IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN MAURICE DEAN,)
Appellant,)
vs.) No. 81209
AITOR NARVAIZA,)
ELKO COUNTY SHERIFF,)
Respondent.)
_____)

APPELLANT'S OPENING BRIEF

APPEAL FROM AN ORDER DENYING

PETITION FOR WRIT OF HABEAS CORPUS

FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

DAVID B. LOCKIE
Nev. Bar #003999
LOCKIE & MACFARLAN, LTD.
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

Attorneys for Appellant

MARK S. MILLS
Nev. Bar #11660
ELKO CO. DISTRICT ATTORNEY
540 Court Street, 2nd Floor
Elko, Nevada 89801
(775) 738-3101

Attorneys for Respondent

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

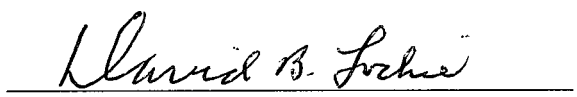
1. Appellant Sean Maurice Dean: There are no corporations.

2. Law Firms: Lockie & Macfarlan, Ltd. has appeared for Appellant. No other law firms are expected to appear on behalf of Appellant.

3. Elko County District Attorney for the State of Nevada.

DATED this 14th day of October, 2020.

LOCKIE & MACFARLAN, LTD.



DAVID B. LOCKIE
Nevada Bar # 2384
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Law Review

JURISDICTIONAL STATEMENT

The basis for the Supreme Court's or Court of Appeal's jurisdiction is NRS 34.575(1). The order appealed from was filed on February 21, 2020. The Notice of Appeal was filed on March 11, 2020. This is an appeal from an Order Denying Post-Conviction Relief, Fourth Judicial District Court, Department 1.

DATED this 14th day of October, 2020.

LOCKIE & MACFARLAN, LTD.

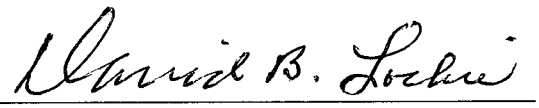
DAVID B. LOCKIE
Nevada Bar # 2384
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

ROUTING STATEMENT

Pursuant to Rule 17(a) this matter is assigned to the Nevada Supreme Court as it involves a post-conviction appeal of a category A felony.

DATED this 14th day of October, 2020.

LOCKIE & MACFARLAN, LTD.



DAVID B. LOCKIE
Nevada Bar # 2384
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

I. STATEMENT OF THE CASE

This is an appeal from the District Court's denial of a Petition for Writ of Habeas Corpus. Petitioner was found guilty at a jury trial, and was sentenced as follows:

COUNT 1: Attempted Murder With Use of a Deadly Weapon: 72-180 months, and a consecutive sentence of 48-120 for the enhancement.

COUNT 2: Battery With the Use of a Deadly Weapon Resulting in Substantial Bodily Harm: 48-120 months, consecutive to Count 2.

COUNT 5: Battery With a Deadly Weapon: 24-72 Months, consecutive to Count 1

Petitioner filed a direct appeal, for which the Court of Appeals issued an Order of Affirmance on January 25, 2019. Petitioner first filed a Petition for Writ of Habeas Corpus on November 11, 2917. On July 17, 2017, the

District Court declined to exercise jurisdiction and dismissed without prejudice on July 17, 2019 due to the pendency of the Direct Appeal.

Petitioner filed the instant Writ on April 16, 2019. The District Court conducted an evidentiary hearing on November 20-21, 2019, and issued an Order Denying Habeas Relief on April 24, 2020. This Appeal followed.

II. STATEMENT OF THE ISSUES

A. WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL'S BEHAVIOR EXHIBITED RACIST VIEWS, AND INTRODUCED PREJUDICIAL MATTERS OF RACE DURING THE TRIAL.

B. WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL DID NOT SEEK TO INTRODUCE EVIDENCE OF VIDEO INTERVIEWS OF HIS INTERVIEWS BY THE POLICE.

III. STATEMENT OF THE FACTS

A. Factual Summary of the Events Giving Rise to the Prosecution.

This prosecution was based upon events of December 8, 2015, when Petitioner was alleged to use a knife to stab his girlfriend Denise Minter, and her ex-husband, Bert ("Duff") Minter outside of Denise's residence in Elko County.

