

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GUSTAVO RAMOS,
Appellant,

v.

THE STATE OF NEVADA
Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 84819-COA

PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and petitions this Court for rehearing in the above-captioned appeal.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 23rd day of February, 2023.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

**MEMORANDUM OF
POINTS AND AUTHORITIES**

On February 15, 2023, this Court issued an ORDER OF REVERSAL AND REMAND (hereinafter “Order”) from the denial of a postconviction petition for writ of habeas corpus. Appellant argued, and this Court agreed, that the district court erred in denying appointment of postconviction counsel. As support for its conclusion, this Court specifically references Appellant’s claim that his counsel was ineffective for failing to seek disqualification of the trial judge (Judge Herndon¹) because the same judge had been involved with the matter when employed as a deputy district attorney as a matter requiring the expertise of an appointed attorney to wade through potential discovery.

The State in this matter is respectfully requesting that this Court remove its current Order so that the State may be given an opportunity to respond. Appellant’s proper person appeal was first noticed to the Supreme Court on June 6, 2022. On June 13, 2022, the Supreme Court issued an Order Directing Transmission of Record and Regarding Briefing. In this order, the Supreme Court instructed the clerk of the district court to submit the record for the appellate court’s review pursuant to NRAP 10(a)(1).

The Supreme Court also indicated that Appellant could file a brief within 120

¹ Judge Herndon is now a Supreme Court Justice. As a show of respect to his current title, he will be referred to as Justice Herndon.

days, and that the Respondent would not need to respond unless ordered to do so by the court. On September 19, 2022, Appellant filed an Informal Brief. On February 14, 2023, the case was transferred to the Court of Appeals, and one day later the Order in question was filed by this Court. Respondent was never given an opportunity to respond prior to the Order.

There are two reasons why the State is requesting that this Court reconsider its current Order. While a proper person appeal may be decided on the record on appeal without briefing, this Court ruled as a matter of law that Appellant was entitled to appointed counsel below. NRS 34.750 clearly does not require that counsel be appointed for a postconviction petition for writ of habeas corpus. NRS 34.750 gives some factual considerations for the district court such as the issues presented being difficult, the petitioner's ability to comprehend the proceedings, or that counsel is needed for discovery. NRS 34.750 uses the word "may" throughout, it does not use the more emphatic "must."

Respondent acknowledges that cases like Renteria-Novoa v. State, 133 Nev. 75 (2017) exist as our brief to the district court cited the case below, but this Court's decision relied upon the fact that Appellant was represented at trial and is indigent. The Order gives a false impression that the district court must automatically appoint counsel simply based upon the charges and his indigency rather than giving deference to the district court's analysis that the petitioner had not shown that he

should have counsel appointed.

Second, this Court clearly considered the argument's set forth in Appellant's informal brief, which was not argued before the district court below. Not only did Appellant submit its informal brief, but he cogently set forth his arguments which goes against the idea that he could not competently represent himself in his petition.

However in addition to his evidenced ability to represent himself, this Court erred in relying upon his argument that his counsel was ineffective for failing to raise a potential conflict regarding Justice Herndon and his prior employment as a deputy district attorney.

Pursuant to Hargrove v. State, 100 Nev. 498 (1984), the petitioner must plead specific facts, and the claims must not be bare and naked. Such accusations must also not be belied by the record. The issue here is that Appellant makes this allegation against Justice Herndon for the first time in his informal brief without an iota of evidence that Justice Herndon was ever involved with his case.

Appellant's case began in 2010. As this Court can see from the record below, there is no reference to Justice Herndon in any document, and he did not appear at hearings on this matter as a deputy district attorney. As an aside, Justice Herndon left the Clark County District Attorney's Office in 2005, a full five years prior to Appellant's case. Thus, for this Court to rely upon this made-up allegation as a basis for an appointed attorney to review the discovery is clearly erroneous. Petitioners

must be required to support their accusations, and when an accusation such as this is clearly unsupported, this Court should not have relied upon these facts as a basis to have an attorney appointed.

WHEREFORE, the State respectfully requests that rehearing be granted and the Order be amended.

Dated this 23rd day of February, 2023.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*

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CERTIFICATE OF COMPLIANCE

1. **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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page and type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points contains 788 words, 67 lines of text and does not exceed 10 pages.

Dated this 23rd day of February, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 23, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

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

GUSTAVO RAMOS, #91166
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Indian Springs, Nevada 89070

BY */s/ E. Davis*

Employee, District Attorney's Office

AC//ed