

A-19

Electronically Filed  
5/10/2019 10:44 AM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Electronically Filed  
May 15 2019 04:06 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

State of Nevada  
PLAINTIFF

case no: A-18-790102-W

VS.

NOTICE OF APPEAL

Frank Hearring

DEFENDANT

Notice is hereby given that Frank Hearring, In Pro Se, proper person  
In the above named case, hereby appeals to the United States Court of Appeals for the Ninth  
Circuit from a judgment in Writ of Habeas Corpus (Post Conviction).  
On 11<sup>th</sup> day of April 2019, which was received by Frank Hearring  
On 15<sup>th</sup> day of April 2019.

Frank Hearring respectfully requests on this 6<sup>th</sup> day of May  
2019, that this Honorable Court enter this Notice of Appeal.

*Frank Hearring*  
RESPECTFULLY

Warm Springs Correctional Center  
P.O. Box 7007  
Carson City, Nevada 89702

CLERK OF THE COURT

MAY 10 2019

RECEIVED

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

**DESIGNATION OF TRANSCRIPTS  
TO BE USED IN RECORD ON APPEAL**

District Court Case Number: C-13-291159-1

Court of Appeals Case Number: A-18-790102-W

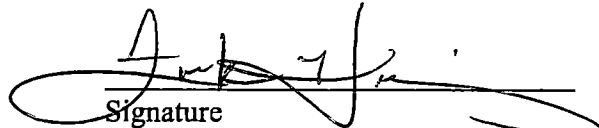
Case Caption: Motion For Writ of Habeas Corpus.

\_\_\_\_\_ Transcripts are **NOT** required for this appeal.

The undersigned hereby designates the following transcripts to be used in the record on appeal for the above listed case and appeal:

Date of Hearing	Docket Number	Proceeding	Recorder/ Reporter	Transcript Filed Yes/No
5/21/13	13F08177X	Criminal Complaint		
7/11/13	13F08177X	Transcript Preliminary <sup>Hearing</sup>		<del>Yes</del>
12/10/14	C-13-291159-1	Notice of Motion to Withdrawal plea		
5/26/15	C-13-291159-1	Notice of Motion; Request for Records/Court case, Documents		
12/3/15	C-13-291159-1	Order granted in part and denying in part Defend Records/Court case doc		
3/8/16	C-13-291159-1	Motion for withdrawal of Attorney of Record for Records/Court case, Documents		
1/23/18	C-13-291159-1	Pro Per Motion to Compel		
10/31/17	C-13-291159-1	Motion to Withdraw Counsel (Order granted)		

Date: May 6, 2019

  
Signature

Frank Hearing  
Print Name

Frank Hearing  
Appellant/Appellee

Mr. Frank Hearing # 1006445

W.S.C.C

P.O. Box 7007

Carson City, NV 89702

RENO NV 895

OUTGOING MAIL

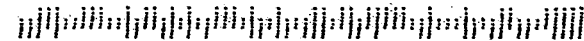
MAY 07 2019

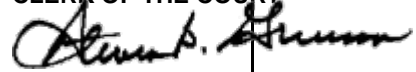
NEVADA DEPARTMENT OF CORRECTIONS  
WARM SPRINGS CORRECTIONAL CENTER



Steven D. Grierson  
200 Lewis Avenue 3rd floor  
Las Vegas, NV 89155-1160

0010188300





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**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR  
THE COUNTY OF CLARK**

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10 FRANK HEARRING,

Case No: A-19-790102-W

11 Plaintiff(s),

Dept No: XII

12 vs.

13

14 STATE OF NEVADA,

15 Defendant(s),

16

17

**CASE APPEAL STATEMENT**

18

1. Appellant(s): Frank Hearing

19

2. Judge: Michelle Leavitt

20

3. Appellant(s): Frank Hearing

21

Counsel:

22 Frank Hearing #1006445  
23 P.O. Box 7007  
24 Carson City, NV 89702

4. Respondent (s): State of Nevada

25

Counsel:

26 Steven B. Wolfson, District Attorney  
27 200 Lewis Ave.  
28 Las Vegas, NV 89155-2212

Aaron D. Ford, Attorney General  
555 E. Washington Ave., Ste. 3900  
Las Vegas, NV 89101-1068

