I.INDEX TO APPENDIX

Page No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARY JAMES PLUMLEE,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 75739

ORDER DENYING PETITION FOR REVIEW

Review denied. NRAP 40B.[1]

It is so ORDERED.

FILED
DEC 20 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Pickering, A.C.J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J
Silver

cc: Hon. Scott N. Freeman, District Judge
Federal Public Defender/Las Vegas
Washoe County District Attorney
Attorney General/Carson City
Washoe District Court Clerk

[1]The Honorable Mark Gibbons, Justice, did not participate in the decision of this matter.

19-51524

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LARY JAMES PLUMLEE,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 75739-COA

FILED
JUN 25 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Lary James Plumlee appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2017. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Plumlee filed his petition nearly 22 years after entry of the issuance of the remittitur on direct appeal on May 16, 1995, *see Plumlee v. State*, Docket No. 24089 (Order Dismissing Appeal, April 27, 1995), and more than 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev., Adv. Op. 53, *22 n.12, 423 P.3d 1084, 1097 n.12 (2018). Plumlee's petition was therefore untimely filed. *See* NRS 34.726(1). The petition was

also successive.[1] *See* NRS 34.810(1)(b)(2). Plumlee's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b).

Plumlee claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). This court has recently held that *Welch* and *Montgomery* do not provide good cause to overcome the procedural bars to a *Byford* claim. *See Branham v. Warden*, 134 Nev., Adv. Op. 99, *6-7, 434 P.3d 313, 316 (Ct. App. 2018).

Plumlee also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. As Plumlee concedes in his opening brief, there was evidence of second-degree murder. This is not actual innocence, and Plumlee thus failed to overcome the procedural bars. *See Bousley v. United States*, 523 U.S. 614, 623 (1998)

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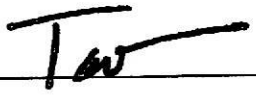
[1]*See Plumlee v. Warden*, Docket No. 31785 (Order Dismissing Appeal, November 18, 1999).

("'[A]ctual innocence' means factual innocence, not mere legal insufficiency."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
Federal Public Defender/Las Vegas
Washoe County District Attorney
Attorney General/Carson City
Washoe District Court Clerk

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[2]The district court acknowledged the State argued the petition was procedurally barred but nevertheless "decided to address the *Petition* on the merits." This was error. Application of the procedural bars is mandatory. *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). We nevertheless affirm the district court's decision for the reasons stated above. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

FILED
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2018-03-09 11:50:02 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6569888

CODE: 3060

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARY JAMES PLUMLEE,

Petitioner,

v.

ISIDRO BACA, WARDEN,

Respondent(s)

Case No.: CR91-1144
Dept. No.: 9

ORDER GRANTING MOTION TO DISMISS

WRIT OF HABEAS CORPUS (POST-CONVICTION)

This case came on for oral argument on January 9, 2018. Prior to the hearing, the Court was in receipt of Petitioner LARY JAMES PLUMLEE's *Petition for Writ of Habeas Corpus (Post-Conviction)* filed on April 13, 2017. On June 21, 2017, this Court entered an Order directing the State to file a response. Respondent, THE STATE OF NEVADA (the "State") filed a *Motion to Dismiss Successive Petition for Writ of Habeas Corpus (Post-Conviction)* on August 7, 2017. Petitioner filed an *Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)* on August 14, 2017, and the State filed a *Reply* on August 21, 2017.

Upon careful review of the petition, motions, and record, good cause appears to GRANT the State's motion to dismiss Petitioner's *Petition for Habeas Corpus (Post-Conviction).*

FINDINGS OF FACT

On October 3, 1992, a jury found Mr. Plumlee guilty on Count I, Murder and Count II, Robbery with the Use of a Firearm. In reaching a guilty verdict on Count I, the jury was given the *Kazalyn* jury instruction on premeditation and deliberation. The *Kalazyn* jury instruction provided:

"Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premediated murder."

Pet'r's Pet. for Writ of Habeas Corpus (Post-Conviction), 2-3.

Eight years after the Mr. Plumlee's conviction, the Nevada Supreme Court found the *Kazalyn* jury instruction to be improper. *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). The Court in *Byford* held that district courts must provide separate instructions for the concepts of intent to kill, and deliberation and premeditation. Mr. Plumlee comes now with his *Petition for Habeas Corpus (Post-Conviction)* alleging that as a matter of due process, the decision in *Byford* should be retroactively applied to his conviction. The State responds by asserting that the Nevada Supreme Court decision in *Byford*, and subsequent decision holding that *Byford* is not to be applied retroactively, remain authoritative on this issue. [1]

STANDARD OF REVIEW

Under the Fifth Amendment of the United States Constitution, individuals in criminal cases are guaranteed the right to due process. U.S.C.A. Const. Amend. 5. Constitutional due process confers the availability of habeas relief when the state's highest court interprets and clarifies the provisions of a state criminal statute for the first time where the interpretation excludes a defendant's acts from the statute's reach at the time the defendant's conviction became final. U.S.C.A. Const. Amend. 14. The United States Supreme Court has held, in *Teague v. Lane* and subsequent case law, that a change in a criminal statute will apply retroactively to convictions finalized prior to the change in law in only two instances: (1) where a new substantive rule represents a change in a constitutional rights, and (2) where a new procedural rule defines procedures "implicit in the concept of ordered liberty." 489 U.S. 288, 290, 109 S.Ct. 1060, 1064

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[1] The State has also asserted that the *Petition* is untimely, abusive, successive and barred by laches. The Court finds this argument well-pled and is well-taken. However, in this case, the Court had decided to address the *Petition* on the merits.

(1989). The Nevada Supreme Court has adopted a modified *Teague* framework for retroactivity. *Colwell v. State*, 118 Nev. 807, 59 P.3d 463. Under *Colwell*, a new rule applies retroactively only in two instances: "(1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished." *Clem v. State*, 119 Nev. 615, 628, 81 P.3d 521, 530–31 (2003). Therefore, on collateral review under *Colwell,* if it is new, but not a constitutional rule, it does not apply retroactively; and if it is new and constitutional, then it applies retroactively only if it falls within one of *Colwell* 's delineated exceptions. *Id.*

DISCUSSION

The Court GRANTS the State's *Motion to Dismiss*, finding that under the doctrine of stare decisis, Nevada case law dictates that the holding in *Byford v. State* is one of statutory construction and therefore, shall not be applied retroactively.

The Nevada Supreme Court decided in *Byford* that use of the *Kazalyn* jury instruction was improper under the requirements of NRS 200.030. 116 Nev. 215, 234, 994 P.2d 700, 713 (2000). NRS 200.030(1)(a) provides in relevant part that a first degree murder is a "willful, deliberate and premediated killing." The Court in *Byford* found the *Kazalyn* jury instruction did not distinguish "deliberation" as a critical element of the *mens rea* for first-degree murder. 116 Nev. 215, 234, 994 P.2d 700, 713 (2000). The Nevada Supreme Court directed district courts to stop instructing juries using the *Kazalyn* jury instruction and instead provide a definition of deliberation where there was a separate instruction given for premeditation. *Id.* Later, the Nevada Supreme Court held the decision in *Byford* represented an evolving common law interpretation of a state statute, and therefore, must be applied only prospectively from the time *Byford* was decided. *Nika v. State*, 124 Nev. 1272, 1284-85, 198 P.3d 839 (2008).

Mr. Plumlee asserts that recent changes in retroactivity jurisprudence by the United States Supreme Court, has taken the question of retroactivity away from the states and have made the issue one of federal consideration. Mr. Plumlee uses the recent holdings in *Welch v. United States*, 136 S.Ct. 1257 (2016), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), to allege (1) any

narrowing in a criminal statute constitutes a change that must be held retroactively, and (2) where a change in interpretation alters the range of conduct or the class of persons the law punishes, the change must be applied retroactively.

In *Welch*, the United States Supreme Court addressed the question of whether the finding of a federal sentencing statute to be unconstitutionally vague must be applied retroactively. The Court found in the affirmative, stating that where a constitutionally based rule of law narrows the scope of conduct punishable, then the rule must be applied retroactively. 136 S.Ct. at 1265 (2016). Similarly, the Court in *Montgomery* held where the Constitution establishes a rule, the rule must be applied retroactively. 136 S.Ct. at 718 (2016).

The State distinguishes *Welch* and *Montgomery* from the issue at hand, by differentiating a change in a constitutionally based rule and a change in statutory interpretation. The Nevada Supreme Court specifically held that the change in *Byford* was a change in statutory interpretation, not based on constitutional rules of law. *Nika v. State*, 124 Nev. 1272, 1280, 198 P.3d 839, 845 (2008). Further, the Court stated "if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law." *Id.* at 1288, 198 P.3d at 850 (2008).

This Court finds the holding of *Nika* controls. Pursuant to *Nika*, the Nevada Supreme Court's ruling in *Byford* regarding the *Kazalyn* jury instruction was a change in statutory interpretation, and thus, must apply only prospectively from the time *Byford* was decided. Here, the Court finds Mr. Plumlee's conviction was reached prior to *Byford* and is thus a valid convition. As such, the Court dismisses Mr. Plumlee's *Petition for Writ of Habeas Corpus*.

THEREFORE, and good cause appearing, the Court HEREBY GRANTS Respondent, THE STATE OF NEVADA's *Motion to Dismiss Successive Petition for Writ of Habeas Corpus (Post-Conviction)*

DATED: this 9 day of March, 2018.

DISTRICT JUDGE

APP. 009

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of _____, 2018, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Further, I certify that on the 9th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

JASON CARR, ESQ. for LARY JAMES PLUMLEE
JENNIFER NOBLE, ESQ. for STATE OF NEVADA
DIV. OF PAROLE & PROBATION

Brianne Anderson
Judicial Assistant

1

The LANDS COUNCIL; Wild West Institute, Plaintiffs–Appellants,

v.

Ranotta McNAIR, Forest Supervisor for the Idaho Panhandle National Forests; United States Forest Service, Defendants–Appellees,

Boundary County; City of Bonners Ferry; City of Moyie Springs; Everhart Logging, Inc.; Regehr Logging, Inc., Defendant–Intervenors–Appellees.

No. 07–35000.

United States Court of Appeals, Ninth Circuit.

Jan. 16, 2008.

Karen Lindholt, University Legal Assistance, Spokane, WA, for Plaintiffs–Appellants.

Deborah A. Ferguson, Esq., USBO–Office of the U.S. Attorney, Boise, ID, Thomas W. Swegle, Esq., U.S. Dept. of Justice Environment & Natural Resources Division, Washington, DC, for Defendants–Appellees.

Julie A. Weis, Esq., Haglund Kirtley Kelley Horngren & Jones, LLP, Scott W. Horngren, Esq., Haglund Kelley Horngren Jones & Wilder, Portland, OR, for Defendant–Intervenors–Appellees.

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35–3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

2

Lary James PLUMLEE, Petitioner–Appellant,

v.

Catherine Cortez MASTO, Attorney General State of Nevada; E.K. McDaniel, Warden, Respondents–Appellees.

No. 04–15101.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 9, 2007.

Filed Jan. 17, 2008.

Background: Petitioner who was convicted of murder and armed robbery in state court sought writ of habeas corpus. The United States District Court for the District of Nevada, David Warner Hagen, J., denied petition, and petitioner appealed. The Court of Appeals, 465 F.3d 910, reversed and remanded. The Court of Appeals, 497 F.3d 981, voted to rehear the matter en banc.

Holding: he Court of Appeals, Silverman, Circuit Judge, held that defendant's distrust of public defense counsel did not constitute an actual conflict of interest.

Denial of habeas corpus affirmed.

Pregerson, Circuit Judge, filed a dissenting opinion.

1. Habeas Corpus ⚿841

In reviewing whether a court's determination was contrary to or an unreasonable application of clearly established federal law, for purposes of a habeas claim under Antiterrorism and Effective Death Penalty Act (AEDPA), Court of Appeals reviews the last reasoned decision by a state court. 28 U.S.C.A. § 2254(d)(1).

2. Habeas Corpus ⚿452

As it pertains to Antiterrorism and Effective Death Penalty Act (AEDPA), "clearly established federal law" is the governing legal principle or principles set forth by the United States Supreme Court at the time the state court renders its decision. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Habeas Corpus ⚿452

In reviewing clearly established federal law, for purposes of a habeas claim under Antiterrorism and Effective Death Penalty Act (AEDPA), what matters are the holdings of the United States Supreme Court, not the holdings of lower federal courts. 28 U.S.C.A. § 2254(d)(1).

