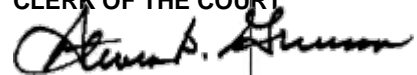


EXHIBIT 9

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

1 I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON  
2 (Felony); COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON  
3 (Felony); COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY  
4 WEAPON (Felony); and COUNT IV – BURGLARY (Felony), in violation of NRS  
5 §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury  
6 verdict was returned on or about the 28th day of June, 1995. Thereafter, the same  
7 trial jury, deliberating in the penalty phase of said trial, in accordance with the  
8 provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating  
9 circumstances in connection with the commission of said crime, to-wit:

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

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

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

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

18 That on or about the 13th day of July, 1995, the Jury unanimously found,  
19 beyond a reasonable doubt, that there were no mitigating circumstances sufficient to  
20 outweigh the aggravating circumstance or circumstances, and determined that the  
21 Defendant's punishment should be Death as to COUNT I – MURDER OF THE FIRST  
22  
23

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

3 WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being  
4 present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and  
5 KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy  
6 District Attorney, also being present; the above-entitled Court did adjudge Defendant  
7 guilty thereof by reason of said trial and verdict and, in addition to the \$25.00  
8 Administrative Assessment Fee, SENTENCED Defendant, as follows: As to COUNT  
9 I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON,  
10 Defendant was sentenced to DEATH by lethal injection; as to COUNT II – ATTEMPT  
11 MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to  
12 TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT  
13 MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada  
14 Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III –  
15 ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant  
16 was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the  
17 ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20)  
18 YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON,  
19 said sentence imposed in Count III to run consecutive to the sentence imposed in  
20 Count II; as to COUNT IV – BURGLARY, Defendant was sentenced to TEN (10)  
21 YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to  
22 run consecutive to the sentence imposed in Count III. Defendant is to pay  
23



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

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

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

7  
8   
9 STEFANY MILEY  
DISTRICT COURT JUDGE 

10  
11 STEVEN B. WOLFSON  
DISTRICT ATTORNEY  
Nevada Bar #001565

12 BY 

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

1                                    CERTIFICATE OF ELECTRONIC FILING

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

4                                    DAVID ANTHONY  
5                                    Email: David\_Anthony@fd.org

6                                    TIFFANY L. NOCON  
7                                    Email: Tiffany\_Nocon@fd.org

8                                    *By: [Signature]*  
9                                    \_\_\_\_\_  
   Employee, District Attorney's Office

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13 SSO//ed  
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## 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**

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

**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.”<sup>1</sup> The district court may proceed if the appeal is patently frivolous.<sup>2</sup> It may proceed if the notice relates to a non-appealable order or judgment.<sup>3</sup> It may also proceed if the appeal is taken in bad faith and would result in unwarranted delay.<sup>4</sup> The notice of appeal filed by

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<sup>1</sup> Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58-59 (1982) (per curiam).

<sup>2</sup> 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)).

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

<sup>4</sup> 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 Profl & 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.<sup>5</sup> Trial will clearly commence within the seventy-day period prescribed by the Speedy Trial Act. The appeal is frivolous.<sup>6</sup>

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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<sup>5</sup> 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).

<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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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<sup>7</sup> 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).

<sup>8</sup> 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.”<sup>9</sup> The court will not countenance these efforts.<sup>10</sup>

This case will proceed to trial and judgment despite the notice of appeal.<sup>11</sup> 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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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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*.<sup>12</sup>

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

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<sup>12</sup> 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**

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

**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.

Electronically Filed  
Jul 20 2017 10:15 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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 20<sup>th</sup> 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

### 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](mailto: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



Electronically Filed  
Jul 11 2017 11:05 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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 30<sup>th</sup> 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



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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

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

3     STEVEN S. OWENS  
4     Chief Deputy District Attorney  
5     Nevada Bar #004352  
6     Clark County District Attorney  
7     Regional Justice Center  
8     200 Lewis Avenue  
9     Post Office Box 552212  
10    Las Vegas, Nevada 89155-2212  
11    (702) 671-2750

