



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Electronically Filed
Sep 19 2016 10:54 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Steven D. Grierson
Clerk of the Court

Brandi J. Wendel
Court Division Administrator

September 19, 2016

Tracie Lindeman
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. TROY MULLNER
S.C. CASE: 71030
D.C. CASE: C-12-283463-1

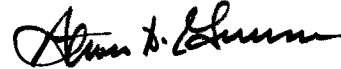
Dear Ms. Lindeman:

In response to the e-mail dated September 19, 2016, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed August 10, 2016 and the Notice of Entry of Findings of Fact, Conclusions of Law and Order filed August 11, 2016 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

A handwritten signature in black ink, appearing to read "Heather Ungermann", with a long horizontal flourish extending to the right.

Heather Ungermann, Deputy Clerk



CLERK OF THE COURT

1 **FLC**
2 **JEAN J. SCHWARTZER, ESQ.**
Nevada Bar No. 11223
3 **LAW OFFICE OF JEAN J. SCHWARTZER**
10620 Southern Highlands Parkway, Suite 110-473
4 Las Vegas, Nevada 89141
Phone: (702) 979-9941
5 Fax: (702) 447-5044
Email: jean.schwartzter@gmail.com
6 Counsel for Petitioner

7
8 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
9 **STATE OF NEVADA FOR THE COUNTY OF CLARK**

10
11 TROY LEE MULLNER) Case No.: C283463
12)
Petitioner,) Dept No.: XXI
13)
vs.)
14 THE STATE OF NEVADA,)
15)
Respondent.)

16
17 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

18 DATE OF HEARING: May 24, 2016

19 TIME OF HEARING: 9:30 AM

20 THIS CAUSE having come on for hearing before Honorable Valerie Adair, District Court
21 Judge, on the 24th day of May, 2015, the Petitioner not being present, represented by JEAN J.
22 SCHWARTZER, ESQ., the Respondent being represented by STEVEN B. WOLFSON, ESQ., District
23 Attorney, by and through WILLIAM FINN, ESQ., Deputy District Attorney, the Court having
24 considered the matter, including briefs, argument, testimony at an evidentiary hearing and documents
25 on file herein, now therefore, the Court makes the following findings of facts and conclusions of law:

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FINDINGS OF FACT

1. On August 15, 2012, the State charged Mullner TROY LEE MULLNER ("Mullner") by way of Indictment with the following: Eleven (11) counts of BURGLARY (Category B Felony – NRS 205.060); Sixteen (16) counts of ROBBERY (Category B Felony – NRS 200.380); Two (2) counts of FIRST DEGREE KIDNAPPING (Category A Felony – NRS 200.310, 200.320); Four (4) counts of COERCION (Category B Felony – NRS 207.190); Four (4) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 200.380, NRS 193.165); Two (2) Counts of ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165); Three (3) counts of ATTEMPT ROBBERY (Category B Felony – NRS 200.380, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360).

2. Pursuant to negotiations, on October 21, 2013, the State charged Mullner by way of Amended Indictment with the following: One(1) count of BURGLARY (Category B Felony – NRS 205.060); Two (2) counts of ROBBERY (Category B Felony – NRS 200.380); One (1) count of COERCION (Category B Felony – NRS 207.190); Two (2) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 200.380, NRS 193.165); Two (2) Counts of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); One (1) count of ATTEMPT ROBBERY (Category B Felony – NRS 200.380, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360).

3. On October 21, 2013, Mullner was arraigned on the Amended Indictment, and a Guilty Plea Agreement ("GPA") was filed. The State reserved the full right to argue, including for habitual criminal treatment. Mullner pleaded guilty to the charges alleged in the Amended Indictment.

4. On January 23, 2014, Mullner was adjudged a habitual criminal and sentenced to TEN (10) YEARS to LIFE on Count 1; TEN (10) YEARS to LIFE on COUNT 2 to run consecutive to Count 1; TWO (2) to SIX (6) YEARS on COUNT 3 to run consecutive to COUNT 2; TEN (10) YEARS to LIFE on COUNT 4 to run concurrent to Count 3; TEN (10) YEARS to LIFE on COUNT 5

1 to run concurrent to Count 4; TEN (10) YEARS to LIFE on COUNT 6 to run concurrent to COUNT
2 5; TEN (10) YEARS to LIFE on COUNT 7 to run concurrent to COUNT 6; TEN (10) YEARS to
3 LIFE on COUNT 8 to run concurrent to COUNT 7; TEN (10) YEARS to LIFE on COUNT 9 to run
4 concurrent to COUNT 8; and ONE (1) to FOUR (4) YEARS on COUNT 10 to run consecutive to
5 COUNT 9. Mullner received FIVE HUNDRED SEVENTY-TWO (572) DAYS credit for time served.

