

IN THE SUPREME COURT OF THE STATE OF NEVADA

Lazaro Martinez-Hernandez,)

Case No: 69169 Electronically Filed
Feb 10 2016 09:26 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Appellant,)

District Case No.: C230237

v.)

D.C. Department No.: XVII

The State of Nevada,)

E-FILE

Respondent.)

_____)

REPLY TO FAST TRACK RESPONSE

I. DEFENDANT’S PETITION FOR WRIT OF HABEAS CORPUS IS A JUSTICIABLE CONTROVERSY.

The State in their Fast Track Response argues that somehow Defendant’s Petition for Writ of Habeas Corpus is not a “justiciable” controversy, citing the case of *UMC Physician’s Bargaining Unit of New Serv. Emplees. Union, SEIU Local 1107 v. Nev. Serv. Emplees. Union, SEIU 1107*, 124 Nev. 84, 93, 178 P.3d 707, 715 (2000).

Defendant’s Petition clearly raised a ripe dispute between two interested and adverse parties. Both the State and the Defendant must certainly be interested in resolving the fundamental question in this case of whether or not the Defendant was

wrongly convicted. The mere fact that Defendant is no longer in custody does not resolve the fundamental question of whether or not Defendant received effective assistance of counsel and whether or not the ineffective assistance he received led to a wrongful and unjust conviction.

II. ONCE AN IN-CUSTODY DEFENDANT ACTUALLY HAS FILED A WRIT OF HABEAS CORPUS, THE DISTRICT COURT RETAINS JURISDICTION TO RESOLVE THE PETITION EVEN AFTER THE DEFENDANT HAS BEEN RELEASED FROM CUSTODY.

To hold that a district court loses its jurisdiction to decide all issues in a post-conviction Writ of Habeas Corpus merely because a prisoner has been fortunate enough to complete the custody part of his sentence while the case is still pending is directly contrary to long standing Nevada case law defining jurisdiction. The collateral consequences of a felony conviction are not trivial, but involve significant liberty interests that last a lifetime. Once direct appeal has been decided, the only effective way to remove the effect of a wrongful conviction absent a pardon or commutation is by Writ of Habeas Corpus.¹

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The rarely used Writ of Coram Nobis once seemed to have been a theoretical remedy possibly available to the Defendant however that Writ has been held to be of limited scope and no longer is a permissible procedural vehicle for handling post-conviction

A strict holding that all out-of-custody defendants could no longer raise ineffective assistance of counsel claims by Writ of Habeas Corpus once they were released would deprive a very large class of defendants, who may have suffered a wrongful conviction, from having any effective remedy to challenge their convictions caused by ineffective assistance of counsel. This result would clearly be unjust and in violation of the Sixth Amendment.

III. DEFENDANT’S PETITION IS NOT MOOT.

This Honorable Court must find Defendant’s Petition for Writ of Habeas Corpus not moot because the collateral consequences of an unjust felony criminal conviction endure for many years and are a severe restraint on individual liberty.

As the State itself has pointed out, the collateral consequences of a conviction overcome mootness on direct appeal. *Knight v. State*, 116 Nev. 140, 143, 144, 993 P.2d 67, 70 (2000) Defendant respectfully submits that collateral consequences likewise overcome mootness on post-conviction review. The State mistakenly tries to argue the dicta in *Nat’l Collegiate Athletic Assn. v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10 (1981) that: ... “the duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not give opinions about moot questions, or abstract propositions, or to declare principles of law which

claims. The Nevada Supreme Court in *Trujillo v. State*, 130 Nev. Adv. Op. 47 , __ P.3d __ (2014) held the habeas corpus is now the exclusive post-conviction remedy based upon the statutory language of NRS 34.724(2)(b).

cannot effect the matter in issue before it...and controls the decision in this case.”

(Emphasis added)

That dicta should not apply to this case. Significant, non-abstract issues can and must be resolved here. Applying basic statutory construction principles to the Writ Statute, the Court should conclude Petitioner has a right to proceed with his Petition on the merits because he has no other remedy available to set aside the wrongful conviction in this case.

