

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

FRANK MILFORD PECK,

Appellant,

vs.

VALLEY HOSPITAL MEDICAL  
CENTER; DAVID R. ZIPF, M.D.; AND  
MICHAEL D. BARNUM, M.D.,

Respondents.

Sup. Ct. Case No.: 68664 Electronically Filed  
Feb 12 2018 09:03 a.m.  
District Court No. A-170847-C Elizabeth A. Brown  
Clerk of Supreme Court

**MOTION TO WITHDRAW AS COUNSEL OF RECORD**

Rachel E. Donn, Esq. and Andrea M. Gandara, Esq., and the law firm Holley Driggs Walch Fine Wray Puzey & Thompson (collectively, “Counsel”), counsel of record for Appellant Frank Peck (“Mr. Peck”), hereby move for an Order allowing their withdrawal as counsel of record now that this Court has rendered its Opinion entered on December 28, 2017 and issued its Order on January 29, 2018 directing Mr. Peck’s Counsel to file either a petition for rehearing or a motion to withdraw as counsel. Mr. Peck has requested an extension of time to submit a Petition for Hearing if Counsel is permitted to withdrawal in this matter.

This Motion to Withdraw as Counsel of Record (“Motion”) is made and based on the S.C.R. 46 and Nevada Rule of Professional Conduct 1.16, the

Memorandum of Points and Authorities herein, the Declarations of Rachel E. Donn, Esq. and Andrea M. Gandara, Esq. attached hereto, the exhibits incorporated therein, and the pleadings and papers filed in this matter.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. FACTUAL BACKGROUND**

On or about December 18, 2015, Counsel began pro bono representation for Mr. Peck after an assignment by the Legal Aid Center of Southern Nevada (“Legal Aid”) to represent Mr. Peck in his appeal before this Court. *See* Correspondence from Legal Aid, dated December 18, 2015, attached hereto as **Exhibit “A.”**

During the three years of Counsel’s representation of Mr. Peck, Counsel obtained a settlement with one of the parties to the appeal, *see* Stipulation and Order to Dismiss Valley Hospital Medical Center, filed September 20, 2016, filed multiple papers and briefs, *see generally* docket, and argued Mr. Peck’s appeal before this Court on September 26, 2017.

On December 28, 2017 this Court issued its decision affirming the District Court’s judgment. *See* Opinion, entered December 28, 2017.

On January 9, 2018, Counsel forwarded a copy of the Opinion to Mr. Peck at High Desert State Prison via U.S. Mail and email to prison staff. *See* Declaration of Rachel E. Donn, Esq., appended hereto, at ¶6. After receiving the Opinion, Counsel understands that Mr. Peck attempted to file a Petition for Hearing pro se,

which was returned to him due to Counsel being on record as currently representing him. *See* Order, filed January 29, 2018.

Counsel believes that the scope of representation of Mr. Peck was completed after oral argument on September 26, 2017 or at the latest when the Court rendered the Opinion affirming the District Court's judgment. *See* Declaration of Rachel E. Donn, Esq., appended hereto, at ¶7. Further, Counsel's current case load and schedule does not allow for continued representation of Mr. Peck in filing the Petition for Rehearing and, therefore, is seeking an Order allowing withdrawal as counsel in this matter. *See* Declaration of Rachel E. Donn, Esq., appended hereto, at ¶8.

On February 9, 2018, Counsel spoke with Mr. Peck who inquired about withdrawal and the Petition for Rehearing and Mr. Peck indicated that he "appreciated the efforts made by Counsel in this appeal" to date and understood if Counsel sought to withdraw from this case. *See* Declaration of Andrea M. Gandara, Esq., appended hereto, at ¶¶3-4. Mr. Peck requested that he be allotted more time to complete the Petition for Rehearing on his own pro se if Counsel is permitted to withdraw. *See* Declaration of Andrea M. Gandara, Esq., appended hereto, at ¶5. Finally, Counsel believes that if Mr. Peck is in need of further representation for post-Opinion matters, he may contact Legal Aid to assist him

further such that he will not be prejudiced by the proposed withdrawal. *See* Declaration of Rachel E. Donn, Esq., appended hereto, at ¶9.

