Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA

Commission on Statewide Rules of Criminal Procedure
Videoconference

Date and Time of Meeting: July 13, 2020 at Noon
Place of Meeting: Remote Access via Blue Jeans

All participants attending via teleconference should mute their lines when not speaking; it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.

AGENDA

I. Call to Order
   A. Call of Roll
   B. Determination of a Quorum
   C. Opening Remarks

II. Public Comment

III. Review and Approval of Previous Meeting Summary* **(Tab 1; pages 3-7)**
   A. July 01, 2020

IV. Ongoing Reports/Status Reports
   A. Settlement Conferences

V. Statewide Rules Discussion
   A. Local Rules of Practice
      i. Second Judicial District
      ii. Eighth Judicial District
   B. Rule 8(h): Pretrial Motions **(Tab 2; page 8)**
   C. Rule 2: Case Assignment **(Tab 3; pages 9-13)**
   D. Rule 4: Initial Appearance and Arraignment **(Tab 4; pages 14-21)**
   E. Rule 5: Pleas of Guilty or Nolo Contendere **(Tab 5; pages 22-23)**

F. Rule 6: Release and Detention Pending Judicial Proceedings **(Tab 6; pages 24-28)**

I. Additional Rules for Commission Consideration **(Tab 7; pages 29-66)**
   A. Post-Conviction Writs
   B. Grand Jury
   C. Jury Commissioner

II. Other Items/Discussion
   A. Rule Approval Process and Next Steps

III. Next Meeting Date and Location
   A. August 5, 2020 @ Noon (if necessary)

IV. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030)
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Nevada Supreme Court, 408 East Clark Avenue.

TAB 1

Supreme Court of Nevada

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Commission on Statewide Rules of Criminal Procedure

July 1, 2020
Noon
Summary prepared by: Kimberly Williams

Members Present
Justice James Hardesty, Chair
Justice Abbi Silver, Co-Vice Chair
Justice Lidia Stiglich, Co-Vice Chair
John Arrascada
Chief Judge Freeman
Judge Douglas Herndon
Luke Prengaman – *Proxy for Christopher Hicks*
Darin Imlay
Mark Jackson
Lisa Rasmussen
Judge Shirley
John Springgate
Darin Imlay - *Proxy for JoNell Thomas*
Chris Lalli – *Proxy for Steve Wolfson*

Guests Present
Alex Chen
Sharon Dickinson
John Petty
Judge Tierra Jones

AOC Staff Present
Jamie Gradick
Kimberly Williams

I. Call to Order
- Justice Hardesty called the meeting to order at 12:02 pm.
- Ms. Gradick called roll; a quorum was present.

II. Public Comment
- There was no public comment.

III. Review and Approval of June 15, 2020 Meeting Summary
- The June 15, 2020 meeting summary was approved.

IV. Ongoing Reports/Status Updates
- Jury Instructions Work Group

- Chief Judge Freeman reported the next 6-hour "retreat" will be held remotely on September 1st, 2020.

➢ Settlement Conferences
- Justice Hardesty informed attendees that he filed a petition seeking approval of the amendment approved on during the last meeting. It is scheduled to be heard in the next *En Banc* conference being held July 8, 2020.

V. Statewide Rules Discussion

➢ Rule 8(h): Pretrial Motions *(Tab 2)*
- Justice Hardesty shared with the committee that the Clark County district attorney's office submitted a memo with views on the subject. Justice Hardesty additionally shared that he and Judge Shirley are also working on an additional draft rule and it will be circulated for the July 13th meeting.

➢ Rule 2: Case Assignment *(Tab 3)*
- Justice Hardesty asked for Judge Herndon or Judge Jones to report if any concerns were found with the case assignment rule being implemented in Clark County.
  - Judge Herndon reported (b), as written, would accommodate Clark County's case assignment system.
  - Justice Stiglich questioned if the rule includes closed cases or only pending cases.
    - Justice Hardesty expressed his understanding that it includes closed cases.
    - Justice Stiglich shared her concern that the point of the rule is to streamline the process and it should not include closed cases from prior years.
    - Chief Judge Freeman agreed with Justice Stiglich.
    - Justice Hardesty suggested striking 'or prior action in this court'.
    - Mr. Jackson questioned if an additional violation that reopens a closed case be assigned to the previous judge or reassigned.
    - Justice Stiglich responded that the idea of the rule is to attribute to efficiency, to assist with resolving all cases currently pending and does not contribute to a random case assignment process. Justice Stiglich supported Justice Hardesty's suggestion of striking the 'prior action' language.
    - Judge Herndon shared his concern on old cases that get reopened on the supreme court level now become pending or reopened cases.
    - Justice Silver supported Judge Herndon's comment and added that once anything is filed in the 8th district, the case is reopened to the same judge.
    - Justice Hardesty suggested substituting "prior" with "re-opened".
    - Mr. Imlay shared concerns regarding rule efficiency and maintaining the ability to modify the rule yearly.
    - Justice Hardesty reminded Mr. Imlay that the Chief Judge already has the ability to modify the rules at whim.
    - Mr. Lalli expressed support for the rule as written and commented that the challenge would be getting justice court compliance.
    - Judge Herndon agreed with Mr. Lalli and commented that the justice court assigns out all the cases and does not offer much flexibility in case management and tracking.
    - Justice Hardesty stated he would like the committee to consider submitting a recommendation to the Supreme Court that the case tracking issue be examined through a statewide study to develop a rule that transcends both courts.
    - Mr. Arrascada suggested looking at the case assignment process used in the 2nd district, and to reach out to Jackie Bryant for additional information.
    - Mr. Imlay suggested getting the justice courts involved in any tracking changes.
    - Justice Hardesty stated that was his understanding.
    - Mr. Prengaman commented on the value of the same judge handling future cases.

- Justice Hardesty stated that on
- Chief Judge Freeman agreed and supported Mr. Lalli's comments.
- Justice Hardesty requested Judge Herndon and Judge Jones confirm with Chief Judge Bell that the language used gives her the authority she needs. The rule will be edited from "prior" to "re-opened" and the draft will be addressed again in the July 13th meeting. **Any additional comments or edits for consideration must be submitted to Ms. Gradick no later than Wednesday, July 8th.**
- Mr. Lalli questioned if something should be drafted to address multi-offender cases.
- Justice Hardesty asked Chief Judge Freeman, Judge Shirley and Mr. Jackson to share how multi-offender cases are handled in their respective districts.
- Chief Judge Freeman reported that in the 2nd district all offenders follow the defendant with prior history.
- Justice Hardesty questioned what happens when 2 of the 3 have prior history in the justice system with different departments. How are cases assigned then?
  - Chief Judge Freeman stated he did not have the answer but would get one for Justice Hardesty.
  - Mr. Prengaman stated the rule is if you have two defendants with history in different departments the case goes to the one with the oldest history.
  - Judge Shirley stated that he receives all cases in his district and tries the defendants separately.
  - Mr. Jackson reported that back with the local rule used in the 9th district.
  - Ms. Dickinson questioned if the 8th Judicial District's Rule 3.10 was going to be considered.
  - Justice Hardesty expressed the understanding that the 8th district wanted more flexibility but offered it to be considered. He reminded the committee to submit any additional edits or comments to be sent to Ms. Gradick to be discussed in the July 13th meeting.

➢ Rule 4: Initial Appearance and Arraignment *(Tab 4)*

- Justice Hardesty requested Mr. Prengaman to share his draft with the committee.
  - Mr. Prengaman shared with the committee how the language was drafted.
  - Mr. Petty supported Mr. Prengaman's draft with slight edits and asked if discovery obligations were purposely omitted from Mr. Prengaman's draft.
  - Mr. Prengaman stated it was intentional the rule doesn't typically happen during arraignment and a criminal rule already addresses the discovery obligation.
  - Ms. Rassmussen questioned why '5 days' in (a)(2) the language "...shall be given an extension of time of at least 5 days before entry of plea;". Ms. Rassmussen additionally questioned why a bail increase is allowed once an indictment is obtained.
  - Mr. Prengaman responded that the '5 days' is simply language used from a previous rule and can be changed. *(Portions of this discussion were inaudible)*
  - Mr. Lalli stated that bail is rarely changed but should be addressed in the rule for the rare occasion that the charges change.
  - Ms. Rassmussen restates her concerns on the language used in (a)(2).
  - Justice Stiglich suggested they 'may request an extension of time'.
  - Mr. Lalli suggested the word 'granted'.
  - Justice Hardesty asked for opposition to "...may be granted an extension of time up to 5 days before entry of plea;"
    - None disagreed.
  - Justice Hardesty requested the commission review the discovery rule that it previously approved to ensure it addresses discovery obligations in relation to section (a)(6).

VI. Additional Rules for Commission Consideration *(Tab 7)*

- Grand Jury
- Jury Commissioner

VII. Other Items/Discussion
- Be prepared to address Rule 8(h), Rule 2 and Rule 4 in the July 13, 2020 meeting.
- Ms. Dickinson is to submit her draft of a post-conviction writs rule to Ms. Gradick for discussion at the July 13th, 2020 meeting.
- Any additional rules for consideration must be submitted to Ms. Gradick before the July 13, 2020 meeting**.**

VIII. Next Meeting
- July 13, 2020 at Noon
- August 5, 2020 at Noon (TBD)

IX. Adjournment
- The meeting was adjourned at 1:18 p.m.

TAB 2

TAB 3

2nd CR Rule 2. Case assignment (As amended during 7/01/2020 meeting)

Each criminal action shall be randomly assigned to a department of the court and shall remain in such department until final disposition of the action, unless:

(a) the action is brought against a defendant who is the subject of another pending or reopened action in this court, in which case the action shall be assigned to the department of the most recent other action; or

(b) as otherwise ordered by the chief judge consistent with a plan of court-wide case management.

Comment: To the extent possible, cases involving a defendant who is the subject of another case in this district shall be assigned to the department of the other case. Otherwise, cases shall be randomly assigned.

PROPOSED RULE 2 – submitted by the Clark County Public Defender's Office

Rule 2. Case Assignment.

Each criminal action shall be randomly assigned to a department of the court and shall remain in such department until final disposition of the action. *(2nd CR Rule 2 and EDCR 1.60 and case law)*

The chief judge in each district shall have the authority to assign or reassign cases consistent with a plan of courtwide case management. *(2nd CR Rule 2 and EDCR 1.60)* However, when a case is remanded to a lower court or a competency court for further proceedings, it must be returned to the original district court judge at the conclusion of these proceedings. *(EDCR 1.60)*

Cases sent to overflow for trial will remain in that court for sentencing. However, cases in overflow that do not proceed to trial will return to the original district court judge. *(General practice in the Eighth)*

Comment:

Case wide management styles reflect the case flow, the number of cases a district is handling, and the management style of the district.

1. Judicial Districts with only one judge - not able to follow random assignment rules.

2. Judicial Districts with between 2-10 criminal/civil court judges:

These districts appear to want to follow the following rule:

(1) If a defendant has more than one current active case in the system, any new case shall be automatically assigned to the department with the more recent action. (2nd CR Rule 2)

3. Eighth Judicial District – 30 or more criminal/civil judges:

The Eighth Judicial District has always followed a random selection process. EDCR 1.60 was not part of the packet but is included here with this proposal for review.

EDCR 1.60 Assignment or transfer of cases generally

(a) The chief judge shall have the authority to assign or reassign all cases pending in the district. Additionally, the presiding judge of the family division shall have the authority to assign or reassign cases pending in the family division; the civil presiding judge shall have the authority to assign or reassign civil cases pending in the civil/criminal division; and the criminal presiding judge shall have the authority to assign or reassign criminal cases pending in the civil/criminal division. Unless otherwise provided in these rules, all cases must be distributed on a random basis. However, when a case is remanded to a lower court or tribunal for further proceedings, it must be returned to the original judge at the conclusion of these proceedings.

- Random assignment of cases is required by EDCR 1.60. *Margold v. Eighth Judicial Dist. Court In & For County of Clark*, 109 Nev. 804, 805, 858 P.2d 33, 34 (1993)
- "SCR 16(3), through EDCR 1.30(b)(5), requires the chief judge to assign cases to each judge, in accordance with the other local rules." *Halverson v. Hardcastle*, 123 Nev. 245, 273, 163 P.3d 428, 447–48 (2007).
- Petitions for writ of mandamus or prohibition filed after the dismissal of complaint in justice court must be randomly assigned to district court. Unpublished Ct of Appeals – *Charles v. Omni-Terra Sols., LLC*, 68440, 2017 WL 897766, at *1–2 (Nev. App. Feb. 28, 2017)

Federal Courts also use random distribution of cases.