6 5. On January 28, 2014, the Judgment of Conviction was filed. On February 5, 2014, an
7 Amended Judgment of Conviction was filed because of a clerical error which was corrected to read as
8 follows; COUNT 7 – ATTEMPT ROBBERY.

9 6. On April 15, 2014, Mullner filed an untimely pro per Notice of Appeal.

10 7. On April 17, 2014, Mullner filed a Writ of Mandamus. On May 13, 2014, the Nevada
11 Supreme Court issued an Order of Dismissal because Mullner's untimely filed his Notice of Appeal.
12 Remittur issued on June 12, 2014.

13 8. On June 13, 2014, Mullner filed a timely Petition for Writ of Habeas Corpus (Post-
14 Conviction).

15 9. On June 13, 2014, Mullner filed a Motion for Appointment of Counsel and Request for
16 Evidentiary Hearing.

17 10. On May 22, 2014, the Court appointed Jean J. Schwartz, Esq. as counsel for Mullner.

18 11. On December 3, 2015, through counsel, Mullner filed a Supplemental Memorandum of
19 Points and Authorities in Support of his Petition for Writ of Habeas Corpus (Post-Conviction). On
20 January 27, 2016, the State filed a Response to Mullner's Supplemental Memorandum of Points and
21 Authorities in Support of his Petition for Writ of Habeas Corpus.

22 12. On March 8, 2016, the Court heard argument on Mullner's Petition for Writ of Habeas
23 Corpus (Post-Conviction) and his Supplemental Memorandum of Points and Authorities in Support of
24 his Petition for Writ of Habeas Corpus (Post-Conviction) and set an evidentiary hearing on the claims
25 raised in said pleadings *relating to denial of his right to appeal* pursuant to NRS 34.770.

26 13. On May 2, 2016, an evidentiary hearing was held wherein Mullner and his trial counsel,
27 Frank Kocka, Esq., testified.

28 14. Prior to testimony being presented at the evidentiary hearing on May 2, 2016, Mullner

1 orally withdrew his request to withdraw his guilty plea.

2 14. At the evidentiary hearing held on May 2, 2016, Mullner testified that he asked his
3 attorney, Mr. Kocka, to file a direct appeal for the first time in Court on January 23, 2014 after
4 Mullner was sentenced. Mullner also testified that he asked Mr. Kocka again to file a direct appeal via
5 written correspondence within a few weeks of January 23, 2014.

6 15. At the evidentiary hearing held on May 2, 2016, Mr. Kocka testified that he did not
7 recall Mullner asking him to file a direct appeal. Mr. Kock also testified that he agreed that the
8 following issues could have been raised on appeal: 1) Mullner's sentence amounts to cruel and
9 unusual punishment; and 2) the District Court erred in adjudicating Muller a large habitual criminal
10 based upon stale prior convictions.

11 16. Mullner requested *by written correspondence* that his attorney, Mr. Kocka, file a direct appeal on his behalf.

12 17. Mr. Kocka did not file the requested direct appeal.

13 14 CONCLUSIONS OF LAW

15
16 1. The United States Supreme Court requires courts to review three factors when
17 determining whether a defendant was deprived of his right to an appeal: 1) whether the defendant
18 asked counsel to file an appeal; 2) whether the conviction was the result of a trial or a guilty plea; and
19 3) whether the defendant had any non-frivolous issues to raise on appeal. Roe v. Ortega, 528 U.S.
20 470, 480, 120 S. Ct. 1029, 1036 (2000).

21 2. The Nevada Supreme Court has held that the court can assess the credibility of
22 witnesses when conducting an evidentiary hearing to determine whether a defendant was deprived of
23 an appeal. Barnhart v. State, 122 Nev. 301, 130 P.3d 650, 652 (2006).

24 3. Mullner was deprived of his right to a direct appeal and is entitled to a direct appeal
25 with the assistance of appointed counsel.

