

ORIGINAL

Justin D. Porter ID NO. 1042449
HIGH DESERT STATE PRISON
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INDIAN SPRINGS, NEVADA 89070

FILED

NOV 02 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

Justin D. Porter In Proper Person

IN THE SUPREME COURT OF THE
STATE OF NEVADA

Justin D. Porter
Appellant,

CASE NO.: 70206

DEPT NO.: _____

vs.

THE STATE OF NEVADA
Respondent

DATE OF HEARING: _____
TIME OF HEARING: _____

COMES NOW, Petitioner, Justin D. Porter, In Proper Person and

Petition this court to take action to grant
this petition under Rule 40A. Petition for ex banc
reconsideration.

THIS Petition, is made and based upon the attached Memorandum of Points
and Authorities, all of the pleadings and other documents on file in this case.

DATED This 24 day of October, 2016.

Respectfully submitted,

Justin D. Porter #1042449
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
Justin D. Porter In Proper Person

1 The United States supreme court holds
 2 allegations of a pro se complaint to less
 8 stringent standards than formal pleadings
 4 drafted by lawyers. And this pleading
 5 should not be dismissed for failure to
 6 state a claim that would entitle relief.
 7 HAINES V. KERNER, 404 US 519, 30 L Ed 2d 652,
 8 92 S Ct 594, (1972). With all due respect
 9 to the court of Appeals, the court
 10 miss interpret the meaning the
 11 petitioner was making out for the
 12 court of Appeals. It's a fact petitioner
 13 Justin D. Porter is actually innocent
 14 of the second degree murder he was/
 15 is convicted of. It's a fact and not
 16 a legal claim, but a fact, and it's
 17 based on the facts of the record.
 18 Because Porter was accused of "killing
 19 the victim under the presumption
 20 of Porter burglarized and attempted
 21 to have robbed the victim". At
 22 Porter's Jury trial the Jury heard
 23 from the Prosecutors that "Porter
 24 is responsible for the victim's death
 25 because Porter burglarized and
 26 attempted to rob the victim". And
 27 Porter's Jury instructions to the

1 Jury accused Porter of being
2 responsible of killing the victim also
3 under the following theories of criminal
4 liability, to-wit: 1) Premeditation and
5 deliberation, and 2) Felony Murder: by
6 the petitioner committing said felony
7 offense during the perpetration or
8 attempted perpetration of the crimes
9 of burglary and attempted robbery.
10 Porter was acquitted of the crimes
11 of burglary and attempted robbery,
12 Porter was acquitted of first degree
13 murder also. Because Porter was
14 acquitted of the burglary and attempted
15 robbery and the first degree murder,
16 Porter was eliminated from the
17 element that make-up the felony
18 murder rule. see *Payne v. State*, 81 Nev.
19 503, 506, 406 P.2d 922, 924 (1965); Also
20 *Ramirez v. State*, 235 P.3d 619, 126 Nev. (2010).
21 When Porter was acquitted of the
22 burglary and attempted robbery, Porter
23 became free of the allegation that
24 Porter burglarized and attempted to
25 rob MR. Lungton. Therefore when Porter
26 was acquitted of the burglary and
27 attempted robbery Porter became

1 innocent of second degree murder. Because
2 malice aforethought doesn't exist where
3 there's no intent to cause malice, whether
4 express or implied. Under plain language
5 of 18 USC § 111(a), malice aforethought is
6 essential element of murder in first
7 degree as well as murder of second
8 degree. *Beardslee v. United States* (1967,
9 CASD) 387 F.2d 280. Because the
10 prosecutors alleged Porter had
11 committed the crimes of burglary
12 and attempted robbery, it allowed
13 malice to be express and implied.
14 When Porter's confession was introduced
15 to the jury, Porter's confession stated
16 that Porter didn't intend to burglarize
17 or attempt to rob MR. Lungtok.
18 And his intentions were not to kill
19 or even engage in any criminal
20 activity, or have any malicious
21 intent for MR. Lungtok. Porter's confession
22 stated he "ran from a [REDACTED] Police car to
23 inside the apartment Porter believed
24 nobody lives in." Porter goes on to say
25 he became frightened when a person
26 came at him from inside the apartment
27 that was dark at the time, and he