Second Judicial District - Policy for Co-Defendant Case Assignments:

- Co-defendants will only receive the A/B case number and this judicial assignment if they are bound over together and identified as co-defendants.
- Co-defendants may be bound over separately and assigned different case numbers but will track to the same judge if co-defendants are identified.
- When co-defendants are bound over together, the Deputy Clerk will conduct a name search for each defendant. If neither defendant has had a prior criminal case then the co-defendant case will be randomly assigned among the General Jurisdiction bench.
- If one of the co-defendants had a prior criminal case, the co-defendants shall both be assigned to the judicial officer who previously heard one of the defendant's criminal cases(s).
- If both co-defendants have had prior criminal cases, the new co-defendant case will be assigned to the judge that heard the most recent case unless one of the cases is still open or has a pending matter, the judge that has that case will receive the new co-defendant case.
- When there is a conflict with co-defendant case assignment, it is the intent of this policy to assign the new co-defendant case to the judge that has the most recent prior case history with a defendant.

TAB 4

Proposed by Luke Prengaman

Rule 4. Initial appearance and arraignment.

Initial appearance and arraignment.

(a) **Defendant charged by information**.

(1) If a defendant has been charged by information, at the initial appearance of the defendant before the district court, the court shall:

(i) Supply the defendant a copy of the information unless the charging document has previously been made available to the defendant through e-filing;

(ii) If necessary, determine whether the defendant qualifies for appointed counsel and, if so, appoint counsel to represent the defendant. In such event, newly appointed counsel shall be given an extension of time of at least 5 days before entry of plea;

(iii) Arraign the defendant upon all charges in the information;

(iv) If the defendant enters a plea of not guilty, set the dates for trial, pretrial motions, evidentiary hearings or status conferences.

(b) **Defendant charged by indictment**.

(1) If the defendant has been charged by indictment, and:

(i) The indictment addresses the same charges or subject matter as a criminal complaint pending in a parallel proceeding in the justice courts, and the warrant issued upon the indictment sets bail or conditions of pretrial release that exceed the prevailing bail or conditions of release set by the magistrate in the parallel proceeding; or

(ii) There is no criminal complaint pending in a parallel proceeding in the justice courts addressing the same charges or subject matter as the indictment;

the court shall conduct a prompt adversarial hearing to determine whether detention is warranted and fix appropriate conditions for the defendant's release from custody or fix appropriate bail.

(2) At the initial appearance of the defendant charged by indictment before the district court, the court shall:

(i) Supply the defendant a copy of the indictment unless the charging document has previously been made available to the defendant through e-filing;

(ii) If necessary, determine whether the defendant qualifies for appointed counsel and, if so, appoint counsel to represent the defendant. In such event, newly appointed counsel shall be given an extension of time of at least 5 days before entry of plea;

(iii) Arraign the defendant upon all charges in the indictment;

(iv) If the defendant enters a plea of not guilty, set the dates for trial, pretrial motions, evidentiary hearings or status conferences.

(c) If the defendant enters a plea of guilty or nolo contendere, the court may transfer the action to the Second Judicial District Court (Washoe County) Specialty Courts, if appropriate, or order a presentence report and set a sentencing date.

(c) Subject to the provisions of NRS 176.135, a presentence report may be waived and sentence imposed at the entry of a plea of guilty or nolo contendere.

Proposed by: Washoe County Public Defender

Rule 4. Initial appearance and arraignment.

Initial appearance and arraignment.

(a) Defendant charged by information.

(1) If a defendant has been charged by information, at the initial appearance of the defendant before the district court, the court shall:

(i) Supply the defendant a copy of the information unless the charging document has previously been made available to the defendant through e-filing;
(ii) If necessary, determine whether the defendant qualifies for appointed counsel and, if so, appoint counsel to represent the defendant. In such event, newly appointed counsel, upon request, shall be given an extension of time ~~of at least 5 days~~ before entry of plea;
(iii) Arraign the defendant upon all charges in the information;
(iv) If the defendant enters a plea of not guilty, set the dates for trial, pretrial motions, evidentiary hearings or status conferences;
(v) Ascertain the content, timing, manner and sequence of any additional discovery as required by Rule 7, if applicable.

(b) Defendant charged by indictment.

(1) If the defendant has been charged by indictment, and:

~~(i) The indictment addresses the same charges or subject matter as a criminal complaint pending in a parallel proceeding in the justice courts, and the warrant issued upon the indictment sets bail or conditions of pretrial release that exceed the prevailing bail or conditions of release set by the magistrate in the parallel proceeding; or~~
~~(ii) There is no criminal complaint pending in a parallel proceeding in the justice courts addressing the same charges or subject matter as the indictment;~~

~~the court shall conduct a prompt adversarial hearing to determine whether detention is warranted and fix appropriate conditions for the defendant's release from custody or fix appropriate bail~~.

(i) The defendant has been charged by indictment and the indictment addresses the same charges or subject matter as a criminal complaint pending in a parallel proceeding in the justice courts, any bail or

conditions of release shall presumptively remain as set in the justice courts;

(ii) The defendant has been charged by indictment and there is no criminal complaint pending in a parallel proceeding in the justice courts addressing the same charges or subject matter as the indictment, the court shall conduct a prompt adversarial hearing to determine and fix appropriate conditions for the defendant's release from custody, fix bail, or detain the defendant;

(iii) The defendant has been charged by indictment and the indictment addresses additional or new charges or subject matter as a criminal complaint pending in a parallel proceeding in the justice courts and the State is seeking to increase the prevailing bail or alter the conditions of release set in the parallel proceeding in the justice courts, the court must conduct a prompt adversarial hearing to determine whether the State's request is warrant and to, if necessary, fix appropriate conditions for the defendant's release from custody, fix bail, or detain the defendant.

(2) At the initial appearance of the defendant charged by indictment before the district court, the court shall:

(i) Supply the defendant a copy of the indictment unless the charging document has previously been made available to the defendant through e-filing;

(ii) If necessary, determine whether the defendant qualifies for appointed counsel and, if so, appoint counsel to represent the defendant. In such event, newly appointed counsel, upon request, shall be given an extension of time ~~of at least 5 days~~ before entry of plea;

(iii) Arraign the defendant upon all charges in the indictment;

(iv) If the defendant enters a plea of not guilty, set the dates for trial, pretrial motions, evidentiary hearings or status conferences;

(v) Ascertain the content, timing, manner and sequence of any additional discovery as required by Rule 7, if applicable.

~~(c) If the defendant enters a plea of guilty or nolo contendere, the court may transfer the action to the Second Judicial District Court (Washoe County) Specialty Courts, if appropriate, or order a presentence report and set a sentencing date.~~

~~(c) Subject to the provisions of NRS 176.135, a presentence report may be waived and sentence imposed at the entry of a plea of guilty or nolo contendere.~~

(c) Sentencing or Transfer.

(1) If a defendant enters a plea of guilty or nolo contendere, the court may transfer the action to a court or a department of the court for the purpose of assigning the defendant into an appropriate program or treatment plan, or order a presentence report and set a sentencing date.
(2) Subject to the provisions of NRS 176.135, a presentence report may be waived and sentence imposed at the entry of a guilty or nolo contendere plea.

Proposed Rule 4 - submitted by the Clark County Public Defender's Office

Rule 4 Initial appearances and arraignment

(a) At the initial appearance of the defendant before the district court, the court shall:

(1) give the defendant a copy of the indictment or information if he or she has not received it;

(2) appoint counsel if necessary and, if defendant requests a continuance, delay the entry of the plea to allow time for the defendant to speak to the newly appointed attorney;

(3) arraign the defendant on the charges listed in the indictment or information; and,

(i) If the defendant enters a plea of not guilty, the court shall set dates for the trial, calendar call, and other hearings. The court shall also specify any discovery obligations of the parties beyond those contained in Chapter 174 of the Nevada Revised Statutes.

(ii) If the defendant enters a plea of guilty, guilty but mentally ill, or nolo contendere the court shall:

1. accept the defendant's plea upon a finding that the plea was knowingly, voluntarily, and willfully entered; and,

2. set a sentencing date; or

3. with the consent of the defendant, defer judgment and transfer the action to a specialty court. Judgment may be deferred if the defendant enters a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a Category B (nonsexual offense), C, D, or E felony.

(b) At the initial arraignment, the court shall determine if the defendant has previously been given a *Valdez-Jimenez* hearing. If not, then court shall conduct an adversarial hearing to determine if the arrestee should be released on his own recognizance. The State shall bear the burden of demonstrating, by clear and convincing evidence, that pre-trial detention or bail is the least restrictive means of ensuring an arrestee's return to court and/or community safety before any order resulting in pre-trial confinement may issue.

(c) The district court may accept the transfer of a case from justice court or municipal court if a defendant has not entered a plea or been found guilty of a misdemeanor and would benefit from a treatment program.

Because we were in the process of evaluating the AB 236 procedures for specialty courts at a district court arraignment, this proposal is being submitted without further evaluation of the new procedures enacted in AB236.

Submitted by the Clark County Public Defender's Office

TAB 5

Rule 5. Pleas of guilty or nolo contendere.

2nd CR Rule 4. Pleas of guilty or nolo contendere.

(a) All pleas of guilty or nolo contendere entered pursuant to a plea bargain agreement shall be supported by a written plea memorandum, filed in open court at the entry of the plea, stating:

(1) the terms of the plea bargain agreement;

(2) the factual basis for the plea and an acknowledgment by counsel that the defendant has been advised of the discovery produced and the evidence the State intends to present at trial;

(3) the constitutional rights waived by the defendant;

(4) the maximum possible punishment for any charge which is the subject of the plea bargain agreement;

(5) whether probation is available and whether multiple or enhanced sentences can be concurrent or consecutive;

(6) the defendant's acknowledgment that the court is not bound by the plea bargain agreement; and

(7) the defendant's knowledge of and voluntary consent to the terms of the plea bargain agreement and the contents of the memorandum.

(b) The guilty or nolo contendere plea memorandum shall be signed by the defendant and counsel for all parties to the agreement.

Comment: The plea bargain memorandum is integral to the entry of a guilty or nolo contendere plea and must be completed, signed and filed when the plea is entered.

TAB 6

Rule 6. Release and detention pending judicial proceedings.

8th Rule 3.80. Release from custody; bail reduction.

(a) When an individual is arrested on probable cause or on an arrest warrant, any district judge may, on an emergency basis only, unilaterally, without contact with a prosecutor, grant a release upon the individual's own recognizance pursuant to NRS 178.4851[5] and 178.4853[6] or reduce the amount of bail below the standard bail, provided that the arrest is for a misdemeanor, gross misdemeanor, non-violent felony, or some combination thereof. Before the court may grant an own recognizance release or bail reduction, the court must be satisfied that the individual arrested will likely appear in court at the next scheduled appearance date and does not present a threat in the interim if released. Once the individual arrested makes an initial court appearance, all issues regarding custodial status shall be addressed by the judge assigned the case or any other judge specifically designated or authorized by the assigned judge. A judge designated or authorized by the assigned judge, or by court rule, may release an individual from a bench warrant for a misdemeanor, gross misdemeanor or non-violent felony, or some combination thereof.

(b) When an individual is arrested on probable cause for a violent felony offense or on a bench warrant for a violent felony offense issued by the district court, Justice Court, or municipal court, a district judge shall not grant an own recognizance

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[5] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[6] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

release or reduce the amount of bail established unless the judge provides an opportunity pursuant to NRS 178.486[7] for the prosecution to take a position thereon by telephone or in person, either in chambers or in open court. A district court judge may unilaterally increase bail for an individual arrested for a violent felony if the court is satisfied that the individual arrested will not likely appear in court at the next scheduled appearance date or presents a threat to the community in the interim if released.

(c) Between the time of an individual's arrest on probable cause, a bench warrant, or an arrest warrant and his or her subsequent court appearance, ex parte contact between the court and any person interested in the litigation regarding the individual's custodial status shall be allowed.

2nd CR Rule 5. Release and detention pending judicial proceedings.

(a) The court shall determine appropriate conditions for release or that detention is warranted using the factors set forth in NRS 178.4853[8] and NRS 178.486.[9]

(b) All persons released from custody, on bail or otherwise, shall comply with any terms or conditions of release imposed by the court.

