

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL BURKETT, A/K/A RAYMOND
HAIRE,

Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Jan 20 2022 10:52 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-19-788633-W

Docket No: 83743

RECORD ON APPEAL

ATTORNEY FOR APPELLANT

JOEL BURKETT #16111,
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT

STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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A-19-788633-W

Joel Burkett, Plaintiff(s)

vs.

William A Gittere, Defendant(s)

I N D E X

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Case No. 8K052190

Dept. No. 12

FILED

FEB 01 2019

John L. Johnson
CLERK OF COURT

IN THE 5th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

JOEL BURKEIT
Petitioner,

A-19-788633-W
Dept. XII

v.

William A. CITIZER
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS

(PURSUANT TO
NRS 34.500(25)(9))

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED

FEB 01 2019

CLERK OF THE COURT

A-19-788633-W
IPW/HC
Inmate Filed - Petition for Writ of Habeas
4813131



(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: EIV STATE PRISON

2. Name and location of court which entered the judgment of conviction under attack: _____

FIGHTING SUNDAY COURT

3. Date of judgment of conviction: 5-4-1981

4. Case number: C052190

5. (a) Length of sentence: 4 ~~YEARS~~ LIFE/10 AND 30 YEARS

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: 1ST DEGREE

KIDNAPPING, SEXUAL ABUSE, DEADLY WEAPON

8. What was your plea? (check one):

(a) Not guilty X (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes X No _____

12. Did you appeal from the judgment of conviction? Yes X No _____

13. If you did appeal, answer the following:

(a) Name of Court: NEWADA SUPREME COURT

(b) Case number or citation: DON'T HAVE

(c) Result: REVERSED 5-11-83

(d) Date of result: 5-11-83
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: DO NOT HAVE

(2) Nature of proceeding: RESCINDMENT

(3) Grounds raised: INDEFINITE CONFINEMENT

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☒ No ☐

(5) Result: DO NOT HAVE

(6) Date of result: DO NOT HAVE

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: N/A

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ☐ No ☐

Citation or date of decision: _____

(2) Second petition, application or motion? Yes ☐ No ☐

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ☐ No ☐

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

NEW US SUPREME COURT RULING 2018
McCoy v. Louisiana 200 LHD 20 88 (BRUNNEN)

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

NEW US SUPREME COURT
RULING PETITION BROUGHT PURSUANT
TO 1334, 500 (25/9) (SEE SUPPORTING FACTS)

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No ☒

If yes, state what court and case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: N/A

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes _____ No ☒

If yes, specify where and when it is to be served, if you know: _____

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One: ~~CONSTITUTIONAL VIOLATION~~
SIX AMEND VIOLATIONS RIGHT TO TRIAL BY
JURY (STRUCTURAL ERROR) EFFECTIVE
COUNSEL, STRUCTURAL ERROR - RIGHT TO
(MAINTAIN INNOCENCE AT TRIAL)
Supporting FACTS (Tell your story briefly without citing cases or law.):

SEE SUPPORTING FACTS ATTACHED
HERE TO AT PAGE 10

(b) Ground Two:

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three:

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four:

Supporting FACTS (Tell your story briefly without citing cases or law.):

(a) **Ground Five:** _____

Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

(b) **Ground Six:** _____

Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

(c) **Ground Seven:** _____

Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

(d) **Ground Eight:** _____

Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

(a) **Ground Nine:** _____

Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

(b) **Ground Ten:** _____

Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

(c) **Ground Eleven:** _____

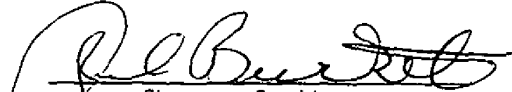
Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

(d) **Ground Twelve:** _____

Supporting **FACTS** (Tell your story briefly without citing cases or law.): _____

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 27 day of the month of Jan of the year 2019.


Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989


Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.


Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, José Bourget, hereby certify pursuant to N.R.C.P. 5(b), that on this 27 day of the month of Jan, of the year 2019 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

William Bittere
Respondent prison or jail official
PO BOX 1989
214.200.89301
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

STEVEN W. LINDEN
District Attorney of County of Conviction
200 HAWKINS AVE
LAS VEGAS
Address

[Signature]
Signature of Petitioner

AFFIRMATION PURSUANT TO NRS 239B.030

I, JOEL BURKETT, NDOC# 16011

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE
ATTACHED DOCUMENT ENTITLED WARRANT OF HABEAS
CORPUS

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

DATED THIS 27 DAY OF JAN, 20 19.

SIGNATURE:

Joel Burkett

INMATE PRINTED NAME: JOEL BURKETT

INMATE NDOC # 16011

INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

DECLARATION PURSUANT TO: N.R.S. 208.165

I, JOSIE BURKE, OF INMATE IDENTIFICATION
NUMBER: 16111, AM A LAWFULLY
COMMITTED PRISONER OF THE NEVADA DEPARTMENT OF
CORRECTIONS, PRESENTLY IN THE LAWFUL CARE AND
CUSTODY OF ELY STATE PRISON, LOCATED AT: 12000 NORTH
BOTHWICK ROAD, (MAILING) P.O. BOX 1989, IN CITY OF: ELY,
COUNTY: WHITE PINE, STATE: NEVADA, 89301. DOES AFFIRM
THAT THE ATTACHED DOCUMENT
ENTITLED: WRIT OF HABEAS CORPUS,
IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE &
BELIEF, AND ANY FALSE STATEMENT OF MATERIAL FACT
MADE THERE IN SHALL BE SUBJECTED TO THE PAINS AND
PENALTIES OF PERJURY PURSUANT TO: N.R.S. 208.165,
THIS 27 DAY OF JAN, 2019.

INMATE SIGNATURE: [Signature]

INMATE NAME (PRINTED): JOSIE BURKE

ADDRESS: ELY STATE PRISON

P.O. BOX 1989, ELY, NEVADA 89301

Grounds, Supporting Facts:

1.

2. (1) AT BURKEET'S 1981 JURY TRIAL, THE
3. JURY WAS INSTRUCTED "THAT IF THE
4. ATTORNEYS STIPULATE OR AGREE TO
5. THE EXISTANCE OF A FACT, YOU
6. MUST ACCEPT THE STIPULATION
7. AS EVIDENCE AND REGARD THE
8. FACT PROVEN;

9.

10. (2) BURKEET INFORMED COUNSEL THAT
11. HE WAS NOT GUILTY OF ANY
12. CRIME CHARGED AND TOOK THE
13. STAND AND TESTIFIED HE WAS
14. NOT GUILTY

15.

16. (3) IN CLOSING ARGUMENTS COUNSEL
17. CONCEDED BURKEET'S GUILT TO
18. THE JURY FOR THE CRIME OF
19. SEXUAL ASSAULT WHEN HE STATED;
20. WHAT COULD YOU FIND HIM GUILTY
21. OF THESE FOUR COUNTS, TAKEN THE
22. BEST EVIDENCE... THAT LEAVES ONE
23. COUNT OF SEXUAL ASSAULT
24. BECAUSE SHE AGREED IT WAS NOT
25. WITH HER CONSENT... THIS
26. EVIDENCE OF SEXUAL ASSAULT.

