

(ORIGINAL)

Electronically Filed  
5/20/2019 11:51 AM  
Steven D. Grierson  
CLERK OF THE COURT

Case No. A-19-788633-W

Dept. No. XII

*Steven D. Grierson*

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

Electronically Filed  
May 31 2019 02:47 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

JOEL BURKETT

Petitioner/Plaintiff,

vs.

THE STATE OF NEVADA

Respondent/Defendant.

NOTICE OF APPEAL

Notice is hereby given that JOEL BURKETT, Petitioner/Defendant  
above named, hereby appeals to the Court of Appeals for the State of Nevada from the final  
judgment / order JOEL BURKETT V. THE STATE OF NEVADA

A-19-788633-W

Entered in this action on the 18th day of April, 2019.

Dated this 14 day of May, 2019.

*Joel Burkett*

NDOC # 16111

Appellant - Pro Per

~~Ely State Prison~~

~~P.O. Box 1989~~

~~Ely, Nevada 89301-1989~~

N.N.C.C

P.O. BOX 7000

CARSON CITY, NV

89702

RECEIVED  
MAY 20 2019

CLERK OF THE COURT

**CERTIFICATE OF SERVICE BY MAIL**

I, JOEL BURKETT, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 14 day of MAY, 2019, I served a true and correct copy of the above-entitled NOTICE OF APPEAL postage prepaid and addressed as follows:

William Bitter

PO BOX 1989

ELY NV 89703

Signature

[Signature]

Print Name

JOEL BURKETT

~~Ely State Prison~~

~~P.O. Box 1989~~

~~Ely, Nevada 89301-1989~~

N.N.C.C.

PO BOX 7000

CARSON CITY, NV

89702

**AFFIRMATION PURSUANT TO NRS 239B.030**

I, JOEL BURKETT, NDOC# 160111,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE  
ATTACHED DOCUMENT ENTITLED NOTICE OF APPEAL

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY  
PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 14 DAY OF MAY, 20 19.

SIGNATURE: Joel Burkett

INMATE PRINTED NAME: JOEL BURKETT

INMATE NDOC # 160111

INMATE ADDRESS: ~~ELY STATE PRISON~~

~~P.O. BOX 1989~~

~~ELY, NV 89301~~

NWCC  
PO BOX 7000  
CARSON CITY, NV  
89702

JOE BURKE 16111

N.W.C.C.

P.O. Box 7000

Caribou, ME 04733

89302

LEGAL MAIL  
CONFIDENTIAL

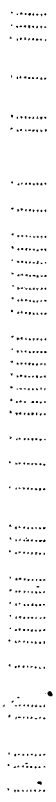
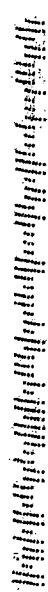
*Clerk of Court*

*200 dectis Ave  
3rd Floor*

*1st USAS. NJ*

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**  
7 **STATE OF NEVADA IN AND FOR**  
8 **THE COUNTY OF CLARK**

9 JOEL BURKETT,

10 Plaintiff(s),

11 vs.

12 WILLIAM A. GITTERE,

13 Defendant(s),

Case No: A-19-788633-W

Dept No: XII

14  
15  
16 **CASE APPEAL STATEMENT**

17 1. Appellant(s): Joel Burkett

18 2. Judge: Michelle Leavitt

19 3. Appellant(s): Joel Burkett

20 Counsel:

21 Joel Burkett #16111  
22 P.O. Box 7000  
23 Carson City, NV 89702

24 4. Respondent (s): William A. Gittere

25 Counsel:

26 Aaron D. Ford, Attorney General  
27 555 E. Washington Ave., Ste. 3900  
28 Las Vegas, NV 89101-1068

Steven B. Wolfson, District Attorney  
200 Lewis Ave.  
Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A  
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes  
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis\*\*: N/A

8 \*\*Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: Yes,  
10 Date Application(s) filed: February 1, 2019

11 9. Date Commenced in District Court: February 1, 2019

12 10. Brief Description of the Nature of the Action: Civil Writ

13 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

14 11. Previous Appeal: No

15 Supreme Court Docket Number(s): N/A

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

18 Dated This 22 day of May 2019.

19 Steven D. Grierson, Clerk of the Court

20 /s/ Heather Ungermann

21 Heather Ungermann, Deputy Clerk  
22 200 Lewis Ave  
23 PO Box 551601  
24 Las Vegas, Nevada 89155-1601  
25 (702) 671-0512