ORDER

THEREFORE, based upon the foregoing Findings of Fact, Conclusions of Law,


IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief requesting a direct appeal is granted;

IT IS ALSO ORDERED that, pursuant to Rule 4(c)(1)(B)(ii), Jean J. Schwartzer, Esq. is appointed to represent petitioner in his direct appeal from his conviction and sentence.

IT IS ALSO ORDERED that, pursuant to Rule 4(c)(1)(B)(iii) of the Nevada Rules of Appellate Procedure, the District Court clerk shall prepare and file, within five (5) days of the entry of the District Court's order, a notice of appeal from the Judgment of Conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms in the Nevada Rules of Appellate Procedure.

DATED this 17 day of June, 2016.


DISTRICT JUDGE 


JEAN J. SCHWARTZER, ESQ.
Nevada Bar No. 11223
LAW OFFICE OF JEAN J. SCHWARTZER

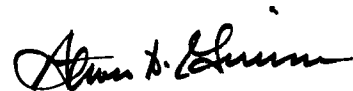
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on 14th day of June, 2016, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to:

William Flinn, Esq.
Deputy District Attorney
Email: William.Flinn@clarkcountyda.com

BY: Jean J. Schwartzer
JEAN J. SCHWARTZER, ESQ.
Nevada Bar No. 11223
Law Office of Jean J. Schwartzer



CLERK OF THE COURT

NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

TROY MULLNER,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-12-283463-1

Dept No: XXI

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

PLEASE TAKE NOTICE that on August 10, 2016, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on August 11, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

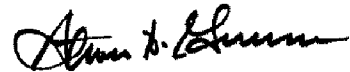
I hereby certify that on this 11 day of August 2016, I placed a copy of this Notice of Entry in:

☒ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:
Troy Mullner # 54371 Jean J. Schwartz, Esq.
P.O. Box 650 10620 Southern Highlands Pkwy, Suite 110-473
Indian Springs, NV 89070 Las Vegas, NV 89141

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk



CLERK OF THE COURT

1 **FLC**
2 **JEAN J. SCHWARTZER, ESQ.**
Nevada Bar No. 11223
3 **LAW OFFICE OF JEAN J. SCHWARTZER**
10620 Southern Highlands Parkway, Suite 110-473
4 Las Vegas, Nevada 89141
Phone: (702) 979-9941
5 Fax: (702) 447-5044
Email: jean.schwartzter@gmail.com
6 Counsel for Petitioner

7
8 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
9 **STATE OF NEVADA FOR THE COUNTY OF CLARK**

10
11 TROY LEE MULLNER) Case No.: C283463
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14 THE STATE OF NEVADA,)
15 Respondent.)

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18 DATE OF HEARING: May 24, 2016

19 TIME OF HEARING: 9:30 AM

20 THIS CAUSE having come on for hearing before Honorable Valerie Adair, District Court
21 Judge, on the 24th day of May, 2015, the Petitioner not being present, represented by JEAN J.
22 SCHWARTZER, ESQ., the Respondent being represented by STEVEN B. WOLFSON, ESQ., District
23 Attorney, by and through WILLIAM FINN, ESQ., Deputy District Attorney, the Court having
24 considered the matter, including briefs, argument, testimony at an evidentiary hearing and documents
25 on file herein, now therefore, the Court makes the following findings of facts and conclusions of law:

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25 raised in said pleadings *relating to the denial of his right to appeal* pursuant to NRS 34.770.

26 13. On May 2, 2016, an evidentiary hearing was held wherein Mullner and his trial counsel,
27 Frank Kocka, Esq., testified.

28 14. Prior to testimony being presented at the evidentiary hearing on May 2, 2016, Mullner

1 orally withdrew his request to withdraw his guilty plea.

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9 unusual punishment; and 2) the District Court erred in adjudicating Muller a large habitual criminal
10 based upon stale prior convictions.

11 16. Mullner requested *by written correspondence* that his attorney, Mr. Kocka, file a direct appeal on his behalf.

12 17. Mr. Kocka did not file the requested direct appeal.

13 14 CONCLUSIONS OF LAW

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16 1. The United States Supreme Court requires courts to review three factors when
17 determining whether a defendant was deprived of his right to an appeal: 1) whether the defendant
18 asked counsel to file an appeal; 2) whether the conviction was the result of a trial or a guilty plea; and
19 3) whether the defendant had any non-frivolous issues to raise on appeal. Roe v. Ortega, 528 U.S.
20 470, 480, 120 S. Ct. 1029, 1036 (2000).

