IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

FRANK MILFORD PECK,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

Case No. CR96P2687

Dept. No. 6

#60040

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION

This cause is before the court upon a writ of mandamus directing this court to issue a written order disposing of the petition for writ of habeas corpus filed by petitioner Peck on August 7, 2008.

The records of this court reveal that petitioner Peck stood trial and was convicted of two counts of sexual assault. Sentence was imposed in 1998. Peck appealed but the judgment was affirmed. *Peck v. State*, 116 Nev. 840, 7 P.3d 470 (2000). The Court ruled that there was no error in declining to instruct the jury on lesser offenses for two reasons. First, noted the Court, the testimony of the defendant was inconsistent with the lesser offenses. Second, the Court ruled that the proposed offenses were not lesser included but were only lesser-related offenses. The Court overruled prior decisions and ruled that a defendant was entitled to instructions

12-14370

only on crimes that were included withing the greater. The Court ruled that it would use the so-called "*Blockburger*" or same-elements test to determine if one charge was included within the other.

Peck then had a series of efforts to obtain relief. He filed a petition in 2001 that mentioned the failure of trial counsel to poll the jury. The Supreme Court ordered a hearing on that claim in 2003. *Peck v. State*, Docket No. 38835, Order Affirming in Part, Reversing in Part and Remanding, (March 4, 2003). This court conducted the hearing but Peck failed to prove his claim. Thus, that petition was denied on December 31, 2003. Peck appealed but the judgment was affirmed. *Peck v. State*, Docket No. 42672, Order of Affirmance (July 11, 2005).

The instant petition was filed on August 7, 2008. The Supreme Court determined that this court had never disposed of that petition but had only disposed of later pleadings and directed that this court now address that 2008 petition.

The 2008 petition was untimely, abusive and successive. *See* NRS 34.726 and 34.810. Peck attempts to overcome that bar by asserting that his claim was not available until shortly before the petition was filed. If that were true, that might overcome the bars. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

The claim in the 2008 petition was based on *Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). That decision was issued on December 21, 2006. Peck did not file his petition until nearly two years later, on August 7, 2008. When an untimely petition is to be justified on the grounds that the claim was not factually or legally available, the petitioner must diligently seek relief once the claim becomes available. *Hathaway*, 119 Nev. at 254. The delay in the instant case is unreasonable. Peck has not pleaded any factual reason why he could not have sought relief more quickly.

The court also finds that *Rosas* provides no relief to Peck. While it is true that *Rosas* overruled part of the decision in *Peck v. State*, 116 Nev. 840, 7 P.3d 470 (2000), that was only an alternate holding. The ruling in *Rosas* was concerned only with the degree to which a

defendant must assert a defense consistent with the instruction on the lesser included offense. The decision in *Rosas* did not call into question the conclusion in *Peck, supra*, that the proposed crimes in Peck's case were not included within the charged offenses of sexual assault.

At trial, Peck proposed to instruct the jury on crimes of indecent exposure, open or gross lewdness, and battery with intent to commit sexual assault. The jury was indeed instructed on the crime of battery with the intent and so that claim is insignificant. As to the crimes of indecent exposure and open or gross lewdness, in the 2000 opinion the Court ruled that those crimes are not wholly included within the crime of sexual assault. Hence, held the Court, Peck was not entitled to an instruction on those offenses, without regard to his theory of defense. That holding remains intact and was not affected by *Rosas, supra*. Hence, the claim is legally unsound. Whether the claim is phrased in terms of ineffective counsel, or trial court error, or error by the Supreme Court, the result is the same. Thus, there is no need for a hearing. Accordingly, the petition for writ of habeas corpus filed on August 7, 2008 is dismissed.

DATED this 3rd day of May, 2012.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 7th day of May, 2012, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

TERRENCE MCCARTHY, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Frank M. Peck, #57106
HDSP Box 650
Indian Springs, NV 89070

Judicial Assistant