

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

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THE STATE OF NEVADA,  
Appellant/Cross-Respondent,  
v.  
WILLIAM LESTER WITTER,  
Respondent/Cross-Appellant.

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Nov 03 2017 08:18 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

CASE NO: 73431

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

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and hereby responds to Respondent/Cross-Appellant's Motion to Dismiss State's Notice of Appeal and Amended Notice of Appeal. This response is based on the following memorandum and all papers and pleadings on file herein.

Dated this 2<sup>nd</sup> day of November, 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 Clark County District Attorney

## **MEMORANDUM**

What should have been a straightforward and relatively simple denial of a successive habeas petition, has unfortunately spawned multiple notices of appeal by both parties resulting in two separate appeals and much confusion. For purposes of clarity and simplicity, the State has moved to consolidate the two appeals, but now Witter seeks to dismiss the State's instant appeal to which the State now responds.

The multiple notices of appeal by both parties stem from a most unusual ruling by the district court judge below – she claimed that she was denying habeas relief, but then ordered the filing of an Amended Judgment which granted partial relief to Witter by removing an order for restitution. How this came about is the subject of some disagreement. From the hearing on April 19, 2017, the State understood that the judge had determined that there was never any final Judgment of Conviction in the case because restitution had been imposed in an uncertain amount, and therefore the one-year time bar had never started to run. Exhibit 1.<sup>1</sup> For that reason, the judge believed the petition was not procedurally barred but still denied habeas relief based on the merits. *Id.* The State's proposed findings reflected this understanding of the judge's ruling. Exhibit 2.

The State agrees that if that had been the end of the matter, then it was not an aggrieved party and the State had no intention nor statutory authority to appeal.

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<sup>1</sup> Numbered exhibits refer to those attached to Witter's Motion to Dismiss Appeal

Habeas had been denied and the district court's erroneous rationale that there was no final judgment in the case could be corrected by this Court in the context of Witter's appeal. "[I]f a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal". Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970). See Bellon v. State, 121 Nev. 436, 443-44, 117 P.3d 176, 180 (2005) (noting that trial court's decision may be upheld if court reached right result even though it was based on incorrect grounds). But that was not the end of the matter.

After the proposed findings of fact had been served on Witter and then signed and filed by the judge, Witter filed a Motion for Order which requested the filing of an Amended Judgment of Conviction to remove the uncertain amount of restitution. Exhibit 4. The basis for the motion was that Witter's counsel believed the State had been ordered to submit and file the Amended Judgment as part of the prior habeas ruling. Id. In its opposition, the State acknowledged that it had orally requested permission to file an Amended Judgment for its own purposes in light of the court's ruling (so as to start the time bars for future habeas filings), but had subsequently reconsidered that request and no longer believed it was necessary. Exhibit A attached hereto. The transcript from denial of habeas on April 19, 2017, supports the State's interpretation that the filing of an Amended Judgment was permissive and, "may be a suggestion if you want to ensure finality . . . ." Exhibit 1, p. 14.

Nonetheless, at the hearing on Witter's Motion for Order, the judge held that the State misunderstood the court's ruling and that the judge was in fact ordering the filing of an Amended Judgment. Exhibit 5.

The State filed a Notice of Appeal, not in bad faith or an improper purpose, but to protect its interests because the Amended Judgment granted relief to Witter by removing an order for restitution and potentially rendering all prior rulings in this case for the past 20 years a nullity. Exhibit 6 and 9. The Amended Judgment may also have implications for resetting federal habeas time bars. If the judge ordered the filing of the Amended Judgment upon motion of Witter and within the context of the habeas petition, then the State is an aggrieved party per NRS 34.575(2) and may appeal from the granting of partial habeas relief. This was the position of Witter below and the ruling of the district court judge. But if the Amended Judgment is not part of the habeas ruling and was ordered as an independent decision as Witter now seems to be arguing on appeal, then there was no authority for the judge's action and the State's remedy may very well be mandamus instead. Only if this Court dismisses the State's appeal can the State be assured it has no adequate remedy at law and may proceed with an extraordinary petition. How this Court construes the judge's rulings below will determine not only the propriety of the State's appeal but also the body of law and authority, or lack thereof, applicable to the entry of the Amended Judgment.

WHEREFORE, the State respectfully opposes dismissal of its appeal.

Dated this 2<sup>nd</sup> day of November, 2017.

Respectfully submitted,

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

BY */s/ Steven S. Owens*

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 2, 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  
Assistant Federal Public Defender

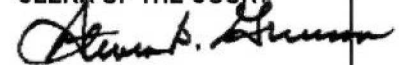
STEVEN S. OWENS  
Chief Deputy District Attorney

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

SSO//ed

EXHIBIT A

EXHIBIT A



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

9 WILLIAM WITTER, )

10 Petitioner, )

CASE NO: 94C117513

11 -vs- )

DEPT NO: IV

12 THE STATE OF NEVADA, )

13 Respondent. )

14 **OPPOSITION TO MOTION**

15 COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney,  
16 through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits this  
17 Opposition to Motion.

