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### Summary of Clay v. Eighth Judicial District Court, 129 Nev. Adv. Op. 48

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## CRIMINAL PROCEDURE

### **Summary**

The Court considered a petition for a writ of mandamus challenging an order from the district court denying a pretrial petition for a writ of habeas corpus. The question before the Court was whether a district attorney violates NRS 172.095(2) when he or she seeks an indictment for child abuse or neglect under NRS 200.508(1),<sup>2</sup> based on nonaccidental physical injury, but fails to inform the grand jurors of the definition of “physical injury.”

### **Disposition**

First, the Court concluded that “abuse or neglect,” as defined by NRS 200.508(4)(a), is an element of the Nevada child abuse and neglect statute regardless of the theory under which the prosecution proceeds. Second, when the abuse or neglect is based on nonaccidental physical injury, NRS 172.095(2) requires that the prosecutor explain “physical injury” as defined by NRS 200.508(4)(d) to the grand jury. Ultimately, the Court held that the prosecutor’s failure to define “physical injury” here likely caused the grand jury to return one indictment on less than probable cause. Accordingly, it granted the petition as to that count.

### **Factual and Procedural History**

Petitioner Bryan Clay (“Clay”) was indicted by a grand jury for two counts of child abuse and neglect in violation of NRS 200.508(1). The first count stemmed from an incident wherein Clay slapped his girlfriend, E.F., on the face several times. The other count resulted from an altercation wherein Clay had used physical force against E.F., including choking, to such a degree that E.F. reported difficulties breathing to the police after the incident. There was no other testimony or evidence offered at the grand jury hearing that E.F. sustained injuries during the two altercations.

Following the indictment, Clay filed his petition for a writ of habeas corpus challenging the indictment arguing that (1) there was not enough evidence of physical injury presented to the jury to sustain an indictment for two counts of child abuse and neglect, and (2) the State had violated NRS 172.095(2) by not instructing the jury on the definition of “physical injury” as used in the child abuse and neglect statute.<sup>3</sup>

Subscribing to the State’s argument that an actual showing of physical or mental injury is inessential under the child abuse and neglect statute, the district court denied Clay’s petition.

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<sup>1</sup> By Katelyn Franklin.

<sup>2</sup> [Hereinafter child abuse and neglect statute].

<sup>3</sup> NRS 172.095(2) requires the prosecutor to “inform the grand jurors of specific elements of any public offense which they may consider as the basis of the indictment.”

The State did not argue against, and the district court did not address Clay's NRS 172.095(2) argument.

## **Discussion**

Justice Douglas wrote the opinion of the three-justice panel, which included Justices Gibbons and Parraguire.<sup>4</sup>

### *Interpretation of NRS 200.508(1)*

The Court first determined that the presence of “abuse or neglect” is an element of the child abuse and neglect statute. The Nevada child abuse and neglect statute provides that [a] person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect [is guilty of a felony].<sup>6</sup>

The Court explained that this statute proscribes two types of abuse: first, actually causing a minor physical pain and mental suffering and second, the act of placing a child in a situation where they may suffer the same.

The State argued that actual “abuse or neglect” is not an element of the statute when the State is alleging that a defendant caused a child to be placed in a situation where they may suffer pain or mental suffering. The Court, however, concluded that based on the statute's plain language and legislative history,<sup>8</sup> both actual suffering and the possibility of suffering as alleged under the statute must be “the result of abuse or neglect.” Because “abuse or neglect” is an element of the child abuse and neglect statute, and because the State based its allegations of abuse or neglect on the theory of nonaccidental physical injury, “physical injury” was an element of the crime here.

### *Application of NRS 172.095(2)*

The Court then turned to the issue of whether the prosecutor violated NRS 172.095(2) when he or she did not define the meaning of “physical injury” for the grand jury. The Court concluded that a prosecutor violates this statute when he or she gives incomplete or misleading instruction in such a manner that results in a likelihood of a grand jury returning indictment on less than probable cause.<sup>9</sup> Since the definition of “physical injury,” as defined by statute<sup>10</sup> is

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<sup>4</sup> A writ of mandamus is an appropriate remedy for violations of grand jury procedures. *See* Lisle v. State, 113 Nev. 540, 551, 937 P.2d 473, 480 (1997), *clarified on rehearing*, 114 Nev. 221, 954 P.2d 744 (1998).

<sup>6</sup> NEV. REV. STAT. § 200.508(1) (2011).

<sup>8</sup> Court found that the State wished to criminalize the act of allowing a child to be subject to abuse or neglect. The State did not, however, intend the statute to punish abuse or neglect that could not result in physical harm or mental suffering.

<sup>9</sup> The Court reasoned that in states with similar statutes to NRS 172.095(2), namely New York, the test is whether the integrity of the grand jury has been impaired. *People v. Calbud, Inc.*, 402 N.E.2d 1140, 1144 (N.Y. 1980). In other words, the test is whether the prosecutor's incomplete or misleading instructions likely led to the grand jury

much narrower than the definition a layperson would ascribe to the phrase, NRS 172.095(2) required the prosecutor to define “physical injury” for the grand jury to prevent corruption of the indictment.

The State argued that it did not violate NRS 172.095(2) because the prosecutor asked the grand jury if it had any questions after issuing instructions. The Court held that this was insufficient because the State had not read the elements of the child abuse and neglect and had not explained the meaning of the elements in layperson’s terms.

The Court then considered whether the prosecutor’s failure to explain “physical injury” caused the grand jury to return an indictment on less than probable cause. The Court held that with respect to the first count where there was no testimony or evidence given suggesting that the victim had sustained physical injury from the slapping, the grand jury likely returned the indictment on less than probable cause. However, the Court concluded that as to the other count, the grand jury likely returned an indictment on probable cause because they could infer “physical injury” based on the victim’s statement to the police that she was having difficulty breathing after the altercation.

### **Conclusion**

The Court granted the petition for extraordinary relief in part, and directed the Clerk of the Court to issue the writ of mandamus instructing the district court to dismiss count one of the indictment without prejudice.

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returning an indictment on less than probable clause. *Id.* Additionally, according to statement made at a hearing before the State Judicial Committee, the Nevada statute was intended to add fairness to grand jury proceedings by providing layperson with detailed explanations of the law and elements of crimes. *Hearing on S.B. 107 Before the Senate Judiciary Comm.*, 63d Leg. (March 4, 1985) (statement of Senate subcommittee member Sue Wagner).

<sup>10</sup> NEV. REV. STAT. § 200.508(4)(d) (2011).