26 cc: Joel Burkett  
27  
28

# CASE SUMMARY

## CASE NO. A-19-788633-W

**Joel Burkett, Plaintiff(s)**  
**vs.**  
**William A Gittere, Defendant(s)**

§  
§  
§  
§  
§

Location: **Department 12**  
 Judicial Officer: **Leavitt, Michelle**  
 Filed on: **02/01/2019**  
 Cross-Reference Case Number: **A788633**

### CASE INFORMATION

**Related Cases**








81C052190 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**
 Case Status: **02/01/2019 Open**
**DATE****CASE ASSIGNMENT****Current Case Assignment**

Case Number	A-19-788633-W
Court	Department 12
Date Assigned	02/01/2019
Judicial Officer	Leavitt, Michelle

### PARTY INFORMATION

**Plaintiff**      **Burkett, Joel****Pro Se****Defendant**      **William A Gittere****DATE****EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**

02/01/2019	 Inmate Filed - Petition for Writ of Habeas Corpus Party: Plaintiff Burkett, Joel <i>Post Conviction</i>
02/01/2019	 Application to Proceed in Forma Pauperis Filed By: Plaintiff Burkett, Joel
02/01/2019	 Affidavit in Support of Application Proceed Forma Pauperis Filed By: Plaintiff Burkett, Joel <i>Affidavit in Support of Application to Proceed in Forma Pauperis</i>
02/07/2019	 Motion Filed By: Plaintiff Burkett, Joel <i>Request to file amended Petition for Writ of Habeas Corpus</i>
03/13/2019	 Notice Filed By: Plaintiff Burkett, Joel <i>Notice of Correction</i>
04/18/2019	 Findings of Fact, Conclusions of Law and Order <i>Findings of Fact, Conclusions of Law, and Order</i>
04/22/2019	 Notice of Entry

**CASE SUMMARY**

**CASE NO. A-19-788633-W**

*Notice of Entry of Findings of Fact, Conclusions of Law and Order*

05/20/2019



Notice of Appeal

Filed By: Plaintiff Burkett, Joel

*Notice of Appeal*

05/22/2019



Case Appeal Statement

*Case Appeal Statement*



## DISTRICT COURT CIVIL COVER SHEET

A-19-788633-W  
Dept. XII

County, Nevada

Case No. \_\_\_\_\_

(Assigned by Clerk's Office)

**I. Party Information** (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Joel Burdick

Defendant(s) (name/address/phone):

William Giffey

Attorney (name/address/phone):

Attorney (name/address/phone):

**II. Nature of Controversy** (please select the one most applicable filing type below)**Civil Case Filing Types**

<b>Real Property</b> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <b>Title to Property</b> <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property <b>Other Real Property</b> <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<b>Negligence</b> <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence <b>Malpractice</b> <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	<b>Torts</b> <b>Other Torts</b> <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
<b>Probate</b> <b>Probate</b> (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate <b>Estate Value</b> <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	<b>Construction Defect &amp; Contract</b> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <b>Contract Case</b> <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	<b>Judicial Review/Appeal</b> <b>Judicial Review</b> <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency <b>Nevada State Agency Appeal</b> <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency <b>Appeal Other</b> <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
<b>Civil Writ</b> <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		<b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

Date

Signature of initiating party or representative

See other side for family-related case filings.



EIGHTH JUDICIAL DISTRICT  
CLARK COUNTY, NEVADA

Case No.: A-19-788633-W

DEPT. No.: XII

(Tenth Petition)

Respondent

## FINDINGS OF FACT

5. On July 29, 1981, the District Court filed the Judgment of Conviction.

1

1           6.       On April 21, 1983, the Supreme Court of the State of Nevada dismissed  
2 the appeal. Remittitur issued on May 10, 1983.

3           7.       On February 2, 1994, Petitioner filed his first Petition for Writ of Habeas  
4 Corpus (Post-Conviction).

5           8.       On February 28, 1994, the District Court filed an Amended Judgment of  
6 Conviction.

7           9.       On June 7, 1999, Petitioner filed his second Petition for Writ of Habeas  
8 Corpus (Post-Conviction).

9           10.      On August 18, 1999, the District Court filed the Findings of Fact,  
10 Conclusions of Law, and Order whereby the District Court denied Petitioner's second  
11 Petition for Writ of Habeas Corpus (Post-Conviction).

12           11.      On August 31, 1999, Petitioner filed a Notice of Appeal of the District  
13 Court's denial of his second Petition for Writ of Habeas Corpus (Post-Conviction).

14           12.      On August 21, 2001, the Supreme Court of the State of Nevada affirmed  
15 the District Court's denial of Petitioner's second Petition for Writ of Habeas Corpus  
16 (Post-Conviction).

17           13.      On November 19, 2001, Petitioner filed his third Petition for Writ of  
18 Habeas Corpus (Post-Conviction).

19           14.      On February 14, 2002, the District Court filed the Findings of Fact,  
20 Conclusions of Law, and Order whereby the District Court denied Petitioner's third  
21 Petition for Writ of Habeas Corpus (Post-Conviction).

22           15.      On March 20, 2002, Petitioner filed a Notice of Appeal of the District  
23 Court's denial of his third Petition for Writ of Habeas Corpus (Post-Conviction).

24           16.      On February 19, 2003, Petitioner filed his fourth Petition for Writ of  
25 Habeas Corpus (Post-Conviction).

26           17.      On March 7, 2003, in response to Petitioner's Notice of Appeal of the  
27 District Court's denial of his third Petition for Writ of Habeas Corpus (Post-  
28 Conviction), the Nevada Supreme Court ordered "the judgment of the district court  
REVERSED AND REMANDED to the district court for proceedings consistent with  
this order."

          18.      On May 14, 2003, the District Court filed an Order whereby the District  
Court denied Petitioner's fourth petition for Writ of Habeas Corpus (Post-Conviction).

1           19.     On May 27, 2003, Petitioner filed a Notice of Appeal of the District  
2 Court's denial of his fourth Petition for Writ of Habeas Corpus (Post-Conviction).

3           20.     On April 2, 2004, the Supreme Court of the State of Nevada affirmed the  
4 District Court's denial of Petitioner's fourth Petition for Writ of Habeas Corpus (Post-  
5 Conviction).

6           21.     On September 1, 2004, Petitioner filed his fifth Petition for Writ of  
7 Habeas Corpus (Post-Conviction).

8           22.     On November 1, 2004, the District Court filed the findings of Fact,  
9 Conclusions of Law and Order whereby the District Court denied Petitioner's fifth  
10 Petition for Writ of Habeas Corpus (Post-Conviction).

11           23.     On May 13, 2005, Petitioner filed his sixth Petition for Writ of Habeas  
12 Corpus (Post-Conviction).

13           24.     On July 25, 2005, the District Court filed the Findings of Fact,  
14 Conclusions of Law and Order whereby the District Court dismissed Petitioner's sixth  
15 Petition for Writ of Habeas Corpus (Post-Conviction).

16           25.     On August 9, 2005, Petitioner filed a Notice of Appeal of the district  
17 Court's denial of his sixth Petition for Writ of Habeas Corpus (Post-Conviction).

18           26.     On December 16, 2005, the Supreme Court of the State of Nevada  
19 affirmed the District Court's denial of Petitioner's sixth Petition for Writ of Habeas  
20 Corpus (Post-Conviction).

21           27.     On July 7, 2011, Petitioner filed his seventh Petition for Writ of Habeas  
22 Corpus (Post-Conviction).

23           28.     On November 14, 2011, the District Court filed an Order Granting  
24 State's Motion to Dismiss and Order Directing Clerk of Court to Transfer [the seventh]  
25 Petition for Writ of Habeas Corpus to the Seventh Judicial District.

26           29.     On June 14, 2013, Petitioner filed his eighth Petition for Writ of Habeas  
27 Corpus (Post-Conviction).

28           30.     On July 10, 2013, the District Court filed the Findings of Fact,  
Conclusions of Law and Order whereby the District Court denied Petitioner's eighth  
Petition for Writ of Habeas Corpus (Post-Conviction).

          31.     On July 22, 2013, Petitioner filed a Notice of Appeal of the District  
Court's denial of his eighth Petition for Writ of Habeas Corpus (Post-Conviction).

1           32. On February 20, 2014, the Supreme Court of the State of Nevada  
2 affirmed the District Court's denial of Petitioner's eighth Petition for Writ of Habeas  
3 Corpus (Post-Conviction).

4           33. On September 7, 2016, Petitioner filed his ninth Petition for Writ of  
5 Habeas Corpus (Post-Conviction).

6           34. On October 31, 2016, the District Court filed the Findings of Fact,  
7 Conclusions of Law and Order whereby the District Court denied Petitioner's ninth  
8 Petition for Writ of Habeas Corpus (Post-Conviction).

