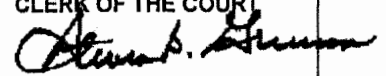


EXHIBIT 1

EXHIBIT 1



1 **FFCL**
2 **STEVEN WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **STEVEN S. OWENS**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #004352**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **WILLIAM WITTER,**

10 **Petitioner,**

11 **-vs-**

12 **THE STATE OF NEVADA,**

13 **Respondent.**

CASE NO: 94C117513

DEPT NO: XXIII

14 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

15 **DATE OF HEARING: 4/19/17**
16 **TIME OF HEARING: 11:00 AM**

17 This Cause having come on for hearing before the Honorable STEFANY A. MILEY,
18 District Judge, on the 19th day of April, 2017, the Petitioner not being present, represented by
19 DAVID ANTHONY and TIFFANY L. NOCON, Assistant Federal Public Defenders, the
20 Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and
21 through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having
22 considered the matter, including briefs, transcripts, arguments of counsel, and documents on
23 file herein, now makes the following findings of fact and conclusions of law:

24 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

25 In 1995, William Witter was convicted of Murder With Deadly Weapon, Attempt
26 Sexual Assault With Deadly Weapon, and Burglary for assaulting and attempting to rape
27 Kathryn Cox, and then stabbing to death her husband, James Cox, when he tried to come to
28 his wife's aid. Witter received the death penalty. His convictions and sentence were

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1 affirmed on direct appeal. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Remittitur
2 issued on December 23, 1996.

3 Witter filed a timely first post-conviction petition which was denied by the district
4 court after an evidentiary hearing and then affirmed on appeal by the Nevada Supreme Court
5 in an unpublished order (SC# 36927). Remittitur issued on September 14, 2001. After
6 litigating a federal habeas petition for several years, Witter returned to state court by filing a
7 second state habeas petition on February 14, 2007. That petition was also denied and again
8 affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 50447).
9 Witter also filed a third state habeas petition on April 28, 2008, which was also denied and
10 affirmed on appeal (SC# 52964). Remittitur from this third habeas appeal issued on
11 February 14, 2011. On January 11, 2017, Petitioner filed a fourth state habeas petition which
12 raises a single issue based on Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016). The State
13 has filed a response and motion to dismiss the petition based on procedural default.

14 This Court finds that the instant petition, which is a fourth petition for a writ of habeas
15 corpus by this Petitioner, is timely filed because the last Judgment of Conviction, although it
16 does set a restitution amount, it also says an additional amount to be determined at a later
17 date. Accordingly, it is not a final judgment and the time and procedural bars in NRS 34
18 never started to run. See Whitehead v. State, 128 Nev. ___, 285 P.3d 1053 (2012); Slaatte v.
19 State, 129 Nev. ___, 298 P.3d 1170, 1171 (2013) ("Because the judgment of conviction
20 contemplates restitution in an uncertain amount, it is not final and therefore is not
21 appealable"). Therefore, the petition is not procedurally barred.

22 Turning to the merits of the issue, this Court finds that the capital proceedings in this
23 case are consistent with Apprendi, Ring, and Hurst. See Hurst v. Florida, 577 U.S. ___, 136
24 S.Ct. 616 (2016). First of all, both the eligibility and suitability were decided by a jury, not
25 by the judge. And likewise, the Court doesn't find anything in Hurst that mandates that the
26 weighing of aggravating and mitigating circumstances be done beyond a reasonable doubt.
27 Accordingly, neither appellate reweighing nor the weighing process implicate Hurst.
28 Because Petitioner has not demonstrated prejudice the petition is denied.

ORDER

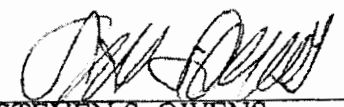
Based on the foregoing, the fourth petition is timely filed due to the lack of a final Judgment of Conviction, but Hurst is simply an application of Ring and nothing in Hurst requires the weighing process be subject to the beyond a reasonable doubt standard. The motion to dismiss the petition is granted and the petition is denied.

DATED this 23rd day of May, 2017.


STEFANY A. MILEY
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY


STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

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Eileen Davis

From: Eileen Davis
Sent: Wednesday, May 10, 2017 10:24 AM
To: david_anthony@fd.org; tiffany_nocon@fd.org
Cc: Steven Owens; Eileen Davis
Subject: William Witter, 94C117513.
Attachments: Witter, William, 94C117513, FFCL&O..pdf

Findings of Fact, Conclusions of Law and Order.

The attached Findings will be submitted to the Judge on May 17, 2017.

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

WILLIAM WITTER,

Petitioner/Appellant,

vs.

TIMOTHY FILSON, et al.,

Respondent.

Supreme Court No. 73431

District Court Case No. 17-00000

(Death Penalty Habeas Corpus Case)

Electronically Filed
Oct 31 2017 03:10 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

OPPOSITION TO MOTION FOR CONSOLIDATION

William Witter opposes the State's Motion for Consolidation. He bases his opposition on the attached Points and Authorities and entire file in this matter.