4. Criminal Law ⚿641.5(.5)

In order to succeed on an ineffective assistance claim based on an alleged attorney conflict, there must be a showing of an actual conflict, namely that a defendant's attorney is representing conflicting interests. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⚿641.5(.5)

Defendant's subjective belief that his public defense counsel was not acting ethically and in his best interest, which was based, inter alia, upon defendant's roommate's conversations with a supervising public defender regarding defendant's case and a public defender's interactions with the district attorney's office, did not constitute an actual conflict of interest, such that he was entitled, under the Sixth Amendment, to appointment of alternative representation outside the public defender's office. U.S.C.A. Const.Amend. 6.

Jason F. Carr, AFPD, Las Vegas, NV, for the petitioner-appellant.

Joseph W. Long, Deputy Attorney General, Ely, NV, for the respondent-appellee.

David K. Neidert, Deputy Attorney General, Reno, NV, for the respondent-appellee.

Appeal from the United States District Court for the District of Nevada; David Warner Hagen, District Judge, Presiding. D.C. No. CV–00–00244–DWH/VPC.

Before: ALEX KOZINSKI, Chief Judge, MARY M. SCHROEDER, HARRY PREGERSON, BARRY G. SILVERMAN, M. MARGARET McKEOWN, RAYMOND C. FISHER, RONALD M. GOULD, RICHARD R. CLIFTON, CONSUELO M. CALLAHAN, SANDRA S. IKUTA, and N. RANDY SMITH, Circuit Judges.

Opinion by Judge SILVERMAN; Dissent by Judge PREGERSON.

SILVERMAN, Circuit Judge:

The Supreme Court has held that a criminal defendant has a constitutional right to counsel who is free of conflicts of interest. It also has held that a defendant does not have a constitutional right to an appointed lawyer with whom he has a "meaningful relationship" so long as the lawyer acts as the client's advocate. In this case, appellant Lary James Plumlee contends that he was unconstitutionally forced to represent himself when the Nevada state trial court refused to replace the Public Defender's Office, which he came to distrust and with which he would not cooperate. He claims that he had developed an "irreconcilable conflict" with counsel. Before the trial began, and again in state post-conviction proceedings, the trial judge made inquiry and found no actual conflict underlying Plumlee's refusal to work with his appointed lawyer because counsel committed no misconduct, and

Plumlee's reasons for distrusting the lawyer were not supported.

We hold today that the Nevada Supreme Court did not misapply clearly established federal law as determined by the Supreme Court when it ruled that Plumlee's right to the effective assistance of counsel was not violated by the trial judge's refusal to appoint a different lawyer.

I. Background

On June 4, 1991, Plumlee was charged in Washoe County, Nevada with the armed robbery and murder of Wilbur Richard Beard. The Washoe County Public Defender's Office was appointed to represent him, and Plumlee was assigned Deputy Public Defender David Allison. Allison's boss was Chief Deputy Public Defender Shelly O'Neill.

Shortly after his arrest, Plumlee heard through the grapevine that O'Neill was good friends with his roommate, John Dewey, who also was a suspect in the Beard robbery and murder. Plumlee came to believe that O'Neill had leaked to Dewey privileged information—namely, that Plumlee was going to point the finger at Dewey.

Plumlee also came to distrust Allison. Prior to being assigned to Plumlee's case, Allison had applied for a position at the Washoe County District Attorney's Office, but had not, Plumlee claimed, mentioned that to Plumlee. Allison received a job offer from the D.A.'s Office during his representation of Plumlee and took the job. Plumlee believed that Allison had deceived him about his applicant status at the D.A.'s Office when Plumlee had asked him about it.

In addition, Plumlee came to believe that, before Allison started his new job, he was leaking privileged information to the D.A.'s Office. Plumlee claimed that the police had released his car from impound to the lienholder soon after Plumlee had told Allison that exculpatory evidence might be found in the vehicle.

Steven Gregory was assigned to Plumlee's case after Allison left for the D.A.'s Office. Two events caused Plumlee to believe that Gregory was acting against his interest. First, Gregory had presented Plumlee with a plea offer after Plumlee had told him that he wanted plea discussions to move forward only with his prior approval. Second, after Plumlee learned of a bail order and attempted to discuss it with Gregory, the attorney told Plumlee that he "needed psychiatric treatment, because no bail order existed." In fact, the order did exist but had been misplaced.

Shortly thereafter, Gregory moved to have the Public Defender's Office "relieved" from the case because a lack of trust was inhibiting the formation of a functional attorney-client relationship. In an affidavit in support of the motion, Gregory attested to Plumlee's general distrust of the Public Defender's Office and, specifically, Plumlee's suspicion that Allison had been leaking information to the D.A.'s Office about his case. The trial judge, Judge Mills Lane, III, held a proceeding in open court to consider the motion, at which Plumlee was present. At the hearing, Judge Lane heard from both Gregory and the prosecution about the alleged leaks from Allison to the D.A.'s Office. He also inquired into the problems with the attorney-client relationship. Gregory told the Judge that, "unfortunately, because of Mr. Plumlee's mistrust with the Public Defender's Office and anyone attached to the Public Defender's Office, he is unable to properly assist me, therefore, making my efforts less than effective." Shelly O'Neill's friendship with John Dewey was not mentioned. At the conclusion of the proceedings, Judge Lane found that no improper conversations occurred, and that no conflict was created by Allison's trans-

fer to the D.A.'s Office. Also, citing the rule enunciated by the Supreme Court in *Morris v. Slappy,* 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), that the Sixth Amendment does not entitle a defendant to a "meaningful relationship" with his attorney, Judge Lane denied the motion to remove the Public Defender's Office from the case.

About two weeks later, Plumlee through Gregory moved to disqualify the Washoe County D.A.'s Office from prosecuting his case because of an alleged imputed conflict arising from Allison's new job with that office. Judge Lane found that Allison had been adequately screened from the matter within the D.A.'s Office and denied the motion.

At the hearing on the motion to disqualify the D.A.'s Office, Gregory renewed his motion to relieve the Public Defender's Office of its representation of Plumlee. The motion was again denied. Judge Lane then informed Plumlee that he had the right to be represented by competent counsel and that Gregory *was* competent counsel. Judge Lane told Plumlee that he also had the constitutional right to represent himself, but those were his only two options. Judge Lane made it clear that he would not remove Gregory and appoint private counsel in his place.

