

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 **No. 82690**

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8 **NARCUS WESLEY**

9 Appellant,

10 vs.

11 **THE STATE OF NEVADA**

12 Respondent.

13 Appeal from Denial of Appellant's Petition for Post-Conviction Habeas Relief

14 **APPELLANT'S OPENING BRIEF**

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I.

ROUTING STATEMENT

Pursuant to NRAP 17, direct appeals from an appeal of a denial of post-conviction relief are presumptively assigned to the Court of Appeals if they challenge a "conviction or sentence for offenses that are not Category A felonies." Because Appellant here was convicted of two Category A felonies, this case is not presumptively assigned to the Court of Appeals and should be retained by the Supreme Court pursuant to NRAP 17.

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II.

JURISDICTIONAL STATEMENT

Appellant brings this appeal asking this Court to reverse the District Court's Findings of Fact and Conclusions of Law which denied his Petition for Writ of Habeas Corpus relief (Post-Conviction).

In this case, the District Court entered its Findings of Fact and Conclusions of Law on February 23, 2021, which denied the requested relief. AA 1269-1277. The Notice of Entry of Order was filed on February 24, 2021. AA 1278. Appellant filed a timely Notice of Appeal on March 24, 2021. AA 1267. NRS 34.575(1) and Section 4 of Article 6 of the Nevada Constitution grant Appellant the right to appeal the Court's Order, and as such, this Court has jurisdiction to hear the present appeal. *See also* Nevada Rules of Appellate Procedure Rule 22.

III.

STATEMENT OF THE CASE

On August 1, 2007, the State of Nevada filed an INFORMATION against Appellant Narcus Wesley ("Wesley"). AA 1. Wesley was charged with Counts 1 through 18. AA 1-9.

Narcus Wesley appeared for a Jury Trial beginning April 9, 2008. AA 10. Jury selection began that day. AA 14. The State called witnesses including Curtis Allen Weske (AA 16), Ryan Tognotti (AA 896), Clint Tognotti (AA 913), Linda Ebbert

1 (AA 925), Aitor Eskandon (AA 929), Kyle Slattery (AA 945), Jennifer Ayers (AA
2 949), Grant Hieb (AA 980), Rodrigo Pena (AA 987), Anthony Niswonger (AA 995),
3
4 Ken Timothy (AA 1001), Bryan Harrison (AA 1006),

5 The Defense called witnesses Donna J. Lamonte (AA 81), Narviez Wesley
6 (AA 99), Angela Wesley (AA 107), and Narcus Wesley (AA 109), pertaining to a
7
8 motion to suppress heard during the trial setting, but did not call any witnesses in the
9
10 defense's case.

11 Closing Arguments took place on April 17, 2008. AA 1089. The jury returned
12
13 its verdict on April 18, 2008. AA 1191. The jury found Wesley guilty of all Counts.
14
15 AA 1191-1196.

16 Sentencing was initially held on July 3, 2008. AA 1197. A Judgment of
17
18 Conviction was entered pursuant to that first sentencing hearing on July 18, 2008.
19
20 AA 1218. However, a re-sentencing hearing was held September 23, 2008. AA 1223.
21
22 An Amended Judgment of Conviction was entered after that second sentencing
23
24 hearing on October 8, 2008. AA 1229.

25 Wesley filed an initial Petition for Writ of Habeas Corpus on September 9,
26
27 2010, which was denied on January 4, 2011. Wesley also filed a Direct Appeal which
28
29 was denied on March 11, 2011 (Case No. 52127). Wesley also initially appealed his
30
31 denied first Post-Conviction Habeas Petition, which was denied on January 16, 2013
32
33 (Case No. 57473).