(c) The court shall order the pretrial release of a defendant on personal recognizance (subject to supervision by the court services department, or upon such additional conditions as the court deems appropriate) unless the court determines that such release will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community.

(d) If the court determines that the release of the defendant pursuant to subsection (c) of this rule will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community, the court shall

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[7] **NRS 178.486 When bail is matter of discretion, notice of application must be given to district attorney.** When the admission to bail is a matter of discretion, the court, or officer by whom it may be ordered, shall require such notice of the application therefor as the court or officer may deem reasonable to be given to the district attorney of the county where the examination is had.

[8] **NRS 178.4853 Factors considered before release without bail.** In deciding whether there is good cause to release a person without bail, the court at a minimum shall consider the following factors concerning the person:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;
8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

[9] **NRS 178.486 When bail is matter of discretion, notice of application must be given to district attorney.** When the admission to bail is a matter of discretion, the court, or officer by whom it may be ordered, shall require such notice of the application therefor as the court or officer may deem reasonable to be given to the district attorney of the county where the examination is had.

consider the release of the defendant upon the least restrictive condition, or combination of conditions, that will reasonably assure the presence of the defendant as required and the safety of any other person or the community, which may include the condition that the defendant:

(1) remain in the custody of a designated person, who agrees to assume supervision and agrees to report any violation of a release condition to the court services department, if the designated person submits to the jurisdiction of the court and is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode or travel;

(5) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(6) report by telephone or in person on a regular basis to the court services department or a designated law enforcement agency or other agency;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device or other dangerous weapon;

(9) refrain from the use of alcohol or controlled substances;

(10) undergo a specified program of available medical, psychological, psychiatric or other counseling or treatment, and remain in a specified institution if required for that purpose;

(11) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;

(12) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the defendant as required;

(13) return to custody for specified hours following release for employment, schooling or other limited purposes; and

(14) satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of any other person and the community

(e) The court may at any time amend the order or conditions of release.

Comment: This rule adopts a release evaluation process primarily derived from 18 U.S.C. § 3142.[10]

[10] 18 U.S. Code § 3142 is lengthy and is therefore reproduced at the end of this document.

- Note that 2nd L.C.R. 7(i), "Pretrial Motions," provides that: "Motions made under L.C.R. 5 may be made orally in open court or in an on-the-record telephone conference with the court and opposing counsel."

TAB 7

Office of the Public Defender

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Darin F,. Imlay, Public Defender · **Virginia F. Eichacker**, Assistant Public Defender

Here are several proposed rules:

1. Bail
2. Jury Commissioner
3. Grand Jury
4. Postconviction Writ of Habeas Corpus

Bail – amended

1) Determinations regarding pretrial custody must be made promptly after arrest. "Prompt" means a time frame commensurate with that which a defendant could post standard bail or the bail fixed in an arrest warrant, but no later than 12 hours following arrest, including non-judicial days.

2) Custody determinations must be made by a judge at an adversarial hearing, with the accused and counsel present.

3) At any hearing on pre-trial custody, prosecutors must *specify* whether they are seeking to detain an individual pretrial. If so, prosecutors must establish by clear and convincing evidence that pretrial detention is the least restrictive means of assuring a defendant's return to court and ensuring community safety.

4) In order for a defendant to be detained pretrial, the reviewing judge must make findings, on the record, that prosecutors established that the defendant poses an unmanageable risk of flight and danger to the community, and that no release condition or combination of conditions can satisfy concerns regarding flight risk and community safety.

5) The failure to hold a custody hearing within the time frames specified herein shall result in the immediate release of the arrestee.

Proposed by the Clark County Public Defender's Office

Chief Deputy Nancy Lemcke

Jury Commissioner

Rule X.XX. **Availability of procedures**. The jury commissioner shall document, in writing, all procedures used by the jury commissioner's office in the selection of prospective jurors and make the procedures available to the public upon request.

Rule X.XX. **Jury sources**. The jury commissioner must utilize a list of persons who are registered to vote in the county, the Department of Motor Vehicles, the Employment Security Division of the Department of Employment, Training and Rehabilitation, and a public utility as required by NRS 6.045, and such other lists as may be authorized by the chief judge.

Rule X.XX. **Yearly reporting requirements**. The jury commissioner shall prepare and submit a yearly report that contains statistics from the records required to be maintained by the jury commissioner pursuant to NRS 6.045, including, without limitation, the name, occupation (where available), zip code and race of each trial juror who is summoned, each trial juror who appears for jury service, each trial juror who is selected, and each trial juror who is seated as a juror.

Rule X.XX. **Availability of documentation in master list**. All documentation collected by the jury commissioner and used to compile the master list must be made available to the parties to a jury trial upon request. A criminal defendant is entitled to information relating to the race, gender, occupation (where available), and zip code of the prospective jurors in the master list. The jury commissioner must also prepare a zip code report listing the number of prospective jurors in the master list by zip code to be given to the public upon request.

Rule X.XX. **Availability of documentation to the parties in a case**. All documentation collected by the jury commissioner from prospective jurors must be made available to the parties to a jury trial upon request. A criminal defendant is entitled to information relating to the race, gender, occupation (where available), and zip code of the prospective jurors assigned to his case, the prospective jurors reporting for jury service, and in the group of jurors summoned for jury on the date set for jury trial. This documentation must be made available, when requested, prior to beginning the jury selection process.

Proposed by:

Clark County Public Defender's Office

Chief Deputy Tegan Machnich
Chief Deputy Sharon Dickinson

135 Nev. 463
Supreme Court of Nevada.

Keandre VALENTINE, Appellant,
v.
The STATE of Nevada, Respondent.

No. 74468
|
FILED DECEMBER 19, 2019

Synopsis
Background: After defendant's request for an evidentiary hearing regarding whether jury venire represented a fair cross-section of the community was denied, defendant was convicted in the District Court, Clark County, Richard Scotti, J., of multiple crimes stemming from five armed robberies. Defendant appealed.

Holdings: The Supreme Court, Stiglich, J., held that:

as a matter of first impression, an evidentiary hearing is warranted on a defendant's fair-cross-section challenge to a jury venire when the defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement;

defendant's allegations were sufficient to establish a prima facie violation of the fair-cross-section requirement;

evidence was insufficient to support two of defendant's robbery convictions;

district court did not abuse its discretion in admitting graphs of DNA test results;

prosecutor's closing argument inviting jurors to make inferences not supported by DNA evidence was improper; and

prosecutor's improper closing argument was harmless.

Vacated and remanded.

****712** Appeal from a judgment of conviction, pursuant to a jury verdict, of seven counts of robbery with the use of a deadly weapon, three counts of burglary while in possession of a deadly weapon, two counts of possession of credit or debit card without cardholder's consent, and one count each of attempted robbery with the use of a deadly weapon and possession of document or personal identifying information for the purpose of establishing a false status or identity. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Attorneys and Law Firms

Darin F. Imlay, Public Defender, and Sharon G. Dickinson, Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Krista D. Barrie, Chief Deputy District Attorney, and Michael R. Dickerson, Deputy District Attorney, Clark County, for Respondent.

BEFORE HARDESTY, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

***463** A defendant has the right to a jury chosen from a fair cross section of the community, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This court has addressed the showing a defendant must make to establish a prima facie violation of this right. We have said little, however, about when an evidentiary hearing may be warranted on a fair-cross-section claim. Faced with that issue in this case, we hold that an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement. Because the defendant in this matter made specific factual allegations that could be sufficient to establish a prima facie violation of the fair-cross-section requirement and those allegations were not disproved, the district court abused its discretion by denying Valentine's request for an evidentiary hearing. None of Valentine's other claims warrant a new trial. We therefore vacate the judgment of conviction and remand for further proceedings as to the fair-cross-section challenge.

***464 **713** *BACKGROUND*

Appellant **Keandre Valentine** was convicted by a jury of multiple crimes stemming from a series of five armed robberies in Las Vegas, Nevada. Before trial, Valentine objected to the 45-person venire and claimed a violation of his right to a jury selected from a fair cross section of the community. He argued that two distinctive groups in the community—African Americans and Hispanics—were not fairly and reasonably represented in the venire when compared with their representation in the community. Valentine asserted that the underrepresentation was caused by systematic exclusion, proffering two theories as to how the system used in Clark County excludes distinctive groups. His first theory was that the system did not enforce jury summonses; his second theory was that the system sent out an equal number of summonses to citizens located in each postal ZIP code without ascertaining the percentage of the population in each ZIP code. Valentine requested an evidentiary hearing, which was denied. The district court found that the two groups were distinctive groups in the community and that one group—Hispanics—was not fairly and reasonably represented in the venire when compared to its representation in the community. However, the district court found that the underrepresentation was not due to systematic exclusion, relying on the

jury commissioner's testimony regarding the jury selection process two years earlier in another case and on this court's resolution of fair-cross-section claims in various unpublished decisions. The court thus denied the constitutional challenge.

DISCUSSION

Fair-cross-section challenge warranted an evidentiary hearing

Valentine claims the district court committed structural error by denying his fair-cross-section challenge without conducting an evidentiary hearing. We review the district court's denial of Valentine's request for an evidentiary hearing for an abuse of discretion. *See Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (reviewing denial of request for an evidentiary hearing on a postconviction petition for a writ of habeas corpus); *accord United States v. Schafer*, 625 F.3d 629, 635 (9th Cir. 2010) (reviewing denial of request for an evidentiary hearing on a motion to dismiss an indictment); *United States v. Terry*, 60 F.3d 1541, 1544 n.2 (11th Cir. 1995) (reviewing denial of request for an evidentiary hearing on fair-cross-section challenge to statute exempting police officers from jury service).

"Both the Fourteenth and the Sixth Amendments to the United States Constitution guarantee a defendant the right to a trial before a jury selected from a representative cross-section of the community." *Evans v. State*, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996). While this right does not require that the jury "mirror the community and ***465** reflect the various distinctive groups in the population," it does require "that the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 1186, 926 P.2d at 274-75 (internal quotation marks omitted). "Thus, as long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." *Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005).

A defendant alleging a violation of the right to a jury selected from a fair cross section of the community must first establish a prima facie violation of the right by showing

> (1) that the group alleged to be excluded is a "*distinctive*" *group* in the community; (2) that the *representation of this group in venires* from which juries are selected *is not fair and reasonable* in relation to the number of such persons in the community; and (3) that this underrepresentation is *due to systematic*

> *exclusion* of the group *in the jury-selection process.*

Evans, 112 Nev. at 1186, 926 P.2d at 275 (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)). To determine "[w]hether a certain percentage is a fair representation of a group," this court ****714** uses "the absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community." *Williams*, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9. And to determine whether systematic exclusion has been shown, we consider if the underrepresentation of a distinctive group is "inherent in the particular jury-selection process utilized." *Evans*, 112 Nev. at 1186-87, 926 P.2d at 275 (internal quotation marks omitted). Only after a defendant demonstrates a prima facie violation of the right does "the burden shift [ ] to the government to show that the disparity is justified by a significant state interest." *Id.* at 1187, 926 P.2d at 275.

Here, Valentine asserted that African Americans and Hispanics were not fairly and reasonably represented in the venire. Both African Americans and Hispanics are recognized as distinctive groups. *See id.; see also United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir. 1996). And the district court correctly used the absolute and comparative disparity between the percentage of each distinct group in the venire and the percentage in the community to determine that African Americans were fairly and reasonably represented in the venire but that Hispanics were not. *See Williams*, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9 ("Comparative disparities over 50% indicate that the representation of [a distinct group] is likely not fair and reasonable."). The district court denied Valentine's challenge as to Hispanics based on the third prong—systematic exclusion.