The next day, in revisiting the issue of Plumlee's possible self-representation, Judge Lane told him, "the rules are going to apply to you same as they apply to everybody else, but if you want to exercise your constitutional right to be your lawyer and defend yourself in this offense, that motion will be granted." Plumlee stated that he wanted to act as his own attorney and the Public Defender's Office was appointed as stand-by counsel. Gregory tried once more to persuade the court to relieve his office of the case, stating, "[i]t's obvious that the reason Mr. Plumlee wants to represent himself is he doesn't trust the Public Defender's Office. To order us to be stand-by counsel, in effect, gives him no stand-by counsel." Judge Lane was not persuaded and refused to appoint different stand-by counsel for Plumlee.

At a subsequent hearing, Plumlee was again advised by Judge Lane of his right to be represented by the Public Defender's Office, and Judge Lane reiterated his refusal to appoint outside counsel. After expressing his view that he had no choice, Plumlee affirmed his decision to proceed pro se. Plumlee then petitioned the Nevada Supreme Court for a writ of mandamus to compel the appointment of counsel outside the Public Defender's Office. The petition was denied.

Plumlee proceeded to trial pro se and was convicted of all charges. He was sentenced to two consecutive life terms without parole for first-degree murder and for the use of a deadly weapon, as well as to two concurrent nine year sentences for robbery and for the use of a deadly weapon.

On direct appeal, Plumlee argued, *inter alia,* that the district court abused its discretion when it refused to provide him with counsel outside the Public Defender's Office, causing him to involuntarily serve as his own attorney in violation of his Sixth Amendment right to counsel. The Nevada Supreme Court dismissed the appeal.

> Absent a showing of adequate cause, a defendant is not entitled to reject court-appointed counsel and substitute other counsel at public expense. *Thomas v. State,* 94 Nev. 605, 607, 584 P.2d 674, 676 (1978). It is within the sound discretion of the trial court to decide whether friction between counsel and client justifies appointment of new counsel. *Id.* A defendant's refusal to cooperate with appointed counsel is no basis for a claim of inadequate representation. *Id.* at 608, 584 P.2d at 676. "Requiring

a defendant to choose between waiving counsel and continuing with present counsel is not constitutionally offensive unless defendant's objections to existing counsel are such that he has a right to new counsel." *State v. Staten*, 60 Wash. App. 163, 802 P.2d 1384, 1387 (1991). Appellant never showed adequate cause justifying appointment of new counsel, and the court below did not abuse its discretion in refusing to do so.

After his conviction was affirmed on direct appeal, Plumlee filed a petition for a writ of habeas corpus in the state trial court. Judge Lane held an evidentiary hearing in connection with Plumlee's petition. At the conclusion of the hearing, Judge Lane denied the petition and made several critical factual findings:

- Chief Deputy Public Defender O'Neill had neither received, nor leaked, any confidential information regarding Plumlee's case.
- Allison was unaware of and did not approve the release of Plumlee's car to the lienholder by the police.
- "Owing to Plumlee's story, prior to January of 1992, Allison reasonably believed the car was not a crime scene, a part of the crime scene or played any role whatsoever in the commission of these crimes."
- "Plumlee's habeas testimony [where] he stressed the importance of his car as the repository of exculpatory evidence is not credible."
- "Plumlee presented no credible evidence at the habeas proceeding having a legitimate tendency or reasonable basis for believing that exculpatory evidence . . . ever existed, even if Allison, or Mr. Gregory, bothered to go and look for these items."
- Plumlee's habeas testimony was not credible on the claim that Allison had not notified him about "the job change," referring to Allison's move to the District Attorney's Office.
- Allison was credible in his habeas testimony that he had applied for the position at the District Attorney's Office prior to being assigned Plumlee's case and thereafter "did not seek out an interview for the position or even ask about the position while he represented Plumlee."
- If Gregory discussed a possible plea deal in his initial encounter with Plumlee, he did so in compliance with ethical rules.
- "No material exculpatory evidence was lost or destroyed while Plumlee awaited trial."
- "In June and July of 1992, Plumlee knowingly and voluntarily waived his constitutional right to counsel, and represented himself until he was convicted; meanwhile, Mr. Gregory was ordered to act as 'standby' counsel."

Plumlee appealed the state district court's denial of his state habeas petition. The Nevada Supreme Court dismissed the appeal, holding:

> Appellant contends that he did not voluntari[ly] waive his right to counsel, because the district court's improper refusal to appoint substitute counsel made appellant's waiver involuntary. Since there was no error in the district court's refusal to appoint new counsel, as we concluded in the direct appeal, we disagree with appellant's contention that he was forced to represent himself. We conclude that appellant's waiver of his right to counsel was voluntary.

Having exhausted his state post-conviction remedies, Plumlee timely filed a federal habeas petition. He presented seven claims in the federal district court. Relevant here is his claim that his Sixth Amendment right to counsel was violated. Plumlee claimed that waiver of the right to counsel was involuntary because he was

limited to either proceeding pro se or accepting the services of the Public Defender's Office, with whom he had an "irreconcilable conflict." The district court noted four ways in which Plumlee believed his representation by the Public Defender's Office created such a conflict: (1) O'Neill's alleged communications of confidential information to Dewey; (2) Allison's alleged deception regarding his intent to take a job at the District Attorney's Office and his subsequent transfer to that position; (3) Gregory's conversations with the prosecutor about the lost bail order against the wishes of Plumlee; and (4) " 'miscellaneous other repeated instances of misconduct' on the part of the public defender's office."

The district court rejected Plumlee's claim that he was compelled to represent himself in violation of his Sixth Amendment right to counsel after the trial court denied him alternate representation outside the Public Defender's Office. In arriving at this conclusion, the court found that Plumlee could not "show that an *actual* conflict of interest adversely affected the attorney's performance," thus failing to meet the standard established in *Cuyler v. Sullivan*, 446 U.S. 335, 348–50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

We now consider Plumlee's appeal of the denial of his petition for a writ of habeas corpus in the District of Nevada. We have jurisdiction pursuant to 28 U.S.C. § 2253(a). We review de novo the denial of habeas relief by a district court. *Polk v. Sandoval*, 503 F.3d 903, 909 (9th Cir.2007). Having done so, we affirm the district court's denial of Plumlee's petition for a writ of habeas corpus.

