ORIGINAL

No. 20-8095

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2021

PASQUAL LOZANO — PETITIONER
(Your Name)

vs.

ROBERT LEGRAND — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Pasqual Lozano #94189
(Your Name)

L.C.C. 1200 Prison Rd
(Address)

Lovelock, NV 89419
(City, State, Zip Code)

775-273-1300
(Phone Number)

LCC LL FORM 40.006

Questions Presented

1. Where respondent warden failed to provide petitioner access to caselaw from United States Court of Appeals circuits other than the Ninth Circuit, and from state courts other than Nevada courts, was petitioner denied his First Amendment right to meaningful access to the courts where he hoped to demonstrate to this Court that the Ninth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; and/or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power?

2. Where the policy of the United States Court of Appeals is to construe a pro se habeas petitioner's Notice of Appeal as an application for certificate of appealability, as the Ninth Circuit did with petitioner, and where the Ninth Circuit then summarily denied petitioner's application for COA without first requesting an opening brief from petitioner, even though petitioner would have been able to brief that court had he filed a proper application for COA, and where Ninth Circuit denied a motion for reconsideration that sought leave to brief that court, were petitioner's First Amendment rights to meaningful access to the

courts, and/or his Fourteenth Amendment rights to Due Process and Fundamental Fairness denied?

3. Where petitioner's defense counsel opened the door to otherwise inadmissable evidence of gang membership at trial, and post-conviction counsel stated petitioner was severely prejudiced, and the state habeas court found that petitioner did not demonstrate prejudice as per Strickland v. Washington, 466 U.S. 668, 688 (1984), and where the Nevada Supreme Court affirmed that finding, and where the federal district court found that trial counsel did not provide ineffective assistance, and where the Ninth Circuit denied COA, was petitioner denied his Sixth Amendment right to the effective assistance of counsel?

4. Where the State presented an in-court photographic identification of petitioner at trial through a witness called by the prosecution after that witness could not identify the petitioner in open court, where trial counsel objected, where appellate counsel raised the issue as a violation of the Due Process Clause of the Fourteenth Amendment, where the federal district court found that the Nevada Supreme Court could reasonably have concluded that the normal procedures for testing the reliability of the witness were sufficient, and where the Ninth Circuit denied an application for certificate of appealability, were Petitioner's Fourteenth Amendment rights to Due Process Denied?

5. Where the State presented out-of-court witness statements, which that witness recanted at trial, as substantive evidence, and petitioner contended on direct appeal of the conviction that same violated his Sixth Amendment right to confront witnesses and his Fourteenth Amendment Due Process right to a fundamentally fair trial, and later the federal district court found that witness's testimony reasonably could have satisfied the Confrontation Clause and did not make the trial fundamentally unfair, and where the Ninth Circuit denied petitioner's application for COA, were petitioner's Sixth and Fourteenth Amendment rights violated?

6. Where petitioner was convicted at a first trial, and the trial court granted a defense motion for new trial, and at the second trial the prosecution inadvertently referenced "the last jury" while direct examining a state witness, and in his response to the prosecutor's question, witness also referenced "the last jury," and where defense counsel objected; and where the Nevada Supreme Court directly, summarily rejected this claim on direct appeal, and where the federal district court found that the reference could have referred to a grandjury, rather than a previous *trial, and Thus that* the Nevada Supreme Court could have reasonably concluded that the prosecutor's inadvertent mention of a prior jury trial, and the witness's **response,** were not **so** prejudicial as to make the trial fundamentally unfair, and the Ninth Circuit denied COA,

were petitioner's Fourteenth Amendment rights to Due Process and a fundmentally fair trial denied?

7. Where trial counsel failed to object to – and appellate counsel failed to raise on direct appeal – the following jury instructions:

1) Instruction 7, defining malice, which states: "Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

"Malice may be implied when no considerable provocation appears, or when all the circumstances show an abandoned and malignant heart"; and

2) Instruction 8's definition of premeditation, which states: "Premeditation is a design, a determination to kill, distinctly formed in the mind by 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 act follows the premeditation, it is premeditated";

and

where, despite trial counsel having objected to and proffered an alternate instruction, appellate counsel failed to challenge the following instruction:

Instruction 24, on reasonable doubt, which stated:

"A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation",

and where the federal district court found that the Nevada Supreme Court reasonably determined that petitioner had not shown deficient performance or prejudice, and where the Ninth Circuit did not grant COA, were *Petitioner's Sixth Amendment* rights to *Effective Assistance of Counsel* and Fourteenth Amendment rights to Due Process and a fundamentally fair trial denied?