***466** We conclude the district court abused its discretion in denying Valentine's request for an evidentiary hearing. Although this court has not articulated the circumstances in which a district court should hold an evidentiary hearing when presented with a fair-cross-section challenge, it has done so in other contexts. For example, this court has held that an evidentiary hearing is warranted on a postconviction petition for a writ of habeas corpus when the petitioner has "assert[ed] claims supported by specific factual allegations [that are] not belied by the record [and] that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002); *see also Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Most of those circumstances are similarly relevant when deciding whether an evidentiary hearing is warranted on a defendant's fair-cross-section challenge, given the defendant's burden of demonstrating a prima facie violation. In particular, it makes no sense to hold an evidentiary hearing if the defendant makes only general allegations that are not sufficient to demonstrate a prima facie violation or if the defendant's specific allegations are not sufficient to demonstrate a prima facie violation as a matter of law. *See Terry*, 60 F.3d at 1544 n.2 (explaining that no evidentiary hearing is warranted on a fair-cross-section challenge if no set of facts could be developed that "would be significant legally"). But unlike the

postconviction context where the claims are case specific, a fair-cross-section challenge is focused on systematic exclusion and therefore is not case specific. Because of that systematic focus, it makes little sense to require an evidentiary hearing on a fair-cross-section challenge that has been disproved in another case absent a showing that the record in the prior case is not complete or reliable.[1] With these considerations in mind, we hold that an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement.[2]

1 For the reasons stated herein, it was error for the district court to rely upon the jury commissioner's prior testimony in denying Valentine's challenge. That is not to say a district court may never rely upon prior testimony when appropriate.

2 We note that, in order to meet the burden of demonstrating an evidentiary hearing is warranted, a defendant may subpoena supporting documents and present supporting affidavits. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

Applying that standard, we conclude that Valentine was entitled to an evidentiary hearing as to his allegation of systematic exclusion of Hispanics. Valentine did more than make a general assertion of systematic exclusion. In particular, Valentine made specific allegations that the system used to select jurors in the Eighth Judicial ****715** District Court sends an equal number of jury summonses to each postal ZIP code in the jurisdiction without ascertaining the percentage ***467** of the population in each ZIP code. Those allegations, if true, could establish underrepresentation of a distinctive group based on systematic exclusion. *Cf. Garcia-Dorantes v. Warren*, 801 F.3d 584, 591-96 (6th Cir. 2015) (discussing a prima facie case of systematic exclusion where a computer used a list to determine the percentage of jurors per ZIP code, but because of a glitch, the list included a higher number of persons from certain ZIP codes that had smaller proportions of African Americans than the community at large). And those allegations were not addressed in the jury commissioner's prior testimony that the district court referenced.[3] Accordingly, the district court could not rely on the prior testimony to resolve Valentine's allegations of systematic exclusion. Having alleged specific facts that could establish the underrepresentation of Hispanics as inherent in the jury selection process, Valentine was entitled to an evidentiary hearing.[4] Accordingly, the district court abused its discretion by denying Valentine's request for an evidentiary hearing.[5] We therefore vacate the judgment of conviction and remand to the district court for an evidentiary hearing. *Cf. State v. Ruscetta*, 123 Nev. 299, 304-05, 163 P.3d 451, 455 (2007) (vacating judgment of conviction and remanding where district court failed to make factual findings regarding motion to suppress and where record was insufficient for appellate review). Thereafter, Valentine's fair-cross-section challenge should proceed in the manner outlined in *Evans*, 112 Nev. at 1186-87, 926 P.2d at 275. If the district court determines that the challenge lacks merit, it may reinstate the judgment of conviction, except as provided below.

3 Even if the jury commissioner's previous testimony addressed Valentine's specific allegations of systematic

exclusion, reliance on the old testimony would have been misplaced. In particular, the prior testimony mentioned that the system was "moving towards a new improved jury selection process" and legislative amendments regarding the juror selection process were implemented close in time to Valentine's trial. *See* 2017 Nev. Stat., ch. 549, §§ 1-5, at 3880-84. While prior testimony relevant to a particular fair-cross-section challenge may obviate the need for an evidentiary hearing, a district court should be mindful that it not rely upon stale evidence in resolving such challenges.

4 It is unclear that Valentine's allegations regarding the enforcement of jury summonses would, if true, tend to establish underrepresentation as a result of systematic exclusion. *See United States v. Orange,* 447 F.3d 792, 800 (10th Cir. 2006) ("Discrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*"). Accordingly, he was not entitled to an evidentiary hearing as to those allegations.

5 We reject Valentine's contention that the district court's failure to hold an evidentiary hearing evinced judicial bias resulting in structural error.

Sufficiency of the evidence

Valentine argues the State presented insufficient evidence to support his convictions for robbery with the use of a deadly weapon in counts 4 and 9. In considering a claim of insufficient evidence, we ***468** "view[ ] the evidence in the light most favorable to the prosecution" to determine whether *"any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State,* 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

NRS 200.380(1) defines the crime of robbery as

> [T]he unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery.[6]

Additionally, we have held that the State must show that the victim had possession of or a possessory interest in the property taken. ****716** *See Phillips v. State,* 99 Nev. 693, 695-96, 669 P.2d 706, 707 (1983).

6 The Legislature amended NRS 200.380, effective October 1, 2019. 2019 Nev. Stat., ch. 76, § 1, at 408. While the amendments do not affect our analysis in this matter, we have quoted the pre-amendment version of NRS 200.380 that was in effect at the time of the events underlying this appeal. 1995 Nev. Stat., ch. 443, § 60, at 1187.

The challenged robbery counts stem from a similar fact pattern. Beginning with count 4, Valentine was charged with robbing Deborah Faulkner of money; Valentine was also charged with robbing Darrell Faulkner, Deborah's husband, of money in count 3. Valentine was convicted of both counts. However, when viewed in a light most favorable to the prosecution, the evidence produced at trial was insufficient to support a robbery charge as it related to Deborah.

While the evidence established that Valentine took $100 that Darrell removed from his own wallet, the evidence demonstrated that Valentine demanded Deborah to empty her purse onto the ground but actually took nothing from it. There was no evidence that Deborah had possession of, or a possessory interest in, the money from Darrell's wallet.[7] Thus, the State presented insufficient evidence for count 4, and the conviction for that count cannot be sustained.

7 We are unconvinced by the State's argument that the singular fact of Darrell and Deborah being married, without more, demonstrated that the money in Darrell's wallet was community property of the marriage such that Deborah had a possessory interest in it. *See* NRS 47.230(3).

Similarly, in count 9, Valentine was charged with robbing Lazaro Bravo-Torres of a wallet and cellular telephone; Valentine was also charged with robbing Rosa Vasquez-Ramirez, Lazaro's wife, of a purse, wallet, and/or cellular telephone in count 11. Valentine was convicted of both counts. Yet viewing the evidence in a light most favorable to the prosecution, the evidence did not establish that Valentine robbed Lazaro. Specifically, Lazaro testified that he ***469** told Valentine he did not have cash or a wallet on him and that his phone, located in the center compartment of the truck, was not taken but was used by the couple after the incident was over. Conversely, Rosa testified that Valentine took her purse along with the items in it. The evidence presented by the State did not establish that Lazaro had possession of, or a possessory interest in, the items taken,[8] and thus the conviction for count 9 cannot be sustained.

8 We again reject the State's argument that the mere fact that Lazaro and Rosa were married demonstrated that Lazaro had a possessory interest in Rosa's purse or the items therein. *See id.*

Prosecutorial misconduct regarding DNA evidence

Valentine contends that the State engaged in prosecutorial misconduct during closing argument when discussing the deoxyribonucleic acid (DNA) evidence. In considering a claim of prosecutorial misconduct, we determine whether the conduct was improper and, if so, whether the improper conduct merits reversal. *Valdez v. State,* 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

During the trial, the State presented an expert witness to testify about the DNA results from a swab of the firearm found in the apartment where Valentine was discovered. The expert testified generally about the procedures her laboratory uses for DNA analysis. She explained that samples are tested at the same 15 locations, or loci, on the DNA molecule and a DNA profile results from the alleles, or numbers, obtained from each of the 15 locations.[9] When complete information from each of the 15 locations is obtained, the result is a full DNA profile; anything less produces a partial DNA profile. The results of the DNA testing process appear as peaks on a graph, and it is those peaks that the expert interprets and uses to make her determinations. In considering the information on a graph, the expert indicated that her laboratory uses a threshold of

200—anything over 200 is usable information, while anything below 200 is not used "because it's usually not reproducible dat[a]," meaning if the sample was tested again, "it's so low that [she] might get that same information, [she] might not."[10] The expert maintained ****717** that sometimes DNA information is obtained "but it's not good enough for us to make any determinations on. So in that case we call it inconclusive."

9 The expert added that her laboratory also looks at an additional location, the amelogenin, in order to determine the gender of the individual represented in the sample.

10 The expert also testified that anything below 40 indicated that there was no actual DNA profile. She explained that her laboratory uses the thresholds "to make sure that when we say that there is a good, usable DNA profile, that it's actually a good, useable DNA profile."

As to the results of the swab from the firearm, the expert testified that she "did not obtain a useable profile, so there was no comparison ***470** made." She stated that the laboratory thresholds were not met and thus "the profile was inconclusive." The only conclusion the expert was able to make was that the partial DNA profile obtained from the firearm swab was consistent with a mixture of at least two persons and that at least one of the persons was male.

During the expert's testimony, the State offered three exhibits: one was a summary, side-by-side comparative table of the DNA information collected from the firearm swab and from Valentine; and two were graphs of the specific information collected from the firearm swab and Valentine, both graphs showing peaks of information alongside a scale indicating the laboratory's threshold limits. Valentine objected to the admission of the graphs, arguing that they could be confusing to the jury, that the jurors should not be drawing their own conclusions from the graphs, and that he did not want the jurors to think they could discern something from the graphs that the expert could not. The district court overruled Valentine's objection, finding the graphs relevant to the expert's methodology and reliability.[11]

11 Valentine argues the district court abused its discretion in admitting the graphs. We cannot say the admission of the graphs to show methodology and reliability was an abuse of discretion. But while the graphs may have been relevant for such purposes, the manner in which the information was used by the State, as discussed below, strongly undermined the district court's reasoning for admitting the evidence. *See* NRS 47.110 (discussing the limited admissibility of evidence and, upon request, the need for an instruction to restrict the jury's consideration to the proper scope).

Regarding the summary, side-by-side table, the expert testified that every tested location of the firearm swab, save for the location used to determine gender, resulted in either an "NR," meaning no DNA profile was obtained from that particular location, or an asterisk, indicating information was present but "it was so low that [she was] not even going to do any comparisons or say anything."

Regarding the graphs, the State went through the tested locations of the firearm swab and, while continuously commenting that the results were below the laboratory's 200 threshold, asked the expert to identify the alleles for which there were peaks of information. In going through the peaks of information from the firearm swab, the State also intermittently mentioned the

corresponding locations and, ostensibly matching, alleles found in Valentine's DNA profile. During cross-examination, the expert repeated the 200 threshold and explained that she does not look at information below that threshold, even if it is close, because it could be incorrect. Valentine asked the expert if she had anything she wanted to add in response to the State's line of questioning regarding each of the locations tested, and the expert reiterated the following:

> [T]he profile [from the firearm swab] was inconclusive, and we call it inconclusive because there wasn't enough DNA.... *471 [A]nd we call that inconclusive ... because if I re-ran that exact same sample, I don't know what kind of results I would come up with. It may be the same, it may be different. So that's why we're not saying that the DNA profile definitely came from the defendant, because it's inconclusive to me.
>
> ....
>
> [The thresholds] exist for a reason.
>
> ....
>
> Because we don't want to present information that may not be correct or overemphasize something, you know, saying yes, this person is there, when it may not be true because our data is not supporting that it's a strong DNA profile. So we want to be sure when we say there's a match, that it is, in fact, a match.
>
> We don't want to make the wrong conclusions on the item that we're looking at.
>
> ....

**718 Despite the expert's testimony, the State pointed to the two graphs and argued that the jurors could assess for themselves whether Valentine's DNA profile matched the DNA profile from the firearm swap. During closing argument, the State made the following comments:

> You heard about the DNA evidence in this case. Now, the scientist came in. She told you she could not make any results. The results that she had for the swab of the gun were below the threshold. But we went through every single one. *And that's something you need to also take a look at when you go back there, just to see what you think for yourself.* When we went through and looked at the items *below the 200 threshold,* but above the 40 threshold *this is what we found.* We found that the swab of the handgun revealed a 12 and a 13 allele. Mr, Valentine, a 12 and a 13 allele. The swab also [had] a 28 allele on the next [location]. A 28 allele on that same [location] for Mr. Valentine.

