

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBER ERNESTO MARTINEZ
GUZMAN,
Petitioner,
vs.

No. 82342 Electronically Filed
Mar 29 2021 03:19 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
WASHOE; AND THE HONORABLE
CONNIE J. STEINHEIMER, DISTRICT
JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party In Interest.

EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY
(directed at an April 12, 2021 motion filing deadline)

Petitioner, Wilber Ernesto Martinez Guzman, pursuant to Rules 8(a)(1)(A), 8(a)(2)(A)(ii) and Rule 27(e) of the Nevada Rules of Appellate Procedure hereby moves for an order staying an April 12, 2021 filing deadline set by the district court for a motion for a declaration of intellectual disability under NRS 174.098(1). To avoid irreparable harm relief is needed before April 12, 2021. NRAP 27(e).

The propriety of this part of the district court's order is presently under review by this Court. Because it is unlikely (though not

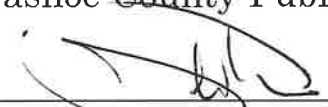
impossible) that this Court will issue a merits opinion or order before April 12, 2021, and because the object of the writ—mandamus directing the district court to vacate the April 12, 2021 filing deadline—will be defeated if a stay is not granted, this Court should issue the requested stay.

DATED this 29th day of March 2021.

Respectfully Submitted,

JOHN L. ARRASCADA
Washoe County Public Defender

By:


JOHN REESE PETTY
Chief Deputy Public Defender

NRAP 27(e) CERTIFICATE
AND DECLARATION OF JOHN REESE PETTY

I declare under penalty of perjury that the following assertions are true.

1. I am an attorney duly licensed to practice law in the State of Nevada. I am employed by the Washoe County Public Defender's Office as a Chief Deputy. I am Petitioner's appellate counsel. My email address is jpetty@washoecounty.us and my telephone number is (775) 337-4827.

2. Appellate counsel for the Real Party in Interest (Real Party) is Marilee Cate, Washoe County Deputy District Attorney. Her email address is MCate@da.washoecounty.us and her telephone number is (775) 337-5755.

3. On January 14, 2021, I filed an Original Petition for Writ of Mandamus asking this Court's intervention and seeking an order directing the Honorable Connie J. Steinheimer, District Judge, to vacate part of an order, filed on December 5, 2020, that sets April 12, 2021 as the filing deadline for Mr. Guzman's *Atkins* motion under NRS 174.098. The basis for the requested relief derives directly from the statute. Subsection 1 states: "A defendant who is charged with murder of the first degree in a case in which the death penalty is sought may, not less than 10 days before the date set for trial, file a motion to declare that the defendant is intellectually disabled." Mr. Guzman is charged with first degree murder and the State is seeking the death penalty if Mr. Guzman is convicted of first degree murder. Trial is set to commence on September 20, 2021, which is nearly five months beyond the April 12, 2021 filing deadline. NRS 174.098(1) grants the decision to file a motion to declare

intellectual disability and, importantly, when to file such a motion, to the defendant, not the Court.

4. On February 18, 2021, this Court entered an order directing the Real Party to file an answer against issuance of the writ within 28 days of the Court's order and granted Mr. Guzman the opportunity to file a reply within 14 days after service of the answer.

5. On February 25, 2021, I sought a stay in the district court. See Petitioner's Motion Appendix (PMA) at 1-10 (Motion for Partial Stay of Proceedings Pending the Resolution of an Original Writ Proceedings Currently Pending in the Nevada Supreme Court (D-29)). The State filed an opposition on March 8, 2021, PMA at 11-20 (Opposition to Motion for Partial Stay of Proceedings Pending the Resolution of an Original Writ Proceedings Currently Pending in the Nevada Supreme Court (D-29)), and Mr. Guzman filed his reply the next day. PMA at 21-27 (Reply to Opposition to Motion for Partial Stay of Proceedings Pending the Resolution of an Original Writ Proceedings Currently Pending in the Nevada Supreme Court (D-29)), and matter was submitted to the district court for decision on the same day. PMA at 28-30 (Request for Submission).

6. On March 18, 2021 the Real Party filed its Answer to Petition for Writ of Mandamus. On today's date, March 29, 2021, I filed the Reply to Answer for Writ of Mandamus.

7. Also on March 29, 2021, at a status hearing, the district court orally denied the motion to stay and directed the Real Party to prepare the order. PMA at 39-41 (Transcript of Proceedings: Status Hearing). As of this filing the written order has not yet been signed and filed, but I will supplement this motion with a file-stamped copy of the district court's order after it has been filed.

8. Because it is unlikely (though not impossible) that this Court will issue a merits opinion or order before April 12, 2021, and because the object of the writ—mandamus directing the district court to vacate the April 12, 2021 deadline—will be defeated if a stay is not granted, and because the April 12, 2021 file date is 14 days away, Mr. Guzman is requesting this Court to issue a stay of the district court's April 12, 2021 filing deadline for Mr. Guzman's motion under NRS 174.098(1).

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9. This emergency motion for stay is brought in good faith and not solely for the purpose of delay or for any other improper purpose. I certify that to avoid irreparable harm relief is needed in less than 14 days. NRAP 27(e).