DATED this 30th day of October, 2017.

Respectfully submitted,

/s/ David Anthony

DAVID ANTHONY

Assistant Federal Public Defender

Nevada Bar No. 7978

411 E. Bonneville Ave., Suite 250

Las Vegas, Nevada 89101

(702) 388-6577

POINTS AND AUTHORITIES

I. INTRODUCTION

On October 6, 2017, the State moved to consolidate Docket Nos. 73431 and 73444: (1) the State’s “appeal” from the district court’s denial in full of Witter’s habeas petition; (2) Witter’s appeal from the same denial of his habeas petition; and (3) Witter’s direct appeal.

The State argues the appeals involve the same issues and facts. Witter requests that this Court deny consolidation because Docket Nos. 73431 and 73444 assert different issues and facts.

II. THE COURT SHOULD DENY CONSOLIDATION

The State predicates its motion entirely upon material misstatements of fact. The two appeals do not arise from the same judgment. To the contrary, the appeal in Docket No. 73431 arises from the district court’s denial of a petition for writ of habeas corpus under Chapter 34 of the Nevada Revised Statutes. The appeal in Docket No. 73444 arises from the entry of a final amended judgment from a jury verdict of guilty and a sentence of death under Chapter 177 of the Nevada Revised Statutes. The two appeals do not arise from the same judgment.

The two appeals also raise wholly distinct and different issues before this Court. The State argues it “has appealed from the part of the decision which required

the filing of an amended judgment for lack of finality (SC # 73431).” Motion for Consolidation at 3. The State fails to cite to the part of the district court’s order requiring it to file an amended judgment. A review of the district court’s order, which the State drafted, shows there is nothing in the order requiring the State to do anything, much less to draft an amended judgment. Ex. 1. Similarly, there is nothing in the amended judgment requiring the State to file an amended judgment.

At most, the State was orally ordered by the district court to submit an amended judgment below. However, the State took no steps below to litigate that issue in an appropriate manner by having the court’s order put in writing. Instead, the State simply decided not to comply with the court’s orders. It thereafter filed a frivolous notice of appeal in Docket No. 73431 in an effort to block the district court from entering the amended judgment. This course of action does not mean that the State is an aggrieved party with standing to appeal the oral order to submit an amended judgment.

Witter has filed a motion to dismiss the State’s notice of appeal in Docket No. 73431, on the ground that it is not an aggrieved party, contemporaneously with the filing of the instant opposition. Witter has also filed a motion to dismiss the State’s amended notice of appeal in Docket No. 73431 because there is no statutory jurisdiction for such an appeal. The State’s instant motion to consolidate is intended

to obscure the fact it has no standing to appeal from either judgment. The State cannot cobble together standing to appeal from a consolidation motion that it does not otherwise have as a non-aggrieved party.

This Court may consolidate where “appeals present identical issues and similar facts.” Prieur v. D.C.I. Plasma Ctr. of Nevada, Inc., 102 Nev. 472, 473, 726 P.2d 1372, 1372 (1986), citing NRAP 3(b); see Milligan v. State, 101 Nev. 627, 630, 702 P.2d 289, 291 (1985) (consolidating where “appeals arise from the same set of operative facts”). However, as to direct appeals and appeals from post-conviction proceedings, “attempting to consolidate the two appeals often creates procedural and administrative problems.” Varwig v. State, 104 Nev. 40, 42, 752 P.2d 760, 761 (1988). This Court has lamented that consolidating direct and post-conviction appeals causes confusion where they are based on different records (*i.e.*, a trial record versus post-conviction record). See id.

Because Docket Nos. 73431 and 73444 present different issues and arise from different facts, the Court should deny consolidation. Docket No. 73431 challenges the May 31, 2017 Order denying post-conviction relief under Nevada Revised Statutes, Chapter 34. Witter’s post-conviction proceedings involve the district court’s conclusions regarding the merits of Witter’s claims based on Hurst v. Florida, 136 S. Ct. 616 (2016).

However, Docket No. 73444 challenges trial issues and the trial record on direct appeal under Nevada Revised Statutes, Chapter 177. Docket No. 73444 will be resolved independent of the State's procedural arguments that only apply to habeas proceedings. Accordingly, the Court should deny consolidation because Docket Nos. 73431 and 73444 assert different issues and facts.

III. CONCLUSION

The Court should deny the State's motion for consolidation.

DATED this 30th day of October, 2017.

Respectfully submitted,

/s/ David Anthony

DAVID ANTHONY

Assistant Federal Public Defender

Nevada State Bar No. 7978

411 E. Bonneville Ave., Suite 250

Las Vegas, Nevada 89101

(702) 388-6577

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of October, 2017, electronic service of the foregoing OPPOSITION TO MOTION FOR CONSOLIDATION shall be made in accordance with the Master Service List as follows:

Steven S. Owens
Chief Deputy District Attorney
steven.owens@clarkcountyda.com

/s/ Stephanie Young
An Employee of the Federal Public Defender,
District of Nevada