9           35. On November 10, 2016, Petitioner filed a Notice of Appeal of the  
10 District Court's denial of his ninth Petition for Writ of Habeas Corpus (Post-  
11 Conviction).

12           36. On August 14, 2017, the Supreme Court of the State of Nevada reversed  
13 and remanded the District Court's denial of Petitioner's ninth Petition for Writ of  
14 Habeas Corpus (Post-Conviction) because the Petition was a time computation issue  
15 and should have been filed in the county where the Petitioner is currently serving his  
16 prison term.

17           37. On March 2, 2018, the District Court filed an Amended Judgement of  
18 Conviction clarifying that Count 3 was to run concurrent to Count 2, and Count 4 was  
19 to run consecutive to Count 3.

20           38. On June 14, 2018, Petitioner filed a notice of appeal on the Amended  
21 Judgement of Conviction and Writ of Mandamus seeking the Supreme Court of the  
22 State of Nevada to direct the Nevada Department of Corrections to accurately calculate  
23 his sentence.

24           39. On January 17, 2019, the Appeals Court of the State of Nevada filed an  
25 Order dismissing the appeal.

26           40. On February 1, 2019, Petitioner filed the instant tenth Petition for Writ of  
27 Habeas Corpus (Post-Conviction).

28           41. On February 7, 2019, Petitioner filed a Motion to Amend the Petition for  
Writ of Habeas Corpus, and supplemented his argument.

          42. The instant petition is untimely. Absent good cause for the failure to  
present the claim in a prior petition or for presenting the claim again, and actual  
prejudice, the petition must be dismissed.

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CONCLUSIONS OF LAW

1. NRS 34.810(2), governing “Additional reasons for dismissal of petition,” requires that “[a] second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and 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.”

2. The petitioner has the burden of pleading and proving specific facts that demonstrate both good cause for failing to present a claim or for presenting a claim again and actual prejudice. NRS 34.810(3). *See also State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

3. A court must dismiss a habeas petition if it presents claims that either were presented in an earlier proceeding or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner. *Evans v. State*, 117 Nev. 609, 621-622, 28 P.3d 498, 507 (2001).

4. Unlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition. *Ford v. Warden*, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).

5. Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory. *State v. District Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

6. Meritless, successive and untimely petitions clog the court system and undermine the finality of convictions. *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

7. The instant petition is a successive petition, and therefore is subject to dismissal pursuant to NRS 34.810(2); NRS 34.810(3). The petition must be dismissed if petitioner failed to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are raised in the petition and the court determines the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. Absent good cause for the failure to present the claim in a prior petition or for presenting the claim again, and actual prejudice, the petition must be dismissed.

8. Here, the Petitioner contends his attorney conceded guilt to the sexual assault charge during closing argument at his trial in violation of his sixth amendment rights. Petitioner contends the recent United States Supreme Court case of *McCoy v. Louisiana*, 584 U.S. —, 138 S.Ct. 1500, (2018) is applicable and he is therefore entitled to relief in the instant petition.

1  
2 9. The United States Supreme Court decided *McCoy v. Louisiana* on May  
3 14, 2018. Thus, the Petitioner's instant claim that his attorney conceded guilt without  
4 his consent, in his Petition filed on February 1, 2019, within a year of the *McCoy*  
5 decision, may support good cause to overcome the Petitioner's failure to file his Petition  
6 within a year of the remittitur issued from direct appeal on May 10, 1983. It is also good  
7 cause to overcome the Petitioner's failure to bring the claim in a previous petition  
8 because it is a new claim that could not have been brought before the *McCoy* decision.  
9 *See Hathaway v. State*, 119 Nev. 248 (2003).

10 10. However, a review of the record and closing argument of defense  
11 counsel indicates the Petitioner's claim is without merit. Defense counsel vigorously  
12 argued to the jury that the State failed to meet their burden of proof and that the jury  
13 should return a verdict of not guilty as to all counts. The Petitioner took the stand in his  
14 own defense at the time of trial. On direct examination, Petitioner testified that he had  
15 sex with the victim, but claimed it was consensual. ( *See* trial transcript, pg. 397).

16 Petitioner's trial counsel argued to the jury that their verdict would be guided by  
17 who they believed. They heard both sides of the story. They heard the testimony of the  
18 victim and the Petitioner. Counsel stated let's say you don't believe anything my client  
19 said (*See* trial transcript, pg. 469). "Now, remember, we're talking here as if we did not  
20 put on a defense" (*See* trial transcript, pg.471). "So what I'm trying to show you is if  
21 you went with that view, which of course I would seriously oppose and will vigorously,  
22 argue against – where can you go from here?" (*See* trial transcript, pg. 471).

