

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE LEWIS, AKA.,
LOUIS RANDOLPH

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Supreme Court No. 73706

District Court No. C120857

FILED

NOV 14 2017

APPELLANT'S INFORMAL BRIEF

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY J. Hadley
DEPUTY CLERK

INSTRUCTIONS: If you are an appellant proceeding pro se (without an attorney) in the Nevada Supreme Court, you must file either (1) a brief that complies with Nevada Rule of Appellate Procedure (NRAP) 28(a), or (2) a completed copy of this informal brief form, see NRAP 28(k), with the Nevada Supreme Court on or before the due date, see NRAP 31. In civil appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court may dismiss your appeal. In postconviction criminal appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court or Nevada Court of Appeals may decide your appeal on the record without briefing.

HOW TO FILL OUT THIS FORM: This form must be typed, unless you are incarcerated, in which case it must be clearly handwritten. You do not need to refer to legal authority or the district court record. If you are completing your brief on this form, write only in the space allowed on the form. **Additional pages and attachments are not allowed.** If typing an informal brief, you may either use the lined paper contained in this form or an equivalent number of pages of your own paper. Your brief will be stricken if you fail to follow the directions in this form and the Nevada Rules of Appellate Procedure.

WHERE TO FILE THE BRIEF: You may submit your brief for filing in person or by mail.

To file your brief in person: Briefs may be submitted for filing Monday through Friday, 8:00 a.m. to 4:00 p.m.

Carson City: Bring the brief to the Clerk's Office at the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada, 89701.

Las Vegas: Place your brief in the Clerk's Office Drop Box at the Las Vegas Courthouse for the Nevada Appellate Courts, 408 East Clark Avenue, Las Vegas, Nevada, 89101.

NOV 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

17-39190

To file your brief by mail: Mail the brief to the Clerk of the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada 89701. **Your brief must be postmarked on or before the due date.**

You must file the original brief and 1 copy with the clerk of the Nevada Supreme Court. If you want the clerk to return a file-stamped copy of your brief, you must file the original form and 2 copies and include a self-addressed, stamped envelope. Documents cannot be faxed or emailed to the Supreme Court Clerk's Office.

Copies of the brief must be mailed or delivered to the other parties to this appeal or to the parties' attorneys, if they have attorneys. You must also include a proper certificate of service or complete the certificate that is attached to the informal brief form.

CAUTION: Pro se parties are prohibited from representing other parties. A pro se party may not complete a brief on behalf of other parties. Pro se parties may collaborate on their briefs, however, provided that if one brief is submitted on behalf of multiple pro se parties, each party must sign and date the brief to confirm that he or she has participated in the preparation of the brief and, by his or her signature, joins in the arguments and representations contained therein.

Judgment or Order You Are Appealing. List the judgment or order that you are appealing from and the date that the judgment or order was filed in the district court.

Filed Date	Name of Judgment or Order
7-10-17	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER. Denial of Petition for Writ of Habeas; Appointment of Counsel; and, Motion to Extend Prison Legal Copy Limit.

Notice of Appeal. Give the date you filed your notice of appeal in the district court: AUGUST 2nd of 2017.

Related Cases. List all other court cases related to this case. Provide the case number, title of the case and name of the court where the case was filed.

Case No.	Case Title	Name of Court
30567	DIRECT APPEAL	Nev. Sup. Court
33145	Affirmance Denial of Habeas Corpus	Nev. Sup. Ct.
2-7-01	Affirmance of above Consolidated Appeals	Nev. Sup. Ct.

Pro Bono Counsel. Would you be interested in having pro bono counsel assigned to represent you in this appeal?

☒ Yes ☐ No

NOTE: If the court determines that your case may be appropriate for having pro bono counsel assigned, an appropriate order will be entered. Assignment of pro bono counsel is not automatic.

Statement of Facts. Explain the facts of your case. (Your answer must be provided in the space allowed.)

On October 5, 1994, Appellant was charged by way of Information with: Count I - Burglary; Count II - Robbery WUDW; Count III - Battery WUDW; Count IV - Murder WUDW; and, Aiding and Abetting.

Appellant's jury trial commenced on August 23, 1995. On September 5, 1995, the jury returned a verdict of guilty as to Count III, alone. The Court declared a mistrial as to

Courts I, II, and IV. Appellate Counsel did not file Appellant's Direct Appeal. On November 30, 1995, Appellant was sentenced to 8 years in the Nevada Department of Corrections.

On March 3, 1997, Appellant's second jury trial commenced on the mistried Courts I, II, and IV. On March 10, 1997, the jury found Appellant guilty of the above remaining counts. On April 29, 1997, Appellant was sentenced to a term of Life with the Possibility of Parole for Murder; plus an equal and consecutive Life with the Possibility of Parole for the Deadly Weapon; 15 years for Robbery; plus an equal and consecutive sentence of 15 years for use of a deadly weapon; and, 10 years for Burglary - to run consecutive to Counts II, III, and IV. A Judgment of conviction was filed May 23, 1997.