- 1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A  
2 Permission Granted: N/A  
3 Respondent(s)'s Attorney Licensed in Nevada: Yes  
4 Permission Granted: N/A  
5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No  
6 7. Appellant Represented by Appointed Counsel On Appeal: N/A  
7 8. Appellant Granted Leave to Proceed in Forma Pauperis\*\*: N/A  
8 \*\*Expires 1 year from date filed  
9 Appellant Filed Application to Proceed in Forma Pauperis: No  
10 Date Application(s) filed: N/A  
11 9. Date Commenced in District Court: February 25, 2019  
12 10. Brief Description of the Nature of the Action: Civil Writ  
13 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus  
14 11. Previous Appeal: No  
15 Supreme Court Docket Number(s): N/A  
16 12. Child Custody or Visitation: N/A  
17 13. Possibility of Settlement: Unknown

18 Dated This 14 day of May 2019.

19 Steven D. Grierson, Clerk of the Court

20 /s/ Heather Ungermann

21 Heather Ungermann, Deputy Clerk  
22 200 Lewis Ave  
23 PO Box 551601  
24 Las Vegas, Nevada 89155-1601  
25 (702) 671-0512

26  
27 cc: Frank Hearing  
28

EIGHTH JUDICIAL DISTRICT COURT

**CASE SUMMARY**  
**CASE NO. A-19-790102-W**

**Frank Herring, Plaintiff(s)**  
**vs.**  
**State of Nevada, Defendant(s)**

§  
§  
§  
§  
§

Location: **Department 12**  
 Judicial Officer: **Leavitt, Michelle**  
 Filed on: **02/25/2019**  
 Cross-Reference Case Number: **A790102**

CASE INFORMATION

**Related Cases**

C-13-291159-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Status: **02/25/2019 Open**

DATE

CASE ASSIGNMENT

**Current Case Assignment**

Case Number	A-19-790102-W
Court	Department 12
Date Assigned	02/25/2019
Judicial Officer	Leavitt, Michelle

PARTY INFORMATION

**Plaintiff**                      **Herring, Frank**

**Pro Se**








**Defendant**                    **State of Nevada**

DATE

EVENTS & ORDERS OF THE COURT

INDEX

**EVENTS**

- |            |                                                                                                                                                                                                                                    |
|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 02/25/2019 |  Inmate Filed - Petition for Writ of Habeas Corpus<br>Party: Plaintiff Herring, Frank<br><i>Post Conviction</i>                                 |
| 04/05/2019 |  Ex Parte Motion<br>Filed By: Plaintiff Herring, Frank<br><i>Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing</i> |
| 04/11/2019 |  Clerk's Notice of Hearing<br><i>Notice of Hearing</i>                                                                                          |
| 04/12/2019 |  Findings of Fact, Conclusions of Law and Judgment<br><i>Findings of Fact, Conclusions of Law and Order</i>                                     |
| 04/15/2019 |  Notice of Entry<br><i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>                                                    |
| 05/10/2019 |  Notice of Appeal (criminal)<br><i>Notice of Appeal</i>                                                                                         |
| 05/14/2019 |  Case Appeal Statement<br><i>Case Appeal Statement</i>                                                                                          |

**CASE SUMMARY**

**CASE NO. A-19-790102-W**

05/30/2019

**HEARINGS**

**Motion for Appointment of Attorney (8:30 AM)** (Judicial Officer: Leavitt, Michelle)  
*Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing*

# DISTRICT COURT CIVIL COVER SHEET

A-19-790102-W  
Dept. XII

County, Nevada

Case No. \_\_\_\_\_  
(Assigned by Clerk's Office)

**I. Party Information** (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): <i>Frank Hewring</i>	Defendant(s) (name/address/phone): <i>State of Nevada</i>
Attorney (name/address/phone):	Attorney (name/address/phone):