1 Just Fired the weapon. Porter is innocent
2 Of the second degree murder because ~~the~~
3 the Ninth Circuit has concluded that
4 Second degree murder is not a lesser included
5 offenses of felony murder. ~~But~~ Because
6 Porter was to have allegedly committed
7 burglary also attempted robbery, the
8 theory was Porter committed felony
9 murder. The Felony murder rule simply
10 stated is that any homicide committed
11 while perpetrating or attempting a
12 Felony, is first degree murder, not
13 second degree murder. United States V.
14 Miguel, 338 F.3d 995; 2003 U.S. App. (9th Cir.).
15 Also because under the Felony murder
16 rule, "malice is implied and express
17 by the intent to commit the
18 underlying felony." Nay V. State, 123 Nev.
19 326, 332, 167 P.3d 430, 434 (2007). Because
20 Porter was acquitted of the crimes
21 of burglary and attempted robbery,
22 Porter is factually innocent of the
23 second degree murder. And there is no
24 malice express or implied in Porter's
25 conviction. Porter is factually
26 innocent, because Porter was acquitted
27 of the foundation for malice aforethought,

1 which was the theories of burglary
2 and attempt robbery. If Porter ~~was~~
3 was found guilty of the burglary
4 and attempt robbery, malice would
5 have exist. But Porter was not found
6 guilty of them. so by Porter not being
7 found guilty of the factor that
8 would allow malice, it show that
9 a fundamental miscarriage of
10 justice has been handed to Porter.
11 Because of Porter being factually innocent
12 and the fundamental miscarriage of
13 justice in Porter's conviction, this
14 Petition should overcome the time
15 bar. See Mitchell v. State, 114 Nev. 1417, 971
16 P.2d 813, 1998 Nev. 164 (1998). And the court's
17 should grant this reconsideration
18 Petition, Because Porter is showing
19 the merits to overcome the Procedural
20 bar. Mitchell v. State, 114 Nev. 1417, 971
21 P.2d 813, 1998 Nev. 164 (1998); Also Mazzan v. Warden,
22 112 Nev 838, 842, 921 ~~112~~ P.2d 920, 922 (1996).

23 If the law that govern second degree
24 murder state that second degree must
25 have malice aforethought or express malice.
26 AUTHORITY: 26 Am J 1st Homi § 38. so then why
27 is Porter being held on murder of second degree
28 without malice.

Petitioner has been trying to explain to the ~~court~~ Courts in his habeas Petition, reply brief and his informal brief that the Stimulated factor for malice aforethought was the burglary and attempt robbery.

CONCLUSION

This petition should be reconsider for en banc, because Porter is actually innocent of second degree murder and malice aforethought doesn't exist in this conviction. And because of the ample amount of evidence this conviction should be vacated.

CERTIFICATE OF SERVICE BY MAILING

I, Justin D. Porter, hereby certify, pursuant to NRCP 5(b), that on this 24
day of October, 2016, I mailed a true and correct copy of the foregoing, "Petition
For en banc reconsideration."

by depositing it in the High Desert State Prison, ~~Legal Library, First Class Postage~~, fully prepaid,
addressed as follows: Mail box

Supreme Court of
Nevada Office of
The Clerk
2013 Carson Street, Suite 201
Carson City, Nevada 89401

District Attorney
P.O. Box 552212
Las Vegas, NV 89135-2212

CC:FILE

DATED: this 24 day of October, 2016.

Justin Porter #1042949
#

/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

for en banc reconsideration.
(Title of Document)

~~filed in District Court Case number~~ Case NO: 70206

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application
for a federal or state grant.

Justin D. Porter
Signature

10-24-16
Date

Justin D. Porter
Print Name

Petition
Title

