

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. 77424

APPELLANT'S REPLY BRIEF

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Appeal from Order Denying Petition for Writ of Habeas Corpus  
Eighth Judicial District Court, Clark County  
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I. ARGUMENT

Burns would submit that all of his claims for relief are meritorious and this Court would be justified in granting relief on any or all of them.

However, this reply has three brief points to make to aid in the Court's review of this matter.

First, the Answering Brief repeatedly contends that the plain language of the appellate waiver waived "all" of Burns' appellate rights. See e.g., Answering Brief, p. 18. It is unfortunate this Court is called upon to settle such a basic question as what a single clearly-written sentence in the appellate waiver means, but that is the state of the case presented.

The agreement isn't ambiguous. It plainly states "Defendant agrees to waive all appellate rights stemming from the guilt phase of the trial." 8 AA 1724. There is no way around this: The State's interpretation that the agreement waived "all" appellate rights is only accurate if one stops reading midway through the sentence. The State's interpretation gives no meaning to the back half of the sentence, i.e. "stemming from the guilt phase of the trial."

Mr. Sgro plainly explained at the evidentiary hearing that the agreement did not waive “all” appellate rights. 12 AA 2575. He specifically stated that the “guilt phase” as used in the agreement was the evidentiary portion of the case, and thus ceased to exist once closing argument began. 12 AA 2575-76.

This Court could certainly take any statements Burns made in his proper person petition with a grain of salt. Counsel was appointed to assist with a supplemental petition below. Burns is not only untrained in the law but suffers from serious cognitive difficulties. His understanding of what the waiver did or did not mean was almost exclusively informed by the advice of trial counsel. Despite these difficulties, Burns did ask his attorneys to appeal even after the waiver was signed, and that is when they redirected him to the post-conviction process. 12 AA 2603.

The agreement did not waive “all” appellate rights, and Burns requested that counsel file an appeal. Moreover, reasonable counsel would have known Burns wanted to appeal, as would anyone in his position. This

Court should grant Burns an out-of-time direct appeal pursuant to NRAP 4(c).

Second, with respect to counsel's failure to move to strike the death penalty, the State's inclusion of hundreds of pages of documentation that counsel tried some other approach to get rid of the death penalty is not negative evidence. That is, the mere fact one approach was tried does not indicate that counsel even considered the approach urged here, which was that the death penalty could have been negated because Burns is ineligible for it based on his mental impairments. Lack of awareness that a potentially winning strategy is available constitutes ineffective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365 (1986).

Instead of filing a 500+ page motion to dismiss the death penalty on grounds that were sure to go (and did go) nowhere, counsel would have been better served to argue Burns was ineligible for the death penalty. The State makes much of Burns' overall IQ being too high. Answering Brief, p. 43. But as exhaustively explained in the opening brief, Nevada is not a pure IQ state, if such a thing were even allowed to exist anymore. Hall v. Florida,

134 S.Ct. 1986 (2014). Rather, the totality of intellectual deficits must be considered in conjunction with eligibility for the death penalty.

Had that been done here, there is a reasonable probability of a more favorable outcome. At a minimum, Burns would have had full appellate rights to challenge any part of his pretrial or trial proceedings. That result alone would have been a “more favorable outcome” under Strickland v. Washington, 466 U.S. 668 (1984). He also would have enjoyed the ability to argue for a non-stipulated sentence in the event of conviction in a non-death trial that did not feature the limited appellate waiver presented here. If relief is granted on this claim, the matter should be remanded for a new trial with no option for the State to seek the death penalty as a sentencing option.

Third and final point concerns the juror note issue. The Answering Brief argues that Manning v. State, 131 Nev. ___, 348 P.3d 1015 (2015) cannot apply retroactively to Burns because his conviction was final two days prior to Manning being decided. Answering Brief, pp. 45-46. The State’s analysis of when a conviction becomes final is very misguided here.

It is well-established that a conviction is final when the opportunity to seek direct review of the conviction expires. Griffith v. Kentucky, 479 U.S. 314 (1987), Clem v. State, 119 Nev. 615, 627, 81 P.3d 521 (2003). The Supreme Court has expressly held that, if no notice of appeal is filed, the conviction “becomes final ‘at the expiration of the time for seeking such review.’” Gonzalez v. Thaler, 565 U.S. 134 (2012).

The State correctly notes that Burns’ judgment of conviction was filed May 5, 2015; two days before Manning was decided. Answering Brief, p. 46. But the conviction was not “final” then, as Burns had thirty days from the date of conviction in which to file a direct appeal with this Court. NRAP 4(b). Nothing about the purported appellate waiver would have deprived this Court of jurisdiction to receive Burns’ notice of appeal, had one been filed. Therefore, his conviction was not final until thirty days after May 5, 2015, meaning he is fully entitled to the benefits of Manning not as a question of retroactivity, but as a matter of due process. Of course, the opening brief explained, and the answering brief did not address, the fact the Ninth Circuit has long recognized the defendant’s right to be present

when a jury note is received. Musladin v. Lamarque, 555 F.3d 830, 840-43 (9th Cir. 2009).

Here, the opening brief explained that Burns was not present or even consulted about the jury note, and that the court then allowed the jury to receive JAVS video which was never part of the evidence admitted at trial. 11 AA 2258. This error was extremely prejudicial and Burns would never have agreed to the introduction of nonevidence into the proceedings after the guilt phase of the trial had closed and deliberations begun.

This Court should therefore order a new trial based on this error at which time Burns would expect the State's prior waiver of the death penalty would remain in full force and effect.

II. CONCLUSION

For all these reasons and those in the opening brief, Burns requests this Honorable Court grant relief on his post-conviction claims and order that the convictions and sentences be reversed, or that relief on the claim Burns was deprived of his direct appeal be granted.

DATED this 9th day of April, 2019.

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RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.
2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.
3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,160 words.

DATED this 9th day of April, 2019.

RESCH LAW, PLLC d/b/a Conviction
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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 April 9, 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

A handwritten signature in blue ink, consisting of a stylized 'R' followed by a series of loops and a long horizontal stroke.

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