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

12    Counsel for Appellant  
13    State of Nevada

Counsel for Respondent  
William Witter

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

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

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

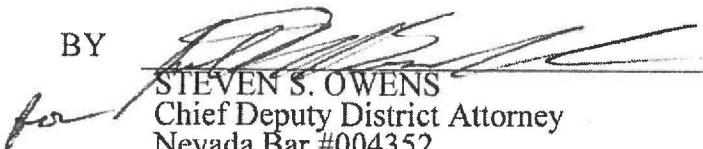
20           9.     Date proceedings commenced in the district court:

21                   Information, filed January 21, 1994

22           DATED this 30<sup>th</sup> day of June, 2017.

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

26                   BY

27                   for   
28                   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 Judicial 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



1 RTRAN

2  
3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

7 STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 WILLIAM L. WITTER,

11 Defendant.  
12

CASE NO. 94C117513

DEPT. NO. XXIII

TRANSCRIPT OF PROCEEDINGS

13  
14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE  
15

16 WEDNESDAY, JUNE 28, 2017  
17

18 DEFENDANT'S MOTION FOR ORDER

19 APPEARANCES:

20 For the Plaintiff:

JONATHAN VAN BOSKERCK, ESQ.  
Deputy District Attorney

21  
22 For the Defendant:

TIFFANY L. NOCON, ESQ.  
DAVID S. ANTHONY, ESQ.  
Deputy Federal Public Defenders

23  
24  
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

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

2  
3 THE MARSHAL: Top of page 1, C117513, Witter.

4 THE COURT: Hi. Hi, you guys.

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

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

10 THE COURT: Okay, so --

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

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

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

22 THE COURT: But you can still raise that issue.

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

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

4 THE COURT: Okay.

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

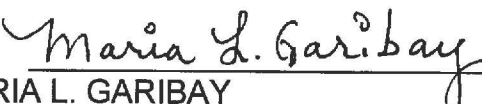
7 THE COURT: Well, I guess Mr. Owens misunderstood the distinction  
8 between leaving it in the State's discretion versus an order from the Court. And  
9 perhaps it's the way I phrased it. I recognize that you're trying to preserve issues on  
10 appeal but many of those issues are already in the record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

15 MR. ANTHONY: Thank you, Your Honor.

16 PROCEEDINGS CONCLUDED AT 9:37 A.M.

17 \* \* \* \* \*

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

20   
21 MARIA L. GARIBAY  
22 Court Recorder/Transcriber  
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25



# EXHIBIT 4

# EXHIBIT 4



1 NOTM  
RENE L. VALLADARES  
2 Federal Public Defender  
DAVID ANTHONY  
3 Assistant Federal Public Defender  
Nevada State Bar No. 7978  
4 David\_Anthony@fd.org  
TIFFANY L. NOCON  
5 Assistant Federal Public Defender  
Nevada State Bar No. 14318C  
6 Tiffany\_Nocon@fd.org  
411 E. Bonneville Avenue, Ste. 250  
7 Las Vegas, NV 89101  
(702) 388-6577  
8 (702) 388-5819 (fax)

9 Attorneys for Petitioner

10  
11 DISTRICT COURT  
CLARK COUNTY, NEVADA

12 WILLIAM WITTER,

13 Petitioner,

14 v.

15 TIMOTHY FILSON, Warden, Ely State  
Prison, and ADAM PAUL LAXALT,  
16 Attorney General for the State of Nevada.

17 Respondents.

Case No. C117513  
Dept. No. XXIII

NOTICE OF MOTION AND MOTION  
FOR ORDER

(Death Penalty Habeas Corpus Case)

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

21 ///

22 ///

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

3 DATED this 7th day of June, 2017.

4 Respectfully submitted,  
5 RENE L. VALLADARES  
6 Federal Public Defender

7 /s/ David Anthony  
8 DAVID ANTHONY  
9 Assistant Federal Public Defender

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

Respectfully submitted,  
RENE L. VALLADARES  
Federal Public Defender

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

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On January 11, 2017, Mr. Witter filed a Petition for a Writ of Habeas Corpus.  
4 He explained that this petition was not subject to procedural default because, inter  
5 alia, the amended judgment of conviction entered against him on August 11, 1995,  
6 was not a final appealable judgment as it failed to specify the amount of restitution.  
7 See Whitehead v. State, 128 Nev. \_\_\_, 285 P.3d 1053 (2012) (en banc); Slaatte v. State,  
8 129 Nev. \_\_\_, 298 P.3d 1170 (2013) (per curiam).