27.

28.

GROUNDS SUPPORTING FACTS CONTINUED;

1. YOU CAN ONLY FIND HIM GUILTY OF ONE
2. COUNT OF SEXUAL ASSAULT, BECAUSE TO
3. FIND HIM GUILTY OF THE REST YOU HAVE
4. TO FIND BEYOND A REASONABLE DOUBT.
- 5.
6. (4) BURRETT CONTENDS THAT HE HAD A RIGHT TO
7. MAINTAIN HIS INNOCENCE AT TRIAL AND
8. THAT IN LIGHT OF THE UNITED STATES
9. SUPREME COURT'S RULING IN,
10. MCCOY V. LOUISIANA, 2001 ED. 2D 821
11. (2018) COUNSEL'S ACTIONS CONSTITUTE
12. STRUCTURAL ERROR, AND BURRETT IS
13. ENTITLED TO DISCHARGE.
- 14.
15. (5) COUNSEL EFFECTUALLY READ BURRETT
16. GUILTY WITHOUT HIS CONSENT OR
17. KNOWLEDGE.
- 18.
19. (6) BURRETT BRINGS THIS ACTION
20. PURSUANT TO 34.000(2); (F), WRIT
21. OF HABEAS CORPUS, AND NOT UNDER
22. THE RULES OF POST-CONVICTION
- 23.
- 24.
- 25.
- 26.
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- 28.

Grounds Supporting Rices Continued

- 1.
2. (7) AS TO QUESTIONS 18 AT Pg. 4, BURKEET
3. COULD NOT HAVE RAISED THE ISSUE
4. BECAUSE AS IT IS A NEW CONSTITUTIONAL
5. RULE OF STRUCTURAL ERROR MADE
6. RETROACTIVE BY THE NATURE OF
7. THE CONSTITUTIONAL ISSUE (VIOLATION)
8. SEE MCCOY V. LOUISIANA 200 L.E.D. 20
9. 821 (2018) RULED ON MAY 14TH
10. 2018, BURKEET HAS BROUGHT
11. THE ISSUE WITHIN ONE YEAR
12. OF THE COURT'S RULING. MOREOVER,
13. BURKEET HAS BROUGHT THIS
14. PETITION PURSUANT TO 285 34,500 (2)(9)
15. POST-CONVICTION RULES DO NOT
16. APPLY

17.

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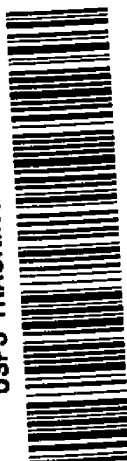


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FEB 07 2019 7

Ann L. Johnson
CLERK OF COURT

4
5 EIGHTH JUDICIAL DISTRICT
6 COURT, STATE OF NEVADA
7 COUNTY OF CLARK

8 NAME, JOEL BURKE

9 Plaintiff(s),

A-19-788633-W
Dept. XII

10 -VS-

11 NAME, William Bitter

12 Defendant(s).

REQUEST TO FILE

AMENDED PETITION

FOR WRIT OF HABEAS

CORPUS 34.500(2)(9)

13
14
15
16
17 COMES NOW JOEL BURKE in PRO PER and herein above respectfully

18 Moves this Honorable Court for a

ORDER ALLOWING THE

19 ABOVE PETITION FOR WRIT OF HABEAS

20 CORPUS TO BE AMENDED.

21
22
23 The above is made and based on the following Memorandum of Points and Authorities.

24
25
26
27
28
RECEIVED
FEB - 7 2019
CLERK OF THE COURT
A-19-788633-W
MOT
Motion
4814691



MEMORANDUM OF POINTS AND AUTHORITIES

ON BURKEET FILED THE ABOVE PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO WRS 34.500(2)(g) AT WHICH TIME BURKEET DID NOT HAVE COPIES OF HIS JURY INSTRUCTIONS OR CLOSING ARGUMENT TRANSCRIPTS, AND WAS UNABLE TO REFER TO PAGE AND LINE NUMBERS WITHIN THOSE TRANSCRIPTS WHERE TRIAL COUNSEL CONCEDED BURKEET'S GUILT TO THE JURY, EFFECTIVELY PLEADING BURKEET GUILTY WITHOUT HIS KNOWLEDGE OR CONSENT.

BURKEET HAS SUBMITTED HERETOIN AN AMENDED PETITION

FOR WRIT OF HABEAS CORPUS
CITING TO PAGE AND LINES
WITHIN THOSE TRANSCRIPTS
IN SUPPORT OF HIS CLAIM UNDER
THE SIXTH AMEND. U.S. CONST.

AND FOR THOSE REASONS REQUEST
THE COURT ACCEPT THE AMENDED
PETITIONS FOR WRIT OF HABEAS
CORPUS

Dated this 3 day of FEB, 2019

By: 

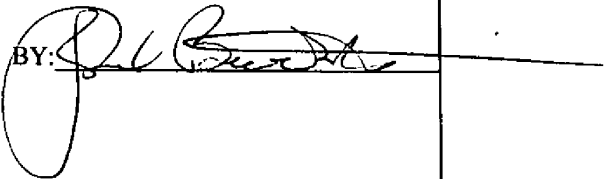
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CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein
and that on this 3 day of FEB, 2019, I mailed a true and correct copy of this
foregoing Request to Amend Writ of Habeas Corpus to the following:

William Gitter
PO Box 1989
ELY, MO 64501

BROWNLEE
200 BOWEN AVE
LYONS, MO 64595

BY: 

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, Request to

Amend the Will of James Corbett

(Title of Document)

Filed in case number: 21052190

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 2-3-18

[Signature]
(Signature)

JOEL BURKETT
(Print Name)

(Attorney for)

Case No. 81C052190

Dept. No. 12

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

JOEL BURKETT
Petitioner,

v.

WILLIAM GITTERE
Respondent.

AMENDED
PETITION FOR WRIT
OF HABEAS CORPUS
(REDACTED)
PURSUANT TO
NRS 34.500(2)(9)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

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FEB - 7 2019

CLERK OF COURT

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON, WHITE PINE

COUNTY

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUD. DIST CLARK COUNTY NEV.

