

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERHARD KURT HOLDERER,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 72911

FILED

JUL 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION

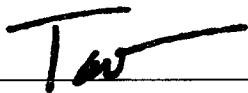
This original petition for a writ of mandamus and/or prohibition seeks an order directing the district court to void its discovery order and rule on petitioner Gerhard Kurt Holderer's motion for discovery, including his specific requests. Holderer asserts the district court erroneously applied civil discovery procedure rule EDCR 2.34 to his criminal case, the district court refused to rule on a properly filed discovery motion, and the district court erroneously found his discovery requests vague and unopposed.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. Petitions for extraordinary writs are addressed to the sound discretion of the court. *State ex rel. Dep't Transp.*

v. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). Neither writ will issue, however, if petitioner has a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330. "Petitioner[] carr[ies] the burden of demonstrating that extraordinary relief is warranted." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

We conclude Holderer has failed to demonstrate this court's intervention by way of extraordinary writ is warranted. Holderer has a plain, speedy, and adequate remedy at law because, in the event he is convicted, he may challenge the discovery order on appeal from the judgment of conviction. See NRS 177.015; NRS 177.045. Further, Holderer has not demonstrated the district court has refused to rule on his discovery motion. In fact the district court's discovery order specifically orders the State to provide Holderer with "all evidentiary material as required pursuant to both federal and state law, including, but not limited to that mandated by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1994, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) and NRS 174.235." Accordingly, we

ORDER the petition DENIED.¹


_____, J.
Tao


_____, J.
Gibbons

SILVER, C.J., concurring:

Optimistically, the district court encouraged the parties to meet and confer regarding discovery, similar to civil practice, citing to

¹We lift the stay imposed on May 1, 2017.

EDCR 2.34. But, I would caution the district court to be mindful that it is incumbent for the district court to resolve discovery disputes in criminal cases prior to trial, no later than calendar call. Unlike civil practice, meeting and conferring on every criminal case may be difficult if not impossible for the parties due to the sheer number of cases practitioners are assigned. Further, unlike civil practice, if a defendant is arrested for probable cause and invokes his right to a speedy trial, discovery may very well be trickling in from law enforcement right up to the calendar call date, and there are no rules similar to NRCP 16.1 to ensure that the parties have met, conferred, and exchanged the exhibits that will be used prior to trial.

Importantly, in some jurisdictions in Nevada, law enforcement will only turn over discovery to the State, as opposed to the defense—further complicating matters. In fact, most law enforcement agencies in Clark County will not even respond to a defense subpoena and so, unlike civil practitioners, criminal defense attorneys face an automatic unfair ~~disadvantage~~ ^{advantage} regarding discovery rightfully owed and mandated by NRS 174.245. Finally, unlike civil practice, there are no discovery commissioners that defense attorneys may utilize in resolving discovery disputes prior to trial in criminal cases. Therefore, it is incumbent upon the district court to resolve any discovery disputes prior to trial in order to prevent possible mistrials, exclusion of evidence due to discovery violations, and potential post-conviction relief based on newly discovered evidence. By resolving all discovery disputes prior to trial, the district court not only ensures judicial resources are not wasted; it also promotes justice.


_____, C. J.
Silver

Corrected
per order
filed 7/14/17

cc: Hon. Susan Johnson, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk