

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEANDRE VALENTINE,  
Petitioner,  
v.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
COUNTY OF CLARK, THE  
HONORABLE JACQUELINE  
BLUTH, DISTRICT COURT JUDGE,  
Respondent,  
THE STATE OF NEVADA,  
Real Party in Interest.

) No. Electronically Filed  
) (Dist Ct. No. 16-316081-1) May 27, 2022 09:19 a.m.  
) Elizabeth A. Brown  
) Clerk of Supreme Court

**PETITION FOR WRIT OF PROHIBITION/MANDAMUS**

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

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KEANDRE VALENTINE,	)	No.
	)	(Dist Ct. No. C-16-316081-1)
Petitioner,	)	
	)	
v.	)	
	)	
THE EIGHTH JUDICIAL DISTRICT	)	
COURT OF THE STATE OF NEVADA,	)	
COUNTY OF CLARK, THE	)	
HONORABLE JACQUELINE	)	
BLUTH, DISTRICT COURT JUDGE,	)	
	)	
Respondent,	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Real Party in Interest.	)	

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**PETITION FOR WRIT OF PROHIBITION/MANDAMUS**

**(Relief Prior to 06/16/22)**

COMES NOW the Petitioner, KEANDRE VALENTINE, by and through his counsel, Chief Deputy Public Defenders, SHARON G. DICKINSON and TYLER GASTON, and pursuant to NRAP 21 (a), respectfully petitions this Honorable Court for a Writ of Mandamus directing the district court to set Keandre Valentine's case for trial, as allowed by *Valentine v. State*, 135 Nev. 463 (2019). Alternatively, Keandre Valentine asks this Honorable Court to issue a Writ of Prohibition, prohibiting the district court from conducting any further evidentiary

proceedings and simply set a trial date. This Petition is based upon the Memorandum of Points and Authorities and the Appendix on file.

DATED this 26<sup>th</sup> day of May, 2022.

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Tyler C. Gaston  
TYLER C. GASTON, #13488  
Chief Deputy Public Defender

By /s/ Sharon G. Dickinson  
SHARON G. DICKINSON, #3710  
Chief Deputy Public Defender

**AFFIDAVIT OF TYLER C. GASTON**

STATE OF NEVADA    )  
  ) ss:  
COUNTY OF CLARK    )

TYLER C. GASTON, being first duly sworn, deposes and says:

1. That affiant is an attorney duly licensed to practice law in the State of Nevada and is the Chief Deputy Clark County Public Defender assigned to represent KEANDRE VALENTINE in this matter.

2. I am more than 18 years of age and am competent to testify to the matters stated herein. I am familiar with the procedural history of this case and have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.

3. KEANDRE VALENTINE authorized me to file the instant motion together with a Petition for Writ of Prohibition/Mandamus.

4. Respondent is the Honorable Jacqueline M. Bluth, the District Court Judge presiding over Department VI of the Eighth Judicial District Court of the State of Nevada.

*/s/ Tyler C. Gaston*  
TYLER C. GASTON

SUBSCRIBED and SWORN to before me  
this 26<sup>th</sup> day of May, 2022.

*/s/ Carrie M. Connolly, No. 94-2602-1, Exp 10/11/25*  
NOTARY PUBLIC in and for said  
County and State

## ROUTING STATEMENT

Keandre Valentine's petition is not presumptively assigned to the Court of Appeals because his grievances arise from an order issued by the Nevada Supreme Court in *Valentine v. State*, 135 Nev. 463 (2019), remanding his case to district court for an evidentiary hearing.<sup>1</sup> Keandre seeks relief because: (1) delays in the completion of the evidentiary hearing violated his right to a speedy appeal and/or trial; and (2) the district court directed Keandre to reveal privileged information to the prosecutor by ordering his expert to create discovery for the State. *Court Exhibits 1 and 2 from 05/03/22 hearing.*

The matters presented in this Petition involve issues of first impression of constitutional and statewide importance,<sup>2</sup> as follows:

- (1) The rights to a speedy appellate process and speedy trial apply throughout a remand during the course of the appeal;

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<sup>1</sup> Keandre's convictions were vacated on appeal and the case was remanded to district court for an evidentiary hearing on his fair cross-section challenge. The charges against him involved 11 category B felonies and 3 category E felonies. Two of the felonies were reversed.

<sup>2</sup> NRAP 17 (a)(11), (12).

