

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACY PETROCELLI A/K/A JOHN
MAIDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53668

FILED

JUL 07 2009

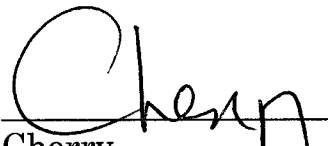
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK


ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

We have reviewed the record on appeal and we conclude that the district court did not err in dismissing appellant's petition for the reasons stated in the attached orders. Therefore, briefing and oral argument are not warranted in this case. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Dan L. Papez, District Judge
Tracy Petrocelli
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Ely
White Pine County Clerk

FILED

2009 APR -2 PM 2:51

Case No. HC-0811022

Dept. No. 2

WHITE PINE COUNTY CLERK
BY *Shyan*
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WHITE PINE COUNTY

TRACY PETROCELLI, AKA
JOHN MAIDA,

Petitioner,

vs:

STATE OF NEVADA,

Respondent.

**ORDER DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS**

FACTUAL AND PROCEDURAL HISTORY

On November 12, 2008, Petitioner Tracy Petrocelli, aka John Maida, filed a Motion For Appointment Of Counsel; To Proceed In Forma Pauperis; And Affidavit In Support, together with a Petition for Writ Of Habeas Corpus (Preliminary). On November 13, 2008, Petitioner again caused to be filed his Motion For Appointment Of Counsel; To Proceed In Forma Pauperis; And Affidavit In Support, together with an Affidavit In Support Of Motion To Proceed On Appeal In Forma Pauperis, and a Petition For Writ Of Habeas Corpus(Preliminary) with attached exhibits. On November 19, 2008, the Court entered and filed its Order Appointing Counsel wherein the Court appointed the Nevada State Public Defender's Office to represent Petitioner in this matter. The Court's Order Appointing Counsel was duly served on Petitioner and the Ely Office of the Nevada State Public

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



1 Defender. On December 11, 2008, the State of Nevada, Respondent herein, by and through
2 Deputy Attorney General Michael Bongard filed an Answer To Petition For Writ Of Habeas
3 Corpus. Respondent filed a Request For Submission on January 9, 2009. On January 20,
4 2009, Petitioner filed his Motion For Appointment Of Substitution Counsel; To Proceed In
5 Forma Pauperis, And Affidavit In Support. On February 13, 2009, Deputy State Public
6 Defender Kelly Brown filed a Motion To Withdraw. On February 23, 2009, the Court issued
7 its Order Granting Motion to Withdraw. On March 20, 2009, Petitioner filed his Reply To
8 Respondent's Answer And Objection To Order Granting Motion To Withdraw. This matter
9 is at issue and ready for decision.
10

11 DISCUSSION

12 Petitioner brings this habeas action pursuant to NRS 179.197 and Chapter 34,
13 NRS, to challenge the proposed action delineated in an Order issued by the Honorable Ron
14 Niman, Justice of the Peace, Ely Justice Court, in an extradition proceeding. The record of
15 this action shows that pursuant to NRS 179.197, Petitioner, an inmate at Ely State Prison,
16 appeared by video before Judge Niman on or about October 15, 2008, on an extradition
17 request from the State of California issued on or about August 8, 2008. During the extradition
18 hearing, Petitioner advised the Justice Court that he intended to challenge the extradition
19 request in district court and that he desired the assistance of appointed counsel. The Justice
20 Court did not appoint counsel but allowed Petitioner 30 days to file a habeas action in district
21 court. This action then ensued.
22
23

24 In his Petition, Petitioner challenges his extradition from Nevada to San
25 Bernardino, California to face a charge of murder. Petitioner grounds his challenge to
26 extradition as follows: (1) that Petitioner is innocent of the crime alleged in California; (2) that

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Petitioner is not a fugitive from the State of California; (3) that Petitioner has been deprived of counsel in the instant proceeding; and (4) that any statements made and/or blood samples given by Petitioner to California law enforcement officers were in violation of Petitioner's right to counsel. In its Answer, Respondent argues that none of the grounds cited by Petitioner have any merit and that this action should be dismissed.