LIST OF PARTIES

[ ] 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 judgment is the subject of this petition is as follows:

Attorney General of Nevada

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

October Term, 2021

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______ court appears at Appendix ______ to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was ______________________.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ______________________, and a copy of the order denying rehearing appears at Appendix __C__.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including __________________ (date) on __________________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______________________, and a copy of the order denying rehearing appears at Appendix ______

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. __A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Provisions Involved

The First Amendment to the United States provides the right to access to the courts.

The Fifth Amendment provides the right to due process of law and a fundamentally fair trial.

The Sixth Amendment provides the right to counsel in all criminal prosecutions.

The Fourteenth Amendment provides the right to due process and equal protections of law in state jurisdictions.

28 U.S.C. ss 2254 allows state prisoners to petition federal courts for a writ of habeas corpus.

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Statement of the Case

The federal district court held that the Nevada Supreme Court could have reasonably denied relief on both the petitioner's direct appeal of his conviction after trial and his state post-conviction petition for writ of habeas corpus. The federal court did not grant a certificate of appealability on any issue. Petitioner timely filed a notice of appeal. Pursuant to Fed. R. App. P. 22(b) and Murray v. Schriro, 745 F.3d 984, 1002 (9th Cir. 2014), the court of appeals properly construed the notice of appeal as an application for COA. However, the court of appeals did not request a brief in support of the application, but rather denied the application summarily. Petitioner then wrote a proper person letter to the court requesting leave to file a brief in support of said application. The court of appeals construed that letter as a motion for reconsideration, which it summarily denied without briefing.

The underlying issues on which petitioner has sought federal appellate review pertain to the standard of effective assistance of counsel and to due process and the right to a fundamentally fair trial.

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Petitioner was charged in the shooting death of a nine-year-old girl in North Las Vegas. The decedent was not the intended victim. Rather, Robert Valentine, an adult and a gang member, was the target. Petitioner was present with four other individuals at the scene when the crime occurred. Petitioner and those other individuals belonged to a rival gang. It is undisputed that one of those individuals was the shooter. However, it has been the State's theory that Petitioner was the shooter.

Petitioner was tried twice in this case. After the first trial, the trial court granted a defense motion for new trial. At the second trial, the trial court ruled that evidence of petitioner's gang membership would not be admissable. Also inadmissable was any reference to the first trial. Yet defense counsel opened the door for the former, and the prosecutor inadvertently brought in the latter.

Petitioner has consistently maintained his innocence, has made no incriminating statements, and did not testify at either trial. However petitioner's guilt or innocence is not now at issue; rather, the question is whether petitioner received effective assistance of trial and appellate counsel, and whether he received due process and a fundamentally fair trial. Also now at issue is whether petitioner has been denied meaningful access to this court.

Reasons for Granting the Petition

The Constitution guarantees prisoners the right of meaningful access to the courts. This right of access imposes an affirmative duty on prison officials to help inmates prepare and file legal papers, either by establishing an adequate law library or by providing adequate assistance from persons trained in the law. Prison officials are not required to provide both as long as access to either is meaningful. Courts will allow some restrictions on a prisoner's access to legal resources to accommodate legitimate administrative concerns, including observing budget restraints. However, virtually every published case known to petitioner[1] in which prison officials successfully demonstrated "budget restraints" pertained to pre-paid postage for indigent defendants sending legal mail. At any rate, a prisoner may not be hindered in seeking access to the judicial system.

Prison officials at Lovelock Correctional Center, where petitioner is presently incarcerated, refuse to provide him published law- whether statutory or caselaw- from federal appellate circuit courts other than the Ninth Circuit, and state courts other than Nevada courts.

FN 1) And Daniel Biggs, the inmate who prepared this petition.

Prior to preparing this petition, petitioner has not been prejudiced. Petitioner was represented by appointed counsel for his state post-conviction petition for writ of habeas corpus and the appeal of the denial of that writ to the Nevada Supreme Court. The federal district court appointed counsel for petitioner's habeas petition pursuant to 28 U.S.C. SS 2254. Petitioner's pro se appeal to the Ninth Circuit was denied summarily without briefing, as was his pro se motion for reconsideration.

