial” as that phrase was used in parties’ mid-trial agreement in which defendant waived appellate rights stemming from guilt phase of trial.
 - Appellate court would construe the appeal waiver in parties’ mid-trial agreement against the government and conclude that defendant did not waive claim relating to jury selection.
 - The phrase “guilt phase of trial” encompassed defendant’s claims stemming from every part of the proceedings after the jury was impaneled up.
 - Defendant did not waive, for purposes of appeal, any errors that occurred during closing arguments.

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Burns v. State, 495 P.3d 1091 (2021)

- Defendant waived his right to appellate review of claims related to denial of his suppression motion pursuant to the parties' mid-trial agreement.
- Any error in jury deliberations fell within appeal waiver provision of parties' agreement.
- Defendant did not make prima facie case of racial discrimination with respect to State's peremptory challenge of Black juror.
- State gave race-neutral rationale for peremptory strike of Black juror.
- It was not prosecutorial misconduct for prosecutor to refer to non-testifying witness in is rebuttal closing argument.
- As a matter of **first impression**, defendant's stipulation to the sentence of life-without-parole for first degree murder precluded his argument on appeal that the sentence was unreasonable and unconstitutional.

Affirmed.



Gunera-Pastrana v. State, 490 P.3d 1262 (2021)

- ▶ Defendant was convicted of two counts of each of sexual assault of a minor under 14 years of age and lewdness with a child under the age of 14 and sentenced to 35 years to life in prison. After denial of his motion for a new trial, defendant appealed.
- ▶ The Supreme Court held that:
 - District court's comment to the jury before opening statements that "defendant had been arrested by the police department" and "that the police department did not go out and select somebody at random to prosecute" constituted misconduct that undermined defendant's presumption of innocence.
 - Defendant was deprived of his ability to demonstrate that prejudice resulted from the jury's misconduct when a juror used the internet search engine to define the term "common sense" and shared the definition with other jurors that constituted extraneous dictionary definition.
 - As a matter of **first impression**, the prosecutor's remark in closing arguments that there were "two people that know what happened and the victim told you what happened" was an indirect reference to defendant's failure to testify in violation of the Fifth Amendment and constituted prosecutorial misconduct.

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***Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)**

- The issue of defendant's guilt was close, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- Judicial, juror, and prosecutorial misconduct that occurred in defendant's trial were so substantial that they undermined defendant's credibility and defense, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- The cumulative effect of errors caused by a judicial, juror, and prosecutorial misconducts denied defendant's due process right to a fair trial and warranted reversal of conviction

Reversed and remanded.



***Goad v. State*, 488 P.3d 646 (2021)**

- ▶ Defendant was convicted of murder with the use of a deadly weapon. Defendant appealed.
- ▶ The Court of Appeals held that:
 - Trial court's failure to order a competency hearing sua sponte violated defendant's due process rights.
 - An order vacating trial court's judgment and remanding with instructions for trial court to hold retrospective competency hearing, if feasible, was warranted.

Vacated and remanded.





VII. Other

A. Judicial Misconduct

- *Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)

B. Prosecutorial Misconduct

- *Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)

C. Sealing of Criminal Records

- *Tiffie v. Eighth Judicial Dist. Ct.*, 485 P.3d 1249 (2021)



Gunera-Pastrana v. State, 490 P.3d 1262 (2021)

- ▶ Defendant was convicted of two counts of each of sexual assault of a minor under 14 years of age and lewdness with a child under the age of 14 and sentenced to 35 years to life in prison. After denial of his motion for a new trial, defendant appealed.
- ▶ The Supreme Court held that:
 - District court's comment to the jury before opening statements that "defendant had been arrested by the police department" and "that the police department did not go out and select somebody at random to prosecute" constituted misconduct that undermined defendant's presumption of innocence.
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 - As a matter of **first impression**, the prosecutor's remark in closing arguments that there were "two people that know what happened and the victim told you what happened" was an indirect reference to defendant's failure to testify in violation of the Fifth Amendment and constituted prosecutorial misconduct.

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***Gunera-Pastrana v. State*, 490 P.3d 1262 (2021)**

- The issue of defendant's guilt was close, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- Judicial, juror, and prosecutorial misconduct that occurred in defendant's trial were so substantial that they undermined defendant's credibility and defense, as a factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial.
- The cumulative effect of errors caused by a judicial, juror, and prosecutorial misconducts denied defendant's due process right to a fair trial and warranted reversal of conviction

Reversed and remanded.



