EXHIBIT 9

EXHIBIT 9

AJOC
STEVEN WOLFSON
Clark County District Attorney
Nevada Bar No. 001565
STEVEN S.OWENS
Chief Deputy District Attorney
Nevada Bar No. 004352
200 Lewis Ave.
Las Vegas, NV 89155-2212
(702) 671-2500

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

WILLIAM WITTER,
aka William Lester Witter,

Defendant.

Case No. 94C117513
Dept. No. XXIII

THIRD AMENDED JUDGMENT OF CONVICTION

WHEREAS, on the 25th day of January, 1994, Defendant, WILLIAM WITTER, aka William Lester Witter, entered a plea of Not Guilty to the crimes of MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and BURGLARY (Felony), NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060; and

WHEREAS, the Defendant WILLIAM WITTER, aka William Lester Witter, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT

I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and COUNT IV – BURGLARY (Felony), in violation of NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury verdict was returned on or about the 28th day of June, 1995. Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

2. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

3. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault.

4. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

That on or about the 13th day of July, 1995, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNT I – MURDER OF THE FIRST

DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy District Attorney, also being present; the above-entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and, in addition to the $25.00 Administrative Assessment Fee, SENTENCED Defendant, as follows: As to COUNT I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, Defendant was sentenced to DEATH by lethal injection; as to COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON, said sentence imposed in Count III to run consecutive to the sentence imposed in Count II; as to COUNT IV – BURGLARY, Defendant was sentenced to TEN (10) YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to run consecutive to the sentence imposed in Count III. Defendant is to pay

RESTITUTION in the amount of $2,790.00. Defendant is given 627 days credit for time served.

THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Third Amended Judgment of Conviction as part of the record in the above entitled matter.

DATED this 7-6-17 day of June, 2017.

STEFANY MILEY
DISTRICT COURT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

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

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Third Amended Judgment of Conviction, was made this 30th day of June, 2017, by Electronic Filing to:

DAVID ANTHONY
Email: David_Anthony@fd.org

TIFFANY L. NOCON
Email: Tiffany_Nocon@fd.org

By: _____
Employee, District Attorney's Office

SSO//ed

Eileen Davis

From: Eileen Davis
Sent: Friday, June 30, 2017 8:43 AM
To: ecf_nvchu@fd.org; tiffany_nocon@fd.org
Cc: Steven Owens; Jonathan VanBoskerck; Eileen Davis
Subject: William Witter, 94C117513.
Attachments: Witter, William, 94C117513, 3rd AJOC..pdf

Third Amended Judgment of Conviction

- This will be submitted to the Judge today, 6/30/17.

EXHIBIT 8

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 1:04-CR-0287**
	:	
v.	:	**(Judge Conner)**
	:	
ALTIMONT WILKES	:	

MEMORANDUM

There are few circumstances in which a district court may continue to exercise authority over a case after the filing of a notice of appeal, an "event of jurisdictional significance [that] confers jurisdiction on the court of appeals and divests the district court of its control over . . . the case."[1] The district court may proceed if the appeal is patently frivolous.[2] It may proceed if the notice relates to a non-appealable order or judgment.[3] It may also proceed if the appeal is taken in bad faith and would result in unwarranted delay.[4] The notice of appeal filed by

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[1] Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58-59 (1982) (per curiam).

[2] United States v. Leppo, 634 F.2d 101, 104-05 (3d Cir. 1980) (citing United States v. Hitchmon, 602 F.2d 689, 692 (5th Cir. 1979)).

[3] Mondrow v. Fountain House, 867 F.2d 798, 800 (3d Cir. 1989); Venen v. Sweet, 758 F.2d 117, 120-22 (3d Cir. 1985).

[4] See Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988); RCA Corp. v. Local 241, Int'l Fed'n of Prof'l & Tech. Eng'rs, AFL-CIO, 700 F.2d 921, 924 (3d Cir. 1983); Government of the Virgin Islands v. Joseph, 685 F.2d 857, 863 n.3 (3d Cir. 1982); 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 303.32 (3d ed. 1999). The court does not suggest, and need not decide, whether bad faith or unwarranted delay could independently support a district court's decision to retain jurisdiction in a particular case. See, e.g., id. (indicating that bad faith or unwarranted delay would bolster district court's retention of jurisdiction after frivolous or premature notice of appeal).

defendant in this case represents a convergence of all of these circumstances. Despite the notice, this court retains jurisdiction over these proceedings.

The notice of appeal relates to a memorandum and order denying defendant's motion to dismiss the indictment based on speedy trial grounds. The motion was filed on April 18, 2005, two weeks before trial was scheduled to commence, and was denied on April 25, 2005. The court found, viewing the record in the light most favorable to defendant, that trial would clearly commence within the period prescribed by the Speedy Trial Act, 18 U.S.C. § 3161. (Docs. 36, 37, 40, 52).

Three days later, the court was notified that defendant wished to change his plea to guilty. A plea colloquy was set for the date previously established for trial, and trial was continued until June 6, 2005. The plea hearing commenced as scheduled, and defendant answered a series of questions indicating that he understood the charges against him and wished to admit his guilt. Near the end of the proceeding, however, defendant abruptly changed course. He stated, contrary to the criminal information—which defendant had previously read—and contrary to the plea agreement—which defendant had previously signed—that the drug involved in his offense was cocaine hydrochloride rather than cocaine base. In light of this unanticipated factual challenge, the court was left with no choice but to adjourn the hearing. The parties were advised to prepare for a June 6, 2005, trial. (Docs. 42-44, 46, 48).

The notice of appeal was filed seven days after the plea hearing, on May 9, 2005. It was filed by defendant *in propria persona*, apparently without the involvement of his appointed counsel. (Docs. 26, 52).

The appeal is substantively frivolous, procedurally improper, and functionally ineffective. There is simply no question that the motion to dismiss—the subject of the notice of appeal—was properly denied. The *maximum* time that has run against the speedy trial clock in this case, even accepting defendant's argument as to the date on which his speedy trial rights accrued, is sixty-seven days. And, when the *appropriate* accrual date is considered, only twenty-three days have actually run against the speedy trial clock.[5] Trial will clearly commence within the seventy-day period prescribed by the Speedy Trial Act. The appeal is frivolous.[6]

It is also premature. Interlocutory appeals are permitted only in limited situations, when continuation of proceedings would foreclose vindication of the rights asserted. This is not such a situation.

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[5] A more extensive discussion of these findings is presented in the court's previous memorandum (Doc. 40), familiarity with which is presumed. Cf. 3RD CIR. L.A.R. 3.1 (permitting district court to issue a "written amplification of a prior written or oral recorded ruling or opinion" after notice of appeal is filed).

[6] See Neitzke v. Williams, 490 U.S. 319, 325 (1989) (defining "frivolous" as "lack[ing] an arguable basis either in law or in fact") (citing Anders v. California, 386 U.S. 738, 744 (1967)); see also Behrens v. Pelletier, 516 U.S. 299, 310-11 (1996); Leppo, 634 F.2d at 104-05; Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989); Death Row Prisoners of Pa. v. Ridge, 948 F. Supp. 1282, 1285-86 (E.D. Pa. 1996); 20 MOORE ET AL., supra, § 303.32.