**II. Nature of Controversy** (please select the one most applicable filing type below)

**Civil Case Filing Types**

<p style="text-align: center;"><b>Real Property</b></p> <p><b>Landlord/Tenant</b></p> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <p><b>Title to Property</b></p> <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property <p><b>Other Real Property</b></p> <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<p style="text-align: center;"><b>Negligence</b></p> <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence <p style="text-align: center;"><b>Malpractice</b></p> <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	<p style="text-align: center;"><b>Torts</b></p> <p><b>Other Torts</b></p> <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
<p style="text-align: center;"><b>Probate</b></p> <p><i>(select case type and estate value)</i></p> <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate <p><b>Estate Value</b></p> <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	<p style="text-align: center;"><b>Construction Defect &amp; Contract</b></p> <p><b>Construction Defect</b></p> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <p><b>Contract Case</b></p> <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	<p style="text-align: center;"><b>Judicial Review/Appeal</b></p> <p><b>Judicial Review</b></p> <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency <p><b>Nevada State Agency Appeal</b></p> <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency <p><b>Appeal Other</b></p> <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
<p style="text-align: center;"><b>Civil Writ</b></p> <p><b>Civil Writ</b></p> <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrantum		<p style="text-align: center;"><b>Other Civil Filing</b></p> <p><b>Other Civil Filing</b></p> <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ <p><b>Other Civil Filing</b></p> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

*Business Court filings should be filed using the Business Court civil coversheet.*

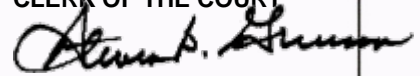
*2-25-2019*  
Date

*Prepared by Clerk*  
Signature of initiating party or representative

*See other side for family-related case filings.*







1 ORDR

2  
3 EIGHTH JUDICIAL DISTRICT  
4 CLARK COUNTY, NEVADA  
5

6 FRANK HEARRING,

7 Petitioner,

8 vs.

9 STATE OF NEVADA,

10 Respondent

) Case No.: A-19-790102-W

) DEPT. No.: XII  
) (Second Petition)

11  
12 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

13  
14 FINDINGS OF FACT

15 1. On July 15, 2013, the State charged Frank Hearing by way of information  
16 with Murder With Use of a Deadly Weapon, Attempt Murder With Use of a Deadly  
17 Weapon, Discharging Firearm At or Into Structure, Vehicle, Aircraft or Watercraft, and  
18 Possession of Firearm by Ex-Felon.

19 2. On October 7, 2013, pursuant to negotiations, Petitioner entered into a  
20 Guilty Plea Agreement ("GPA") with the State, wherein, he agreed to plead guilty to one  
21 count of Murder (Second Degree) With Use of a Deadly Weapon. The same day, the  
22 court conducted a plea canvass on the record and thereafter accepted Petitioner's plea. An  
23 Amended Information was filed in open court reflecting the charge contained in the GPA.

24 3. On December 10, 2013, Petitioner was sentenced to life imprisonment in  
25 the Nevada Department of Corrections with parole eligibility after ten years, plus a  
26 consecutive sentence of a maximum of 240 months and a minimum of 96 months for the  
27 deadly weapon enhancement. Petitioner received 293 days credit for time served.  
28 Judgment of Conviction was filed on December 30, 2013. Petitioner did not file a direct  
appeal.

4. On May 15, 2014, Petitioner filed a Motion to Withdraw Counsel. On  
June 12, 2014, the Motion was granted.

5. On November 12, 2014, Petitioner filed a Motion for Appointment of  
Counsel and Request for Evidentiary Hearing. The State filed its response on November

1 25, 2014. On December 4, 2014, the court denied the motion, finding the request for  
2 evidentiary hearing was made prematurely and could be renewed in a Petition for Writ of  
3 Habeas Corpus (post-conviction).

4 6. On December 10, 2014, Petitioner filed a Motion to Withdraw Plea. On  
5 December 22, 2014, the State filed an opposition. On January 6, 2015, the district court  
6 denied Petitioner's motion. The district court filed its order on January 16, 2015.

7 7. On March 30, 2015, Petitioner filed a Petition for Writ of Habeas Corpus  
8 (post-conviction). On July 31, 2015, the State filed its response. A hearing was held on  
9 August 4, 2015 and the Petition was denied. The court's Findings of Fact, Conclusions of  
10 Law and Order was filed on September 14, 2015.

11 8. On October 6, 2015, Petitioner filed a Notice of Appeal. On April 14,  
12 2016, the Supreme Court of Nevada affirmed the district court's denial of the Petition for  
13 Writ of Habeas Corpus (post-conviction). Remittitur issued on May 9, 2016.