However, Petitioner is now prejudiced from complying with Rule 10(a) of this Court. Petitioner cannot know if either the federal district court and/or the Ninth Circuit has entered into a decision in conflict with the decision of another United States court of appeals on the same important matters pertaining to his case; or if either has decided an important federal question pertaining to his case that conflicts with a decision by a state court of last resort in a state other than Nevada.

Petitioner now asks this court to hold that all prison law libraries must provide published case law from any and all courts in the United States. Absent this holding, prisoners — especially those acting in pro se — cannot effectively petition this court.

Conversly, such a holding will not unduly burden prison officials. Indeed, Attorney General often cite case law from other circuits and other states in advocating for their clients — and those clients often include prison officials.

Nothing in the history of this court — indeed in all of Anglo-American jurisprudence — discourages this Court to reach the holding now sought. Rather, the right of prisoners to access published caselaw seems so fundamental that, as best as petitioner could determine, this Court has never been asked to consider the issue. Yet prison officials at Lovelock Correctional Center compel petitioner to do so now.

It is also noted that prison officials have not provided petitioner the assistance of a person trained in law. The person assisting petitioner now is neither trained in law nor provided by the prison — he is merely another prisoner housed in the same unit as petitioner. Even much of the reference material used to prepare this petition, such as the Georgetown Law Journal Forty-Ninth Annual Review of Criminal Procedure 2020, are the personal property of the inmate who prepared this petition.[2]

FN2) The court may notice citations to published cases from other circuits — Petitioner was merely able to read the footnotes from reference material, not full published opinions.

If this Court does grant review of this petition, the Court will in all likelihood appoint counsel to represent petitioner. In posse counsel would presumably supplement the arguments to this petition and in doing so would remedy any prejudice currently suffered by petitioner. Yet this issue alone is worthy of this Court's review.

Pro Se Notice of Appeal to the Court of Appeals

A petitioner wishing to appeal from an order denying habeas relief must apply for a certificate of appealability (COA) either from the district court judge who rendered the decision or from a circuit court judge. In the absence of a COA, a petitioner's notice of appeal of a district court order will be deemed by a circuit court to be a request for a COA.

A district or circuit court judge may issue a COA only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. ss 2253(c)(2); see also Clark v. Chappell, 936 F.3d 944, 983 (9th Cir. 2019).

There is a conflict in how this standard is interpreted. According to 49 Geo. L.J. Ann. Rev. Crim. Proc. (2020) fn 2905, the Second, Fifth, Tenth and D.C. circuits interpret this standard as the same as the predecessor standard of certificate of probable cause, see Barefoot v. Estelle, 463 U.S. 880, 893 (1983) and

Slack v. McDaniel, 529 U.S. 473 (2000).

The Ninth and Tenth-Circuit approach creates a "more demanding" standard. See Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996).

At any rate, petitioners applying for COA, whether through counsel or in pro se, are permitted to file a brief in support of their application. Yet pro se petitioners who instead file a notice of appeal are not permitted to file a brief. Petitioner contends that this procedural rule violates Due Process. Petitioner had notice that his pro se notice of appeal would be construed as a COA—it was perfectly reasonable, indeed inevitable, for him to assume he would receive the same procedural process thereafter as if he had filed a proper application for COA.

Petitioner now asks this court to reach a holding that when pro se habeas petitioners file a notice of appeal to the U.S. Court of Appeals, that court must then offer the petitioner an opportunity to submit a brief in support of an application for COA.

This holding will not create any significant burden on the Court of Appeals or the states. But it will promote fundamental fairness and access to the courts, consistent with constitutional. Indeed, as prisoners are compelled to pursue post-conviction relief in pro se now more than ever, this proposed procedural safeguard will ensure transparency in the courts.

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Ineffective Assistance of Counsel

As the federal district court noted in this case, "'[T]he right to counsel is the right to the effective assistance of counsel.' McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation 'fell below an objective standard of reasonableness,' Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unproffessional errors, the result of the proceeding would have been different.' Id. at 694. '[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.' Id. at 697."
(See district court order attached hereto.)