(Emphases added.) Valentine objected and argued that the State's own expert said that such a comparison was improper. The district court overruled the objection, finding the prosecutor was merely arguing that some weight should be given to the evidence and stating it was up to the jury to decide the weight to give the evidence. The State continued:

> [I]t's worth taking into consideration. You are here for two weeks. Look at all the evidence. This is part of the evidence. You heard that under each [location] there is a number of alleles. And here, though, yeah, maybe the threshold is under 200, *there's something here. But just consider for yourself.*
>
> ***472** Next, we have the [location] on the swab of the handgun, 15 and 16. Mr. Valentine also at 15 and 16. Next [location] at 7; Mr. Valentine also at 7. Next [location] at 12 and 13; Mr. Valentine also at 12 and 13. So on and so forth, *matching.*
>
> ....
>
> Ladies and gentlemen, it's just worth considering. Take a look at it. *See what you think. Make your own determination.*[12]

(Emphases added.)

12 In his closing argument, Valentine attempted to rebut the State's presentation of the evidence:

> The DNA analysis, she seemed to really know her stuff. State's expert. They put her on. What did she testify to? Well, she testified to a lot with the State and she looked extremely uncomfortable, which was clarified on cross that, a lot of this, well, the peaks, there's a little bit of peak that sort of matches him. She was very uncomfortable about that because as she said on cross, that's not how it works. It's not reliable under a certain level. They can't say inside—for scientific certainty that it's even possible. It's even plausible, because they might get totally different results if they ran it again. That's why she was uncomfortable testifying to that.

Without reservation, we conclude the prosecutor's closing argument was improper. "[A] prosecutor may argue inferences from the evidence and offer conclusions on contested issues" during closing argument, but "[a] prosecutor may not argue facts or inferences not supported by the evidence." *Miller v. State,* 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotation marks omitted). Here, the State presented an expert witness to testify as to the DNA results obtained from the swab of the firearm. *See United States v. McCluskey,* 954 F. Supp. 2d 1224, 1253 (D.N.M. 2013) ("[J]urors can understand and evaluate many types of evidence, but DNA evidence is different and a prerequisite to its admission is technical testimony from experts to show that correct scientific procedures were followed." (internal quotation marks omitted)). The purpose of expert testimony "is to provide the trier of fact [with] a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." *Townsend v. State,* 103 Nev. 113, 117, 734 P.2d 705, 708 (1987); *see also* NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert... may testify to matters within the scope of such knowledge."). But after presenting its expert to testify about a subject outside the ordinary range of knowledge for jurors, the State disregarded that testimony and invited the jury to make inferences that ****719** the expert testified

were not supported by the DNA evidence. The State asked the jury to consider evidence about which the expert was emphatic she could make no conclusions, save for her overall conclusion that the evidence was consistent with a mixture of at least two persons, at least ***473** one of whom was male. The State then asked the jury to compare the unusable profile to Valentine's DNA profile. This is precisely what the expert said she could not do because it would be unreliable. *See Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008) (holding that expert witness "testimony will assist the trier of fact only when it is relevant and the product of reliable methodology" (footnote omitted)). No evidence was introduced, statistical or otherwise, regarding the significance or meaning of the data that fell below the 200 threshold. To the contrary, the only evidence presented was that such information produced an unusable profile and was not considered by the expert. It is hard to imagine what weight could be ascribed to evidence that was described only as inconclusive, unusable, and incomparable. Rather, the State's use of the expert's testimony can better be viewed as taking advantage of the "great emphasis" or the "status of mythic infallibility" that juries place on DNA evidence. *People v. Marks*, 374 P.3d 518, 525 (Colo. App. 2015) (internal quotation marks omitted). Simply put, the prosecution argued facts not in evidence and inferences not supported by the evidence. This was improper.

We nevertheless conclude that the improper argument would not warrant reversal of Valentine's convictions because it did not substantially affect the jury's verdict. *See Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476. There was evidence presented that Valentine handled the gun and multiple victims identified Valentine as the perpetrator. Thus, the error was harmless, and Valentine is not entitled to a new trial based on the prosecutorial misconduct.[13]

13 We have considered Valentine's remaining contentions of error and conclude no additional relief is warranted.

CONCLUSION

The district court abused its discretion in denying Valentine's request for an evidentiary hearing on his fair-cross-section challenge. We therefore vacate the judgment of conviction and remand for the district court to conduct an evidentiary hearing and resolve the fair-cross-section challenge. None of Valentine's other arguments require a new trial. Accordingly, if the district court determines on remand that the fair-cross-section challenge lacks merit, it may reinstate the judgment of conviction except as to the convictions for counts 4 and 9, which were not supported by sufficient evidence.[14]

14 This opinion constitutes our final disposition of this appeal. Any future appeal following remand shall be docketed as a new matter.

We concur:

Hardesty, J.

Silver, J.

135 Nev. 463, 454 P.3d 709

All Citations

End of Document

Grand Jury

1. All procedures used by court for the selection process for grand jurors must be in writing and available to the public for review.

2. The district court shall keep all documents and statistics on the selection process for the grand jury and conduct periodic review to ensure the process allows for a grand jury drawn from the fair cross-section of our community.

2. A defendant is entitled to information relating to the composition of the grand jury in order to assess whether he has a viable constitutional challenge. A defendant may gain access to grand jury information by filing a motion in the district court where his Indictment is proceeding.

"Certainly, Nevada is not bound by this federal statute, and it does not have a state statute providing the right to inspect grand jury records. Nevertheless, this court is bound by Supreme Court precedent, and in *Adler,* we recognized that a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community. 95 Nev. at 347, 594 P.2d at 731. As the Supreme Court of Missouri noted when considering this same issue, "[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." *State ex rel. Garrett v. Saitz,* 594 S.W.2d 606, 608 (Mo.1980). Thus, we hold that Afzali is entitled to information relating to the racial composition of the grand jury so that he may assess whether he has a viable constitutional challenge." *Afzali v. State*, 130 Nev. 313, 317, 326 P.3d 1, 3 (2014).

Proposed by the Clark County Public Defender's Office

Postconviction Writ of Habeas Corpus

1. The court shall appoint post-conviction counsel for a petitioner who is unable to pay the costs of the proceedings or unable to employ counsel if:

(a) Petitioner was deemed incompetent at any time prior to conviction;
(b) Petitioner is deemed incompetent at any time after conviction;
(c) English is a second language for petitioner or petitioner is unable to fluently read English;
(d) Counsel is needed to facilitate discovery;
(e) Petitioner is unable to comprehend the proceedings;
(f) The consequences the petitioner is facing are severe;
(g) Issues presented in the case are difficult; or
(h) Based on any other reason the court deems meritorious.

2. If petitioner is in custody, petitioner will be allowed to be present telephonically for all hearings that do not involve the testimony of witnesses on his petition or other post-conviction motions. Court shall set up procedures to allow for telephonic communications between the court and the prison or other facility. Petitioner shall appear in person, rather than telephonically, for all hearings that will involve the testimony of witnesses.

Proposed by the Clark County Public Defender's Office

FW: Post Conviction Rule - Draft

Gradick, Jamie <jgradick@nvcourts.nv.gov>

Wed 2/5/2020 1:12 PM

To: Sharon Dickinson <dickinsg@ClarkCountyNV.gov>

Hi Sharon,

I hope all is well. I'm reviewing notes from last week's post-conviction subcommittee conference call. It appears that we're going to work from your *habeas* rule draft; will you send that to me so I can include it in the meeting materials for the next full-Committee meeting?

Thank you,

Jamie Gradick
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Post Conviction Rule - Subcommittee Conference Call

Gradick, Jamie <jgradick@nvcourts.nv.gov>

Wed 1/22/2020 1:06 PM

To: Luke Prengaman <lprengaman@da.washoecounty.us>; Alexander Chen <Alexander.Chen@clarkcountyda.com>; Grimes, Alysa <agrimes@nvcourts.nv.gov>; Linda Marie Bell (BellL@clarkcountycourts.us) <BellL@clarkcountycourts.us>; Sharon Dickinson <dickinsg@ClarkCountyNV.gov>
Cc: Williams, Kimberly <kwilliams@nvcourts.nv.gov>; Linda Marie Bell (perrys@clarkcountycourts.us) <perrys@clarkcountycourts.us>

Good afternoon,

I'm working on setting up a conference call for Justice Hardesty and the members of the subcommittee working on the post-conviction rule. You are receiving this email because, according to the notes from last Friday's Commission on Statewide Rules of Criminal Procedure meeting, you (or someone from your office) will be serving on that subcommittee.

Justice Hardesty wants a call set up for next week; proposed dates/times are listed below. Please respond to this email and indicate all times that work for your schedule. I apologize for the short response time but Justice Hardesty would like this scheduled by the end of the week so **please response by Friday (1/24) at noon.**

January 27 @ 9:00 am
January 28 @ 11:00 am
January 28 @ 2:30 pm
January 29 @ 9:00 am
January 29 @ 10:00 am
January 29 @ 1:30 pm
January 30 @ 9:00 am
January 30 @ 10:00
January 31 @ 9:00 am

Thank you, enjoy your afternoon.

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NRS 34.750 Appointment of counsel for indigents; pleadings supplemental to petition; response to motion to dismiss.

1. A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:

(a) The issues presented are difficult;

(b) The petitioner is unable to comprehend the proceedings; or

(c) Counsel is necessary to proceed with discovery.

2. If the court determines that the petitioner is unable to pay all necessary costs and expenses incident to the proceedings of the trial court and the reviewing court, including court costs, stenographic services, printing and reasonable compensation for legal services, all costs must be paid from money appropriated to the office of the State Public Defender for that purpose. After appropriations for that purpose are exhausted, money must be allocated to the office of the State Public Defender from the Reserve for Statutory Contingency Account for the payment of the costs, expenses and compensation.

3. After appointment by the court, counsel for the petitioner may file and serve supplemental pleadings, exhibits, transcripts and documents within 30 days after:

(a) The date the court orders the filing of an answer and a return; or

(b) The date of counsel's appointment,

➥ whichever is later. If it has not previously been filed, the answer by the respondent must be filed within 15 days after receipt of the supplemental pleadings and include any response to the supplemental pleadings.

4. The petitioner shall respond within 15 days after service to a motion by the State to dismiss the action.

5. No further pleadings may be filed except as ordered by the court.

(Added to NRS by 1985, 1230; A 1987, 1218; 1991, 85, 1751, 1824)

133 Nev. 75
Supreme Court of Nevada.

Guillermo RENTERIA–NOVOA, Appellant,
v.
The STATE of Nevada, Respondent.

No. 68239
|
FILED MARCH 30, 2017

Synopsis
Background: Defendant filed a pro se postconviction petition for a writ of habeas corpus and moved for appointment of counsel after his jury conviction for multiple sexual offenses was affirmed by the Supreme Court, 2014 WL 4804213. The Eighth Judicial District Court, Clark County, Eric Johnson, J., and Charles Thompson, Senior Judge, denied petition. Defendant appealed.

[Holding:] The Supreme Court held that trial court abused its discretion by denying motion to appoint postconviction counsel for defendant.

Reversed and remanded.

West Headnotes (3)

[1] **Criminal Law**
⇐Post-conviction relief

The Supreme Court reviews the district court's decision to deny the appointment of counsel on a petition for postconviction relief for an abuse of discretion. Nev. Rev. St. § 34.750(1).

144 Cases that cite this headnote

[2] **Criminal Law**
⇐Right to counsel

Trial court abused its discretion by denying motion to appoint postconviction counsel for indigent defendant who had filed pro se his first petition for postconviction relief; defendant had limited English-language proficiency, defendant was facing severe consequences for his 36 convictions for sexual offenses, the petition was defendant's only opportunity to assert ineffective assistance of counsel and other claims that could not have been raised at trial or on direct appeal, and the pro se petition, although not well pleaded, might have required discovery and investigation of facts outside the record. U.S. Const. Amend. 6; Nev. Rev. St. §§ 34.745(1), (4), 34.750(1).

15 Cases that cite this headnote

[3] **Criminal Law**
⇐Right to counsel

The decision whether to appoint counsel per statute on petitions for postconviction relief is not necessarily dependent upon whether a pro se petitioner has raised claims that clearly have merit or would warrant an evidentiary hearing. Nev. Rev. St. § 34.750(1).

15 Cases that cite this headnote

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Attorneys and Law Firms

Guillermo Renteria–Novoa, Carson City, in Pro Se.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Clark County, for Respondent.