IV. THE DEFENDANT HAS ALWAYS BEEN DILIGENT IN ALL APPELLATE AND POST-CONVICTION PROCEEDINGS. HE THEREFORE MAY SEEK EQUITABLE RELIEF.

The procedural history of this case shows that none of the delays in processing the Defendant’s case can be attributable to lack of diligence by the Defendant. The State nevertheless argued in their Fast Track Response that Defendant cannot assert an equitable remedy because he has not been diligent arguing that the Defendant did not file a post-conviction petition between April 24, 2008, and February 1, 2011. The Judgment of Conviction however was not even filed until February 1, 2010. It was therefore impossible to even file a Writ before February 1, 2010. The Defendant’s first Writ, which attacked his first attorney’s failure to even file an appeal, was timely filed on February 1, 2011, and was successful. (A.A. 60) The Supreme Court then remanded the case to district court. The Nevada Supreme Court later affirmed the District Court again on July 22, 2014. (A.A. 63-67) Defendant, after another counsel was then appointed for him filed Supplemental Points in support of Defendant’s

Petition for Habeas Corpus Relief on February 24, 2015. (A.A. 68-80)

The State, rather than respond on the merits to Supplemental Points and Authorities, chose not to respond on the merits but instead chose to raise the procedural issue that the Writ was time barred. The State argued the court should dismiss the Petition for Writ of Habeas Corpus, claiming the issue of ineffective assistance of counsel cannot be considered under Nevada statutory law because Defendant is now out of custody and a Writ of Habeas Corpus is unavailable now.

It should be noted that the Defendant will stipulate that he has wanted to get out of custody as soon as possible. It should also be clear that Defendant has always wanted to clear his name and clear his record of the collateral consequences of a wrongful felony conviction as soon as possible. Elementary logic makes clear a defendant would have no motive to slow the process of his exoneration.

The only delays which occurred in this case were the types of delays inherent in any complex litigation process. Most importantly, the State has not shown any significant prejudice from any delays, certainly not any prejudice that would outweigh the overwhelming prejudice to the Defendant resulting from no remedy for a wrongful conviction.

CONCLUSION

In this case the Court needs to decide a fundamental issue affecting the rights of many defendants who seek to challenge their felony conviction by filing a post-conviction Habeas Corpus Petition. If any defendant is in custody when he files his post-conviction petition, should his petition, no matter how meritorious, ever be

dismissed or procedurally barred merely because he has been released from custody before the Writ is decided on the merits?

The collateral consequences of a felony conviction entail important liberty interests that need to be protected. It is respectfully submitted post-conviction was the only effective remedy which remained to protect the defendant in this case from a wrongful conviction resulting from ineffective assistance of counsel and protect his Sixth Amendment right to assistance of counsel. The Writ of Coram Nobis was not available. This Honorable Court should find that in this case and others like it that a defendant who files a timely Writ of Habeas Corpus should be entitled to a decision on the merits to determine whether he received effective assistance of counsel and to determine whether his conviction is just. Release from custody should not eliminate a defendant's chance for post-conviction relief.

DATED this 4th day of February, 2016.

/s/ Terrence M. Jackson

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VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:
[X] This fast track statement has been prepared in a proportionally spaced typeface using Word Perfect X7 in Times New Roman style and size 14 font.
2. I further certify that the fast track statement complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is:
[X] Proportionately spaced, has a typeface of 14 points or more, and contains 1,232 words, and
[X] Does not exceed fifteen pages.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely Fast Track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 4th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Terrence M. Jackson, Esquire, a person competent to serve papers, not a party to the above-entitled action and on the 4th day of February, 2016, I served copy of the foregoing: Appellant's Reply to Fast Track Response, as follows:

[X] Via E-Flex electronic Service to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Nevada Attorney General and Petitioner/Appellant as follows:

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