In the Supreme Court of the State of Nevada

Case No. 80255

Evaristo Jonathan Garcia

Appellant,

v.

James Dzurenda, et al.,

Respondent.

Motion to Stay the Briefing Schedule

Dated this 20th day of December, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ *S. Alex Spelman*
S. ALEX SPELLMAN
Assistant Federal Public Defender

Appellant Garcia moves this Court to stay the briefing schedule for this appeal pending the district court's resolution of his outstanding Nevada Rule of Civil Procedure 59(e) motion.

Mr. Garcia was found guilty following a jury trial of Second-Degree Murder with Use of a Deadly Weapon. He was sentenced to ten years to life plus an equal and consecutive term of ten years to life. (Tr. 8/29/13; 9/11/13 Judgment of Conviction.) This Court affirmed the judgment on direct appeal. (5/18/15 Order of Affirmance.)

Mr. Garcia then filed a pro se post-conviction petition for a writ of habeas corpus. (6/10/16 Petition.) The district court denied the petition, and Mr. Garcia timely appealed. (10/13/16 Notice of Appeal.) The case was transferred to Nevada's Court of Appeals (3/2/17 Notice of Transfer), which affirmed the district court's decision (5/16/17 Order of Affirmance).

Mr. Garcia mailed a pro se federal habeas petition under 28 U.S.C. § 2254 to the federal district court on December 13, 2017.

(ECF No. 1-1.)[1] That court appointed the Federal Public Defender to represent Mr. Garcia. (ECF No. 9.)

Mr. Garcia then filed a counseled post-conviction petition for a writ of habeas corpus in the Eighth Judicial District Court—the petition at issue in this appeal. He challenged his conviction on the ground that the prosecution suppressed material and exculpatory evidence at the time of trial. (3/14/19 Petition for Writ of Habeas Corpus.)

Namely, undisclosed school police reports identified an alternative shooter suspect that the school police officers claimed matched the description of the shooter, who they found fleeing the crime scene in the direction witnesses saw the shooter run, and who was wearing clothing that matched witnesses' descriptions. The reports also showed that the State's star witness provided an inconsistent description of the shooter right after the shooting occurred. The defense requested these reports, but the State never provided them, so neither the defense nor the jury

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[1] Mr. Garcia cites to documents filed in his federal district court case, *Garcia v. NDOC*, No. 2:17-cv-03095-JCM-CWH (D. Nev.), by their "ECF" numbers. The Court should take judicial notice of these documents, which are from a federal case challenging the criminal conviction at issue in this appeal. *See Mack v. Estate of Mack*, 125 Nev. 80, 91–92, 206 P.3d 98, 106 (2009).

learned this information. This would have been critical in this case because the main issue at trial was the identity of the shooter. Nonetheless, the district court denied Mr. Garcia's habeas petition, entering a written order on November 15, 2019. (11/15/19 Order.)

However, Mr. Garcia identified two important factual errors in the district court's final judgment. He believes these factual errors should alter the district court's resolution of his habeas corpus petition. Thus, believing it more prudent to seek correction from the district court in the first instance, he promptly filed a Motion to Alter or Amend a Judgment pursuant to Nev. R. Civ. P. 59(e). (11/27/19 Motion.)

In the Rule 59(e) motion, Mr. Garcia argued that the district court's order rested on two incorrect factual premises. First, the district court stated that defense counsel at trial "presented three alternative suspects who were never ruled out by an eye witness." (11/15/19 Order at 2.) In fact, at least one of these suspects *was* ruled out by an eye-witness who—as the suppressed reports reveal—gave inconsistent descriptions of the shooter and was thus impeachable. (*See* 11/17/19

Motion at 2–3.) This was a material misunderstanding related to Mr. Garcia's *Brady* claim.

Second, the court incorrectly assumed trial counsel made a strategic decision to forgo investigating the *Brady* claim. This was not in the record at all, yet the Court relied on this incorrect factual assumption for its conclusion that the suppressed evidence was not exculpatory. (11/15/19 Order at 2–3.) This was error. As Mr. Garcia is now arguing to the district court, trial counsel's strategy is legally irrelevant to the *Brady* inquiry—but in any event, the court's assumption about trial counsel's actions was simply factually incorrect, as shown by the Rule 59(e) motion. (*See* 11/27/19 Motion at 3–4, and the accompanying exhibits).

Mr. Garcia would like the provide the district court the chance to fix these errors in the first instance before this appeal. The district court's resolution of the Rule 59(e) motion may render this appeal moot.

