Case No. 83167

Supreme Court of Nevada

Zane M. Floyd,

Petitioner,

vs.

The Eighth Judicial District Court of the State of Nevada, In and For the County of Clark; and The Honorable Michael P. Villani, District Judge,

Respondent.

State of Nevada,

Real Party in Interest.

District Court Case No. 99C159897

Habeas Court Case No. A-21-832952-W

Petition for rehearing

DEATH PENALTY CASE

Zane Floyd petitions this Court for rehearing from its order denying his original petition for writ of mandamus and prohibition.[1]

Floyd seeks rehearing on the ground that this Court's decision overlooked and failed to apply NRS 34.820(3), and 176.505(2), statutory provisions that are directly controlling of the dispositive issue decided in the case. NRAP 40(a)(2). This Court also overlooked its decision in *Orion Portfolio Services 2, LLC v. Cnty of Clark ex rel. UMC of Southern Nevada*, 126 Nev. 397, 245 P.3d 527 (2010), which is directly controlling of the statutory construction issue regarding the meaning of the term "possible" in NRS 34.730(3)(b). NRAP 40(a)(2). Rehearing and reconsideration is required to maintain the uniformity of the Court's decisions. NRAP 40A(a).

---

[1] *Floyd v. Eighth Judicial District Court*, No. 83167, Order Denying Petition (filed February 24, 2022) ("Slip. Op.").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

State Cases

State Statutes

Other

I. Introduction

In his writ petition, Floyd argued that Chapters 34 and 176 of the Nevada Revised Statutes create a uniform requirement that an order and warrant of execution and a postconviction petition can only be heard by the court in the specific judicial department that entered the judgment of conviction and heard the prior postconviction petitions. This Court's decision acknowledges that Floyd's interpretation of the statutory provisions was correct as it concerns NRS 34.730(3)(b), slip op. at 4, which refers to the "original judge or court," and with respect to Chapter 176 as stated in *Rainsberger v. State*, 85 Nev. 22, 449 P.2d 254 (1969). Slip. Op. at 3.

Notwithstanding these acknowledgments, this Court still rejected Floyd's statutory construction arguments by holding that the term "the court" "lends itself to a broader interpretation, encompassing an entire judicial district, not a specific department within the judicial district." Slip. Op. at 3. However, the statutes at issue are not limited to the term "the court," but are more specifically directed to the *court in which the conviction was had*, NRS 176.495(1), 176.505(1), and the *court in which*

the death sentence was obtained, NRS 176.505(2), the latter term being the same one that was before this Court in *Rainsberger*.

Moreover, while acknowledging that Floyd's department specific interpretation of NRS 34.780(3)(b) was correct, the Court relied on the "whenever possible" language in the statute to postulate that "there may be circumstances when a postconviction habeas petition will not be 'assigned to the original judge or court.'" Slip. Op. at 4. But this Court did not actually apply statutory construction analysis to the term "possible," and the Court's interpretation of that term in other published decisions is irreconcilable with its decision in Floyd's case.

Floyd seeks rehearing on the ground that this Court's decision overlooked NRS 34.820(3), another statute that refers specifically to the judge who stayed the execution and heard the prior petitions for postconviction relief. This statutory provision is consistent with the other ones cited by Floyd in Chapters 34 and 176 which refer to a specific judicial department rather than any court in the county.

II. Argument

A. This Court overlooked NRS 34.820(3) which requires a department specific interpretation of the statutes in Chapters 34 and 176.

Floyd seeks rehearing on the ground that this Court overlooked NRS 34.820(3) which controls both the authority of the district court to issue an order and warrant of execution as well as to decide a postconviction petition. That statute provides:

> If the petitioner has previously filed a petition for relief or for a stay of execution in the same court, the petition must be assigned to the judge or justice who considered the previous matters.

