

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 65168

RESPONSE TO NOTICE OF ENDORSEMENT OF PRO PER DOCUMENT

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Response to Notice of Endorsement of Pro Per Document. This response is based on the following memorandum and all papers and pleadings on file herein.

Dated this 25th day of July, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Steven S. Owens
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney

MEMORANDUM

This is an appeal from the denial of post-conviction habeas relief in a capital case. The Opening Brief has not yet been filed and is currently due on October 6, 2014. In his Notice of Endorsement of Pro Per Document, Johnson's counsel requests remand of this appeal in order to litigate a new issue and "endorses" his client's proper person document which seeks to file a Supplemental Opening Brief. The State opposes both requests.

Obviously, there is no need for a Supplemental Opening Brief because the Opening Brief itself has not yet been filed and is not even due until October 6, 2014. If Johnson desires to raise an issue regarding unrecorded bench conferences, counsel may do so in the Opening Brief without need for any supplement. It stands to reason that one cannot supplement something that does not yet exist. Such an odd request would circumvent the page limit requirements and burden the State with responding to the dual arguments of both the defendant and his attorney in a single Answering Brief.

As to the request for remand, Appellant offers no legal authority for a remand of a habeas appeal in order to raise a new issue below related to an alleged recantation by a co-defendant. Although this Court undoubtedly has authority to remand in an appropriate case, the record in this case is already complete for purposes of reviewing and resolving the issues that were raised and justice does not

require any further proceedings below. See 5 C.J.S. Appeal and Error § 1017; Carter v. California Dep't. of Veterans Affairs, 38 Cal.4th 914, 44 Cal.Rptr.3d 223, 135 P.3d 637 (2006); see also McNelson v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999) (declining remand for consideration of new claims not previously raised below). While remand might be appropriate in certain cases for further proceedings on an existing claim, any new claim and evidence must be raised in a successive petition per NRS 34.810 which requires a showing of good cause and prejudice as to why it was not raised sooner. See NRS 34.724(2)(b); NRS 34.738(1); NRS 34.810. Remand of this appeal is entirely unnecessary for Johnson to pursue claims based upon his alleged discovery of new evidence.

WHEREFORE, the State respectfully requests that the requests for remand and for a supplemental brief be denied.

Dated this 25th day of July, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Steven S. Owens

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 25, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

CHRISTOPHER R. ORAM, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

BY /s/ E. Davis
Employee, District Attorney's Office

SSO//ed