

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BIELA, Petitioner

v.

THE STATE OF NEVADA, Respondent

On Petition for Writ of Certiorari to the
Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Nevada Supreme Court committed error when it applied the wrong standard in failing to grant Mr. Biela relief based upon an unfair and impartial jury impaneled and the failure of appellate counsel to raise this issue on direct appeal in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CAPITAL CASE

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

LIST OF RELATED PROCEEDINGS

As far as Mr. Biela is aware, there are no related proceedings to the instant case.

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I.

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Biela respectfully petitions for a Writ of Certiorari from the Supreme Court of Nevada from the Order of Affirmance in *State of Nevada v. James Biela*, No. 71427 (Nev. S. Ct. 04/22/2019).

II.

PARTIES TO THE PROCEEDING

All parties to the case are named in the caption.

III.

OPINIONS BELOW

The Nevada Supreme Court affirmed Mr. Biela's conviction and sentence of death. The Order of Affirmance is not published and is reproduced in the Appendix at App. A p. 1-21.

IV.

JURISDICTION

The Nevada Supreme Court entered its Order of Affirmance on April 22, 2019 (App. A p. 1-21). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

V.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty or property without due process of law. . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VI.

STATEMENT OF THE CASE

On December 19, 2008, an Information was filed charging Mr. Biela with five counts as follows: Count I, Sexual Assault as to Amanda C.; Count II, Kidnapping in the 1st Degree as to Hsiaotzu (Emma) C.; Count III, Sexual Assault as to Hsiaotzu C.; Count IV, Murder as to Brianna Denison; and Count V, Sexual Assault as to Brianna Denison. After an 18-day jury trial commencing on May 10, 2010, Mr. Biela was found guilty on all five counts.

The penalty phase with respect to the murder count began on May 27, 2010. On June 2, 2010, after considering specific mitigating and aggravating circumstances, the jury returned a special verdict of death as to the murder of Brianna Denison. On June 30, 2010, the Court sentenced Mr. Biela on the remaining four counts to imprisonment as follows: As to Count I, Mr. Biela was sentenced to life with the possibility of parole beginning after a minimum of ten years has been served and with a consecutive sentence for the use of a deadly weapon of one year to a maximum of twenty years to run consecutively to the sentence of death in Count IV. As to Count II, Mr. Biela was sentenced to life with the possibility of parole beginning after a minimum of five years has been served, to run consecutively to the sentence in Count I. As to Count III, Mr. Biela was

sentenced to life with the possibility of parole beginning after a minimum of ten years has been served, to run consecutively to the sentence in Count II. As to Count V, he was sentenced to life with the possibility of parole beginning after a minimum of ten years has been served, to run consecutively to the sentence in Count III. The Judgment of Conviction was filed on August 18, 2010.

Mr. Biela filed a timely appeal on August 18, 2010. After briefing concluded, on August 1, 2012, the Nevada Supreme Court entered an Order of Affirmance, affirming Mr. Biela's convictions and sentence of death.

On December 3, 2012, Mr. Biela filed a timely post-conviction Petition for Writ of Habeas Corpus alleging sixty-six grounds for relief. Counsel was appointed and a Supplemental Brief was filed on May 6, 2015. The State filed a Response on June 22, 2015. The district court held an evidentiary hearing on July 11, 12, and 13, and August 18, 2016. At the conclusion of the hearing on August 18, 2016, the district court denied all grounds for relief. On September 13, 2016, the district court entered the Order denying Mr. Biela post-conviction relief.

A timely Notice of Appeal was filed on September 28, 2016. After briefing concluded, the Nevada Supreme Court issued its Order of Affirmance on April 22, 2019 (App. A, p. 1-21). A timely Petition for Rehearing was filed, but denied on

July 9, 2019 (App. B p. 22).

VII.

STATEMENT OF THE FACTS

Although a full statement of the facts concerning the offense is not largely relevant to the issue presented within this Petition, the Nevada Supreme Court enunciated a brief statement of facts in it's decision in *State of Nevada v. James Biela*, No. 71427 (Nev. S. Ct. 04/22/2019) (App A, p. 1-21).

VIII.

REASONS WHY THE WRIT SHOULD ISSUE

A. **THE NEVADA SUPREME COURT COMMITTED ERROR WHEN IT UTILIZED AN INCORRECT STANDARD TO DENY MR. BIELA RELIEF FROM HIS UNFAIR AND IMPARTIAL JURY IMPANELED AS WELL AS HIS RECEIPT OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO RAISE THIS JURY ISSUE ON DIRECT APPEAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

Pretrial, Mr. Biela filed a motion for change of venue. The district court denied the motion. However, on direct appeal to the Nevada Supreme Court, the issue was not raised. Given the gravity and nature of the error shown, appellate counsel rendered ineffective assistance in failing to raise the issue on appeal.