(2) A court order directing the defense expert to create discovery for the prosecutor violates due process and the defendant's protections as privileged information; and

(3) Prosecutorial misconduct occurs when the prosecutor seeks an order for privileged information from the defense expert.

Another reason for the Nevada Supreme Court to handle this Petition is because several cases are in conflict as to the procedures used for a remand back to district court. In *Afzali v. State*, 130 Nev. 313 (2014), and *Mungai v. State*, Case No. 75247<sup>3</sup>, this Court retained appellate jurisdiction during the remand back to district court for a fair cross-section hearing and set status check dates. In the case at bar and in *Simms v. State*, Case No. 78999, the Court decided all the appellate issues except for the fair cross-section challenge, vacated the convictions, and remanded with instructions but no deadlines. In *Ousley v. State*, Case No. 79140, the Court remanded the case back for an evidentiary hearing without deciding any issues in the appeal. In *Ousley*, if the district court finds no systematic exclusion, then *Ousley* must file a new appeal and re-appeal the undecided issues in his original appeal.

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<sup>3</sup> See *Mungai* at III:465-704.

Because no guidelines were issued in Keandre's case, after more than two years from the issuance of the remittitur, the evidentiary hearing has not been completed. Because there are no appellate rules (NRAP), district court rules, or statutes governing the procedures for a remand back to district court in a criminal case during the appellate process, Keandre is without recourse and has filed this Petition.

### **RELIEF SOUGHT**

Keandre asks this Court to intervene and direct the district court to set his case for trial due to the violations of due process, violations of privileged information, prosecutorial misconduct, and violations of his right to a speedy appeal and/or trial.

Alternatively, Keandre Valentine asks this Honorable Court to prohibit the district court from conducting any further evidentiary proceedings and simply set Keandre's case for trial as allowed in *Valentine*.

Keandre asks for this Honorable Court's intervention by or before 06/16/22. If this Honorable Court would like additional time to study the issues in this Petition, then Keandre asks the Court issue an order and he will obtain a stay from the district court. At the 05/03/22 hearing, the district court appeared to be inclined to grant a stay.

Also, if the Honorable Court concludes the order filed on 05/18/22 is an appealable order then Keandre will need to file a notice of appeal by 06/16/22. However, Keandre believes it is not a final appealable order under NRAP 177.015(b) and *Harris v. State*, 131 Nev. 551, 556 (2015).

Based on the above, Keandre prays for an answer by 06/16/22.

### **OVERVIEW OF ARGUMENTS AND RELIEF SOUGHT**

In *Valentine v. State*, 135 Nev. 463 (2019), this Court remanded his case to district court for an evidentiary hearing on his challenge to the jury selection process. The evidentiary hearing has yet to be completed. During this more than two year timeframe, violations of due process, violations of privileged information, prosecutorial misconduct, and the right to a speedy appeal and/or trial make it unlikely Keandre will receive a fair resolution and the remedy is for a new trial to be ordered.

### **STATEMENT OF THE ISSUES**

- I. A court order directing the defense expert to create discovery for the prosecutor violates due process and the defendant's protections under the work-product doctrine.
- II. Prosecutorial misconduct occurs when the prosecutor seeks an order for privileged information from the defense expert.



III. The rights to a speedy appellate process and speedy trial apply throughout a remand to district court during the course of the appeal.

### **STATEMENT OF FACTS AND PROCEDURAL POSTURE**

On 06/29/16, the State filed an Indictment charging Keandre Valentine with 14 felony counts involving several different victims and the crimes of robbery with use of a deadly weapon, attempt robbery with a deadly weapon, burglary while in possession of a firearm, possession of personal identifying information, and possession of credit cards without consent. III:705-10. The crimes occurred at different times during one weekend.

Keandre's 10-day jury trial began on 07/24/17 and concluded on 08/04/17, with the jury returning guilty verdicts on all counts. I:013-22;058.

On 09/28/17, District Court, Department II, sentenced Keandre to an aggregate term of 18 to 48 years. I:013-22.

Keandre filed a notice of appeal on 11/06/17. III:711-15.

Upon direct appeal of the judgment of conviction, on 12/19/19, the Nevada Supreme Court vacated Keandre's convictions, reversed counts 4 and 9, and remanded Keandre's case to district court for an evidentiary

hearing on his fair cross-section challenge. I:024-41. The remittitur issued on 01/13/20. I:043-45.

