



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

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Elizabeth A. Brown
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Steven D. Grierson
Clerk of the Court

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Court Division Administrator

March 12, 2019

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: JUSTIN ODELL LANGFORD vs. WARDEN RENEE BAKER

S.C. CASE: 78144

D.C. CASE: A-18-784811-W

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated February 22, 2019, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed March 11, 2019 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

A handwritten signature in black ink, appearing to read "Heather Ungermann", with a long horizontal flourish extending to the right.

Heather Ungermann, Deputy Clerk

ORIGINAL

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3/11/2019 11:20 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

JUSTIN ODELL LANGFORD,
#2748452

Defendant.

CASE NO: **A-18-784811-W**
C-14-296556-1

DEPT NO: **XV**

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: **JANUARY 28, 2019**
TIME OF HEARING: **9:00 AM**

THIS CAUSE having presented before the Honorable JOE HARDY, District Judge, on the 28th day of February, 2019; Petitioner not being present, proceeding IN PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JACOB VILLANI, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

N

PROCEDURAL BACKGROUND

On March 14, 2014, JUSTIN ODELL LANGFORD (hereinafter "Defendant") was charged by way of Information with the following: COUNTS 1, 2, 6, 7, 8, 10, 11, and 12 – Lewdness With A Child Under The Age Of 14 (Category A Felony - NRS 201.230); COUNTS 3, 4, and 5 – Sexual Assault With A Minor Under Fourteen Years Of Age (Category A Felony - NRS 200.364, 200.366); and COUNT 9 – Child Abuse, Neglect, or Endangerment (Category B Felony - NRS 200.508(1)).

On March 7, 2016, a jury trial convened and lasted nine days. On March 17, 2016, the jury returned a guilty verdict as to COUNT 2, and not guilty as to all other Counts.

On May 10, 2016, Defendant was sentenced to Life with a possibility of parole after a term of 10 years have been served in the Nevada Department of Corrections ("NDOC"). Defendant received 841 days credit for time served. The Judgment of Conviction was filed on May 17, 2016.

On June 1, 2016, Defendant filed a Notice of Appeal from his conviction. On June 27, 2017, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued July 28, 2017.

On July 19, 2017, Defendant filed a Motion to Modify And/Or Correct Sentence ("Motion to Modify"), Motion for Sentence Reduction ("Motion for Reduction"), Motion for Production of Documents, Papers, Pleadings, and Tangible Property of Defendant, a Motion for Transcripts at the State's Expense and Memorandum of Point and Authorities in Support of Request for Transcripts at State's Expense, a Motion to Obtain a Copy of a Sealed Record, and a Motion to Withdraw Counsel. The State filed its Response to Defendant's Motion to Modify And/Or Correct Sentence and Motion for Sentence Reduction on August 2, 2017.

On August 10, 2017, the Court denied Defendant's Motion for Sentence Reduction, granted Defendant's Motion for Production of Documents, Papers, Pleadings, and Tangible Property of Defendant, denied Defendant's Motion for Transcripts at State's Expense, granted Defendant's Motion to withdraw Counsel, granted Defendant's Motion to Obtain Copy of a Sealed Record, and denied Defendant's Motion to Modify/Correct Illegal Sentence.

1 On October 10, 2017, Defendant filed a Motion to Claim and Exercise Rights
2 Guaranteed by the Constitution for the United States of America and Require the Presiding
3 Judge to Rule upon this Motion, and All Public Officers of this Court to Uphold Said Rights
4 and an affidavit in support of that Motion. He also filed a Motion to Reconsider Transcripts at
5 State's Expense, a Motion to Compel Court Orders, and a Motion to Reconsider Motions for
6 Correction of Illegal Sentence and Sentence Reduction. The State responded to the Motion to
7 Reconsider Motions for Correction of Illegal Sentence and Sentence Reduction on October 30,
8 2017. On October 31, 2017, the Court denied all of Defendant's Motions, and the order was
9 filed on November 7, 2017.