18 This opposition is made and based upon all the papers and pleadings on file herein, the  
19 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
20 deemed necessary by this Honorable Court.

21 **POINTS AND AUTHORITIES**

22 In his motion filed on June 7, 2017, Witter requests entry of an amended judgment of  
23 conviction in connection with his recently denied habeas petition. Written findings denying  
24 the habeas petition have already been signed and were filed on May 31, 2017. When the  
25 habeas petition was argued in court on April 19, 2017, this court held that the time bars did  
26 not apply because the prior judgment of conviction had ordered restitution in an uncertain  
27 amount. This court went on to deny the petition on the merits and asked the State to prepare  
28 the findings. In response, it was the State's prosecutor, not Witter's counsel, who requested

1 permission to submit an amended judgment curing the alleged defect by striking the uncertain  
2 restitution order so as to start the time bars for future habeas filings in light of the court's  
3 ruling. The court agreed, "that may be a suggestion if you want to ensure finality given the  
4 Whitehead and Slatte cases." Transcript, 4/19/2017, p. 14.

5 However, after having drafted the findings to deny the habeas petition, the State's  
6 prosecutor no longer believes an amended judgment is necessary to start the time bars or to  
7 procedurally bar future habeas filings. This court's reasoning and determination regarding the  
8 nonfinality of the prior judgment with its uncertain restitution award, is fully set forth in the  
9 written findings and the issues are preserved for appeal. Accordingly, the State did not prepare  
10 or submit an amended judgment as it had requested permission to do. The transcript from  
11 April 19, 2017, shows that the amended judgment was merely permissive at the State's request  
12 and for the State's unique purpose, and had not been affirmatively "ordered" by the court or  
13 requested by the defense as part of any kind of habeas relief as is now asserted. At most,  
14 Witter's counsel simply agreed to the submission of an amended judgment, "consistent with  
15 what Mr. Owens is saying." Id., at p. 15. But at no time in his petition, in his pleadings, or at  
16 argument did Witter's counsel request the remedy of an amended judgment to cure the  
17 restitution defect.

18 Now in the instant motion, Witter's counsel for the first time is demanding the entry of  
19 an amended judgment of conviction for his own purposes in addition to the written findings  
20 already filed. Witter claims that the Nevada Supreme Court is "without jurisdiction to consider  
21 any appeal of Mr. Witter's case until the deficiency is cured." Motion, p. 6. That's utter  
22 nonsense. In Whitehead, the restitution defect in the judgment did not mean there was no  
23 jurisdiction for the subsequent habeas appeal, but rather that the district court was required to  
24 reach the merits of the habeas petition rather than applying the procedural bars. Whitehead v.  
25 State, 128 Nev. \_\_\_, 285 P.3d 1053 (2012). That is exactly what this court has done. Although  
26 the Court in Slaatte may have dismissed the appeal in that case for lack of jurisdiction, that  
27 was an appeal directly from the nonfinal judgment of conviction pursuant to a guilty plea, not  
28 a habeas appeal as in the present case. See Slaatte v. State, 129 Nev. \_\_\_, 298 P.3d 1170, 1171

1 (2013). In a habeas appeal the final judgment being appealed is the Findings of Fact and  
2 Conclusions of Law, not the judgment of conviction. NRS 34.575. No amended judgment is  
3 necessary for Witter to pursue his appeal.

4 Just as the State has reconsidered its position regarding its need for an amended  
5 judgment, the defense apparently has also thought about it and decided an amended judgment  
6 would benefit them. There is probably some kind of tolling or restarting of the federal habeas  
7 bars that works to the defendant's advantage should an amended judgment be entered, even if  
8 that amended judgment is later vacated as unnecessary. An amended judgment can always be  
9 entered following Witter's appeal if the Nevada Supreme Court agrees that the habeas time  
10 bars never started running due to the defect in the judgment. But if an amended judgment is  
11 entered now before the Nevada Supreme Court has had an opportunity to review the issue, it  
12 may have irreversible consequences rendering all prior rulings in this case for the past 20 years  
13 a nullity. Because the defense did not ask for such relief in their petition and the petition has  
14 already been denied by a final written order, there is no authority for belatedly granting the  
15 defense such relief now by way of motion.

16 WHEREFORE, the State respectfully requests that the motion be denied.

17 Dated this 24<sup>th</sup> day of June, 2017.

18 Respectfully submitted,

19 STEVEN WOLFSON  
20 Clark County District Attorney  
Nevada Bar #001565

21  
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