Mr. Peck's last known address is:

Frank Peck (ID # 57106)

High Desert State Prison

P.O. Box 650

Indian Springs, NV 89070-0650

Counsel will serve Mr. Peck with this Motion for Withdrawal at the above-referenced address and emailed to prison staff to ensure he has prompt and formal notice of the withdrawal request and an opportunity to respond, if desired. *See* Declaration of Andrea M. Gandara, Esq., appended hereto, at ¶¶6-7.

## **II. LEGAL AUTHORITY AND ANALYSIS**

The Nevada Supreme Court Rules allow for withdrawal of counsel as follows:

**Withdrawal or change of attorney.** The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows:

1. Upon consent of the attorney, approved by the client.
2. Upon the order of the court or judge thereof on the application of the attorney or the client.

**After judgment or final determination, an attorney may withdraw as attorney of record at any time upon the attorney's filing a withdrawal, with or without the**

**client's consent.**

*See S.C.R. 46 (emphasis added).*

The Nevada Rules of Professional Conduct also provide for withdrawal of counsel as follows:

**Rule 1.16. Declining or Terminating Representation.**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) The representation will result in violation of the Rules of Professional Conduct or other law;
- (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) The lawyer is discharged.

**(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:**

- (1) Withdrawal can be accomplished without material adverse effect on the interests of the client;**
- (2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) The client has used the lawyer's services to perpetrate a crime or fraud;
- (4) A client insists upon taking action that the lawyer considers repugnant or with which the

lawyer has fundamental disagreement;

(5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;  
**or**

**(7) Other good cause for withdrawal exists.**

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

*See Nevada Rules of Professional Conduct 1.16 (emphasis added).*

In this case, withdrawal of Counsel is appropriate because Mr. Peck's appeal has been rendered to judgment or final determination by way of the Opinion issued by this Court affirming the District Court's judgment. In addition, now Mr. Peck's appeal is now complete, except post-judgment motions

such as the Petition for Rehearing, which Mr. Peck has previously attempted to file pro se and was returned to him by the Court. Mr. Peck has requested that he be allotted more time to complete the Petition for Rehearing on his own pro se if Counsel is permitted to withdraw. Finally, if Mr. Peck is in need of further pro bono representation for post-Opinion matters, he may contact Legal Aid to assist him further such that he will not be prejudiced by the proposed withdrawal.

### **III. CONCLUSION**

Based on the foregoing, Counsel Rachel E. Donn, Andrea M. Gandara, and the law offices of Holley Driggs Walch Fine Wray Puzey & Thompson respectfully requests an Order allowing withdrawal as counsel of record for Mr. Peck in this action. Further, Mr. Peck has requested an extension of time to submit a Petition for Hearing if Counsel is permitted to withdrawal in this matter.

DATED this 9th day of February, 2018.

/s/ Rachel E. Donn, Esq.  
Rachel E. Donn, Esq. (NBN 10568)  
Andrea M. Gandara, Esq. (NBN 12580)  
Holley Driggs Walch  
Fine Wray Puzey & Thompson  
400 South Fourth Street, Third Floor  
Las Vegas Nevada 89101  
*Attorney for Appellant Frank Peck*

**DECLARATION OF RACHEL E. DONN, ESQ.**

I, Rachel E. Donn, Esq. declare as follows:

1. I am an attorney duly admitted to practice in the State of Nevada, and my law firm, Holley Driggs Walch Fine Wray Puzey and Thompson, and I, along with my associate, Andrea M. Gandara, Esq. are counsel for Appellant Frank Peck (“Mr. Peck”) in the above-captioned action.