3. Date of judgment of conviction: 5/4/1981

4. Case number: C052190

5. (a) Length of sentence: 4 LIFE/WITH AND 35 YEARS

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No ✓

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: SEXUAL ASSAULT, KIDNAPING, ROBBERY

8. What was your plea? (check one):

(a) Not guilty ✓ (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ✓ (b) Judge without a jury _____

11. Did you testify at the trial? Yes ✓ No _____

12. Did you appeal from the judgment of conviction? Yes ✓ No _____

13. If you did appeal, answer the following:

(a) Name of Court: NEV SUPREME COURT

(b) Case number or citation: DO NOT HAVE

(c) Result: DENIED

(d) Date of result: 5/11/1983
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: 1ST DIST CT

(2) Nature of proceeding: WRIT OF HABEAS CORPUS POST-CONVICTION

(3) Grounds raised: INEFFECTIVE ASSISTANCE OF COUNSEL

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☒ No ☐

(5) Result: denied

(6) Date of result: 8-20-1987

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ☐ No ☐

Citation or date of decision: _____

(2) Second petition, application or motion? Yes ☐ No ☐

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ☐ No ☐

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

18. If any of the grounds listed in No. 's 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

GROUND ONE, NEW CONSTITUTIONAL RULE did NOT
EXIST PRIOR TO 2018

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

YES. NEW CONSTITUTIONAL RULE
MADE RETROACTIVE, SEE SUPPORTING FACTS
ATTACHED HERETO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No ☒

If yes, state what court and case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: _____

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ☒ No _____

If yes, specify where and when it is to be served, if you know: WHITEHOUSE

COUNTY 6 MONTH COUNTY JAIL TERM

23. State concisely every ground on which you claim that you are being held unlawfully, summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One: INEFFECTIVE ASSISTANCE OF COUNSEL

BURKETT WAS DENIED THE RIGHT TO
~~REPRESENT~~ AUTONOMY

Supporting FACTS (Tell your story briefly without citing cases or law.):

SEE SUPPORTING FACTS ATTACHED
HEREIN AT Pg 10,

(b) Ground Two:

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three:

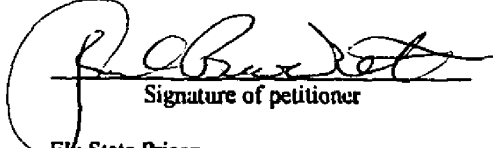
Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four:

Supporting FACTS (Tell your story briefly without citing cases or law.):

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 3 day of the month of Feb of the year 2019.


Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

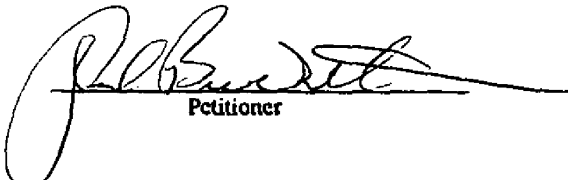
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.


Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, JOCI BURKE, hereby certify pursuant to N.R.C.P. 5(b), that on this 3 day of the month of FEB, of the year 2019 I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

William GIBBE
Respondent prison or jail official
P.O. Box 988 ELY NV
89306
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

STEVEN L. WATSON
District Attorney of County of Conviction

200 KENNEDY AVE
ELIOT NV
Address

[Signature]
Signature of Petitioner

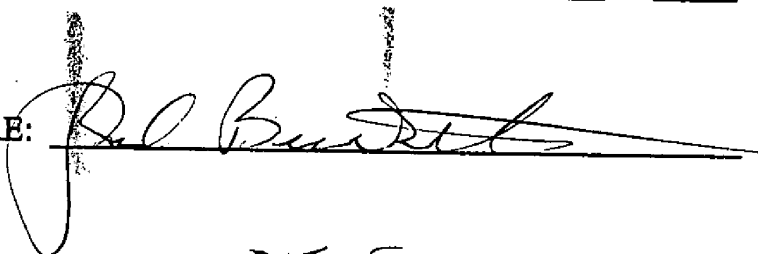
AFFIRMATION PURSUANT TO NRS 239B.030

I, JOEL BURKEY, NDOC# 16411

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE
ATTACHED DOCUMENT ENTITLED Amended Petition of
HABEAS CORPUS

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

DATED THIS 3RD DAY OF FEB, 2018.

SIGNATURE: 

INMATE PRINTED NAME: JOEL BURKEY

INMATE NDOC # 16411

INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

GROUND ONE, SUPPORTING FACTS:

- 1.
2. PETITIONER TESTIFIED IN HIS OWN DEFENSE
3. THAT HE WAS NOT GUILTY OF ANY
4. CRIME CHARGED, HIS DEFENSE WAS
5. CONSENT. WITHOUT COUNTERING WITH
6. PETITIONER AND AGAINST PETITIONERS
7. OWN DEFENSE TRIAL COUNSEL CONCEDED
8. HIS GUILT TO THE CRIME OF
9. SEXUAL ASSAULT. HIS TRIAL COUNSEL
10. BEEN AWARE OF THE DEFENSE OF
11. CONSENT THERE CAN BE NO JUSTIFICATION
12. FOR HIM TELLING THE JURY THAT
13. PETITIONER WAS GUILTY OF RAPE.
14. "WHAT COULD YOU FIND HIM GUILTY
15. OF, THESE FOUR COUNTS, THAT HEAVES
16. ONE COUNT... THAT HE HAD SEXUAL
17. INTERCOURSE WITH HER AGAINST HER
18. WILL, BY FORCE OR FEAR, A SEXUAL
19. ASSAULT, MORE REFINED WAY FOR
20. RAPE, ALL RIGHT, AND THERE WAS
21. EVIDENCE OF THAT TAKING THE
22. BEST EVIDENCE, BECAUSE SHE
23. AGREED IT WASN'T WITH HER
24. CONSENT (T.T. Pg 477)

25.
26. (Continued on Pg 11.)

27.

28.

GROUND ONE SUPPORTING FACTS CONTINUED FR. PG 10:

- 1.
2. "THIS EVIDENCE OF RAPE" (T.T. PG 477)
3. "YOU COULD COME BACK WITH A VERDICT
4. OF GUILTY OF SEXUAL ASSAULT" (T.T. PG 477).
5. "ONLY ONE CRIME YOU CAN FIND HIM
6. GUILTY OF, THAT'S SEXUAL ASSAULT,
7. ONE COUNT OF HAVING SEXUAL
8. INTERCOURSE WITH THAT GAY,
9. BECAUSE TO FIND HIM GUILTY OF THE
10. REST, YOU HAVE TO FIND BEYOND
11. A REASONABLE DOUBT" (T.T. PG 479)
12. COUNSEL WENT ON TO INFORM THE
13. JURY: "SO, WE REALLY ARE DOWN,
14. NOT A VERY HARD PROBLEM AS FAR AS
15. YOUR CONCERNED, BECAUSE, COURSE, I'M
16. HERE TO TRY AND CONVINCE YOU
17. OTHERWISE" (T.T. PG 480) "YOU KNOW
18. IT COULD BE IN PART TRUE
19. EVERYTHING AFTER THE FACT OF
20. GOING OUT IN THE DESERT MAKE
21. HE FORCED HIMSELF ON HER" (T.T. PG 481)
- 22.
23. THE JURY WAS INSTRUCTED IF
24. THE ATTORNEY'S
- 25.
26. (Continued on PG 12)
- 27.
28. 11.

Grounds, Supporting Facts, Continued Fr. Pg 11,

1.