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1. Relevant Authority

NRS 174.455(1) provides that a criminal action “may be removed from the court in which it is pending, on application of the defendant or state, on the ground that a fair and impartial trial cannot be had in the county where the indictment, information or complaint is pending”. Whether to change venue is in the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion. *Sonner v. State*, 112 Nev. 1328, 1336, 930 P.2d 707, 712 (1996), *modified on rehearing on other grounds*, 114 Nev. 321, 955 P.2d 673 (1998). A defendant seeking to change venue must not only present evidence of inflammatory pretrial publicity but must demonstrate actual bias on the part of the jury impaneled. *Id.* Even where pretrial publicity has been pervasive, this Nevada Supreme Court has upheld the denial of motion for change of venue when the jurors assured the district court during voir dire that they would be fair and impartial in their deliberations. *Id.* at 1336, 930 P.2d at 712-13. *See also, Ford v. State*, 102 Nev. 126, 129-32, 717 P.2d 27, 29-31 (1986).

Criminal defendant are entitled to a “fair trial by a panel of impartial, indifferent jurors.” *Hayes v. Ayers*, 632 F.3d 500, 507 (9th Cir. 2011) (quoting, *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)) (see

also, Estrada v. Scribner, 512 F.3d 1227, 1239-40 (9th Cir. 2008) (even a single jurors prejudice can violate the defendant's right to an impartial jury). The constitution does not, however, require the jurors "be totally ignorant of the facts and issue involved." *Mu'min v. Virginia*, 500 U.S. 415, 430, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) (internal quotation marks omitted); *See also, Skilling v. United States*, 561 U.S. 358, 380-81, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). "The relevant question is not whether the community remembered the case, but whether the jurors...had such mixed emotions that they could not judge impartially the guilt of the defendant." *Mu'min*, 500 U.S. at 430.

2. Voir dire demonstrates the pretrial publicity in this case was extensive, damaging, and permeated the community

During voir dire, there were extensive discussions involving the pretrial publicity surrounding this case. Incredibly, no perspective juror had not heard about this case. The discussion involving the pretrial publicity was a dominant theme throughout voir dire. A review of the voir dire transcripts reveals significant and prejudicial areas of discussion during voir dire. Further, there were numerous occasions where the publicity was discussed while voir dire was occurring.

Prospective juror Doherty explained that he would find it very difficult to disregard the pretrial publicity given the fact that he followed the case very

closely. Prospective juror Doherty discussed that she had been teaching young women who had been in the position of some of the victims in this case.

Prospective juror Robinson believed he could not put his feelings aside regarding this case.

Prospective juror Alcantar explained that he had zero tolerance for anyone in Mr. Biela's position and did not think he could disregard the pretrial publicity.

Prospective juror Dezuzman informed the court that he could not "handle" this case based on pretrial publicity.

Prospective juror Dudley informed the court that he was prejudiced by the information he had learned prior to trial. Outside the presence of the other jurors, Prospective juror Dudley informed the court that he had learned that Mr. Biela had chased "another women around the UNR parking garage", he named her as Angela Driggs. Prospective juror Dudley also informed the court that he had briefly met Brianna Denison. Prospective juror Dudley's son also knew Brianna Denison. In fact, his son "...let her cheat off his Spanish tests and homework in Spanish."

Prospective juror Dickerman informed the court that he did not believe he could be fair based upon "...what I've seen in the community, and I have prejudiced and biased opinions..."

Prospective juror Green was not one hundred percent sure she could be fair as she had followed the case closely and her twenty year old daughter is currently a college student. Prospective juror Green was unsure that she could be completely impartial. Prospective juror Green had followed the case very closely. Prospective juror Green expressed concern as to the ability to decide the case on the merits because for "...two years that['s] all you heard about..."

Prospective juror Dimaggio believed it would be extremely difficult to decide the case on the evidence and set aside bias and prejudice as a result of pretrial publicity.

Prospective juror Glynn explained that she was a UNR student and her parents would give her rides because they were worried for her safety based upon the pretrial publicity. Prospective juror Glynn became less concerned once the news reported that they "found him."

Prospective juror Lundin explained that she worked at UNR and actually was "walking in the same parking lots" "so it was kind of a scary time for all of us." Prospective juror Lundin followed the case online. Prospective juror Lundin believed it would be difficult for her to avoid media press surrounding the case during trial, as her employment was the director of media services. Prospective

juror Lundin explained she wore a blue ribbon at a basketball game. Blue ribbons symbolized solidarity with Ms. Denison's family. Prospective juror Lundin informed the court that everyone was given blue ribbons to wear at the game. Prospective juror Lundin had fears while walking through the UNR parking garages until Mr. Biela was caught. Sometimes, Prospective juror Lundin would contact UNR police to escort students to their cars. Prospective juror Lundin was involved in numerous conversations regarding the case.