> Unlike the protection afforded by the Double Jeopardy Clause [or doctrines of immunity], the Speedy Trial [Act] does not, either on its face or according to the decisions of [federal courts], encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the [statutory] guarantee of a speedy trial. . . . Proceeding with the trial does not cause or compound the deprivation already suffered.[7]

Defendant may secure full relief on his claims under the Speedy Trial Act following trial and the entry of judgment in this case. The order denying the motion to dismiss is nonappealable, and the notice of appeal is ineffective to divest this court of jurisdiction.[8]

The only plausible explanation for the plainly deficient notice, and the sole possible effect of the appeal, is to delay entry of final judgment. There is no issue presented in the notice of appeal that cannot be presented post-judgment, and there is no reason to postpone resolution of the general question of guilt or innocence pending appellate review. Invocation of interlocutory appellate

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[7] The Supreme Court in United States v. MacDonald, 435 U.S. 850, 861 (1978), was discussing a motion to dismiss under the Speedy Trial Clause of the Sixth Amendment, but the rationale applies with equal force to a motion to dismiss under the Speedy Trial Act. See United States v. Grabinski, 674 F.2d 677, 678-79 (8th Cir. 1982); United States v. Bilsky, 664 F.2d 613, 618-19 (6th Cir. 1981); United States v. Mehrmanesh, 652 F.2d 766, 768-69 (9th Cir. 1981); 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 833 (2d ed. 1986); 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.2(c) (2d ed. 1999); see also United States v. Hollywood Motor Car Co., 458 U.S. 263, 268-70 (1982); United States v. Tsosie, 966 F.2d 1357, 1359-61 (10th Cir. 1992).

[8] See Mondrow, 867 F.2d at 800; Venen, 758 F.2d at 120-22; Leppo, 634 F.2d at 104-05; see also 20 MOORE ET AL., supra, § 303.32; Allan Ides, The Authority of a Federal District Court To Proceed after a Notice of Appeal Has Been Filed, 143 F.R.D. 307, 311-12 (1992).

jurisdiction could serve only to inhibit "the smooth and effective functioning of the judicial process."[9] The court will not countenance these efforts.[10]

This case will proceed to trial and judgment despite the notice of appeal.[11] The decision to go forward is not in any way in derogation of the jurisdiction of the Court of Appeals for the Third Circuit. The appellate court maintains exclusive authority to decide the merits of the appeal, and enjoys the discretion to stay further trial proceedings pending its decision. In short, the fact that this court

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[9] United States v. Hitchmon, 602 F.2d 689, 694 (5th Cir. 1979) (en banc), quoted with approval in Leppo, 634 F.2d at 104-05.

[10] See Mary Ann, 847 F.2d at 97; RCA Corp., 700 F.2d at 924; Joseph, 685 F.2d at 863 n.3; see also United States v. Mala, 7 F.3d 1058, 1061 (1st Cir. 1993); Apostol, 870 F.2d at 1339; Main Line Fed. Sav. & Loan Ass'n v. Tri-Kell, Inc., 721 F.2d 904, 907 (3d Cir. 1983); Hitchmon, 602 F.2d at 694; 20 MOORE ET AL., supra, § 303.32.

[11] As the Court of Appeals for the Third Circuit cogently remarked in addressing the district court's obligation to proceed in the face of a premature notice of appeal:

> We recognize that a district court may be reluctant to proceed when, in order to do so, it must in effect determine that the court of appeals has no jurisdiction. Nevertheless, such a procedure has the salutary effect of avoiding delay at the trial level during the pendency of an ineffective appeal. While this is not an invitation for district courts to resolve thorny issues of appellate jurisdiction, the application of the . . . rule [that a premature notice of appeal does not divest the district court of jurisdiction] is sufficiently clear, and the interest in expediting cases sufficiently strong, that the district courts should continue to exercise their jurisdiction when faced with clearly premature notices of appeal.

Mondrow, 867 F.2d at 800.

views the notice of appeal as invalid does not impinge on the ability of the Court of Appeals to consider the issue *de novo*.[12]

Absent contrary appellate directive, the parties should prepare for trial. Jury selection will begin on June 6, 2005, and trial will commence immediately thereafter. An appropriate order will issue.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

Dated: May 12, 2005

[12] See Leppo, 634 F.2d at, 105 (3d Cir. 1980); see also 28 U.S.C. § 1651 (providing for petition for writ of mandamus or prohibition); FED. R. APP. P. 8 (providing for motion to stay proceedings pending appeal).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 1:04-CR-0287**
	:	
v.	:	**(Judge Conner)**
	:	
ALTIMONT WILKES	:	

ORDER

AND NOW, this 12th day of May, 2005, upon consideration of the notice of appeal (Doc. 52), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. All previous scheduling orders entered in the above-captioned case remain in full force and effect.

2. Jury selection in the above-captioned case shall commence at 9:30 a.m. on Monday, June 6, 2005, in Courtroom No. 2, Ninth Floor, Federal Building, 228 Walnut Street, Harrisburg, Pennsylvania.

    a. Trial shall commence as soon as practicable following the conclusion of jury selection.

    b. Counsel are attached for jury selection and trial in the above-captioned case.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

EXHIBIT 7

EXHIBIT 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA
Plaintiff,

v.

WILLIAM WITTER,
Defendant.

Case No. 73431

(District Court No. 94C117513)

AMENDED NOTICE OF APPEAL

TO: DAVID ANTHONY & TIFFANY NOCON, Assistant Federal Public Defenders,

NOTICE IS HEREBY GIVEN and THE STATE OF NEVADA, Plaintiff in the above entitled matter, appeals to the Supreme Court of Nevada to amend the State's Notice of Appeal, Case No. 73431, as follows: the State appeals the May 31, 2017 Order granting in part the fourth Petition for Writ of Habeas Corpus and the Amended Judgment of Conviction filed on July 12, 2017.

Dated this 20th day of July, 2017.

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 District Attorney

I:\APPELLATE\WPDOCS\SECRETARY\NOA - NV SCT\WITTER, WILLIAM, 94C117513, ST'S AMENDED NOA..DOCX

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 20, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

DAVID ANTHONY
TIFFANY NOCON
Assistant Federal Public Defenders
ecf_nvchu@fd.org

STEVEN S. OWENS
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JUDGE STEFANY MILEY
EJDC, Dept. 23
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

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

SSO//ed

EXHIBIT 6

EXHIBIT 6

NOASC
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM WITTER,
#1204227

Defendant.

CASE NO: C-94-117513

DEPT NO: XXIII

NOTICE OF APPEAL

TO: WILLIAM WITTER, Defendant; and

TO: DAVID ANTHONY & TIFFANY NOCON, Federal Public Defenders; and

TO: STEFANY MILEY, District Judge, Eighth Judicial District, Dept. No. XXIII

NOTICE IS HEREBY GIVEN and THE STATE OF NEVADA, Plaintiff in the above entitled matter, appeals to the Supreme Court of Nevada from the May 31, 2017 Order denying fourth Petition for Writ of Habeas Corpus.

Dated this 30th day of June, 2017.

Respectfully submitted,

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the District Attorney

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing Notice of Appeal was made June 30, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID ANTHONY
TIFFANY NOCON
Assistant Federal Public Defenders
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89107

JUDGE STEFANY MILEY
Eighth Judicial District Court Judge, Dept. XXIII
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

Employee, District Attorney's Office

SSO//ed

ASTA
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Street
Las Vegas, Nevada 89155-2212
(702) 671-2750
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- WILLIAM WITTER, #1204227, Defendant.	Case No. C-94-117513 Dept. No. XXIII

CASE APPEAL STATEMENT

1. **Name of appellant filing this case appeal statement:**

   The State of Nevada

2. **Identify the judge issuing the decision, judgment, or order appealed from:**

   Judge Stefany Miley.

3. **Identify all parties to the proceedings in the district court:**

   William Witter

   The State of Nevada

4. **Identify all parties involved in this appeal:**

   William Witter

   The State of Nevada

5. Name, law firm, address, and telephone number of all counsel on appeal and party or parties whom they represent:

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2750

Counsel for Appellant
State of Nevada

DAVID ANTHONY
TIFFANY NOCON.
Assistant Federal Public Defenders
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Respondent
William Witter

6. Indicate whether appellant was represented by appointed or retained counsel in the district court: Retained

7. Indicate whether appellant is represented by appointed or retained counsel on appeal: Retained

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: N/A

9. Date proceedings commenced in the district court:

Information, filed January 21, 1994

DATED this 30th day of June, 2017.