Petitioner had come to Denise's residence (where Duff was staying at the time) to discuss their relationship. *Appellant's Appendix (hereinafter A.A.) Vol. 2, p. 210.* Matters became heated, and eventually resulted in a scenario whereby the prosecution argued that Petitioner stabbed Duff seven times, and Denise once above her left breast. *A.A. Vol. 2, pp. 211-212.* Petitioner denied stabbing either victim, contending that the Minters must have stabbed each other while trying to stab him during the course of a fight started by Duff. *A.A. Vol. 2, pp. 204, 210, 213, 215.*

The police recovered a knife that the prosecution theorized Petitioner used to stab the two individuals from the floor of the residence where

Petitioner was staying nearby. *A.A. Vol. 2, pp. 210, 213.* The crime lab found no blood or comparison-worthy DNA anywhere on the knife. There was limited DNA showing an "unknown male dominant partial DNA profile, that matched none of the parties involved in the altercation. *A.A. Vol. 2, p. 213.* The knife was admitted without objection from the defense at trial.

B. The Jury Trial

1. Facts showing that defense counsel held racist views which affected his performance at trial.

a. Petitioner is an African-American man. *A.A. Vol. 2, p. 205.* Petitioner's trial attorney was a white man. During the proceedings, Petitioner's attorney wrote the following words in a trial note: "Shenck is a nigger too." *A.A. Vol. 2, p. 217.* Mr. Shenck, a key witness for the prosecution, has clearly discernable features that identify his race as African-American. Besides Mr. Shenck, Petitioner was the only other African-American individual involved in the trial. Petitioner saw the note during a break in the trial At some point prior to sentencing, Petitioner wrote a letter to his attorney

accusing him of being a racist. His attorney wrote a letter in reply that, among other things, disputed the racial significance of the note. But he also wrote: "I've called you a lot worse names than that for getting hooked up and staying with a 5'9" fat lady who sells dope and gambles away everything she's got." *A.A. Vol. 2, pp. 218, 220.*

b. Petitioner testified that he told his attorney that he did not want race to be involved in any way with the trial, because he did not want the all white jury to think he was trying to play the race card. *A.A. Vol. 2, p. 219; A.A. Vol. 2, p. 177.* Disregarding Petitioner's wishes, his trial attorney elected to immediately inject the issue of race during the process of jury selection.

> Q: Did anybody on [the] jury notice whether Mr. Dean is black or not?
>
> Pretty clear, isn't it?
>
> Anybody on the jury notice whether or not there is another black person in the room?
>
> Pretty clear, isn't it?
>
> Did you ever think you would be sitting as a juror with a **black guy** sitting in the defendant's box and you would be asked to be fair about him?

Anybody thinks they can't be fair?

Are there any jurors sitting here who do not have some kind of notion that black people have certain attributes that are widely known, from your television or things you have read or friends you have talked to?

You don't?

Is that right?

They all like watermelon, don't they?

Nobody ever heard that before?

Did you ever think about whether it's true or not?

Ladies and gentlemen, I have no means to know all of the things that are out there that one might assume about black people. I can't know all the things.

We know some of them. **We know about the watermelon.** This case isn't about watermelon.

If you have heard that they have an attribute of violence, that they are sneaky, all of those things? Clearly, some of you have heard things like that about black people. Is there anybody who can raise their hand and say they have never heard that?

What we're trying to accomplish is Mr. Dean, **we're not asking you to fall in love with black people**; we are not deciding anything like that. We're not asking you to be more than fair or fall over backward to pull Mr. Dean out of this.

But what we are asking is that when you hear evidence that triggers – just in your mind – that there is an attribute that **black guys** have that explains his conduct, we're asking you to do one thing: Take one second and think about whether or not the evidence justifies that conclusion or whether you are just putting an assumption that you have heard sometime before in other

> circumstances and applying it to Mr. Dean.
>
> Is there anybody that thinks they can't or wouldn't or shouldn't do something like that? Does everybody see what I'm saying? Is it clear?
>
> That you have assumptions about black people. They are in your head, I can't take them out. I don't know what all of them are. Everybody agrees that those assumptions are in there in some form or another in every one of you guys. Is that correct?

A.A. Vol. 1, pp. 38-39.

Only one prospective juror responded to any of Mr. Woodbury's questions about race.

