

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEP 26 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

BRIAN KERRY O'KEEFE,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 65217

PROPER PERSON
RECEIVED/ENTERED

AUG 04 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

NRAP 32 (2)(3)(C)
NRAP 40 (C)(2)(B)

PETITION FOR REHEARING

COMES NOW, Appellant, Brian Kerry O'Keefe, pro-per, and respectfully moves this Honorable Court for a full REHEARING thereby vacating the Affirmance Order filed July 23, 2014 and ultimately granting appellants Motion to Correct Illegal Sentence based on "want of jurisdiction".

This Petition for Rehearing is made and based pursuant to N.R.A.P., RULE 40(2) along with the supporting Points and Authorities within as well as all papers, pleadings, and documents on file herein with the request also made that petitioner's already filed "Opening Brief" and exhibits be officially docketed and filed; to be incorporated for consideration by ordering the Clerk to file said documents received by this Court on May 6, 2014.

RECEIVED
JUL 30 2014
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK
Humphrey and Planned v. Kerner, 404 U.S. 519 (1972)

SECTION

TABLE OF CONTENTS

PAGE

I.	DISPOSITIVE ISSUE INITIALLY RAISED IN MOTION (176.555)	2
II.	JURISDICTION FOR THE PETITION	2
III.	ISSUE PRESENTED FOR NRAP 40(C)(2)(B)	2
IV.	STATEMENT OF CASE	3
V.	a.) PROPERLY APPLYING ABNEY	3-6
	b.) AUTOMATIC STAY <u>and</u> c.) PROPERLY APPLYING CONTAINER	6
VI.	AFFECT OF APPEAL	7-9
VII.	CONCLUSION / PRAYER OF RELIEF	9-10
VIII.	SPECIFIC PRAYER REQUEST	11
IX.	CERTIFICATE OF COMPLIANCE	11
X.	CERTIFICATE OF SERVICE BY MAIL	12
XI.	AFFIRMATION PURSUANT TO NRS 239B.030	12
•	TABLE OF CONTENTS	i
•	TABLE OF AUTHORITIES	ii

CASES	TABLE OF AUTHORITIES	Page
N.R.S. 177.155		5
Abney v. U.S. 431 U.S. 651		2, 3, 4, 6, 8, 9
BAREFOOT v. ESTELLE 463 U.S. 880		2, 5, 6
BENTON v. MARYLAND 395 U.S. 784		9
Fouquette v. BERNARD 198 F.2d 96		9
GONZALEZ v. THALER 132 S.Ct 641		2, 6
GOULD v. MUTUAL LIFE INC. 790 F.2d 769		7
GRIGGS v. PROVIDENT CONSUMER DISCOUNT CO. 459 U.S. 56		5, 6, 7
MOROYOGUI v. U.S. 570 F.2d 862		5, 7
RICHARDSON v. U.S. 468 U.S. 317		8
ROCHE v. EVAPORATED MILK ASS'N. 319 U.S. 21		8
STRINGER v. WILLIAMS 161 F.3d 259		7
U.S. v. Bhatiz 2007 U.S. Dist. LEXIS 74029		7
U.S. v. Claiborne 727 F.2d 842		4, 7
U.S. v. COTTON 535 U.S. 625, 630		2, 6
U.S. v. DeFRIES 129 F.3d 1293		7
U.S. v. DUNBAR 611 F.2d 985		4
U.S.A. v. HICKEY 580 F.3d 922		7
U.S. v. YELLOW FREIGHT SYSTEM INC.		4
HABEAS CORPUS ACT OF 1867		5
28 U.S.C. § 1291		2, 5, 6
28 U.S.C. §§ 1331, 2251		5
28 U.S.C. § 2241		3, 5, 7, 10
28 U.S.C. § 2253		6, 8
28 U.S.C. § 2254		6
FRAP 21 and 22 (b)		5
1 st and 14 th U.S. CONSTITUTIONAL AMENDMENTS		10
FRAP 10 & 11 & 21	ii	6, 7, 8

I. DISPOSITIVE ISSUE INITIALLY RAISED IN MOTION (NRS 176.535)

the Certificate of Appealability ("COA"), res ipsa loquitur! The Eighth Judicial District Court proceeded in want of jurisdiction, while appeal was pending.