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

BY
for STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2750

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing Case Appeal Statement was made June 30, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID ANTHONY
TIFFANY NOCON
Assistant Federal Public Defenders
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101

JUDGE STEFANY MILEY
Eighth Juducual District Court, Dept. 23
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

Employee, District Attorney's Office

SSO//ed

EXHIBIT 5

EXHIBIT 5

Electronically Filed
7/7/2017 2:17 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. WILLIAM L. WITTER, Defendant.	CASE NO. 94C117513 DEPT. NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

WEDNESDAY, JUNE 28, 2017

DEFENDANT'S MOTION FOR ORDER

APPEARANCES:

For the Plaintiff: JONATHAN VAN BOSKERCK, ESQ.
Deputy District Attorney

For the Defendant: TIFFANY L. NOCON, ESQ.
DAVID S. ANTHONY, ESQ.
Deputy Federal Public Defenders

RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

Case Number: 94C117513

WEDNESDAY, JUNE 28, 2017, 9:35 A.M.

THE MARSHAL: Top of page 1, C117513, Witter.

THE COURT: Hi. Hi, you guys.

MR. VAN BOSKERCK: Good morning, Your Honor, Jonathan Van Boskerck for the State.

MR. ANTHONY: David Anthony from the Federal Public Defender's Office for Mr. Witter who's in custody and we will waive his appearance for the purpose of this hearing.

THE COURT: Okay, so --

MS. NOCON: Tiffany Nocon from the Federal Defender's Office.

THE COURT: Good morning. I guess I don't understand the why. It's just why a JOC is not being done. I mean legally why?

MR. VAN BOSKERCK: First off, Judge, Mr. Owens asked me to apologize to you that he is not here. He's speaking at the bar convention or he'd be here himself, so that's why you have me. But to answer your question, the reason Mr. Owens decided that he didn't want to adopt what you described as his suggestion of filing an Amended JOC, there's two reasons. Number one, we have real concerns that on appeal *Whitehead* and *Slaatte* will not be found to be retroactive. So we don't necessarily -- we still believe the petition will be filed untimely in the end. But our ultimately concern, that is, when it comes to --

THE COURT: But you can still raise that issue.

MR. VAN BOSKERCK: But ultimately our real concern is whether the petition, whether it's timely or not. If we file an Amended JOC at this point without waiting for the Nevada Supreme Court, they will argue in federal court that we have

waived all of the procedural bars by filing a new JOC. So we felt that it would be more prudent to wait until we have a decision from the Nevada Supreme Court 'cause we --

THE COURT: Okay.

MR. VAN BOSKERCK: -- don't have to waive the procedural bars in federal court.

THE COURT: Well, I guess Mr. Owens misunderstood the distinction between leaving it in the State's discretion versus an order from the Court. And perhaps it's the way I phrased it. I recognize that you're trying to preserve issues on appeal but many of those issues are already in the record and certainly they will be contained within the record should this case go forward into other courts for further relief, but there needs to be a JOC. And I did not intent to make it a suggestion that the State could choose to comply or not comply with. So it is now, if everyone's clear, an order. Okay. Thank you.

MR. ANTHONY: Thank you, Your Honor.

PROCEEDINGS CONCLUDED AT 9:37 A.M.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Maria L. Garibay

MARIA L. GARIBAY
Court Recorder/Transcriber

EXHIBIT 4

EXHIBIT 4

NOTM

RENE L. VALLADARES
Federal Public Defender
DAVID ANTHONY
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TIFFANY L. NOCON
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(702) 388-6577
(702) 388-5819 (fax)

Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, v. TIMOTHY FILSON, Warden, Ely State Prison, and ADAM PAUL LAXALT, Attorney General for the State of Nevada. Respondents.	Case No. C117513 Dept. No. XXIII **NOTICE OF MOTION AND MOTION FOR ORDER** (Death Penalty Habeas Corpus Case)

Petitioner William Witter hereby moves the Court to enter the attached Proposed Second Amended Judgment of Conviction. See Ex. 1. Mr. Witter bases this motion on the attached memorandum of points and authorities, attached Declaration

///

///

of Assistant Federal Public Defender David Anthony, see Ex. 2, and the entire file in this matter.

DATED this 7th day of June, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Respondents

PLEASE TAKE NOTICE that the MOTION FOR ORDER filed June 7, 2017, will be heard on the 19 day of June 2017, at the hour of 9:30 a.m. ~~/p.m.~~, in Department 23 of the District Court.

DATED this 7th day of June, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 11, 2017, Mr. Witter filed a Petition for a Writ of Habeas Corpus. He explained that this petition was not subject to procedural default because, inter alia, the amended judgment of conviction entered against him on August 11, 1995, was not a final appealable judgment as it failed to specify the amount of restitution. See Whitehead v. State, 128 Nev. __, 285 P.3d 1053 (2012) (en banc); Slaatte v. State, 129 Nev. __, 298 P.3d 1170 (2013) (per curiam).

This Court heard argument on Mr. Witter's petition on April 19, 2017. See Ex. 3 (Transcript of Proceedings). This Court agreed with Mr. Witter's position regarding the effect of Whitehead and Slatte. See id. at 2-3. This Court expressly found, consistent with Whitehead and Slaate, that the prior amended judgment of conviction was not final because it imposed "an additional amount [of restitution] to be determined at a later date." Id. The Court subsequently denied Mr. Witter's petition on the merits. See id. at 12.

The Court then directed the State to prepare an order consistent with its findings, including "the Court's findings on the timing issue." See id. at 13-14. The State represented that it would file an amended judgment of conviction in order to address this Court's finding regarding the non-finality of the earlier amended judgment of conviction:

> MR. OWENS: What I would like to do is along with these findings is submit an amended judgment. I guess it would be a second amended judgment but would differ from the last amended judgment in simply striking the language that says something to the effect of 'and an additional amount of restitution to be determined in the future.' If I –

> THE COURT: That may be a suggestion if you want to ensure finality given the Whitehead and Slaatte cases.
>
> MR. OWENS: You know, I don't agree with the Court that its necessary, but to avoid this issue in the future, and I'm all about doing what we can to avoid problems in the future, it won't help us with this case or this appeal going up, but for the next petition it might start the time bar. If the court later agrees with you that, yeah, the time for – when your time bar never started then I'd like to get it started with an amended judgment so I'll submit that along with the findings.

Id. at 14.

The State submitted its Proposed Findings of Fact, Conclusions of Law, and Order to the Court on May 17, 2017, which the Court entered on May 31, 2017 and filed on June 5, 2017. Ex. 4 (Notice of Entry of Findings of Fact, Conclusions of Law and Order). Therein, it correctly reflected the Court's findings that the first amended judgment of conviction was a non-final order:

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

See id. at 2.

Contrary to its representations to this Court, however, the State did not submit an amended judgment. Mr. Witter, through counsel, inquired about this omission on May 31, 2017, and offered a proposed second amended judgment consistent with the State's intent to "strik[e] the language that says something to the effect of 'and an additional amount of restitution to be determined in the future.'" See Ex. 1 (Decl. of Assistant Federal Public Defender David Anthony). The next day, June 1, 2017, the

State responded that it had changed course and no longer intended to file an amended judgment of conviction. Id.

II. A SECOND AMENDED JUDGMENT OF CONVICTION MUST BE ENTERED

To ensure proper jurisdiction, this Court must enter the attached Proposed Second Amended Judgment of Conviction, Ex. 3. On the one hand, this Court has entered notice of entry of its order denying his petition, triggering, in the usual case, his obligation to file a notice of appeal within thirty days. See NRAP 4(a)(1). On the other hand, this Court also has found that the operative judgment of conviction in this case "is not a final judgment" and therefore the Nevada Supreme Court is without jurisdiction to consider any appeal of Mr. Witter's case until the deficiency is cured. See Slaatte, 129 Nev. __, 298 P.3d at 1170.