21 2. The Nevada Supreme Court has held that the court can assess the credibility of
22 witnesses when conducting an evidentiary hearing to determine whether a defendant was deprived of
23 an appeal. Barnhart v. State, 122 Nev. 301, 130 P.3d 650, 652 (2006).

24 3. Mullner was deprived of his right to a direct appeal and is entitled to a direct appeal
25 with the assistance of appointed counsel.

1 **ORDER**

2 THEREFORE, based upon the foregoing Findings of Fact, Conclusions of Law,


3 **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief requesting a direct
4 appeal is granted;
5

6 **IT IS ALSO ORDERED** that, pursuant to Rule 4(c)(1)(B)(ii), Jean J. Schwartzer, Esq. is
7 appointed to represent petitioner in his direct appeal from his conviction and sentence.

8 **IT IS ALSO ORDERED** that, pursuant to Rule 4(c)(1)(B)(iii) of the Nevada Rules of
9 Appellate Procedure, the District Court clerk shall prepare and file, within five (5) days of the entry of
10 the District Court's order, a notice of appeal from the Judgment of Conviction and sentence on the
11 petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms in the
12 Nevada Rules of Appellate Procedure.
13

14 DATED this ~~14~~ 17 day of June, 2016.
15
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17

18 
19 DISTRICT JUDGE 

20
21
22 
23 JEAN J. SCHWARTZER, ESQ.
24 Nevada Bar No. 11223
25 LAW OFFICE OF JEAN J. SCHWARTZER
26
27
28

1
2 **CERTIFICATE OF SERVICE**

3 **IT IS HEREBY CERTIFIED** by the undersigned that on 14th day of June, 2016, I served a
4 true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** to:
5
6

7 William Flinn, Esq.
8 Deputy District Attorney
9 Email: William.Flinn@clarkcountyda.com
10

11
12 **BY:** Jean J. Schwartzer
13 **JEAN J. SCHWARTZER, ESQ.**
14 Nevada Bar No. 11223
15 Law Office of Jean J. Schwartzer
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Clerk of the Courts
Steven D. Grierson

200 Lewis Avenue
Las Vegas, NV 89155-1160
(702) 671-4554

September 19, 2016

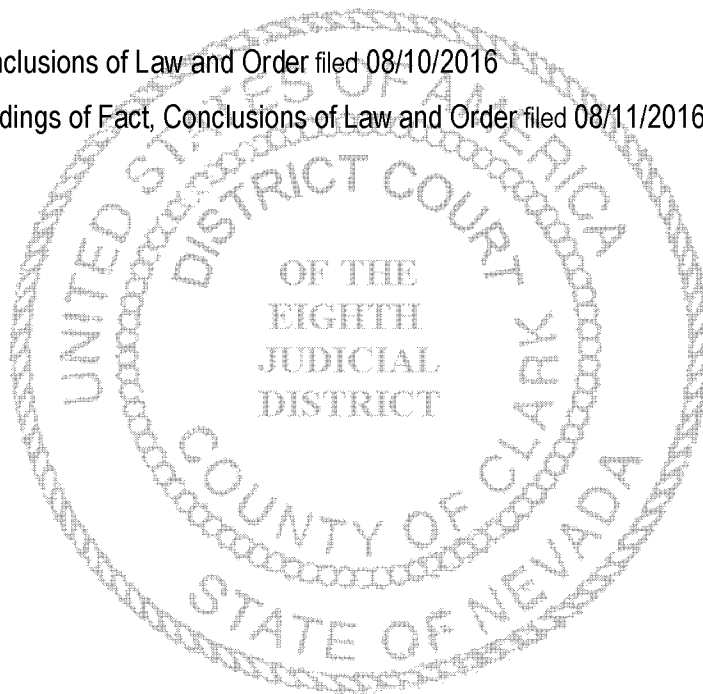
Case No.: C-12-283463-1

CERTIFICATION OF COPY

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):

Findings of Fact, Conclusions of Law and Order filed 08/10/2016

Notice of Entry of Findings of Fact, Conclusions of Law and Order filed 08/11/2016



now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 10:05 AM on September 19, 2016.


STEVEN D. GRIERSON, CLERK OF THE COURT