- The NINTH CIRCUIT has clearly not adopted the "Dunbar Rule." (Clarborne, infra)

II. JURISDICTION FOR THIS PETITION

Submission results from the AFFIRMANCE ORDER filed July 23, 2014. Rehearing pursuant to NRAP 40(C)(2)(B), based on SUPREMACY CLAUSE; Jurisdiction divested with NINTH CIRCUIT issuing "not" REMAND/MANDATE order.

III. ISSUE PRESENTED PER NRAP 40(C)(2)(B)

When the Court has overlooked, misapplied or failed to consider a "statute," procedural rule, regulation or "decision" directly controlling a dispositive issue in the case, i.e., 28 U.S.C. § 1291; Abbey v. U.S., 431 U.S. 651, 663; GONZALEZ v. THALER, 132 S.Ct. 641, 648; "28 U.S.C. § 2253"; BAREFOOT v. ESTELLE, 463 U.S. 880; U.S. v. Cotton, 535 U.S. 625, 630 (2002).

- Precedent can only be set by the U.S. SUPREME COURT and even the 9th Circuit must exercise authority under § 1291 dictated by Abbey, supra. Therefore, petitioner submits that this Court humbly failed to follow the controlling authorities above, emphasis on Abbey, supra, which is located on page 2 of O'Keefe's Motion to Correct Illegal Sentence¹ filed in the E.J.D.C. on 01/27/2014. Also, petitioner has filed an extensive Opening Brief and Appellant's Appendix with this court on 05/06/2014, which was never officially docketed. Humbly, petitioner request this Court to issue ORDER instructing clerk to file.

- Footnote 1 - All authorities listed above as i.e., are located on pages 2 and 3, of Motion filed 11/27/2014.

IV. STATEMENT OF CASE

Petitioner was wrongfully charged with "OPEN MURDER" based on malice aforethought, implied malice, by the alleged stabbing of one single puncture wound of his girlfriend, Ms. Victoria Whitmarsh on November 5, 2008.

Ultimately, subsequent two trials, defendant was still unconvicted.

At the time of filing his pretrial Habeas matter pursuant § 2241, undisputed is O'Hecke's custody status - pretrial detainee - being held against the laws and treaties of the U.S. Constitution. O'Hecke's right not to be tried a third time until disposition of appeal was guaranteed by the guarantors "COA." However, notwithstanding the COA, the third trial commenced 59 days subsequent the granted COA. A direct appeal, #6631, was a distasteful example of pure ineffective counsel. This appeal was a pure red herring. Counsel, court appointed, didn't even file the law-of-the-trial, i.e., jury instructions, or raise the claim, constituted only as clear "fundamental constitutional error", in the traditional old-fashion sense, (i.e., to the legal power to try the defendant). Mr. O'Hecke simply continues to try to get the court to correct this error by this post remedy and others, when necessary, if.

V. PROPERLY APPLYING ABNEY DEMONSTRATES

TRIAL COURT DIVESTED OF JURISDICTION

● 2.) Effect of Notice of Appeal and granted COA -

The automatic divestiture rule applied when Mr. O'Hecke presented a meritorious Abney-type claim - - asserting a valid, Constitutional "right not to be tried". (see COA by 9th)

The Fifth Circuit in U.S. v. Dunbar, 611 F.2d 985, 987-88 (5th Cir.) followed Abney's direction and adopted the "dual jurisdiction" rule that "appeal from the denial of a frivolous [Abney-type] motion does not divest the district court of jurisdiction to proceed to trial, if the district court has found the motion to be frivolous". How ironic, and made as a matter of the record, by her "filed order," U.S. District Court Judge Gloria Navarro quoted Mr. O'Keefe's:

• (the) "collateral estoppel

claim in GROUND 2 would appear to be based upon double jeopardy protections". see (Case 2:11-cr-02109 GMN-VCF Document 4 Filed 01/06/12 pg 5)

• [A POINT MADE IN U.S.A. v. Hickey, infra; U.S. Judge did not declare frivolous]

• (the) Controlling moreso is the legal precedent, by the dispositive fact, of the COA granted by the 9th on, NAMELY, a double jeopardy violation.