In light of Slaatte and Whitehead, Mr. Witter submits that the only way to give effect to this Court's order denying his petition, and to permit his appeal on the merits of his petition, is to enter the Proposed Second Amended Judgment of Conviction envisioned by the State at the hearing on his petition.

///

///

III. CONCLUSION

Mr. Witter requests this Court sign and enter the Proposed Second Amended Judgment of Conviction.

DATED this 7th day of June, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the June 7, 2017, a true and accurate copy of the foregoing NOTICE OF MOTION AND MOTION FOR ORDER was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com

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

EXHIBIT 1

EXHIBIT 1

AJOC
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Attorneys for William Witter

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. WILLIAM WITTER, aka William Lester Witter, Defendant.	Case No. 117513 Dept. No. XXIII

PROPOSED SECOND AMENDED
JUDGMENT OF CONVICTION

WHEREAS, on the 25th day of January, 1994, Defendant, WILLIAM WITTER, aka William Lester Witter, entered a plea of Not Guilty to the crimes of MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and BURGLARY (Felony), NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060; and

WHEREAS, the Defendant WILLIAM WITTER, aka William Lester Witter, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and COUNT IV – BURGLARY (Felony), in violation of NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury verdict was returned on or about the 28th day of June, 1995. Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

2. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

3. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault.

4. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

That on or about the 13th day of July, 1995, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the

Defendant's punishment should be Death as to COUNT I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy District Attorney, also being present; the above-entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and, in addition to the $25.00 Administrative Assessment Fee, SENTENCED Defendant, as follows: As to COUNT I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, Defendant was sentenced to DEATH by lethal injection; as to COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON, said sentence imposed in Count III to run consecutive to the sentence imposed in Count II; as to COUNT IV – BURGLARY, Defendant was sentenced to TEN (10) YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to

run consecutive to the sentence imposed in Count III. Defendant is to pay RESTITUTION in the amount of $2,790.00. Defendant is given 627 days credit for time served.

THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Third Amended Judgment of Conviction as part of the record in the above entitled matter.

DATED this ____ day of June, 2017.

_____
District Judge

EXHIBIT 2

EXHIBIT 2

DECLARATION OF DAVID ANTHONY

I, David Anthony, declare as follows:

1. I am an attorney at law admitted to practice before this Court and employed as an Assistant Federal Public Defender. I represent Petitioner William Witter in this capital case.

2. I was present at the April 19, 2017, hearing on Mr. Witter's petition, at which time this Court denied Mr. Witter's claims premised on Hurst v. Florida, 136 S. Ct. 616 (2016), on the merits. The Court instructed Deputy District Attorney Steven S. Owens to prepare a written order to this effect.

3. At the hearing, Mr. Owens represented that he would additionally file with the Court a second amended judgment of conviction to address this Court's finding that the previous judgment of conviction, entered August 11, 1995, was a non-final order. Specifically, Mr. Owens represented that he would remedy this error by submitting a new judgment "striking the language that says something to the effect of 'and an additional amount of restitution to be determined in the future.'"

4. On May 10, 2017, Mr. Owens caused a proposed order denying Mr. Witter's petition to be sent to my office. This proposed order correctly reflected this Court's finding that the August 11, 1995, judgment "is not a final judgment and the time and procedural bars in NRS 34 never started to run," and otherwise accurately reflected the findings this Court made on the record. Accordingly, I lodged no objection to the proposed order, presuming at that time that Mr. Owens would follow through on his stated intent to file an amended judgment of conviction. The proposed order was

delivered to the Court on or about May 17, 2017.

5. On May 31, 2017, still not having received any information about the amended judgment of conviction, I e-mailed Mr. Owens inquiring about its status and attached a proposed amended judgment of conviction conforming to the change Mr. Owens suggested at the hearing.

6. On June 1, 2017, Mr. Owens responded that he did not feel that it was necessary to file an amended judgment of conviction, and did not intend to do so at the present time.

I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed on June 7, 2017, in Las Vegas, Nevada.

/s/ David Anthony
DAVID ANTHONY

EXHIBIT 3

EXHIBIT 3

Electronically Filed
8/29/2017 10:38 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. WILLIAM WITTER, Defendant.	CASE NO. C117513 DEPT. NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

MONDAY, JUNE 19, 2017

DEFENDANT'S MOTION FOR ORDER

APPEARANCES:

For the Plaintiff: ROBERT BRAD TURNER, ESQ.
Chief Deputy District Attorney

For the Defendant: TIFFANY L. NOCON, ESQ.
HEATHER FRALEY, ESQ.
Asst. Federal Public Defenders

RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

Case Number: 94C117513

MONDAY, JUNE 19, 2017, 10:58 A.M.

THE MARSHAL: Page 1, C117513, Witter.

THE COURT: Hi.

MS. NOCON: Good morning, Your Honor.

MR. TURNER: Judge, Brad Turner on behalf of the State on this matter. I contacted -- or actually called my secretary, while the Court was handling another matter, to contact appeals and ask them to appear on this matter.

THE COURT: Uh-huh.

MR. TURNER: Appeals contacted her who subsequently texted me. They indicated that they did not -- they were not aware that this was on calendar, that they didn't get a copy of the motion and they're requesting 20 days.

MS. NOCON: To the extent the Court is inclined to grant any kind of extension to the State, we would request that it's less than 20 days for three reasons. One is that we have confirmation it was properly served. Two is the motion only asks what the State requested -- suggested at the hearing, that is for an amended motion -- or amended judgment of conviction to be entered. And we're also pushing against a deadline to file a notice of appeal for the order that was filed on June 5, so that would be July 5; and extending 20 days would put us past that date.

THE COURT: But aren't you concerned also that you don't have a filed order that you can appeal?

MS. NOCON: Correct. So that's why if the Court wanted to give the State an extension, we'd request that we be not 20 days, 'cause 20 days would put us past that.

THE COURT: When is -- I mean there's -- obviously, there's -- I guess there needs to be an argument when that date starts. When would the 20 days be, according to your calculations now from the date of the order?

MS. NOCON: Let me see the calendar.

MS. FRALEY: The 20 days from today -- Heather Fraley from the Federal Public Defender, Your Honor. So they're asking for 20 days from today to respond to our motion and then this Court would have to set on calendar after that. According to the findings of facts that Your Honor already entered, our notice of appeal date from the notice of that would be July the 5th. And so even though yes we agree with Your Honor that technically we need a new judgment of conviction, to preserve that issue we would have to file by July the 5th. So we would just like to have this judgment of conviction issue resolved prior to that appeal date of July 5th if possible.

THE COURT: Okay. Why don't we do the 20th of June?

MR. TURNER: Yes, Judge.

MS. NOCON: The 20th of June?

THE COURT: June 20th.

MS. NOCON: Yes, Your Honor.

THE COURT: Okay.

THE CLERK: I'm sorry, you said the 28th?

MS. FRALEY: Your Honor, that's for the hearing or for the State's response to the motion?

THE COURT: Both. I don't know whether the State is going to have a long response. Basically the -- there should've been a judgment of conviction.

MS. FRALEY: Yes, Your Honor, we agree with that.

THE COURT: So I don't -- both on the 28th, 'cause you don't need to really say much more. And I don't understand why the State hasn't filed an amended judgment of conviction. Perhaps, it fell through the cracks, I don't know.

MR. TURNER: I -- Judge, I'm at a disadvantage. I don't have any information for the Court, but I've asked them --

THE COURT: Okay. So let's do the 20th of June at 9:30.

MS. NOCON: Thank you, Your Honor.

MS. FRALEY: Thank you, Judge.

MR. TUNER: Thank you, Judge.

