

In the Supreme Court of the State of Nevada

No. 85513

Electronically Filed
May 02 2023 11:05 AM
Elizabeth A. Brown
Clerk of Supreme Court

DUJUAN LOOPER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**Appeal from Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

REPLY BRIEF

DIANE C. LOWE, ESQ.
Lowe Law, L.L.C.
7350 West Centennial Pkwy #3085
Las Vegas, Nevada 89113
(725) 212-2451

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DA.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Attorneys for Respondent

Looper Reply Brief Table of Contents

Reply	1-7
Certificate of Compliance	8
Certificate of Service	10

Table of Authorities

<u>Adam v. State</u> , 261 P.3d 1063 (Nev. 2011)	1
<u>Brown v. McDaniel</u> , 130 Nev. 565, 331 P.3d 867 (2014)	6
<u>City of Reno v. Howard</u> , 130 Nev. Adv. Op. 12 (Nev. 2014)	1
<u>Cnty. of Clark v. Sun City Summerlin Cmty. Ass'n, Inc., No. 60776</u> (Nev. Mar. 25, 2014).	2
<u>Harris v. State</u> , 2017 Nev. App. LEXIS 1, *1-2, 133 Nev. 683, 683- 684, 407 P.3d 348, 349-350, 133 Nev. Adv. Rep. 85.	7
<u>Martinez v. Ryan</u> , 566 U.S. 1, 132 S. Ct. 1309 (2012).	6
<u>Nev. Dep't of Health & Human Servs. v. Samantha Inc.</u> , 407 P.3d 327 (Nev. 2017)	1
<u>Senjab v. Alhulaibi</u> , 497 P.3d 618 (Nev. 2021)	2
<u>State v. Lloyd</u> , 129 Nev. Adv. Op. 79 (Nev. 2013)	2

Nevada Revised Statutes

NRS §34.575	3-4
NRS §177.015(1)(c)	3-4

LOOPER REPLY BRIEF

The Nevada Supreme Court is generally reluctant to depart from the doctrine of stare decisis, but will do so for "compelling reasons." Such reasons may include when a prior decision is "unsound in principle," "unworkable," or "badly reasoned."

Several cases from the Nevada Supreme Court address the question of when the court may overrule precedent. In City of Reno v. Howard, the court stated that it is "loath to depart from the doctrine of stare decisis," but will do so for "compelling reasons." City of Reno v. Howard, 130 Nev. Adv. Op. 12 (Nev. 2014).

This language is echoed in other cases, such as Adam v. State and Nevada Department of Health & Human Services v. Samantha Inc., which both emphasize the need for "compelling reasons" in order to overrule precedent. Adam v. State, 261 P.3d 1063 (Nev. 2011).

The caselaw provides some guidance as to what might constitute "compelling reasons." For example, in Adam v. State, the court noted that "weighty and conclusive" evidence is required, while in State v. Lloyd, the court overruled prior case law in order to align with federal precedent. State v. Lloyd, 129 Nev. Adv. Op. 79 (Nev. 2013).

In Senjab v. Alhulaibi, the court found that a long-standing rule was "unsound" and should be abandoned, while in County of Clark v. Sun City Summerlin Community Association, Inc., the court stated that a prior holding must be "badly reasoned" or "unworkable" in order to be overruled. Senjab v. Alhulaibi, 497 P.3d 618 (Nev. 2021); Cnty. of Clark v. Sun City Summerlin Cmty. Ass'n, Inc., No. 60776 (Nev. Mar. 25, 2014).

Overall, Nevada caselaw suggests that the Nevada Supreme Court is generally reluctant to overturn precedent, but will do so when there are strong reasons to justify such a departure. While the cases do not provide an exhaustive list of what might constitute "compelling reasons," they do offer some guidance as to the types of circumstances that might warrant overturning stare decisis.

In our opening brief we argue that Plaintiff is statutorily entitled to appeal from a post-conviction final order. Had he or someone on his behalf filed a timely appeal there is nothing the State could have done to prevent that because he had a legal right under the statutes to do so.