• (any subsequent panel may not overrule any part of the prior panel's decision absent intent)

Expressed in U.S. v. Claiborne, 727 F.2d 842, citing Abney and advising that the Ninth Circuit has yet to adopt DUNBAR in the context of an Abney-type claim involving § 727 F.2d 851} a "right not to be tried".

This reluctance is due to the Ninth Circuit's concern that a defendant who has raised a meritorious Abney-type claim would be irreparably harmed if the trial court were allowed to proceed to trial prior to the appellate court's disposition of the claim. Under the dictates of Abney, the district court loses its power to proceed from the time the defendant files its Notice of Appeal until the appeal is resolved. U.S. v. Yellow Freight System Inc.,

(Continued cite)

(cite
continued)

637 F.2d 1248, 1252 (9th Cir. 1980) citing Monoyogui v. U.S., 570 F.2d 862, 864 (9th Cir. 1977) Gripps v. Provident Consumer Discount Co., 459 U.S. 56 (1982)
see also NRS. 177.125, example.

• b.) AUTOMATIC STAY / FEDERAL STATUTES 1291, 1331, 2241, 2253, FRAP 22(b) — (FEDERAL QUESTION; SEE § 1331) 2 •

Properly applying BAREFOOT, demonstrates stay automatic.

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383 (1983)

(FRAP 22(b); § 2253 (c)(1).)

• The right to have pretrial motions based on double jeopardy applies also to habeas corpus petitions filed pursuant sections 2241, 2254. The power derives from Section 1291 in granting authority, commonly referred to as jurisdiction.

• BAREFOOT, at * 893,

"the primary means of separating meritorious from frivolous appeals is by the decision to grant or withhold a certificate of probable cause". It is generally agreed that the "probable cause requires something more than the absence of frivolity, and that the standard is a higher one than the "good faith" requirement of section 1915."

FN3.

FN3: The habeas act of 1867, act of Feb. 5, 1867 Ch. 28 § 1, 14 Stat. 385, the first act empowering federal courts to issue a writ of habeas corpus for persons in state custody, imposed an automatic stay of "any proceeding against such person" pending "such proceedings on appeal".

• BAREFOOT, at * 894 ... We caution that the issuance of a CPC [COA] generally should indicate that an appeal is not legally frivolous ... • CRUCIAL is the fact that any stay granted or denied pursuant to § 2251 is irrelevant.

FN2: (2251, Separate issue to COA.) — 5 — (STAY Per "2251" mooted by issued COA)
(STAY REQUEST UNNECESSARY ONCE COA GRANTED. ONLY IF NOT GRANTED, THEN REQUEST)

• BAREFOOT, at * 907... We have repeatedly held that once a CPC [COA] has been granted, an appeal must be "duly considered" and "disposed of on the merits" by the court of appeals "in accord with its ordinary procedure". see § 1291.

O'Hare's point is no stay motion was required. However, denials of certiorari never have precedential value, • BAREFOOT, at * 908, FNS. and the denial of a stay can have no precedential value either since the Court's order did not discuss the standard that courts of appeals should apply in passing on an application for a stay pending appeal. SEE FRAP 21, Circuit Advisory Committee note to Rules 21-1 to 21-4.

• Any (stay) denial is not regarded as decision on the merits.

• C.) Properly Applying GONZALEZ, 132 S.Ct. 641 (2012) -

• GONZALEZ, id at 644; (HOLDINGS)

... the parties agree that § 2253 (C)(1)'s plain terms makes the issuance of a COA a jurisdictional prerequisite.

• GONZALEZ, id at 646, Justice SOTOMAYOR delivers the opinion of the Court. ... "The COA may issue only if the petitioner has made a "substantial showing of the denial of a Constitutional right".