1 Wesley filed an additional Pro Per Petition for Writ of Habeas Corpus on
2 November 12, 2020. AA 1237. Therein, Mr. Wesley made several arguments. First,
3
4 he argued that his conviction was invalid because he did not use a deadly weapon but
5 was convicted for deadly weapon crimes. AA 1239. Wesley also argued that the jury
6 was improperly instructed on the deadly weapon enhancements, which constituted
7 plain error. AA 1240. Wesley specifically complained that he was convicted of using
8 a deadly weapon without a requirement of proof that the weapon could cause
9 substantial bodily harm or death. AA 1241. Wesley complained that Instruction 36
10 improperly relieved the State of its obligation to prove a firearm is a deadly weapon.
11
12 AA 1243.

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15 The State responded on December 18, 2020. AA 1245. The State argued that
16 the Petition was procedurally barred. AA 1247. The State argued that the Petition was
17 successive and should not be heard. AA 1249. The State argued that Wesley failed to
18 demonstrate good cause or prejudice to overcome those apparent procedural bars. AA
19
20 1250.

21
22 A hearing was set for January 14, 2021. AA 1254. The District Court
23 conducted the hearing with the State present, but not with Narcus Wesley present to
24 argue on behalf of his own petition. AA 1255. The Court noted that "he's in pro per
25 and I don't see in the order to transport and I don't see anything filed by the opposing
26 party." AA 1256.
27
28

1 The Court summarily denied the Petition without Wesley present, finding that:
2 "So I've reviewed the pleadings in this. We'll go on the record. Note that Ms. Wong
3 is here on behalf of the State. Mr. Wesley is not present; he's in custody of NDOC
4 and was not transported. The Court has reviewed the pleadings in this case; it will not
5 take argument from the State. And based on the pleadings, I find that the State's
6 response is compelling. I agree that Mr. Wesley should have submitted all the
7 arguments in this writ when his initial writ was filed. And so this petition will be
8 denied by the Court." AA 12557.
9

10
11
12 Apparently, Mr. Wesley attempted to file a Reply in support of his pending
13 Petition, in advance of the District Court's hearing on the matter. AA 1258. Therein
14 Mr. Wesley made a pro per attempt to address the State's arguments. AA 1259-1265.
15 Wesley argued that his claims were not time-barred. AA 1259. Wesley rested his
16 argument upon his alleged actual innocence as to the firearm charge. AA 1261.
17

18
19 It must be noted that Mr. Wesley's postage envelope for this pleading was dated
20 January 5, 2021, and that he signed it January 4, 2021, but that for an unexplained
21 reason it was not filed by the District Court until more than three weeks later on
22 January 26, 2021, after the hearing had occurred (outside the presence of Wesley).
23 AA 1258, 1265, 1266.
24

25
26 Findings of Fact and Conclusions of Law were then filed on February 23, 2021.
27 AA 1269. Notice of Entry of that Order was filed on February 24, 2021. AA 1278.
28

1 Retained counsel then entered the case and filed a Notice of Appeal on behalf of Mr.
2 Wesley on March 24, 2021. AA 1267. This Opening Brief now follows.
3

4 **IV.**

5 **STATEMENT OF THE ISSUES**

6
7 1. Whether the District Court abused its discretion when it resolved
8 Wesley's Pro Per Habeas Petition without his presence?

9
10 2. Whether the District Court abused its discretion when it overlooked
11 Wesley's Pro Per Reply Brief stating his alleged grounds justifying the successive
12 petition, and did not re-open the hearing on the subject matter of the petition once it
13 had filed Wesley's Pro Per Reply Brief?
14

15 **V.**

16 **STATEMENT OF THE FACTS**

17
18 This case has appeared twice before this Court elsewhere, dealing directly with
19 the underlying facts of this case. Appellant need not extensively re-state the entirety
20 of those facts here, as the issues on appeal are limited.
21

22 Narcus Wesley was convicted on Eighteen Counts after a Jury Trial before the
23 Eighth Judicial District Court. These counts involved robbery, burglary, kidnapping,
24 and sexual offenses, all of which with a deadly weapon.
25

26 One question at trial, which appears relevant to Wesley's attempt to litigate
27 certain issues on his Pro Per Habeas Petition, dealt with whether it had been
28

1 established that Wesley utilized a firearm in the offense to establish the "deadly
2 weapon" prong of the various offenses. This argument was addressed at the closing
3 of trial, with the State arguing that the deadly weapon was credibly identified by
4 witnesses without a motive to lie, whereas Wesley allegedly had a motive to lie. AA
5 1105. The defense had argued about Wesley's culpability (as compared to a co-
6 defendant) and that the evidence that Wesley actively used a firearm was weak. AA
7 1107-1108.