The evidence and testimony given at both trials shows that Appellant did not rob anyone, nor did he participate in the alleged crimes as the State portrayed. More importantly, the record reflects that Appellant fled from the scene prior to the deceased (Paul Moden) being shot. Therefore, Appellant undoubtedly was not present and should not have been held accountable for others' actions beyond Appellant's power to control. Moreover, several State's witnesses testified to seeing Appellant fleeing the crime scene.

The giving of the Kozakyn instruction to Appellant's Jury violated the Due Process Clause of the 14th Amendment because it permitted the Jury to find Appellant guilty of first-degree murder without unanimously finding all of the -

elements of that crime beyond a reasonable doubt. This relieved the State of their burden of proof determined by the Supreme Court. Sandstrom v. Montana, 442 U.S. 510, 521 (1979). The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. In re Winship, 379 U.S. 358, 364 (1970). However, Trial Counsel was Ineffective for not objecting to the unconstitutional Kazalyn instruction as relieving the State of its burden of proof.

On Direct Appeal, Appellant's Counsel was Ineffective for failing to raise the Unconstitutional Kazalyn jury instruction claim, knowing that the Kazalyn instruction issue was pending during the same time that Appellant's Appeal was pending in the Nevada Supreme Court. see: Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

Appellate Counsel (Christopher Oram) stated within Appellant's Opening Brief the following under the Heading:

Statement of the Facts:

"Counsel is unaware of any pending Appeal that would affect or involve the instant appeal." at Page 8. Nev. Sup. Ct. case No. 30567

On February 7, 2001, the Nevada Supreme Court Affirmed Appellant's Appeal in cases No.'s 33145 and 30567.

On or about March 28th of 2017, Appellant received a missive from the Federal Public Defender's Office (Megan C. Hoffman), informing the Appellant to submit a Petition for Writ of Habeas Corpus on the Unconstitutional Kazalyn Jury instruction - under the new ruling.

of the U.S. Supreme Court in Welch v. United States; Montgomery v. Louisiana; and, in Nevada Supreme Court Cases Cordova and Riley. However, Appellant was not offered representation of Counsel, because Ms. Hoffman, stated there weren't enough Attorneys for every case - regarding Kazalyn Jury Ins.

Appellant therefore submitted his composed Petition for Writ of Habeas Corpus (PCR) containing Four (4) Grounds, on April 9, 2017, from Ely State Prison's mail. However, the 8th Judicial District Court Clerk, did not file Appellant's Petition until April 22, 2017 - and did not provide him with a copy of the envelope, in which, the Petition was mailed in; that should have been stamped by E.S.P.'s mailroom, & stamped by the Court Clerk

Statement of District Court Error. Explain why you believe the district court was wrong. Also state what action you want the Nevada Supreme Court to take. (Your answer must be provided in the space allowed.)

The District Court erred in DENYING Appellants Post-Conviction Petition without conducting an Evidentiary Hearing to determine whether he can meet/overcome the procedural Bars under NRS 34.726(1) and NRS 34.810(2).

The state of Nevada provides, as of Right, a poor criminal defendant a Direct Appeal of a felony conviction obtained after a Trial. As such, Fundamental Equal Protection and Due Process Guarantees of the 5th and 14th Amendments of the U.S. Constitution, as well as, Articles 1 sec. 3 and 8; Article IV sec. 21 of Nevada's Constitution require that a

poor defendant the likes of Appellant has a right to appointed Counsel to effectively assist him in vindicating his rights in that Direct Appeal contesting the fairness of his trial. "EQUAL PROTECTION and DUE PROCESS CLAUSES command that an indigent defendant has a right to appointed Counsel," to assist in first appeal as of right. *U.S. v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985); *Halbert v. Michigan*, 545 U.S. 605 (2005).

Appellant is an indigent defendant who invoked his right to Counsel both at Trial and on Direct Appeal. However, the State of Nevada has removed Ineffective Assistance of Counsel claims from being raised in the Direct Appeal process, requiring such claims to be raised in collateral state Habeas Corpus proceedings where the appointment of Counsel to assist poor defendants is not mandated as of right. Appellant's Direct Appeal Counsel did not raise any Ineffective Assistance of Counsel claims on his behalf, because any attempts to do so would be futile under current state law. Furthermore, the Court did not appoint Appellant Counsel to assist him with filing a Writ of Habeas Corpus with respects to his second trial convictions of: Counts I) Burglary; II) Robbery WUDW; III) MURDER WUDW. Therefore, Appellant should not be held to blame for the first post-conviction petition for writ of Habeas Corpus Appellate Counsel filed in consolidation, without Appellant's consent.

As such, Appellant was denied a 1st Habeas petition that constituted the functional equivalent of "His One and Only APPEAL" as of RIGHT to raise his IAC at trial claims, for Trial Counsel's failure to object to the unconstitutional Kazalyn Jury instruction at the 2nd trial. see: *MARTINEZ V. RYAN*, 132 S.Ct. 1309, at 1315 (2012); *Coleman v. Thompson*, 112 S.Ct. 2546, 501 U.S. 722, 755-756 (1991).

