

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAQUELINE FAUSTO,

Appellant/Petitioner,

vs.

RICARDO SANCHEZ-FLORES, an individual;

VERENICE RUTH FLORES, an individual

Respondents.

Supreme Court Case

No.: 80074

Electronically Filed

Apr 26 2021 03:42 p.m.

District Court Case No.

Elizabeth A. Brown

A-19-797890-C
Clerk of Supreme Court

**PETITION
FOR *EN BANC*
RECONSIDERATION**

Hutchison & Steffen, PLLC

Jason D. Guinasso, Esq. (NV Bar No. 8478)

Joseph R. Ganley, Esq. (NV Bar No. 5643)

Alex R. Velto (NV Bar No. 14961)

500 Damonte Ranch Parkway, Suite 980, Reno, NV 89521; Phone: (775) 853-8746

jguinasso@hutchlegal.com; jganley@hutchlegal.com; avelto@hutchlegal.com

Attorneys for Petitioner

NRCP 26.1 DISCLOSURE

Counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Petitioner is JAQUELINE FAUSTO.

Petitioner is represented by Jason D. Guinasso, Joseph R. Ganley, and Alex R. Velto of Hutchison & Steffen, PLLC and have been at all times relevant to the District Court Case through the current appeal the attorneys of record for Jaqueline Fausto. No other attorneys from Hutchison & Steffen are expected to appear before this Court with respect to the appeal now pending.

DATED: April 26, 2021. **HUTCHISON & STEFFEN, PLLC**

By: *Jason D. Guinasso, Esq.*

Jason D. Guinasso, Esq. (NV Bar No. 8478)
Joseph R. Ganley, Esq. (NV Bar No. 5643)
Alex R. Velto, Esq. (NV Bar No. 14961)
Hutchison & Steffen, LLC.
500 Damonte Ranch Parkway, Suite 980
Reno, NV 89521
Tel.: 775-853-8746
Fax: 775-201-9611
Attorneys for Petitioner

TABLE OF CONTENTS

NRCP 26.1 DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION.....	- 1 -
II. PETITION FOR EN BANC RECONSIDERATION STANDARD	- 3 -
III. ARGUMENT	- 4 -
<i>a. En Banc reconsideration is appropriate because the Court’s decision could have a large effect on a number of similarly situated individuals who waited for their rape kits to be processed.</i>	<i>- 4 -</i>
IV. CONCLUSION	- 7 -
CERTIFICATE OF COMPLIANCE	- 9 -
CERTIFICATE OF SERVICE.....	- 11 -

TABLE OF AUTHORITIES

Cases

Fausto v. Sanchez-Flores, Case. No. 80074, March 11, 2021- 1 -

Statutes

NRS 11.190(4).....- 7 -

Other Authorities

A.B. 142 during the 2019,-2-, - 7 -

Human Rights Watch, Testing Justice: The Rape Kit Backlog in Los Angeles City
and County f> <2009- 3 -

NRAP 26.1(a) ii

NRAP 32(a)(4).....- 9 -

NRAP 32(a)(6).....- 9 -

NRAP 32(a)(7)(C)- 9 -

NRAP 40(a)(2).....- 9 -

NRAP 40(b)(3)- 9 -

NRAP Rule 25(d)- 11 -

I. INTRODUCTION

Just like the Clark County District Attorney waited over two years for the results of the rape kit before charging and prosecuting Mr. Sanchez Flores for sexual assault, Ms. Fausto waited to bring a claim for battery against her attacker until she had DNA evidence to establish the fact that she was raped. It was the State, not Ms. Fausto, who failed to exercise reasonable diligence by taking over two years to process the rape kit she had completed with a doctor the day after she was assaulted. As a result of the State's failure and Ms. Fausto's lack of understanding regarding what was required of her after she completed the rape kit and reported the crimes committed against her to the police, the statute of limitations ran on her civil tort claims. However, after Ms. Fausto received the rape kit results, she diligently proceeded to seek out the assistance of an attorney to commence a civil lawsuit against her attacker, Mr. Flores.

On these facts, this Court has now correctly determined that "equitable tolling may apply in such cases when the plaintiff demonstrates reasonable diligence in pursuing his or her claims and extraordinary circumstances that prevent him or her from timely filing the complaint." *Fausto v. Sanchez-Flores*, Case. No. 80074, March 11, 2021. But it has added further insult and grievous injury to Ms. Fausto by construing Ms. Fausto's patience in waiting for the results of the rape kit as a lack of diligence. Further, despite the record on appeal clearly and unequivocally

establishing an extraordinary backlog of as many as 8,000 unprocessed rape kits, this Court erroneously found that the State's failure to timely process Ms. Fausto's rape kit was not extraordinary. Although this Court recognized the efforts of the Nevada Legislature to deal with the crisis of thousands of unprocessed rape kits in our State by passing Assembly Bill 142 in 2019, this Court did not seem to appreciate the nexus between this crisis and the reasons for Ms. Fausto waiting to bring her claims against her attacker. Ironically, Nevada now deems experienced prosecutors, who patiently wait years for the results of a rape kit before bringing criminal charges against a rapist more diligent, but does not afford victims of sexual assault, who typically have no legal training or experience, the same deference regarding when they bring their civil action.

