

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FRANCIS MEEGAN, II,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 35811

JAMES FRANCIS MEEGAN, II,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38129

JAMES FRANCIS MEEGAN, II,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK, AND, THE HONORABLE  
SALLY L. LOEHRER, DISTRICT  
JUDGE,  
Respondents,  
THE STATE OF NEVADA,  
Real Party in Interest.

No. 39442

FILED

OCT 08 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND, ORDER OF AFFIRMANCE,  
AND ORDER DENYING PETITION

Docket No. 35811 is a proper person appeal from a district court order denying a proper person post-conviction petition for a writ of habeas corpus. Docket No. 38129 is a proper person appeal from a district court order denying a proper person motion to correct an illegal sentence. Docket No. 39442 is a proper person petition for an extraordinary writ.

Pursuant to NRAP 3(b) we have elected to consolidate these matters for disposition.

On November 15, 1996, appellant James Francis Meegan, II was convicted, pursuant to a jury verdict, of first-degree murder. The district court sentenced Meegan to serve a prison term of life without the possibility of parole. Meegan appealed, and this court affirmed the conviction.<sup>1</sup>

Docket No. 35811

On September 17, 1999, Meegan filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Without conducting an evidentiary hearing or appointing counsel, the district court denied the petition. Meegan's proper person appeal from the district court order denying the petition is docketed in this court as Docket No. 35811.

This court has held that a petitioner claiming his counsel was ineffective is entitled to an evidentiary hearing on those claims which, if true, would entitle him to relief.<sup>2</sup> We conclude the district court erred in finding that none of Meegan's claims warranted an evidentiary hearing. Specifically, we conclude that the district court should have conducted an evidentiary hearing on Meegan's claims that his trial and appellate counsel were ineffective for failing to challenge the first-degree murder jury instructions, which required the jury to presume malice if it found the murder resulted from child abuse.

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<sup>1</sup>Meegan v. State, 114 Nev. 1150, 968 P.2d 292 (1998).

<sup>2</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Our review of the record on appeal reveals that Jury Instruction Nos. 6 and 10 given at trial were erroneous because, like the jury instructions given in Collman v. State,<sup>3</sup> the instructions improperly relieved the State of its burden of proving that a first-degree murder by means of child abuse was committed with malice aforethought. Because Meegan's claims that his trial and appellate counsel were ineffective for failing to challenge the erroneous first-degree murder instructions may entitle him to relief, we reverse the order of the district court and remand this matter for the appointment of counsel and an evidentiary hearing on those claims only.<sup>4</sup> We affirm the district court's order in all other respects.

Docket No. 38129

On November 28, 2000, Meegan filed a motion to correct an illegal sentence in the district court. The district court refused to consider the motion, finding that it lacked jurisdiction to consider it. Meegan then filed a petition for a writ of mandamus in this court challenging the district court's finding, which was granted.<sup>5</sup> In the order granting the petition, this court concluded that the district court did have jurisdiction

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<sup>3</sup>116 Nev. 687, 711-20, 7 P.3d 426, 441-47 (2000).

<sup>4</sup>We note that such erroneous jury instructions are subject to a harmless-error analysis. The district court should consider whether the errors were harmless in determining whether Meegan was prejudiced by his counsels' alleged deficient conduct. See Collman, 116 Nev. at 722-23, 7 P.3d at 449-50; see also Strickland v. Washington, 466 U.S. 668 (1984).

<sup>5</sup>Meegan v. State, Docket No. 37277 (Order Granting Petition for Writ of Mandamus, April 6, 2001).

and directed the district court to consider the merits of the claims presented in Meegan's motion.<sup>6</sup> Without conducting an evidentiary hearing or appointing counsel, the district court considered the merits of Meegan's motion to correct an illegal sentence, and denied the motion. Meegan's proper person appeal from the district court order denying his motion to correct illegal sentence is docketed in this court as Docket No. 38129.

In the motion, Meegan contended that he had both a due process and a statutory right to be sentenced by a three-judge panel. We conclude that that the district court properly rejected Meegan's claim.

The record on appeal reveals that counsel affirmatively requested the trial court to sentence Meegan, rather than a three-judge panel, because the jury had rejected the death penalty, and therefore counsel argued, Meegan's case should no longer be treated as a capital case. The State opposed Meegan's request, and alternatively requested that Meegan waive his right to appeal any issues complaining that he was not sentenced by a three-judge panel. The trial court, pursuant to Meegan's request, agreed to sentence Meegan, and asked defense counsel to "waive any appellate argument that the case should have gone or should go to a three-judge panel." Thereafter defense counsel reiterated the request that the trial court impose sentence. Additionally, at the sentencing hearing, which occurred on November 1, 1996, neither defense counsel nor Meegan objected to the trial court's imposition of sentence, or requested that Meegan's sentence be imposed by a three-judge panel.

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<sup>6</sup>Id.

Accordingly, we conclude that defense counsel, in advocating that the district court impose sentence instead of a three-judge panel, waived any entitlement Meegan may have had to be sentenced by a three-judge panel. Therefore, the district court did not err in denying Meegan's motion.

Docket No. 39442

On April 5, 2002, Meegan filed a proper person petition for an extraordinary writ in this court. In the petition, Meegan claims that this court should issue a writ granting him a new trial because the first-degree murder instruction given at his trial was erroneous. Meegan's proper person petition for an extraordinary writ is docketed in this court as Docket No. 39442.

Meegan contends that this court should issue a writ directing a new trial because the presumed-malice jury instruction given at his trial was unconstitutional, and he has no adequate remedy at law. We disagree.

A writ of mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered.<sup>7</sup> Generally, a writ of mandamus will not issue if the petitioner has a plain, speedy and adequate remedy in the ordinary course of law.<sup>8</sup> We conclude that Meegan's claim regarding the Collman instruction can be adequately addressed in his post-conviction petition in the district court. Although Meegan's trial and appeal both occurred before this court

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<sup>7</sup>Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

<sup>8</sup>NRS 34.170.

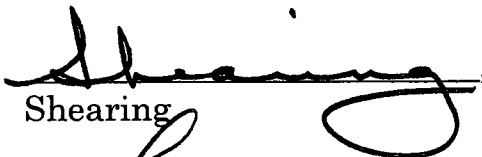
published the Collman decision; Collman did not create new law, but instead merely applied existing law. Because Meegan has an adequate remedy at law, we conclude that our intervention by way of extraordinary writ is not warranted.


Having considered Meegan's contentions and for the reasons discussed above, we

ORDER the judgment of the district court in Docket No. 35811 REVERSED AND REMAND the matter to the district court for further proceedings consistent with this order; we

ORDER the judgment of the district court in Docket No. 38129 AFFIRMED; and we

ORDER the petition in Docket No. 39442 DENIED.<sup>9</sup>

  
Shearing, J.

  
Leavitt, J.

  
Becker, J.

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<sup>9</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Sally L. Loehrer, District Judge  
James Francis Meegan II  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Clerk