2. STIPULATE OR AGREE TO THE EXISTENCE
3. OF A FACT, YOU MUST ACCEPT THE
4. STIPULATION AS EVIDENCE AND
5. REGARD THE FACT AS PROVEN.
6.

7.

8. THE PETITIONER WAS 19 YEARS OLD AT
9. THE TIME OF HIS TRIAL WITH A 7TH GRADE
10. EDUCATION, AND 74 I.Q. SCORE,
11. COUNSEL NEVER COUNTERED OR
12. INFORMED PETITIONER HE WAS GOING
13. TO CONCEDE HIS GUILT
14.

15. IN LIGHT OF THE UNITED STATES
16. SUPREME COURT'S RULING IN,
17. MCCOY V. LOUISIANA 138 S. CT 1500,
18. 200 L. ED. 2D 821 (2008) WHEREIN, THE
19. COURT RULED "VIOLATION OF A
20. DEFENDANT'S SIXTH AMENDMENT
21. SECURED AUTONOMY CONSTITUTIONAL
22. STRUCTURAL ERROR"

23.

24. BURKEEN COUNTERS MCCOY (SUPRA)
25. APPLIES RETROACTIVELY
26.

27. (Continued on Pg 13)

28.

12.

GROUNDS, SUPPORTING FACTS CONTINUED FR. Pg 12.

1.

2. AS TO QUESTION 18, 19 OF THE

3. PETITION FOR WRIT OF HABEAS CORPUS.

4. PETITIONER CONTENDS THAT THE

5. HABEAS CORPUS IS BASED UPON A

6. NEW RULE OF CONSTITUTIONAL

7. LAW WHICH APPLIES RETROACTIVELY

8. MCCOY (SUPRA) THAT CASE WAS

9. DECIDED MAY 14TH 2018, THUS,

10. PETITIONER HAS BROUGHT HIS

11. CLAIM WITHIN ONE YEAR OF

12. THE COURT'S RULING.

13.

14. PETITIONER BRINGS THIS WRIT OF

15. HABEAS CORPUS PURSUANT TO

16. N.R.S. 34.500(2)(9).

17.

18.

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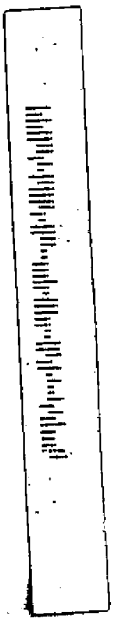
28.

Joe, Darker 1611
PO BOX 689
E19000
81301



Las Vegas, NV 89199
TUE 05 FEB 2019 PM

Clark, Stuart, Dis Court
200 Lewis Ave
3rd Floor
Las Vegas, NV
89155-2212



STATE PRISON

FEB 03 2013

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27

1 JOEL BURKETT #76111
2 PO BOX 1989
3 ELY, NV 89301

FILED

MAR 13 2019

John L. Williams
CLERK OF COURT

4
5 EIGHTH JUDICIAL DISTRICT
6 CLARK COUNTY OF NEVADA
7 STATE OF NEVADA

8 NAME JOEL BURKETT

9 Plaintiff(s),

10 -VS-

11 NAME WILLIAM BITTLE

12 Defendant(s).

CASE NO A-19-788633-W

NOTICE OF
CORRECTION

13
14
15
16
17 COMES NOW, JOEL BURKETT, in PRO PER and herein above respectfully

18 Moves this Honorable Court for a CORRECTION IN THE
19 RECORD

20
21
22
23 The above is made and based on the following Memorandum of Points and Authorities.

24 RECEIVED
25 MAR 13 2019
26 CLERK OF THE COURT

A-19-788633-W
NOTC
Notice
4822252



MEMORANDUM OF POINTS AND AUTHORITIES

ON 2-7-19 BURKEIT FILED A REQUEST
TO AMEND THE PETITION. AMENDED
PETITION AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF THE
PETITION FOR WRIT OF HABEAS CORPUS

IN THE MEMORANDUM OF POINTS
OF AUTHORITIES BURKEIT CONTENDED
TRIAL COUNSEL'S CONFESSIONS WOULD
IMPACT A GUILTY PLEA IN LIGHT OF
THE JURY BEING INSTRUCTED:

" IF THE ATTORNEYS STIPULATE
OR AGREE TO THE EXISTENCE
OF A FACT YOU MUST ACCEPT
THE STIPULATIONS AS EVIDENCE
AND REGARD THE FACT AS
PROVEN (JURY INSTRUCTION 20)

BURKEIT FAILED TO CITE
(JURY INSTRUCTION # 20) IN THE
RECORD.

BURKEIT RESPECTFULLY REQUEST
THE COURT CORRECT THE
RECORD TO SHOW THAT
THE JURY INSTRUCTION STATED
THEREAS IS IN FACT
JURY INSTRUCTION 20

Respectfully
Submitted

Dated this 10th day of MARCH, 2018

By: 

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CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCR Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein
and that on this 10 day of MARCH, 20 19, I mailed a true and correct copy of this
foregoing NOTICE OF CORRECTIONS to the following:

STEVEN WILSON
200 Lewis Ave
Los Vegas, NV

William Riddle
P.O. Box 188
Elko, NV

BY: [Signature]

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, Notice

OF CORRECTIONS

(Title of Document)

Filed in case number: A-19-722633-C-5

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

Or

☐ For the administration of a public program

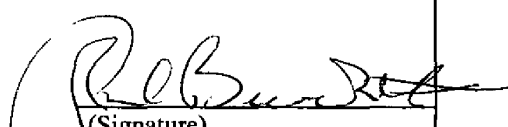
Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 3-10-19


(Signature)

Rob Burket
(Print Name)

(Attorney for)

DECLARATION PURSUANT TO: N.R.S. 208.165

I, JOEL BURKE, OF INMATE IDENTIFICATION
NUMBER: 1611, AM A LAWFULLY
COMMITTED PRISONER OF THE NEVADA DEPARTMENT OF
CORRECTIONS, PRESENTLY IN THE LAWFUL CARE AND
CUSTODY OF ELY STATE PRISON, LOCATED AT: 12000 NORTH
BOTHWICK ROAD, (MAILING) P.O. BOX 1989, IN CITY OF: ELY,
COUNTY: WHITE PINE, STATE: NEVADA, 89301. DOES AFFIRM
THAT THE ATTACHED DOCUMENT
ENTITLED: NOTICE OF CORRECTIONS,
IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE &
BELIEF, AND ANY FALSE STATEMENT OF MATERIAL FACT
MADE THERE IN SHALL BE SUBJECTED TO THE PAINS AND
PENALTIES OF PERJURY PURSUANT TO: N.R.S. 208.165,
THIS, 10, DAY OF: MARCH, 2019.