10 On November 27, 2017, Defendant filed a Motion for Ancillary Services and a Motion
11 for Transcripts and Other Court Documents and State's Expense. The State filed its
12 Opposition to Defendant's Motion for Ancillary Services on December 13, 2017. The Court
13 denied Defendant's Motions on December 19, 2017, and the order was filed on December 29,
14 2017.

15 On December 29, 2017, Defendant filed a "Notice of Understanding of Intent and Claim
16 of Right as well as a Notice of Denial of Consent." He additionally filed a Petition for Writ
17 of Habeas Corpus (Post-Conviction), Memorandum in Support of Petition, Motion for
18 Appointment of Counsel, and Request for Evidentiary Hearing. The State responded to
19 Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), Memo in Support, Motion
20 to Appoint Counsel, and Motion for Evidentiary Hearing on February 20, 2018.

21 On March 7, 2018, Defendant filed a Motion for Summary Judgment on Petition for
22 Writ of Habeas Corpus (Post-Conviction) Due to Respondent's Silence, and on March 15,
23 2018, he filed a Motion to Strike State's Response [to Defendant's Petition]. In both of those,
24 he alleged that since the State did not respond by February 19, 2018 (45 days from the order
25 to respond), its Response should be disregarded. Pursuant to Eighth Judicial District Court
26 Rule 1.14(b), "If any day on which an act required to be done by any one of these rules falls
27 on a Saturday, Sunday or legal holiday, the act may be performed on the next succeeding
28 judicial day." February 19, 2018, was a legal holiday, thus, the State properly filed its

1 Response on the next succeeding judicial day, February 20, 2018.

2 On March 15, 2018, Defendant filed a Motion for Stay of Sentence, Traverse, and
3 Motion to Strike the State's Response. The State responded on April 2, 2018. The court denied
4 Defendant's Motion on April 5, 2018.

5 On March 30, 2018, Defendant filed a Motion to Modify and/or Correct Illegal
6 Sentence and "Judicial Notice of Lack of Jurisdiction" claiming that the District Court lacked
7 subject matter jurisdiction to sentence him. The State responded on April 18, 2018.

8 On April 24, 2018, the court denied Defendant's Pro Per Petition for Writ of Habeas
9 Corpus. That same day, the court also denied Defendant's Motion to Modify and/or Correct
10 Illegal Sentence. On May 7, 2018, Defendant filed a notice of appeal.

11 On March 7, 2018, Defendant filed a Motion for Summary Judgment on Writ of Habeas
12 Corpus (Post-Conviction). On May 1, 2018 the court issued an Order denying Defendant's
13 Motion.

14 On June 1, 2018, the court entered and order denying Defendant's Motion to Modify
15 and/or Correct Illegal Sentence and "Judicial Notice of Lack of Jurisdiction. The court also
16 entered its Findings of Fact, Conclusions of Law, and Order.

17 On July 2, 2018 this case was reassigned to Department fifteen (15). On August 28,
18 2018, Defendant filed a Motion to Recuse and Application for Bail. The State responded on
19 October 8, 2018. The court denied Defendant's Motion on October 9, 2018. Defendant filed a
20 Notice of Appeal on October 22, 2018.

21 On November 19, 2018, Defendant filed a Petition for Writ of Habeas Corpus. The
22 State responded on January 17, 2019.

23 ANALYSIS

24 **I. THIS INSTANT PETITION IS PREMATURE DUE TO THE PENDING** 25 **DIRECT APPEAL**

26 "Jurisdiction in an appeal is vested solely in the supreme court until the remittitur issues
27 to the district court." Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994)
28 (emphasis added). While an appeal is pending district courts do not have jurisdiction over the

1 case until remittitur is issued. Id. The Nevada Supreme Court has repeatedly held that the
2 timely filing of a notice of appeal ‘divests the district court of jurisdiction to act and vests
3 jurisdiction in [the appellate] court.’” Foster v. Dingwall, 126 Nev. 49, 52, 228 P.3d 453, 454-
4 55 (Nev. 2010) (quoting Mack-Manley v. Manley, 122 Nev. 849, 855, 138 P.3d 525, 529
5 (2006)).