Floyd previously filed a motion for stay of execution in Department 5 of the Eighth Judicial District Court on August 31, 2000. Department 5 was also the judicial department that adjudicated Floyd's first and second postconviction petitions. NRS 34.820(3) and 34.730(3)(b) both require that Floyd's instant habeas petition be heard in Department 5.

NRS 34.820(3) also draws a distinction between the term "court" and the modifying terms used in Chapters 176 and 34 to designate a specific judicial department. As stated above, this Court's entire decision is based on its interpretation of the term "the court" as it is

used in other statutory provisions. *See* Slip. Op. at 3. But Floyd's argument was not based on the term "the court." Instead, his argument was based on the specific phrasing in NRS 176.495(1) and 176.505(1), which refers to the court *in which the conviction was had*, and NRS 176.505(2), which refers to the court *in which the sentence of death was obtained*. This Court's decision overlooked and failed to acknowledge the phrasing in the statutes that modify the term "court" which requires the department specific interpretation that Floyd urges.

Finally, this Court's precedents dictate that it will only decide the meaning of a statute by reference to other statutory provisions if it first concludes that the provision is ambiguous. *See, e.g.*, *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000). But this Court purported to reject Floyd's arguments based on plain meaning when its corresponding rationale was based on the definition of the term "the court" as used in other statutes. *See* Slip. Op. at 3. In fact, this Court specifically relied on the definition of "the court" that it acknowledges was *not* meant to apply to NRS 176.495 and 176.505. Slip. Op. at 3 (citing 1967 Nev. Stat., Ch. 523, § 246, at 1434 and acknowledging that the Legislature did "not specifically apply[ ]

that definition to NRS 176.495"). It was error for this Court to refer to other definitions of "the court" as used in other statutory provisions that do not have the specific modifiers found in NRS 176.495 and 176.505 while also concluding the plain meaning of the terms was contrary to Floyd's interpretation of the statutory provisions.

B. This Court overlooked NRS 176.505(2) which was the same statutory provision before the Court in *Rainsberger*.

Rehearing is also required because this Court overlooked and failed to acknowledge that NRS 176.505(2) is the same statutory provision that existed when this Court decided in *Rainsberger v. State*, 85 Nev. 22, 449 P.2d 254 (1969), that the statutory scheme required a department specific interpretation. *Rainsberger* cites to former NRS 176.495(2), which was repealed for unrelated reasons after the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). NRS 176.505(2) was the companion provision that applied in guilty plea cases along with former NRS 176.495(2) when this Court decided *Rainsberger*. NRS 176.495 and 176.505 were both passed at the same time in 1967 by the Legislature. Sections one of 176.495 and 176.505 apply in cases where there was a jury verdict, and both provisions refer to the court in which

the conviction was had. Sections two of the same statutory provisions apply in guilty plea cases, and both provisions were before this Court when it decided *Rainsberger*.

The error in this Court's attempt to distinguish *Rainsberger* is that former NRS 176.495(2) must be interpreted consistently with NRS 176.505(2). For this Court's decision to be correct, it would have to be the case that the Legislature meant to designate a department specific court in section 176.495(2), but then specifically intended not to do so in section 176.505(2). This is illogical and irrational as both provisions must be read *in para materia* with each other.

Former section 176.495(2) deals with the issuance of a new execution warrant, and section 176.505(2) deals with the timing of the issuance of the warrant following appeal. Those two provisions must be read consistently with one another. It is tenuous to suggest that a specific department must issue the warrant but that the corresponding timing provision of section 176.505(2) refers to any district court in the county. This Court did not suggest there was any such inconsistency in the statutory provisions in *Rainsberger*, and the fact that this Court did not previously note a contradiction shows that there is not one and that

the provisions both refer to the same thing, i.e., the specific court in the judicial department where the death sentence was obtained.

