IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARTHUR LEE SEWALL, JR., Appellant, v. THE STATE OF NEVADA Respondent.	Electronically Filed Dec 10 2020 04:10 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 81309

PETITION FOR REHEARING PURSUANT TO NRAP 40

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, ALEXANDER CHEN, on behalf of the above-named respondents and submits this Petition for Rehearing from this Court's issuance of a writ of mandamus filed December 4, 2020, in the above-captioned case. This Petition for Rehearing is based on the following memorandum and all papers and pleadings on file herein.

Dated this 10th day of December, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
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Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 27, 2018, Petitioner Arthur Sewall was arraigned and pled not guilty to the crime of Murder with Use of a Deadly Weapon. On October 19, 2018, Petitioner filed a Motion to Suppress Illegally Obtained Statements. The State filed an opposition to the Motion, and a Jackson v. Denno evidentiary hearing was scheduled for January 18, 2019. Following the hearing on January 18, 2019, the district court accepted additional briefing on the matter. Finally on August 20, 2019, the district court suppressed part of the Petitioner's statement to the police where he admitted to shooting and killing the victim. The State appealed this decision to this Court, but the district court's decision to suppress the statement was affirmed via an Order filed April 16, 2020.

While the parties were awaiting this Court's decision regarding the suppressed statement, this Court came out with the Valdez-Jimenez v. 8th Judicial District, 136 Nev. Adv. Op. 20 (April 9, 2020) decision. Thus on April 24, 2020, slightly over a week after this Court's Order affirming the district court's suppression, and four days after the Valdez-Jimenez decision, Petitioner filed a Motion for Own Recognizance Release/Setting Reasonable Bail. In short, Petitioner argued that he should be permitted a reasonable setting of bail because he has strong community ties, he lacks a risk of flight, and he had a high probability of success at trial.

Petitioner went on to acknowledge that a defendant charged with murder could be held without bail, but that his case did not fall within that category of cases.

In response to Petitioner's argument, the State filed a lengthy opposition against Petitioner's release, including how this case came to be. The State's response included the criminal history of Petitioner dating back to his arrest in 1997 while serving as a Las Vegas Metropolitan Police Officer. While he was out of custody and awaiting sentencing, Petitioner picked up a new criminal case, soliciting prostitution of an undercover officer, out of San Diego, California. Neither he, nor his counsel, informed the sentencing court, and the State at the time was unaware he had new criminal charges. The State pointed out that although new criminal charges were pending, which were similar in nature to his underlying case, Petitioner instead in preparation for his sentencing told the sentencing court that had good character and that "this is the first and last time that I have ever been in trouble with law enforcement."

The State went on to point out in its opposition that Petitioner also violated the terms of his probation. His violations spanned from refusing to submit a DNA sample, not attending mandated classes, and having in his possession a .22 caliber firearm, which was prohibited on probation. Notably, Petitioner was revoked at that time and it was only upon his revocation that his DNA was collected, which would be the basis for a CODIS Hit Notification that would lead to his arrest in the instant

case, for the sexual assault and murder of Nadia Iverson. The State's response indicated how the State had shown by clear and convincing evidence that the proof is evident and presumption is great of Petitioner's guilt.

On May 1, 2020, a Valdez-Jimenez hearing was held in front of Senior District Court Judge David Barker. Upon listening to the arguments of counsel the district court found by clear and convincing evidence that the proof is evident and presumption great for the murder charge. As such, the district court ordered a no-bail hold.

Petitioner then sought a writ of mandamus with this Court asking for intervention to the denial of his bail motion. On December 4, 2020, a panel of this Court granted the writ of mandamus over objection. The State now petitions for rehearing on this matter.

ARGUMENT

On December 4, 2020, a panel of this Court issued and Order in this case, granting Appellant's Petition for a Writ of Mandamus regarding his custody status. "The court may consider rehearings in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2).

A writ of mandamus will only issue to control a court's arbitrary or capricious exercise of its discretion. Washoe County DA v. Second Judicial Dist Ct., 116 Nev. 629 (2000). In this case, a panel of this Court should have only granted a writ of mandamus if the district court abused its discretion in denying Petitioner bail.

The panel of this Court, however, may not have fully realized the extent of the factual record that led the district court to properly put Petitioner in the slight realm of cases that are not entitled to bail pursuant to Article 1, section 7 of the Nevada Constitution. Petitioner was charged with first degree murder, under two theories: (1) that the murder was willful, deliberate, and premediated or (2) that the murder occurred during the perpetration or attempted perpetration of a sexual assault. In other words, the second theory of first-degree murder set forth by the State was under a felony murder theory of liability.

Pursuant to the Valdez-Jimenez decision, the district court held a hearing to determine if Petitioner should be released on bail. The panel of this Court referenced only part of the record that the district court considered in finding that the proof was evident and the presumption was great for the first-degree murder charge. In its Order, it cited to the district court's consideration of Petitioner's semen in the victim's vagina and rectum and that the Petitioner owned a .357 Ruger which could have been involved with the crime. Based upon these facts, the panel of this Court argued that those facts alone did not support the elements of first-degree murder.