Keandre's evidentiary hearing was continued several times due to various reasons and remains unfinished as of today.<sup>4</sup> *Minutes*:I:082-97.

Although District Court, Department VI, began an evidentiary hearing on 02/07/22, the court never scheduled a follow-up date for the completion of the hearing until Keandre filed a motion seeking an order granting a new trial based on violations of due process, prosecutorial misconduct, and the right to a speedy appeal and/or trial. I:001-231;II:231-268. At the hearing on the motion, the court scheduled the completion of the hearing for 06/20/22. II:279-99.

But first the court heard Keandra's motion seeking an order for a new trial. I:279-99. Keandre argued that his right to due process and his rights to a speedy appeal and/or trial were violated by the delay in the hearings for more than two years. Keandre also argued that his due process rights were violated by the court's 02/07/22 discovery order directing his expert to create discovery for the prosecutor. I:003-7;II:279-99.

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<sup>4</sup> The district court minutes for the hearings held after 12/16/21 have not posted. However, Keandre has included the transcripts from the three subsequent hearings held on 12/28/21 (II:232); 02/07/22 (III:527-704); and 05/03/22 (II:279-99). Keandre has also included all other transcripts since the remand back. I:099-230;II:232-60.

The discovery order came about during the 02/07/22 evidentiary hearing when the prosecutor claimed she needed Keandre's expert to create a sub-master list to aid her in her cross-examination of him. I:061-74;III:691-704. Although both parties received the same discovery from the jury commissioner, the State chose not to hire an expert to evaluate the jury master list and other jury documents, while Keandre paid an expert for his assistance.

Upon the prosecutor's request, the court ordered Keandre's expert to create the requested documentation. I:60-74;III:691-704.

The Defense followed the court's directive but objected that it was being forced to give the prosecutor its work-product. I:075-77;III:691-704. The Defense filed notice of its compliance and Keandre's continued objection on 02/10/22. I:076-79. The ordered information was made part of the district court record on 05/03/22. *Court's Exhibits 1 and 2 from 05/03/22 hearing.*

On 05/03/22, when faced with Keandre's motion and objections, the court ruled:

But I'm not going to change my mind [on the discovery order]...because I have been clear to both sides multiple times... I think that at this point and time at this juncture if you think... I'm totally wrong about it I think that the proper thing to do is to probably take up and see... In regards to procedurally

moving forward I am happy – we can set it right away if you guys want... II:0293-94.

...

[I] am denying [the motion]. Like I stated I think there have been many - - there are many reasons on both sides, defense has asked for continuances, State has asked for continuances, defense has objected, State has objected, we had Covid, I have been working with the parties, I've done half of the evidentiary hearing, now I'm waiting for the other – we're going to do the other half on June 20<sup>th</sup>.

As far as the work product, listen, I have said over and over again to both parties I want everybody to have access to all the information that they need in order to present a full case so that the Court can have a complete understanding. I understand that the defense disagrees with me in regards to that, and like I stated I'm never offended if they think I'm wrong to take me up and then we'll get a clear ruling from the supreme court, but that will be my order. II:298-99.

Accordingly, if this Honorable Court needs additional time to decide this writ, the district court appears to be willing to grant a stay because she advised the Defense to take it up.

During the 05/03/22 hearing, the court explained her reasoning in requiring Keandre's expert to prepare discovery for the State. The court said, "I want everybody to be on the same field in regards to having access to this information so that we can have a full and thorough hearing." II:293. Thus, the district court appears to be treating discovery in the criminal arena as if Keandre's case was a civil case.

The district court's comments were similar to comments made at the 12/03/21 hearing. At this hearing, Keandre asked the court to use the

Mungai transcript from the Mungai fair cross-section hearing to rule in his favor. Keandre made his request because the district court who handled the Mungai evidentiary hearing found systematic exclusion occurred during the jury selection process in the Eighth Judicial District Court because the jury commissioner was not using records from DETR. III:497-507. In declining to rule in Keandre's favor, the court compared Keandre's case to her "two years on the civil bench" finding each case is different and that judges rule differently in tobacco cases and HOA cases. I:213-15.