In reviewing a petition for writ of habeas corpus that challenges an extradition request, Nevada law allows a reviewing court only to determine (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.¹ A governor's grant of extradition request is prima facie evidence that the constitutional and statutory requirements of an extradition request have been met.²

In applying Nevada law to the instant petition, the Court finds that Petitioner's claim that he is innocent of the California charge irrelevant to the Court's review of this matter.³ Likewise, Petitioner's claim that his statements made and blood samples given to California law enforcement officials were unlawful and violated his right to counsel have no bearing on the extradition request. These are issues that lie with the California court. Regarding Petitioner's claim that he is entitled to appointed counsel in the instant proceeding, for the reasons stated in its Order Granting Motion To Withdraw, the Court finds that

¹See *Castriotta vs. State*, 111 Nev. 67, 69, 888 P.2d 927 (1995) (citing *Michigan vs. Doran*, 439 U.S. 282, 289 (1978)).
²*Doran*, 439 U.S. at 289, 99 S.Ct. At 535.
³See *Ex Parte Filtzer*, 60 Nev. 109, 100 P.2d 942 (1940) (A court in an extradition hearing cannot try the guilt or innocence of an accused).



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Petitioner is not entitled to appointed counsel to assist him in challenging extradition in the instant action.⁴

Petitioner also challenges extradition on the grounds that he is not a fugitive from justice. Specifically, Petitioner claims that he has been incarcerated in Nevada jails or prisons since 1982 and therefore cannot be considered a fugitive from the State of California.⁵

Concerning the term "fugitive from justice", NRS 179.181 provides as follows:

NRS 179.181 Fugitives from justice; duty of Governor.
Subject to the provisions of NRS 179.177 to 179.235, inclusive, the provisions of the Constitution of the United States controlling, and any and all Acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

"In order to determine if a person is a fugitive from justice, the court should find that (1) a crime has been committed in another state, (2) the accused has been charged in that state with the commission of such crime, and (3) the accused fled from the jurisdiction and (4) is found within this state."⁶ In examining these elements, the Court finds that the State of California has sufficiently shown that the crime of murder allegedly occurred in San Bernardino, California on or about November 19, 1981. The requisition documents also show

⁴See *Order Granting Motion To Withdraw*, filed herein on February 23, 2009.

⁵The criminal complaint issued in the State of California charging Petitioner and supporting the extradition request alleges that Petitioner committed the crime of murder on or about November 19, 1981.

⁶*Castriotta vs. State*. 111 Nev. 67, 69, fn 2, 888 P.2d 927 (1995) citing *Ex parte Lorraine*, 16 Nev. 63, (1881). See also *Gallegos vs. State*, 123 Nev. Adv. Rep. 31, 163 P.3d 456 (2007) where the Nevada Supreme Court held that the term "fugitive from justice" has not been defined in Nevada and is unconstitutionally vague as it appears in NRS 202.360(1)(b).

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



1 that the State of California has formally charged Petitioner with that crime. There also can
2 be no question that Petitioner was found in Nevada as he is currently an inmate at Ely State
3 Prison.

4 While the Supreme Court's decision in *Gallegos* has left somewhat murky how
5 a trial court should determine if an accused has "fled" from a demanding state, this Court can
6 only look to the chain of inferences available from the requisition documents in this case.
7 Those documents would lead this Court to conclude that on or about November 19, 1981, a
8 murder occurred in San Bernardino, California, that at the time of the alleged murder
9 Petitioner was physically present in the State of California, that Petitioner left the State of
10 California sometime after the murder occurred, and that Petitioner was found to be in Nevada
11 in July, 2008, when an arrest warrant for Petitioner was issued by California authorities in
12 connection with the 1981 murder. From these requisition documents this Court can only infer
13 that some time after the November 19, 1981 murder occurred in California and before
14 Petitioner's incarceration in Nevada some time in 1982, he "fled" from the California
15 jurisdiction and has since been found in Nevada. For purposes of extradition, the Court
16 therefore finds and concludes that Petitioner is a "fugitive from justice".
17
18

19 In summary, the Court finds and concludes that Petitioner's claims are without
20 merit and that this matter should be dismissed.