Moreover, if the term "the court in which the death sentence was obtained" in NRS 176.505(2) is department specific, as it must be given that this statute was in existence when this Court decided *Rainsberger*, then it also must be the case that the term "the court in which the conviction was had" is also a department-specific reference. As explained above, the reason this Court did not address this issue is because it only interpreted the term "the court" rather than the modifiers to that term (i.e., "in which the conviction was had," or "in which the death sentence was obtained") that require a department specific interpretation.

The only difference between sections one and two of NRS 176.495 is that the first section deals with jury verdict cases and section two deals with guilty plea cases. *Compare* NRS 176.495(1) (referring to "the court in which the conviction was had"), *with* former NRS 176.495(2) (referring to "the district judge before whom the confession or plea was made, or his successor in office"). The Court did not suggest any rational basis for the Legislature to specifically intend for jury verdict

cases to go to any district court in the county but for guilty plea cases to be confined to a specific department of the court.[2] This Court's reference to the "materially different language," slip. op. at 4, in the two provisions therefore does not support its conclusion that the Legislature intended for department specific assignments in one type of case but not in others.

C. This Court's interpretation of the term "whenever possible" is contrary to its construction of the same term in prior published decisions.

Finally, rehearing is required because this Court's application of the term "whenever possible" in NRS 34.730(3)(b) is inconsistent with this Court's construction of that term in *Orion Portfolio Services 2, LLC v. Cnty of Clark ex rel. UMC of Southern Nevada*, 126 Nev. 397, 245 P.3d 527 (2010). In *Orion*, this Court interpreted NRS 332.185(1), which provides that "all sales of personal property of the local government *must be made*, as nearly as possible, under the same conditions and

---

[2] In three-judge panel sentencings, the other two district judges were selected from counties other than the one in which the defendant was charged, so this is not a situation where the difference in language was necessary to distinguish between three judges sitting in the same county.

limitations as required by this chapter in the purchase of personal property." *Id*. at 403, 245 P.3d at 531 (emphasis in original). The term "possible" was "defined as 'that may or can be, exist, happen [or] be done.'" *Id*. at 405, 245 P.3d at 532 (citing *Webster's New Universal Unabridged Dictionary* 1283, 1509 (1996)) (alterations in original). Applying this interpretation, this Court held that a local government must follow the competitive bidding rules of NRS Chapter 32. *Id*. at 399, 245 P.3d at 529; *see id*. at 405, 245 P.3d at 533.

This Court's interpretation of the term "possible" in *Orion* requires strict adherence to NRS 34.730(3)(b). This Court referred to the Eighth Judicial District Court rules that generally permit the assignment and reassignment of cases as the reason for the reassignment of Floyd's case to Department 17. *See* Slip. Op. at 4. It may be inconvenient to follow the statute when a contrary court rule leads to the subsequent reassignment of a case to another department, but it is undisputed that the terms of the statute control. NRS 3.020 (providing for jurisdiction of judges in districts with more than one judicial department "under such rules as may be prescribed by law, and the district judges therein may make additional rules, *not inconsistent*

with the law, which will enable them to transact judicial business in a convenient and lawful manner" (emphasis added)); *see, e.g.*, *Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 85, 140 P.2d 953, 956 (1943) (statutes passed by legislature control over court rules to the extent there is an inconsistency). The existence of such a court rule here providing for the transfer of Floyd's case to Department 17 does not mean it impossible for Department 5 to adjudicate this case as required by statute.

This Court's decision contravenes *Orion* as it renders the entire clause of NRS 34.730(3)(b) superfluous. *See Orion*, 126 Nev. at 404, 245 P.3d at 532. There will always be a reason why a case is transferred to a particular department. It cannot be the case that the statute was only meant to be followed when the transfer of a case was an accident or was otherwise unexplained. In *Orion*, this Court rejected the suggestion that a local government could deviate from the statute "as a matter of convenience without regard to the stringent statutory competitive bidding requirement." *Id.* at 405, 245 P.3d at 533. So too here. This Court's interpretation of the term "possible" in Floyd's case means that NRS 34.730(3)(b) will *never* be followed unless the case already happens

to be in the correct judicial department. "Whenever possible" does not mean that the statute need not be followed if there is a good reason for not doing so. Floyd's case can be transferred to Department 5 so the statute requires that it must be under *Orion*.