2. The facts set forth herein are of my own personal knowledge, except as to those matters based upon information and belief, and as to those matters, I believe them to be true and correct.

3. On or about December 18, 2015, I was assigned by the Legal Aid Center of Southern Nevada (“Legal Aid”) to represent Mr. Peck on December 18, 2015 in his appeal before the Nevada Supreme Court. *See* Correspondence from Legal Aid, dated December 18, 2015, attached hereto as **Exhibit “A.”**

4. During the three years of representation of Mr. Peck, my firm and I obtained a settlement with one of the parties to the appeal, *see* Stipulation and Order to Dismiss Valley Hospital Medical Center, filed September 20, 2016, filed multiple papers and briefs, *see generally* docket, and I argued Mr. Peck’s appeal before this Court on September 26, 2017.

5. On December 28, 2017 this Court issued its decision affirming the District Court’s judgment. *See* Opinion, entered December 28, 2017.



6. On January 9, 2018, my office forwarded a copy of the Opinion to Mr. Peck at High Desert State Prison via U.S. Mail and email to prison staff.

7. I believe that the scope of representation of Mr. Peck was completed after oral argument on September 26, 2017 or at the latest when the Court rendered the Opinion affirming the District Court's judgment.

8. Further, my current case load and schedule does not allow for continued representation of Mr. Peck in filing the Petition for Rehearing and, therefore, my firm and I are seeking an Order allowing withdrawal as counsel in this matter

9. I believe that if Mr. Peck is in need of further representation for post-Opinion matters, he may contact Legal Aid to assist him further such that he will not be prejudiced by the proposed withdrawal.

10. This Motion to Withdraw is brought in good faith and not for purposes of delay, or any other improper purpose.

I declare under penalty of perjury under that the foregoing is true and correct.

Executed on this 9th day of February, 2018.

/s/ Rachel E. Donn, Esq.  
RACHEL E. DONN, ESQ.

**DECLARATION OF ANDREA M. GANDARA, ESQ.**

I, Andrea M. Gandara, Esq. declare as follows:

1. I am an attorney duly admitted to practice in the State of Nevada, and my law firm, Holley Driggs Walch Fine Wray Puzey and Thompson, and I, along with my partner, Rachel E. Donn, Esq. are counsel for Appellant Frank Peck (“Mr. Peck”) in the above-captioned action.

2. The facts set forth herein are of my own personal knowledge, except as to those matters based upon information and belief, and as to those matters, I believe them to be true and correct.

3. On February 9, 2018, I spoke with Mr. Peck who inquired about withdrawal of my firm, Ms. Donn, and I from representation of him in this appeal and the Petition for Rehearing.

4. Mr. Peck indicated that he appreciated the efforts made by us in this appeal to date and understood if we sought to withdraw from this case.

5. Mr. Peck requested that he be allotted more time to complete the Petition for Rehearing on his own pro se if we are permitted to withdraw.

6. Mr. Peck’s last known address is:

Frank Peck (ID # 57106)

High Desert State Prison

P.O. Box 650

Indian Springs, NV 89070-0650

7. My office will serve Mr. Peck with this Motion for Withdrawal at the above-referenced address and emailed to prison staff to ensure he has prompt and formal notice of the withdrawal request and an opportunity to respond, if desired.

I declare under penalty of perjury under that the foregoing is true and correct.

Executed on this 9th day of February, 2018.

/s/ Andrea M. Gandara, Esq.  
ANDREA M. GANDARA, ESQ.