21 Good cause appearing;

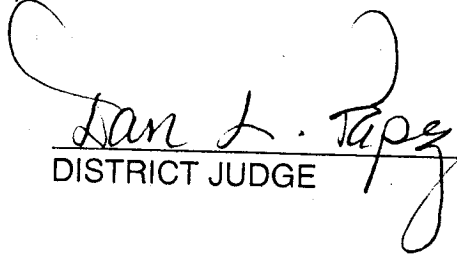
22 IT IS HEREBY ORDERED that Petitioner's Petition For Writ of Habeas Corpus
23 must be, and the same HEREBY IS DISMISSED.⁷
24

25 ///

26 _____

⁷Petitioner did not challenge the validity of the extradition documents on their face.

DATED this 2nd day of April, 2009.


DISTRICT JUDGE

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



SEVENTH JUDICIAL DISTRICT COURT.
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Case No. HC-0811022

Dept. No. 2

FILED

2009 FEB 23 PM 3:43

WHITE PINE COUNTY CLERK
BY K. Manzoni
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

TRACY PETROCELLI, AKA
JOHN MAIDA,
Petitioner,

vs.

STATE OF NEVADA,
Respondent.

**ORDER GRANTING
MOTION TO WITHDRAW**

FACTUAL AND PROCEDURAL HISTORY

On November 12, 2008, Petitioner Tracy Petrocelli, aka John Maida, filed a Motion For Appointment Of Counsel; To Proceed In Forma Pauperis; And Affidavit In Support, together with a Petition for Writ Of Habeas Corpus (Preliminary). On November 13, 2008, Petitioner again caused to be filed his Motion For Appointment Of Counsel; To Proceed In Forma Pauperis; And Affidavit In Support, together with an Affidavit In Support Of Motion To Proceed On Appeal In Forma Pauperis, and a Petition For Writ Of Habeas Corpus(Preliminary) with attached exhibits. On November 19, 2008, the Court entered and filed its Order Appointing Counsel wherein the Court appointed the Nevada State Public Defender's Office to represent Petitioner in this matter. The Court's Order Appointing Counsel was duly served on Petitioner and the Ely Office of the Nevada State Public

1 Defender.¹ On December 11, 2008, the State of Nevada, Respondent herein, by and
2 through Deputy Attorney General Michael Bongard filed an Answer To Petition For Writ Of
3 Habeas Corpus. Respondent filed a Request For Submission on January 9, 2009. On
4 January 20, 2009, Petitioner filed his Motion For Appointment Of Substitution Counsel; To
5 Proceed In Forma Pauperis, And Affidavit In Support. On February 13, 2009, Deputy State
6 Public Defender Kelly Brown filed a Motion To Withdraw.² The Court will decide the Motion
7 without a response by Respondent.

8 DISCUSSION

9 Petitioner brings this habeas action pursuant to NRS 179.197 and Chapter
10 34, NRS, to challenge the proposed action delineated in an Order³ issued by the Honorable
11 Ron Niman, Justice of the Peace, Ely Justice Court, in an extradition proceeding. The
12 record of this action shows that pursuant to NRS 179.197, Petitioner appeared by video
13 before Judge Niman on or about October 15, 2008, on an extradition request from the
14 State of California issued on or about August 8, 2008. During the extradition hearing,
15 Petitioner advised the Justice Court that he intended to challenge the extradition request
16 in district court and that he desired the assistance of appointed counsel. The Justice Court
17 did not appoint counsel but allowed Petitioner 30 days to file a habeas action in district
18 court. This action then ensued.⁴

19 ¹See Aff. of Service, filed on November 19, 2008.

20 ²The Motion To Withdraw was served on Respondent but not on Petitioner.

21 ³Order issued on October 15, 2008 by Judge Niman which is attached as an exhibit to
22 Petitioner's Petition.