23 Counsel went through each charge with the jury and argued extensively that  
24 there was reasonable doubt. He stated, "[a]ll right. Taking it in the best event, then, of  
25 what could you find him guilty of, these four counts, that leaves one count – that he had  
26 sexual intercourse with her against her will, by force or fear. A sexual assault. More  
27 refined way for rape. All right. And there was evidence of that, taking the best events,  
28 because she agreed it was not with her consent" (*See* trial transcript, pg. 476). "Now, if  
you take our case and throw it out the window – don't believe anything from him. Don't  
believe anybody, or her, with a vengeance of conviction, and going with the State's –  
simply back to the 18<sup>th</sup> Century – then you could come back with a verdict of guilty of  
sexual assault" (*See* trial transcript pg. 477). Counsel then continues to argue there was  
no evidence of forced sex because the victim and Petitioner both had no marks on them  
(*See* trial transcript, pg. 478). Counsel also vigorously argued the victim was not  
truthful in her testimony to the jury pointing out inconsistencies in her testimony and  
her statements to the police, and arguing the medical examiner found no evidence of  
anal sex which the victim reported. (*See* trial transcript pg's. 476- 486).


Defense counsel further stated, "Now, again, we're still talking in the best  
evidence of the State's case." "Now, what are we going to find him guilty of? Only one  
crime you can find him guilty of. That's sexual assault, one count of having sexual  
intercourse with Tina Cage" (*See* trial transcript, pg. 479).

1 A review of the entire closing argument indicates defense counsel did not concede guilt  
2 to the sexual assault charge. Accordingly, Petitioner's claim is without merit. *McCoy*  
3 *v. Louisiana* is not applicable. Petitioner failed to show prejudice, and therefore, the  
petition must be denied.

4 **ORDER**

5 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas  
6 Corpus (Post-Conviction) shall be, and it is, hereby DENIED.

7 Dated this 18 day of April, 2019.

8   
9 MICHELLE LEAVITT  
10 DISTRICT COURT JUDGE  
11 DEPARTMENT XII  
12 EIGHTH JUDICIAL DISTRICT  
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**CERTIFICATE OF MAILING**

I hereby certify that on the date filed, I placed a copy of the Order for  
Petition for Writ of Habeas Corpus (Post-Conviction) in the U.S. Mail, postage  
prepaid to:

Joel Burkett #16111  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

Steven B. Wolfson  
Clark County District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Aaron Ford  
Nevada Attorney General  
555 E. Washington, Suite 3900  
Las Vegas, NV 89101-1068

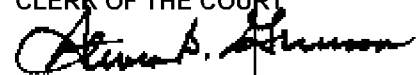
  
Pamela Rocha  
Judicial Executive Assistant  
Department XII  
Eighth Judicial District Court

C052190

Joel Burkett

vs.

William Gittere  
(Tenth Petition)



NEO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JOEL BURKETT,

Petitioner,

Case No: A-19-788633-W

Dept No: XII

vs.

WILLIAM GITTERE,

Respondent,

**NOTICE OF ENTRY OF FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

**PLEASE TAKE NOTICE** that on April 18, 2019, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on April 22, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Debra Donaldson

Debra Donaldson, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 22 day of April 2019, I served a copy of this Notice of Entry on the following:

☒ By e-mail:

Clark County District Attorney's Office  
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

Joel Burkett # 16111  
P.O. Box 1989  
Ely, NV 89301

/s/ Debra Donaldson

Debra Donaldson, Deputy Clerk

EIGHTH JUDICIAL DISTRICT  
CLARK COUNTY, NEVADA

Case No.: A-19-788633-W

DEPT. No.: XII

(Tenth Petition)

Respondent

## FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

## FINDINGS OF FACT

2. On May 4, 1981, the jury found the Petitioner guilty of Count 1, ROBBERY WITH USE OF A DEADLY WEAPON; Count 2, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON; Count 3, SEXUAL ASSAULT; and Count 4, SEXUAL ASSAULT.

3. On June 2, 1981, Petitioner was sentenced to serve a term in the Nevada State Prison as follows: Count 1, Fifteen years for Robbery and a consecutive fifteen (15) years for Use of a Deadly Weapon in Commission of a Crime; Count 2, Life with Possibility of Parole and a consecutive term of Life with the Possibility of Parole for Use of a Deadly Weapon in Commission of a Crime; Count 2 is to be served consecutive to Count 1; Count 3, Life with Possibility of Parole; Count 3 to run concurrent to count 2; and Count 4, Life with Possibility of Parole. Count 4 to be served consecutive to count 3.