In all of his post-conviction litigation to date, Petitioner has argued that his trial counsel was ineffective and that he was prejudiced as a result. The question before this Court now is: what exactly are the pleading standards regarding prejudice?

In both his state and federal habeas petitions, Petitioner argued his trial counsel was ineffective for opening the door to the prosecution introducing evidence of his gang affiliation. That trial counsel did open the door is not in dispute — it is clear in the record. Petitioner argued at length why, as a matter of law, trial counsel was ineffective for doing so. Petitioner concluded that, but for counsel's error, the gang evidence would not have been introduced at trial.

This is in light of the fact that the trial being challenged was a second trial. The trial court had granted a defense motion for new trial after petitioner was convicted due to prejudicial evidence of gang membership. Thus trial counsel opening the door to evidence of gang membership at the second trial was obviously prejudicial — the trial court had already determined as much.

So after a lengthy argument explaining how objectively reasonable trial counsel would have easily avoided counsel's mistake, petitioner concluded "'[A]s a result, Mr. Lozano was severely prejudiced.'" Federal district court order, quoting petitioner's opening brief on appeal to Nevada Supreme Court of denial of writ in state district court.

The Nevada Supreme Court, and later the federal district court, determined that such did not essentially meet the pleading standards of Strickland. Petitioner disagrees.

The federal district court did not grant a certificate of appealability on this (or any) issue, and the U.S. Court of Appeals summarily denied COA.

In order to deny COA, a federal court must find that "reasonable jurists would not find this conclusion to be debatable or wrong." But the conclusion that petitioner failed to adequately plead prejudice is — at the very least — debatable.

The Ninth Circuit should have granted COA and reviewed this claim on the merits. Failure to do so was so far of a departure from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by the federal district court, as to call for an exercise of the Court's supervisory power.

This is an issue of federal law that has national importance. Does Strickland require a talismanic recitation of the definition of prejudice? The lower court decision implies that it does. But that is an incredibly dangerous precedent — especially considering that the vast majority of habeas petitioners either proceed in pro se (they have no right to counsel) or are represented by appointed counsel, as in this case.

Either appointed counsel for petitioner committed blatant malpractice by failing to meet the pleading standards, or the Nevada Supreme Court, and later the federal district court misapplied Strickland. Petitioner contends that it is the latter.

At any rate, this Court, petitioner humbly submits, should take this opportunity to clarify Strickland. Pro se petitioners, post-conviction attorneys, and courts across the country will benefit this Court's opinion.

Conversely, no one stands to lose from clarification by this Court. Jurisdictions defending their convictions against collateral attack will be better instructed to the standards petitioners must meet. Habeas courts will be better able to adjudicate claims. And attorneys — especially court-appointed — will be better prepared to adequately represent their clients.

Lastly, review of this case will further the interests of public transparency of the judiciary. Sometimes defendants in this country are convicted of crimes they didn't commit. That happens even when defense counsel is effective at trial — but it is more likely when defense counsel is ineffective. Habeas corpus is a touchstone of Anglo-American jurisprudence. It seems repugnant to constitutional principles to deny a prisoner's meritful petition merely on the basis of an arbitrary interpretation of Strickland's pleading standards. But those standards need to be now plainly stated.

Photographic Lineup and Due Process

The law is well settled that the Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that that is unneccessarily suggestive and conducive to irreparable mistaken identification. See Kirby v. Illinois, 406 U.S. 682, 691 (1981).

"A conviction based on identification testimony that follows a pre-trial identification violates the Defendant's constitutional right to due process whenever the pre-trial identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

"It is the likelihood of misidentification that violates the defendant's due process rights. ...

"The due process concern is heightened when that misidentification is possible because that witness is called upon to identify a defendant whom she has observed only briefly, under poor conditions, and at a time of extreme emotional distress and excitement."

Courts review identification procedures under the totality of the circumstances. See Manson v. Braithwaite, 432 U.S. 114-16 (1997).

The circumstances in the instant case are that the witness could not identify the shooter in the court room, but did identify the petitioner in a lineup of photos based off the booking photo of petitioner. The lineup was administered by the prosecutor at trial in front of the jury. The same photo was shown several times in the media.

Essentially, all the witness had to do was recognize the photo in the lineup as the exact same photo he saw on the news. This is precisely the unfair situation that all the relevant jurisprudence on the subject was designed to prevent.