6 Only a remittitur will return jurisdiction from an appellate court of competent
7 jurisdiction to the district court. See NRS 177.305 (“After the certificate of judgement has
8 been remitted, the appellate court of competent jurisdiction shall have no further jurisdiction
9 of the appeal or of the proceedings thereon, and all order which may be necessary to carry the
10 judgement into effect shall be made by the court to which the certificate is remitted.”). Until a
11 remittitur is received, a district court lacks jurisdiction over a particular case. Buffington, 110
12 Nev. at 126, 868 P.2d at 644.

13 While a perfected appeal ordinarily “divests the district court of jurisdiction to act
14 except with regard to matters collateral to or independent from the appealed order, the district
15 court nevertheless retains a limited jurisdiction to ... direct briefing on the motion, hold a
16 hearing regarding the motion, and enter an order denying the motion, but lacks jurisdiction to
17 enter an order granting such a motion. ... ” however, “the district court does have jurisdiction
18 to deny such requests.” Foster v. Dingwall, 126 Nev. 49, 52–53, 228 P.3d 453, 455–56 (2010)
19 (emphasis in original).

20 In the instant case, Defendant filed two notices of appeal on May 7, 2018, and October
21 22, 2018. These are now consolidated appeals under Nevada Supreme Court case numbers
22 75825 and 76075. Both of these appeals remain outstanding. Therefore, these appeals are
23 pending, and no remittitur has been issued. Accordingly, the instant petition is technically
24 premature but raises issues which can be entertained on the merits and denied.

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1 **II. DEFENDANT'S PETITION IS PROCEDURALLY BARRED UNDER NRS**
2 **34.726(1).**

3 Defendant's Petition for Writ of Habeas Corpus is time barred with no good cause
4 shown for delay. Pursuant to NRS 34.726(1):

5 Unless there is good cause shown for delay, *a petition that*
6 *challenges the validity of a judgment or sentence must be filed*
7 *within 1 year of the entry of the judgment of conviction* or, if an
8 appeal has been taken from the judgment, within 1 year after the
Supreme Court issues its remittitur. For the purposes of this
subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

9 (a) That the delay is not the fault of the petitioner; and

10 (b) That dismissal of the petition as untimely will unduly prejudice
11 the petitioner.

12 (Emphasis added). The Supreme Court of Nevada has held that NRS 34.726 should be
13 construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
14 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726
15 begins to run from the date the judgment of conviction is filed or a remittitur from a timely
16 direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

17 The one-year time limit for preparing petitions for post-conviction relief under NRS
18 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
19 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
20 evidence presented by the defendant that he purchased postage through the prison and mailed
21 the Notice within the one-year time limit.

22 Furthermore, the Nevada Supreme Court has held that the district court has a duty to
23 consider whether a defendant's post-conviction petition claims are procedurally barred. State
24 v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The
25 Riker Court found that "[a]pplication of the statutory procedural default rules to post-
26 conviction habeas petitions is mandatory," noting:

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1 Habeas corpus petitions that are filed many years after conviction are
2 an unreasonable burden on the criminal justice system. The necessity
3 for a workable system dictates that there must exist a time when a
criminal conviction is final.

4 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district
5 court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme
6 Court has granted no discretion to the district courts regarding whether to apply the statutory
7 procedural bars; the rules must be applied.

8 In the instant case, Defendant's Judgement of Conviction was filed on May 17, 2016.
9 Defendant filed a direct appeal, and remittitur was issued on July 28, 2017. Thus, the one-year
10 time bar began to run from the date of remittitur. Defendant's Petition was not filed until
11 November 19, 2018. This is over 12 months after remittitur issued and in excess of the one-
12 year time frame. Absent a showing of good cause for this delay and undue prejudice, this Court
13 finds Defendant's petition must be dismissed because of its tardy filing.

14 **III. DEFENDANT'S CLAIMS ARE SUCCESSIVE AND AN ABUSE OF WRIT**

15 Defendant's claims are successive and an abuse of the writ pursuant to NRS 34.810(2)
16 which reads:

17 A second or successive petition *must* be dismissed if the judge or
18 justice determines that it fails to allege new or different grounds for
19 relief and that the prior determination was on the merits or, *if new and*
20 *different grounds are alleged, the judge or justice finds that the failure*
of the petitioner to assert those grounds in a prior petition constituted
an abuse of the writ.