II. Discussion

A. Habeas Review Under AEDPA and *Carey v. Musladin*

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As a preliminary matter, we conclude that the state court decision was not premised on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The state trial court held an evidentiary hearing and its factual findings are supported by the record. *Cf. Miller–El v. Dretke*, 545 U.S. 231, 241 n. 2, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("state court factfinding must be assessed 'in light of the evidence presented in the State court proceeding' " (quoting 28 U.S.C. § 2254(d)(2))). These findings are entitled to a presumption of correctness. Plumlee has not rebutted them "by clear and convincing evidence." *See* 28 U.S.C. § 2254(e)(1).

[1, 2] We now turn to whether the Nevada Supreme Court's determination was contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). We review "the 'last reasoned decision' by a state court." *Gautt v. Lewis*, 489 F.3d 993, 1002 (9th Cir.2007) (quoting *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir.2004)). As it pertains to AEDPA, "clearly established federal law" is "the governing legal princi-

ple or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade,* 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); *see also Yarborough v. Alvarado,* 541 U.S. 652, 660–61, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004); *Wiggins v. Smith,* 539 U.S. 510, 520, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

[3] In *Carey v. Musladin,* —— U.S. ——, 127 S.Ct. 649, 653–654, 166 L.Ed.2d 482 (2006), the Supreme Court recently emphasized that habeas relief is available only if the state court's decision is contrary to or involved an unreasonable application of the *Supreme Court's* own holdings. In that case, the Court reiterated its previously stated instruction that,

> "clearly established Federal law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."

Id. at 653 (quoting *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). What matters are the holdings of the Supreme Court, not the holdings of lower federal courts.

B. Supreme Court Jurisprudence

[4] In *Cuyler v. Sullivan,* the Supreme Court stated that "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 446 U.S. at 350, 100 S.Ct. 1708. In other words, in order to succeed on a claim based on an alleged conflict, there must be a showing of an *actual* conflict, namely that a defendant's attorney is representing conflicting interests. Conflicting interests have been recognized by the Supreme Court in a variety of settings. *See, e.g., Mickens v. Taylor,* 535 U.S. 162, 164–65, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (recognizing a "potential conflict of interest" when appointed counsel previously represented the murder victim in a separate case); *Wood v. Georgia,* 450 U.S. 261, 270–72, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (suggesting strong "*possibility* of a conflict of interest" (emphasis in original) when defendants were represented by a lawyer hired by their employer); *Cuyler,* 446 U.S. at 348, 100 S.Ct. 1708 ("Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial."); *Holloway v. Arkansas,* 435 U.S. 475, 490, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (noting "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process" (emphasis in original)).

[5] Obviously, the word "conflict" is also used in common parlance to describe a personality conflict, an artistic conflict, a family conflict, and many other sorts of antagonism—even war. In this context, however, as the Supreme Court cases make clear, we are talking about legal conflicts of interest—an incompatibility between the interests of two of a lawyer's clients, or between the lawyer's own private interest and those of the client. *See* BLACK'S LAW DICTIONARY 319 (8th ed.2004). Here, the state court found that Plumlee's lawyers had no *actual* conflict of interest, and Plumlee does not argue otherwise. Rather, he argues that his relationship with his public defender was dysfunctional due to his subjective distrust of the office and that this created a "conflict," entitling him to new counsel as a matter of Sixth Amendment right.

In *Morris v. Slappy,* the Court held that there is no Sixth Amendment right to "a

'meaningful relationship' between an accused and his counsel," reasoning that, "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel." 461 U.S. at 13–14, 103 S.Ct. 1610.

Plumlee has cited no Supreme Court case—and we are not aware of any—that stands for the proposition that the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust. Indeed, *Morris v. Slappy* is to the contrary.

The Supreme Court has held that a defendant is entitled to counsel who "function[s] in the active role of an advocate." *Entsminger v. Iowa*, 386 U.S. 748, 751, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967); *see also United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Plumlee has not demonstrated that his attorneys failed to satisfy this obligation or acted unreasonably in the *Strickland* sense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Rather, Plumlee argues that many events that took place throughout his relationship with the Public Defender's Office "caused him to *subjectively* believe that said office and his assigned counsel were not acting ethically and in his best interest." (Emphasis added.) As bases for his "subjective[ ] belie[f] that the Washoe County Public Defender's Office was not acting ethically and in his best interest," Plumlee points to (1) O'Neill's relationship and alleged discussions with Dewey regarding Plumlee's case; (2) Allison's interactions with the District Attorney's Office and his alleged prevaricating to Plumlee about the situation; and (3) Gregory's handling of the plea proposal and bail order.

Under our precedents, *see, e.g., Schell v. Witek*, 218 F.3d 1017, 1025–26 (9th Cir. 2000), Judge Lane had a duty to inquire into the problems with counsel when they were first raised, and he did so. This case is thus unlike *Schell*, 218 F.3d at 1025–26, where the trial court completely ignored a timely motion to remove an appointed lawyer. In contrast, when the matter first came to Judge Lane's attention, he made inquiry and then found no basis for Plumlee's unwillingness to cooperate with Gregory. When he reviewed the matter again years later in connection with the state habeas petition, Judge Lane held a full-blown evidentiary hearing and made extensive findings to the same effect. Plumlee had no valid basis for insisting that the Public Defender's Office, or any of its employees, was leaking information to the D.A.'s Office. This case is thus in the *Morris v. Slappy* category.