Ms. Fausto exercised the reasonable judgment of a rape survivor when she waited for the results of the rape kit before bringing a civil action. This Court's decision disregarding her judgment as a lack of "diligence" creates a terrible precedent that appears to minimize the trauma experienced by rape survivors, like Ms. Fausto, who have been forced to wait years for the State to process rape kits so they would have DNA evidence to support their testimony that they had been grossly violated by a sexual predator. This evidence is critical to proving up their cases before a judge and jury. This Court's recent opinion creates significant precedential and public policy concerns for all those in Ms. Fausto's shoes. The same people

who were asked what they were wearing before they were asked if they were okay are the same strong survivors who “assume that if they have not heard back from the police, it is not because testing was not done; it was because testing was done but there was no DNA in the kit.”¹ Ms. Fausto requests that this Court grant her petition for en banc reconsideration because the Court has closed the door, not only on her ability to hold her attacker accountable for violating her dignity and causing her irreparable trauma, but on all other victims of sexual assault like her who have waited patiently for the State to process rape kits only to be denied justice because the statute of limitations had run without regard for the compelling reasons why a survivor of rape would wait.

II. PETITION FOR EN BANC RECONSIDERATION STANDARD

A petition for en banc reconsideration is appropriate when: (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. NRAP 40A(a). The basis for Ms.

¹Human Rights Watch, Testing Justice: The Rape Kit Backlog in Los Angeles City and County (2009), available at <http://www.hrw.org/node/81826> (quoting Gail Abarbanel, director of the Rape Treatment Center at Santa Monica-UCLA Medical Center, and an unidentified sexual assault nurse examiner).

Fausto's petition for en banc reconsideration is that the proceedings involve a substantial precedential, constitutional or public policy issue.

Here, en banc reconsideration is necessary and appropriate pursuant to NRAP 40(a) because, respectfully, the proceedings involve substantial precedential, constitutional or public policy issues.

III. ARGUMENT

- a. En Banc reconsideration is appropriate because the Court's decision could have a large effect on a number of similarly situated individuals who waited for their rape kits to be processed.*

The Court's conclusion that a plaintiff who waits to file suit against his or her attacker until a rape kit is processed is not acting diligently. This determination will have an effect on many others like Ms. Fausto. Ms. Fausto erred in relying on law enforcement to act diligently. But to ask a plaintiff to seek out a civil attorney while she waits for the State to conduct its investigation and process a rape kit, is too much to expect of a lay person.

In 2019, Nevada recognized that prosecutors need more time to analyze a case when there is a rape kit that has not been processed. Why aren't plaintiffs afforded the same benefit? "DNA evidence will likely carry weight in court. Many cases of sexual violence rely on first-hand accounts and other evidence that leaves room for

interpretation. DNA evidence helps build a stronger case against the perpetrator.”²

Nevada changed the law because sexual assault is a difficult claim to prove, as it is often he-said-she-said. As we know, sexual assault is an endemic problem:

Every 98 seconds, someone is sexually assaulted in the United States. When the victim reports the assault to the police, a hospital, or a rape crisis center, a medical professional conducts an exhaustive and invasive four- to six-hour examination of the victim’s body for DNA evidence left behind by the attacker. During the examination, the victim’s body is photographed and swabbed for biological evidence. The examiner collects and preserves this evidence in a sexual assault evidence kit, often referred to as a “rape kit.” Survivors can consent to release this kit to law enforcement and report the crime, or can elect to have the kit for testing at a later date (“non-investigatory kits”).³

The American Bar Association have explained how low a priority sexual assault is for law enforcement, and that best practices are for victims to be apprised of the kit’s status, something that did not occur for Ms. Fausto:

Indeed, sexual assault is regarded as a low priority by many in law enforcement, says Ilse Knecht, director of policy and advocacy at the Joyful Heart Foundation, a New York City–based organization that works to heal and

²RAINN, The Importance of DNA in Sexual Assault Cases, <https://www.rainn.org/articles/importance-dna-sexual-assault-cases>

³*End the Backlog*, Comprehensive Rape Kit Reform: a Legislative Handbook (2018), <https://www.endthebacklog.org/sites/default/files/JHF%20Policy%20Handbook%20%285%29.pdf>

empower sexual assault survivors. It was founded in 2004 by TV actress Mariska Hargitay, star of Law & Order Special Victims Unit. ‘Our society doesn’t recognize sexual assault for the violent crime it is, doesn’t understand the impact it has on victims,’ Knecht points out. ‘There’s a complete underplaying of how violent an act—how dehumanizing and invasive—it is.’

