

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WITTER,

Appellant,

vs.

STATE OF NEVADA,

Appellees.

Supreme Court No. ~~Electronically Filed~~
Jun 21 2018 11:48 a.m.
District Court Case No. ~~Elizabeth A. Brown~~
C17513
Clerk of Supreme Court

(Death Penalty Habeas Corpus
Case)

MOTION TO TRANSMIT COURT EXHIBITS

Appellant William Witter, through counsel, and pursuant to Supreme Court Rule 250(6)(c) and Nevada Rules of Appellate Procedure 10(b)(2), and 30(d) moves this Court to direct the clerk of the Clark County District Court to transmit certain color photographs (State's guilt-phase exhibits 10, 18, 19, 20, 21, 22, 23, 28, 35, 36, 41, and 51; State's penalty-phase exhibits 4, 6, 7, 10, and 11) to this Court for use when reaching a decision on the issues presented in Witter's appeal from conviction and sentence of death. These photographs were admitted at Witter's trial and their inclusion in the record on appeal is critical to this

Court's ability to fully and fairly consider claims raised in Witter's opening brief.

DATED this 21st day of June, 2018.

Respectfully submitted,

/s/ David Anthony
DAVID ANTHONY
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POINTS AND AUTHORITIES

I. DESIGNATING THE RECORD ON APPEAL

The creation of the record on appeal differs between non-capital and capital direct appeals. *See Evans v. State*, 117 Nev. 609, 642, 28 P.3d 498, 521 (2001). In non-capital direct appeals, the parties designate the record on appeal by compiling and submitting appendices to their briefs. *See Nevada Rules of Appellate Procedure* 10(b), 30. In capital cases, Supreme Court Rule 250(6)(c) provides that “[o]n direct appeal from a judgment of conviction and sentence of death, the clerk of the district court shall transmit as the record on appeal a certified copy of the complete record made and considered in the court below.” The rule directs the clerk of the district court to include certified copies of

any criminal complaint, indictment or information (including any amendments); all papers, motions, petitions, oppositions, responses, replies, orders, opinions, and *documentary evidence or exhibits filed in the lower courts*; transcripts of all lower court proceedings; all jury instructions offered, excluded or given; all verdicts or findings of fact, conclusions of law, and decisions; the lower court minutes; [and] any notices of appeal.

Id. (emphasis added). The rule exempts from inclusion in the record on appeal “physical evidence or exhibits” absent an order by this Court. *Id.*

II. RULE 250 ADDITIONS TO THE RECORD ON APPEAL

Photographs generally constitute documentary evidence. *See, e.g.,* Classifications of evidence, 1 Casualty Insurance Claims § 10:26 (4th ed.) (documentary evidence includes reports, records, photographs, etc.). At Witter’s capital trial, several photographs of the crime scene and photographs of Witter following his arrest were offered by the State and admitted. The record on appeal does not currently include these photographs or certified copies of them. Pursuant to SCR 250(6)(c), these items should have been included in the record on appeal as “documentary evidence or exhibits.”

In his opening brief, Witter challenges the admission of these photographs on several grounds. The inclusion of these photographs in the record on appeal is necessary for the full and fair consideration by this Court of claims Witter raises in his opening brief. Accordingly, Witter moves this Court to direct the clerk of the Clark County district court to transmit either the original photographs (State’s guilt-phase exhibits 10, 18, 19, 20, 21, 22, 23, 28, 35, 36, 41, and 51; State’s penalty-phase exhibits 4, 6, 7, 10, and 11) or color copies of those photographs to

this Court to be included in the record on appeal. *Cf.* Supreme Court Rule 250(6)(c) (order by supreme court required to transmit physical evidence, exhibits).

III. RULE 30 ADDITIONS TO THE RECORD ON APPEAL

Rule 30 of the Nevada Rules of Appellate Procedure governs the appendices to the briefs. With respect to exhibits, the rule provides that “[c]opies of relevant and necessary exhibits shall be clearly identified, and shall be included in the appendix as far as practicable.” *Id.* As noted above, appendices are generally associated with non-capital appeals. But out of an abundance of caution, Witter intends to include color copies of the identified exhibits as part of an appendix to his opening brief unless directed otherwise by this Court.

In addition, Rule 30 permits a party to file a motion requesting the court to direct the district court clerk to transmit original exhibits. Rule 30(d); *see also* Rule 10(b)(2) (party may request transmittal of original exhibits). Should this Court determine Rule 30 has some governing effect, Witter invokes the rule and moves this Court to direct the clerk of the Clark County district court to transfer the following exhibits: State’s

guilt-phase exhibits 10, 18, 19, 20, 21, 22, 23, 28, 35, 36, 41, and 51; and State's penalty-phase exhibits 4, 6, 7, 10, and 11.

The exhibits identified above are crucial for this Court to render a decision on the issues in this appeal and are therefore necessary. Witter moves for their inclusion in the record on appeal.

IV. CONCLUSION

Based on the reasons and authorities above, Witter moves this Court to direct the clerk of the Clark County district court to transmit State's guilt-phase exhibits 10, 18, 19, 20, 21, 22, 23, 28, 35, 36, 41, and 51; and State's penalty-phase exhibits 4, 6, 7, 10, and 11 or color copies of those exhibits to this Court for use when reaching a decision on the issues presented in his appeal from conviction and sentence of death.

DATED this 21st day of June, 2018.

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 June, 2018, electronic service of the foregoing MOTION TO TRANSMIT COURT EXHIBITS shall be made in accordance with the Master Service List as follows:

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/s/ Sara Jelinek

An employee of the Federal Public
Defender, District of Nevada