BEFORE PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

PER CURIAM:

*75 Appellant Guillermo Renteria–Novoa was convicted, pursuant to a jury verdict, of 36 felony sexual offenses and sentenced to a total term of life with the possibility of parole after 85 years. After the judgment of conviction was affirmed on direct appeal, Renteria–Novoa filed a timely pro se postconviction petition for a writ of habeas corpus in the district court and moved for the appointment of counsel. Under Nevada law, the appointment of postconviction counsel was discretionary with the district court because Renteria–Novoa had not been sentenced to death. *Compare* NRS 34.750(1), *with* NRS 34.820(1). Exercising that discretion, the district court declined to appoint postconviction counsel and denied the petition following a hearing at which Renteria–Novoa was not present.[1] This appeal followed. We take this opportunity to address the factors that are relevant to the district court's exercise of its discretion to appoint postconviction counsel under NRS 34.750(1). Because we conclude that the district court abused its discretion, we reverse and remand for further proceedings.[2]

*76 [1]Under NRS 34.750(1), the district court has discretion to appoint counsel to represent a petitioner who has filed a postconviction petition for a writ of habeas corpus if (1) the petitioner is indigent and (2) **761 the petition is not summarily dismissed. The statute sets forth a nonexhaustive list of factors that the district court "may consider" in deciding whether to appoint postconviction counsel: the severity of the consequences that the petitioner faces, the difficulty of the issues presented, the petitioner's ability to comprehend the proceedings, and the necessity of counsel to proceed with discovery. We review the district court's decision to deny the appointment of counsel for an abuse of discretion.

The threshold requirements for the appointment of postconviction counsel were met in this case. First, the district court necessarily found that Renteria–Novoa was indigent when it granted him permission to proceed in forma pauperis in the postconviction proceedings. Second, the petition was not subject to summary dismissal as it was Renteria–Novoa's first petition challenging the validity of his judgment of conviction and sentence. *See* NRS 34.745(1), (4).

[2]In briefly considering some of the factors identified in NRS 34.750(1), the district court noted in its written order that Renteria–Novoa had not demonstrated that the issues were difficult, that he was unable to comprehend the proceedings, or that discovery was needed. We disagree.

The motion for appointment of postconviction counsel generally tracked the factors set forth in NRS 34.750(1) without much explanation. With respect to Renteria–Novoa's ability to comprehend the proceedings in particular, the motion recited that he had "very limited knowledge of the law and process thereof." The petition made a similar representation, but it also indicated that Renteria–Novoa has limited English-language proficiency. The potential language barrier is further supported by the trial record, which shows that Renteria–Novoa had the assistance of a Spanish language interpreter throughout the trial proceedings. The use of an interpreter throughout trial indicates that Renteria–Novoa may be unable to comprehend the postconviction proceedings due to a language barrier. While the district court specifically found that Renteria–Novoa did not demonstrate an inability to comprehend the proceedings, this finding, which was made after a hearing where Renteria–Novoa was not present and which appears to have been based solely on the petition, lacks support in the record, particularly as the petition was not well pleaded and Renteria–Novoa had previously needed an interpreter.

The other factors identified in NRS 34.750(1) also weigh in favor of the appointment of counsel in this case. The consequences that Renteria–Novoa faces are severe: he has been convicted of 36 felony **762 offenses following a jury trial and is serving what arguably is the *77 functional equivalent of a life-without-parole sentence as he must serve approximately 85 years before being eligible for release on parole. This petition is Renteria–Novoa's only opportunity to assert ineffective-assistance and other claims that could not have been raised at trial or on direct appeal. The pro se petition, although not well pleaded, raised several ineffective-assistance-of-counsel claims, including the failure to investigate, which may require discovery and investigation of facts outside the record.

We also are troubled by the possibility that the district court's decision as to the appointment of counsel was influenced by the assertion in the State's responsive pleading that, quoting *Peterson v. Warden*, 87 Nev. 134, 136, 483 P.2d 204, 205 (1971), Renteria–Novoa had

to "show that the requested review is not frivolous before he may have an attorney appointed." The quoted language from *Peterson* referred to former NRS 177.345(2). That provision addressed the appointment of counsel to assist a petitioner on appeal from the district court's judgment on a petition for postconviction relief. 1969 Nev. Stat., ch. 87, § 5, at 107. It provided for the appointment of appellate postconviction counsel only if the appellate court determined that the petitioner's appeal "is not frivolous." NRS 177.345(2) (1969). In contrast, the appointment of postconviction counsel to represent the petitioner in the district court proceedings was mandatory if the petitioner was indigent, with no regard for whether the allegations in the petition were frivolous. NRS 177.345(1) (1969). And, when the Legislature later made the appointment of postconviction counsel to represent the petitioner in the district court proceedings discretionary and added the factors that today appear in NRS 34.750(1), the Legislature did not include the "frivolous" language that previously had restricted the appointment of appellate postconviction counsel under NRS 177.345(2) (1969). *See* 1987 Nev. Stat., ch. 539, § 42, at 1230–31 (amending NRS 177.345(1)). For these reasons and because NRS 177.345 was repealed in its entirety effective January 1, 1993, 1991 Nev. Stat., ch. 44, § 31, at 92, the language in *Peterson* has no bearing on a district court's decision to appoint postconviction counsel to represent a petitioner under current Nevada law set forth in NRS 34.750(1).

[3]We take this opportunity to stress that the decision whether to appoint counsel under NRS 34.750(1) is not necessarily dependent upon whether a pro se petitioner has raised claims that clearly have merit or would warrant an evidentiary hearing. In some cases, such as this one where a language barrier may have interfered with the petitioner's ability to comprehend the proceedings, the petitioner may be unable to sufficiently present viable claims in his or her petition without the assistance of counsel. *See generally Woodward v. State*, 992 So.2d 391, 392 (Fla. Dist. Ct. App. 2008) (noting that the decision to appoint counsel "turns upon whether, under the circumstances ***78** of a particular case, the assistance of counsel is essential to accomplish a fair and thorough presentation of a defendant's claim(s) for collateral relief" (internal quotation marks omitted)); *cf. Martinez v. Ryan*, 566 U.S. 1, 11–12, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) (recognizing inherent difficulties for prisoners in presenting claims of trial error without the assistance of counsel). In such cases, the district court's failure to appoint postconviction counsel may deprive the petitioner of a meaningful opportunity to present his or her claims to the district court.

In light of the severity of the consequences that Renteria–Novoa faces, the potential need for discovery, and Renteria–Novoa's questionable proficiency with the English language, we conclude that the district court abused its discretion in declining to appoint postconviction counsel to represent Renteria–Novoa. Accordingly, we reverse the district court's order denying Renteria–Novoa's petition and remand this matter for the appointment of counsel to assist Renteria–Novoa in the postconviction proceedings.[3]

All Citations

133 Nev. 75, 391 P.3d 760

Footnotes

1 Senior Judge Charles Thompson presided over the hearing on the postconviction petition and orally denied the petition and the motion for appointment of counsel. Judge Johnson entered the written order denying the petition and motion.

2 Although this matter was docketed before the amendments to the Nevada Rules of Appellate Procedure that allow parties appearing without the assistance of counsel to file briefs and other documents without seeking leave of court, *see* NRAP 28(k) (effective October 1, 2015); NRAP 46A (effective October 1, 2015), we have considered the pro se brief received on October 20, 2015, and the pro se informal brief received on February 12, 2016.

3 We express no opinion as to the merits of Renteria–Novoa's postconviction petition. Given our disposition of this matter, we deny the motion for appointment of appellate counsel submitted to this court or December 16, 2015.

Writ of Habeas Corpus Memorandum

Habeas corpus is considered a civil, not a criminal, action. It is guaranteed in Nevada under NRS § 34.360, which allows any person unlawfully restrained or incarcerated to prosecute a writ of habeas corpus.

Habeas corpus is also a protected right under the Nevada Constitution. Nev. Const. art. 1 § 5 prohibits the suspension of the privilege of a writ of habeas corpus except in limited circumstances.

Under NRS § 34.724: "[a]ny person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State…may… file a petition for a writ of habeas corpus to obtain relief…'.

A plaintiff's right to be present at a hearing in a civil matter under art. I, § 8 of the Nevada Constitution.

Nev. Const. art. I, § 8(1) states, "and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, *as in civil actions*" (emphasis added). The latter clause, "as in civil actions," implies that the Nevada Constitution grants the party a right to "be allowed to appear" in a civil action. As habeas corpus is a civil action, a party would therefore, under the plain language of the provision, have a right to appear in a petition for habeas corpus. Given the blanket nature of this provision, it is unlikely that it could mean that a person's right to appear does not apply if they happen to be incarcerated.

Right to counsel for post-conviction habeas proceedings. NRS 34.750.

A plaintiff seeking to file a petition for a writ of habeas corpus may receive appointed counsel as outlined in NRS 34.750(1).

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
> (a) The issues presented are difficult;
> (b) The petitioner is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

NRS 34.750(1). "[T]he decision whether to appoint counsel under NRS 34.750(1) is not necessarily dependent upon whether a pro se petitioner has raised claims that clearly have merit or would warrant an evidentiary hearing." *Renteria-Novoa v. State*, 133 Nev. 75, 77 (2017).

The Appellate Courts have reversed numerous cases involving the district court's failure to grant a post-conviction writ of habeas corpus when the court failed to appoint counsel for the petitioner. In reversing, the Courts have indicated that reversal was needed because "[t]he failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." The following cases outline some of the facts the Court used for concluding post-conviction counsel was required.

Language barrier.

- Petitioner needed a Russian court interpreter throughout the trial proceedings. *Lagerev v. State*, 66003, 2014 WL 6143401, at *1 (Nev. Nov. 13, 2014) (unpublished).

Language barrier, trouble understanding procedures and burdens, and was not given trial transcripts.

- Transcripts revealed that the petitioner did not understand procedures and burdens at the evidentiary hearing, he needed an interpreter to translate for him, he did not have trial transcripts to rely on, and court did not take into account all factors that would allow for the appointment of counsel. *Morga v. State*, 76887-COA, 2019 WL 4298067, at *1 (Nev. App. Sept. 10, 2019) (unpublished).

Language barrier and confusion over whether petitioner was appointed counsel.

- Appellant's petition was time barred because it was filed more than three years after issuance of the remittitur. Petitioner claimed he had good cause for the delay because he did not understand English and during part of the time period he mistakenly believed he was represented by counsel. "A language barrier may under certain circumstances provide good cause where a petitioner is unable to access legal materials in his native language or receive help in his native language because of inadequacies in the prison's resources. *See id; see also Bounds v. Smith,* 430 U.S. 817, 828 (1977) (discussing meaningful access to the courts), *limited by Lewis v. Casey,* 518 U.S. 343, 354–56 (1996); *Mendoza v. Carey,* 449 F.3d 1065, 1070 (9th Cir.2006) (recognizing that equitable tolling in the federal courts requires a non-English speaking petitioner demonstrate that during the time period, the petitioner was unable to procure either legal materials in his own language or translation assistance despite diligent efforts)...the petition is written in English with an attached supporting affidavit written in Spanish, for which there is no translation in the record. The district court's order contains no findings of fact or conclusions of law regarding appellant's claims of state interference and the effect of a potential language barrier, and thus, we cannot affirm the denial of the petition

as procedurally barred…Further, it appears that the district court should have appointed counsel to assist appellant after the filing of the petition… The district court previously determined that appellant had difficulties comprehending the proceedings when it ordered the appointment of counsel prior to the filing of the petition, and while the appointment of counsel was premature, the record supports the district court's initial determination that petitioner had difficulties comprehending the proceedings. Under these circumstances, on remand the district court should appoint counsel to assist appellant in the post-conviction proceedings..."*Urbina-Maldonado v. State*, 63330, 2013 WL 7158567, at *1–2 (Nev. Dec. 12, 2013) (unpublished).

Inability to read

- Many criminal defendants have little or no ability to read English even though English is their first and only language.

Documents in record showed the petitioner did not understand proceedings and other reasons.

- Based on documents filed in district court, court found that the petitioner did not comprehend the proceedings and "the failure to appoint postconviction counsel deprived Dumas of a meaningful opportunity to present his claims to the district court." *Dumas v. State*, 77778-COA, 2019 WL 3335563, at *1 (Nev. App. July 24, 2019)(unpublished).

- "Appellant filed a timely petition…Appellant, who is indigent and serving a significant sentence, moved for the appointment of post-conviction counsel. His petition arose out of a jury trial during which he was represented by counsel. Appellant raised several issues, some implicating an impaired ability to comprehend the proceedings and others requiring the development of facts outside the record. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Hernandez-Ayala v. State*, 126 Nev. 719, 367 P.3d 778 (2010) (unpublished).