JOHN REESE PETTY

MEMORANDUM OF POINTS AND AUTHORITIES

NRS 174.098(1) states: “[a] defendant who is charged with murder of the first degree in a case in which the death penalty is sought may, not less than 10 days before the date set for trial, file a motion to declare that the defendant is intellectually disabled.” Mr. Guzman’s writ petition in this Court argues that because NRS 174.098(1) vests discretion *in the defendant* to file a motion to declare that the defendant is intellectually disabled and limits or cabins the exercise of that discretion only in so far as the motion must be filed “not less than 10 days before the date set for trial”, the district court manifestly abused its discretion by setting April 12, 2021 as the filing deadline for a motion under NRS 174.098(1) where, as here, trial is set to commence some five months later, on September 20, 2021.

Standards for granting a stay

In *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000), this Court identified four factors to be considered when deciding a motion for a stay:

- (1) Whether the object of the appeal or writ petition will be defeated if the stay is denied;
- (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied;
- (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and
- (4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

In *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 245, 251, 89 P.3d 36, 38 (2004), the Court added, “[w]e have not indicated that any one factor carries more weight than the others, although [*Hansen*] recognizes that if one or two factors are especially strong, they may counterbalance other weak factors.”

Where the first factor is especially strong because the object of the petition will be defeated without a stay, it takes precedence and the opposing party can defeat the stay motion *only* by “making a strong showing that appellate relief is unattainable.” *Id.* at 253, 89 P.3d at 40. Here the Real Party would have to demonstrate that the writ petition

“appears to be frivolous or the stay [is] sought purely for dilatory purposes.” *State v. Robles v. Nieves*, 129 Nev. 537, 546, 306 P.3d 399, 406 (2013); and *McCrea*, 120 Nev. at 253, 89 P.3d at 40 (noting that “if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the court should deny the stay”). In contrast, the moving party does not have to establish an absolute probability of success on the merits to be granted a stay. Instead, the moving party need only “present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” *Hansen*, 116 Nev. at 659, 6 P.3d at 987 (internal quotation marks and citation omitted).

Here the first and third factors are interrelated and are met: The object of the writ petition will be defeated, resulting in legal harm to Mr. Guzman if a stay is not granted by this Court because without a stay the filing deadline for a motion under NRS 174.098(1) will arrive on April 12, 2021, and it is this deadline that the writ seeks to have vacated. That harm is not abated by resort to an after the fact “good cause” standard for filing of an otherwise timely motion, *i.e.*, one that is filed at any time not less than 10 days before trial. “[A]bsent a strong

showing that the [writ] lacks merit or that irreparable harm will result [to the opposing party] if a stay is granted, *a stay should issue to avoid defeating the object of the appeal.*” *McCrea*, 120 Nev. at 251-52, 89 P.3d at 38 (italics added). Conversely, because trial is set to commence some five months later, the Real Party will not suffer irreparable harm if the stay is granted pending resolution of the writ petition.

The equities weigh heavily in favor of granting the stay. The Real Party has filed its notice of intent to seek the death penalty if Mr. Guzman is convicted of first-degree murder. The United States Supreme Court has held that the death penalty is not a sentencing option for convicted first-degree murder defendants who are intellectually disabled. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that the execution of intellectually disabled criminals did not “measurably advance the deterrent or the retributive purpose of the death penalty” and holding that “such punishment is excessive and that the Constitution places a substantive restriction on the State’s power to take the life of [an intellectually disabled] offender.”) (internal quotation marks and citation omitted). The purpose of NRS 174.098 is to give effect to *Atkins*’ holding. See *Ybarra v. State*, 127 Nev. 47, 53,

247 P.3d 269, 273 (2011) (noting that the United States Supreme Court left “to the State[s] the task of developing appropriate ways to enforce [this] constitutional restriction upon ... execution[s]” and, in Nevada, the Legislature “accomplished that task with the passage of NRS 174.098, which sets forth the procedure for raising [intellectual disability] claims in a capital case[.]”). Without a stay, that purpose may be defeated.

In the district court’s bench ruling it opined that the Petitioner will not prevail. But the district court views the writ petition as one asking the Supreme Court to tell the district court that has “no authority to manage their docket with pretrial orders.” PMA at 39. The writ petition does not make that claim. Rather, it asks for the district court’s compliance with the plain language of NRS 174.098(1) while constructing pretrial scheduling orders. The district court did not specifically find that the Real Party would suffer irreparable harm if the deadline was stayed. PMA at 40. The district court found that Petitioner, even if he misses the April 12, 2021 filing deadline, can “make a request later” if some “good cause” standard is met. *Id.* But, under NRS 174.098(1), a good cause showing is required for the filing of

a late motion, i.e., one filed within 10 days of trial or during the trial itself. A good cause standard does not apply to the timely filing of a motion under NRS 174.098(1), and a “timely” filing is any time not less than 10 days before the trial date. Because the district court’s understanding of the underlying issues is misplaced, but which informed its decision on the stay request before it, this Court should grant the stay pending resolution of the writ petition before the Court.

DATED this 29th day of March 2021.

JOHN L. ARRASCADA
Washoe County Public Defender

By: John Reese Petty
JOHN REESE PETTY
Chief Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of March 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows: Jennifer P. Noble, Chief Appellate Deputy and Marilee Cate, Appellate Deputy, Washoe County District Attorney's Office.

I certify that I served a copy of this document by e-mailing a true and correct copy thereof to:

Christopher J. Hicks
Washoe County District Attorney
Mark Jackson
Douglas County District Attorney

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