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## Mayo v. Eigh. Jud, Dist. Ct., 123 Nev. Adv. Op. 79 (Nov. 23, 2016)

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CRIMINAL PROCEDURE; EVIDENCE; GRAND JURY; PROSECUTION DUTIES

**Summary:**

The Court found that the district court did not err when it found no violation of NRS 172.145(2). The Court interpreted NRS 172.145(2), which creates a duty on district attorneys to submit evidence to a grand jury if they are “aware” it will “explain away the charge.” The Court determined that a district attorney must be “aware” evidence has exculpatory value before there is a duty to present the evidence to a grand jury. The district attorney is not obligated to present exculpatory evidence it possesses but does not recognize as exculpatory. In the case at issue, because the district attorney did not know moyamoya disease could explain a murder charge against Mayo, the district attorney did not need to present the evidence to the grand jury. The Court did not grant a pre-trial petition for writ of habeas corpus.

**Background:**

A grand jury indicted Anthony Mayo for battery constituting domestic violence, coercion, dissuading a witness, and the murder of his wife Beverly McFarlane. The district attorney presented evidence to the grand jury that Mayo, among other things, killed his wife. It included (1) Mayo’s daughter’s testimony that her father strangled and beat Beverly so badly that she remained confused and incoherent for two days before the police were called, (2) after then being transported to the hospital, examination reports that were consistent with strangulation, and (3) brain and autopsy examinations consistent with murder.

A Clark County medical examiner performed Beverly’s autopsy while her brain was sent to a Neuropathologist in California. The medical examiner testified the cause of death was brain injuries due to assault. The Neuropathologist testified that she observed swelling and hemorrhages on Beverly’s brain which predisposed Beverly to trauma and ultimately caused her death.

The district attorney did not present evidence of possible moyamoya disease to the grand jury. The district attorney’s file contained two notes suggesting Beverly had the disease. One note mentioned she may have had a stroke and “possible moya moya.” Another note said Beverly’s future death could be caused by hemorrhaging from moyamoya.

After being indicted, and before trial, Mayo petitioned the district court for writ of habeas corpus seeking to dismiss the indictment with prejudice. Mayo argued that the district attorney violated NRS 172.145(2) by failing to submit exculpatory evidence the state possessed to the grand jury. The district attorney forwarded the petition to a neuropathologist who examined Beverly’s brain. In response, she issued a new report concluding there was no evidence of moyamoya disease.

The district court held two hearings on Mayo’s pretrial motion, ultimately denying it. The deputy district attorney prosecuting the case acknowledged that he had notes mentioning moyamoya disease but claimed he did not notice any reference to the disease or recognize it as potentially exculpatory until after the indictment. Defense counsel also acknowledged

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<sup>1</sup> By Alex R. Velto

moyamoya is a very rare disease and not something he knew about before preparing for the trial. The district court accepted the prosecutions arguments.

As a result, the district court denied the petition and held that “the state is only required to present to the Grand Jury exculpatory evidence of which the state is aware. . . at the time.” The district court did not make a determination as to whether Beverly had moyamoya disease. Instead, it rejected the petition because the state was unaware of the exculpatory value of the moyamoya references in the medical record and thus was not required to present it to a grand jury.

## **Discussion:**

### *Consideration of the writ petition*

The Court may issue a writ of mandamus to compel an actor’s legal duty.<sup>2</sup> Generally, mandamus is an extreme remedy and the Court preserves the district court’s discretion. However, the Court may review pretrial habeas corpus determinations when it tests the scope of the district attorney’s obligation.

Here, the Court denies writ relief. But the Court does review the following question: whether the obligation to present exculpatory evidence to a grand jury of which a district attorney is “aware” extends to evidence the district attorney possesses but does not recognize as exculpatory?

### *Interpreting NRS 172.145(2)*

Prosecutors do not have a constitutional obligation to present exculpatory evidence to a grand jury. Instead an accused person’s right to have a prosecutor present exculpatory evidence to a grand jury lies in statute. Under NRS 172.145(2), the district attorney must submit evidence to a grand jury that it is “aware” of and that will “explain away the charge.”

Using a plain-reading, the Court concludes an attorney must be “aware” that the evidence could “explain away the charge” before the duty to submit evidence to a grand jury arises. Simply possessing evidence that could “explain away the charge” does not trigger the duty.

The Court determines this is consistent with both the statute’s underlying policy and legislative history. Because a grand jury proceeding only exists to determine probable cause, forcing prosecutors to mount a defense of the accused is incompatible with either the prosecutor’s role or the role of a grand jury. It would also impose an “intolerable burden on the government” to force it to actively seek out evidence that could be exculpatory. When adopting NRS 172.145(2), the legislature also chose not to adopt wording that would have imposed a broader obligation on district attorneys in committee meetings.

### *The awareness presumption of a trial does not apply to a grand jury*

Mayo argues that the Court should presume the district attorney is aware of exculpatory evidence because it exists in the district attorney’s file. However, the Court does not find this presumption compatible with the objective of a grand jury. The Court acknowledges that a

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<sup>2</sup> Schuster v. Eigh, Jud. Dist. Ct., 123 Nev. 187, 190 (2007).

defendant is entitled to any evidence that could be exculpatory before a trial. But unlike a trial, there is no presumption of awareness in a grand jury setting because the grand jury's objective is to determine whether there is probable cause only – not to determine guilt.<sup>3</sup> Also, the district attorney has not completed the investigation.

*This ruling does not make bad faith abuse of the system more likely*

The Court concludes there are other mechanisms to deter and correct prosecutorial abuse which do not require broadening NRS 172.145(2).

**Conclusion:**

The Court denies relief to Anthony Mayo because the district attorney did not have a duty to disclose medical records indicating Mayo's wife potentially had moyamoya disease to a grand jury. In doing so, the Court answers the question of whether the obligation to present exculpatory evidence of which a district attorney is "aware" extends to evidence the district attorney possesses but does not recognize as exculpatory. The Court holds that because the prosecutor was not aware of the exculpatory value of the evidence, it was not required to disclose the evidence.

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<sup>3</sup> Gordon v. Ponticello, 110 Nev. 1015, 1020 (1994).