

IN THE SUPREME COURT OF THE STATE OF NEVADA

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RANDOLPH LYLE MOORE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Electronically Filed  
Feb 15 2018 11:31 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 66652

**MOTION TO PUBLISH FEBRUARY 9, 2018, ORDER OF AFFIRMANCE**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and files this Motion to Publish February 9, 2018, Order of Affirmance. This motion is filed pursuant to NRAP Rules 27 and 36 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 15<sup>th</sup> day of February, 2018.

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

## ARGUMENT

This Court's Order of Affirmance, filed February 9, 2018, disposes of an issue of law that has arisen in other cases and is likely to be litigated again without a published opinion. Publication is warranted to provide guidance to the district courts and to prevent inconsistent rulings on the same legal issue.

Rule 36(c)(1)-(3) of the Nevada Rules of Appellate Procedure (NRAP) indicates that a decision of this Court is suitable for publication where it “[p]resents an issue of first impression[,]” alters or clarifies a previously announced rule of law, or “[i]nvolves an issue of public importance that has application beyond the parties.” Further, a motion to publish “must be based on one or more of the criteria for publication set forth in Rule 36(c)(1)-(3).” NRAP Rule 36(f)(3). This Court will upgrade a dispositional order to published authority where appropriate. Sullivan v. State, 120 Nev. 537, 538, 96 P.3d 761, 762 (2004) (“Cause appearing, we grant the State’s motion to publish. Accordingly we issue this opinion in place of our prior unpublished order.”); Rupley v. State, 93 Nev. 60, 61, footnote 1, 560 P.2d 146, 147, footnote 1 (1977) (an unpublished disposition may be elevated to precedent “[b]ecause of the paucity of published authority on the issues[.]”). However, “[p]ublication is disfavored if revisions to the text of the unpublished disposition will result in discussion of additional issues not included in the original decision.” NRAP Rule 36(f)(4).

The February 9, 2018, Order of Affirmance conclusively adjudicated the issue of whether it is a defendant's duty and burden of pleading to disclose facts in post-conviction habeas necessary for judges to discern which issues are new and whether they are timely raised. (Order of Affirmance, p. 3-7). The third NRAP Rule 36 factor supports publication since the inappropriate pleading practices highlighted in the Order of Affirmance are prevalent in most capital habeas cases causing considerable delay and expense for both the judiciary and prosecution and is "an issue of public importance that has application beyond the parties." NRAP 36(c)(3); (Order of Affirmance, p. 3). These inappropriate pleading practices are engrained on the defense bar and are not likely to be curtailed absent publication. Further, publication would not require textual revisions in order to analyze issues not included in Order of Affirmance. As such the concern expressed by NRAP Rule 36(f)(4) is not relevant.

### **CONCLUSION**

Conversion of the Order of Affirmance, filed February 9, 2018, to a published opinion will be helpful in efficiently and consistently adjudicating habeas issues because defendants will the affirmative duty of explaining why they are raising their claims again, and if new, why they did not raise it sooner; saving the courts from having to spend significant time looking for the actual issues raised and distinguishing whether they were raised before or whether they are new.

Additionally, publication will prevent re-litigation of the same issue in the future or in different judicial districts.

WHEREFORE, the State respectfully requests that this Court convert the Order of Affirmance, filed February 9, 2018, into a published opinion.

Dated this 15<sup>th</sup> day of February, 2018.

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 February 15, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY /s/ E.Davis  
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