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of the law firm of Holley Driggs Walch Fine Wray Puzey & Thompson, and that on this 9<sup>th</sup> day of February, 2018, I served the above and foregoing **MOTION TO WITHDRAW AS COUNSEL OF RECORD** in accordance with NRAP 25 by placing a true and correct copy of same, in a sealed envelope, with postage fully prepaid thereon, and sending in the U.S. Mail, addressed as follows:

David J. Mortensen, Esq. Candace C. Herling, Esq. Bridgette E. Foley, Esq. Alverson Taylor Mortensen & Sanders 6605 Grand Montecito Pkwy, #200 Las Vegas, Nevada 89149 T: (702) 384-7000 <b>Attorney for Respondent</b>	Jill M. Chase, Esq. Dylan P. Todd, Esq. McCormick Barstow LLP 8337 W Sunset Road, #350 Las Vegas, NV 89113 T: (702) 949-1100 <b>Attorneys for Respondent</b> David R. Zipf, M.D.
Michael D. Barnum, M.D. Frank Peck (Id# 57106) High Desert State Prison P.O. Box 650 Indian Springs, NV 889070-0650	John F. Bemis, Esq. Kirill V. Mikhaylov, Esq. Hall Prangle & Schoonveld LLC 1160 N. Town Center Drive, Ste. 200 Las Vegas, NV 89144 <b>Attorneys for:</b> Valley Hospital Medical Center
Professor Anne Traum Chair of Pro Bono Committee Appellate Section of St. Bar of NV. UNLV William S. Boyd School of Law 4505 S. Maryland Parkway, Box 451003 Las Vegas, Nevada 89154-1003	Barbara Buckley Legal Center of So. Nevada 725 E. Charleston Blvd. Las Vegas, NV 89104

/s/ Cynthia Kelley

C. Kelley, an employee of Holley Driggs  
Walch Fine Wray Puzey & Thompson

**EXHIBIT A**

**EXHIBIT A**

Since 1958  
**LEGAL AID CENTER**  
■ ■ ■ ■ *of Southern Nevada*

December 18, 2015

Rachel E. Donn, Esq.  
Holley Driggs Walch Fine Wray Puzey & Thompson  
400 S. Fourth St. Third Floor  
Las Vegas, Nevada 89101

RE:    **Pro Bono Placement:**            **Frank Peck-APPEALS**

Dear Ms. Donn:

Thank you so much for accepting a pro bono appeals case through the Pro Bono Project. It is an awesome responsibility to represent an individual in a time of need. We hope you will find it to be a rewarding experience.

Enclosed please find the above-referenced client's file, a "Notice of Appearance", an FAQ regarding volunteers representing prisoners, a suggested "Client Retainer" form, a "Final Disposition" form, and the Pro Bono Guidelines signed by Mr. Peck. **Please take note that the enclosed "Notice of Appearance" must be filed within 60 days of the "Order Regarding Pro Bono Counsel." The order is dated December 7, 2015 and a copy is included in the client's file.**

Please complete the "Final Disposition" form and return it to me when the case is closed. Additionally, periodically I will send you "Hours Reports" which I hope you will complete and return in order that we may track the hours you spend on this matter. This statistical information is important for reporting purposes pursuant to the grants we receive and for determining our annual pro bono award winners. Your anticipated cooperation is greatly appreciated.

If at any point in the case you have difficulties, problems or questions, please do not hesitate to contact us so we can be of assistance. In addition, as I mentioned, you may also contact Franny Forsman at [f.forsman@cox.net](mailto:f.forsman@cox.net) who has agreed to mentor attorneys taking prisoner appeal cases. Also, if at any point, you believe the client's financial situation has changed for the better, or you for any reason question the client's continued financial eligibility for pro bono services, do not hesitate to contact us and we would be happy to review the client's financial situation again. If you have any questions, comments, or concerns, please contact me at 386-1070, extension 1429. Again, thank you for your continued support of our program.

Sincerely,

*Melanie Kushnir*

Melanie L. Kushnir, Esq.,  
Director Pro Bono Project

MLK:swh  
Enclosure

725 E. Charleston Blvd. Las Vegas, Nevada 89104  
702.386.1070 Toll-Free 800.522.1070 Fax 702.366.0569 TDD 702.386.1059 [www.lacsn.org](http://www.lacsn.org)