That prospective juror assured that "we're all equal" and essentially that it would be unfair to make any assumptions about people based on their skin color. *A.A. Vol. 2, p. 39.*.

c. Petitioner's attorney called him to testify at the trial. At the hearing, Petitioner testified that he was surprised because his attorney had done little to prepare his testimony. *A.A. Vol. 2, p. 175.* He was particularly surprised when his attorney proceeded to question him regarding his experience with knife fights *A.A. Vol. 2, p. 37.* He testified at the hearing that, before testifying (and while during the course of the trial) his attorney asked

about his knowledge of knife fights. However, Petitioner testified that he was not made aware that this would be included in his trial testimony, and that he would never have agreed to take the stand and answer such questions, because of the potential for jurors to view growing up in a rough neighborhood and being involved in knife fights is associated with a stereotype that African Americans are violent. *A.A. Vol. 2, p. 220.*

Trial Counsel admitted at the hearing that he was aware that this testimony might further amplify notions of racial and cultural associations of African-American people and knives. *A.A. Vol. 2, p. 140.*

> Q. Mr. Dean, while you were being raised in Sacramento, California did you have - did you have friends or associates or people that you knew got in knife fights?
>
> A: Yes
>
> Q: Did you ever get in one?
>
> A: A few.
>
> Q: All right. Were you the person with the knife?
>
> A: No sir. Knives been pulled on me.

Q: Ah. Based on that kind of knowledge, did you learn if you were going to hurt somebody real bad with a knife, maybe kill them, how would you go about doing that?

A: Try to puncture them and twist it and rip it, just try to - try to rip, try to rip something.

Q: Okay, Is that something you have ever done?

A: No, sir.

Q: How do you know that's ho your are supposed to do it?

A: That's how it has been done ever since I known people that get into knife fights.

IV. SUMMARY OF THE ARGUMENT

Appellant (Petitioner below) received Ineffective Assistance of Counsel under the 6th Amendment where his trial counsel wrote a trial note indicating that both Petitioner and a Witness were "niggers." Trial counsel, during voire dire, referred to Petitioner as a "black guy," asked prospective jurors whether they heard that black people "like watermelon," and are "sneaky" and "violent." With little preparation, trial counsel called Appellant to testify, and elicited testimony regarding Appellant having been raised in a rough neighborhood in Sacramento, his involvement in knife fights, and knowledge

of how one would go about effectively killing a person with a knife. This testimony inferred racial and cultural stereotypes regarding African Americans. The needless injection of racial stereotypes, and the crude manner in which it was done by trial counsel was so prejudicial, and done in such crude manner, that Petitioner was deprived of his Constitutional rights under the 6th Amendment.

Appellant received Ineffective Assistance of Counsel when trial counsel failed to introduce video taped evidence of his police interviews that would have rebutted the prosecution's theory that the crime was motivated by Appellant's deep seated anger with the victims.

V. ARGUMENT

A. Legal Standards for Ineffective Assistance of Counsel.

It is clear that a defendant has a Sixth Amendment right to effective assistance of counsel at trial. "The key to evaluating an ineffectiveness claim is whether the proper functioning of the adversarial process was so

///

undermined by counsel's conduct that the reviewing court cannot trust that the trial produced a just result." Foster v. State, 121 Nev. 165, 169 (2005) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)). Under the test established in Strickland, to prevail on a claim of ineffective assistance of counsel, "a claimant must make two showings." Id. (citing Strickland, 466 U.S. at 687).

First, a claimant must show that counsel's performance was deficient. Id. In other words, a claimant must show that counsel's representation fell "below an objective standard of reasonableness." Id. (quoting Evans v. State, 117 Nev. 609, 622 (2001)). "The inquiry on review must be whether, in light of all the circumstances, counsel's assistance was reasonable." Id. (citing Strickland, 466 U.S. at 688).

"Second, a claimant must show that counsel's 'deficient performance prejudiced the defense.'" Id. (quoting Evans, 117 Nev. at 622). "Specifically, the claimant must show that there is a reasonable probability

///

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694).

B. Petitioner Received Ineffective Assistance of Counsel Due to Trial Counsel's Injection of Race Into The Proceedings.

In order to establish this claim, Petitioner must show that his attorney's trial performance was adversely affected by his racist views and that Petitioner was prejudiced as a result.

In assessing this claim, the District Court noted that it "understands the ugliness of the epithet that [trial counsel] wrote in his voir dire notes. Given the lack of other evidence that [trial counsel] is a racist and the context in which he wrote the epithet, one might infer that the note was the product of the attorney's consideration of uncomfortable questions about racial animus. Given [trial counsel's] failure to explain the note along those or other

///

reasonable lines, one might infer that [trial counsel] is a closet racist. *A.A. Vol. 2, p. 222.*

It is frankly astounding how the District Court could come to any conclusion other than trial counsel harbors racist views, relying on "a lack of other evidence." His trial counsel wrote a note that specifically stated "Shenck is a nigger too." When questioned at the hearing, trial counsel could offer no reasonable explanation for his words. They plainly state perhaps the most derogatory word in the English vocabulary that a white person can choose to express racial animus towards persons of African-American descent. Further, the "too" in that phrase conveys that Petitioner's trial counsel saw his client as a "nigger."