PROCEEDINGS CONCLUDED AT 11:01 A.M.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Maria L. Garibay

MARIA L. GARIBAY
Court Recorder/Transcriber

EXHIBIT 2

EXHIBIT 2

FFCL
STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
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200 Lewis Avenue
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(702) 671-2500

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: 94C117513

DEPT NO: XXIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

Turning to the merits of the issue, this Court finds that the capital proceedings in this case are consistent with Apprendi, Ring, and Hurst. *See* Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). First of all, both the eligibility and suitability were decided by a jury, not by the judge. And likewise, the Court doesn't find anything in Hurst that mandates that the weighing of aggravating and mitigating circumstances be done beyond a reasonable doubt. Accordingly, neither appellate reweighing nor the weighing process implicate Hurst. 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

aa

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

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

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 10th day of May, 2017, by Electronic Filing to:

DAVID ANTHONY
Email: David_Anthony@fd.org

TIFFANY L. NOCON
Email: Tiffany_Nocon@fd.org

By: E Davis

Employee, District Attorney's Office

SSO//ed

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.

EXHIBIT 1

EXHIBIT 1

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RTRAN

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. WILLIAM L. WITTER, Defendant.	CASE NO.: 94C117513 DEPT. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

WEDNESDAY, APRIL 19, 2017

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS POST-CONVICTION

DEFENDANT'S OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: DAVID ANTHONY, ESQ.
TIFFANY L. NOCON, ESQ.
Assistant Federal Public Defenders

RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, APRIL 19, 2017 at 10:53 A.M.

THE RECORDER: Page 16, C117513; Witter.

THE COURT: All right, so it's State of Nevada -- its Witter versus State of Nevada, C -- you know 117513. It's a motion to dismiss the 4th habeas petition. There's a petition for habeas corpus and there's a motion to dismiss it and then I have a reply and opposition as well.

Good morning, everyone; if you want to introduce yourself for the record.

MR. ANTHONY: Good afternoon, Your Honor, David Anthony from the Federal Public Defender for William Witter who's in custody.

THE COURT: Okay.

MR. ANTHONY: You want to introduce yourself?

MS. NOCON: Oh, Tiffany Nocon also from the Federal Public Defenders Office on behalf of Mr. Witter.

MR. OWENS: Your Honor, Steve Owens for the State.

THE COURT: Okay, so there's a couple of claims brought up. One of the first issues brought up was the timeliness issue. And I know that the State's position is that it's untimely and that we'd go off the original judgment of conviction. I'll be frank with you, I went through and I looked at *Slaatte versus State* and *Whitehead versus State* and I would tend to agree with the Defense that the way those cases are -- well, the way the holding came out in those particular cases, that unless there's a JOC that I didn't see, that it would be timely. It looks like that last judgment of conviction, although it does set a restitution amount, it also says an additional amount to be determined at a later

date. I don't show where there's been any additional judgments of conviction subsequent to that second one.

MR. OWENS: You know I'll be happy to address that.

THE COURT: And the other thing I want to address is I know that the case law says if it appears to be clerical, but I don't think that the -- but I don't think that it's a clerical matter because when you look at the first judgment of conviction it sets forth the sentence on the murder charge. The second judgment of conviction, it not only sets forth the sentence for the murder charge, it also sets forth the sentence on the additional counts on which the Defendant was convicted, so I just don't see where that could be clerical in nature. I mean I understand -- not being there, my guess is probably it was just inadvertently left out. But on its face, I don't think that you can find that its -- I don't think the Court can find that it's clerical in nature. So unless you have something I don't know, it appears that everything is timely by the Defense.

MR. OWENS: I was under the impression that the original judgment had sentenced on everything --

THE COURT: Let me look at it.

MR. OWENS: -- other than the amended just came in and sentenced -- and added some restitution in.

THE COURT: Let me look at it. Judgment of Conviction; the original one's '95. No, it doesn't. If you look at it, you go through and there's no -- it sentences on the murder. It doesn't sentence on the other ones. Do you see it, the August 4th, 1995 judgment of conviction?

MR. OWENS: Yeah, I'm looking at the August 4th one right now. Well, I -- you know I would say that unlike those other cases that the Defense has

cited where they were remanded because it was improper to take an appeal because the court said those aren't -- that's not a final judgment, it leaves an amount uncertain of restitution. Here we had a direct appeal. It was treated as a final judgment.

THE COURT: Yeah, and -- but the appeal was obviously subsequent to the Court's clarification in the *Slaatte* and the *Whitehead* case.

MR. ANTHONY: And the other thing that I might add, Your Honor, is is that really the conduct of the parties can't confer appellate jurisdiction on the Nevada Supreme Court. That's why they dismissed the appeal in the *Slaatte* case is that jurisdiction either exists or it doesn't and it's not something that can be conferred by the parties, so.

THE COURT: All right, my guess is it was just never raised previously. You know it's never been --

MR. OWENS: Well, if the Court's telling me that after this many years they can go and find a defect like this and it's not procedurally barred, and even though there was a direct appeal with issuance of a remittitur and you're telling me that this case was never final all along and we got to redo a capital case, there's been no other published --

THE COURT: That's not what I'm telling you at all. What I'm telling you is -- you know honestly, if I read between the lines, my guess is what happened is -- I don't have access to what happened you know twenty plus years ago; okay? My guess is probably she -- he was sentenced on everything at the original hearing date and the judgment of conviction inadvertently did not include the sentence for all the other counts, but that's just me guessing. All I can see is I have a judgment of conviction that convicts him -- that sentences --

adjudicates him on the murder charge. Then I have a subsequent judgment of conviction that comes along not too long later and adds a sentence for all the other charges on which the Defendant was convicted. In addition, it adds a restitution amount with the additional *caveat* to be determined; okay? When you look at the subsequent -- the case law that's come along, what, 15, 20 years later, I think the Supreme Court was pretty clear that for purposes of determining timing issues, and I say timing issues and that's for post-conviction relief, that if there's an open issue in that judgment of conviction the -- its not final and that doesn't start the timing -- the timing doesn't start to run. That's all I'm saying. I'm not saying you're going to redo this murder case.

MR. OWENS: Okay.

THE COURT: So, that -- where that comes into play in this case is if those cases had not come out I think the State would have a very good argument that its time barred. I mean quite simply there's been many, many, many years passed since remittitur on the direct appeal, remittitur on the post-conviction petition for habeas corpus, but you know those cases came out and I don't know any other way to reconcile them.

MR. OWENS: I see what Your Honor is saying now. So, if --

THE COURT: So that would mean we go into the merits.

MR. OWENS: Well, there's still a successive petition bar. This is -- there's been -- this is, what, the fourth petition bar? It has nothing to do with time. It has to do with the number of petitions that have been filed regardless of whether or not they're still timely and that the one year time bar never started ticking. This is their fourth habeas petition. Their last one was procedurally

barred because it was successive. I don't think that argument gets them around the successive petition bar and being here today on a fourth. So, I think we still have bars.

But let me jump to the merits on the *Hurst* issue because really, yeah, we have raised procedural bars. Those are mandatory. The Court's got to deal with those. But the merits of the *Hurst* issue to me is very simple. I don't see how any reasonable attorney can go read the *Hurst* case and come out of it with the interpretation that the Federal Public Defender has. I guess reasonable minds can disagree about just about anything, but I haven't found any court anywhere in the country that has attributed to it the interpretation that they have.

They've got a case from back east that I've gone and read and, yeah, there's a court there and there's a few other courts elsewhere that have applied the beyond a reasonable doubt standard to the weighing of aggravating and mitigators, but their case -- is it Delaware?

MR. ANTHONY: Delaware; correct.

MR. OWENS: My reading of that case is that part of their opinion was not in any way premised upon the *Hurst* decision 'cause *Hurst* doesn't say that and they didn't rely on *Hurst* for coming up with that part of their ruling. They based that on Delaware state law and the interpretation of other cases. And there's a few other jurisdictions that do the weighing beyond a reasonable doubt but it's not based on *Hurst*. So, I just fundamentally disagree with them on *Hurst*.