• GONZALEZ, id at 648 ... "When a requirement goes to subject-matter jurisdiction, courts are obligated to consider SUA SPONTE issues that the parties have disclaimed or have not presented. SEE

• U.S. v. Cotton, 535 U.S. 625, 630 (2002)

• Subject-matter jurisdiction can never be waived or forfeited. Additionally, Abney v. U.S. supra, the U.S. Supreme Court held that "the court of appeals had no jurisdiction under § 1291 to pass on the merits of petitioner's challenge... The state had to choose, violate speedy trial again or violate double jeopardy, again. - 6 - O'Hare was protected by both!

VI. AFFECT OF APPEAL

The notice of appeal confers jurisdiction on the court of appeals.

Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 103 S.Ct 400 (1992)

- A claim that is considered immediately appealable, then the district court loses its power to proceed from the time the defendant files its NOA until the appeal is resolved. • U.S. v. Claiborne, 727 F.2d 842, 850 (9th Cir.)
- Stringer v. Williams, 161 F.3d 259 Habeas petition § 2241 jurisdictional basis. (The court found that it lacked jurisdiction to grant appellant relief. Appellant's underlying constitutional claims had no merit. It therefore refused to grant a COA and dismissed the appeal.) • The 9th Circuit law requires the conclusion that, unless the case is remanded a district court does not regain jurisdiction after a NOA is filed. • Cowd v. Mutual Life Ins., 790 F.2d 769 (9th Cir. 1986) at 775

Acting before a mandate is issued is acting in want of jurisdiction. see U.S. v. DeFries, 129 F.3d 1293, 1301-03 (D.C. Cir. 1997)

-  (see Hickey, quoting Moroyogui)
- O'Hee, relying on Moroyogui v. U.S., 570 F.2d 862, 864 (9th Cir. 1977) stands solely for the proposition that once a petitioner files an appeal of an appealable order, such as a double jeopardy claim, that filing "divests the district court of jurisdiction to proceed to trial".

- see United States v. Bhatia, 2007 US Dist. LEXIS 74029, 2007 WL 2795066 at * 1 (ND. Cal. Sept 2007) see U.S.A. v. Hickey, 580 F.3d 922 (9th Cir. 2009)

Reminder, the denial of the stay held no precedent. IN FACT, the 9th circuit was saying, "we already have jurisdiction by the granted COA". The petition being already filed, perfected the appeal. FRAP 10 & 11
The record was forwarded. - 7 - EXCLUSIVE jurisdiction attached by record.

Habeas and plenary jurisdiction attached by filing the NoA. EXCLUSIVE jurisdiction attached by filing the record on Feb. 9, 2012.³ This then became bolstered by the granted COA: 2253(c)(1), FRAP 22(b)

★ ● The COA was granted by the special panel of the circuit court designed to hear all COA requests in the first instance! No, other panel could, or did, UNgrant the COA before trial. Therefore, without any REMAND, MANDATE or REMITTANCE being issued, the trial court was in absolute "want of jurisdiction". Capping off the undisputed fact, the state's attempt to have my case mooted failed. My case has also already survived the state's Motion to DISMISS. O'Keefe admits the circuit court granted their motion in Jan. 2013, but correctly placed back on calendar in May of 2013. (soon after the S.C.N. had wrongly affirmed direct appeal #61631!?)

• This SUA SPONTE Action is available, by the S.C.N. also.

— Noting in ROCHE v. EVAPORATED MILK ASS'N, 319 US 21, 32 (1943),

“MANDAMUS does not lie where a remedy through the ordinary processes of an appeal is available,” such as O'Keefe's pending appeal. “Circuit Appellate authority is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are without appellate jurisdiction although no appeal has been perfected.”

• Here, in O'Keefe's case, the Ninth did not substitute mandamus for an appeal that was already granted by the issued COA. There was no need! This was tantamount to a pretrial ABNEY type claim that was immediately appealable pursuant to section 1291, based on a “colorable” claim. see Richardson v. U.S., 468 US 317 (1984)

- In the instant case, if the decision to grant a CoA had not been decided. Legally, if any stay was required then the denial was another error. See Fouquette v. Bernard, 198 F.2d 96 (Nev. 1952, E.S.D.C.);

- the U.S.

