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Howard W. Conyers

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ESTATE OF NOLAN KLEIN

Case No.: CV10-01057

Petitioner,

Dept. No.: 7

vs.

WASHOE COUNTY DISTRICT
ATTORNEYS JOHN AND JANE DOES
A-Z; PARDON BOARD; ATTORNEY
GENERAL KATHERINE CORTEZ
MASTO; JOHN AND JANE DOES A-Z,

Respondents.

ORDER

Parties to this action came before this Court on September 30, 2010 for oral argument on a Petition for Writ of Mandamus filed on March 30, 2010, requesting this Court overturn the conviction of Petitioner's brother based on alleged Brady violations and further asking this Court to punish those alleged to have committed such violations by reporting them to the State Bar and to commence criminal actions against them. Brady v. Maryland, 373 U.S. 83 (1963).

Respondents point to a number of procedural defects with the Petition, chief amongst these is the contention that a Writ of Mandamus an inappropriate vehicle for the relief sought, which warrants dismissal of the Petition. At oral argument, Petitioner, through her attorney, argued that as the Writ was filed when Petitioner was essentially *in pro per*, this Court should instead entertain the orally amended Petition and refer the District Attorney's office to the State Bar to investigate alleged misconduct. Petitioner also seeks a Grand Jury investigation.

Exhibit 9 -ACAJ
Document consists of 8 pages.
Entire exhibit probed.
Meeting Date: 2-4-16.

Group 9 Exhibit 8

1 Respondents contended the relief requested is still beyond this Court's power. In the interests of
2 justice, this Court will entertain the requests made during oral argument as the operative Petition.

3 **Discussion**

4 **Referral to the State Bar is Unwarranted Based on the Information Before This Court**

5 The essence of Petitioner's argument is that the District Attorney's office withheld
6 potentially exculpatory evidence during the trial of NOLAN KLEIN, which constitutes
7 misconduct. Specifically, there were police reports that referenced a certain hitchhiker matching
8 the description given by the victims of the crimes for which NOLAN KLEIN was convicted.
9 Further there were cigarette butts which are no longer in the evidence file. Petitioner states that
10 NOLAN KLEIN's jury initially deadlocked and thus argues that evidence that there was another
11 potential suspect would likely have led to an acquittal. Petitioner argues that this potentially
12 exculpatory evidence was not disclosed to NOLAN KLEIN's trial attorneys or subsequent
13 appellate counsel. Therefore, Petitioner requests this Court refer this matter to the State Bar of
14 Nevada, which would then conduct an investigation into the alleged wrong doing by prosecutors
15 of the Washoe County District Attorney's Office pursuant to Nevada Code of Judicial Conduct
16 Rule 2.15(d) which states that a judge "who receives information indicating a substantial
17 likelihood that a lawyer has committed a violation of the Nevada Rules of Professional Conduct
18 shall take appropriate actions."

19 Respondents note that there is no impediment to Petitioner filing a complaint with the
20 State Bar of Nevada. Further, Respondents argued that Petitioner could not show a "substantial
21 likelihood" that a prosecuting attorney had committed any ethical violation. Respondents make
22 several arguments that tend to reduce the likelihood that any ethical violation had occurred.

23 First, Respondents argued that the existence of a possible alternative suspect, one
24 ZARSKY, was known to NOLAN KLEIN's trial attorney, who testified in prior post-conviction
25 cases that she decided to not pursue a defense theory that ZARSKY was the perpetrator. The
26 description of this subject was related to a separate and unrelated investigation. Additionally, this
27 information was disclosed to KLEIN's attorney who made a tactical decision not to use it in his
28 defense. The test for a Brady discovery violation is whether the evidence is disclosed to, not

1 whether it is used by, the defense. There is no evidence of a Brady violation and Petitioner has
2 not met her burden here.

3 Next, Petitioner points to the absence of cigarette butts from the evidence file as viewed
4 by Treva Hearne, an experienced defense counsel hired by the KLEIN family to pursue post-
5 conviction remedies. Petitioner argues that DNA testing of those cigarette butts at the time of
6 trial would have provided exculpatory evidence and that the District Attorney's Office
7 committed fundamental error in either (1) not testing those items or, (2) surreptitiously testing
8 those items and not sharing the test results with the defense.