### **STANDARDS FOR THE WRIT**

A writ of Mandamus or Prohibition may issue when the "there is not a plain, speedy and adequate remedy in the ordinary course of the law." NRS 34.170; *also see* NRS 34.160. Even if a remedy in the course of the law exists, such as an appeal from a judgment of conviction, this Court will entertain a writ presenting "issues of first impression of the law and [when] doing so serve[s] judicial economy." *Helpstein v. Eighth Jud. Dist. Ct.*, 131 Nev. 909, 912–13 (2015); *Direct Grading & Paving, LLC v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 137 Nev. Adv. Op. 31, 491 P.3d 13, 17 (2021).

Court reviews the district court orders "for clear legal error or a manifest abuse of discretion" and may entertain a writ "when an important

issue of law requires clarification.” *McNamee v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 135 Nev. 392, 395 (2019); *Debiparshad v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 137 Nev. Adv. Op. 71, 499 P.3d 597 (2021)(Court granted a Writ of Mandamus when deciding an issue of first impression regarding the disqualification of a judge).

### **WRIT RELIEF IS WARRANTED UNDER THE STANDARDS**

Writ relief is warranted because Keandre has no plain, speedy and adequate remedy in the ordinary course of the law.

When the *Valentine* Court remanded Keandre’s case to district court for a hearing, it vacated his judgment of convictions. I:040. This means the district court’s order denying Keandre’s motion for a new trial based on violations of due process, prosecutorial misconduct, and the right to a speedy appeal and/or trial is a prejudgment, intermediate order that is not appealable.

Although NRS 177.015(b) allows a defendant to appeal the denial of a motion for a new trial, in *State v. Harris*, 131 Nev. 551, 556 (2015), this Court ruled that “[a]A prejudgment order denying a motion for a new trial is an intermediate order that can be reviewed on appeal from the judgment of conviction.” Thus, the 05/18/22 order is not appealable at this time.

Waiting to file a second appeal is not a speedy or adequate remedy for Keandre. The original notice of appeal was filed in his case in 2017 and he would be required to initiate a second appeal at some point in 2022. Also, if the Honorable Court does not intervene at this point, the State will be allowed to use work-product from the Defense at the hearing and Keandre will have no recourse.

Writ relief is also warranted because this Petition addresses issues of first impression of constitutional and statewide importance. When Keandre's case was remanded there were no guidelines or timelines for the district court to accomplish its task. While all district courts that Keandre was assigned to set regular status checks, Department VI did not. Even though Keandre's case was transferred to Department VI in September of 2021, the first time he was brought to court was 12/03/21 and that was also the first time he met his judge. Thereafter, Keandre needed to file a motion to obtain a date for the continuance of his evidentiary hearing. Accordingly, as an issue of first impression, this Court may address how the right to a speedy appellate process and the right to a trial apply during a remand.

Additionally the issue of privilege and work-product, as it applies to discovery in a criminal case, is the type of intervention for which a writ is warranted. In *Okada v. Eighth Judicial Dist. Court in & for Cnty. of Clark*,

134 Nev. 6, 6–7 (2018), this Court issued a writ when deciding the application of the gaming privilege under NRS 463.120 (6).

**A WRIT IS WARRANTED ON THE MERITS**

- I. A court order directing the defense expert to create discovery for the prosecutor violates due process and the defendant’s protections under the work-product doctrine; and,**
- II. Prosecutorial misconduct occurs when the prosecutor seeks an order for privileged work-product information.**

At the close of the partial evidentiary hearing on 02/07/22, the court ordered the Defense to prepare, create, and deliver discovery to the prosecutor for the State to use during its cross-examination of Defense expert Jeffrey Martin. I:061-74;III:691-702.

The court’s order arose from the prosecutor’s request that Mr. Martin prepare a nuanced master list for her to use during her cross-examination of him. I:062-73;III:691-702. The prosecutor did not want to rely on the master list she already had in her possession, the one compiled by the jury commissioner based on the information obtained in 2020. Instead, the prosecutor wanted Mr. Martin to give her a document or CD with the portions of the master list that he used in his analysis for 2017.



Mr. Gaston told the court: [W]e're not sending anything unless the Court specifically orders us to. There's no new list, there's no nothing. It's just his analysis [from the original master list which the prosecutor already has in her possession]. I:061;III:691.

The prosecutor, Ms. Botelho, responded: "What I'm really requesting – I understand there's not a list...But what I am saying is I don't even know the numbers...he's working all of this mathematical, you know, analysis on." I:063;III:693. Ms. Botelho said she needed Mr. Martin to prepare a list for her so she could "properly prepare for cross, I would like to get that as soon as possible." I:064;III:694.

Court overruled Keandre's objection to preparing discovery for the prosecutor and ordered that he deliver the information the prosecutor wanted by the end of the week. As such, Keandre was forced to provide the prosecutor with his work product so that she could use it against him during her cross-examination of Mr. Martin. I:064-65;71-72;III:094-5;701-02.. Keandre submitted the information under protest. I:076-78.

There are no rules regarding discovery for an evidentiary hearing but the discovery rules for trials are instructive.

NRS 174.234(2) requires a defendant file an expert notice, 21 days before trial. The written notice must contain:

- (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
- (b) A copy of the curriculum vitae of the expert witness; and
- (c) A copy of all reports made by or at the direction of the expert witness.

The notice Keandre filed complied with NRS 174.234 (2).

The fact that Mr. Martin did not prepare a report is not uncommon. When an expert testifies at trial, NRS 50.305 allows the expert to testify without preparing a written report and without disclosing the underlying facts or data he/she relied on in making his opinion. NRS 50.305 states:

The expert may testify in terms of opinion or inference and give his or her reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Keandre provided the prosecutor with the underlying facts or data that Mr. Martine relied on, as obtained from the jury commissioner and DETR, prior to the hearing. Both parties had the same discovery. The only difference was that Keandra hired his own expert to explain the information to him and the prosecutor did not hire an expert.

After Mr. Martin's direct examination, the court ordered Mr. Martin to create a new list, consisting of the names he included when conducting his analysis, and directed the Defense to give this information to the prosecutor.

In so doing, the court ordered the Defense to provide the State with work product to assist the prosecutor in her cross-examination of Mr. Martin.

NRS 174.245 prohibits the prosecutor from obtaining access to work product information because it is privileged. The rationale behind the work product doctrine is to prohibit one party from preparing his case by using the investigative work of his adversary when the same or similar discovery is available through ordinary techniques. *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1384 (Fla. 1994).

The United States Supreme Court identifies the work product doctrine as the framework within the court system that allows an attorney to prepare his client's case without the fear that the opposing party will intrude. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). "[D]efense counsel's selection and compilation of documents in preparation for pretrial discovery fall within the highly-protected category of opinion work product." *United States v. Horn*, 811 F.Supp. 739 (D.N.H. 1992), *rev'd in part*, 29 F.3d 754 (1st Cir. 1994). The work of an agent or an expert hired by the party to assist in preparation of the case is also the attorney's work product. *Skinner v. State*, 532, 538 (Court of Criminal Appeals of Texas 1997).

The situation in this case is similar to what occurred in *Horn*. In *Horn*, the prosecutor arranged for the defense attorneys and the defense expert to

view over 10,000 documents of discovery being held by a private company under contract with the government housed in a Department of Justice Building. Unbeknownst to the defense, the prosecutor directed an employee to make an extra copy of the documents that the defense and its expert requested be copied when reviewing the discovery. The extra copy was for the prosecutor. When the defense learned of the copying arrangement, they asked the prosecutor to stop and asked that all copies be returned. The prosecutor refused.

After the defense filed a motion to seal the documents pending a court decision, the prosecutor obtained the documents, reviewed them, and showed them to other prosecutors and witnesses. The prosecutor also made copies of the documents despite a court's order directing the prosecutor not to do so.

The *Horn* court found the selectivity used by the defense in copying a few documents, upon consultation with its expert, showed the defense attorney's thought process and amounted to work product. *Horn at 747*.

The same analysis as used in *Horn* applies in this case.

Here, the jury commissioner's master list consists of thousands of entries much like the *Horn* discovery consisted of 10,000 documents. Here, the defense expert went through the thousands of entries and determined

which ones would be eliminated or included in his analysis – much like the expert did in *Horn* when selecting certain documents to be copied. In *Horn*, the prosecutor was able to convince the private company to copy documents the defense wanted to use and give her the copies. Here, the prosecutor asked, and the court ordered, the defense expert reveal the names and entries he used, much like the prosecutor did in *Horn* by directing the employee to copy documents. Upon review, the *Horn* Court found that the prosecutor improperly obtained work product information.

This Court should come to the same conclusion in this case.

Although the prosecutor in this case obtained a court order for the discovery, the prosecutor lacked candor with the court when asking for the new list to be created because she was asking for work-product information. III:091-95. A prosecutor has a duty of candor and fairness when prosecuting a case. RPC 3.3; RPC 3.4; RPC 3.8.