After the trial, Petitioner sent his attorney a letter complaining about the implication of racism against him found in the note. Rather than apologize, or offer any type of explanation, his attorney, in writing, chose to amplify the derogatory way in which he viewed his client. While he ostensibly disputed

///

the racial significance of the trial note, but also wrote: "I've called you a lot worse names than that for getting hooked up and staying with a 5'9" fat lady who sells dope and gambles away everything she's got." *A.A. Vol. 2, pp. 218-220.*

Any notion that the derogatory trial note should be chalked up as an error made in some spontaneous and unthoughtful moment is dispelled by what trial counsel wrote in response to his client's concerns about the note. Rather than apologizing, or offering any explanation, he proceeded to derogate and belittle his client even further. The letter was not penned during some heat of the moment at trial. Rather, trial counsel wrote it later with a full opportunity for reflection.

While it is true that Mr. Dean's letter to his trial counsel contained derogatory statements about him and others, his trial counsel is a trained and licensed professional, who swears an oath of fidelity to his client. Nothing in Mr. Dean's letter excuses that. While it may be true that the legal test that the court may employ to evaluate this claim is whether racism affected his

counsel's performance at trial, Petitioner respectfully suggests that this conduct should allow no space to draw any inferences favorable to trial counsel. In fact, it suggests that this court should draw inferences the other way.

Starting with voir dire during jury selection, and against his client's wishes, trial counsel chose to pursue the issue of race. While the District Court correctly cites authority for the proposition that a trial attorney has an obligation to employ a strategy calculated to ensure fair treatment by the jury in terms of race, those standards do not endorse any type of strategy. The one used by trial counsel in this case was overtly racist and provocative. There are many effective strategies that do not include, or require reference to the defendant as "a black guy." An effective strategy does not require using the idea that "black people like watermelon, or that black people may be seen as "sneaky or violent."

Only one of the prospective jurors chose to respond to trial counsel's strategy. Who knows that effect that may have had on the rest? The

methodology used in this case by trial counsel was so offensive that the court should draw no inferences that the silence of all but one prospective juror infers that the other jurors adopted the one's response. It is true that any prospective juror could have exposed racial prejudice by standing up and saying that they do think that African-Americans are generally sneaky and violent, and are particularly fond of watermelon. However, common sense dictates that people are generally reluctant to overtly announce the fact that they suffer from racial prejudice. There are certainly more professional means that could be used to elicit information regarding bias. Given the hard evidence that trial counsel harbored enormous disdain for his client, it may be fairly questioned as to why trial counsel chose not to use a more professional approach. Cynthia Lee, *A New Approach To Voir Dire On Racial Bias,* UC Irvine Law Review, Vol. 5; 843.

Petitioner respectfully suggests that trial counsel's racism also influenced the subject matter involved in his client's trial testimony. While some may urge this court to once again chalk the issue up to strategy, it defies

reason as to why counsel might choose to provide a jury with information that his client grew up in a rough neighborhood (and is presumably of rough character himself). He was familiar with, and a past participant in knife fighting - and particularly that his client had particular knowledge about how the most effective way that one could go about killing another with a knife.

On its face, this is strategy is so unsound that it should compel this court to draw other inferences. It is unsound because it established that the client was of rough character to start with due to his upbringing. Further, that he is no stranger to the use of knives during fights, and that he himself participated in such (although only to the extent of having knives pulled on him). The connection between this testimony and racism is obvious. Furthermore, trial counsel recognized the concern of potentially exposing the jury that information might further amplify notions of racial and cultural association of African-American people with violence and knives. *A.A. Vol. 2, p. 140.*

This court should accept Petitioner's testimony at the hearing that he was surprised by these questions, and that he would have refused to testify had

he known that his attorney intended to delve into that area. Common sense would dictate that a defendant would not be interested in telling a jury about his own rough character, prior knowledge and experience in knife fights, and how to best go about killing a person with a knife. This tactic was a matter of Trial Counsel's trial strategy. However, this strategy was so unusual and prejudicial, that it cannot be excused as merely "strategy." Petitioner testified at the hearing that he perceived the line of questions was the product of Trial Counsel's racism.

C. The Court Erred In Finding That Petitioner's Video Recorded Statements To The Police Were Not Hearsay.

At the hearing, Petitioner adduced evidence to counter testimony from Denise that Petitioner had been drinking at the time of the incident, and was enraged at the victims. *A.A. Vol. 2, p. 225.* The defense admitted body camera recordings of police interviews that took place at the scene, and while Petitioner was in the hospital, in support of that proposition. The court in

///

denying Habeas relief, found that the Petitioner's statements would have been inadmissible hearsay.