21 (Emphasis added). Second or successive petitions are petitions that either fail to allege new
22 or different grounds for relief and the grounds have already been decided on the merits or that
23 allege new or different grounds but a judge or justice finds that a defendant's failure to assert
24 those grounds in a prior petition would constitute an abuse of the writ. Second or successive
25 petitions will only be decided on the merits if the petitioner can show good cause and prejudice.
26 NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

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1 The Nevada Supreme Court has stated: "Without such limitations on the availability of
2 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
3 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
4 system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950.
5 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require
6 a careful review of the record, successive petitions may be dismissed based solely on the face
7 of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other
8 words, if the claim or allegation was previously available with reasonable diligence, it is an
9 abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-
10 498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112
11 P.3d at 1074.

12 Defendant's first Petition was filed on December 29, 2017, and raised claims regarding
13 ineffective assistance of trial and appellate counsel, denial of discovery, prosecutorial
14 misconduct, cumulative error, and due process violations. That Petition was considered on the
15 merits by this Court, and then denied on April 24, 2018. Defendant raises the ineffective
16 assistance of trial and appellate counsel, and cumulative error claims again in the instant
17 petition. Therefore, these claims are successive. Defendant's other claims of (1) factual and
18 legal innocence, (2) lack of grand jury indictment (3) coercive use of Allen charge, (4)
19 violation of rules of criminal procedure, (5) DNA issues, (6) false use of preliminary hearing,
20 (7) improper oath of jurors, (8) lack of jurisdiction and (9) false prosecution were available to
21 Defendant at the time he filed his first petition which was not time barred. Therefore, raising
22 these claims in a successive petition is an abuse of writ. Accordingly, this Court finds
23 Defendant's Petition must be denied.

24 **IV. DEFENDANT HAS NOT SHOWN GOOD CAUSE OR ACTUAL INNOCENCE**
25 **TO OVERCOME THE PROCEDURAL BARS.**

26 To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading
27 and proving specific facts that demonstrate good cause for his failure to present his claim in
28 earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be

1 unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see
2 Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada
3 Dep’t of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a
4 habeas petition if it presents claims that either were or could have been presented in an earlier
5 proceeding, unless the court finds both cause for failing to present the claims earlier or for
6 raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646–
7 47, 29 P.3d 498, 523 (2001) (emphasis added).

8 **A. Good Cause**

9 “To establish good cause, appellants must show that an impediment external to the
10 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
11 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
12 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. “A qualifying
13 impediment might be shown where the factual or legal basis for a claim was not reasonably
14 available at the time of default.” Clem, 119 Nev. at 621, 81 P.3d at 525. The Court continued,
15 “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526. Examples
16 of good cause include interference by State officials and the previous unavailability of a legal
17 or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly,
18 any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

19 Here, Defendant fails to address good cause to ignore his procedural defaults.
20 Defendant has failed to show that an impediment external to the defense prevented him from
21 raising these claims in an earlier proceeding. Indeed, the applicable law and facts were all
22 available to him on direct appeal and he offers no excuse for his failure to raise these issues
23 there. Accordingly, this Court finds Defendant’s petition must be denied.

24 **B. Actual Innocence**

25 Where a petition is procedurally barred and the petitioner cannot demonstrate good
26 cause, the district court may nevertheless reach the merits of any constitutional claims if the
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1 petitioner demonstrates that failure to consider those constitutional claims would result in a
2 fundamental miscarriage of justice. Lisle v. State, 351 P.3d 725, 729-730 (2015), citing
3 Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A fundamental miscarriage of
4 justice requires "a colorable showing" that the petitioner "is actually innocent of the crime or
5 is ineligible for the death penalty." Id. This generally requires the petitioner to present new
6 evidence of his innocence. House v. Bell, 547 U.S. 518, 536-37, 126 S. Ct. 2064, 165 L. Ed.
7 2d 1 (2006); Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

8 When claiming a fundamental miscarriage based on actual innocence, the petitioner
9 "must show that it is more likely than not that no reasonable juror would have convicted him
10 absent a constitutional violation. Crump v. State, 2016 Nev. Unpub. LEXIS 374, *9-10, citing
11 Pellegrini v. State, 117 Nev. at 887, 34 P.3d at 537 (2001). In this context, actual innocence
12 means "factual innocence, not mere legal insufficiency." Mitchell v. State, 122 Nev. 1269,
13 1273-74, 149 P.3d 33, 36 (2006).