If Your Honor wants to reach the merits of that as an alternative decision if overcoming the one year time bar, they still have to show prejudice

and *Hurst* does not give them the relief and remedy that they're looking for if it did. We're talking about almost every death sentence in the country would be overturned. And here we are more than a year since *Hurst* publication; nobody's interpreted *Hurst* that way and overturned a death sentence based on *Hurst* saying that, oh, you didn't use the beyond a reasonable doubt standard on the weighing of aggravating and mitigators. There's tons of federal cases out there that have looked at this issue and said you don't have to do weighing beyond a reasonable doubt. I cited to all these circuits that have looked at this issue and none of those cases were addressed by the court in *Hurst*. None of them were overturned in *Hurst*. The argument they've got, if they're right, it would be astronomically devastating to the death penalty across the country. And the fact that it's not belies that they've got an issue here.

I don't know what else to say on it. I -- they filed this in 20 different death penalty cases here in Clark County and we're going in one by one and ticking them off. We're [indiscernible]. Judge Cadish has denied this in two capital cases. You're the third judge to look at this issue as far as I am aware. Jonathan Vanboskerck might have had it.

THE COURT: You know I actually had this issue on calendar twice today in a pending case and in this case.

MR. OWENS: Okay. Well, I obviously don't have them all. I've got 20 of them myself and you'd be the third one in my stack. The issue's floating around out there. I'm not aware of anyone granting them relief so far. They may yet get relief. But that's where we're at with this and if you have further questions I'll be happy to answer but they -- my brief covers everything else I wanted to say.

THE COURT: I tend to agree with the State upon reading *Hurst*. I just don't see how you got to the position you have.

MR. ANTHONY: Could --

THE COURT: I mean *Hurst* does repeatedly reference *Ring* which was many, many years prior. And I just don't -- looking at the facts of *Hurst* I just even know how you're applying them to this situation because as in this -- I'm sorry, I'll let you argue.

MR. ANTHONY: Well, first of all, Your Honor, one of the things that I think is unique about the *Hurst* decision, and I'm looking at section 2 of the decision. I'm sure at this point we've all read it probably several times.

THE COURT: Yes.

MR. ANTHONY: The court refers to findings plural and they refer to two different sets of findings: one regarding the existence of the aggravating circumstances and one finding regarding the weighing of the aggravating circumstances against the mitigation. Now, the reason that I believe that our reading of *Hurst* is supportable is because that's exactly the reading of *Hurst* that the Florida Supreme Court adopted on remand in the *Hurst* case. Mr. Owens notes that Delaware also took the same route in the *Rauf* case. Not only did they do that, in the follow up case, in *Powell*, they did apply the reasonable doubt standard exactly the way that we're asking the Court to do so and they completely emptied Delaware's death row. So, if the question is there's no court anywhere that hasn't done this, well there is. There is a state and they completely emptied their death row. There's a very similar situation that appears to be occurring in Florida as a result of this as well, so.

THE COURT: Okay, so obviously the different states can choose to

obviously not be inconsistent with the U.S. Supreme Court but they can go over and beyond what's mandated by the U.S. Supreme Court which, --

MR. ANTHONY: Correct, Your Honor.

THE COURT: -- in these particular jurisdictions, it sounds like some states have made that decision to go over and beyond what's mandated by the Nevada Supreme Court -- I'm sorry, the U.S. Supreme Court. However, there is -- the State is correct, there is a whole bunch of cases -- I mean it was a whole bunch of jurisdictions that have not gone over and beyond what was mandated by the U.S. Supreme Court in *Hurst* and the cases from those states are not being overturned as being inconsistent with *Hurst*.

MR. ANTHONY: Could I address that aspect --

THE COURT: Yes, please.

MR. ANTHONY: -- of it, Your Honor?

Again, I think the State has done an admirable job of collecting, you know the way that different states have handled this. The one thing that I would comment to the Court about that is that it varies state by state.

THE COURT: Okay.

MR. ANTHONY: And a lot of times -- for example, the State cites to the California system but California doesn't have a system where you weigh aggravating and mitigating factors. It's not a weighing state. So, the way that I would address the Court's concern is that there are state systems that don't do this. There are different state systems like in Texas there's no weighing at all. You just answer a list of questions. So, I'm not saying that *Hurst* has application in every state.

What I am saying is that in a state like Nevada where you have

what I would consider a three-step process, the first step being the finding of the aggravating circumstances, the second step being the weighing of the aggravating circumstances, and only then can you get to the third step where you can consider other matter evidence or the jury can decide to extend mercy, my argument, Your Honor, is is that if you look at the unique way that the capital sentencing scheme is set up in Nevada that's what differentiates Nevada from a place like California or a place like Arizona where once the jury finds the aggravating circumstance they're basically done as far as finding the Defendant eligible for the death penalty.

So, while I agree that the State has definitely cataloged and brought forward a lot of the ways different states have gone, and there are different states that have gone in different directions, my argument is that our system is very, very similar to Florida's which is they have the finding of the aggravators and then the weighing of the aggravators against the mitigators. And so, I would certainly agree with their point that this doesn't have an effect in every state on every capital punishment system but I believe it does in Nevada based upon the way that the Legislature has basically set out this capital sentencing scheme. So, that's the way that I would distinguish the cases that Mr. Owens cited. And a lot of those cases from the federal system also pre-date *Hurst*.

And so, I think that in light of *Hurst* I think that there is certainly a movement that I see, the opposite direction, mostly by the Florida Supreme Court, also by the Delaware Supreme Court. Maybe this is something that ultimately needs to go to the Nevada Supreme Court obviously to speak to this because the Nevada Supreme Court decided the *Nunnery* decision which is kind of what we're kind of up against. That's the difficulty that we face. But that's

the same thing that occurred in Delaware and Florida. They had adverse authority. *Hurst* came out. They interpreted *Hurst* to apply to the weighing stage in their state and we would just ask that that same consideration apply to Nevada based on the way the statute is set up.

THE COURT: Okay.

Anything else from the State?

MR. OWENS: Well, any time we're dealing with the death penalty it gets real political and I perceive that's what happened in Delaware. Many jurisdictions are looking at the death penalty. The Legislature is looking at the death penalty. But here, Nevada has looked at the issue in terms of what the policy is here in Nevada and whether weighing applies to the aggravating and mitigating circumstances or beyond a reasonable doubt standard applies and they said it doesn't. Granted, they haven't revisited that decision in light of *Hurst*, but *Hurst* doesn't give you any reason to overturn that published case law that is against them. The Nevada jurisprudence on the death penalty is whatever the Nevada Supreme Court says it is. And if there's any confusion in the case law it's because of federal counsel coming in and trying to compare us to other jurisdictions like Florida and saying, no, Nevada, this is what your system is. They have no grounds or standing to come in and tell us in Nevada what our own death penalty statutes mean and what they don't mean. We're free to interpret them, the Nevada Supreme Court is, any way we want to. We can say black is white. And so they get caught up on these words that, oh, you called this an eligibility factor, you called this a selection. Our Nevada Supreme Court has used those terms in different ways than what federal counsel used to from the U.S. Supreme Court but -- and so we have a

fundamental disagreement. They don't agree with how Nevada has itself defined the factors for aggravating and mitigating and selection and how Nevada has defined its own case law so I have problems even overcoming that. We're not on the same equal footing when discussing what Nevada law means. So, I'll just submit it.

THE COURT: Is there anything else, any other record you want to make?

MR. ANTHONY: I don't think so, Your Honor.