Prospective juror Reeder would watch the evening news and read the Reno Gazette journal while following this case. Prospective juror Reeder's employer was contacted by the police to determine whether they had any video surveillance connected to this case .

Prospective juror Williams is a history teacher in middle school and discussed the pretrial publicity with his students.

Prospective juror Fonfara had read the newspaper just prior to voir dire and read about an interview with Kathy Lovell (a witness at trial).

Prospective juror Snyder read an article surrounding Mr. Biela's mother. The prosecutor asked Prospective juror Snyder "did you think it was appropriate or inappropriate to have that on the day before this trial started." (referring to the

article about Mr. Biela's mother). Prospective juror Snyder did not believe it was inappropriate or appropriate regarding the article on Mr. Biela's mother.

Prospective juror Seaton saw the article in the newspaper which was laying on the kitchen table. He did not read the article .

Prospective juror Graham read blogs regarding the case.

Prospective juror Duenas-Demaya was concerned that her son would approach her and discuss the Biela case. Prospective juror Duenas-Demaya took little blue candles to the “place” and she wore a Brianna Denison button.

Prospective juror Virrey also wore a blue ribbon. Perspective juror Virrey put the blue ribbon in her car. Prospective juror Virrey placed the blue ribbon in the car to support the family of the victim.

Prospective juror John works at the community college and placed blue ribbons on a fence.

Prospective juror Spellacy tied a blue ribbon to her tree. Prospective juror Spellacy had her fears diminish as “time passed.”

Prospective juror Ramos tied a blue ribbon to a tree. Prospective juror Ramos had conducted internet searches on the case.

Prospective juror Ramirez participated with displaying a blue ribbon.

Prospective juror Auclair drove past 1395 Mackey Court to look at the memorial for Ms. Denison.

Prospective juror Shugar felt that the area where the body had been disposed “really bothered” him.

Prospective juror Anderson's friend had to provide a DNA sample with regard to this case.

Prospective juror Deandreis had a previous roommate who had been asked to give a DNA sample during the investigation into this case.

Prospective juror Morales had “...pretty deep involvement with this case personally”. Prospective juror Morales had an emotional attachment to the case and followed the case extensively. Prospective juror Morales had already made up his mind about the case. Prospective juror Morales’ father is in charge of the Reno Gazette Journal. Prospective juror Morales had followed the case on CNN and other television stations. The prosecutor discussed the Nancy Gray show with Mr. Morales. Prospective juror Morales determined that he would already vote guilty.

Prospective juror Indiano believed there was concern in the office because they had a twenty year old female working there.

Prospective juror Adame informed the court in the presence of the entire

venire panel that her brother was incarcerated with Mr. Biela, awaiting trial.

On May 17, 2010, the district court held a hearing to determine if Mr. Biela's sitting jury had been prejudiced by a member of the public who had yelled to the jury "give him the death penalty". This individual was determined to be a defendant in the mental health court.

In this case, review of the voir dire process provides a remarkable example where pretrial publicity has permeated a community into action. Numerous members of the jury wore blue ribbons, visited the scenes, watched local and national news, and conducted internet searches. At least one prospective juror believed Mr. Biela was responsible for another attempted assault at UNR. Prospective jurors knew Brianna Denison. Prospective jurors indicated that they could not put the pretrial publicity aside.

Almost all of these discussions occurred in the presence of the entire venire panel. The pressure upon the sitting jury for a verdict against Mr. Biela with regard to both guilt and punishment must have been enormous. Here, the record demonstrated that the community (Reno, Nevada) was saturated with prejudicial and inflammatory media publicity about the crime. The voir dire reveals that numerous jurors harbored partiality and hostility against Mr. Biela.

This conclusion was furthered by testimony adduced from the post-conviction evidentiary hearing. Ms. Mazie Pusich was trial counsel for Mr. Biela. Mr. Pusich testified at the post conviction evidentiary hearing that she was born and raised in Reno and had never seen a case receive more pre-trial publicity in Reno. Ms. Pusich explained that Mr. Biela's case had more publicity than cases involving Darren Mack, Kathy Woods, and Thomas Been (other high profile cases in the area). Ms. Pusich explained that there was more publicity in Mr. Biela's case than Mr. Mack's because of the internet and the length of time that the case received extensive media exposure.

Appellant Counsel, John Petty had lived in Reno for approximately fifty years and testified that the pre-trial publicity was tremendous and permeated the community. The spirit was echoed by co-counsel Jim Leslie who was concerned about the pre-trial publicity and believed his concerns materialized during the jury selection. Mr. Leslie was particularly concerned that all the other jurors overheard the comments of each other. Mr. Leslie noticed that there had been a request that the court conduct a sequester the voir dire, which was denied. Ms. Pusich also explained that pre-trial publicity had heavily influenced the community and this was apparent in the courtroom.