9 First, Petitioner's counsel admitted that there was nothing that prevented KLEIN from
10 accessing or independently testing those items at the time of his trial. Counsel also admitted that
11 the cigarettes were obtained at the veritable dawn of DNA testing. DNA testing standards and
12 protocols at the time of NOLAN KLEIN's trial were not as sophisticated as they are now. Thus,
13 while it is possible that Petitioner's theory is correct, it is at least equally likely that the evidence
14 was either merely lost in the intervening twenty-two years or that it was destroyed in testing that
15 produced no results. In either event, this evidence may have not been favorable (or admissible)
16 in Mr. KLEIN's defense. If KLEIN's DNA had been on the cigarettes, it would have established
17 his presence at the scene of the crime, a fact hardly consistent with his claim of alibi. If
18 KLEIN's DNA was not on the cigarette it would not have been relevant evidence. Here again the
19 burden rests on Petitioner to demonstrate the likelihood of their theory, a burden of proof they
20 have not carried.

21 Petitioner alleges that items found in the prosecution file do not appear in the defense
22 trial bolstering their claim that not all items were shared between offices. However, there are
23 several flaws with this argument. First, among the items identified by Petitioner is a copy of a
24 discovery order with a prosecutor's handwritten notes. This is properly classified as "work
25 product" of the prosecutor and would not have been disclosed to the defense under any
26 interpretation of Brady. Secondly, this Court has reviewed every exhibit attached to the filed
27 *Petition and Reply* and finds that the exhibits presented to this Court do not disclose *information*
28 indicating a substantial likelihood of misconduct, at most the exhibits disclose a discrepancy

1 between files over the course of decades with no particular cause supported. Lastly, comparing
2 the Defense file to the Prosecutor's file does not necessarily indicate anything suspicious. There
3 is no evidence that the Prosecutors failed to turn over everything to which the Defense was
4 entitled at the time of trial, or during post-conviction proceedings. It may be that items were
5 placed in the KLEIN prosecution file as mere cross-reference, unrelated to the actual prosecution
6 of the case. It may be that there was a determination that the items not turned over had no
7 potential exculpatory value at the time that determination was made, and without the benefit of
8 twenty years of hindsight. It may well be that the Defense file is not intact, or has itself been
9 poorly maintained over the many years, giving rise to the illusion that some evidence was never
10 received. It is irrelevant whether this Court believes the Defense file to have been poorly
11 maintained or not. What is relevant is that this Court has not received evidence indicating a
12 substantial likelihood of any particular *cause* for the discrepancy between the files, and this
13 Court cannot and will not speculate as to the cause of the discrepancy (if any) between the files
14 maintained by two different offices many years ago.

15 This Court is impressed with Petitioner's dedication to her relentless pursuit of
16 vindication of her deceased brother's reputation. However, this Court finds that Petitioner has
17 pursued an avenue that can not lead to the relief sought. To refer the Washoe County District
18 Attorney's office to the State Bar of Nevada for an investigation into the withholding of
19 exculpatory evidence, this Court would have to find that it had received information indicating a
20 substantial likelihood that an attorney committed a violation of the Nevada Rules of Professional
21 Conduct. Here, this Court would essentially have to find a substantial likelihood that the
22 Washoe County District Attorney's office withheld exculpatory evidence. This Court cannot
23 make such a finding on the basis of the information before this Court. The information provided
24 to this Court does not rise to such a level that it indicates a substantial likelihood of wrongdoing
25 or misconduct.

26 This Court appreciates Petitioner's dilemma. Without an investigation, Petitioner is
27 likely hard-pressed to find evidence that would "indicate a substantial likelihood" that
28 misconduct had occurred. However, this Court finds that the mere insinuation or intimation of

1 misconduct, even if vigorously asserted by a plausible theory, is insufficient to grant Plaintiff's
2 request for such sweeping relief. If this Court were to grant Petitioner's request, it would
3 become not merely a "super-review court" as portended by Respondents, but it would become a
4 "super-review court" with an unreasonably low standard for taking action. As a result, any
5 *allegation* of misconduct, when accompanied by a plausible *theory* would result in multiple
6 investigations at the behest of *any* court. While this Court is presented with a *theory* of what
7 *may* have happened, it is nonetheless a mere theory not evidence or proof of any fact.

