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### Summary of State v. Beaudion, 131 Nev. Adv. Op. No. 48 (Jul. 2, 2015)

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*State v. Beaudion*, 131 Nev. Adv. Op. No. 48 (Jul. 2, 2015)<sup>1</sup>  
CIVIL PROCEDURE: WITHHOLDING NOTICE

**Summary**

NRS 172.241 affords the target of a grand jury investigation the opportunity to testify before them unless, after holding “a closed hearing on the matter,” the district court determines that adequate cause exists to withhold target notice. NRS 172.241(3) specifies that “[t]he district attorney may apply to the court for a determination that adequate cause exists to withhold notice, if the district attorney.... [d]etermines” that the target poses a flight risk, cannot be located or, as relevant here, “that the notice may endanger the life or property of other persons.” Accordingly, NRS 172.241’s procedure for withholding notice is met if the State presents sufficient evidence to the district court, through written application and/or at oral argument, should the court require it, to allow the court to conclude by written order that that adequate cause to withhold notice of the grand jury proceedings exists.

**Background**

The State alleges that respondent Earl Wayne Beaudion committed battery causing substantial bodily harm constituting domestic violence against his then-girlfriend when he tied her to their bed and poured boiling water over her exposed torso, burning her so severely that she required skin grafts. The State further alleges that Beaudion intimidated or threatened the victim with additional harm if she cooperated in his prosecution. Each time the date scheduled for the preliminary hearing arrived, the victim failed to appear and, eventually, she vanished.

Several years later, detectives located the victim. The district attorney's office renewed its efforts to charge Beaudion, this time utilizing the grand jury, which conducts its proceedings largely in secret.<sup>2</sup> Before presenting its case against Beaudion to the grand jury, the district attorney's office submitted a written application, supported by an affidavit from the prosecutor, to the court supervising the grand jury for permission to withhold target notice from Beaudion. As grounds for withholding target notice, the application asserted that Beaudion would threaten or harm the victim and/or her family to prevent the victim from testifying if Beaudion knew the grand jury was considering his indictment. After considering the written application and supporting affidavit, but without holding an oral hearing, the court entered a written order finding cause for and authorizing the State to proceed without notice to Beaudion.

The victim testified before the grand jury, which returned a true bill, and the State filed an indictment against Beaudion in district court. Beaudion filed a motion to dismiss arguing that the order authorizing the district attorney’s office to withhold “*Marcum* notice” was deficient because it had not been preceded by the “closed hearing” required by NRS 172.241(4) and that this deficiency invalidated the indictment.

The district court granted Beaudion's motion to dismiss holding that it was a violation of NRS 172.241(4)’s “closed hearing” requirement for the court to have dispensed with target notice

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<sup>1</sup> By Michael S. Valiente.

<sup>2</sup> See NEV. REV. STAT. § 172.245.

based on the prosecutor's written submissions, without conducting an oral, face-to-face hearing. In the district court's view, the failure to hold the hearing required by NRS 172.241(4) invalidated the order authorizing the State to withhold target notice from Beaudion and rendered the indictment procedurally defective, requiring dismissal.

## **Discussion**

NRS 172.241(4) does not define the term "closed hearing." The Court rejected Beaudion's argument that "closed hearing" excludes the public but includes the target of the grand jury investigation. The Court concluded that the defendant has no right to participate in the "closed hearing" beyond that conferred by statute and here, the statute does not confer the right to notice of the "closed hearing" on the defendant.<sup>3</sup> After all, the point of the hearing is to determine whether "adequate cause" exists to withhold notice of the grand jury proceeding from its target because, under NRS 172.241(3), giving such notice might cause the target to flee or endanger the lives or property of other.

The Court noted that the harder question is whether the reference in NRS 172.241(4) to a "closed hearing" requires an oral presentation to the court by the prosecutor or permits the court to decide whether to approve withholding target notice based on the prosecutor's written submission if the written submission is adequate to the task. The majority of courts to have considered the question "have concluded that the use of the term 'hearing' in a statute does not confer a [mandatory] right to oral argument [or oral presentation] unless additional statutory language or the context indicates otherwise."<sup>4</sup> Thus, depending on context, a statutory hearing requirement may be satisfied by providing the parties the opportunity to present arguments and evidence through written submissions.<sup>5</sup>

## **Conclusion**

NRS 172.241, does not mandate an oral hearing in all instances, as that would require use of court resources and time for essentially no reason in cases such as this. Thus, NRS 172.241's procedure for withholding notice is met if the State presents sufficient evidence to the district court, through written application and/or at oral argument, should the court require it, to allow the court to conclude by written order that that adequate cause to withhold notice of the grand jury proceedings exists. As the State did so here, we reverse the order dismissing the indictment and remand.

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<sup>3</sup> See NEV. REV. STAT. § 172.241(4)

<sup>4</sup> Lewis v. Superior Court, 970 P.2d 872, 884 (Cal. 1999 ) (collecting cases); Chan v. Gantner, 464 F.3d 289, 296 (2d Cir. 2006) ("Absent some otherwise expressed Congressional intent, the mere use of the word 'hearing' in a statute does not mandate an evidentiary hearing be held.").

<sup>5</sup> See, e.g., Florida K Coast Ry. Co., 410 U.S. at 241–42 (holding that a hearing requirement contained in the Administrative Procedure Act could be satisfied by allowing interested parties to file written submission of argument and evidence and did not require oral testimony or argument); Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 176-77 (3d Cir. 1990) ("While [former Federal Rule of Civil Procedure] Rule 56 speaks of a 'hearing,' we do not read it to require that an oral hearing be held before judgment is entered. An opportunity to submit written evidence and argument satisfies the requirements of the rule.").