INMATE SIGNATURE

INMATE NAME (PRINTED):

ADDRESS: ELY STATE PRISON

P.O. BOX 1989, ELY, NEVADA 89301

JOE BUCKLEY 1611
Re BOK 1988
21/1/20
87361

ELY STATE PRISON
MAR 10 2019
UB

C/ERK at COURT
Ree Lewis NOE
3rd Floor
Las Vegas, NV
89155-2212
89155-2212





1 ORDR

2
3 EIGHTH JUDICIAL DISTRICT
4 CLARK COUNTY, NEVADA

5 JOEL BURKETT,

6 Petitioner,

7 vs.

8 THE STATE OF NEVADA

9 Respondent

) Case No.: A-19-788633-W

) DEPT. No.: XII
) (Tenth Petition)

10 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

11 FINDINGS OF FACT

12
13 1. On January 19, 1981, the State of Nevada charged Joel Burkett
14 ("Petitioner") by way of Information with Count 1, ROBBERY & USE OF A
15 DEADLY WEAPON IN COMMISSION OF A CRIME (Felony – NRS 200.380,
16 193.165); Count 2, FIRST DEGREE KIDNAPPING & USE OF A DEADLY
17 WEAPON IN COMMISSION OF A CRIME (Felony – NRS 200.310, 193.165); Count
18 3, SEXUAL ASSAULT (Felony – NRS 200.364, 200.366); and Count 4, SEXUAL
19 ASSAULT (Felony – NRS 200.364, 200.366).

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

24 3. On June 2, 1981, Petitioner was sentenced to serve a term in the Nevada
25 State Prison as follows: Count 1, Fifteen years for Robbery and a consecutive fifteen
26 (15) years for Use of a Deadly Weapon in Commission of a Crime; Count 2, Life with
27 Possibility of Parole and a consecutive term of Life with the Possibility of Parole for
28 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.

MICHELLE LEAVITT
DISTRICT JUDGE

DEPARTMENT TWELVE
LAS VEGAS, NEVADA 89155

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 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
29 you take our case and throw it out the window – don't believe anything from him. Don't
30 believe anybody, or her, with a vengeance of conviction, and going with the State's –
31 simply back to the 18th Century – then you could come back with a verdict of guilty of
32 sexual assault" (*See* trial transcript pg. 477). Counsel then continues to argue there was
33 no evidence of forced sex because the victim and Petitioner both had no marks on them
34 (*See* trial transcript, pg. 478). Counsel also vigorously argued the victim was not
35 truthful in her testimony to the jury pointing out inconsistencies in her testimony and
36 her statements to the police, and arguing the medical examiner found no evidence of
37 anal sex which the victim reported. (*See* trial transcript pg's. 476- 486).


38 Defense counsel further stated, "Now, again, we're still talking in the best
39 evidence of the State's case." "Now, what are we going to find him guilty of? Only one
40 crime you can find him guilty of. That's sexual assault, one count of having sexual
41 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
DISTRICT COURT JUDGE
10 DEPARTMENT XII
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)



1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 JOEL BURKETT,

6 Petitioner,

Case No: A-19-788633-W

Dept No: XII

7 vs.

8 WILLIAM GITTERE,

9 Respondent,

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

10
11 **PLEASE TAKE NOTICE** that on April 18, 2019, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

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

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Debra Donaldson

18 Debra Donaldson, Deputy Clerk

19 **CERTIFICATE OF E-SERVICE / MAILING**

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

21 ☒ By e-mail:

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

24 ☒ The United States mail addressed as follows:

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

28 /s/ Debra Donaldson

Debra Donaldson, Deputy Clerk



1 ORDR

2
3 EIGHTH JUDICIAL DISTRICT
4 CLARK COUNTY, NEVADA

5 JOEL BURKETT,

6 Petitioner,

7 vs.

8 THE STATE OF NEVADA

9 Respondent

) Case No.: A-19-788633-W

) DEPT. No.: XII
) (Tenth Petition)

10 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

11 FINDINGS OF FACT

12
13 1. On January 19, 1981, the State of Nevada charged Joel Burkett
14 ("Petitioner") by way of Information with Count 1, ROBBERY & USE OF A
15 DEADLY WEAPON IN COMMISSION OF A CRIME (Felony – NRS 200.380,
16 193.165); Count 2, FIRST DEGREE KIDNAPPING & USE OF A DEADLY
17 WEAPON IN COMMISSION OF A CRIME (Felony – NRS 200.310, 193.165); Count
18 3, SEXUAL ASSAULT (Felony – NRS 200.364, 200.366); and Count 4, SEXUAL
19 ASSAULT (Felony – NRS 200.364, 200.366).

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

24 3. On June 2, 1981, Petitioner was sentenced to serve a term in the Nevada
25 State Prison as follows: Count 1, Fifteen years for Robbery and a consecutive fifteen
26 (15) years for Use of a Deadly Weapon in Commission of a Crime; Count 2, Life with
27 Possibility of Parole and a consecutive term of Life with the Possibility of Parole for
28 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.

MICHELLE LEAVITT
DISTRICT JUDGE

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
29 you take our case and throw it out the window – don't believe anything from him. Don't
30 believe anybody, or her, with a vengeance of conviction, and going with the State's –
31 simply back to the 18th Century – then you could come back with a verdict of guilty of
32 sexual assault" (*See* trial transcript pg. 477). Counsel then continues to argue there was
33 no evidence of forced sex because the victim and Petitioner both had no marks on them
34 (*See* trial transcript, pg. 478). Counsel also vigorously argued the victim was not
35 truthful in her testimony to the jury pointing out inconsistencies in her testimony and
36 her statements to the police, and arguing the medical examiner found no evidence of
37 anal sex which the victim reported. (*See* trial transcript pg's. 476- 486).

38 Defense counsel further stated, "Now, again, we're still talking in the best
39 evidence of the State's case." "Now, what are we going to find him guilty of? Only one
40 crime you can find him guilty of. That's sexual assault, one count of having sexual
41 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
DISTRICT COURT JUDGE
10 DEPARTMENT XII
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)

(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

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

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, JOSE 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 BIERRE

PO BOX 1989

ELY, NV 89703

Signature

[Signature]

Print Name

JOSE 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, 2019.

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

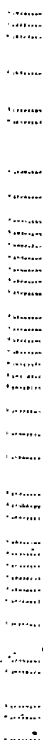
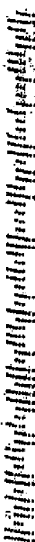
89202

JOE BURKETT 16111
N.W.C.C.
P.O. Box 7000
CAROUSEL, NC
89202

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CONFIDENTIAL

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1st Vegas, NV
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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),
14
15

Case No: A-19-788633-W

Dept No: XII

16
17 **CASE APPEAL STATEMENT**

18 1. Appellant(s): Joel Burkett

19 2. Judge: Michelle Leavitt

20 3. Appellant(s): Joel Burkett

21 Counsel:

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

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

26 Counsel:

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

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

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5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A
- Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A
6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No
7. Appellant Represented by Appointed Counsel On Appeal: N/A
8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: Yes,
Date Application(s) filed: February 1, 2019
9. Date Commenced in District Court: February 1, 2019
10. Brief Description of the Nature of the Action: Civil Writ
Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus
11. Previous Appeal: No
Supreme Court Docket Number(s): N/A
12. Child Custody or Visitation: N/A
13. Possibility of Settlement: Unknown

Dated This 22 day of May 2019.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Joel Burkett

Steven D. Grierson

OSCC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JOEL BURKETT, PLAINTIFF(S)
VS.
WILLIAM A GITTERE,
DEFENDANT(S)

CASE NO.: A-19-788633-W

DEPARTMENT 12

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to
statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☒ Summary Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☐ Voluntary Dismissal
- ☐ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- ☐ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☐ Other Manner of Disposition

DATED this 6 day of June, 2019.