8 This Court is mindful of the constitutional structure of the separation of powers. The
9 Legislative Branch enacts laws, the Judiciary is charged with the interpretation of the laws and
10 the Executive Branch is charged with the enforcement of the laws. This court is reminded of the
11 historical limitations on the exercise of judicial power. During the debate over ratification of the
12 Constitution, Alexander Hamilton, writing as "Publicus" in *The Federalist Papers* explained that
13 judges lacked both the Executive's control over the "sword" and Congress' control over the
14 "purse." Possessing "neither FORCE nor WILL, but judgment," the judiciary "must ultimately
15 depend upon the aid of the executive arm even for the efficacy of its judgments." For this reason,
16 he assured his readers, the judiciary would be the "least dangerous" of the three branches of
17 government.¹ In this case, Petitioner is attempting to use the Judiciary a civil proceeding to
18 review the conduct of the District Attorney in a criminal prosecution. This attempt would lead to
19 chaos in the civil docket and frustrate the principle of finality in the criminal forum, thereby
20 undermining the public confidence in our American system of justice. This Court cannot open
21 the floodgates to endless relitigation and review.

22 A Grand Jury Inquiry Is Not Warranted Based On the Information Before This Court

23 In Nevada, a District Court Judge may empanel a Grand Jury for a limited specific
24 purpose. NRS § 172.047. Among the purposes for which a Grand Jury may be empanelled is to
25 inquire into matters set forth in NRS § 172.175. NRS § 172.175(1)(c) states that grand juries
26 shall inquire into "the misconduct in office of public officers of every description within the
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28 ¹ Alexander Hamilton, "The Federalist No. 78," in *The Federalist Papers*, ed. Clinton Rossiter (1961), 465.

1 county which may constitute a violation of a provision of chapter 197 of NRS." Chapter 197
2 contains two sections which could in theory be construed as applicable to the case at hand.

3 NRS § 197.200 "Opression Under Color of Office" includes unlawfully and maliciously
4 doing any act whereby the person, property or rights of another person are injured. Brady
5 violations would seem to fit this description. NRS § 197.220, a catchall provision, states that
6 "Every public officer or other person who shall willfully disobey any provision of law regulating
7 his or her official conduct in cases for which no other punishment is provided shall be guilty of a
8 misdemeanor." Violation of the rules of professional conduct by a prosecutor seems to fit this
9 description.

10 An allegation has been made that would implicate to sections of Chapter 197, and a
11 request to empanel a Grand Jury to investigate has been made by Petitioner. The question
12 becomes, what standard of proof, or cause, or suspicion is required to warrant the empanelling of
13 a Grand Jury. Nevada has no case law on this particular point, nor any statutory or constitutional
14 authority to guide this Court. This Court finds wise guidance in the laws of Pennsylvania, where
15 the nature of the Grand Jury was traced to the foundation of our common law so as to instruct
16 courts as to the proper bases for impaneling the Grand Jury. Petition of McNair, Mayor, et al.,
17 324 Pa. 48 (1936). This Court adopts the rules laid out in McNair.

18 The Grand Jury is an ancient and august legal body, whose development likely dates to
19 the reign of Ethelred, and certainly existed in the time of William the Conqueror. This inquiry
20 into history is warranted by the precept that the Courts of each State, including this Court, have
21 all the powers of the King's Bench unless subsequently modified by Constitution, statute, or
22 precedent. Thus, this Court reaches a millennium into the past for guidance on the propriety of
23 this Court empanelling a Grand Jury in this case.