The above commentary which was present through voir dire, demonstrates Mr. Biela received an unfair trial in violation of the Fifth, Sixth and Fourteenth amendments to the United States Constitution.

3. The Nevada Supreme Court’s holding utilized an improper standard in denying Mr. Biela relief

Given the overwhelming nature of the pretrial publicity and the damaging atmosphere within the courtroom, it is clear Mr. Biela’s appellate counsel erred in failing to raise this issue on direct appeal.

“Jurors prejudice may be actual or presumed.” *Hayes*, 632 F.3d at 508. Prejudice is presumed “when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime.” *Id.* (Quoting, *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988)). However, a “presumption of prejudice...attends only the extreme case.” *Skilling*, 561 U.S. at 381. Actual prejudice exists when “voir dire reveals that the jury pool harbors factual impartiality or hostility that cannot be laid aside.” *Hayes*, 632 F.3d at 508. (Quoting, *Harris*, 885 F.2d at 1363).

In this case, a simple review of voir dire reveals the community (Reno, Nevada) was so saturated with prejudicial and inflammatory media publicity about the crime, that Mr. Biela did not receive a fair trial. Based upon this, had appellate

counsel raised this issue on direct appeal, reversal would have been mandated.

However, utilizing an incorrect standard, the Nevada Supreme Court disagreed. Within the Order of Affirmance, the Nevada Supreme Court explained,

No seated juror indicated that the publicity would prevent them from acting impartially. Even where pretrial publicity has been pervasive, this court has upheld the denial of motions for change of venue where the jurors assured the district court during voir dire that they could be fair and impartial in their deliberations (App A, p. 18).

Thus, the Nevada Supreme Court denied Mr. Biela relief because the seated jurors did not expressly indicate they could not be fair. Under this rationale, the Nevada Supreme Court found had appellate counsel raised the issue on direct appeal, he would not have been able to demonstrate that the trial court erred in denying his motion for change of venue (App. A, p. 18-19).

The Nevada Supreme Court's holding is in error because the basis of the holding is contrary to this Court's reasoning in *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). To receive a new trial under the Sixth Amendment, Mr. Biela would have only needed to demonstrate that "the nature and strength of the opinion formed are such as in law necessarily... raise the presumption of partiality." *Id.* at 723. Thus, a prospective juror need not demonstrate an unqualified belief in the defendant's guilt in order to raise a

presumption of partiality.

The Nevada Supreme Court held that the jurors indicated they could be impartial, thus Mr. Biela was not entitled to relief (App. A, p. 18). However, under federal law, “the juror’s assurances that he is equal to this task cannot be dispositive of the accused’s rights, and it remains open to the defendant to demonstrate ‘the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.’” *Murphy v. Florida*, 421 U.S. 794, 800, 95 S. Ct. 2031, 2036 (1975) (quoting *Irvin*, 366 U.S. at 723). The presumption of impartiality created by such assurances may be overcome with evidence of actual bias or evidence that “the general atmosphere in the community or courtroom is sufficiently inflammatory.” *Murphy*, 421 U.S. at 803. Importantly, all of the jurors in *Irvin* indicated that they could be impartial. Nevertheless, the Court held that the defendant had been denied his constitutional right to an impartial jury.

This Court further explained,

No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one’s fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, “You can’t forget what you hear and see.” *Irvin*, 366 U.S. at 728.

In this case, the Nevada Supreme Court does not acknowledge that a juror’s

assurances of impartiality could be rebutted, or fully considered whether the atmosphere in the community or courtroom was sufficiently inflammatory as to rebut the assurances of impartiality. Nor does the Nevada Supreme Court acknowledge that this Court has held a juror's indication that they can be impartial, when the atmosphere of the courtroom indicates otherwise, requires consideration. Instead, the Nevada Supreme Court denied Mr. Biela relief solely on the basis that the seated jurors indicated they could be impartial.

A review of the voir dire transcripts demonstrates the entirety of the voir dire process was so infected given that the prejudicial publicity had permeated the entire Reno community. The Nevada Supreme Court in denying Mr. Biela relief acknowledged as much: “[a]ll the perspective jurors indicated that they had been exposed to some media coverage of the case and followed media reports while Denison was missing.” (App A, p. 18). Here, as in *Irvin*, despite the jurors best assurances that they could be impartial, the atmosphere of both the courtroom and the community indicates otherwise. Given that the issue is of great constitutional magnitude, requiring reversal, and the Nevada Supreme Court has applied the wrong standard, Certiorari should be granted.

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IX.

CONCLUSION

Based upon the above and foregoing, Mr. Biela respectfully requests this Court grant Certiorari.

Dated this 2nd day of October, 2019.

Respectfully submitted,

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