

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DEAN NICHOLAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41357

**FILED**

OCT 13 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant John Dean Nicholas's post-conviction petition for a writ of habeas corpus.

On April 25, 1991, Nicholas was convicted, pursuant to a guilty plea, of one count each of first-degree kidnapping with the use of a deadly weapon and robbery with the use of a firearm. The district court sentenced Nicholas to serve two consecutive prison terms of 10 years for the kidnapping count and two consecutive prison terms of 5 years for the robbery count, to run consecutively to the kidnapping count. Nicholas appealed, and this court dismissed the direct appeal as untimely.<sup>1</sup>

Nicholas filed a post-conviction petition for a writ of habeas corpus in the district court. In the petition, Nicholas alleged that his trial counsel was ineffective because counsel failed, contrary to Nicholas's request, to file a timely notice of appeal. The district court denied the petition, ruling that the issue raised was not cognizable in a habeas proceeding. Nicholas appealed, and this court concluded that the district

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<sup>1</sup>Nicholas v. State, Docket No. 22788 (Order Dismissing Appeal, December 3, 1992).

court erred and remanded the matter to the district court for an evidentiary hearing pursuant to Lozada v. State.<sup>2</sup>

The district court conducted an evidentiary hearing on Nicholas's claims of ineffective assistance of counsel and, subsequently, denied Nicholas's petition. Nicholas appealed, and this court again vacated the district court order and remanded the matter to allow Nicholas to file a post-conviction petition for a writ of habeas corpus raising direct appeal issues pursuant to Lozada.<sup>3</sup> Nicholas filed a proper person petition for rehearing of this court's order of remand, arguing that the Lozada remedy was inadequate and requesting that he be released from prison. This court denied the petition for rehearing.<sup>4</sup>

On remand, the district court appointed counsel to represent Nicholas. Rather than raise direct appeal issues as instructed by this court, on October 8, 1999, counsel filed a notice that no supplement to the original petition for a writ of habeas corpus would be filed because Nicholas believed the Lozada remedy was inadequate and, therefore, was seeking relief in federal court. From late 1999 to March 2001, Nicholas sought relief in federal court but was unsuccessful. Consequently, on March 21, 2002, Nicholas "reactivated" his State habeas proceeding and with the assistance of counsel filed a post-conviction habeas petition in district court challenging the adequacy of the Lozada remedy and seeking

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<sup>2</sup>110 Nev. 349, 871 P.2d. 944 (1994), cited in Nicholas v. State, Docket No. 25497 (Order of Remand, July 8, 1994).

<sup>3</sup>Nicholas v. State, Docket No. 26353 (Order of Remand, February 10, 1999).

<sup>4</sup>Nicholas v. State, Docket No. 26353 (Order Denying Rehearing, March 24, 1999).

release from custody. In the petition, Nicholas did not raise any direct appeal issues pursuant to Lozada.

On June 4, 2002, the State moved to dismiss the petition, arguing that Nicholas had disregarded this court's instructions on remand by failing to allege direct appeal issues in a timely manner. On July 19, 2002, Nicholas filed a reply to the State's motion to dismiss, reiterating his argument that the Lozada remedy was inadequate. On July 19, 2002, the district court denied the State's motion to dismiss and, on January 24, 2003, conducted an evidentiary hearing on Nicholas's claim that the Lozada remedy was inadequate. On April 10, 2003, the district court denied Nicholas's petition. Nicholas filed this timely appeal.

Nicholas contends that the district court erred in denying his petition because the Lozada remedy is inadequate to address the loss of his appellate rights resulting from ineffective assistance of counsel. Specifically, Nicholas argues that the Lozada remedy fashioned by this court is an unsatisfactory substitute for a belated direct appeal because: (1) there is no right to effective assistance of counsel in a Lozada proceeding; (2) a trial judge who presided over the original proceedings rules on the claims in the Lozada petition, rather than an unbiased panel of appellate judges; and (3) the Lozada remedy conflicts with NRS 34.724(2).<sup>5</sup> Citing to numerous federal and state decisions, Nicholas contends that the appropriate remedy for an appeal deprivation claim

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<sup>5</sup>NRS 34.724(2)(a) provides that a post-conviction habeas petition "[i]s not a substitute for and does not affect any remedies which are incident to the proceedings in the trial court or the remedy of direct review of the sentence or conviction."

should be a delayed or belated appeal. We conclude that Nicholas's contentions lack merit.