Nevada law permits an appeal from a district court order refusing a new trial and or order on a writ action. See NRS §34.575; NRS §177.015(1)(c).

NRS 34.575 Appeal from order of district court granting or denying writ.

1. An applicant who, after conviction or while no criminal action is pending against the applicant, has petitioned the district court for a writ of habeas corpus and whose application for the writ is denied, may appeal to the

appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from the order and judgment of the district court, but the appeal must be made within 30 days after service by the court of written notice of entry of the order or judgment.

We don't dispute that the district court still retained discretion on whether to appoint an appeal attorney if one had not already been appointed. But typically, if one is appointed as postconviction writ of habeas corpus counsel it is just assumed if there is a loss they will appeal it as a matter of course. No additional appointment is needed. The initial postconviction appointment carries through to allow them also to file an appeal.

Respondent misses the point of this argument – or fails to respond specifically because there is not an adequate response available:

It is not fair that postconviction writ of habeas corpus counsel Gamage was able to sabotage Looper's statutorily provided right to appeal the results of his District Court

action. He misled him into thinking this would be done but it wasn't. Had he not been assured otherwise Mr. Looper would have taken action pro per immediately. 2AA413. It is an unsound rule and an exception should be carved out.

Petitioner/Plaintiff tried to rectify this error by submitting another postconviction writ of habeas corpus action claiming prejudicial ineffectiveness for failure to file an appeal of the Findings of Fact, Conclusions of Law & Order: Postconviction Petition for Writ of Habeas Corpus. 2AA389-411 at 394-406. See also Opening Brief: *A. This Court should Reconsider Stare Decisis Cited by the District Court and find this action not time barred. Looper Opening Brief p. 16-30. B. The District Court Error in finding that Looper Cannot Demonstrate Good Cause and Prejudice Sufficient to Overcome his Procedural Bars. Looper Opening Brief p. 4, 30-38.*

We argue throughout that if read broadly this Court does have the right to grant Mr. Looper relief. But even if this

Court does not agree to existing relief under current verbiage of statutes and caselaw – they certainly have the right to carve out an exception to Brown in a manner that would help Looper. Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014); Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).

Respondent argues that the exception we are asking to be carved out would fail to assist Looper. Respondent Brief p. 7. We disagree. And simply state:

Our request should be interpreted in a manner that would help him.

We ask that this court carve out an exception to the precedent in Brown v. McDaniel that would allow Mr. Looper relief.

Further we ask that this Court find that we have demonstrated cause for the delay under NRS 34.726(1)(a) by showing by analogy the required Harris factors: (1) the petitioner believed counsel filed an appeal of his FFCO on

petitioner's behalf; (2) this belief was objectively reasonable; (3) counsel abandoned the petitioner without notice and failed to timely file the appeal; and (4) the petitioner filed the appeal within a reasonable time after the petitioner should have known counsel did not file a appeal. Harris v. State, 2017 Nev. App. LEXIS 1, *1-2, 133 Nev. 683, 683-684, 407 P.3d 348, 349-350, 133 Nev. Adv. Rep. 85. Opening Brief p. 20-30.

DATED this 2nd Day of May 2023.

Respectfully Submitted,

/s/ Diane C. Lowe
DIANE C. LOWE ESQ. Nevada Bar #14573

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 1041 words;

3. Finally, I hereby certify that I have read this appellate brief, 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 brief 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 2nd Day of May 2023.

Respectfully Submitted,

/s/ Diane C. Lowe
DIANE C. LOWE ESQ. Nevada Bar #14573
7350 West Centennial Pkwy #3085
Las Vegas, NV 89131
(725) 212-2451
Attorney for Appellant

CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify and affirm that this document was electronically filed with the Nevada Supreme Court on May 2, 2023. Electronic Service of the foregoing document and appendix shall be made in accordance with the Master Service list as follows:

Steven B. Wolfson Clark County District Attorney

Aaron D. Ford Attorney General Carson City

A copy was mailed to Mr. Looper this same date.