IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 59147

RESPONDENT'S REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

On October 3, 2011, this Court issued an Order to Show Cause why this appeal should not be dismissed for lack of jurisdiction. Petitioner filed her Response within twenty days on October 24, 2011. The Court's Order gave the State five days from the date the appellant's response was filed in which to file the instant Reply.

This is an appeal from the denial of a petition for genetic marker testing pursuant to NRS 176.0918. In its Order to Show Cause, this Court noted that the right to appeal is statutory and neither NRS 176.0918 nor any other statute or rule appears to provide for an appeal. Appellant's response is that while NRS 176.0918 does not expressly provide for an appeal, the legislative history shows an intent for appellate review because language expressly barring an appeal was specifically removed from the final draft.

Application of the rules of statutory construction necessarily begins with a finding that the statute or statutory provision at issue is ambiguous. State v. Colosimo, 122 Nev. 950, 960, 142 P.3d 352, 359 (2006). A statute is ambiguous when its language "lends itself to two or more reasonable interpretations." State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). But when the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it. Colosimo, *supra*. In such

circumstances the legislative history has no application. Id. *citing* U.S. v. Gonzalez-Mendez, 150 F.3d 1058, 1060 (9th Cir. 1998). When the statutory language is clear, "there is no room for construction, and courts are not permitted to search for its meaning beyond the statute itself." State Division of Insurance v.State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2005). "Where the language of a statute is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations." Latterner v. Latterner, 51 Nev. 285, 290, 274 P. 194, 195 (1929).

A statute's "silence" on the question of appealability can not be deemed to create an ambiguity that would warrant resort to legislative intent. This Court has consistently held that the right to appeal is statutory; where no statutory authority to appeal is granted, no right to appeal exists. Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1 (1990) (finding no statute or court rule authorizing an appeal from an order of the district court refusing to transfer a defendant back to the juvenile court); State v. Lewis, 124 Nev. 132, 134, 178 P.3d 146, 147 (2008) (finding no statute or court rule providing for an appeal from an order granting a presentence motion to withdraw a guilty plea); Mazzan v. State, 109 Nev. 1067, 1075, 863 P.2d 1035, 1040-41 (1993) (finding no court rule or statute providing for an appeal from an order denying a motion to change venue). Because the right to appeal must be statutorily granted, the absence of such authority is not an ambiguity capable of two or more reasonable interpretations. Rather, the absence of a statutory grant of a right to appeal is plain and any attempt to construe legislative history to the contrary is impermissible.

In the event a right to appeal exists, this Court's Order to Show Cause also noted that the notice of appeal in this case is untimely considering the 30-day appeal period prescribed by NRAP 4(b). In response, Appellant creatively argues that her DNA petition was in pursuit of a civil right and remedy and that her motion to reconsider under EDCR 2.24 confirmed a "civil status" on the DNA petition such that the applicable time period for appeal is controlled by NRAP 4(a).

Per NRAP 4(b), in a ***criminal*** case "the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the ***entry of judgment or order*** appealed

from." NRAP 4(b)(1) defines "entry" of judgment as "when it is signed by the judge and filed with the clerk." This is different than the rule in ***civil*** cases where the thirty days runs from when the ***notice*** of entry of order is served. NRAP 4(a). In a civil case, where a party is never served with a written notice of entry of order, the 30-day deadline for filing a notice of appeal is not activated. In re Duong, 118 Nev. 920, 59 P.3d 1210 (2002). However, in a criminal case, a lack of notice of the entry of an order "does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed." NRS 178.586.[1] In this case, although a notice of entry of order was apparently served, there is no statutory provision or requirement for such.

Appellant's argument that her DNA petition pursuant to NRS 176.0918 constitutes a civil action for purposes of the time periods prescribed in NRAP 4 is unavailing. The statute for post-conviction DNA testing is found in Title 14 "Procedure in Criminal Cases," Chapter 176 "Judgment and Execution" of the Nevada Revised Statutes. The DNA petition was filed, entertained, and denied all under the criminal case number of the underlying criminal offense, C177394. While NRS 176.0918(14) provides that the remedy provided is in addition to any other right or remedy, it does not describe the DNA petition as a civil action.

In Mazzan, supra, this Court decided it "cannot, in the absence of specific legislative authority permitting us to do so, take jurisdiction over an appeal by selectively grafting civil rules onto rules governing appealability in post-conviction habeas proceedings. *Cf.* Washington v. State, 104 Nev. 309, 311, 756 P.2d 1191, 1193 (1988) (rejecting argument that timeliness of notice of appeal in post-conviction proceedings brought pursuant to NRS Chapter 177 should be determined by civil rather than criminal rules); O'Donnell v. Perry, 100 Nev. 356, 683 P.2d 12 (1984) (rejecting argument that order denying motion to bifurcate civil and criminal contempt proceedings was appealable as order refusing to change place of trial pursuant to NRAP 3A(b)(2) and NRS 2.090). This Court has previously rejected

[1] However, post-conviction habeas appeals are quasi-civil in nature and by separate statute the time for filing a notice of appeal does not begin to run until after notice of entry of order has been served. NRS 34.575(1); NRS 34.830; Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998).

Appellant's argument to take jurisdiction over an untimely appeal in the absence of specific legislative authority permitting it to do so, by the selective application of rules relating to civil proceedings. Washington, supra. This Court has also previously rejected the argument that it should determine which appellate rule applies by looking to the manner in which federal courts treat appeals. Id. Appellant's attempt to find a civil right to appeal in NRAP 3A(b), must fail for the same reasons.

WHEREFORE, the State respectfully requests that the instant appeal be dismissed for lack of jurisdiction.

Dated this 27th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 27th day of October, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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