The court also denied relief, noting that "there was no trial evidence that Petitioner was drunk when the stabbing occurred, and would have been ineffective to impeach Denise's testimony. The court found that Petitioner while Petitioner was "animated," he did not appear intoxicated. Notably, there was no mention that he seemed angry or resentful. Finally, the court found that Petitioner gave the two police officers the same basic statement about the stabbings. The statement was also consistent with his trial testimony.

1. The evidence is admissible under NRS 51.095, which provides: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." The sole purpose of the police contact was to interview Petitioner regarding the events. The court found that Petitioner appeared "animated" on the video. *A.A. Vol. 2, p. 225*. Accordingly, Petitioner's statement related only, and directly to the incident, which was

obviously "startling" in and of itself. Furthermore, it is also "startling" for one to be placed under arrest, and may be even so when a person is arrested while believing he did nothing wrong to deserve it.

The statute does not require that the statement be made within any particular amount of time. There are no limitations on the types of events, identity or role of participants, who or what caused them, or whose fault the situation may have been.

The first interview was at the scene, shortly after the events occurred. The second was after the police took Petitioner to the hospital for treatment of his injuries. Injuries that require treatment at a hospital are painful and traumatic, and contribute to the "stress of excitement" that may have been caused by the "startling event."

2. The interviews were not "hearsay." NRS 51.035(2) provides that a statement is not hearsay where it is consistent with the declarant's testimony, and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

The prosecution expressly argued that the defendant's recent trial testimony was fabricated. *A.A. Vol. 2, pp. 82, 85, 87.* Since the testimony was very recent (during the very trial); and the prosecutor expressly argued, and certainly implied, that the defendant's version of the events was fabricated, the prior statements were admissible under NRS 51.035(2).

3. The interviews were admissible as proof of Petitioner's state of mind, even if the court were to conclude that they did not fit within the excited utterance exception, or were prior consistent statements made to rebut an express or implied charge of recent fabrication. The prosecution emphatically argued that the defendant was motivated by anger, both prior and during the events:

> "Look at the text messages. You will see that the defendant was angry when he went over there. He was angry when he showed up. He was angry to begin with. And he was frustrated about the relationship. That's obvious from the text messages . . .
>
> "Isn't that motive enough, in the middle of a fist fight, and just out of anger that maybe he is not winning the fight the way he wanted to, just angry that somebody is hitting him in the midst of a fist fight, he is angry at the circumstances. And there is that overall anger and frustration about the relationship with Denise." *A.A. Vol. 2, pp. 85-86.*

The definition of hearsay under NRS 51.035 requires that the statement be "offered to prove the truth of the matter asserted." The prosecutor was emphatic that the defendant was frustrated and angry with Denise prior to the events, and that he was exceedingly angry at both victims when they transpired. Petitioner did not display such anger while being interviewed. Under the theory of prosecution, the anger was pre-existing and pervasive - a condition that would not likely dissipate quickly. Accordingly, the videos were admissible to show the defendant's lack of anger shortly afterwards, which is relevant to rebut the prosecution's central theory that the defendant's anger was such that he was prepared to, and did act with an intent to kill. The prosecution would have been entitled to offer the jury a limiting instruction regarding the purpose for which the evidence was admitted.

///

///

///

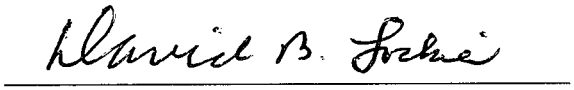
///

VI. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse his convictions, and remand the case to the District Court for a new trial.

DATED this 14th day of October, 2020.

LOCKIE & MACFARLAN, LTD.



DAVID B. LOCKIE
Nevada Bar #2384
Attorneys for Appellant
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

CERTIFICATE OF COMPLIANCE

1. I hereby 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 WordPerfect Office x5 in 14-point Times New Roman font and *triple spaced.*

2. I further certify that this brief complies with the page or type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, 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, in particular 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 on is to be 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.

DATED this 14th day of October, 2020.

LOCKIE & MACFARLAN, LTD.

David B. Lockie

DAVID B. LOCKIE
Nevada Bar #2384
Attorneys for Appellant
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of October, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Nevada Attorney General

David B. Lockie

Elko County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid to the following address(es):

Sean Dean #61722
c/o Southern Desert Correctional Ctr
P. O. Box 208
Indian Springs NV 89070-0208

Georgia Jordan