The federal district court reasoned that since defense counsel had an opportunity to cross-examine witness and question witness about the identification, but did not do so, that Petitioner's due process claim failed.

Such reasoning confuses the Fifth and Fourteenth Amendments with the Sixth Amendment. Petitioner alleged that his due process rights were violated, not his right to have counsel present at the in-trial lineup. Merely having trial counsel present only satisfies the Sixth Amendment — if the opposite were true, there would be no need for this and lower courts to have developed the existing Due Process jurisprudence on the subject.

Both the Nevada Supreme Court and later the federal district court so far departed from the accepted and usual course of proceedings — and the Ninth Circuit sanctioned same by denying COA — that this court should exercise its supervisiory power.

Out-of-Court Witness Statements

Petitioner argued originally on direct appeal of his conviction, and later in his federal habeas petition, that the jury should not have been allowed to use the out-of-court statement recanted by witness as substantive evidence.

Prior to trial, witness Darrian Moten, one of the five individuals present at the shooting, told police that Petitioner was the shooter. In turn, Moten, who was in custody for the same incident, was given immunity. The Supreme Court of New Jersey has previously considered the exact issue:

"We particularly noted that the status of the declarant can be a highly relevant circumstance, especially if the declarant is a criminal suspect and is implicated in the underlying crime for which the defendant is being prosecuted and has given the statement while in police custody. ... We reasoned that the out-of-court statements of such persons can be inherently suspect."

State v. Spruell, 577 A.2d 821, 826 (N.J. 1990) citing State v. A. Gross, 577 A.2d 806 (N.J. 1990) and State v. F. Gross, 577 A.2d 814 (N.J. 1990).

The Nevada Supreme Court, and later the federal district court concluded that this issue did not violate petitioner's Sixth Amendment right to confrontation. The Courts did not consider the Fourteenth Amendment implications.

Since State Supreme Courts are conflicted on this issue, this Court should review the matter. Petitioner submits that the Fourteenth Amendment provides protections exclusive of the Sixth Amendment. Fundamental fairness is not satisfied merely by the right to confront a witness on cross-examination at trial. Juries are not infallible — a jury could convict an innocent person based on highly suspect statements offered as substantive evidence. The Sixth Amendment does not provide a safeguard. Petitioner asks this Court to adopt a holding that the Fourteenth Amendment does provide such a protection.

Such a holding will discourage law enforcement from coercing in-custody witnesses from making statements that police want them to make. This *long-standing*, corrupt police tactic needs to be dismantled.

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Prosecutor's Reference to "The Last Jury"

State's witness, Darrian Moten was asked in front of the jury by the prosecutor:

"Q: That isn't what you told the police when you gave your statement. That's not what you told the last jury, was it? I'm sorry, was --

"A: That's what I told the last jury, though."

Defense counsel moved for a mistrial. The trial court denied the motion. Petitioner raised the issue on direct appeal and in his federal habeas petition. The federal court accepted the trial court's reasoning that "the last jury" did not indisputably refer to a prior trial of Lozano in which he was found guilty.

Of course, that is exactly what the prosecutor was refering to, however. Yet the federal district court rationalized that the reference could have referred to a grand jury, or a trial of two of the other people who were at the shooting whom the jury might have thought were tried and charged separately.

Two major logical errors are readily apparent! in the Court's reasoning. The first is Occum's Razor - the simplest explanation is the most likely one - and the second is that the jury would have had to necessarily determine a truth to be false - that Petitioner had been convicted at a first trial — in order for Petitioner to have received a fair trial.

In other words, the jury would have had to reach the less probable, more complicated, and factually untrue conclusion over the simple, common-sense and factually true conclusion. Such cannot possibly satisfy the Fourteenth Amendment right to Due Process and a fundamentally fair trial.

By denying COA, the Ninth Circuit sanctioned so far a departure from the accepted and usual course of judicial proceedings by the Nevada Supreme Court and ultimately the federal district court as to call for an exercise of this Court's supervisory power.

Furthermore, if this court does not intervene, prosecutors will have a green light to further taint trials where the question of gilt is close. Prosecutors should not be able to make predjucial statements — whether inadvertently or not — and be able to rely on reviewing courts to create unlikely, hypothetical scenarios to sustain unjust convictions.