(Sewall v. 8th Judicial Dist Ct, Order No. 81309, 8/16/20, p. 3).

However as pointed out above, the State charged Petitioner with first-degree murder under two separate theories of liability. While the limited evidence above may not directly prove that the murder was willful, deliberate, and premeditated, the evidence considered by the district court is certainly evidence of the sexual assault that supports a felony murder charge. The positioning of the body, the bullet to the back of the victim's head, and the Petitioner's admission that the gun were all factors that supported the charge. The panel of this Court also stated that evidence to prove the first-degree murder charge "must be admissible." *citing* In re Wheeler, 81 Nev. 495, 500, 422 P.2d 538, 539 (1967) (Sewall v. 8th Judicial Dist. Ct., Order No. 81309, 8/16/20, p. 3). However, this Court has never held that evidence to be considered at a bail hearing must be admissible evidence. Moreover, this Court has never indicated that such evidence produced at a bail hearing must be trial admissible evidence as the panel of this Court has now held. At bail hearings, both parties oftentimes incorporate arguments that rely on evidence that would not necessarily be admissible evidence at a trial. In ruling the way that this panel has ruled, it sets forth a new standard that has not been set by this Court's prior cases.

While Wheeler does state that the district court must rely upon "some competent evidence," competent evidence should not be synonymous with trial admissible evidence. The context of Wheeler was to merely set forth some minimum

standards and considerations that the State needs to meet when seeking to detain an individual for a first-degree murder charge. The Court in Wheeler made it clear that the State need not put forth proof beyond a reasonable doubt in order to detain an individual defendant. Id.

While a portion of the Petitioner's statement was suppressed, it was still evidence which the district court could consider. Courts routinely allow for even suppressed statements to be used for other purposes even after suppression. Lamb v. State, 127 Nev. 26, 251 P.3d 700 (2011). Thus, despite the panel of this Court essentially saying that the State could not prove Defendant's involvement, such is an issue that would be left to trial and the State's burden of proof. (Sewall v. 8th Judicial Dist. Ct., Order No. 81309, 8/16/20, p.3).

The district court was properly able to consider and find that Petitioner was involved with the death of a woman who had been shot in the back of her head and left dead in a vacant duplex. Moreover, the district court could consider Petitioner's statement to the police, even though portions of it had been suppressed. The fact that the statement was suppressed for the purposes of evidence in the State's case at trial does not mean that the statement should be ignored or that the facts admitted to by the Petitioner never occurred.

While the suppression of a portion of the statement presents evidence that the State must overcome at a jury trial, the district court would still not err in considering

the statement to support that the proof is evident and the presumption is great that the murder took place. The suppression of this statement was based on a Fifth Amendment Miranda issue. This is not a case with an involuntary confession based on the overbearing of Petitioner's will. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973). Thus, there is no reason for any court to doubt the veracity of Petitioner's confession that his gun shot and killed the victim.

Even though the statement has been suppressed at trial, Petitioner's own words affirm that he shot and killed this victim. Such a statement still has value for the district court to consider. The panel that decided this case, for instance, implies that the State has never proven Petitioner's involvement with the victim's death since the State only could say the .357 Ruger (owned by Petitioner) *could* have fired the round that detectives found at the scene. (Sewall v. 8th Judicial Dist. Ct., Order No. 81309, 8/16/20, p.3). Again, this would be an issue for trial, and not as a consideration for whether or not Petitioner qualifies for bail. The district court was aware that Petitioner admitted that he was the one who fired the shot killing the victim.

Once the district court determined that the proof is evident and presumption was great for first-degree murder, then the district court was free to consider other factors against release, including the safety of the public from being harmed by an individual who has admitted to shooting and killing another human being.

The district court's exercise of discretion in denying bail did not amount to an abuse of discretion. As evidenced by the State's opposition to bail, there were numerous reasons for the district court to be concerned about releasing Petitioner from custody. The district court was able to consider Petitioner's prior contact with law enforcement and the courts. Although Petitioner argued that his overall contact with law enforcement was limited, the State clearly showed that Petitioner performed horribly. Not only did he violate his condition of release while he was awaiting sentencing in his 1997 case, he went on to ignore many of the court-mandated sentencing requirements while on supervised probation. It was not arbitrary for the district court to consider Petitioner's unsatisfactory compliance with his prior release and regulations, and to reasonably believe that conditions of bail would not satisfy the court.

When combining the Petitioner's first-degree murder charge with his poor compliance in the past, it was entirely reasonable for the court to deny Petitioner bail.

CONCLUSION

WHEREFORE, there was no abuse of discretion committed by the district court, the State respectfully requests that this Court grants rehearing and that the Order be amended.

/ / /

Dated this 10th day of December, 2020.

Respectfully submitted,

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BY */s/ Alexander Chen*

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page and type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more, contains 1,979 words and does not exceed 10 pages.

Dated this 10th day of December, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 10, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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AC//ed