Michelle Leavitt
MICHELLE LEAVITT
DISTRICT COURT JUDGE

MICHELLE LEAVITT
DISTRICT JUDGE

DEPARTMENT TWELVE
LAS VEGAS, NEVADA 89155



1 CSERV

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5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7
8 JOEL BURKETT,

9 Plaintiff(s),

10 vs.

11 WILLIAM A GITTERE,

12 Defendant(s).

Case No: A-19-788633-W

Dept No: XII

13
14
15 **CERTIFICATE OF RE-SERVICE**

16 I HEREBY CONFIRM that the Notice of Entry of Findings of Fact Conclusions of Law
17 and Order originally filed on April 22, 2019 has been served on the Office of the Clark County
18 District Attorney and the Office of the Attorney General via electronic service.

19
20 All other respective party(ies) and their counsel(s), if any, have already received copies
21 via U.S. Mail when initially filed.

22
23 Steven D. Grierson, Clerk of the Court

24 s/Debra Donaldson

25 Debra Donaldson, Deputy Clerk

Ungermann, Heather

From: Donaldson, Debra
Sent: Wednesday, July 24, 2019 10:12 AM
To: 'motions@clarkcountyda.com'; 'wiznetfilings@ag.nv.gov'; Ungermann, Heather
Subject: FW: Filing Accepted for Case: A-19-788633-W; Joel Burkett, Plaintiff(s)vs.William Gittere, Defendant(s); Envelope Number: 4178095

From: efilingmail@tylerhost.net [mailto:efilingmail@tylerhost.net]
Sent: Monday, April 22, 2019 10:05 AM
To: Donaldson, Debra
Subject: Filing Accepted for Case: A-19-788633-W; Joel Burkett, Plaintiff(s)vs.William Gittere, Defendant(s); Envelope Number: 4178095



Filing Accepted

Envelope Number: 4178095
Case Number: A-19-788633-W
Case Style: Joel Burkett, Plaintiff(s)vs.William Gittere, Defendant(s)

The filing below was accepted through the eFiling system. You may access the file stamped copy of the document filed by clicking on the below link.

Filing Details	
Court	Clark District Criminal/Civil
Case Number	A-19-788633-W
Case Style	Joel Burkett, Plaintiff(s)vs.William Gittere, Defendant(s)
Date/Time Submitted	4/22/2019 10:02 AM PST
Date/Time Accepted	4/22/2019 10:04 AM PST
Accepted Comments	Auto Review Accepted
Filing Type	Notice of Entry - NEO (CIV)
Filing Description	Notice of Entry of Findings of Fact, Conclusions of Law and Order
Activity Requested	EFile
Filed By	Debra Donaldson
Filing Attorney	

Document Details	
Lead Document	A788633.042219_neo_dd.pdf
Lead Document Page	9

Count	
File Stamped Copy	<u>Download Document</u>
This link is active for 45 days.	

Please Note: If you have not already done so, be sure to add yourself as a service contact on this case in order to receive eService.

For technical assistance, contact your service provider

Odyssey File & Serve

(800) 297-5377

Please do not reply to this email. It was automatically generated.

Case No. _____

Dept. No. _____

FILED
FEB 06 2020

John J. Williams
CLERK OF COURT

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

A-19-788633-W
Dept. XII

JOEL BURKEIT
Petitioner,

v.

ISIDRO BACA WARDEN
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED

FEB - 6 2020

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CLERK OF THE COURT

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: NEVADA NORTHERN CORRECTIONS CENTER CARSON CITY NEVADA

2. Name and location of court which entered the judgment of conviction under attack: First Jud. Dist. Ct., Clark County, NV

3. Date of judgment of conviction: 5/4/1981

4. Case number: C652190

5. (a) Length of sentence: 4 LIFE/10 YR, AND 30 YRS

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No ✓
If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: SEXUAL ASSAULT 1ST DEGREE KIDNAPING, ROBBERY WITH WEAPON

8. What was your plea? (check one):
(a) Not guilty ✓ (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury ✓ (b) Judge without a jury _____

11. Did you testify at the trial? Yes ✓ No _____

12. Did you appeal from the judgment of conviction? Yes ✓ No _____

13. If you did appeal, answer the following:
(a) Name of Court: NEV SUPREME CT
(b) Case number or citation: DO NOT KNOW
(c) Result: REVERSED

(d) Date of result: 5/11/1983
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?
Yes _____ No _____

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: 1ST CIR. DIST. CT.
(2) Nature of proceeding: WRIT OF HABEAS CORPUS PETITION

(3) Grounds raised: INEFFECTIVE COUNSEL

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _____ No ✓

(5) Result: denied

(6) Date of result: 8-20-1987

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No _____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: GROUND ONE

(b) The proceedings in which these grounds were raised: WRIT OF HABEAS CORPUS CASE NO. A-19-788633-W, ALSO COA CASE NO. 78868-COA

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

SEE QUESTION 17 ON PAGE 12

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

NONE

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

SEE QUESTION 19 ON PAGE 12

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ☐ No ☒

If yes, state what court and case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: DO NOT HAVE

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ☐ No ☒

If yes, specify where and when it is to be served, if you know:

23. State concisely every ground on which you claim that you are being held unlawfully, summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One: SIXTH AMENDMENT RIGHT TO
AUTONOMY AND EFFECTIVE COUNSEL

Supporting FACTS (Tell your story briefly without citing cases or law.):

SEE SUPPORTING FACTS GROUND ONE
ON PAGE (9) ✓

(b) Ground Two:

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three:

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four:

Supporting FACTS (Tell your story briefly without citing cases or law.):

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 2 day of the month of Feb of the year 2020.


Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

N. N. C. C.

P.O. BOX 7000

CARSON CITY, NV
89702

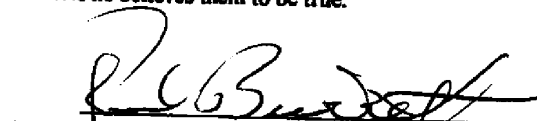
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.


Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, JOEL BURKE, hereby certify pursuant to N.R.C.P. 5(b), that on this 2 day of the month of FEB, of the year 2020 mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

ISIDRO BACA
Respondent prison or jail official
PO Box 7000
CARSON CITY, NV 89705
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

CLARK COUNTY
District Attorney of County of Conviction
200 LEWIS AVE
CARSON CITY, NV
Address

[Signature]
Signature of Petitioner

AFFIRMATION PURSUANT TO NRS 239B.030

I, JOEL BURETT, NDOC# 16111

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE
ATTACHED DOCUMENT ENTITLED WRIT OF HABEAS
CORPUS POET CONVICTION

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

DATED THIS 2 DAY OF FEB, 2020.