In summary, applying the plain meaning of the statutes above in Chapters 34 and 176 must result in the conclusion that the Legislature uniformly requires execution warrants and habeas petitions to be heard by a particular department of the district court. This Court's contrary decision overlooked NRS 34.820(3), overlooked NRS 176.505(2) as applied in *Rainsberger*, and its interpretation of the term "possible" in NRS 34.730(3)(b) is irreconcilable with *Orion*.

D. This Court overlooked legislative history showing that Chapter 34 was intended to have postconviction matters assigned to the same judicial department that previously handled the case.

Even if this case was not controlled by the plain meaning, legislative history surrounding the statutory provisions in Chapter 34 make clear that the Legislature had a department specific meaning for the terms. At the very least, the discussion above should have prompted this Court to conclude the statutory terms were ambiguous and to

review relevant legislative history to discern legislative intent. *State Farm*, 116 Nev. at 294, 995 P.2d at 485. As explained below, such a review demonstrates that the Legislature was referencing a particular department of the court rather than any court in the county.

When NRS 34.730(3)(b) and NRS 34.820(3) were passed by the Legislature, it was specifically intended that a postconviction case remain with the trial court that had the original case. Both the proponents of the legislation and those who had reservations about the relevant provisions understood it as requiring postconviction petitions to be heard by the particular judge who entered the judgment of conviction, not just any court in the county. David Sarnowksi from the Nevada Attorney General's Office testified, "The best forum for consideration of any claim is in the original trial court." *AB 227, An Act that Makes Various Changes Relating to Post-Conviction Relief: Hearings before the Assembly Judiciary Committee*, 66th Session 5 (1991) [hereinafter *Assembly Hearing*] (testimony of David Sarnowski). Former district judge Michael Fondi testified in favor of the legislation for the same reason. *AB 227, An Act that Makes Various Changes Relating to Post-Conviction Relief: Hearings Before the Senate Judiciary*

Committee, 66 Session 3 (1991) [hereinafter *Senate Hearing*] (testimony of the Honorable Michael Fondi). On the other side, John Lambrose, a member of the Study Committee on the legislation, and Assemblyman Bernie Anderson expressed concerns about the fairness of having a postconviction petition decided by the same judge who presided over the trial. *Assembly Hearing*, at 4-6 (testimony of John Lambrose and comments by Bernie Anderson). Janet Bessemer from the state public defender's office echoed the same concern, insisting "in her experience, the best reviews were done in courts other than where the case was originally heard." *Senate Hearing*, at 4 (testimony of Janet Bessemer).

This Court's interpretation of the relevant provisions of Chapter 34 is inconsistent with the understanding of the Study Committee and the members of the Assembly and Senate Judiciary Committees. Under this Court's interpretation, the benefits envisioned by the proponents and the concerns expressed those against the legislation would have both been entirely speculative. The one thing both sides had in common is that no one suggested the provisions were merely aspirational unless a court rule provided for reassignment to another department of the court. And no member of the assembly or senate judiciary committees

suggested the legislation would only be followed unless a court rule provided for a different outcome.

III. Conclusion

For the foregoing reasons, Floyd requests that this Court grant his petition for rehearing, grant his petition for writ of mandamus, and remand with instructions that the criminal and habeas cases be transferred to Department 5 for further proceedings.

Dated this 14th day of March, 2022.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ David Anthony
David Anthony
Assistant Federal Public Defender

/s/ Brad D. Levenson
Brad D. Levenson
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

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 processing program in 14-point font size and Century Schoolbook font;

I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 2,821 words.

/s/ David Anthony
David Anthony
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Alexander G. Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Sara Jelinek
An Employee of the
Federal Public Defender