III. Conclusion

The Supreme Court has held that a defendant is constitutionally entitled to a lawyer who is free of conflicts of interest and who can act as a loyal advocate, but he has no constitutional right to a "meaningful relationship" with appointed counsel. Given the facts as they reasonably were found to be, the Nevada Supreme Court did not act contrary to, or unreasonably apply, federal law as determined by the United States Supreme Court in ruling that (1) Plumlee was not entitled to the appointment of a different lawyer, and that (2) his waiver of counsel was not involuntary. Consequently, the district court's denial of Plumlee's petition for a writ of habeas corpus is **AFFIRMED.**

PREGERSON, Circuit Judge, dissenting:

It is a universal truth that an indigent criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Gideon v. Wainwright,* 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (citation and internal quotation marks omitted). Lary James Plumlee, an indigent criminal defendant, was indicted for armed robbery and murder, and desperately "require[d] the guiding hand of counsel." But because Plumlee's relationship with his Washoe County public defender had been seriously compromised and because the Nevada trial judge refused to appoint new counsel, his only choice was to represent himself. Proceeding pro se, Plumlee was convicted and sentenced to two consecutive life terms in prison. The refusal of the Nevada courts to grant Plumlee's habeas petition in these circumstances violates clearly established Sixth Amendment Supreme Court jurisprudence. Thus, I dissent.

I wholeheartedly agree with the opinion rendered by the three-judge panel in this case, an opinion which was vacated when this case was taken en banc. *See Plumlee v. Del Papa,* 465 F.3d 910 (9th Cir.2006) (vacated). The Supreme Court has held that an indigent criminal defendant is entitled to an attorney who "function[s] in the active role of an advocate." *Entsminger v. Iowa,* 386 U.S. 748, 751, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967); *see also Anders v. California,* 386 U.S. 738, 743, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Court has also explained that the Sixth Amendment "requires not merely the provision of counsel to the [indigent] accused, but 'Assistance,' which is to be 'for his defence.' " *United States v. Cronic,* 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Nevada did not provide Plumlee with an attorney who could function in the active role of an advocate. Here, as the trial judge found, Plumlee had good reason to believe that his representation by the Public Defender's Office was tainted by a conflict of interest. His relationship with his public defenders had deteriorated to the point that Plumlee believed that being represented by the Public Defender's Office was worse than having no representation at all. This unhappy situation was recognized by his public defender, who explained that Plumlee was "unable to establish an attorney/client relationship with me or any of my colleagues in the Public Defender's office" and that having the Public Defender's Office as stand-by counsel "in effect, gives him no stand-by counsel." Judge Lane, the trial judge, made clear that while he did not believe the public defender's office had betrayed Plumlee, he nonetheless believed that Plumlee's distrust was reasonable. During the evidentiary hearing on state habeas, Judge Lane noted that "it is clear Mr. Plumlee didn't trust, didn't like or trust the Public Defender's Office for reason. And based upon certainly where he was sitting, I can't disagree he had a right to feel that" and that "I can understand why Mr. Plumlee felt like he did. I doggone sure can."

The majority's reliance on *Morris v. Slappy,* 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), is misplaced. In *Slappy,* the defendant challenged the trial court's refusal to grant him a continuance so that his preferred lawyer could represent him. The Supreme Court rejected the argument that a defendant had a right to a "meaningful relationship" with his attorney. Here, Plumlee did not argue that he was entitled to be represented by any one particular lawyer. Instead, Plumlee simply wanted *any* lawyer who could function as an effective advocate. The Supreme Court confirmed this distinction in *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988),

explaining that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (citations omitted). Where a criminal defendant has a reasonable, good-faith justification for being unable to work with an appointed lawyer, the Sixth Amendment requires that the court appoint a lawyer who can develop a functioning attorney-client relationship with the indigent defendant.

The majority concludes that Judge Lane's findings that the Public Defender's Office did not betray Plumlee, despite appearances to the contrary, resolve the issue. Judge Lane's findings do not, however, change the fact that Plumlee's relationship with the Public Defender's Office had deteriorated to the point that he had no attorney functioning in the role of an advocate, in violation of the Sixth Amendment. Accordingly, I dissent.

Kathleen LOWDEN and John Mahowald, individually and on behalf of all the members of the class of persons similarly situated, Plaintiffs–Appellees,

v.

T–MOBILE USA, INC., a foreign corporation, Defendant–Appellant.

No. 06–35395.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 7, 2007.

Filed Jan. 22, 2008.

Background: Customers brought action against cellular phone service provider alleging breach of contract and violation of Washington Consumer Protection Act (CPA). Provider removed action to federal district court and moved to compel arbitration per its service agreements. The United States District Court for the Western District of Washington, Marsha J. Pechman, J., 2006 WL 1009279, denied motion. Provider appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

(1) litigation and arbitration class action prohibitions contained in arbitration provision in cellular phone service contract was substantively unconscionable and unenforceable under Washington law for denying any meaningful remedy, and

(2) such determination was not preempted by Federal Arbitration Act (FAA).

Affirmed.

1. Federal Civil Procedure ⚿103.7

In a class action, Article 3 standing is satisfied if at least one named plaintiff meets the standing requirements. U.S.C.A. Const. Art. 3, § 1 et seq.

2. Alternative Dispute Resolution ⚿213(5)

The denial of a motion to compel arbitration under the Federal Arbitration Act (FAA) is reviewed de novo. 9 U.S.C.A. § 2.

3. Alternative Dispute Resolution ⚿213(5)

A district court's interpretation of the validity and scope of the arbitration clause subject to the Federal Arbitration Act (FAA) is reviewed de novo. 9 U.S.C.A. § 2.

4. Federal Courts ⚿850.1

A district court's findings of fact are reviewed for clear error.

APP. 020

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARY JAMES PLUMLEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44537

FILED

APR 0 5 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a motion to correct an illegal sentence. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On November 17, 1992, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole and two consecutive terms of nine years, the latter terms to be served concurrently with the former terms. This court dismissed appellant's appeal from his judgment of conviction and sentence.[1] Appellant unsuccessfully sought post-conviction relief.[2]

On September 12, 2002, appellant filed a proper person motion to correct an illegal sentence in the district court. The State

[1]Plumlee v. State, Docket No. 24089 (Order Dismissing Appeal, April 27, 1995).