24 The origins of the Grand Jury as described by Bracton disclose the Grand Jury to be an
25 accusatory body. McNair, 324 Pa. 48 at n.1, *citing* Bracton, De Corona, cap. 1. In its earliest
26 inception, the Grand Jury was convened specifically to issue accusations against the jurors'
27 fellows and neighbors. Over time, investigative functions were added, and this Court is guided
28 by that development in that it demonstrates the need to restrain from initiating accusatory

1 proceedings against citizens without sufficient reason.

2 As described by Blackstone, the Grand Jury is founded as a body empowered to prefer
3 indictments or accusations against specific offenders after deliberation. This function comports
4 with the purpose for which the Grand Jury as we know it was created, to protect citizens from
5 summary and unjust accusations. 4 Blackstone, Com. 302. The Grand Jury issues indictments
6 on the standard of probable cause. Therefore, it is axiomatic that the threshold for empanelling
7 the Grand Jury must be lower than probable cause. However, this Court must exercise restraint
8 and may not empanel a Grand Jury on mere speculation or whimsy. When a court orders an
9 investigation, it acts under its official responsibility and must exercise sound discretion.

10 A Grand Jury's investigation cannot be a blanket inquiry to bring to light supposed
11 grievances or wrongs for the purposes of criticizing an officer or a department of government,
12 nor may it be instituted without direct knowledge or knowledge gained from trustworthy
13 information that misconduct is afoot warranting an investigation. McNair, 324 Pa. at 61. There
14 is no power to institute or prosecute an inquiry on chance or speculation that some misconduct
15 may be discovered. The Grand Jury must not be set upon fruitless searches, founded upon mere
16 rumor, suspicion or conjecture. There must be a sound, solid basis on which to proceed. A court
17 is without power to set a grand jury investigation in motion unless the court has reasonable cause
18 to believe that the investigation will disclose some misconduct which is within its jurisdiction to
19 address. *See*, C.J.S. Grand Jury § 6; McNair, 324 Pa. 48 (1936).

20 As above, this Court appreciates Petitioner's attempt to uncover information that would
21 warrant an investigation. But this Court cannot initiate an investigation to discover information
22 that would be the basis for an investigation. This Court takes guidance in the wise decision of
23 the Supreme Court of Pennsylvania which noted that the Grand Jury removes the protections of
24 the Bill of Rights from the target of inquiry. This Court cannot effect such an inquiry absent
25 reasonable cause.

26 This Court does not find such reasonable cause here. Petitioner may have a cogent theory
27 for the discrepancy between the Defense file and the Prosecution file, but that theory is founded
28 solely on speculation as to why the discrepancy exists. This Court is without direct knowledge

1 of misconduct, and finds that Petitioner's theory does not rise to the level of "knowledge gained
2 from trustworthy information." Petitioner's theory is an allegation, an accusation, and
3 speculation, not information. This Court finds that empanelling a Grand Jury here would be little
4 more than a "fishing expedition". McNair, 324 Pa. at 63. Accordingly, this Court finds it does
5 not have sufficient basis to empanel a Grand Jury in this matter.

6 This potentially new exculpatory evidence came to light pursuant to an order permitting
7 extensive discovery by the Honorable Judge Brent Adams in Department Six of the Second
8 Judicial District Court. Any further proceedings relating to items uncovered through that
9 discovery are properly brought before that department. This Court notes that Petitioner has no
10 impediment to seeking an investigation from the State Bar on her own.

11 **Conclusion**

12 The filed Petition for Writ of Mandamus is an inappropriate vehicle for the relief
13 requested in the Petition. Therefore, this Court **DENIES** the Petition for Writ of Mandamus as
14 filed on March 10, 2010.

15 Based on the information received by this Court, this Court does not find a substantial
16 likelihood that any attorney of the Washoe County District Attorney's Office has violated any
17 Rule of Professional Conduct in the prosecution of NOLAN KLEIN. This Court does not find
18 reasonable cause to believe that a Grand Jury inquiry would disclose any misconduct within this
19 Court's jurisdiction to punish. Therefore the Petitioner's requests for relief are **DENIED**.

20 **DATED** this 27 day of October, 2010.

21 
22 **PATRICK FLANAGAN**
23 District Judge
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