In 1994, when the Lozada remedy was implemented, this court expressly concluded that it was a "proper" vehicle to remedy a petitioner's loss of his appellate rights. While not identical to the remedy of a belated direct appeal, we conclude that the Lozada remedy is the functional equivalent of a belated direct appeal and is an adequate remedy for a petitioner's loss of his appellate rights. Contrary to Nicholas's belief, a petitioner afforded the Lozada remedy has the right to effective assistance of counsel involving the Lozada claims because the appointment of counsel for that proceeding is constitutionally required.<sup>6</sup> Moreover, although the district court initially considers a Lozada petitioner's direct appeal claims, the district court's conclusions are independently reviewed by this court.<sup>7</sup> Finally, we disagree with Nicholas that the Lozada remedy conflicts with NRS 34.724(2) because that statute does not concern a post-conviction habeas petition filed pursuant to Lozada. A Lozada petition does not fall within the purview of NRS 34.724(2) because the Lozada proceeding is designed to cure the loss of a direct appeal and, thus, is not a collateral proceeding challenging the

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<sup>6</sup>See Gebbers v. State, 118 Nev. at \_\_\_, \_\_\_, 50 P.3d 1092, 1095 (2002) (noting that the Lozada remedy is "incomplete if the district court does not provide the petitioner with the assistance of counsel to identify and pursue any potential direct appeal claims"); Lozada, 110 Nev. at 359, 871 P.2d at 950; see also Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 163-65, 912 Nev. 255, 257-58 (1996).

<sup>7</sup>See generally Paige v. State, 116 Nev. 206, 208, 995 P.2d 1020, 1021 (2000) (recognizing that questions of law are reviewed de novo).

validity of the judgment of conviction.<sup>8</sup> Because Nicholas failed to raise claims pursuant to Lozada and because the Lozada remedy is adequate, we conclude the district court did not err in denying Nicholas's petition.

Nicholas also contends that his conviction should be reversed because the extreme delay in processing his appeal constitutes a violation of his right to due process. Nicholas relies on Ninth Circuit precedent applying the Barker v. Wingo<sup>9</sup> factors to determine whether a delay in an appeal interfered with an appellant's right to due process.<sup>10</sup> However, this court has rejected the application of the Barker analysis to such claims.<sup>11</sup> Instead, to determine whether a delay in an appeal warrants relief on due process grounds, we consider whether an appellant: (1) has demonstrated that he is unable to present an adequate appeal because of the delay; and (2) will be unable to adequately defend himself if given a new trial.<sup>12</sup>

Here, Nicholas has not demonstrated that he is unable to present an adequate appeal; in fact, Nicholas has failed even to posit any potential errors occurring in the proceedings below. Notably, because Nicholas pleaded guilty the issues he may raise on appeal are quite

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<sup>8</sup>See Nev. Const. art. 6, §§ 4, 6.

<sup>9</sup>407 U.S. 514, 530 (1972) (discussing deprivation of the right to a speedy trial and setting forth four factors to be balanced: length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant).

<sup>10</sup>See, e.g., U.S. v. Antoine, 906 F.2d 1379 (9th Cir. 1990); Coe v. Thurman, 922 F.2d 528 (9th Cir. 1990).


<sup>11</sup>See Lopez v. State, 105 Nev. 68, 86-87, 769 P.2d 1276, 1288-89 (1989).

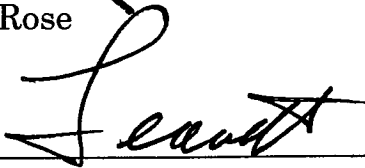
<sup>12</sup>See id. at 87, 769 P.2d at 1289.


limited.<sup>13</sup> Likewise, Nicholas has failed to show that he will be unable to adequately defend himself if given a trial. Accordingly, we conclude that Nicholas's due process claim lacks merit.

Having considered Nicholas's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Maupin

cc: Hon. Steven R. Kosach, District Judge  
Scott W. Edwards  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>13</sup>See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).