The prosecutor could have hired an expert to review the jury commissioner master list and her expert could have answered her questions. Instead, she chose to ask the court to direct the defense expert to provide her with the information she felt she needed for her preparation.

The *Horn* Court further found serious prosecutorial misconduct based on the prosecutor's lack of candor to the court, found actual prejudice to the

defendants, and ordered sanctions. This Court should find the same in this instance because the prosecutor lacked candor in her request and the defendant is prejudiced because he needed to use his paid expert to create documents for the State. As a sanction, a new trial should be ordered.

Additionally, the district court's order directing Keandre to create discovery for the State violated his right to due process at the evidentiary hearing because he was required to provide information for the State to use against his expert.

As previously stated, all parties had the underlying master list. Mr. Martin used the master list he obtained in 2020, as given to him by the jury commissioner, and formulated an opinion as to the composition of the prospective jurors who would have been on the 2017 master list at the time of Keandre's trial. He then further used this analysis to render an opinion that the list lacked minorities as represented in the census figures. Accordingly, the CD Keandre gave to the prosecutor was part of Mr. Martin's and Keandre's attorneys' thought process and analysis upon reviewing the master list obtained in 2020 – it was work product.

Therefore, the district court clearly erred and manifestly abused her discretion when ordering Keandre's expert to create work-product to help the prosecutor. Also, the prosecutor violated ethical duties when asking for

work-product. These errors amount to Due Process violations, violations of privileged information, and prosecutorial misconduct that deny Keandre the right to a fair evidentiary hearing and appellate process.

**III. The rights to a speedy appellate process and speedy trial apply throughout a remand to district court during the course of the appeal.**

The appellate process began on 11/06/17 when Keandre filed his notice of appeal. III:711-15. Although this Court issued an order on 12/19/19, Keandre's case remains in the appellate process based on the remand back for an evidentiary hearing even though the case was closed procedurally. I:024-41. Without any guidelines in place, his evidentiary hearing could be continued again. Now, more than four years from the start of his appeal, his appeal is not completed because the evidentiary hearing is still pending. If he loses the evidentiary hearing then the appellate process for the same conviction begins again.

Since the issuance of the opinion on 12/19/19 and the remittitur on 01/13/20, the district court minutes reflect numerous continuances based on several reasons.<sup>5</sup>

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<sup>5</sup> See district court minutes and docketing sheet at I:044-59;081-97.

- March of 2020 until March of 2021 – continuances due to difficulty obtaining discovery from the Jury Commissioner: 02/20/20, 05/20/20, 11/09/20, 01/25/21, 02/16/21, 03/16/21.<sup>6</sup>
- March of 2020 to September of 2021 – difficulty setting evidentiary hearing because case was transferred to other courtrooms: 01/28/21; 09/02/21.<sup>7</sup>
- March 21, 2021, to September 2021 – difficulty obtaining a hearing date: 03/21/21, 04/15/21, 09/02/21.<sup>8</sup>
- September of 2021 to November 2021 - Matter taken off calendar by court: 09/16/21, 09/23/21, 10/05/21, 10/19/21, 11/04/21, 11/18/21, 11/23/21.<sup>9</sup>
- Although Department VI conducted a partial hearing on 02/07/22, a further hearing was not schedule until Keandre demanded a new trial. I:001-10.

See Docketing Sheet I:046-58; Court minutes I:081-97; Transcripts of court hearings for 05/20/20; 02/20/20; 11/09/20; 12/07/20; 01/25/21; 02/16/21;

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<sup>6</sup> Transcripts at I:099-156.

<sup>7</sup> Transcripts at I:136-140;172-75.

<sup>8</sup> Transcripts at I:151-56;157-59;172-75. Docketing sheet at 046-59.

<sup>9</sup> Docket sheet at I:053.



02/16/21; 03/16/21; 04/15/21; 04/29/21; 07/29/21;08/03/21;  
09/02/21;12/03/21; 12/28/21 at I:099-231;II:232-60.

An evidentiary hearing has only been set three times after the discovery issues were resolved in March of 2021. The first evidentiary hearing was set for 09/10/21 but needed to be continued because Defense Counsel was in trial. Judge Holthus was unable to reschedule the evidentiary hearing in November because the Chief Judge transferred Keandre's case to Department VI. At the second evidentiary hearing date on 12/03/21, after much argument, the court granted the State a continuance. The next date for the hearing was 02/07/22. The evidentiary hearing has not been completed at this time.