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Jury Instructions

"Abandoned and Malignant Heart"

Nevada is the only State that allows trial courts to use the term "abandoned and malignant heart" in jury instructions. The phrase was used in Petitioner's trial with regards to implied malice, an alternative element for First Degree Murder in Nevada.

Petitioner's trial counsel did not object to the instruction. Direct appeal counsel did not raise the issue. In his state habeas petition, Petitioner claimed both were ineffective for these omissions and that he was prejudiced, and specifically that the term "abandoned and malignant heart" is archaic and unconstitutionally vague and ambiguous. The state habeas court denied the claim, and the Nevada Supreme Court affirmed on appeal. Petitioner raised the claim in his federal habeas petition. The federal habeas court concluded that the Nevada Supreme Court made a reasonable determination. The Ninth Circuit denied COA.

The Nevada Supreme Court is in conflict with every other state supreme court. This court should now settle whether "Abandoned and malignant heart" is a meaningless, confusing phrase that violates Due Process in light of modern usage of American English in the 21st century.

"Instantaneous" Premeditation

Premeditation and deliberation are the elemental difference between first-degree and second-degree murder in Nevada. An instruction that stated in relevant part:

"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 act follows the premeditation, it is premeditated."

Again, neither trial counsel objected nor appellate counsel raised a claim on this instruction. In his state habeas petition. Petitioner claimed in his state habeas petition that these omissions violated his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment rights to Due Process and equal protection. The State habeas court denied the claim. The Nevada Supreme Court affirmed. The federal habeas court found some to be reasonable. The Ninth Circuit did not grant COA.

However, the quoted instruction renders the distinction between First- and Second-degree murder meaningless. Thus, the State was relieved of its burdens of proving the element of premeditation beyond a reasonable doubt, warranting reversal. As such, at best, the State merely proved second-degree murder.

The question now before the Court is this: Can premeditation be instantaneous? And if so, what is the distinction between first-and second-degree murder?

If premeditation cannot be instantaneous, then the challenged jury instruction clearly violates due process, and counsels' failures were deficient and prejudicial. The prejudice is this: but for counsel's failure, Petitioner would not have been found guilty of first-degree murder.

Furthermore, Petitioner humbly submits that prosecutors and trial courts are continually failing to meet burdens of proof and shifting those burdens onto petitioners — often pro se inmates — to challenge that conduct on post conviction. A clear opinion is needed by this Court on this issue. As it stands now, defendants in Nevada — and anywhere else that has "instantaneous" premeditation — cannot properly defend against first-degree murder.

Indeed, an objectively reasonable person would not have Due Notice of the difference between First and Second degree, and such is impermissible as public policy.

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Reasonable Doubt Instruction

Is Nevada's reasonable doubt instruction constitutional?

"A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable must be actual, not mere possibility or speculation."

This instruction minimized the State's burden of proof by including terms, "It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life.", and "Doubt, to be reasonable, must be actual, not mere possibility or speculation." This instruction inflates the constitutional standard of doubt necessary for acquittal.

Jurisprudence from this Court discourages such an inflation. See Victor v. Nebraska, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); Cage v. Louisiana, 498 U.S. 39, 41 (1990); Estelle v. McGuire, 502 U.S. 62, 72 (1991).

Trial counsel objected to the instruction, but appellate counsel did not raise it on appeal. Petitioner raised it in all post-conviction habeas proceedings.

The federal district court noted that the Ninth Circuit found this instruction constitutional. Ramirez v. Hatcher, 136 F.3d 1209, 1211-15 (9th Cir. 1998). H that the Ninth Circuit denied COA on in Nevias v. McDaniel, 218 F.3d 940, 944-45 (9th Cir. 2000).

Petitioner submits to this court that the instruction is ultimately unconstitutional. It's interesting that the instruction focuses on what reasonable doubt is not, rather than an affirmative definition of reasonable doubt.

The reasonable doubt instruction, and the federal district court's and appellate court's endorsment of it, so far departs from the accepted and usual course of judicial proceedings in the United States, as to call for an exercise of this Court's supervisory power.

Lastly, reasonable doubt instructions are paramount to Anglo-American criminal justice jurisprudence. This Court, Petitioner humbly submits should take this opportunity to clarify its constitutional limitations. It has been nearly thirty years since it last ruled on this issue.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Pasqual Lozano

Date: 5, 10, 21