IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

THE STATE OF NEVADA,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE,
Respondents,
and,
FRANCISCO MERINO OJEDA,
Real Party In Interest.
_______________________________________/

No. 72456

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

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Docket 72456 Document 2017-18419

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

The Court has directed the Real Party in Interest to file an answer against issuance of the requested writ.

Background:

This matter involves a criminal prosecution. In the district court, Mr. Ojeda's defense counsel filed a pretrial motion for equal access to juror information. Petitioner's Appendix (PA) at 5-14 (seeking copies of any criminal histories of the veniremembers obtained by the State prior to jury selection). The State filed a response in opposition. PA 15-31. At a motions hearing held on February 10, 2016, the district court informed the parties that Mr. Ojeda's motion was granted, subject to some disclosure guidelines. See Real Party in Interest's Appendix (RA) at 21-22. The district court noted that the jury list is generally released on the Thursday before the Monday trial date, and that the State would be required to provide a hard copy of the criminal histories it obtained to the district court "no later than 4:00 o'clock on the Friday before trial." And the defense must pick up a hard copy from the district court "by 5:00 o'clock on the Friday before trial[.]" RA 22.

The district court prepared a written order. PA 32-36 (Order Granting Motion for Equal Access to Juror Information). Focusing on this Court's opinion in *Artiga-Morales v. State*, 130 Nev. Adv. Op. 77, 335 P.3d 179 (2014) (declining to find reversible error on appeal where trial court denied defense access to juror background information developed by the prosecution), the district court concluded that under *Artiga-Morales* nothing mandates disclosure of juror background information to the defense, but nothing prohibits "a trial court from ordering its disclosure." PA 33-34. The district court noted its belief "in the fundamental right *to fair play*." It reasoned that allowing "only the State to use the criminal histories of potential jurors creates a disparity," which "is removed if both the State and Mr. Ojeda have equal access to the criminal history of potential veniremembers." PA 34 (italics added).

The State now seeks a writ of prohibition or mandamus against an exercise of discretion by the district court that provides "parity in the parties' positions." PA 34-35. The request for a writ of prohibition is easily disposed of. A writ of prohibition is inapplicable here because the district court had jurisdiction in the criminal case to hear, consider, and rule upon Mr. Ojeda's pretrial motion for equal access to juror information. See *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (a writ of prohibition will not lie "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration."). Because the district court had jurisdiction to rule on the pretrial motion, this Court's focus should be on whether the State has presented a compelling need for a writ of mandamus.

Regarding the request for a writ of mandamus, the State essentially rehashes the arguments it made in the district court below; those arguments should fare no better in this Court. Additionally, the State has not demonstrated that the district court's order was an abuse of discretion, let alone a manifest abuse of discretion, and has not presented any compelling reason—other than that some district courts in the Second Judicial District Court may require production of veniremembers' criminal histories while others do not[1]—to warrant this

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[1] Petition for Writ of Prohibition or Mandamus (Petition) at 9-10. Why this fact creates urgency is unclear. If this Court denies the writ petition, the judges in the Second Judicial District Court may continue their differing approaches. Or they may move to a uniform exercise of discretion consistent with the approach taken by Judge Simons.

Court's consideration of its writ petition. Thus, the requested writ of mandamus should be denied.

Memorandum of Points and Authorities Against Issuance of the Requested Writ

Standard of Review

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from the office, trust or station; or to control a manifest abuse of discretion or which has been exercised in an arbitrary or capricious manner. *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 4, 200 P.3d 509, 511 (2009). Because "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously," this Court reviews the district court's order under a manifest abuse of discretion standard. *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court*, 116 Nev. 629, 635, 5 P.3d 562, 565 (200) (citing *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or [is] contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267

P.3d 777, 780 (2011) (internal quotation marks and citations omitted); *Nev. Dep't. of Pub. Safety v. Coley,* 132 Nev. Adv. Op. 13, 368 P.3d 758, 760 (2016) ("An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law.") (internal quotation marks omitted). "Manifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will." *Armstrong,* 127 Nev. at 932, 267 P.3d at 780 (internal quotation marks, alteration, and citation omitted).

Discussion

A.

Because writs of mandamus are extraordinary remedies, this Court has "complete discretion whether to consider them." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008); *Grace v. Eighth Judicial Dist. Court,* 132 Nev. Adv. Op. 51, 375 P.3d 1017, 1019 (2016) ("[I]t is within the discretion of this court to determine if a petition will be considered.") (internal quotation marks and citation omitted, alteration in the original).

The State's writ petition is at bottom, an attempt to absolutely prevent a district court from exercising its discretion to order the prosecution to disclose veniremembers' criminal histories that the State routinely obtains in criminal cases. In other words, the State invites this Court to expand its limited holding in *Artiga-Morales*—which was focused on *appellate* review—into an absolute per se *pretrial* rule against the disclosure of juror background information. For the reasons to follow, this Court should not accept the State's invitation.