Advocates for rape kit reform say victims have the right not just to have their kit promptly tested but also to be kept apprised of its status in the system.⁴

Victims who have gone through the process of getting a rape kit done are relying on the State to process the kit. The State’s lack of diligence shouldn’t establish a victim’s.

As to the extraordinary circumstances Ms. Fausto faced, this Court determined that the State’s failure to process a rape kit is not an extraordinary circumstance. These victims suffer from psychological trauma that actively prevents them from diligently pursuing a claim as this Court now requires because “avoidance and withdrawal are common PTSD-related responses from rape victims.”⁵ The act of rape is itself an extraordinary circumstance, as is the State’s failure to process the

⁴ Erin Gordon, Untested Rape Kits: Delays, Destruction, and Disregarded Victims (May 17, 2019)

<https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/may/untested-rape-kits-delays-destruction-and-disregarded-victims/>

⁵*Id.*

rape kit. This view aligns with the Nevada Legislature's, which has effectively deemed the rape kit backlog an extraordinary circumstance. The Court's opinion recognizes that the back log was so severe that it in-part led to the passage of A.B. 142 during the 2019 legislative session. At one point, there were over 8,000 rape kits that remained untested. If 8,000 people were potentially affected by the State's failures, and victims of assault believe the rape kit results contradict their lived experience, this Court should deem that an extraordinary circumstance that warrants reconsideration.

IV. CONCLUSION

Ms. Fausto supports this Court's determination that NRS 11.190(4) allows for equitable tolling, and that the standard requires diligence and an extraordinary circumstance. However, the Court's determination that Ms. Fausto—and other sexual assault survivors placed in a similar situation by the State's failures—did not and do not act diligently when they wait for the State to process the rape kit, and that the State's failure to process the rape kit was not an extraordinary circumstance, is, respectfully, a legal conclusion that has grave implications on survivors of sexual assault. Accordingly, Ms. Fausto seeks this Court's en banc reconsideration based on the effect this will have on people in Nevada.

Additionally, in the event that this Court directs Respondent to answer this petition for en banc reconsideration, Appellant respectfully requests that this Court

permit leave for Appellant to file a reply in support of this petition.

DATED: April 26, 2021. **HUTCHISON & STEFFEN, PLLC**

By /s/ Jason D. Guinasso

Jason D. Guinasso, Esq. (NV Bar No. 8478)
Joseph R. Ganley, Esq. (NV Bar No.5643)
Alex R. Velto, Esq. (NV Bar No. 14961)
500 Damonte Ranch Parkway, Suite 980
Reno, NV 89521
Tel.: 775-853-8746
Fax: 775-201-9611
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I, Jason D. Guinasso, Esq., declare as follows:

1. I am a partner with Hutchison & Steffen, PLLC, counsel of record for Petitioner.

2. I certify that I have read the foregoing **PETITION FOR EN BANC RECONSIDERATION**.

3. I certify that this brief 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).

4. I further certify that this brief complies with the page- or type- volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is either proportionally spaced, has a type face of 14 points or more and contains no more than 4,667 words or does not exceed 10 (ten) pages. This brief contains **2,581 words**.

5. Finally, I hereby certify that I have read this brief, and it is not frivolous of interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2) which requires any claim that the court overlooked a material fact be supported by a reference to the page of the transcript appendix or record where the matter may be found; any claim that the court has overlooked a material question of law or has

overlooked or misapprehended or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner raised the issue. 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.

I declare under the penalty of perjury the statements herein are true and correct.

Executed on April 26, 2021 in Washoe County, Nevada.

HUTCHISON & STEFFEN, PLLC

By: */s/ Jason D. Guinasso*

Jason D. Guinasso, Esq. (NV Bar No. 8478)
Joseph R. Ganley, Esq. (NV Bar No. 5643)
Alex R. Velto, Esq. (NV Bar No. 14961)
500 Damonte Ranch Parkway, Suite 980
Reno, NV 89521
Tel.: 775-853-8746
Fax: 775-201-9611
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to NRAP Rule 25(d), I served the foregoing **PETITION FOR EN BANC RECONSIDERATION** on the following parties, via the manner of service indicated below, on April 26, 2021:

Via Electronic service through
the Nevada Supreme Court's
Eflex system:

John H. Wright, Esq.-
john@wrightlawgroupnv.com

Amy J. Smith, Esq.-
chris@wrightlawgroupnv.com

Christopher B. Phillips, Esq.-
amys@wrightlawgroupnv.com
THE WRIGHT LAW GROUP

2340 Paseo Del Prado,
Suite D-305
Las Vegas, NV 89102

Attorneys for Respondents

Dated: April 26, 2021.

By: */s/ Bernadette Francis*

An Employee of Hutchison & Steffen, PLLC