11 **VI.**
12 **LEGAL ARGUMENT** .

14 The right to seek the remedy of habeas corpus is protected by the Nevada
15 Constitution. Article 1, Section 5, states: "The privilege of the writ
16 of Habeas Corpus, shall not be suspended unless when in cases of rebellion or
17 invasion the public safety may require its suspension." As late as 1967, however, no
18 statutory framework existed to govern the procedure for obtaining post-
19 conviction relief, though the constitutional right to petition for habeas corpus relief
20 was recognized in Chapter 34 of the NRS. That year, our Legislature enacted the
21 Nevada Criminal Procedure Act ("1967 Act"), providing for procedures to obtain
22 post-conviction relief, which were ultimately codified at NRS Chapter 177
23 ("Chapter 177 remedy"). Because the drafters of the 1967 Act intended "to offer but
24 one remedy" in post-conviction, they designated the Chapter 177 remedy as

1 "habeas Corpus" and made it the exclusive means of collaterally attacking the
2 validity of a conviction or sentence. *Pellegrini v. State*, 117 Nev. 860, 870 (Nev.
3 2002), abrogated on other grounds by *Rippo v. State*, 134 Nev. 411, 423 n.12, 423
4 P.3d 1084, 1097 n.12 (2018).

5
6 No person may be deprived of life, liberty, or property, without due process of
7 law. *See* Fifth Amendment to the United States Constitution. Procedural due process
8 is defined as a fundamental requirement of fairness requiring not only the right to
9 present evidence but also a reasonable opportunity to know the claims of the
10 opposing party and to meet them. Procedural due process mandates that defendant
11 receive proper notice and have opportunity to be heard. *In re American Aluminum*
12 *Window Corp.*, 15 B.R. 803

13
14 The Sixth Amendment guarantees criminal defendants the right to represent
15 themselves at trial. *United States v. Spangle*, 626 F.3d 488, 494 (9th Cir. 2010). A
16 *pro se* defendant must be allowed to control the organization and content of his own
17 defense, to make motions, to argue points of law, to participate in *voir dire*, to
18 question witnesses, and to address the court and the jury at appropriate points in the
19 trial. *McKaskle v. Wiggins*, 465 U.S. 168, 174, 104 S. Ct. 944, 949 (1984).

20
21 Relatedly, due process is violated when *pro se* defendants are denied
22 meaningful access to telephone or current research materials. *Milton v. Morris*, 767
23 F.2d 1443, 1446-1448 (9th Cir. 1985). Likewise, a *pro se* defendant's right to
24

1 proceed in self-representation is violated when the court and the prosecution
2 repeatedly excluded the Defendant from arguing points of law and by excluding the
3 defendant from plea negotiations. *Oses v. Massachusetts*, 961 F.2d 985, 986 (1st Cir.
4 1992).

5
6 Even when it comes to proceedings other than criminal trial, it is still important
7 that a convicted person's constitutional right of access to the courts, and an ability to
8 pursue the protection of constitutional rights and due process of law, be protected.
9 Such protections are a "vital concern." *Sullivan v. District Court*, 111 Nev. 1367,
10 1372 (Nev. 1995). Nevada has built infrastructure to effectuate this constitutional
11 access for inmates: "Nevada's system of satellite law libraries and inmate law clerks
12 provides inmates with a constitutional basis for meaningful access to the
13 courts." *See Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1991)." *Miller v.*
14 *Evans*, 108 Nev. 372, 374 (Nev. 1992).