23 ⁴The Court notes that the Public Defender's Motion to Withdraw was filed on February
24 13, 2009, almost three months after the Court's appointment and only after the Court
25 conducted a status conference on this case in late January, 2009. The Court had
26 received a pleading from Petitioner filed on January 20, 2009, requesting new
appointed counsel and advising the Court that the Public Defender had never met with

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



1 In its Motion To Withdraw, the Nevada State Public Defender's Office
2 advances the argument that Mr. Petrocelli is not entitled to representation [in a habeas
3 action challenging extradition] at state expense and therefore the State Public Defender
4 should be permitted to withdraw.⁵ The State Public Defender contends further that Nevada
5 law authorizes that Office to represent indigent persons only in cases arising out of Chapter
6 62, NRS, Chapter 171, NRS, and Chapter 432B, NRS, and no other.⁶

7 While NRS 179.197(1) provides that a person facing an extradition hearing
8 has a right to "demand and seek legal counsel" for such a hearing, it is clear that such a
9 person is not entitled to appointed counsel at state expense.⁷ The issue before the Court
10 then is whether the Court has the authority under Nevada law to appoint and require the
11 State Public Defender to represent an indigent person in a habeas action brought under
12 Chapter 34, NRS, that challenges an extradition request as allowed in NRS 179.197.

13 The general provisions of Nevada law regarding prosecution for writs of
14 habeas corpus are found at NRS 34.360 - 34.680. The statutory provisions for petitions
15 for pretrial relief are found at NRS 34.700 - 34.710, and the provisions of law for post-
16 conviction relief are found at NRS 34.720 - 34.830. A habeas action challenging
17 extradition to the demanding state to face criminal charges in that state would appear to
18 the Court to be pretrial in nature. The Court is unable to find any statutory provision in
19 NRS 34.360 - 34.710 allowing the Court to appoint counsel for an indigent person seeking

20 _____
21 him since the November 19, 2008 appointment. In addressing this issue, Deputy Public
22 Defender Kelly Brown advised the Court that his supervisor had instructed him to file a
23 request to withdraw from the case, but that his busy caseload had prevented him from
24 doing so.

25 ⁵Mot. to Withdraw, p. 3, lines 4-5.

26 ⁶Mot. to Withdraw, pp. 3-4.

⁷*Roberts v. Hocker*, 85 Nev. 390, 456 P.2d 425 (1969); See NRS 179.197.

DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA



56

1 habeas relief in an extradition demand.⁸ Because Nevada case law has established that
2 there is no constitutional right to appointed counsel in an extradition setting⁹, and no
3 statutory authority exists for such appointments, the Court believes it erred when it
4 appointed the State Public Defender to act as counsel for Petitioner.¹⁰

5 Good cause appearing;

6 IT IS HEREBY ORDERED that the Nevada State Public Defender's Motion
7 To Withdraw, must be, and the same HEREBY IS, GRANTED.

8 DATED this 22nd day of February, 2009.

9
10 
11 _____
12 DISTRICT JUDGE

13
14
15 _____
16 ⁸NRS 34.750 allows the court to appoint counsel for indigent persons prosecuting post-
17 conviction habeas actions, however, the instant action is pretrial in nature and therefore
18 NRS 34.750 is inapplicable to this matter. (See NRS 34.720).

19 ⁹85 Nev. at 392. (This Court notes that other jurisdictions recognize a constitutional
20 right to appointed counsel when an indigent person challenges extradition in a habeas
21 action, see *Mora v. District Court*, 494 P.2d 596 (Colo. 1972); *People ex rel. Harris v.*
22 *Ogilvie*, 221 N.E.2d 265 (Ill. 1966); *Ex Parte Turner*, 410 S.W.2d 639 (Tex.Cr.App.
23 1967); and *People v. Braziel*, 169 N.W.2d 513 (Mich. App. 1969)).

24 ¹⁰Obviously Petitioner may continue to prosecute his petition *in pro per* or retain counsel
25 at his own expense to assist him. Although Petitioner has stated twice in his moving
26 papers and affidavit that he is indigent, the Court will allow Petitioner 30 days from the
date of this Order to seek retained counsel or to notify the Court that Petitioner will
continue *in pro per*. If Petitioner retains counsel, a Notice of Appearance must be filed
within 30 days of the date of this Order. If Petitioner continues to proceed *in pro per*, the
Court will allow Petitioner 30 days from the date of this Order to file a reply to
Respondent's Answer.

SEVENTH JUDICIAL DISTRICT COURT
DAN L. PAPEZ
DISTRICT JUDGE
DEPARTMENT 2
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