9 This Court heard argument on Mr. Witter's petition on April 19, 2017. See Ex.  
10 3 (Transcript of Proceedings). This Court agreed with Mr. Witter's position regarding  
11 the effect of Whitehead and Slatte. See id. at 2-3. This Court expressly found,  
12 consistent with Whitehead and Slaate, that the prior amended judgment of conviction  
13 was not final because it imposed "an additional amount [of restitution] to be  
14 determined at a later date." Id. The Court subsequently denied Mr. Witter's petition  
15 on the merits. See id. at 12.

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

21 MR. OWENS: What I would like to do is along with these findings is  
22 submit an amended judgment. I guess it would be a second amended  
23 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 –

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

2 MR. OWENS: You know, I don't agree with the Court that its necessary,  
3 but to avoid this issue in the future, and I'm all about doing what we can  
4 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  
5 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.

6 Id. at 14.

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

12 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  
13 Judgment of Conviction, although it does set a restitution amount, it  
also says an additional amount to be determined at a later date.  
14 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  
15 (2013) ("Because the judgment of conviction contemplates restitution in  
an uncertain amount, it is not final and therefore is not appealable.").

16 See id. at 2.

17 Contrary to its representations to this Court, however, the State did not submit  
18 an amended judgment. Mr. Witter, through counsel, inquired about this omission on  
19 May 31, 2017, and offered a proposed second amended judgment consistent with the  
20 State's intent to "strik[e] the language that says something to the effect of 'and an  
21 additional amount of restitution to be determined in the future.'" See Ex. 1 (Decl. of  
22 Assistant Federal Public Defender David Anthony). The next day, June 1, 2017, the  
23

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

3 **II. A SECOND AMENDED JUDGMENT OF CONVICTION MUST BE**  
4 **ENTERED**

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

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

17 ///

18 ///

1   **III.   CONCLUSION**

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

4           DATED this 7th day of June, 2017.

5                               Respectfully submitted,  
6                               RENE L. VALLADARES  
                                  Federal Public Defender

7                               /s/ David Anthony  
8                               DAVID ANTHONY  
                                  Assistant Federal Public Defender

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



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

/s/ Stephanie Young

# EXHIBIT 1

# EXHIBIT 1

1 **AJOC**

2 RENE L. VALLADARES

3 Federal Public Defender

4 Nevada Bar No. 11479

5 DAVID ANTHONY

6 Assistant Federal Public Defender

7 Nevada Bar No. 7978

8 David\_Anthony@fd.org

9 411 E. Bonneville, Ste. 250

10 Las Vegas, Nevada 89101

11 (702) 388-6577

12 (702) 388-5819 (Fax)

13 Attorneys for William Witter

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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

1 WHEREAS, the Defendant WILLIAM WITTER, aka William Lester Witter,  
2 was tried before a Jury and the Defendant was found guilty of the crimes of COUNT  
3 I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON  
4 (Felony); COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON  
5 (Felony); COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY  
6 WEAPON (Felony); and COUNT IV – BURGLARY (Felony), in violation of NRS  
7 §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury  
8 verdict was returned on or about the 28th day of June, 1995. Thereafter, the same  
9 trial jury, deliberating in the penalty phase of said trial, in accordance with the  
10 provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating  
11 circumstances in connection with the commission of said crime, to-wit:

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

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

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

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

20 That on or about the 13th day of July, 1995, the Jury unanimously found,  
21 beyond a reasonable doubt, that there were no mitigating circumstances sufficient to  
22 outweigh the aggravating circumstance or circumstances, and determined that the  
23

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

4 WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being  
5 present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and  
6 KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy  
7 District Attorney, also being present; the above-entitled Court did adjudge Defendant  
8 guilty thereof by reason of said trial and verdict and, in addition to the \$25.00  
9 Administrative Assessment Fee, SENTENCED Defendant, as follows: As to COUNT  
10 I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON,  
11 Defendant was sentenced to DEATH by lethal injection; as to COUNT II – ATTEMPT  
12 MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to  
13 TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT  
14 MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada  
15 Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III –  
16 ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant  
17 was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the  
18 ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20)  
19 YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON,  
20 said sentence imposed in Count III to run consecutive to the sentence imposed in  
21 Count II; as to COUNT IV – BURGLARY, Defendant was sentenced to TEN (10)  
22 YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to  
23