- After district court found Appellant's petition was untimely, "[t]his court reversed and remanded that decision, concluding that an evidentiary hearing was warranted on appellant's allegation of good cause to determine whether appellant believed his direct appeal was still pending, whether that belief was objectively reasonable, and whether he filed his petition within a reasonable time after he should have known that his appeal had been resolved. *Azcarate v. State,* Docket No. 60872 (Order of Reversal and Remand, December 12, 2012). Further, this court noted that the district court had the discretion to appoint counsel to assist appellant in litigating this issue. *Id.* Upon remand, the district court did not appoint counsel but conducted an evidentiary hearing as to whether appellant demonstrated good cause. In announcing its decision, the district court did not make any findings in accordance with this court's May 17, 2012, order but instead "accepted" appellant's allegations regarding cause for the delay, then denied the petition as untimely because appellant failed to demonstrate "actual prejudice." … we conclude that the district court erred in denying the petition without appointing post-conviction counsel…Appellant had moved for the appointment of post-conviction counsel.

Appellant is indigent and was represented by appointed counsel at trial and on appeal. His petition arose out of a jury trial, the result of which was a significant sentence: consecutive terms of life without the possibility of parole. Finally, appellant's claim that he was prejudiced because he was prevented from collaterally attacking his conviction suggests that he was unable to comprehend the complex issue of his procedural bar. The failure to appoint post-conviction counsel prevented the meaningful litigation of appellant's procedural bar and, ultimately, any post-conviction claims." *Azcarate v. State*, 63448, 2014 WL 495411, at *1–2 (Nev. Jan. 16, 2014) (unpublished).

Guilty plea with complex issues surrounding the advice of counsel, significant sentence, and petitioner sought a court appointed attorney to assist in his writ.

- "Appellant's petition arose out of a guilty plea with a potentially complex issue surrounding the advice of court-appointed counsel regarding appellant's ability to withdraw his guilty plea post-sentencing. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Santiago v. State*, 64577, 2014 WL 2625092, at *1 (Nev. June 11, 2014) (unpublished).

Court refused to provide transcripts at State expense and other reasons.

- Petitioner's sentence was significant, he was represented by appointed counsel at trial, he filed a motion seeking assistance of counsel for his habeas petition which was denied. "The failure to appoint postconviction counsel, coupled with the district court's earlier order denying Shelton's request for transcripts at the State's expense, prevented a meaningful litigation of the petition." *Shelton v. State*, 76762-COA, 2019 WL 2158331, at *1 (Nev. App. May 15, 2019)(unpublished).

Mental health and competency concerns plus other reasons

- Indigent defendant sought counsel to assist in post-conviction writ proceedings. His petition arose out of a trial with complex issues, he is serving a lengthy sentence, he had mental health problems and difficulty accessing medication. "Further development of claims related to mental health issues would require investigation and discovery by post-conviction counsel. Thus, we reverse the district court's denial of appellant's petition and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings." *Battle v. State*, 64982, 2014 WL 3664268, at *1 (Nev. July 22, 2014) (unpublished).

- Appellant filed a timely petition claiming his attorney was ineffective for failing to investigate his competency, a possible insanity defense, and by not presenting this issue in district court. "Appellant asserted that months after he was convicted in this case, he was determined to be incompetent in another district court case. The district court denied

the petition without appointing counsel or conducting an evidentiary hearing...We conclude that the district court erred in denying the petition without appointing counsel...[because] Appellant moved for the appointment of counsel and claimed that he was indigent. More importantly, appellant's petition arose out of a trial with potentially complex issues related to his competency. Although the record contains indications that counsel and the court were aware of appellant's mental health issues, there was no competency evaluation conducted prior to trial in this case and the record is silent regarding the investigation and actions taken by counsel given appellant's prior mental health history. NRS 178.405(1) requires the suspension of trial proceedings "if doubt arises as to the competence of the defendant ... until the question of competence is determined." Also weighing in favor of the appointment of post-conviction counsel is the fact that appellant was adjudicated a habitual criminal and is serving a significant sentence of 8 to 20 years. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *McDonald v. State*, 63335, 2014 WL 702034, at *1 (Nev. Feb. 19, 2014) (unpublished).

- "Appellant filed a timely petition arising out of a trial involving potentially complex issues. Appellant was represented by appointed counsel at trial and is now serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. Moreover, appellant's mental health issues indicate that appellant may have difficulty comprehending the proceedings. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Leeds v. State*, 127 Nev. 1154, 373 P.3d 935 (2011) (unpublished).

Potentially complex issues or factual issues or ineffective assistance of counsel claims that may require factual development outside the record or an evidentiary hearing and other reasons.

- "[A]ppellant's conviction arose out of a jury trial with claims of ineffective assistance of counsel requiring factual development outside the record. The failure to appoint postconviction counsel prevented a meaningful litigation of the petition and resulted in appellant being unable to provide evidence supporting his claims at the evidentiary hearing." *Randolph v. State*, 440 P.3d 658 (Nev. 2019) (unpublished).

- Court found the failure to appoint counsel prevented a meaningful litigation of the defendant's claims because the petition arose out of a trial with potentially complex issues. *Tutt v. State*, 74944-COA, 2018 WL 5881629, at *1 (Nev. App. Nov. 6, 2018)(unpublished).

- "Appellant's petition challenges a judgment of conviction that was the result of a lengthy trial with potentially complex legal issues and factual issues that may require development outside the record. Appellant is indigent and was represented by appointed counsel at trial. Appellant is serving a significant sentence. Considering the relevant factors and circumstances, the failure to appoint postconviction counsel prevented a

meaningful litigation of the petition." *Burns v. State*, 389 P.3d 1037 (Nev. 2017) (unpublished).

- Defendant raised several ineffective assistance of counsel claims which may require development outside the record. His conviction arose out of a jury trial and his sentence is significant. He alleged he was indigent and requested the appointment of counsel. *Uceda v. State*, 68525, 2016 WL 1092025, at *1 (Nev. Mar. 17, 2016) (unpublished).

- "We conclude that the facts in this case weighed in favor of appointing counsel. Appellant's petition arose out of a trial with issues that require development of facts outside the record. For example, there is nothing in the record regarding whether a plea offer was made by the State, and if a plea offer had been made, whether it was conveyed to appellant by his counsel. *See Missouri v. Frye,* 566 U.S. ——, 132 S.Ct. 1399 (2012). Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent." *Wright v. State*, 64117, 2014 WL 619884, at *1 (Nev. Feb. 13, 2014) (unpublished).

- "The determination of whether counsel should be appointed is not necessarily dependent upon whether a petitioner raises issues in a petition which, if true, would entitle the petitioner to relief. Appellant's petition arose out of a trial with potentially complex issues. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition…" *Cardenas v. State*, 61795, 2013 WL 3895830, at *1 (Nev. July 23, 2013) (unpublished).

- "Appellant's petition arose out of a capital murder trial with potentially complex issues and issues that may require further factual development outside the record. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence—two consecutive terms of life without the possibility of parole and two consecutive terms of 72 to 180 months. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition…" *Pearce v. State*, 128 Nev. 924, 381 P.3d 649 (2012) (unpublished).

- "Appellant filed a timely petition…Appellant's petition arose out of a lengthy trial with potentially complex issues. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Zana v. State*, 126 Nev. 771, 367 P.3d 837 (2010) (unpublished).

- "Appellant filed a timely petition …Appellant's petition arose out of a trial with potentially complex issues. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence. In addition, appellant provided documentation

showing that he was indigent." *Washington v. State*, 126 Nev. 767, 367 P.3d 832 (2010) (unpublished).

- "Appellant's petition arose out of a trial with potentially complex issues, including double jeopardy and redundancy issues. Appellant also raised claims relating to a failure to adequately investigate that may require factual development outside the record. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Lall v. State*, 128 Nev. 912, 381 P.3d 632 (2012) (unpublished).

- "Appellant moved for the appointment of counsel and included an inmate account statement demonstrating his indigency. Appellant was convicted of multiple offenses, including first-degree kidnapping with substantial bodily harm and first-degree murder, after a lengthy capital murder trial. Appellant's sentence was significant in that he was sentenced to serve two consecutive terms of life without the possibility of parole. Appellant was represented by appointed counsel at trial. While many of the claims raised by appellant in the petition were based on legal arguments and not difficult to resolve, appellant raised a potentially complex issue relating to whether counsel provided effective assistance of counsel in conceding to appellant's guilt of burglary, one of the enumerated felonies in this case for the felony-murder theory of first-degree murder, and the advisability of that concession based on trial counsel's admission that the argument was "novel" and was ultimately rejected by the district court in the settling of the jury instructions, after the concession had already occurred. *See Jones v. State,* 110 Nev. 730, 877 P.2d 1052 (1994). The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Rogers v. State*, 128 Nev. 930, 381 P.3d 657 (2012) (unpublished).

- "Appellant, who is indigent and serving a significant sentence, moved for the appointment of post-conviction counsel to which the State did not object. His petition arose out of a jury trial during which he was represented by appointed counsel. Appellant raised several issues, some requiring the development of facts outside the record. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Butler v. State*, 128 Nev. 885, 381 P.3d 598 (2012) (unpublished).

- "Appellant filed a timely petition…raising numerous claims of ineffective assistance of trial and appellate counsel. The district court denied the petition without conducting an evidentiary hearing or appointing counsel. We conclude that the district court erred in denying the petition without appointing counsel… Appellant's petition arose out of a trial with potentially complex legal issues. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition…" *Morales v. State*, 128 Nev. 920, 381 P.3d 643 (2012) (unpublished).

- "The district court denied the petition without appointing counsel. We conclude that the district court erred in denying the petition without appointing counsel… Appellant's petition arose out of a lengthy trial with potentially complex legal issues and several factual issues that appear to require development outside the record. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Fergason v. State*, 128 Nev. 895, 381 P.3d 611 (2012)(unpublished).

- District court denied Appellant's timely petition without conducting an evidentiary hearing and without appointing counsel. "We conclude that the district court erred in denying the petition without appointing counsel…Appellant's petition arose out of a three-day jury trial with potentially complex issues. Appellant was represented by appointed counsel at trial. Appellant is serving a significant sentence pursuant to the provisions of NRS 207.010(l)(a). In addition, appellant moved for the appointment of counsel and claimed that he was indigent." *Lane v. State*, 128 Nev. 912, 381 P.3d 632 (2012) (unpublished).

- District court erred in denying the petition without holding an evidentiary hearing and without appointing counsel. "Appellant's petition arose out of a trial with potentially complex issues…[he] was represented by appointed counsel at trial…[and he] is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Silva v. State*, 128 Nev. 934, 381 P.3d 662 (2012) (unpublished).

- "We conclude that the district court erred in denying the petition without appointing counsel…Appellant's petition arose out of a trial at which he was represented by appointed counsel, and he is serving a significant sentence. Appellant raised claims in his petition that may require factual development outside the record. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Irive v. State*, 62609, 2014 WL 494859, at *1 (Nev. Jan. 24, 2014) (unpublished).

- Petition was timely filed, arose out of a trial involving complex issues, including a voluntary intoxication defense. Appellant was represented by counsel at trial and received a significant sentence. Appellant sought counsel for the filing of the writ and claimed he was indigent. "The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Herrera v. State*, 127 Nev. 1141, 373 P.3d 921 (2011) (unpublished).

- The timely filed petition was denied by the court without holding an evidentiary hearing or appointing counsel, even though Appellant ask for the appointment of an attorney. "Appellant's petition arose out of a trial with potentially complex issues. Appellant was represented by appointed counsel at trial. Appellant was adjudicated a habitual criminal and sentenced to serve terms totaling 67 to 168 months." *Roberson v. State*, 126 Nev. 750, 367 P.3d 813 (2010) (unpublished).