SIGNATURE: 

INMATE PRINTED NAME: JOEL BURETT

INMATE NDOC # 16111

INMATE ADDRESS: ~~STATE PRISON~~

~~P.O. BOX 7000~~

~~CLARK COUNTY~~

N. N. C.

P.O. BOX 7000

CLARK COUNTY, NV
89702

GROUND ONE: SUPPORTING FACTS CONTINUED FR. PG (5)

1.
2. BURKETT'S TRIAL ATTORNEY CONCEDED HIS GUILT
3. WITHOUT HIS CONSENT TO THE CRIME OF
4. SEXUAL ASSAULT.
5. THE JURY WAS INSTRUCTED, " IF THE
6. ATTORNEYS STIPULATE OR AGREE TO
7. THE EXISTANCE OF A FACT, YOU
8. MUST ACCEPT THE STIPULATION
9. AS EVIDENCE AND REGARD THE
10. FACT AS PROVEN" (JURY INSTRUCTION 20).

11.
12. IN THE FACE OF JURY INSTRUCTION 20,
13. TRIAL COUNSEL INFORMED THE JURY;
14. " WHAT COULD YOU FIND HIM GUILTY
15. OF THESE FOUR COUNTS. THAT
16. LEAVES ONE COUNT... THAT HE
17. HAD SEXUAL INTERCOURSE WITH HER
18. AGAINST HER WILL, BY FORCE OR
19. FEAR, A SEXUAL ASSAULT,
20. MORE REFINED WAY FOR RAPE,
21. ALL RIGHT, AND THERE WAS
22. EVIDENCE OF THAT TAKING
23. THE BEST EVENTS, BECAUSE
24. SHE AGREED IT WASN'T WITH
25. HER CONSENT (TRIAL TRANSCRIPT PG. 476)

GROUND ONE; SUPPORTING FACTS CONTINUED FR. Pg 479)

1...
2... "THE ONLY CORROBORATION THAT YOU
3... HAVE THAT THERE WAS A SEXUAL
4... ASSAULT WAS THE FACT THAT SHE
5... HAD ACID PHOSPHATASE INSIDE OF
6... HER AND SPERMATOZOON IN HER
7... VAGINA, THAT'S EVIDENCE OF RAPE
8... (T.T. Pg 477)

9...
10... "YOU COULD COME BACK WITH A VERDICT
11... OF GUILTY OF SEXUAL ASSAULT" (T.T. Pg 477)

12...
13... "ONLY ONE CRIME YOU CAN FIND HIM
14... GUILTY OF, THAT'S SEXUAL ASSAULT,
15... ONE COUNT OF HAVING SEXUAL
16... INTERCOURSE WITH TINA CAGE,
17... BECAUSE TO FIND HIM GUILTY OF
18... THE REST YOU HAVE TO FIND
19... BEYOND A REASONABLE DOUBT"
20... (T.T. Pg 479) (EMPHASIS ADDED)

21...
22... "YOU KNEW IT COULD BE TRUE
23... EVERYTHING AFTER THE FACT OF
24... COMING OUT IN THE DESERT
25... MAYBE HE FORCED HIMSELF
26... ON HER" (T.T. Pg 481)

27...
28...

GROUND ONE: SUPPORTING FACTS CONTINUED FR. Pg. (10)

1...

2... COUNSEL WENT ON TO TELL THE JURY;

3... "SO WE REALLY ARE DOWN, NOT A

4... VERY HARD PROBLEM AS FAR AS

5... YOUR CONCERNED, BECAUSE,

6... COURSE, I'M HERE TO TRY AND

7... CONVINCE YOU OTHERWISE"

8... (T.T. Pg 480)

9...

10... COUNSEL'S CONCESSIONS, "STIPULATIONS -

11... AGREEMENTS" IN THE FACE OF JURY

12... INSTRUCTION #20 WAS IN FACT A

13... GUILTY PLEA AND/OR DIRECTED

14... VERDICT FOR THE CRIME OF

15... SEXUAL ASSAULT IN VIOLATION

16... OF BURKETT'S SIXTH AMENDMENT

17... RIGHT OF AUTONOMY, MCCOY V.

18... LOUISIANA 138 S.Ct 1500 (2018)

19... AND CONTRARY TO BURKETT'S OWN

20... TESTIMONY (T.T. Pg 390-423)

21... THAT HE WAS INNOCENT OF ALL

22... CRIMES CHARGED.

23...

24...

25...

26...

27...

28...

29...

30...

31...

32...

QUESTION 17 CONTINUED FROM Pg 4

- 1..
- 2.. BURKETT FILED A WRIT OF HABEAS CORPUS
- 3.. PURSUANT TO 34,500(259) IN
- 4.. CASE NO: A.19-788633W, WHICH THIS
- 5.. COURT DENIED. BURKETT THEN APPEALED
- 6.. TO THE NEVADA COURT OF APPEALS IN
- 7.. CASE NO: 78868-CA
- 8.. THE COURT DENIED BURKETT'S APPEAL ON
- 9.. JAN. 14TH 2020 CHAMING BURKETT
- 10.. MUST FILE PURSUANT TO N.R.S 34,360
- 11.. THROUGH 34,680.
- 12..
- 13..

14.. QUESTION 19 CONTINUED FROM Pg(4)

- 15..
- 16.. AS TO QUESTION 19, PETITIONER CONTENDED
- 17.. THAT THIS POST-CONVICTION PETITION IS
- 18.. BASED UPON A NEW RULE OF
- 19.. CONSTITUTIONAL LAW WHICH MUST
- 20.. APPLY RETROACTIVELY
- 21.. MCCOY V. LOUISIANA 138 S.Ct 1500,
- 22.. (2018) WHEREIN THE COURT RULED
- 23.. " VIOLATION OF A DEFENDANT'S SIXTH
- 24.. AMENDMENT SECURED AUTONOMY
- 25.. CONSTITUTED STRUCTURAL ERROR"
- 26..
- 27..
- 28..