4. On June 19, 1981, Petitioner filed a direct appeal.

5. On July 29, 1981, the District Court filed the Judgment of Conviction.

DEPARTMENT TWELVE  
LAS VEGAS, NEVADA 89155

1           6.       On April 21, 1983, the Supreme Court of the State of Nevada dismissed  
2 the appeal. Remittitur issued on May 10, 1983.

3           7.       On February 2, 1994, Petitioner filed his first Petition for Writ of Habeas  
4 Corpus (Post-Conviction).

5           8.       On February 28, 1994, the District Court filed an Amended Judgment of  
6 Conviction.

7           9.       On June 7, 1999, Petitioner filed his second Petition for Writ of Habeas  
8 Corpus (Post-Conviction).

9           10.      On August 18, 1999, the District Court filed the Findings of Fact,  
10 Conclusions of Law, and Order whereby the District Court denied Petitioner's second  
11 Petition for Writ of Habeas Corpus (Post-Conviction).

12           11.      On August 31, 1999, Petitioner filed a Notice of Appeal of the District  
13 Court's denial of his second Petition for Writ of Habeas Corpus (Post-Conviction).

14           12.      On August 21, 2001, the Supreme Court of the State of Nevada affirmed  
15 the District Court's denial of Petitioner's second Petition for Writ of Habeas Corpus  
16 (Post-Conviction).

17           13.      On November 19, 2001, Petitioner filed his third Petition for Writ of  
18 Habeas Corpus (Post-Conviction).

19           14.      On February 14, 2002, the District Court filed the Findings of Fact,  
20 Conclusions of Law, and Order whereby the District Court denied Petitioner's third  
21 Petition for Writ of Habeas Corpus (Post-Conviction).

22           15.      On March 20, 2002, Petitioner filed a Notice of Appeal of the District  
23 Court's denial of his third Petition for Writ of Habeas Corpus (Post-Conviction).

24           16.      On February 19, 2003, Petitioner filed his fourth Petition for Writ of  
25 Habeas Corpus (Post-Conviction).

26           17.      On March 7, 2003, in response to Petitioner's Notice of Appeal of the  
27 District Court's denial of his third Petition for Writ of Habeas Corpus (Post-  
28 Conviction), the Nevada Supreme Court ordered "the judgment of the district court  
REVERSED AND REMANDED to the district court for proceedings consistent with  
this order."

          18.      On May 14, 2003, the District Court filed an Order whereby the District  
Court denied Petitioners fourth petition for Writ of Habeas Corpus (Post-Conviction).

1           19.     On May 27, 2003, Petitioner filed a Notice of Appeal of the District  
2 Court's denial of his fourth Petition for Writ of Habeas Corpus (Post-Conviction).

3           20.     On April 2, 2004, the Supreme Court of the State of Nevada affirmed the  
4 District Court's denial of Petitioner's fourth Petition for Writ of Habeas Corpus (Post-  
5 Conviction).

6           21.     On September 1, 2004, Petitioner filed his fifth Petition for Writ of  
7 Habeas Corpus (Post-Conviction).

8           22.     On November 1, 2004, the District Court filed the findings of Fact,  
9 Conclusions of Law and Order whereby the District Court denied Petitioners fifth  
10 Petition for Writ of Habeas Corpus (Post-Conviction).

11           23.     On May 13, 2005, Petitioner filed his sixth Petition for Writ of Habeas  
12 Corpus (Post-Conviction).

13           24.     On July 25, 2005, the District Court filed the Findings of Fact,  
14 Conclusions of Law and Order whereby the District Court dismissed Petitioners sixth  
15 Petition for Writ of Habeas Corpus (Post-Conviction).

16           25.     On August 9, 2005, Petitioner filed a Notice of Appeal of the district  
17 Court's denial of his sixth Petition for Writ of Habeas Corpus (Post-Conviction).

18           26.     On December 16, 2005, the Supreme Court of the State of Nevada  
19 affirmed the District Court's denial of Petitioner's sixth Petition for Writ of Habeas  
20 Corpus (Post-Conviction).

21           27.     On July 7, 2011, Petitioner filed his seventh Petition for Writ of Habeas  
22 Corpus (Post-Conviction).

23           28.     On November 14, 2011, the District Court filed an Order Granting  
24 State's Motion to Dismiss and Order Directing Clerk of Court to Transfer [the seventh]  
25 Petition for Writ of Habeas Corpus to the Seventh Judicial District.