Just one thing that I would mention that I think I neglected to mention just a moment ago is that the State's brief focuses a lot on the difference between the identity of the fact finder versus the standard of proof. And I just wanted to just make it clear that in *Hurst* itself and also in the *Apprendi* case which is the predecessor to *Hurst* they make it very clear that if you decide something is an element of the offense then it follows that the beyond a reasonable doubt standard of proof has to apply to that element. And so, I would disagree with at least what's being said over here that nobody has extended the sixth amendment jurisprudence to the beyond a reasonable doubt standard. I think that's clearly in *Hurst*. Its right at the tip of section 2 and it's also in *Apprendi* as well. So, that's the only thing that I think that I haven't covered that I wanted to at least talk about 'cause it was in their reply.

Thank you, Your Honor.

THE COURT: Okay, I am going to deny it. I do agree with the State's position. I am going to adopt the State's position. I do believe that the capital proceedings in this case are consistent with *Apprendi*, *Ring*, and *Hurst*. First of all, both the eligibility and suitability were decided by a jury, not by the judge. And likewise, the Court doesn't find anything in *Hurst* that mandates that the

second prong likewise be proven beyond -- or the -- aggravating, the mitigating weighing that be done beyond a reasonable doubt.

I am going to ask the State please prepare an order to be run by the special -- I'm sorry, the Federal Public Defenders Office for approval.

MR. OWENS: Okay. Could I get a transcript from today? Do you want me to submit an order?

THE COURT: Yes.

MR. OWENS: Okay; will do.

THE COURT: And also address the timing issue.

MR. OWENS: Yes, in line with you finding that it is -- or it's timely because the judgment was never final, but are you finding that it's successive and as an alternative basis there's no prejudice because *Hurst* doesn't mean these things?

THE COURT: Well, just basically finding that there's no prejudice. I mean --

MR. OWENS: No prejudice.

THE COURT: -- prejudice to the --

MR. OWENS: Okay.

THE COURT: -- State because basically the Court found that the capital scheme is not inconsistent with *Hurst*, and again, *Hurst* references *Ring* which they could have brought that relief several years prior but I just chose to go into the merits of the case because of --

MR. OWENS: Sure.

THE COURT: -- the time bars. But my suggestion would be to put the Court's findings on the timing issue to put it in the order. That way if you ever

want to bring it back up in front of the Nevada Supreme Court at least it's obviously there.

MR. OWENS: Oh, absolutely. They'll want that in there.

THE COURT: Because perhaps they're going to want --

MR. ANTHONY: We would definitely want to see that in there.

THE COURT: I mean it's kind of weird how it all played out and you know perhaps in some other cases the Supreme Court will issue a clarification on --

MR. OWENS: What I would like to do is along with these findings is submit an amended judgment. I guess it would be a second amended judgment but would differ from the last amended judgment in simply striking the language that says something to the effect of 'and an additional amount of restitution to be determined in the future.' If I --

THE COURT: That may be a suggestion if you want to ensure finality given the *Whitehead* and *Slaatte* cases.

MR. OWENS: You know, I don't agree with the Court that its necessary, but to avoid this issue in the future, and I'm all about doing what we can to avoid problems in the future, it won't help us with this case or this appeal going up, but for the next petition it might start the time bar. If the court later agrees with you that, yeah, the time for -- when your time bar never started then I'd like to get it started with an amended judgment so I'll submit that along with the findings.

THE COURT: It would be inappropriate for me to put my position there but I have a feeling the issue could be -- unless the Supreme Court issues some clarification it could be raised, because looking at old judgment of convictions it

seems to happen a lot where it's to be determined on certain things. So I guess there's always the potential for this issue to arise again so perhaps the Supreme Court should address it if they deem it appropriate.

MR. ANTHONY: And also, Your Honor, we would agree to the submission of an amended judgment consistent with what Mr. Owens is saying as well.

THE COURT: Yeah. Okay; thank you.

MR. OWENS: Okay. Thank you.

MR. ANTHONY: Thank you, Your Honor.

[Proceedings concluded at 11:12 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Cynthia Georgilas

CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

IN THE SUPREME COURT OF THE STATE OF NEVADA

*** * * * * * * * * ***

WILLIAM WITTER, Petitioner/Appellant, vs. TIMOTHY FILSON, et al., Respondents.	Supreme Court No. 73431 District Court Case No. C121975 (Death Penalty Habeas Corpus Case)

MOTION TO DISMISS STATE'S NOTICE OF APPEAL AND AMENDED NOTICE OF APPEAL

William Witter moves to dismiss the State's Notice of Appeal and Amended Notice of Appeal in Docket No. 73431. He bases this motion on the attached Points and Authorities and entire file in this matter.

DATED this 30th day of October, 2017.

Respectfully submitted,

/s/ David Anthony

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POINTS AND AUTHORITIES

I. INTRODUCTION

The Court lacks jurisdiction over the State's Notice of Appeal and Amended Notice of Appeal in Docket No. 73431 and must dismiss them.

On April 19, 2017, the district court heard arguments on Witter's habeas petition. Ex. 1. The court found: (1) Witter's habeas petition was not untimely because no final judgment of conviction had been filed; and (2) Witter's habeas petition lacked merit. Ex. 1 at 5, 12.

The district court ordered the State to prepare findings of fact and conclusions of law addressing both findings. Ex. 1 at 13

. The State raised the need to file an amended judgment to make the case final. Ex. 1 at 14 (the State telling the district court, "What I would like to do is along with these findings is submit an amended judgment."). The district court agreed and orally ordered the State to submit an amended judgment. Ex. 1 at 14.

A. The State Knowingly Failed to Comply with the District Court's Oral Order

The State submitted the findings of fact and conclusions of law to the district court and the court entered them on May 31, 2017 ("May 31, 2017 Order"). Ex. 2. However, the State did not comply with the district court's oral order to submit an

amended judgment. Ex. 3. See NRAP 4(b)(5)(C) (sanctions for failure to timely submit proposed order to district court).[1]

Witter accordingly filed a motion requesting the court enter an amended judgment. Ex. 4. Undersigned counsel contacted counsel for the State and learned the State had changed course and decided not to comply with the court's order to submit an amended judgment. Ex. 4 at Exhibit 2 at 2 to Notice of Motion and Motion for Order (Declaration of David Anthony).

At the hearing on Witter's motion, the State asked for more time to respond because it had not filed a written opposition. Ex. 3 at 2. The district court granted the State nine days to file an opposition to Witter's motion. Id. at 3. The court chided, "there should've been a judgment of conviction" and "I don't understand why the State hasn't filed an amended judgment of conviction." Id. at 3, 4.

At the next hearing, the State explained it had changed course and decided not to comply with the district court's order. Ex. 5. However, the State did not file a motion for reconsideration or request the court reduce to writing its order to submit an amended judgment. In response to the State's attempt to re-litigate the issue, the

[1] The district court judge in Witter's habeas proceeding has standing orders that require submission of a proposed order within ten days of notification of a ruling under EDCR 7.21. Eighth Judicial District Court, Department XXIII Guideline, "Submission of Orders" (Oct. 30, 2017, 7:57 A.M.), http://www.clarkcountycourts.us/departments/judicial/civil-criminal-divison/department-xxiii/.

court deduced the State "misunderstood the distinction between leaving it in the State's discretion versus an order from the Court." Ex. 5 at 3. The court reiterated "there needs to be a JOC [judgment of conviction]. And I did not intend to make it a suggestion that the State could choose to comply or not comply with. So it is now, if everybody's clear, an order." Id.

Even after the district court repeated its order, the State failed to file a motion for reconsideration. The State also failed to request the court's order to submit an amended judgment be reduced to a written order so the State could take further steps to litigate the issue appropriately.

B. The State Filed an Improper Notice of Appeal and Amended Notice of Appeal

The State filed a Notice of Appeal in Docket No. 73431 to circumvent the district court's order to submit an amended judgment for the court to enter. See Ex. 6. The Notice of Appeal was filed in bad faith to divest the court of jurisdiction to enter the amended judgment of conviction.[2] The State's Notice of Appeal and Case Appeal Statement show it was not an aggrieved party. Ex. 6. The Notice of Appeal

[2] The State's notice of appeal was accepted for filing at 9:04 a.m. on June 30, 2017. Ex. 6. The State notified undersigned counsel at 8:43 a.m. the same day that the State intended to submit the amended judgment of conviction to the district court. Ex. 9.

purported to appeal from "the May 31, 2017 Order denying fourth Petition for Writ of Habeas Corpus." Ex. 6 (emphasis added).