The Rule 59(e) motion is still pending in the district court. However, Mr. Garcia needed to file a notice-of-appeal before the district court's resolution of the Rule 59(e) motion due to this Court's caselaw

holding Rule 59(e) motions do not toll the notice-of-appeal deadline in habeas corpus cases. Namely, in *Klein v. Warden* (a *pro se* appeal) this Court held that—just for habeas proceedings, unlike all other civil proceedings—Rule 59(e) motions do *not* toll the time for filing a notice of appeal, *see* 118 Nev. 305, 309–11, 43 P.3d 1029, 1032–33 (2002), despite the plain language of Nevada Rule of Appellate Procedure 4(a)(4)(C).[2]

Mr. Garcia filed a timely notice of appeal from the district court's November 15, 2019 order denying his habeas petition. Because Mr. Garcia had to file his notice of appeal while his Rule 59(e) motion remains pending in the district court, pursuant to *Klein*, the procedures for resolution of the motion outlined in *Foster v. Dingwall*, 126 Nev. 49, 228 P.3d 453 (2010), control.[3] Therefore, the district court currently

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[2] *Klein* is a *per curiam* opinion this Court published without the benefit of counsel for both parties. *See* 118 Nev. at 306, 43 P.3d at 1030 ("Nolan E. Klein, Carson City, in Proper Person"). Specifically, the *Klein* Court ruled for the State in a published opinion against a *pro se* party, which has had a wide-reaching effect and is a cause of procedural uncertainty in post-conviction habeas corpus litigation in Nevada. Mr. Garcia would request this Court overturn its holding in *Klein*. If this Court cannot do so when resolving this motion, he preserves the argument for his briefs.

[3] Mr. Garcia recognizes that the post-judgment motion at issue in *Foster* was filed under Nevada Rule of Civil Procedure 60(b). But because of the fact that Rule 59 motions do not toll the time for filing a notice of

retains jurisdiction over Mr. Garcia's Rule 59(e) motion. "In considering such motions, the district court has jurisdiction to direct briefing on the motion, hold a hearing regarding the motion, and enter an order denying the motion, but lacks jurisdiction to enter an order granting such a motion." *Foster*, 126 Nev. at 52–53, 228 P.3d at 455. Instead, if the district court is "inclined to grant relief," then it must so certify to this Court, at which point Mr. Garcia could move for a remand. *Id.*

Because this process remains ongoing—the district court has neither denied the motion nor certified that it is inclined to grant it—the interests of judicial economy and avoiding piecemeal litigation

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appeal in habeas cases, Mr. Garcia's case is analogous. This is in contrast to *Chapman Indus. v. United Ins. Co. of Am.*, 110 Nev. 454, 457, 874 P.2d 739, 741 (1994), where a Rule 59 motion was filed before an appeal was perfected but tolled the time for filing the notice of appeal. Therefore, *Foster*'s recognition that *Chapman* may provide an exception to the use of the procedure outlined in *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), and clarified in *Foster* does not affect Mr. Garcia's case.

Going forward, a solution to these procedural challenges would be overturning the *per curiam* decision in *Klein*, ruling the plain language of NRAP 4(a)(4)(C) applies to habeas cases like any other. This would allow the timely filing of a Rule 59(e) motion to toll the deadline for a notice of appeal, allowing a district court to resolve errors before appeal and potentially saving significant judicial resources on appeal.

counsel in favor of staying the briefing schedule on appeal until resolution in the district court on Mr. Garcia's Rule 59(e) motion.

These interests will be served by staying the briefing schedule on appeal regardless of the outcome of the motion. If the district court denies the motion, then Mr. Garcia may also appeal from the denial of the 59(e) motion. *See id.* at 53 n.3, 228 P.3d at 456 n.3 (recognizing that order denying Rule 59 motion is independently appealable). Because the appeal from the order denying Mr. Garcia's habeas petition and the appeal from any order denying his Rule 59(e) motion would overlap in content, they would likely be consolidated on appeal.

If, however, the current briefing schedule was not stayed and the motion was not decided upon before the appeal from the denial of the habeas petition concluded, then there would be a risk of duplicative or conflicting dispositions. And if the district court is inclined to grant the Rule 59(e) motion, then the resolution of the motion could render the appeal from the denial of the habeas petition moot. In any scenario, Mr. Garcia submits that it is most efficient and orderly to wait to proceed on the current appeal until the district court has resolved the 59(e) motion.

Mr. Garcia therefore respectfully requests this Court to stay the briefing schedule in his appeal from the November 15, 2019 denial of his habeas petition until the district court has either denied or certified that it is inclined to grant his pending motion under Rule 59(e).

Dated this 20th day of December, 2019.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

/s/ S. Alex Spelman
S. Alex Spelman
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Alexander Chen.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

Evaristo Jonathan Garcia
No. 1108072
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

/s/ Adam Dunn
An Employee of the
Federal Public Defender, District of Nevada