14 Defendant claims he is factually innocent because the facts presented at trial did not
15 mirror the facts as outlined in the Information. Specifically, the victim did not give an exact
16 date when the incident occurred, the victim did not testify that Defendant placed his hands on
17 her face, the incident did not occur in public, and the victim did not run away and ask for help,
18 therefore consenting. Petition at 11-19. This is not factual innocence. Defendant is not negating
19 the fact that the incident occurred, he is merely suggesting that the act did not occur as framed
20 by the State. To the extent the Defendant is alleging that the facts don't match the crime
21 charged, this is a claim of legal innocence which cannot be used to support a claim that a
22 fundamental miscarriage of justice will occur if the petition is not heard. Mitchell, 122 Nev. at
23 1273-74, 149 P.3d at 36 (2006).

24 Accordingly, Defendant cannot prove his actual innocence and this Court finds
25 Defendant's Petition for Writ of Habeas Corpus must be denied.

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ORDER

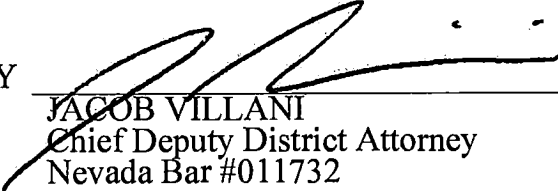
THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and is, DENIED *without prejudice.*

DATED this 8th day of ~~February~~ ^{March}, 2019.


DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY


JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

hjc/SVU



Clerk of the Courts
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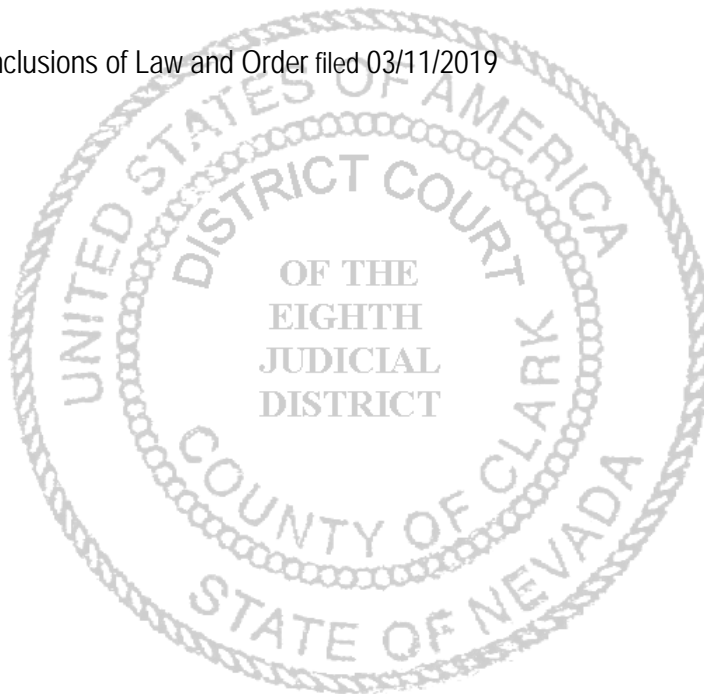
March 12, 2019

Case No.: A-18-784811-W

CERTIFICATION OF COPY

Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full, and correct copy of the hereinafter stated original document(s):

Findings of Fact, Conclusions of Law and Order filed 03/11/2019



now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 2:54 PM on March 12, 2019.


STEVEN D. GRIERSON, CLERK OF THE COURT