Tiffie v. Eighth Judicial Dist. Ct., 485 P.3d 1249 (2021)

- ▶ Petitioner, who had successfully withdrawn his initial guilty plea to a felony sex offense and later pled guilty to gross misdemeanor unlawful contact with a child, filed a petition to seal his criminal records. District court denied his petition on the grounds that felony and misdemeanor offenses were not subject to sealing and that public policy concerns weighed against sealing. Petitioner appealed.
- ▶ The Supreme Court held that:
 - District court could not consider felony offense in reviewing petition.
 - Unlawful contact with a child is not a crime for which sealing is precluded under record-sealing statute.
 - Petition was entitled to presumption in favor of record sealing.
 - The State failed to present evidence of lack of rehabilitation, and thus failed to rebut presumption.

Reversed and remanded with instructions.



VII. Other



E. Public Records

- *Nuveda, LLC v. Eighth Judicial District Court*, 495 P.3d 500 (2021)

F. Motion to Disqualify Judge

- *Debiparshad v. Eighth Judicial Dist. Ct.*, 499 P.3d 597 (2021)

G. Zoom Hearing

- *Chaparro v. State*, 497 P.3d 1187 (2021)

H. NRS 604A Loans

- *State, Dep't of Bus. and Indus., Fin. Insts. Div. v. Titlemax of Nev., Inc.*, 495 P.3d 506 (2021)



Nuveda, LLC v. Eighth Judicial District Court, 495 P.3d 500 (2021)

- ▶ Cannabis establishment operator filed a petition for writ of prohibition and/or mandamus, challenging district court's order denying its motion to transfer indirect contempt proceedings to another judge.
- ▶ The Supreme Court held that:
 - Interests of sound judicial economy and administration favored the Court's consideration of the writ petition.
 - As a matter of **first impression**, a party may waive its right to a peremptory challenge to a judge in indirect contempt proceedings by failing to make a motion for a new judge in a reasonably timely fashion, without undue delay, after grounds for such a motion is ascertained.
 - Petitioner's delayed motion for a new judge was unreasonable such that its peremptory challenge was deemed waived.

Petition denied.



Debiparshad v. Eighth Judicial Dist. Ct., 499 P.3d 597 (2021)

- ▶ Patient asserted medical malpractice claims against doctors and their respective professional entities. Doctor filed a motion to disqualify district judge based on a judge's laudatory comments about the patient's counsel during trial. District court granted patient's motion for mistrial, and judge was subsequently disqualified. District court awarded costs to the patient and denied the doctor's motion for relief from the findings set forth in the mistrial order and denied the doctor's motion for reconsideration. Doctor filed original petition for writ of mandamus.
- ▶ The Supreme Court held that:
 - As a matter of **first impression**, once a party files a motion to disqualify a judge, that judge can take no further action in the case until the motion to disqualify is resolved.

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Debiparshad v. Eighth Judicial Dist. Ct., 499 P.3d 597 (2021)

- As a matter of **first impression**, if a motion to disqualify the judge is granted and the judge is disqualified, any order entered by the judge after the motion to disqualify was filed is void.
- Doctor's petition for writ of mandamus was not barred by the doctrine of laches.
- The Supreme Court would entertain doctor's petition for writ of mandamus to determine whether district judge could enter order after doctor had moved to disqualify judge.
- As a matter of **first impression**, trial judge's written order granting patient's motion for mistrial became void once doctor's motion to disqualify was granted.

Petition granted.



Chaparro v. State, 497 P.3d 1187 (2021)

- ▶ Defendant was convicted of sexual assault, battery with intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Defendant appealed.
- ▶ In a case of first impression, the Supreme Court held, en banc, that:
 - Sentencing hearing via videoconferencing during the COVID-19 pandemic did not violate defendant's right to be present.
 - Evidence of prior conviction for battery with intent to commit sexual assault was admissible to show intent and propensity.
 - Trial court acted within its discretion in limiting defendant's voir dire inquiries about specific evidence that would be presented at trial.
 - Inconclusive DNA evidence was relevant to show thoroughness of investigation and to complete the story of evidence already presented.

Affirmed.



State, Dep't of Bus. and Indus., Fin. Insts. Div. v. Titlemax of Nev., Inc.,
495 P.3d 506 (2021)

- ▶ Title lender brought declaratory judgment action against Financial Institutions Division (FID), seeking relief from FID's findings that certain purported refinances were loan extensions within the meaning of the statute prohibiting extensions for 210-day title loans. District court granted summary judgment to lender. FID appealed.
- ▶ The Supreme Court held that:
 - Purported “refinance” opportunity offered by lender was in fact an “extension” and thus was a prohibited practice for 210-day title loans.
 - “Fair Market Value” of a vehicle, in calculating permissible upper limit on vehicle title loan, only refers to the principal amount of the loan and does not calculate interest.

Affirmed in part and reversed in part.



QUESTIONS?



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