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

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

7 DATED this \_\_\_\_ day of June, 2017.

8 \_\_\_\_\_  
9 District Judge

# EXHIBIT 2

# EXHIBIT 2

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

2 5. On May 31, 2017, still not having received any information about the amended  
3 judgment of conviction, I e-mailed Mr. Owens inquiring about its status and attached  
4 a proposed amended judgment of conviction conforming to the change Mr. Owens  
5 suggested at the hearing.  
6

7 6. On June 1, 2017, Mr. Owens responded that he did not feel that it was  
8 necessary to file an amended judgment of conviction, and did not intend to do so at  
9 the present time.  
10

11 I declare under penalty of perjury that the foregoing is true and correct and this  
12 declaration was executed on June 7, 2017, in Las Vegas, Nevada.  
13

14 /s/ David Anthony   
15 DAVID ANTHONY  
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# EXHIBIT 3

# EXHIBIT 3



1 RTRAN

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA  
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6  
7 STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 WILLIAM WITTER,

11 Defendant.  
12  
13

CASE NO. C117513

DEPT. NO. XXIII

TRANSCRIPT OF PROCEEDINGS

14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

15 MONDAY, JUNE 19, 2017

16  
17 **DEFENDANT'S MOTION FOR ORDER**

18 APPEARANCES:

19  
20 For the Plaintiff:

ROBERT BRAD TURNER, ESQ.  
Chief Deputy District Attorney

21  
22 For the Defendant:

TIFFANY L. NOCON, ESQ.  
HEATHER FRALEY, ESQ.  
Asst. Federal Public Defenders

23  
24  
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

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

2  
3 THE MARSHAL: Page 1, C117513, Witter.

4 THE COURT: Hi.

5 MS. NOCON: Good morning, Your Honor.

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

9 THE COURT: Uh-huh.

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

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

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

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

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

4 MS. NOCON: Let me see the calendar.

5 MS. FRALEY: The 20 days from today -- Heather Fraley from the Federal  
6 Public Defender, Your Honor. So they're asking for 20 days from today to  
7 respond to our motion and then this Court would have to set on calendar after  
8 that. According to the findings of facts that Your Honor already entered, our  
9 notice of appeal date from the notice of that would be July the 5<sup>th</sup>. And so  
10 even though yes we agree with Your Honor that technically we need a new  
11 judgment of conviction, to preserve that issue we would have to file by July the  
12 5<sup>th</sup>. So we would just like to have this judgment of conviction issue resolved  
13 prior to that appeal date of July 5<sup>th</sup> if possible.

14 THE COURT: Okay. Why don't we do the 20<sup>th</sup> of June?

15 MR. TURNER: Yes, Judge.

16 MS. NOCON: The 20<sup>th</sup> of June?

17 THE COURT: June 20<sup>th</sup>.

18 MS. NOCON: Yes, Your Honor.

19 THE COURT: Okay.

20 THE CLERK: I'm sorry, you said the 28<sup>th</sup>?

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

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

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

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

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

7 THE COURT: Okay. So let's do the 20<sup>th</sup> of June at 9:30.

8 MS. NOCON: Thank you, Your Honor.

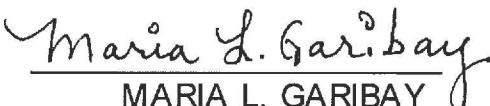
9 MS. FRALEY: Thank you, Judge.

10 MR. TUNER: Thank you, Judge.

11 PROCEEDINGS CONCLUDED AT 11:01 A.M.

12 \* \* \* \* \*

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

15   
16 MARIA L. GARIBAY  
17 Court Recorder/Transcriber  
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# EXHIBIT 2

# EXHIBIT 2



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 19<sup>th</sup> 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



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.

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DATED this 23<sup>rd</sup> day of May, 2017.