[2]Plumlee v. State, Docket No. 31785 (Order Dismissing Appeal, November 18, 1999).

opposed the motion. Appellant filed a reply. On December 30, 2004, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that the district court did not have jurisdiction to sentence him because a separate penalty hearing with the participation of a jury was not conducted. Specifically, appellant claimed that NRS 175.552 required the district court to conduct a separate penalty hearing in front of a jury in a first degree murder case and because that was not done, he requested a new penalty hearing.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum.[3] "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"[4]

Our review of the record on appeal reveals that the district court did not err in denying appellant's motion. Appellant's sentence was facially legal.[5] Further, appellant's claim that the district court lacked jurisdiction to sentence him lacked merit. At the time appellant committed his crime and at the time that he was convicted, a separate

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[3]Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

[4]Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

[5]1989 Nev. Stat., ch. 631, § 1, at 1451.

penalty hearing was not required in a non-capital murder case.[6] Thus, we affirm the order of the district court.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[7] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.
Becker

Rose, J.
Rose

Gibbons, J.
Gibbons

cc: Hon. Robert H. Perry, District Judge
Lary James Plumlee
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[6]See Kazalyn v. State, 108 Nev. 67, 77, 825 P.2d 578, 584 (1992); McCabe v. State, 98 Nev. 604, 607, 655 P.2d 536, 537-38 (1982). In 1993, after appellant was convicted, the legislature amended NRS 175.552 to require a separate penalty hearing regardless of whether the death penalty was sought. 1993 Nev. Stat., ch. 182, § 1, at 322. This amendment was applicable only to defendants who were tried for murder after October 1, 1993. 1993 Nev. Stat., ch. 182, § 4, at 323.

[7]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

APP. 023

IN THE SUPREME COURT OF THE STATE OF NEVADA

'95 MAY 18 P4:29

LARY JAMES PLUMLEE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 24089

FILED

APR 27 1995

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first degree murder and robbery with use of a deadly weapon.

Appellant contends that the district court erred in three ways: in refusing to appoint him private counsel, in refusing to disqualify the district attorney's office, and in refusing to allow him to present expert testimony.

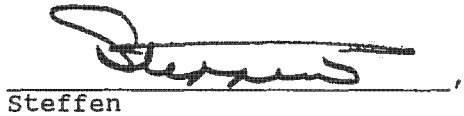
Absent a showing of adequate cause, a defendant is not entitled to reject court-appointed counsel and substitute other counsel at public expense. Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978). It is within the sound discretion of the trial court to decide whether friction between counsel and client justifies appointment of new counsel. Id. A defendant's refusal to cooperate with appointed counsel is no basis for a claim of inadequate representation. Id. at 608, 584 P.2d at 676. "Requiring a defendant to choose between waiving counsel and continuing with present counsel is not constitutionally offensive unless defendant's objections to existing counsel are such that he has a right to new counsel." State v. Staten, 802 P.2d 1384, 1387 (Wash. Ct. App. 1991). Appellant never showed adequate cause justifying appointment of new counsel, and the court below did not abuse its discretion in refusing to do so.

The decision to disqualify a prosecutor's office is within the sound discretion of the trial court. Collier v.

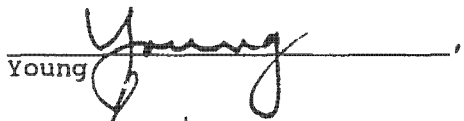
Legakes, 98 Nev. 307, 390, 646 P.2d 1219, 1220 (1982). The trial court should consider all the facts and determine whether the prosecution can be carried out impartially and without breach of any privileged communication. Id. at 310, 646 P.2d at 1220. Ethical rules that require vicarious disqualification of an entire firm or office are applied less strictly to government agencies than to private law firms, and individual rather than vicarious disqualification may be appropriate, depending on the facts. Id., 646 P.2d at 1221. The district court properly assessed the facts per Collier and did not err in refusing to disqualify the district attorney's office.

NRS 50.275 permits testimony by a qualified expert if it will assist the jury to understand the evidence or to determine a fact in issue. Absent clear abuse of discretion, this court will not disturb the trial court's decision regarding such testimony. Allen v. State, 99 Nev. 485, 487, 665 P.2d 238, 239 (1983). The district court did not abuse its discretion in considering appellant's proffered expert to be unqualified to testify or in concluding that expert testimony would not have assisted the jury in understanding the evidence in question. Accordingly, we

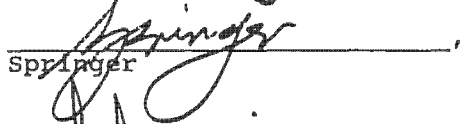
ORDER this appeal dismissed.



_____, C.J.
Steffen

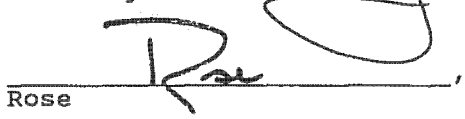


_____, J.
Young



_____, J.
Springer

_____, J.
Shearing



_____, J.
Rose

cc: Hon. Mills Lane, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Richard A. Gammick, District Attorney
Michael R. Specchio, Public Defender
Judi Bailey, Clerk

FILED
November 17, 1992
JUDI BAILEY, Clerk
By J Nyamanski
Deputy Clerk

No. CR91-1144

Dept. No. 9

38309

IN THE SECOND JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA, Plaintiff,	Reporter: J. Schonlau
vs.	J U D G M E N T
LARY JAMES PLUMLEE, Defendant.	

The Jury having returned the Verdicts of Guilty on October 3, 1992 and the Court having entered judgment consistent with the Jury Verdicts finding the Defendant Guilty of Murder In The First Degree as charged in Count I and Robbery as charged in Count II; and, no sufficient cause being shown by Defendant as to why judgment should not have been entered and sentence imposed. Now, therefore, the Defendant is sentenced as follows:

That Lary James Plumlee be punished by imprisonment in the Nevada State Prison for the term of Life Without The Possibility Of Parole as to Count I plus a consecutive term of Life Without The possibility of Parole in the Nevada State Prison for the Use Of A Deadly Weapon; and, Nine (9) years in the Nevada State Prison as to Count II plus a consecutive term of Nine (9)

MKM

years in the Nevada State Prison for the Use Of A Deadly Weapon. Count II is to run concurrently with the sentence imposed in Count I. The Defendant is given credit for five hundred eighty-five (585) days time served. It is further ordered that the Defendant pay the statutory Twenty-Five Dollar ($25.00) administrative assessment fee.

Dated this 17th day of November, 1992.

DISTRICT JUDGE

CERTIFIED COPY
document to which this
is a full, true and
on file and of record
11/18/92
Clerk of the
Court, in and for
State of Nevada.
Deputy

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LAST NAME NAM: PLUMLEE,
FIRST NAME: LARY
MIDDLE NAME: J.