26           29.     On June 14, 2013, Petitioner filed his eighth Petition for Writ of Habeas  
27 Corpus (Post-Conviction).

28           30.     On July 10, 2013, the District Court filed the Findings of Fact,  
Conclusions of Law and Order whereby the District Court denied Petitioners eighth  
Petition for Writ of Habeas Corpus (Post-Conviction).

          31.     On July 22, 2013, Petitioner filed a Notice of Appeal of the District  
Court's denial of his eighth Petition for Writ of Habeas Corpus (Post-Conviction).

1           32. On February 20, 2014, the Supreme Court of the State of Nevada  
2 affirmed the District Court's denial of Petitioner's eighth Petition for Writ of Habeas  
3 Corpus (Post-Conviction).

4           33. On September 7, 2016, Petitioner filed his ninth Petition for Writ of  
5 Habeas Corpus (Post-Conviction).

6           34. On October 31, 2016, the District Court filed the Findings of Fact,  
7 Conclusions of Law and Order whereby the District Court denied Petitioner's ninth  
8 Petition for Writ of Habeas Corpus (Post-Conviction).

9           35. On November 10, 2016, Petitioner filed a Notice of Appeal of the  
10 District Court's denial of his ninth Petition for Writ of Habeas Corpus (Post-  
11 Conviction).

12           36. On August 14, 2017, the Supreme Court of the State of Nevada reversed  
13 and remanded the District Court's denial of Petitioner's ninth Petition for Writ of  
14 Habeas Corpus (Post-Conviction) because the Petition was a time computation issue  
15 and should have been filed in the county where the Petitioner is currently serving his  
16 prison term.

17           37. On March 2, 2018, the District Court filed an Amended Judgement of  
18 Conviction clarifying that Count 3 was to run concurrent to Count 2, and Count 4 was  
19 to run consecutive to Count 3.

20           38. On June 14, 2018, Petitioner filed a notice of appeal on the Amended  
21 Judgement of Conviction and Writ of Mandamus seeking the Supreme Court of the  
22 State of Nevada to direct the Nevada Department of Corrections to accurately calculate  
23 his sentence.

24           39. On January 17, 2019, the Appeals Court of the State of Nevada filed an  
25 Order dismissing the appeal.

26           40. On February 1, 2019, Petitioner filed the instant tenth Petition for Writ of  
27 Habeas Corpus (Post-Conviction).

28           41. On February 7, 2019, Petitioner filed a Motion to Amend the Petition for  
Writ of Habeas Corpus, and supplemented his argument.

          42. The instant petition is untimely. Absent good cause for the failure to  
present the claim in a prior petition or for presenting the claim again, and actual  
prejudice, the petition must be dismissed.

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CONCLUSIONS OF LAW

1. NRS 34.810(2), governing “Additional reasons for dismissal of petition,” requires that “[a] second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and 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.”

2. The petitioner has the burden of pleading and proving specific facts that demonstrate both good cause for failing to present a claim or for presenting a claim again and actual prejudice. NRS 34.810(3). *See also State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

3. A court must dismiss a habeas petition if it presents claims that either were presented in an earlier proceeding or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner. *Evans v. State*, 117 Nev. 609, 621-622, 28 P.3d 498, 507 (2001).

4. Unlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition. *Ford v. Warden*, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).

5. Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory. *State v. District Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

6. Meritless, successive and untimely petitions clog the court system and undermine the finality of convictions. *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

7. The instant petition is a successive petition, and therefore is subject to dismissal pursuant to NRS 34.810(2); NRS 34.810(3). The petition must be dismissed if petitioner failed to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are raised in the petition and the court determines the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. Absent good cause for the failure to present the claim in a prior petition or for presenting the claim again, and actual prejudice, the petition must be dismissed.

8. Here, the Petitioner contends his attorney conceded guilt to the sexual assault charge during closing argument at his trial in violation of his sixth amendment rights. Petitioner contends the recent United States Supreme Court case of *McCoy v. Louisiana*, 584 U.S. —, 138 S.Ct. 1500, (2018) is applicable and he is therefore entitled to relief in the instant petition.

