

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 WILLIAM LESTER WITTER,
 Appellant,

No. 50447

3 vs.

4 E.K. McDANIEL, Warden, Ely State
5 Prison, CATHERINE CORTEZ MASTO,
6 Attorney General of the State of Nevada,
 Respondents.

7 WILLIAM LESTER WITTER,
8 Appellant,

 Electronically Filed
No. 52964 Jun 12 2009 03:36 p.m.
Tracie K. Lindeman

9 vs.

10 E.K. McDANIEL, Warden, CATHERINE
11 CORTEZ MASTO, Attorney General of
 the State of Nevada,
 Respondents.

12 **MOTION TO CONSOLIDATE CASE NOS. 50447 AND 52964**

13 Appellant, William Lester Witter, through counsel, moves to consolidate two appeals,
14 Case Nos. 50447 and 52964, involving the same parties. See NRAP 3(b), 27(a). This Motion
15 is based upon the attached memorandum of points and authorities, and the complete files in both
16 cases.

17 Dated this 12th day of June, 2009.

18 Respectfully submitted,

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Attorneys for Petitioner/Appellant

1 **I. BACKGROUND**

2 William Lester Witter was convicted of first-degree murder with use of a deadly weapon,
3 attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly
4 weapon, and burglary. Appellant's Appendix to Case No. 52964 at 1 AA 166. He was
5 sentenced to death in Case No. C117513, in the Eighth Judicial District Court, Clark County. Id.
6 The jury found four aggravating circumstances: the murder was committed by a person who was
7 previously convicted of a felony involving the use or threat of violence to the person of another;
8 the murder was committed while the person was engaged in the commission of or an attempt to
9 commit any burglary; the murder was committed while the person was engaged in the
10 commission of or an attempt to commit a sexual assault; and, the murder was committed to avoid
11 or prevent a lawful arrest or to effect an escape from custody. Appellant's Appendix to Case No.
12 52954 at 1 AA 160; see NRS 200.033(2), (4), (5). A second amended judgment of conviction
13 was entered September 26, 1995. Appellant's Appendix to Case No. 52964 at 1 AA 166. On
14 direct appeal, this Court deleted one aggravating circumstance, preventing lawful arrest, and
15 affirmed. Witter v. State, 112 Nev. 908, 928-30, 921 P.2d 886, 900-01 (1996).

16 On October 27, 1997, Mr. Witter filed a petition for writ of habeas corpus in the Eighth
17 Judicial District Court in propria persona, requesting the appointment of counsel. Mr. Witter
18 was appointed state post-conviction counsel and, on August 11, 1998, post-conviction counsel
19 filed a supplemental brief. Following an evidentiary hearing, the district court denied relief.
20 This Court affirmed the denial of relief in an unpublished order. Witter v. State, (No. 36927,
21 filed August 10, 2001).

22 Mr. Witter filed a pro per petition for writ of habeas corpus in the United States District
23 Court on September 4, 2001. On November 23, 2005, Mr. Witter filed an amended petition for
24 writ of habeas corpus followed by a motion for stay and abeyance on March 7, 2006. On
25 November 30, 2006, the United States District Court granted Mr. Witter's motion for stay and
26 abeyance pending the exhaustion of state court remedies.

27 **A. Case No. 50447**

28 Consistent with the federal court's order, Mr. Witter filed a Petition for Writ of Habeas
Corpus ("habeas petition") and a Supplemental Claim to the habeas petition in the district court.

1 On August 2, 2007, and August 30, 2007, the district court denied relief. Appellant's Appendix
2 to Case No. 50447 at 11 AA 2219, 23 AA 4879 and 24 AA 5109. Mr. Witter timely appealed.
3 Mr. Witter's opening brief was filed on May 13, 2008, and Respondents' answering brief was
4 filed on August 22, 2008. On December 1, 2008, Mr. Witter filed his reply brief. The briefing
5 is complete, but no decision by this Court has issued.

6 B. Case No. 52964

7 On September 11, 2007, the Ninth Circuit Court of Appeals decided Polk v. Sandoval,
8 503 F.3d 903, 909 (9th Cir. 2007), which held the Nevada premeditation instruction violated due
9 process and relieved the state of proving every element of first-degree murder beyond a
10 reasonable doubt. Because this federal constitutional claim was unavailable at the time the
11 district court denied relief on Mr. Witter's habeas petition, Mr. Witter filed a new petition for
12 writ of habeas corpus on April 28, 2008, and attacked the constitutionality of the premeditation
13 instruction in his trial under Polk. Appellant's Appendix to Case No. 52964 at 2 AA 263. On
14 October 28, 2008, the district court denied relief. The district court approved the prosecutor's
15 proposed findings of fact on November 24, 2008. Appellant's Appendix to Case No. 52964 at
16 2 AA 333. Mr. Witter timely appealed. On June 8, 2009, Mr. Witter filed his opening brief.
17 On July 1, 2009, Respondent's answering brief is due and Mr. Witter's Reply brief will be due
18 August 4, 2009. The matter is pending in this Court.

19 II. ARGUMENT

20 Mr. Witter moves this Court to consolidate the appeals in Case Nos. 50447 and 52964,
21 pursuant to Rule 3(b), which provides that: "[a]ppeals may be consolidated by order of the
22 Supreme Court . . . upon motion of a party. . . ." NRAP 3(b). Mr. Witter filed two separate
23 petitions for writ of habeas corpus in the district court. The first petition and supplement thereto
24 raised nineteen (19) constitutional claims. Because the Ninth Circuit Court of Appeals decided
25 Polk after the district court denied relief on Mr. Witter's first petition, he filed a second petition
26 which raised a single claim challenging the constitutionality of the premeditation instruction in
27 his trial.

28 The parties in these appeals are the same, the claims raised in these appeals arose from
the same trial and the same judgment, and such circumstances make joinder both practicable and

1 appropriate. Mr. Witter requests that the Court consolidate these appeals in order to avoid
2 piecemeal appellate review and to conserve judicial resources. See Jackson v. State, 115 Nev.
3 21, 973 P.2d 241 (1999) (the Court consolidated appeals for disposition in the interests of
4 judicial economy); see also NRAP 3(b).

5 **III. CONCLUSION**

6 Mr. Witter respectfully requests this Court to grant his motion to consolidate his appeals
7 in Case Nos. 50447 and 52964.

8 Respectfully submitted this 12th day of June 2009.

9
10 Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of June, 2009. Electronic Service of the foregoing **MOTION TO CONSOLIDATE CASE NOS. 50447 AND 52964** shall be made in accordance with the Master Service List as follows:

Steven Owens, Deputy District Attorney

Catherine Cortez Masto, Attorney General

Katrina Lang,
An Employee of the Federal Public Defender

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 12th day of June, 2009, she deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing **MOTION TO CONSOLIDATE CASE NOS. 50447 AND 52964** addressed to counsel as follows:

John M. Warwick, IV
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**Katrina Lang,
An Employee of the Federal Public Defender**