14 9. On October 28, 2015, Petitioner filed a Motion for Records/Court Case  
15 Documents. A hearing was held on November 19, 2015 and the motion was granted in  
16 part. The district court filed its order on December 3, 2015.

17 10. On January 21, 2016, Petitioner filed a Motion for Records/Court Case  
18 Documents. On February 17, 2016, the State filed its response. A hearing was held on  
19 February 23, 2015 and the motion was denied. The district court filed its order on March  
20 2, 2016.

21 11. On March 8, 2016, Petitioner filed a Motion for Withdrawal of Attorney  
22 of Record or in the Alternative, Request for Records/Court Case Documents. On March  
23 11, 2016, the State filed its reply. A hearing was held on March 29, 2016 and the motion  
24 was denied. The district court filed its order on April 12, 2016.

25 12. On October 6, 2017, Petitioner filed a Motion to Withdraw Counsel. A  
26 hearing was held on October 31, 2017 and the motion was granted. The district court  
27 filed its order on November 14, 2017.

28 13. On December 11, 2017, Petitioner filed a Motion to Modify Sentence. On  
December 26, 2017, the State filed its opposition. A hearing was held on January 2, 2018  
and the motion was denied. The district court filed its order on January 8, 2018.

14. On December 29, 2017, Petitioner filed a Motion to Compel. A hearing  
was held on January 23, 2018 and the motion was granted. The district court filed its  
order on February 2, 2018.

15. On June 6, 2018, Petitioner filed a Motion to Compel. A hearing was held  
on June 28, 2018 and the court ordered a show cause hearing. A show cause hearing was  
held on July 31, 2018, August 2, 2018 and September 4, 2018 and were all continued for

28

1 counsel to appear. On September 11, 2018, counsel appeared and confirmed the file was  
2 turned over to the Petitioner.

3 16. On October 10, 2018, Petitioner filed a Motion for Order to Show Cause  
4 Contempt of Court and Monetary Sanctions. A hearing was held on November 6, 2018  
5 and the court ordered the motion taken off calendar because the file was turned over. On  
6 November 26, 2018, Petitioner filed a Notice of Appeal. On December 17, 2018, the  
7 Supreme Court of Nevada dismissed the appeal. Remittitur issued on January 11, 2019.

8 17. On February 25, 2019, Petitioner filed the instant (second) Petition for  
9 Writ of Habeas Corpus (post-conviction).

10 18. Absent good cause for the failure to present the claim in a prior petition or  
11 for presenting the claim again, and actual prejudice, the petition must be dismissed.

### 12 CONCLUSIONS OF LAW

13 1. NRS 34.726(1), governing “Limitations on time to file...,” requires that a  
14 petition for a writ of habeas corpus “must be filed within 1 year after entry of the  
15 judgment of conviction or, if an appeal has been taken from the judgment, within 1 year  
16 after the Supreme Court issues its remittitur.” Late-filing of a petition may be excused  
17 from procedural default if the Petitioner can establish good cause for delay in bringing  
18 the claim. *Id.* Good cause for late-filing consists of a showing that: (1) “delay is not the  
19 fault of the petitioner”; and (2) “dismissal of the petition as untimely will unduly  
20 prejudice the petitioner.” *Id.* at (1)(a)-(b).

21 2. To avoid dismissal, the petitioner must plead and prove specific facts that  
22 demonstrate good cause for his failure to present claims before and actual prejudice. *See*  
23 *State v. District Court*, 121 Nev. 225, 232, 112 P.3d 1070, 1074 (2005).

24 3. In order to demonstrate good cause, a petitioner must show that an  
25 impediment external to the defense prevented him or her from complying with the state  
26 procedural default rules. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

27 4. The court may excuse the failure to show good cause where the prejudice  
28 from a failure to consider the claim amounts to a fundamental miscarriage of justice.  
*Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

1 “that the factual or legal basis for a claim was not reasonably available to counsel, or that  
2 ‘some interference by officials,’ made compliance impracticable.” *Hathaway v. State*,  
3 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting *Murray v. Carrier*, 477 U.S. 478,  
4 488 (1986)).

5 6. NRS 34.810(2), governing “Additional reasons for dismissal of petition,”  
6 requires that “[a] second or successive petition must be dismissed if the judge or justice

1 determines that it fails to allege new or different grounds for relief and that the prior  
2 determination was on the merits or, if new and different grounds are alleged, the judge or  
3 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
constituted an abuse of the writ.”

4 7. The petitioner has the burden of pleading and proving specific facts that  
5 demonstrate both good cause for failing to present a claim or for presenting a claim again  
6 and actual prejudice. NRS 34.810(3). *See also State v. Haberstroh*, 119 Nev. 173, 181, 69  
P.3d 676, 681 (2003).

7 8. A court must dismiss a habeas petition if it presents claims that either were  
8 presented in an earlier proceeding or could have been presented in an earlier proceeding,  
9 unless the court finds both cause for failing to present the claims earlier or for raising  
10 them again and actual prejudice to the petitioner. *Evans v. State*, 117 Nev. 609, 621-622,  
28 P.3d 498, 507 (2001).

11 9. Unlike initial petitions which certainly require a careful review of the  
12 record, successive petitions may be dismissed based solely on the face of the petition.  
*Ford v. Warden*, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).

13 10. Application of the statutory procedural default rules to post-conviction  
14 habeas petitions is mandatory. *State v. District Court (Riker)*, 121 Nev. 225, 231, 112  
P.3d 1070, 1074 (2005).

15 11. Meritless, successive and untimely petitions clog the court system and  
16 undermine the finality of convictions. *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944,  
950 (1994).

17 12. Petitioner had one year from December 30, 2013, the date the Judgement  
18 of Conviction was filed, to file a Petition for Writ of Habeas Corpus (post-conviction).  
19 The instant Petition was filed over five years after the Judgement of Conviction was filed.  
20 The instant petition is untimely. Absent good cause and prejudice, the instant petition is  
time barred and must be dismissed.

21 13. The instant petition is a successive petition, and therefore is also subject  
22 to dismissal pursuant to NRS 34.810(1)(b)(2); NRS 34.810(2). The petition must be  
23 dismissed if petitioner failed to allege new or different grounds for relief and the prior  
24 determination was on the merits or, if new and different grounds are raised in the petition  
25 and the court determines the failure of the petitioner to assert those grounds in a prior  
petition constituted an abuse of the writ. Absent good cause for the failure to present the  
claim in a prior petition or for presenting the claim again, and actual prejudice, the  
petition must be dismissed.

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14. Petitioner failed to establish good cause for filing the instant petition more than five years after the Judgment of Conviction was filed. The instant petition raises some new or different claims; however, the court finds the failure to assert those claims in a previous petition constitutes an abuse of the writ.

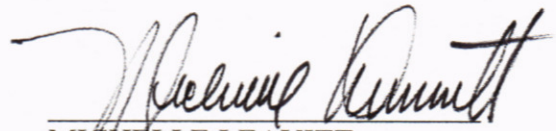
15. The Petitioner further failed to demonstrate prejudice to the petitioner which would amount to a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

16. Accordingly, the petition is time barred. The petition is a successive petition and constitutes an abuse of the writ.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (post-conviction) shall be, and it is, hereby DENIED.

Dated this 11 day of April 2019.

  
MICHELLE LEAVITT  
DISTRICT COURT JUDGE  
DEPARTMENT XII  
EIGHTH JUDICIAL DISTRICT

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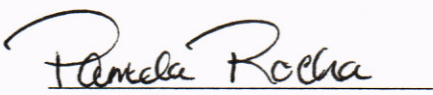
**CERTIFICATE OF MAILING**

I hereby certify that on the date filed, I placed a copy of the Order for Petition for Writ of Habeas Corpus (Post-Conviction) in the U.S. Mail, postage prepaid to:

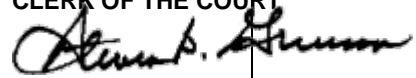
Frank Herring #1006445  
Warm Springs Correctional Center  
P.O. Box 7007  
Carson City, NV 89702

Steven B. Wolfson  
Clark County District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Aaron Ford  
Nevada Attorney General  
555 E. Washington, Suite 3900  
Las Vegas, NV 89101-1068

  
Pamela Rocha  
Judicial Executive Assistant  
Department XII  
Eighth Judicial District Court

A-19-790102-W  
Frank Herring  
vs.  
The State of Nevada



1 NEO

2 **DISTRICT COURT**  
3 **CLARK COUNTY, NEVADA**

4  
5 FRANK HEARRING,

Petitioner,

Case No: A-18-790102-W

Dept No: XII

6  
7 vs.

8 STATE OF NEVADA,

Respondent,

**NOTICE OF ENTRY OF FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

9  
10  
11 **PLEASE TAKE NOTICE** that on April 12, 2019, the court entered a decision or order in this matter, a  
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you  
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is  
15 mailed to you. This notice was mailed on April 15, 2019.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Debra Donaldson

Debra Donaldson, Deputy Clerk

17  
18  
19 CERTIFICATE OF E-SERVICE / MAILING

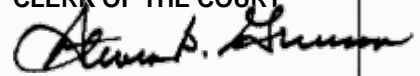
20 I hereby certify that on this 15 day of April 2019, I served a copy of this Notice of Entry on the following:

21  By e-mail:  
22 Clark County District Attorney's Office  
23 Attorney General's Office – Appellate Division-

24  The United States mail addressed as follows:  
25 Frank Hearing # 1006445  
26 P.O. Box 7007  
27 Carson City, NV 89702

28 /s/ Debra Donaldson

Debra Donaldson, Deputy Clerk



1 ORDR

2  
3 EIGHTH JUDICIAL DISTRICT  
4 CLARK COUNTY, NEVADA  
5

6 FRANK HEARRING,

7 Petitioner,

8 vs.

9 STATE OF NEVADA,

10 Respondent

) Case No.: A-19-790102-W

) DEPT. No.: XII  
) (Second Petition)

11  
12 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

13  
14 FINDINGS OF FACT

15 1. On July 15, 2013, the State charged Frank Hearing by way of information  
16 with Murder With Use of a Deadly Weapon, Attempt Murder With Use of a Deadly  
17 Weapon, Discharging Firearm At or Into Structure, Vehicle, Aircraft or Watercraft, and  
18 Possession of Firearm by Ex-Felon.

19 2. On October 7, 2013, pursuant to negotiations, Petitioner entered into a  
20 Guilty Plea Agreement ("GPA") with the State, wherein, he agreed to plead guilty to one  
21 count of Murder (Second Degree) With Use of a Deadly Weapon. The same day, the  
22 court conducted a plea canvass on the record and thereafter accepted Petitioner's plea. An  
23 Amended Information was filed in open court reflecting the charge contained in the GPA.

24 3. On December 10, 2013, Petitioner was sentenced to life imprisonment in  
25 the Nevada Department of Corrections with parole eligibility after ten years, plus a  
26 consecutive sentence of a maximum of 240 months and a minimum of 96 months for the  
27 deadly weapon enhancement. Petitioner received 293 days credit for time served.  
28 Judgment of Conviction was filed on December 30, 2013. Petitioner did not file a direct  
appeal.

4. On May 15, 2014, Petitioner filed a Motion to Withdraw Counsel. On  
June 12, 2014, the Motion was granted.

5. On November 12, 2014, Petitioner filed a Motion for Appointment of  
Counsel and Request for Evidentiary Hearing. The State filed its response on November



1 25, 2014. On December 4, 2014, the court denied the motion, finding the request for  
2 evidentiary hearing was made prematurely and could be renewed in a Petition for Writ of  
3 Habeas Corpus (post-conviction).

4 6. On December 10, 2014, Petitioner filed a Motion to Withdraw Plea. On  
5 December 22, 2014, the State filed an opposition. On January 6, 2015, the district court  
6 denied Petitioner's motion. The district court filed its order on January 16, 2015.

7 7. On March 30, 2015, Petitioner filed a Petition for Writ of Habeas Corpus  
8 (post-conviction). On July 31, 2015, the State filed its response. A hearing was held on  
9 August 4, 2015 and the Petition was denied. The court's Findings of Fact, Conclusions of  
10 Law and Order was filed on September 14, 2015.

11 8. On October 6, 2015, Petitioner filed a Notice of Appeal. On April 14,  
12 2016, the Supreme Court of Nevada affirmed the district court's denial of the Petition for  
13 Writ of Habeas Corpus (post-conviction). Remittitur issued on May 9, 2016.

14 9. On October 28, 2015, Petitioner filed a Motion for Records/Court Case  
15 Documents. A hearing was held on November 19, 2015 and the motion was granted in  
16 part. The district court filed its order on December 3, 2015.

17 10. On January 21, 2016, Petitioner filed a Motion for Records/Court Case  
18 Documents. On February 17, 2016, the State filed its response. A hearing was held on  
19 February 23, 2015 and the motion was denied. The district court filed its order on March  
20 2, 2016.

21 11. On March 8, 2016, Petitioner filed a Motion for Withdrawal of Attorney  
22 of Record or in the Alternative, Request for Records/Court Case Documents. On March  
23 11, 2016, the State filed its reply. A hearing was held on March 29, 2016 and the motion  
24 was denied. The district court filed its order on April 12, 2016.

25 12. On October 6, 2017, Petitioner filed a Motion to Withdraw Counsel. A  
26 hearing was held on October 31, 2017 and the motion was granted. The district court  
27 filed its order on November 14, 2017.

28 13. On December 11, 2017, Petitioner filed a Motion to Modify Sentence. On  
December 26, 2017, the State filed its opposition. A hearing was held on January 2, 2018  
and the motion was denied. The district court filed its order on January 8, 2018.

14. On December 29, 2017, Petitioner filed a Motion to Compel. A hearing  
was held on January 23, 2018 and the motion was granted. The district court filed its  
order on February 2, 2018.

15. On June 6, 2018, Petitioner filed a Motion to Compel. A hearing was held  
on June 28, 2018 and the court ordered a show cause hearing. A show cause hearing was  
held on July 31, 2018, August 2, 2018 and September 4, 2018 and were all continued for

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1 counsel to appear. On September 11, 2018, counsel appeared and confirmed the file was  
2 turned over to the Petitioner.

3 16. On October 10, 2018, Petitioner filed a Motion for Order to Show Cause  
4 Contempt of Court and Monetary Sanctions. A hearing was held on November 6, 2018  
5 and the court ordered the motion taken off calendar because the file was turned over. On  
6 November 26, 2018, Petitioner filed a Notice of Appeal. On December 17, 2018, the  
7 Supreme Court of Nevada dismissed the appeal. Remittitur issued on January 11, 2019.

8 17. On February 25, 2019, Petitioner filed the instant (second) Petition for  
9 Writ of Habeas Corpus (post-conviction).

10 18. Absent good cause for the failure to present the claim in a prior petition or  
11 for presenting the claim again, and actual prejudice, the petition must be dismissed.

### 12 CONCLUSIONS OF LAW

13 1. NRS 34.726(1), governing “Limitations on time to file...,” requires that a  
14 petition for a writ of habeas corpus “must be filed within 1 year after entry of the  
15 judgment of conviction or, if an appeal has been taken from the judgment, within 1 year  
16 after the Supreme Court issues its remittitur.” Late-filing of a petition may be excused  
17 from procedural default if the Petitioner can establish good cause for delay in bringing  
18 the claim. *Id.* Good cause for late-filing consists of a showing that: (1) “delay is not the  
19 fault of the petitioner”; and (2) “dismissal of the petition as untimely will unduly  
20 prejudice the petitioner.” *Id.* at (1)(a)-(b).

21 2. To avoid dismissal, the petitioner must plead and prove specific facts that  
22 demonstrate good cause for his failure to present claims before and actual prejudice. *See*  
23 *State v. District Court*, 121 Nev. 225, 232, 112 P.3d 1070, 1074 (2005).

24 3. In order to demonstrate good cause, a petitioner must show that an  
25 impediment external to the defense prevented him or her from complying with the state  
26 procedural default rules. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

27 4. The court may excuse the failure to show good cause where the prejudice  
28 from a failure to consider the claim amounts to a fundamental miscarriage of justice.  
*Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

1 “that the factual or legal basis for a claim was not reasonably available to counsel, or that  
2 ‘some interference by officials,’ made compliance impracticable.” *Hathaway v. State*,  
3 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting *Murray v. Carrier*, 477 U.S. 478,  
4 488 (1986).

5 6. NRS 34.810(2), governing “Additional reasons for dismissal of petition,”  
6 requires that “[a] second or successive petition must be dismissed if the judge or justice

1 determines that it fails to allege new or different grounds for relief and that the prior  
2 determination was on the merits or, if new and different grounds are alleged, the judge or  
3 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
constituted an abuse of the writ.”

4 7. The petitioner has the burden of pleading and proving specific facts that  
5 demonstrate both good cause for failing to present a claim or for presenting a claim again  
6 and actual prejudice. NRS 34.810(3). *See also State v. Haberstroh*, 119 Nev. 173, 181, 69  
P.3d 676, 681 (2003).

7 8. A court must dismiss a habeas petition if it presents claims that either were  
8 presented in an earlier proceeding or could have been presented in an earlier proceeding,  
9 unless the court finds both cause for failing to present the claims earlier or for raising  
10 them again and actual prejudice to the petitioner. *Evans v. State*, 117 Nev. 609, 621-622,  
28 P.3d 498, 507 (2001).

11 9. Unlike initial petitions which certainly require a careful review of the  
12 record, successive petitions may be dismissed based solely on the face of the petition.  
*Ford v. Warden*, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).

13 10. Application of the statutory procedural default rules to post-conviction  
14 habeas petitions is mandatory. *State v. District Court (Riker)*, 121 Nev. 225, 231, 112  
P.3d 1070, 1074 (2005).

15 11. Meritless, successive and untimely petitions clog the court system and  
16 undermine the finality of convictions. *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944,  
950 (1994).

17 12. Petitioner had one year from December 30, 2013, the date the Judgement  
18 of Conviction was filed, to file a Petition for Writ of Habeas Corpus (post-conviction).  
19 The instant Petition was filed over five years after the Judgement of Conviction was filed.  
20 The instant petition is untimely. Absent good cause and prejudice, the instant petition is  
time barred and must be dismissed.

21 13. The instant petition is a successive petition, and therefore is also subject  
22 to dismissal pursuant to NRS 34.810(1)(b)(2); NRS 34.810(2). The petition must be  
23 dismissed if petitioner failed to allege new or different grounds for relief and the prior  
24 determination was on the merits or, if new and different grounds are raised in the petition  
25 and the court determines the failure of the petitioner to assert those grounds in a prior  
petition constituted an abuse of the writ. Absent good cause for the failure to present the  
claim in a prior petition or for presenting the claim again, and actual prejudice, the  
petition must be dismissed.

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14. Petitioner failed to establish good cause for filing the instant petition more than five years after the Judgment of Conviction was filed. The instant petition raises some new or different claims; however, the court finds the failure to assert those claims in a previous petition constitutes an abuse of the writ.

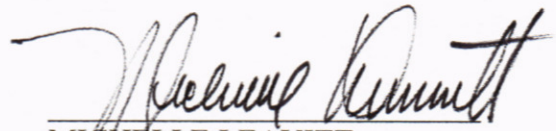
15. The Petitioner further failed to demonstrate prejudice to the petitioner which would amount to a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

16. Accordingly, the petition is time barred. The petition is a successive petition and constitutes an abuse of the writ.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (post-conviction) shall be, and it is, hereby DENIED.

Dated this 11 day of April 2019.

  
MICHELLE LEAVITT  
DISTRICT COURT JUDGE  
DEPARTMENT XII  
EIGHTH JUDICIAL DISTRICT

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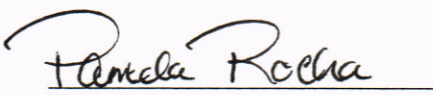
**CERTIFICATE OF MAILING**

I hereby certify that on the date filed, I placed a copy of the Order for Petition for Writ of Habeas Corpus (Post-Conviction) in the U.S. Mail, postage prepaid to:

Frank Herring #1006445  
Warm Springs Correctional Center  
P.O. Box 7007  
Carson City, NV 89702

Steven B. Wolfson  
Clark County District Attorney  
200 Lewis Avenue  
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Pamela Rocha  
Judicial Executive Assistant  
Department XII  
Eighth Judicial District Court

A-19-790102-W  
Frank Herring  
vs.  
The State of Nevada

# Certification of Copy

State of Nevada }  
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FRANK HEARRING,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),


Case No: A-19-790102-W

Dept No: XII

now on file and of record in this office.

**IN WITNESS THEREOF**, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 14 day of May 2019.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