District Court denied petitioners stay of execution but granted a CPC. The ninth circuit granted the stay once it found issues that warranted the appeal. Court stated, "Obviously, if there is probable cause for the appeal it would be a mockery of federal justice to execute Fouquette, pending its consideration".

- Regardless of any final disposition of 9th No. 12-15271, either way, the third trial was in complete want of jurisdiction and completely violated O'Keefe's due process to be heard on appeal. The state ran Roughwater over the double jeopardy protection clause and operated on the sole principle known as the "BAD FAITH DOCTRINE". Committing multiple constitutional violations upon O'Keefe to prevent being heard and exercising my "right to petition" the Courts! REM SAYS! (1st AMENDMENT VIOLATION) and to petition the Government for a redress of grievances)

VII. CONCLUSION / PRAYER OF RELIEF

The law according the U.S Constitution and by the express dictates of BENTON V. MARYLAND, 395 U.S. 84, acts to enforce due process and equal protection upon the states and for the appellant, O'Keefe. Applying ABNEY, supra, to the instant case, it becomes clear that as a consequence, the trial court was without power to proceed with the "third trial" without any REMEDY.

- Wrong or right, any stay motion, 9 - by a pro-se defendant, doesn't moot CoA!

Under the law of the circuit, 9th, the Court of Appeals must vacate the conviction if the Supreme Court of Nevada fails to act properly, even SUA spite. This is a matter based on substantial precedential, constitutional authorities!

- Does the Supreme Court of Nevada also know that there are always (3) sides to every argument, legally.

"YOURS" ; "THEIRS" ; and the "LAW".

"YOURS" - O'Keefe filed NOA and NINTH GRANTED COA;
thereby plenary jurisdiction going exclusive with record filed.
• Immediately appealable by statute. Appealable decision.

"THEIRS" - Trial court was without legal authority to proceed with third trial in absence of REMAND based on COA.
• "CE DUNBAR RULE" see Clarborne, supra.

• the "LAW" - Where a state is precluded by a Constitutional claim from trying the defendant at all, his conviction must be set aside, FIN.

• see ABNEY, RICHARDSON, § 2253(c)(1). Emphasis that

O'Keefe patiently, timely, and properly utilized his 1st Amendment right, to petition the government for redress of his 5th Amendment double jeopardy violation, by his pretrial "2241" habeas petition, that resulted in the first "two trials" SOLELY! Properly, the Ninth agreed and issued a COA. NOTWITHSTANDING this COA, (59) days later, the state conducts the third trial in contumacy of the status quo order being the COA. What is BIG BROTHER OR IS BIG BROTHER PAID OFF?

VIII. SPECIFIC PRAYER REQUEST

Petitioner can only pray that besides a valid Full Rehearing being granted that the Supreme Judges act as proper jurist of reason; taking note that the direct appeal, #61631, was worthless. Additionally, petitioner requests this Honorable Court issue an ORDER directing their clerks to officially file O'Keefe's Opening

Brief and Appellate Appendix received May 6, 2014.

These contain additional legal argument that may be helpful to the Court. Expedite in and for a righteous ruling.

IX. CERTIFICATE OF COMPLIANCE

Rehearing petition is timely filed and submission complies with NRAP 32 and 40(b)(3).

By Penalty of Perjury pursuant NRS 208.165:

Respectfully Submitted,

Signed and By: DAVID K. O'KEEFE
Dated July 26, 2014. David K. O'Keefe
#98244

LOVELOCK CORRECTION CENTER
1200 PRAIRIE ROAD
LOVELOCK, NV. 89419

X. CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF MOTION to the below address(es) on this 28th day of July, 2014, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

• BRASS SLIP # 2061302

Supreme Court of Nevada
Office of the Clerk
201 S. Carson Street, Suite 201
Carson City, NV. 89701

NOTE : All participants of the electronic filing system will be served by the clerk, if needed, using that perspective system.

Brian K. O'Leary

BRIAN K. O'Leary # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

XI. AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF MOTION does not contain the social security number of any person.

Dated this 28th day of July, 2014.

Brian K. O'Leary

Petitioner In Pro Se