1  
2 9. The United States Supreme Court decided *McCoy v. Louisiana* on May  
3 14, 2018. Thus, the Petitioner's instant claim that his attorney conceded guilt without  
4 his consent, in his Petition filed on February 1, 2019, within a year of the *McCoy*  
5 decision, may support good cause to overcome the Petitioner's failure to file his Petition  
6 within a year of the remittitur issued from direct appeal on May 10, 1983. It is also good  
7 cause to overcome the Petitioner's failure to bring the claim in a previous petition  
8 because it is a new claim that could not have been brought before the *McCoy* decision.  
9 *See Hathaway v. State*, 119 Nev. 248 (2003).

10 10. However, a review of the record and closing argument of defense  
11 counsel indicates the Petitioner's claim is without merit. Defense counsel vigorously  
12 argued to the jury that the State failed to meet their burden of proof and that the jury  
13 should return a verdict of not guilty as to all counts. The Petitioner took the stand in his  
14 own defense at the time of trial. On direct examination, Petitioner testified that he had  
15 sex with the victim, but claimed it was consensual. ( *See* trial transcript, pg. 397).

16 Petitioner's trial counsel argued to the jury that their verdict would be guided by  
17 who they believed. They heard both sides of the story. They heard the testimony of the  
18 victim and the Petitioner. Counsel stated let's say you don't believe anything my client  
19 said (*See* trial transcript, pg. 469). "Now, remember, we're talking here as if we did not  
20 put on a defense" (*See* trial transcript, pg.471). "So what I'm trying to show you is if  
21 you went with that view, which of course I would seriously oppose and will vigorously,  
22 argue against – where can you go from here?" (*See* trial transcript, pg. 471).

23 Counsel went through each charge with the jury and argued extensively that  
24 there was reasonable doubt. He stated, "[a]ll right. Taking it in the best event, then, of  
25 what could you find him guilty of, these four counts, that leaves one count – that he had  
26 sexual intercourse with her against her will, by force or fear. A sexual assault. More  
27 refined way for rape. All right. And there was evidence of that, taking the best events,  
28 because she agreed it was not with her consent" (*See* trial transcript, pg. 476). "Now, if  
you take our case and throw it out the window – don't believe anything from him. Don't  
believe anybody, or her, with a vengeance of conviction, and going with the State's –  
simply back to the 18<sup>th</sup> Century – then you could come back with a verdict of guilty of  
sexual assault" (*See* trial transcript pg. 477). Counsel then continues to argue there was  
no evidence of forced sex because the victim and Petitioner both had no marks on them  
(*See* trial transcript, pg. 478). Counsel also vigorously argued the victim was not  
truthful in her testimony to the jury pointing out inconsistencies in her testimony and  
her statements to the police, and arguing the medical examiner found no evidence of  
anal sex which the victim reported. (*See* trial transcript pg's. 476- 486).

Defense counsel further stated, "Now, again, we're still talking in the best  
evidence of the State's case." "Now, what are we going to find him guilty of? Only one  
crime you can find him guilty of. That's sexual assault, one count of having sexual  
intercourse with Tina Cage" (*See* trial transcript, pg. 479).




1 A review of the entire closing argument indicates defense counsel did not concede guilt  
2 to the sexual assault charge. Accordingly, Petitioner's claim is without merit. *McCoy*  
3 *v. Louisiana* is not applicable. Petitioner failed to show prejudice, and therefore, the  
petition must be denied.

4 **ORDER**

5 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas  
6 Corpus (Post-Conviction) shall be, and it is, hereby DENIED.

7 Dated this 18 day of April, 2019.

8   
9 MICHELLE LEAVITT  
10 DISTRICT COURT JUDGE  
11 DEPARTMENT XII  
12 EIGHTH JUDICIAL DISTRICT  
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**CERTIFICATE OF MAILING**

I hereby certify that on the date filed, I placed a copy of the Order for  
Petition for Writ of Habeas Corpus (Post-Conviction) in the U.S. Mail, postage  
prepaid to:

Joel Burkett #16111  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

Steven B. Wolfson  
Clark County District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Aaron Ford  
Nevada Attorney General  
555 E. Washington, Suite 3900  
Las Vegas, NV 89101-1068

  
Pamela Rocha  
Judicial Executive Assistant  
Department XII  
Eighth Judicial District Court

C052190

Joel Burkett

vs.

William Gittere  
(Tenth Petition)

# Certification of Copy

State of Nevada }  
County of Clark } SS:

I, 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):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT  
DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

JOEL BURKETT,

Plaintiff(s),

vs.

WILLIAM A. GITTERE,

Defendant(s),

Case No: A-19-788633-W

Dept No: XII

now on file and of record in this office.

**IN WITNESS THEREOF**, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 22 day of May 2019.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk