

IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM WITTER,

Defendant/Appellant,

vs.

STATE OF NEVADA,

Plaintiff/Appellee.

Supreme Court No. 73444
District Court Case No. 17-00011
(Death Penalty Case)

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Elizabeth A. Brown
Clerk of Supreme Court

OPPOSITION TO MOTION FOR CONSOLIDATION

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

DATED this 30th day of October, 2017.

Respectfully submitted,

/s/ David Anthony

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POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

II. THE COURT SHOULD DENY CONSOLIDATION

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

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

the filing of an amended judgment for lack of finality (SC # 73431).” Motion for Consolidation at 3. The State fails to cite to the part of the district court’s order requiring it to file an amended judgment. A review of the district court’s order, which the State drafted, shows there is nothing in the order requiring the State to do anything, much less to draft an amended judgment. 25 ROA 5741-43. Similarly, there is nothing in the amended judgment requiring the State to file an amended judgment.

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

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

jurisdiction for such an appeal. The State’s instant motion to consolidate is intended to obscure the fact it has no standing to appeal from either judgment. The State cannot cobble together standing to appeal from a consolidation motion that it does not otherwise have as a non-aggrieved party.

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

Because Docket Nos. 73431 and 73444 present different issues and arise from different facts, the Court should deny consolidation. Docket No. 73431 challenges the May 31, 2017 Order denying post-conviction relief under Nevada Revised Statutes, Chapter 34. Witter’s post-conviction proceedings involve the district

court's conclusions regarding the merits of Witter's claims based on Hurst v. Florida, 136 S. Ct. 616 (2016).

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

III. CONCLUSION

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

DATED this 30th day of October, 2017.

Respectfully submitted,

/s/ David Anthony

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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 OPPOSITION TO MOTION FOR CONSOLIDATION 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,
District of Nevada