- Appellant received six consecutive life terms for three counts of first-degree murder with the use of a deadly weapon. Appellant filed a timely petition and sought the appointment of counsel which court denied. "Appellant raised numerous claims in his petition including twelve claims of ineffective assistance of counsel: (1) failing to investigate appellant's innocence; (2) failing to investigate the identification by Celeste Palau; (3) failing to object to bad act evidence; (4) failing to conduct scientific testing on blood stains; (5) failing to disclose a conflict of interest between counsel and appellant prior to the first day of trial; (6) failing to keep an unavailable witness's testimony from the preliminary hearing from being read to the jury; (7) conceding appellant's guilt in closing arguments; (8) failing to secure a handwriting expert; (9) failing to object to judicial misconduct; (10) failing to object to the instruction on first-degree murder; (11) failing to object to the instruction on credibility; and (12) failing to object to the reasonable doubt instruction. Appellant further claimed that he received ineffective assistance of appellate counsel because appellate counsel failed to raise the above underlying claims on direct appeal and failed to "federalize" his claims. Appellant also claimed that the State committed prosecutorial misconduct because the State failed to disclose a deal between the State and a key witness and because the State failed to call a witness referenced in opening statements. Finally, appellant claimed that the cumulative errors committed entitled him to relief. Our review of the record on appeal reveals post-conviction counsel should have been appointed in the instant case... Appellant's petition arose out of a lengthy trial with potentially complex issues and several of appellant's claims may require the development of facts outside the record. Appellant was represented by appointed counsel at trial....In addition, appellant moved for the appointment of counsel and claimed that he was indigent....The district court's failure to appoint postconviction counsel deprived appellant of a meaningful opportunity to litigate his claims in the instant case. As appellant is serving a significant sentence, is indigent, and there are potentially complex issues, we reverse the district court's denial of appellant's petition and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings." *Budd v. State*, 125 Nev. 1022, 281 P.3d 1158 (2009) (unpublished).

- Appellant is serving two consecutive life terms for first-degree kidnapping and sexual assault. He filed a timely petition and asked counsel be appointed. Court denied both requests. "On appeal, Appellant claimed his trial counsel was ineffective in the following ways: 1) failing to present testimony from a nurse that there was no trauma or semen found on the victim; 2) failing to request blood samples of the victim that would show she had been on methamphetamines, 3) not allowing appellant to testify at trial; 4) failing to have an expert in serology and drug samples testify at trial; 5) failing to request an independent review of the audio tapes of his discussions with police; 6) failing to request video surveillance tapes from the Hard Rock Casino; 7) failing to present evidence that the victim had previously been convicted of drug charges and perjury; 8) failing to file appellant's proper person motions; 9) failing to seek production of materials including witnesses prior records, "specific evidence that undermined credibility," and prior inconsistent statements of witnesses pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and 10) failing to file a motion to set aside the guilty

verdict because there was insufficient evidence presented for a conviction. Appellant also claimed that he received ineffective assistance of appellate counsel for failing to include the audio tapes of his interview with detectives on appeal. In addition to ineffective assistance of counsel, appellant claimed that he was subject to double jeopardy because the kidnapping was incidental to the sexual assault. Finally, appellant reraised each of his claims from his direct appeal. On appeal, appellant argues, among other things, that the district court abused its discretion by failing to appoint counsel to represent him during the post-conviction proceedings in district court...We cannot affirm the denial of the petition in the instant case at this time. Appellant raised several ineffective assistance of counsel claims, including the failure to investigate, the failure to secure expert witnesses, and failures regarding his right to testify on his behalf at trial which appear to require discovery and investigation outside the record and which are beyond the capability of the average incarcerated person. The district court granted appellant's request to proceed in forma pauperis but declined to appoint counsel when appellant requested it after the petition was filed and again at the evidentiary hearing. Appellant indicated that he was unfamiliar with the law and procedure involved in litigating his claims. Notably, at the evidentiary hearing, appellant stated that he did not know how to proceed at the hearing, how to ask questions or what questions to ask. At the hearing, appellant appeared confused that he would have to waive his attorney-client privilege and appellant was unable to form specific or focused questions of his former counsel. Appellant's inability to ask specific questions made it difficult to receive clear answers from counsel. Further, appellant's sentence of two consecutive life terms is severe. Finally, appellant was appointed counsel five days after the evidentiary hearing which indicates that the district court determined that counsel was necessary pursuant to NRS 34.750. The lack of post-conviction counsel at the evidentiary hearing deprived appellant of a meaningful opportunity to litigate his claims and thus, this court cannot conduct a meaningful appellate review at this time." *Smith v. State*, 125 Nev. 1079, 281 P.3d 1219 (2009) (unpublished).

- Petitioner Ibert Aguilar is a habitual offender, serving two consecutive life terms without the possibility of parole for murder. On the remaining counts, he received a term of 40-100 years. Petitioner Dayomashell Aguilar is serving 20 years with the possibility of parole for murder; and, on the remaining counts 11-28 years. Both filed petitions in district court and requested appointment of counsel. Both were denied. "Our review of the record on appeal reveals that the district court abused its discretion in denying appellants' petitions without appointing counsel... In their petitions, appellants raised numerous claims of ineffective assistance of counsel. These claims included claims that counsel failed to investigate numerous State witnesses, interview numerous alibi witnesses, permitted the introduction of unreliable scientific and demonstrative evidence, failed to obtain physical evidence, and failed to litigate competency. These claims arose out of a nine-day trial that occurred roughly ten years before the district court conducted the evidentiary hearing in the instant case. Further, the evidentiary hearing that was held did not fully address appellants' claims despite the fact that it purported to do so. Moreover, the structure of the hearing appeared to improperly restrict the appellants' examination of witnesses. In particular, the district court arbitrarily limited the duration of each examination and inappropriately guided the examination of each witness. In

addition, Gilbert Aguilar moved for the appointment of counsel and claimed that he was indigent. Dayomashell Aguilar requested counsel at the evidentiary hearing. Both appellants had been granted permission to proceed in forma pauperis. The district court's failure to appoint postconviction counsel deprived appellants of a meaningful opportunity to litigate their claims at the evidentiary hearing. As appellants are serving significant sentences, are indigent, have raised numerous claims that required the investigation of facts outside the record, and faced a significant impediment to litigating those claims with the district court's delay in resolving the petitions, we reverse the district court's denial of appellants' petitions..." *Aguilar v. State*, 124 Nev. 1447, 238 P.3d 790 (2008)(unpublished).

- After Appellant filed a post-conviction writ and requested the appointment of counsel, the district court asked his appellate counsel to review the petition. His prior attorney told the court that there were no viable legal issues. The court then denied Appellant's writ and motion for the assistance of counsel. "The district court did, however, determine that an evidentiary hearing was necessary. At the evidentiary hearing, appellant requested additional time and the appointment of counsel to help him with subpoenas as his witnesses were not present for the hearing. The district court questioned the need for the witnesses, and denied the request for additional time and the appointment of counsel. While the district court proceeded to hear testimony from appellant's former trial counsel...appellant told the court that he was not ready to proceed because his witnesses were not present. The district court asked him if he wished to proceed, and appellant answered that he did not. The district court considered the petition withdrawn and closed the proceedings. Based upon our review of the record on appeal, we conclude that the district court erred in failing to appoint counsel for the reasons discussed...Appellant's petition arose out of a trial. Appellant was represented by appointed counsel in prior proceedings. Appellant is serving a significant sentence. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition. We are especially troubled by the district court's use of appellant's former appellate counsel as a barometer as to whether he should receive the appointment of counsel. The factors of NRS 34.750(1) govern the appointment of counsel, not the opinion of an attorney who has a potential conflict of interest as she represented him in the same proceedings that he was challenging. We are also troubled by the fact that appellant's petition was withdrawn without anyone informing him of the consequences of doing so. Thus, we reverse the district court's decision and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings." *Adams v. State*, 128 Nev. 877, 381 P.3d 587 (2012) (unpublished).

Age and other reasons.

- Court denied petitioner's request for appointment of an attorney and denied his writ. "Our review of the record on appeal reveals that the district court abused its discretion in denying appellant's petition without appointing counsel... Appellant's petition arose out of a lengthy trial with potentially complex issues. Appellant was represented by appointed counsel at trial. Appellant is serving two consecutive terms of life in prison

with the possibility of parole after ten years. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. Appellant had been granted permission to proceed in forma pauperis. Further, appellant was 15 years old at the time of the offense and 19 when the instant petition was filed. The district court's failure to appoint post-conviction counsel deprived appellant of a meaningful opportunity to litigate. As appellant is serving a significant sentence, is indigent, and there are potentially complex issues, we reverse the district court's denial of appellant's petition and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings." *Ford v. State*, 281 P.3d 1172 (Nev. 2009) (unpublished).

- "[Untimely post-conviction petition for a writ of habeas corpus stemming from a conviction, pursuant to a guilty plea, of three counts of sexual assault and three counts of sexual assault with the use of a deadly weapon causing substantial bodily harm. In his petition, appellant...claimed that the six sentences of life imprisonment without the possibility of parole for three of the six counts were cruel and unusual punishment because Rogers was a juvenile when he committed his offenses. Rogers also claimed that the manner in which the sentences were imposed, with every sentence to be served consecutively, amounted to cruel and unusual punishment. The district court granted the petition in part, determining that the petition was procedurally barred, but that new caselaw applied retroactively and provided good cause to excuse the procedural default. To correct the sentences, the district court imposed three consecutive sentences of life with the possibility of parole after 10 years had been served. In this appeal, we consider whether the district court abused its discretion in failing to appoint counsel to assist Rogers in the post-conviction proceeding. Given the severity of the consequences, Rogers' indigency, and the difficulty of the issues presented related to the applicability and scope of the holding in *Graham v. Florida,* 560 U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), we conclude that the district court abused its discretion in failing to appoint counsel in the instant case...*See Bejarano v. State,* 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006) (recognizing that good cause may be established where the legal basis for a claim was not reasonably available)...Rogers' petition raised difficult issues relating to the applicability and scope of *Graham*...The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition in the instant case." *Rogers v. State*, 127 Nev. 981, 982–86, 267 P.3d 802, 802–05 (2011).

Actual innocence requiring an evidentiary hearing.

- Appellant filed an untimely petition alleging newly discovered evidence of a recantation and alleged actual innocence. "The district court denied the petition without appointing post-conviction counsel or conducting an evidentiary hearing." While the Court determined that the recantation was not newly discovered, the Court found: "district court's findings regarding the actual innocence claim, however, are not supported by the record...The fact that the recantation was not allegedly raised in a timely fashion does not resolve a claim of actual innocence presented to overcome application of the procedural bars. *Calderon v. Thompson,* 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State* . 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden,* 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)... The district

court has never conducted an evidentiary hearing on the credibility and weight to be given to the victim's recantation. For the reasons discussed below, we conclude that the district court abused its discretion in denying this petition without appointing post-conviction counsel…Appellant's petition raised a potentially complex issue relating to actual innocence—particularly in light of the fact that no court has ever considered the credibility or weight of the victim's recantation. Appellant was represented by appointed counsel at trial. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Williams v. State*, 128 Nev. 945, 381 P.3d 676 (2012)(unpublished).

Numerous cases were reversed using the same or similar wording without discussing specific facts of the case. These cases said: "Appellant filed a timely petition… Appellant, who is indigent and serving a significant sentence, moved for the appointment of post-conviction counsel. His petition arose out of a jury trial during which he was represented by appointed counsel. Appellant raised several issues, some requiring the development of facts outside the record. The failure to appoint post-conviction counsel prevented a meaningful litigation of the petition." *Luna v. State*, 127 Nev. 1156, 373 P.3d 938 (2011)(unpublished).

- *Luna v. State*, 127 Nev. 1156, 373 P.3d 938 (2011)(unpublished).
- *Walters v. State*, 127 Nev. 1184, 373 P.3d 972 (2011) (unpublished).
- *Almy v. State*, 127 Nev. 1114, 373 P.3d 890 (2011) (unpublished).
- *Cina v. State*, 126 Nev. 700, 367 P.3d 757 (2010) (unpublished).
- *Jardine v. State*, 126 Nev. 727, 367 P.3d 786 (2010) (unpublished).
- *Ramet v. State*, 126 Nev. 749, 367 P.3d 811 (2010) (unpublished).
- *Adkins v. State*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished).
- *Tabile v. State*, 126 Nev. 761, 367 P.3d 826 (2010) (unpublished).
- *Walker v. State*, 126 Nev. 766, 367 P.3d 831 (2010) (unpublished).
- *Hampton v. State*, 126 Nev. 718, 367 P.3d 777 (2010) (unpublished).
- *Lopez v. State*, 126 Nev. 733, 367 P.3d 794 (2010) (unpublished)(week long jury trial),
- *Thomas v. State*, 126 Nev. 762, 367 P.3d 826 (2010) (unpublished)(serving 118 months to 336 months).
- *Modelfino v. State*, 126 Nev. 740, 367 P.3d 801 (2010) (unpublished) (potentially complex issues).

Submitted by:

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