STATE USAGE

ALIASES

CONTRIBUTOR ORI: NV018035C DEPT OF PRISONS CARSON CITY, NV

SIGNATURE OF PERSON FINGERPRINTED: X [signature]

DATE OF BIRTH DOB: [redacted] Year 68

THIS DATA MAY BE COMPUTERIZED IN LOCAL STATE AND NATIONAL FILES

DATE: 2316092 SIGNATURE OF OFFICIAL TAKING FINGERPRINTS: [signature]

DATE ARRESTED OR RECEIVED DOA: 11-20-92

SEX	RACE	HGT.	WGT.	EYES	HAIR	PLACE OF BIRTH POB
M	W	67"	140	GRY	BRN	LAS VEGAS, NV.

YOUR NO. OCA: 38309

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CHARGE: MURDER 1st DEGREE CS W/UDW
CC ROBBERY CS W/UDW

FBI NO. FBI: 896123NA7

CLASS.

SID NO. SID: NV00805791

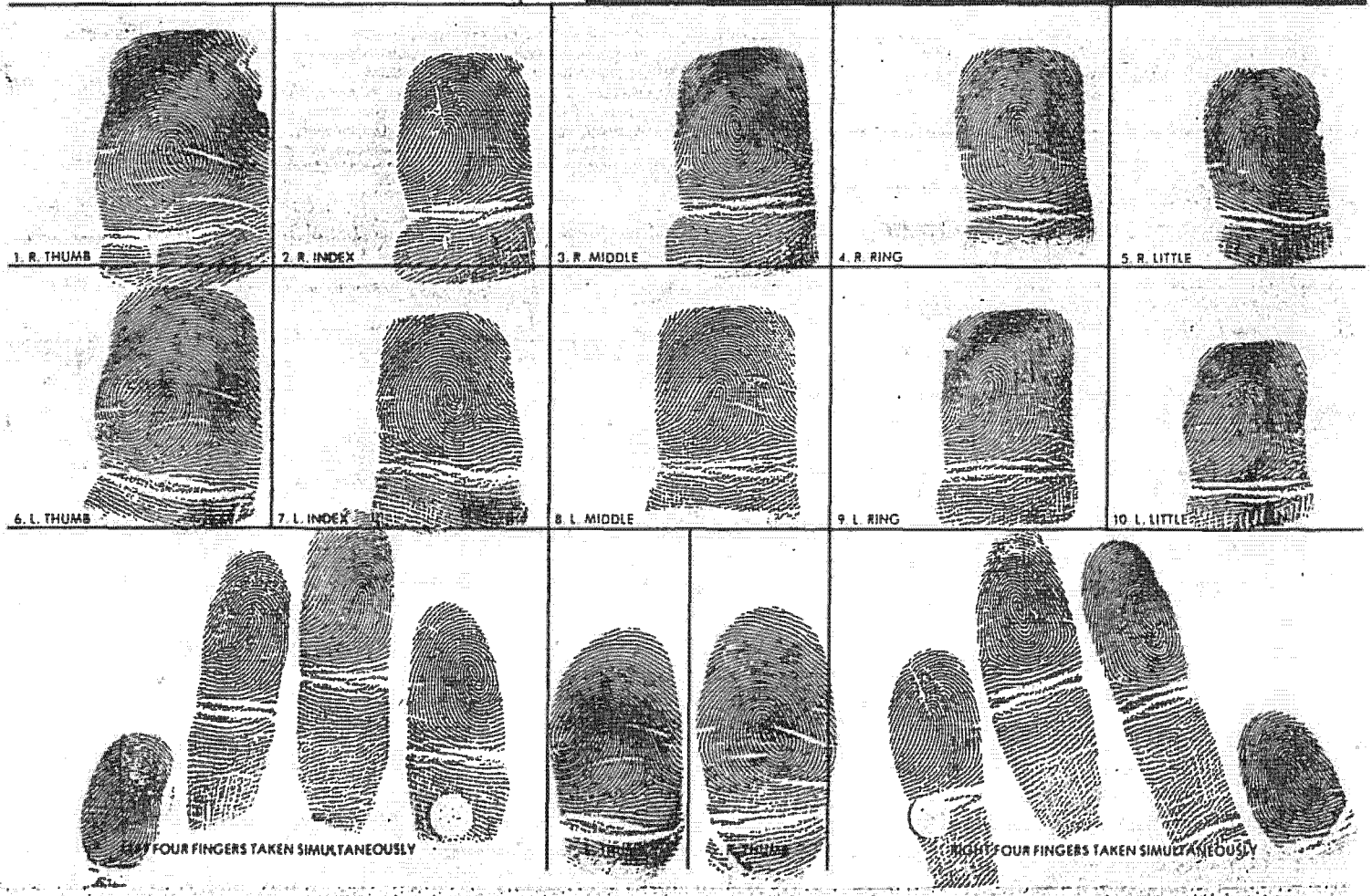
REF.

SOCIAL SECURITY NO. SOC: [redacted]7424

FINAL DISPOSITION: LIFE W/OUT CS LIFE W/OUT CC
9 YRS CS 9 YRS

NCIC CLASS - FPC

CAUTION



Plumlee
2nd JD 5/1/01

Plumlee
2nd JD 5/1/01

APP. 029

PLEASE ATTA[illegible]HIS CERTIFICATE PERMANENTLY [illegible]LL RECORDS

APP. 030

(U.S. Rev. Statutes, Sec. 906. Attestation by Legal Keeper of Records with Certificate (seal attached) of Secretary of State to official capacity of said Legal Keeper.)

STATE OF NEVADA)
COUNTY OF CARSON CITY) ss.

I, Bennie McGuinness (Name of Official Custodian), hereby certify:

That I am the Correctional Case Records Manager (Official Position) of the Nevada Department of Prisons, a penal institution of the State of Nevada, situate in the County and State aforesaid; that in my legal custody as such officer are the original files and records of persons heretofore committed to said penal institution; that the

(1) Photograph, (2) Fingerprint Record and (3) Commitment attached hereto are copies of the original records of Plumlee, Lary NDOP#38309, a person heretofore committed to said penal institution and who served a term of imprisonment therein; that I have compared the foregoing and attached copies with their respective originals now on file in my office and each thereof contains, and is, a full, true and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of October, A.D. 19 96.

Bennie McGuinness
Signature

Correctional Case Records Manager
Official Title

STATE OF NEVADA)