15
16 The issues on this Appeal are very limited. Mr. Narcus Wesley is imprisoned
17 for a very long sentence in Nevada's prison system. He sought access to the Court's
18 by filing a Petition for Habeas Relief, pro per. He set forth his arguments in that
19 document.

20
21 The State then raised competing arguments: that Wesley's Petition was
22 procedurally barred. AA 1271. This put Wesley on direct notice that he needed to
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1 respond to the State's argument and defend his access to the Court (as it related to his
2 Habeas Petition) by attempting to establish good cause and prejudice. AA 1274.
3

4 Wesley attempted to respond to these arguments by filing a Reply Brief, which
5 he mailed for filing well in advance of the hearing, on January 5, 2021. The postage
6 stamp is for that date, so it can be assumed it was mailed by the prison approximately
7 on the date of January 5, 2021. Despite this mailing more than three weeks before the
8 hearing, the Court did not file the document until after the hearing, and thus the Court
9 did not consider Wesley's pro per Reply Arguments.
10

12 Second, the District Court held a hearing on the matter, with the State present,
13 but without the Pro Per movant present. Either the Court, or the State, could have
14 directed that Wesley be transported so he could enjoy his access to the Courts by at
15 least being present for the hearing and make arguments on his own behalf. Instead,
16 the Court conducted a one-party hearing and summarily denied Wesley's relief.
17

19 Third, the Court then did receive and file the Pro Per reply submitted by
20 Wesley well in advance of entering its Findings of Facts and Conclusions of law. The
21 Court could have re-opened the hearing on the Petition *sua sponte* in order to make a
22 record of considering the arguments Wesley made in his pro per Reply, but the Court
23 declined to do so.
24

26 Appellant concedes that the appropriate standard of review for these issues,
27 which pertain more so to the Court's management of its hearing rather than the subject
28

1 matter of Wesley's Pro Per Petition, should be reviewed for Abuse of Discretion.
2 “*Trucking, LLC v. Versa Prod. Co., Inc.*, 136 Nev., Adv. Op. 72, 475 P.3d 397, 403
3 (2020) (providing that "courts have inherent authority to manage the judicial process
4 so as to achieve the fair, orderly, and expeditious disposition of cases").
5

6
7 Nevertheless, Appellant Wesley asks this Court to find that the District Court
8 abused its discretion when it: (1) held the hearing on his Petition without him present,
9 but with the State present; and (2) failed to re-open the hearing after it filed the Pro
10 Per Reply Brief which was mailed on January 5, 2021. These decisions constituted
11 an abuse of discretion, in light of the counterbalance of the needs to provide fair
12 access to the courts for convicted persons. Appellant also expresses concerns over
13 the fact that a pro per filing such as his, which may in this instance and in many other
14 instances be a last gasp chance to raise issues for judicial review, are to be resolve
15 with one part present for the scheduled hearing, and the other absent, which creates
16 an effectively Ex Parte hearing in favor of the State.
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21 While it may be in the interests of judicial economy not to transport prisoners
22 for this purpose (where they themselves have failed to secure an Order to do so), the
23 reality is that many prisoners have difficulty engaging with the judicial system, and
24 that a more favorable rule which would, in general, require their presence at hearings
25 which would act to finally resolve (against the absent pro per party) their asserted
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1 rights, would better advance the constitutional access to the Courts which is required
2 to be provided.
3

4 Appellant Wesley, for these reasons, asks this Court to hold that, by resolving
5 his pro per Petition in this manner, the Court impermissibly effectively denied Mr.
6 Wesley constitutionally sufficient access to the Courts.
7

8 **CONCLUSION**

9 Appellant Wesley thus asks that this case be reversed and remanded so that
10 Mr. Wesley may appear at a hearing on his Petition, that his pro per Reply Brief may
11 be considered, and for further proceedings consistent with that relief.
12
13

14 Dated this 24th day of September 2021.

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and providing a copy to the following by virtue of e-filing with the Supreme Court:

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Dated this 24th day of September, 2021.

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Dated this 24th day of September, 2021.

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