On July 20, 2017, although the May 31, 2017 Order granted Witter nothing, the State filed an Amended Notice of Appeal, purporting to appeal "the May 31, 2017 Order granting in part the fourth Petition for Writ of Habeas Corpus and the Amended Judgment of Conviction filed on July 12, 2017 [("Amended Judgment")]." Ex. 7 at 1 (emphasis added).

The Court lacks jurisdiction over both the State's Notice of Appeal and Amended Notice of Appeal. Although the State's Notice of Appeal appeals from the May 31, 2017 Order, that order did not aggrieve the State. And although the State's Amended Notice of Appeal purports to appeal from the Amended Judgment, the State has no right to file a direct appeal from a criminal judgment. Finally, the State filed the Notice of Appeal and Amended Notice of Appeal for improper purposes.

II. THE COURT SHOULD DISMISS BOTH THE STATE'S NOTICE OF APPEAL AND AMENDED NOTICE OF APPEAL FOR LACK OF JURISDICTION

A. The Complete Denial of Witter's Habeas Petition Did Not Aggrieve the State

"[T]his court has jurisdiction to entertain an appeal only where the appeal is brought by an aggrieved party." Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 446-47, 874 P.2d 729, 734 (1994) (noting court's "restrictive view of those persons

that have standing to appeal"); NRAP 3A. A party is "aggrieved" when its claims were litigated to a judgment against it. Vinci v. Las Vegas Sands, Inc., 115 Nev. 243, 246, 984 P.2d 750, 752 (1999). But "[t]he fact that the [lower court] reached its decision through an analysis different than this Court might have used does not make it appropriate for this Court to rewrite the [lower] court's decision, or for the prevailing party to request us to review it." California v. Rooney, 483 U.S. 307, 311 (1987).

Because the May 31, 2017 Order denying Witter's habeas petition did not aggrieve the State, the State cannot appeal from it. The May 31, 2017 Order granted the State's motion to dismiss Witter's habeas petition and denied that petition on the merits. As the party which drafted the May 31, 2017 Order, the State cannot now be heard to advance a contrary position before this Court. Cf. Am. First Fed. Credit Union v. Soro, __ Nev. __, 359 P.3d 105, 106 (2015) (contract "should be construed against the drafter") (internal quotation marks omitted). Thus, the State's claims were not litigated to a judgment against it.

At most, the State has an "alternative ground for affirmance" of a district court decision "entirely favorable" to the State, i.e., that Witter's petition is untimely. Cf. Recontrust Co. v. Zhang, 130 Nev. __, 317 P.3d 814, 819 (2014) (internal quotation marks omitted). However, this Court has rejected the argument that a party's desire

to advance alternative grounds for affirmance makes that party aggrieved for filing a notice of appeal. Id. Because the May 31, 2017 Order did not aggrieve the State, the Court should dismiss the State's Notice of Appeal in Docket No. 73431.

B. The State Has No Right to Appeal From a Judgment of Conviction

"Where no statutory authority to appeal is granted, no right exists." Kokkos v. Tsalikis, 91 Nev. 24, 25, 530 P.2d 756, 757 (1975). Here, the State filed an Amended Notice of Appeal purporting to appeal from the Amended Judgment, but the State lacks the right to appeal it. The Amended Judgment is pursuant to a jury verdict convicting Witter and sentencing him to death. The State lacks statutory authority to directly appeal from the Amended Judgment and to appeal a criminal conviction and sentence at all. NRS 177.015(3) ("The defendant only may appeal from a final judgment or verdict in a criminal case."); NRAP 3B. Because the State has no right to appeal, the Court should dismiss the State's Amended Notice of Appeal in Docket No. 73431.[3]

[3] The State also lacked statutory authority to file an Amended Notice of Appeal because Nevada Rule of Appellate Procedure 4 permits amended notices of appeal after district courts rule on Rule 50(b), 52(b), and 59 motions only. NRAP 4(a)(4). Otherwise, a notice of appeal "must be docketed separately from the appeal from the final judgment when it challenges an independently appealable order." Weddell v. Stewart, 127 Nev. 645, 652, 261 P.3d 1080, 1085 (2011) (emphasis added).

C. The State Filed Both its Notice of Appeal and Amended Notice of Appeal for Improper Purposes

A party appeals improperly where its "status is nothing more than a dissatisfied party." See Kenney v. Hickey, 60 Nev. 187, 189, 105 P.2d, 192, 193 (1940). The State is nothing more than dissatisfied and is not an aggrieved party. The district court found that no final judgment existed and orally ordered the State to submit an amended judgment on April 19, 2017. The State delayed doing so for over two months. On June 30, 2017, the State submitted the Amended Judgment and on the same day, filed the Notice of Appeal in Docket No. 73431. The State's notice was therefore filed in defiance of the district court's order. It was not filed because the State was an aggrieved party with standing to appeal.

If the State seeks to challenge the district court's order to submit an amended judgment, the State should have requested a written order. Rust v. Clark Cty. Sch. Dist., 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("Appellant, rather than filing a premature notice of appeal, should have requested a written judgment from the district court."). Rust dismissed a premature notice of appeal, and thus it failed to vest jurisdiction in this Court. Id. Here, the State's Notice of Appeal and Amended Notice of Appeal is frivolous. Even the State acknowledges the invalidity of its Notice of Appeal when it characterizes the issue for review in its motion for consolidation as whether the district court erred in "requir[ing] the filing of an

amended judgment for lack of finality." Motion at 3. However, the findings of fact and conclusions of law drafted by the State that were adopted by the district court do not require the State to submit an amended judgment. The State's own characterization of its grievance shows precisely why its failure to litigate the issue properly cannot be saved by its self-designation as a "cross-appellant."

The district court has not entered any judgment against the State. The State's invalid Notice of Appeal and Amended Notice of Appeal neither divested the district court of jurisdiction nor vested jurisdiction in this Court. See Ex. 8, Memorandum, United States v. Wilkes, Docket No. 1:04-CR-0287, United States District Court for the Middle District of Pennsylvania (May 12, 2005) at 1 ("The district court may continue to exercise authority over a case after the filing of a notice of an appeal . . . if the appeal is patently frivolous.") (citing extensive authorities for the proposition that a frivolous notice of appeal does not divest the district court of jurisdiction).

Moreover, the State may seek a writ ordering the district court to vacate its order for abuse of discretion or exceeding its jurisdiction. State v. Eighth Judicial Dist. Court ex rel. Cty. of Clark (Riker), 121 Nev. 225, 227, 112 P.3d 1070, 1071 (2005). Counsel for the State knows that mandamus relief could provide an avenue for review because he was counsel for the State in Riker. As a policy matter, parties should be encouraged to properly litigate decisions they believe are adverse to them

in the correct manner, rather than allowing them to file frivolous notices of appeal to arrest the court proceedings. This Court should not sanction the filing of invalid notices of appeal to bless a party's contempt of the district court's lawful orders.

Because the State filed its Notice of Appeal and Amended Notice of Appeal in Docket No. 73431 for improper purposes, the Court must dismiss them.

III. CONCLUSION

Witter therefore requests that this Court dismiss both the State's Notice of Appeal and Amended Notice of Appeal in Docket No. 73431. In addition, the Court should designate Witter as Appellant in Docket No. 73431 and the State as the Respondent.

DATED this 30th day of October, 2017.

Respectfully submitted,

/s/ David Anthony

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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 MOTION TO DISMISS STATE'S NOTICE OF APPEAL AND AMENDED NOTICE OF APPEAL 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