Consequently, Nevada's Direct Appeal's process (which mandates Counsel, but disallows IA of Trial Counsel claims) and the State Habeas post-conviction procedures (which does not mandate appointment of Counsel, but allows IA of Counsel claims); Taken together, as a whole, operated to discriminate against Appellant and infringed upon his rights to have Counsel assist him in vindicating his most substantial right deprivations **INEFFECTIVE ASSISTANCE OF TRIAL AND DIRECT APPEAL COUNSEL**. Unlike Appellant, Rich Defendants can hire Counsel to assist in Habeas Proceedings. But poor criminal Defendants like Appellant are left to fend for themselves, drawing an unconstitutional separation of Rich from the poor. see, i.e., *DOUGLAS V. CALIFORNIA*, 372 U.S. 353, 357 (1963) (Holding that "where the merits of the one and only Appeal an indigent has as of right are decided without benefit of Counsel, we think an unconstitutional line has been drawn between Rich and poor").

NEVADA'S Habeas procedure for Post-Conviction Petitions and its Direct Appeals process should be rendered void as coupled together, they impose procedural requirements that run afoul of the Constitutional safeguards meant to protect the poor, depriving poor defendants like Appellant of Due Process and Equal Protection of the Law. Compare, e.g., *Evitts* -

v. Lucey, 469 U.S. 387, 396 (1985) ("A First Appeal as of Right... is not adjudicated in accord with Due Process of Law if the Appellant does not have effective assistance of an Attorney"). Any procedural defaults flowing from such circumstances violate the federal Constitution. Alternatively, the State's action in crafting the previously mentioned procedures the way it has, constitute impediments external to the defense that cannot be fairly attributed to the Appellant. Manning v. Foster.

During litigation of his previous Pro-Se Petition, without the help of an Attorney, Appellant encountered similar difficulties as a Prisoner would trying to perfect a Direct Appeal on his own while trying to determine what claims were available to him, that occurred at Appellants Second Trial. "Claims of IAC at Trial often require investigative work and an understanding of Trial Strategy" Martinez v. RYAN, Supra, 132 S.Ct. at 1317. Therefore, since Appellant lacked the required understanding of trial strategy, he was unable to comprehend the full process, in which, he must bring IAC at Trial claims on his own. Moreover, Appellant is indigent and is over the \$100 legal work copy limit, and is unable to make copies for him self, and provide the state copies as well.

In the instant Petition, Appellant raised issues that affected his Second Trial and Direct Appeal process, that denied him Effective Counsel at Trial and on Direct Appeal following convictions for BURGLARY; ROBBERY WUDW; and, First Degree Murder. The Petition was initiated by Appellant because he was not appointed Counsel to assist him in raising any IAC at Trial claims, after a Direct Appeal was denied. Moreover, Direct Appeal Counsel failed to raise the unconstitutional Ka-zalyn Jury instruction on Appeal, while knowing, it is clearly established Federal Law that a defendant is deprived of Due Process if a Jury instruction "has the effect of relieving the State of the burden of Proof, enunciated in Winship on the critical question of Appellant's State of mind", Sandstrom v. Montana, 442 U.S. 510, 521 (1979).

The District Court also erred in denying Appellants "MOTION FOR APPOINTMENT OF COUNSEL", "MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS", and, "MOTION TO EXTEND PRISON COPYWORK LIMIT." Appellants case is extremely complex and therefore requires the appointment of Counsel, as there are convincing factual issues that requires an Evidentiary Hearing on the instant Petition, that entitles the Appellant to relief for a New Trial -- in accordance with the New decisions in Cardoza (2016)/RILEY (2015)/Montgomery (2016) and, Welch (2016).

For the record, Appellant is completely destitute and unable to make any legal copies due to being over the →

\$100 Legal Copywork limit. Therefore, Appellant requests this court to also grant his Motion to Extend Copywork limit.

Appellant respectfully request that this Honorable Court remand for an Evidentiary Hearing with the Appointment of Counsel to demonstrate Ineffective Assistance of Trial and Appellate Counsel, for Trial Counsel's failure to object to the Unconstitutional Kozalyn Jury instruction, and Appellate Counsel's failure to raise the Kozalyn Jury instruction claim/issue within Appellant's Direct Appeal following his 2nd Trial Conviction for First Degree Murder. It will be much appreciated.

God Bless!

DATED this ____ day of November, 2017.

Clyde Lewis
Signature of Appellant

CLYDE LEWIS
Print Name of Appellant

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this completed informal brief form upon all parties to the appeal as follows:

- ☐ By personally serving it upon him/her; or
☒ By mailing it by first-class mail with sufficient postage prepaid to the following address(es) (list names and address(es) of parties served):

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. Carson Street, Suite 201
Carson City, Nevada. 89701

DATED this day of November, 2017.

Clyde Lewis
(Signature of Appellant)

CLYDE LEWIS #48875
Print Name of Appellant

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