

***Means v. State*, 120 Nev. Adv. Op. 101, 103 P.3d 25 (2004)<sup>1</sup>**

**CRIMINAL LAW – PROCEDURE – HABEAS CORPUS**

**Summary**

Clyde Means was charged with one count of open or gross lewdness and three counts of sexual assault upon his nineteen year old son. At trial, the jury was empaneled but the district court conducted a hearing to determine the admissibility of Means' prior bad acts. Because the district court ruled that the acts were admissible, Means, through his attorneys, negotiated a plea bargain. Means would plead guilty to one count of sexual assault in exchange for dismissal of the other charges.

Means was informed that he would face two to twenty years in prison, fines, and be required to pay restitution. He was also told that probation was not available. However, Means was not informed that upon release from prison, he would be subject to lifetime supervision. The district court later sentenced him to the maximum penalty, which included post-release lifetime supervision.

Means did not appeal his sentence. He filed a proper person petition for post conviction relief alleging that:

- 1) His guilty plea was not entered intelligently and voluntarily because he was on medication for manic depression;
- 2) His defense counsel's assistance was ineffective for:
  - a) failing to obtain a competency evaluation, and
  - b) failing to directly appeal the conviction upon his request;
- 3) His sentence violated his constitutional right against cruel and unusual punishment; and
- 4) The lifetime supervision provision constituted double jeopardy and violated the equal protection clause.

The district court appointed post-conviction counsel. After a hearing, the habeas petition was denied in part, but Means' request for an evidentiary hearing on his counsels' failure to pursue an appeal was granted. Before the hearing, Means requested his former counsels' notes and files, but was only given the files without the notes. At this hearing, one of Means' previous attorneys referred to his notes while being examined. Means then moved to inspect those notes and have them introduced into evidence. His motion was denied. Subsequently, Means' petition for post-conviction relief was also denied.

Means then appealed denial of his petition claiming the district court erred by:

- 1) not allowing access to the trial attorney's notes;
- 2) applying the wrong burden of proof;
- 3) refusing to conduct a hearing on the validity of his plea;
- 4) concluding that his trial counsel had provided adequate assistance; and
- 5) denying his motion for a default judgment.

---

<sup>1</sup> By Justin L. Carley

## **Issues and Disposition**

### **Issue**

Did the district court properly deny the petitioner's petition for post-conviction relief?

Sub-Issues:

- 1) Did the district court properly deny the petitioner access to his former counsel's notes?
- 2) Did the district court correctly require the petitioner to prove his facts under the clear and convincing standard?
- 3) Should the district court have conducted evidentiary hearings on the validity of the petitioner's plea?
- 4) Did the district court properly conclude that petitioner's previous counsel was adequate?
- 5) Did the court properly deny the petitioner's request for a default judgment in the absence of timely response by the state?

### **Disposition**

The Nevada Supreme Court reversed the district court's denial of post-conviction relief asked for in Means' habeas corpus petition. The case was remanded for an evidentiary hearing to determine: 1) whether Means was deprived of his right to appeal due to ineffective assistance of counsel; and 2) to determine if Means' guilty plea was entered with knowledge that he would be subject to lifetime supervision upon his release from prison. The district court must also allow Means the opportunity to inspect the notes reviewed by his former counsel in aid of his testimony at the first post-conviction hearing.

## **Commentary**

### **State of the Law Before *Means v. State* (3 important issues)**

1) Prior to *Means*, Nev. Rev. Stat. § 50.125 allowed an adverse party to inspect any writing used to refresh a witness's recollection and to cross-examine the witness about the writing and introduce relevant portions into evidence.<sup>2</sup> The work product doctrine's effect on that statute had not been addressed in the context of a former client seeking the files and notes of his former attorney in Nevada.

2) *Strickland v. Washington* created the current test for post-conviction habeas corpus ineffective assistance of counsel claims.<sup>3</sup> The test starts with a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Then, the petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the counsel's deficiency has prejudiced the defense. In *Strickland*, however, the United States Supreme Court did not set forth the specific burden that the petitioner carries to prove his factual allegations. The Nevada Supreme Court has also not clarified the burden of proof.

---

<sup>2</sup> NEV. REV. STAT. § 50.125 (2003).

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In Nevada, *Davis v. State* indicated that strong and convincing proof was necessary to overcome the presumption that defense counsel has fully discharged his duties.<sup>4</sup>

3) Nev. Rev. Stat. §§ 34.800 & 34.810 allow a district court to dismiss a petition of habeas corpus if the petitioner fails to comply with procedural rules.<sup>5</sup> The statutes do not address the consequences if the State fails to abide by the same procedural rules.

In *Beets v. State*, the Nevada Supreme Court held that the statutes governing post-conviction habeas corpus proceedings do not allow for summary judgment as a means of resolving the merits of the issues.<sup>6</sup>

### **Other Jurisdictions**

1) The Fifth Circuit has addressed the issue of applying the work product doctrine in a similar post-conviction habeas corpus action.<sup>7</sup> In *Spivey*, the Fifth Circuit held that the work product doctrine did not protect the attorney's file from disclosure to the client.<sup>8</sup>

2) The Ninth Circuit has addressed the burden of proof issue and concluded that the petitioner need only establish the factual basis by a preponderance of the evidence.<sup>9</sup> Similarly the Fifth Circuit has also addressed the burden of proof issue, coming to the same conclusion.<sup>10</sup>

### **Effect of *Means v. State* on Current Law**

1) The Nevada Supreme Court held that the work product doctrine is not an exception to the inspection rights conferred in Nev. Rev. Stat. §50.125 and does not shield an attorney from having to disclose his notes to his former client when the attorney, in giving his testimony, has refreshed his memory with the notes.<sup>11</sup>

2) The Nevada Supreme Court has aligned it self with the Ninth and Fifth Circuits in holding that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>12</sup> So, *Davis*, and its predecessor cases are overruled to the extent that they disagree with that proposition.

3) The Nevada Supreme Court upheld its prior discussion in *Beets*, and expanded that to prevent the use of default judgments against the state in habeas corpus petition proceedings.<sup>13</sup>

---

<sup>4</sup> *Davis v. State*, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991).

<sup>5</sup> NEV. REV. STAT. §§ 34.800 & 34.810 (2003).

<sup>6</sup> *Beets v. State*, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994).

<sup>7</sup> *Spivey v. Zant*, 683 F.2d 881 (5th Cir. 1982).

<sup>8</sup> *Id.* at 882.

<sup>9</sup> *Alcala v. Woodford*, 334 F.3d 862, 869 (9th Cir. 2003).

<sup>10</sup> *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995).

<sup>11</sup> *Means v. State*, 103 P.3d 25, 31 (Nev. 2004).

<sup>12</sup> *Id.* at 33.

<sup>13</sup> *Id.* at 37.

## **Unanswered Questions**

The Nevada Supreme Court was careful to point out that although default judgment would not be allowed against the state, the state could still be subject to disciplinary sanctions at the discretion of the district court. It would be interesting to see if this ever happens.

## **Conclusion**

*Means v. State* has created or clarified three important rules:

1. The work product doctrine does not shield an attorney from having to disclose his notes to his former client when the attorney, in giving his testimony, has refreshed his memory with the notes.
2. A habeas corpus petitioner must only prove the underlying facts to an ineffective assistance of counsel claim by a preponderance of the evidence.
3. A default judgment will not be entered against the state for failure to timely reply to a petition for habeas corpus even though such failure would be grounds for dismissal if the defendant fails to comply with procedural rules.