Nevada recognizes the right to a speedy appellate process. *Rawson v. Ninth Judicial Dist. Court in & for County of Douglas*, 133 Nev. 309, 314, 396 P.3d 842, 846 (2017) (A right to an appeal is generally an “adequate and speedy legal remedy” that precludes [pre-trial] writ relief”). The Nevada Supreme Court will reverse a conviction based on a violation of due process if the delay in the appellate process results in severe prejudice. *Bergendahl v. Davis*, 102 Nev. 258, 259–60, 720 P.2d 694, 694–95 (1986)(due process violated due to a delay in the filing of the JOC and missing transcript resulting in a seven year delay)

Due process requires an appellate system that works quickly so individual appellants are not imprisoned for substantial periods without an adequate opportunity to challenge their convictions. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 Duke J. Comp. & Int'l L. 1, 44 (2011). “[I]f an appeal is allowed, appellate delay risks prejudicing the fairness of any retrial that is ordered.” *Id.*

Although there is no specific guideline for a violation of due process based on a delay in the appellate process in the Nevada statutes, due process violations have been recognized for a delay in a parole or probation hearing. *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (due process requires a prompt hearing for a parole-revocation case); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (defendant entitled to prompt hearing for probation violation); also see *Anaya v. State*, 96 Nev. 119 (1980). Accordingly, the same protections of promptness should apply to a defendant being held in custody from a remand back from the Nevada Supreme Court for an evidentiary hearing. The only remedy available at this point would be for the court to order a new trial because holding the hearing would only further delay the appellate process.

Nevada also recognizes a defendant’s constitutional right to a speedy trial as discussed in *Barker v. Wingo*, 407 U.S. 514 (1972) and *Doggett v.*

*U.S.*, 505 U.S. 647 (1992). The four factors the court examines when deciding if the Sixth Amendment right to a speedy trial has been violated are: (1) the length of the delay; (2) who is responsible for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant.

More than two years have passed since the Nevada Supreme Court ordered an evidentiary hearing and an evidentiary hearing has not been completed.

It is important to note that much of the delay in holding the hearing was caused by the Eighth Judicial District Court's jury commissioner not giving Keandre the discovery under subpoena. Keandre began requesting discovery in March of 2020, had to file a motion to compel discovery in January of 2021, and then had to litigate it further when the jury commissioner objected to the order to compel. Also, the Eighth Judicial Court's Chief Judge transferred his case three times thereby making the setting of a hearing date difficult. And Department VI took the case off calendar numerous times.

Once the discovery was obtained, on 03/16/21, Keandre requested a trial date be set, State objected, and court denied his requests. I:151-56.

Keandre is prejudiced because he remains in custody. He is losing valuable credits that he could be obtaining if the court had denied his motion for a new trial and placed him in the prison system. On the other hand, he is also losing valuable time needed to prepare for a new trial if the court were to find that the State violated his right under the fair cross-section provision of the United States Constitution.

As layed out in this Petition, the district court's order denying the motion for a new trial based on numerous errors was clearly erroneous and an manifest abuse of the district court's discretion.

### **CONCLUSION**

Based upon the foregoing, the defense respectfully requests that this court issue the writ of mandamus ordering the district court to grant his motion for a new trial.

DATED this 26<sup>th</sup> day of May, 2022.

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Tyler C. Gaston  
TYLER C. GASTON, #13488  
Chief Deputy Public Defender

By /s/ Sharon G. Dickinson  
SHARON G. DICKINSON, #3710  
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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this writ 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:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 21(d):

Proportionately spaced, has a typeface of 14 points or more and contains 4,894 words which does not exceed the 7,000 word limit.

3. Finally, I hereby certify that I have read this writ, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this writ complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

///

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26<sup>th</sup> day of May, 2022.

DARIN F. IMLAY  
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TYLER C. GASTON, #13488  
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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26<sup>th</sup> day of May, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD  
ALEXANDER CHEN

SHARON G. DICKINSON  
TYLER C. GASTON

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Honorable Jacqueline Bluth  
District Court, Department VI  
200 Lewis Avenue  
Las Vegas, NV 89101

BY           /s/ Carrie M. Connolly            
Employee, Clark County Public  
Defender's Office