

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Feb 28 2019 10:54 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. 77424

**MOTION TO FILE APPENDIX VOLUME UNDER SEAL OR IN THE
ALTERNATIVE FOR ORDER DIRECTING TRANSMISSION OF SEALED
SENTENCING MEMORANDUM**

COMES NOW Appellant, David Burns, by and through counsel, Jamie Resch, Esq., and files this Motion to file an appendix volume under seal, or in the alternative for an order directing the lower court clerk to transmit a copy of the sealed sentencing memorandum. This motion is based on the following memorandum and all papers and pleadings on file herein.

DATED this 28th day of February, 2019.

RESCH LAW, PLLC d/b/a Conviction
Solutions

By: _____

JAMIE J. RESCH

Attorney for Appellant

MEMORANDUM

At sentencing, the court relied on a long sentencing memorandum that contained several medical and expert reports in mitigation of Burns' offenses. AA 2276. At the end of the sentencing hearing, counsel requested that the sentencing memorandum be made a sealed part of the record based on the private and medical nature of the information in it. AA 2279. The trial court granted the request and memorandum was "filed in open court and it will be sealed." AA 2280. The State offered no objection to the memorandum being filed under seal. AA 2280.

As a result, the memorandum was part of the record of these proceedings, but the only file-stamped copy believed to exist is the sealed copy possessed by the Clerk of Court below. Trial counsel, Christopher Oram, provided an unfiled copy of the memorandum as part of his files. That unfiled copy was provided to the State as part of the supplemental post-conviction proceedings, which plainly referenced it as part of Burns' claims. AA 2433.

It is necessary that this Court have a copy of the sentencing memorandum in order to properly review the trial court's denial of Burns' post-conviction claims. Two alternatives are proposed. First, Burns has, consistent with what are believed to be this Court's procedures for filing sealed appendix volumes, prepared this motion and sent the Supreme Court Clerk and State of Nevada a paper copy of the proposed sealed appendix volume, which is the sentencing memorandum. Burns requests that the sealed appendix volume be filed under seal as part of the record in this matter.

While Burns has no reason to believe the unfiled version of the memorandum differs in any meaningful way from the filed version, it is offered in the alternative that if this Court prefers to review the filed sentencing memorandum, it can order the district court to provide it. The record was sealed below and thus remains sealed on appeal. Rules for Sealing and Redacting Court Records ("SRCR") 7. As a result, the content of the sentencing memorandum itself could not be included in the appendix. Nevada Rule of Appellate Procedure ("NRAP") 10(b)(2). A slip sheet was

placed where the memorandum might otherwise have appeared in the appendix. AA 2273.

Pursuant to NRAP 30(d) if an exhibit is “incapable of being reproduced in the appendix, the parties may file a motion requesting the court to transmit the original exhibits.” The sentencing memorandum is incapable of being made a part of the appendix because it remains filed under seal. This Court could therefore direct the lower court clerk to transmit a copy of the sentencing memorandum under seal, in much the same way a presentence report would be transmitted for appellate review.

A copy of the sentencing memorandum is necessary to the adjudication of this appeal because one of Burns’ claims directly relies upon the material in it. That is, Burns asserts among other claims that his trial lawyers were ineffective for failing the move to strike the death penalty notice based on a diagnosis of fetal alcohol syndrome and low intellectual function. The facts which support such a claim are fully set forth in the sealed sentencing memorandum. This is an important claim, as the negation of the death penalty as a sentencing option was the sole benefit

Burns received in agreeing to waive certain appeal rights and in stipulating to a sentence of life without parole if convicted. A full array of sentencing and appeal options would have been available to Burns absent that stipulation, and the stipulation would have been wholly unnecessary if the death penalty was not available in the first instance.

WHEREFORE, Appellant respectfully requests either that his proposed sealed appendix volume be filed under seal as part of the record in this matter, or, that this court direct the transmission of a file stamped copy of the sentencing memorandum on file below.

DATED this 28th day of February, 2019.

RESCH LAW, PLLC d/b/a Conviction
Solutions

By: _____

JAMIE J. RESCH

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 28, 2019. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

AARON FORD
Nevada Attorney General



An Employee of RESCH LAW, PLLC, d/b/a
Conviction Solutions