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### Summary of *Whitehead v. State*, 128 Nev. Adv. Op. No. 24

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CRIMINAL LAW AND PROCEDURE – POST-CONVICTION PETITION FOR WRIT OF  
HABEAS CORPUS

**Summary**

The Court grants an en banc reconsideration of an appeal from an order dismissing a post-conviction petition for writ of habeas corpus.

**Disposition/Outcome**

The Court, sitting en banc, reversed a panel of its own judges that affirmed the district court's dismissal of petitioner's post-conviction petition for writ of habeas corpus as untimely. The Court held that the petition was timely, and remanded it for further proceedings on its merits.

**Factual and Procedural History**

Petitioner Jonathon Whitehead ("Whitehead") pleaded guilty to DUI causing death and DUI causing substantial bodily harm and subsequently filed a post-conviction petition for writ of habeas corpus. A panel of the Court affirmed the district court's dismissal of his petition as untimely. Whitehead filed a petition for rehearing, which the panel denied. Whitehead then petitioned for en banc reconsideration.

On September 20, 2006, Whitehead's vehicle overturned after veering off the road and overcorrecting, causing the vehicle to roll over several times. The accident killed one passenger and critically injured four others. A subsequent test of Whitehead's blood taken just after the accident showed various concentrations of alcohol and marijuana.

The district court entered a judgment of conviction on May 7, 2008, sentencing Whitehead to twelve to thirty years and stating that restitution would be required, but failing to determine the specific amount of restitution. An amended judgment, filed on May 16, 2008, also failed to determine the amount of restitution. The district court eventually held a restitution hearing and entered a second amended judgment of conviction on January 27, 2009, stating the same sentencing terms and ordering Whitehead to pay \$1,390,647 in restitution.

Whitehead filed a post-conviction petition for a writ of habeas corpus on May 13, 2009, listing May 16, 2008, as the date of his conviction. The district court dismissed the petition, concluding that because the date of conviction was May 7, 2008, the petition was untimely by six days and therefore barred by NRS 34.726(1).<sup>2</sup> Whitehead appealed, arguing that a judgment of conviction that imposed restitution in an unspecified amount is not final until an amount of restitution is determined, and that the final judgment in this case was not entered until January 27, 2009, making his petition timely. The Court agreed.

**Discussion**

NRS 34.726(1) holds that "a petition that challenges . . . a judgment or sentence must be

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<sup>1</sup> By Eric Carson.

<sup>2</sup> NEV. REV. STAT. § 34.726(1) (2007).

filed within 1 year after entry of the judgment of conviction.”<sup>3</sup> Initially, the district court and the Court relied on *Sullivan v. State* for the proposition that tolling the one-year time limit every time the judgment of conviction is amended would “frustrate the purpose and spirit of NRS 34.726.”<sup>4</sup> Upon reconsideration, however, the Court concluded that *Sullivan* is distinguishable from the case at hand because in *Sullivan*, the judgment of conviction was amended to correct a clerical error, while here the judgment was amended to set the amount of restitution. Here, the amendment was not to correct a simple error, it was to establish an integral part of the sentence.<sup>5</sup>

Given the requirement in NRS 176.105(1) that restitution be included in the judgment of conviction in a specific dollar amount,<sup>6</sup> the Court concluded that a judgment that imposes a restitution obligation but does not specify its terms, is *not* a final judgment. Consequently, the final judgment here was not entered until January 27, 2009, when the district court filed a judgment that set forth a specific dollar amount of restitution. Whitehead’s post-conviction petition for a writ of habeas corpus on May 13, 2009, was within one year of the entry of the final judgment. Therefore, his petition was timely filed and the district court erred in dismissing it. Accordingly, the Court reversed the judgment of the district court and remanded the case for further proceedings consistent with this opinion.

### **Conclusion**

A judgment of conviction that imposes restitution but does not set an amount of restitution is not final and therefore does not trigger the one-year time limit for filing a post-conviction petition for a writ of habeas corpus.

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<sup>3</sup> *Id.*

<sup>4</sup> *Sullivan v. State*, 120 Nev. 537, 540, 96 P.3d 761, 764 (2004).

<sup>5</sup> *See* NEV. REV. STAT. § 176.105(1) (2007) (the judgment of conviction *must* set forth the amount and terms of restitution); NEV. REV. STAT. § 176.033(1)(c) (2007) (requiring the district court to “set an amount of restitution” when it determines that restitution “is appropriate” as part of a sentence); *Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993) (requiring the district court to “set a specific dollar amount of restitution” and therefore not allowing the district court to “award restitution in uncertain terms”).

<sup>6</sup> NEV. REV. STAT. § 176.105(1).