22

BY

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

1                                    **CERTIFICATE OF ELECTRONIC FILING**

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

4  
5                                    DAVID ANTHONY  
                                     Email: David\_Anthony@fd.org

6                                    TIFFANY L. NOCON  
                                     Email: Tiffany\_Nocon@fd.org  
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8  
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10                                   By: E. Davis  
11                                   Employee, District Attorney's Office  
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## **Eileen Davis**

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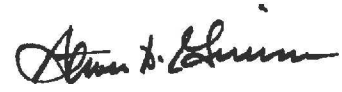
**From:** Eileen Davis  
**Sent:** Wednesday, May 10, 2017 10:24 AM  
**To:** david\_anthony@fd.org; tiffany\_nocon@fd.org  
**Cc:** Steven Owens; Eileen Davis  
**Subject:** William Witter, 94C117513.  
**Attachments:** Witter, William, 94C117513, FFCL&O..pdf

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



CLERK OF THE COURT

1 RTRAN

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA  
5

6  
7 THE STATE OF NEVADA,

CASE NO.: 94C117513

8  
9 Plaintiff,

DEPT. XXIII

10 vs.

**TRANSCRIPT OF PROCEEDINGS**

11 WILLIAM L. WITTER,

12 Defendant.  
13

14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

15 WEDNESDAY, APRIL 19, 2017

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

17 ***DEFENDANT'S OPPOSITION TO STATE'S RESPONSE AND MOTION TO***  
18 ***DISMISS***

19 **APPEARANCES:**

20  
21 For the State:

STEVEN S. OWENS, ESQ.  
Chief Deputy District Attorney

22  
23 For the Defendant:

DAVID ANTHONY, ESQ.  
TIFFANY L. NOCON, ESQ.  
Assistant Federal Public Defenders

24  
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

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

2  
3 THE RECORDER: Page 16, C117513; Witter.

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

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

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

12 THE COURT: Okay.

13 MR. ANTHONY: You want to introduce yourself?

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

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

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

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

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

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

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

17 THE COURT: Let me look at it.

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

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

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



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

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

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

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

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

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

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

12 MR. OWENS: Okay.

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

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

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

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

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

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

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

16 MR. ANTHONY: Delaware; correct.

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

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

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

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

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

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

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

3 MR. ANTHONY: Could --

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

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

11 THE COURT: Yes.

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

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

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

3 MR. ANTHONY: Correct, Your Honor.

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

11 MR. ANTHONY: Could I address that aspect --

12 THE COURT: Yes, please.

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

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

17 THE COURT: Okay.

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

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

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

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

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

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

5 THE COURT: Okay.

6 Anything else from the State?

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



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

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

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

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

20 Thank you, Your Honor.

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

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

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

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

7 THE COURT: Yes.

8 MR. OWENS: Okay; will do.

9 THE COURT: And also address the timing issue.

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

14 THE COURT: Well, just basically finding that there's no prejudice. I mean  
15 --

16 MR. OWENS: No prejudice.

17 THE COURT: -- prejudice to the --

18 MR. OWENS: Okay.

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

23 MR. OWENS: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: Yeah. Okay; thank you.


8 MR. OWENS: Okay. Thank you.

9 MR. ANTHONY: Thank you, Your Honor.

10  
11 [Proceedings concluded at 11:12 a.m.]

12 \* \* \* \* \*

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

15   
16 CYNTHIA GEORGILAS  
17 Court Recorder/Transcriber  
18 District Court Dept. XVII  
19  
20  
21  
22  
23  
24  
25

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \* \*

WILLIAM WITTER,  
  
Petitioner/Appellant,  
  
vs.  
  
TIMOTHY FILSON, et al.,  
  
Respondents.

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Supreme Court No. 73431  
District Court Case No. 17-0001  
(Death Penalty Habeas Corpus Case)

Electronically Filed  
Oct 31 2017 03:12 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**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

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).<sup>1</sup>

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

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<sup>1</sup> 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/departments-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.<sup>2</sup> The State’s Notice of Appeal and Case Appeal Statement show it was not an aggrieved party. Ex. 6. The Notice of Appeal

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<sup>2</sup> 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.<sup>3</sup>

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<sup>3</sup> 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:

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