In *Artiga-Morales v. State*, 130 Nev. Adv. Op. 77, 335 P.3d 179 (2014), a divided court held that a district court's denial of defense access to juror background information developed by the prosecution did not constitute reversible error on appeal. 335 P.3d at 180. The majority noted that many courts have concluded that "in the absence of a statute or rule mandating disclosure, no such disclosure obligation exists," and thus "no reversible error [on appeal] in a trial court's denial of access to prosecution-developed juror background information." *Id.* The majority's reasoning was further grounded on the fact that the existence of any injury or prejudice to the defendant based on the court's denial of access to juror background information, was too speculative to establish *reversible* error. *Artiga-Morales*, 335 P.3d at 180-81.[2] But the majority did not say that a district court did not have the authority to order pretrial disclosure of juror background information. Indeed, the majority cited four cases—*People v. Murtishaw*, 631 P.2d 446 (Cal. 1985), *Tagala v. State*, 812 P.2d 604 (Alaska Ct. App. 1991), *State v. Goodale*, 740 A.2d 1026 (N.H. 1999) and *Commonwealth v. Smith*, 215 N.E. 2d 897 (Mass. 1966)—which collectively indicate that disclosure "may" be compelled, or should be accomplished upon defense request because of fairness and parity. 335 P.3d at 180-81. The majority's point was that the district court's failure to do so however, did not require an appellate court to reverse a conviction, absent a showing of prejudice. See e.g., 335 P.3d at 180 (noting *Murtishaw's* holding ("distinct from its dictum")).

The holding in *Artiga-Morales* is an after-conviction-appellate-review-based holding that recognizes the difficulty in conducting

[2] The majority had earlier noted that the record before the Court was not complete. 335 P.3d at 180. See also *Id.* at 182 (noting the "limited record and arguments" in the case).

reasonable appellate review in the absence of a governing rule or statute mandating such disclosure.[3] The majority did not address the before-trial-exercise-of-discretion at issue here. More significantly, the majority did not hold that a district court may not order such disclosure, and did not identify any rule or statute or other legal source precluding a district court from exercising its discretion to do so.[4]

B.

The district court's order is based on *Artiga-Morales* but the State rehashes almost word for word many of the arguments it made in its

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[3] To be sure, the existence of a well-crafted rule or statute would make appellate review easier because the review would turn in large part on compliance with the language of the rule or statute. The majority suggested as much. See 335 P.3d at 181-82 (noting that a rule could be adopted under NRS 179A.100(7)).

[4] For these reasons, the State's discussion of *Artiga-Morales* in its petition—Petition at 24-28—misses the mark. Additionally, the State selectively quotes from *People v. McIntosh*, 252 N.W.2d 779, 782 (Mich. 1977), leaving off this tidbit: "the prosecutor need not share this information with the defense, so long as it is *reasonably available to the defense from other sources*." (italics added). (According to the court, the information in the "prosecutor's dossier," is "available from public records."). Here the district court, because jury lists are not issued until the Thursday before a Monday trial, directed the State to provide the veniremember criminal histories to the court no later than 4:00 o'clock on Friday, and directed defense counsel to pick up a copy no later than by 5:00 o'clock that same day (creating a window between 4:00 and 5:00 o'clock for defense counsel to get a copy of the State's veniremember criminal histories).

opposition in the district court. The district court did not address those arguments, and with good reason: they are straw men arguments. The State argues that “the idea” of Due Process does not create “some kind of right to ‘parity of information,’ ‘symmetry of information,’ or ‘equality of information’ between the prosecution and defense,” and that due process does not require or allow a district court to order jury information. And the Court is told that *Brady* discovery does not embrace this disclosure, and that even the right to an impartial jury does not compel this disclosure. Petition at 10-24. But the creation and knocking down of these arguments does not warrant the issuance of a writ of mandamus by this Court, where the sole question is: “Did the district court manifestly abuse its discretion in directing the State to provide veniremember criminal histories to the court and to defense counsel on the Friday before a Monday trial in a criminal case?” The question hints the answer. *Cf. Artiga-Morales*, 335 P.2d at 183 (Cherry, J., joined by Douglas and Saitta, JJ., dissenting) (noting that “[e]ven the majority concedes that other jurisdictions have mandated the sharing of jury information in criminal cases.”).

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Conclusion

The district court's order is based on a fair reading of *Artiga-Morales*. It is not founded on prejudice or preference, but reason and fairness. It is not arbitrary. Nor is it capricious; the order is not contrary to established rules of law. Because the district court's order is neither arbitrary nor capricious the court did not manifestly abuse its discretion. Accordingly, this Court should find that the district court acted within its jurisdiction, did not act arbitrarily and capriciously and did not manifestly abuse its discretion.

In sum, this Court should not issue the requested writ.

Dated this 2nd day of June, 2017.

By: *John Reese Petty*
JOHN REESE PETTY
Chief Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on 2nd day of June 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joseph R. Plater, Appellate Deputy
Washoe County District Attorney's Office

I further certify that I have on this date, emailed a copy of this document to:

The Chambers of Judge Lynne K. Simons
(C/O Heidi Boe, Judicial Assistant)

John Reese Petty
John Reese Petty
Washoe County Public Defender's Office