

IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM WITTER,

Petitioner/Appellant,

vs.

TIMOTHY FILSON, et al.,

Respondents/Respondents.

Supreme Court No. 73431

District Court Case No. 17-0001

(Death Penalty Habeas Corpus Case)

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Elizabeth A. Brown
Clerk of Supreme Court

**REPLY TO RESPONSE TO MOTION TO DISMISS NOTICE
OF APPEAL AND AMENDED NOTICE OF APPEAL**

William Witter replies to the State's Response to his Motion to Dismiss Notice of Appeal and Amended Notice of Appeal in Docket No. 73431. He bases this Reply on the attached Points and Authorities and the entire file in this matter.

DATED this 21st day of November, 2017.

Respectfully submitted,

/s/ David Anthony

DAVID ANTHONY

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POINTS AND AUTHORITIES

I. THE STATE ACKNOWLEDGES THAT ITS NOTICE OF APPEAL FROM THE DISTRICT COURT'S DENIAL OF THE HABEAS PETITION MUST BE DISMISSED BECAUSE IT IS NOT AN AGGRIEVED PARTY.

Witter moved to dismiss the State's Notice of Appeal in Docket No. 73431 for lack of jurisdiction. The State's Response acknowledges that Witter's position is correct: the court's order, which the State drafted, shows that "it was not an aggrieved party and the State had no . . . statutory authority to appeal." Response at 2-3. The State's Notice of Appeal filed on July 11, 2017, expressly and exclusively appeals "from the May 31, 2017 Order denying fourth Petition for Writ of Habeas Corpus." Ex. 6 at 1. Therefore, the Court must dismiss the State's Notice of Appeal.

At most, the State argues the court's oral order for it to draft an amended judgment occurred "within the context of the habeas petition," Response at 4, but this does not mean the State has jurisdiction to appeal under NRS 34.575(2). NRS 34.575(2) permits the State to appeal only where "the district court grants the writ and orders the discharge or a change in custody of the petitioner." That did not occur here. Therefore, the State's argument about the "context" of the district court's order on the habeas petition versus its separate oral order for the State to submit an amended judgment is irrelevant.

II. THE STATE FAILS TO ADDRESS WITTER’S ARGUMENT THAT THERE IS NO STATUTORY JURISDICTION FOR ITS AMENDED NOTICE OF APPEAL UNDER NRS 177.015.

The State fails to address Witter’s argument that there is no statutory jurisdiction for its Amended Notice of Appeal from an amended judgment altering a restitution order under NRS 177.015. Instead of addressing Witter’s argument, the State conflates the issue of jurisdiction to appeal the restitution order under NRS 177.015 with jurisdiction to appeal under NRS 34.575(2). As explained above, NRS 34.575(2) governs grants of habeas petitions—not amended judgments changing the amounts of restitution. The State fails to address Witter’s arguments that an amended notice of appeal is not permitted under NRAP 4(a)(4) and Weddell v. Stewart, 127 Nev. 645, 652, 261 P.3d 1080, 1085 (2011). Motion at 7 n.3.¹

The State’s failure to address Witter’s arguments that there is no statutory jurisdiction for its Amended Notice of Appeal under NRS 177.015 should therefore operate as a concession that its amended notice must be dismissed. See, e.g., Polk v. State, 126 Nev. 180, 184-85, 233 P.3d 357, 359-61 (2010) (holding counsel for State waived Appellant’s argument for failing to address it, citing NRAP 31(d)). The State’s argument that it needed to “protect its interests,” Response at 4, even if true,

¹ The State did not even file its Amended Notice of Appeal in Docket No. 73444.

fails to address Witter's argument that there is no statutory jurisdiction for it to appeal under NRS 177.015.

III. THE STATE FAILS TO ADEQUATELY ADDRESS WITTER'S ARGUMENTS THAT ITS NOTICE OF APPEAL WAS FILED IN BAD FAITH.

Finally, the State fails to address Witter's argument that its Notice of Appeal was filed in bad faith as an act of contempt to frustrate the district court's ability to enter the amended judgment. The State's argument that it did not act "in bad faith" once again conflates the habeas action with its feigned concern for "its interests" in the removal of the uncertain restitution amount in connection with the amended judgment. Response at 4.² A party does not "protect its interests" by filing a frivolous notice of appeal in lieu of taking the steps necessary to properly litigate the district court's order to prepare an amended judgment.

The State does not address Witter's argument that it failed to seek a written order from the district court, See, e.g., Rust v. Clark Cty. Sch. Dist., 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987), and failed to seek review from this Court in an appropriate manner. See, e.g., State v. Eighth Judicial Dist. Court ex rel. Cty. of

² Witter notes that this is the first time that the State has expressed any concern about the restitution amount. It has accordingly waived any argument in this regard, even if there were jurisdiction for its appeal because the State did not raise this argument below. See, e.g., McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Clark (Riker), 121 Nev. 225, 227, 112 P.3d 1070, 1071 (2005). The State also fails to address its improper conduct after it purportedly learned that the district court's order was mandatory rather than permissive. Response at 3-4.

The State's failure to take the steps above repels its present argument that "[o]nly 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." Response at 4. To the contrary, the State should have known from the outset that there was no statutory jurisdiction for an appeal under NRS 177.015. See, e.g., State v. Hoxie, No. 65375, 2014 WL 3695300, at *1 (Nev. July 22, 2014) (dismissing appeal "[b]ecause no statute or court rule allows the State to appeal from an amended judgment of conviction").³ The totality of the circumstances here therefore show the State should have known that its conduct in the district court was inconsistent with obtaining the very review that it claims it could receive only after receiving guidance from this Court.

³ Witter realizes that this Court's rules do not allow citation to unpublished authority, issued before January 1, 2016, under NRAP 36(c)(3). He does so here not for the purposes of citing to persuasive authority, NRAP 36(c)(2), but to show that counsel for the State should have known of Hoxie as it is found in Westlaw, an "electronic database." NRAP 36(c)(3).

IV. CONCLUSION

For the foregoing reasons, Witter 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 the Appellant in Docket No. 73431 and the State as the Respondent.

DATED this 21st day of November, 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 21st day of November, 2017, electronic service of the foregoing REPLY TO RESPONSE TO 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/ Richard D. Chavez
An Employee of the
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