QUESTIONS 19 CONTINUED FROM PG 12

1.
2. BURKETT ALSO CONTENDS THAT THE
3. PRO SE PETITIONER FILED THE
4. INCORRECT PETITION IN THE
5. PRIOR PROCEEDINGS IN CASE NO.
6. A-18-788633-WV BECAUSE HE
7. HAD NO ACCESS TO A LAW
8. LIBRARY OR PERSON TRAINED IN
9. THE LAW, AT THE TIME OF
10. THOSE PROCEEDINGS BURKETT WAS HOUSED
11. AT THE ZIL STATE PRISON WHEREAS
12. THE LAW LIBRARY CONSIST OF A
13. PAGING SYSTEM - BURKETT COULD NOT
14. GO TO THE LAW LIBRARY NOR COULD
15. A LAW CLERK COME TO THE HOUSING
16. UNITS - HE COULD ONLY REQUEST
17. IN WRITING FOR THINGS HE KNEW
18. TO ASK FOR. THUS IF YOU ARE
19. NOT AN ATTORNEY YOU'RE LEFT
20. WITH NO WAY TO KNOW WHAT
21. TO REQUEST - MOREOVER, SOME
22. UNNAMED INMATE LAW CLERK
23. INFORMED HIM HE NEEDED TO FILE
24. A WRIT OF HABEAS CORPUS -
25. THUS HE FILED THE INCORRECT
26. PETITION.

27.
28.

QUESTIONS 19. CONTINUED FR. Pg 13

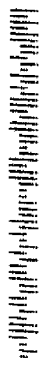
- 1.
- 2.
3. BURKEIT CONTENDS A DENIAL OF
4. HIS CONSTITUTIONAL RIGHT OF
5. ACCESS TO THE COURT PURSUANT
6. TO BOUNDS V. SMITH 97 S.Ct. 1481
7. (1977) AS "GOOD CAUSE" FOR
8. PRESENTING HIS CLAIM AGAIN AND
9. FOR UNLAWFULLY FILING THE CORRECT
10. POST-CONVICTION PETITION
- 11.
12. MOREOVER, ACTUAL PREJUDICE EXISTS
13. WHEREAS, THE COURT IN
14. MCCOY (SUPRA) FOUND A
15. VIOLATION OF BURKEIT'S SIXTH
16. AMENDMENT SECURED AUTONOMY
17. CONSTITUTED STRUCTURAL ERROR
- 18.
- 19.
- 20.
- 21.
- 22.
- 23.
- 24.
- 25.
- 26.
- 27.
- 28.

JOEL BURKE 16111
NUEC
PO BOX 7000
CHANDLER, AZ
89762

CLERK OF COURT
700 LEONIS AVE
3RD FLOOR
LAS VEGAS, NV
89155-2212

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Hasler
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ZIP 89701
011812650768



FEB 03 2003

NORTHERN NEVADA CO-RECTIONAL CENTER
1721 Snyder Ave.
Carson City, Nevada 89701

THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
100 - 103
WILL FOLLOW VIA
U.S. MAIL

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL BURKETT,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

Supreme Court No. 78868
District Court Case No. A788633

FILED

FEB 25 2020

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

Elizabeth A. Brown
CLERK OF COURT

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 14 day of January, 2020.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
February 10, 2020.

Elizabeth A. Brown, Supreme Court Clerk

By: Danielle Friend
Administrative Assistant



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOEL BURKETT,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 78868-COA

FILED

JAN 14 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE


Joel Burkett appeals from an order of the district court denying a petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.


Burkett filed a petition for a writ of habeas corpus in the district court on February 1, 2019. In his petition and later-filed supplements, Burkett specifically stated he did not file a postconviction petition for a writ of habeas corpus. Rather, Burkett's petition was filed pursuant to the provisions contained within NRS 34.360 through NRS 34.680. However, the district court construed the petition to be a postconviction petition for a writ of habeas corpus and concluded it was procedurally barred pursuant to NRS 34.810(2). As Burkett did not file a postconviction petition for a writ of habeas corpus, the district court should not have applied NRS 34.810(2) to his petition. However, for the reasons discussed below, we affirm the decision of the district court because it reached the correct result, but for the wrong reason. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).


In his petition, Burkett claimed he was entitled to a new trial because his trial counsel improperly conceded his guilt during closing

arguments. A person "may prosecute a writ of habeas corpus to inquire into the cause of [his] imprisonment or restraint." NRS 34.360. The cause of Burkett's imprisonment, as reflected in the record before this court, is his July 29, 1981, conviction and sentence for robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, and two counts of sexual assault. Burkett's challenge to the validity of the judgment of conviction was not properly raised in a petition for a writ of habeas corpus filed pursuant to NRS 34.360 through NRS 34.680, but rather must be raised in a postconviction petition for a writ of habeas corpus.¹ See NRS 34.724(2)(b) (stating that a postconviction petition for a writ of habeas corpus is the exclusive remedy with which to challenge the validity of a judgment of conviction). Therefore, we affirm the district court's decision to deny the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹We express no opinion as to whether Burkett could meet the procedural requirements of NRS chapter 34.

cc: Hon. Michelle Leavitt, District Judge
Joel Burkett
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: February 10, 2020

Supreme Court Clerk, State of Nevada

By: [Signature]

Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL BURKETT,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

Supreme Court No. 78868
District Court Case No. A788633

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 10, 2020

Elizabeth A. Brown, Clerk of Court

By: Danielle Friend
Administrative Assistant

cc (without enclosures):

Hon. Michelle Leavitt, District Judge
Joel Burkett
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on FEB 25 2020.

HEATHER UNGERMANN

Deputy District Court Clerk

**RECEIVED
APPEALS**

FEB 25 2020

CLERK OF THE COURT

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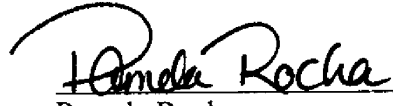
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CERTIFICATE OF SERVICE

I hereby certify on the 18th day of March, 2020, this document was electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial District court's electronic filing system, to the email addresses denoted on the Electronic Mail Notice List, with the date and time of the electronic service substituted for the date and place of deposit in the mail and/or by Fax transmission to

Clark County District Attorney
Alexander Chen, Chief Deputy District Attorney
Alexander.chen@clarkcountyda.com



Pamela Rocha
Judicial Executive Assistant
to the Honorable Michelle Leavitt
District Court Department XII



1 **RSPN**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **ALEXANDER CHEN**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #10539**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

12 **JOEL BURKETT,**
13 **aka, Raymond Haire, #609533**
14 **Defendant.**

CASE NO: A-19-788633-W

DEPT NO: XII

15 **STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS**
16 **CORPUS**

17 **DATE OF HEARING: May 19, 2020**
18 **TIME OF HEARING: 8:30 AM**

18 **COMES NOW**, the State of Nevada, by **STEVEN B. WOLFSON**, Clark County
19 District Attorney, through **ALEXANDER CHEN**, Chief Deputy District Attorney, and hereby
20 submits the attached Points and Authorities in State's Response to Petitioner's Petition for
21 Writ of Habeas Corpus.

22 This response is made and based upon all the papers and pleadings on file herein, the
23 attached points and authorities in support hereof, and oral argument at the time of hearing, if
24 deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On January 19, 1981, Joel Burkett ("Petitioner") was charged with Count 1 – Robbery
4 and Use of a Deadly Weapon in Commission of a Crime (Felony – NRS 200.380, 193.165);
5 Count 2 – First-Degree Kidnapping and Use of Deadly Weapon in Commission of a Crime
6 (Felony – NRS 200.310, 193.165); and Counts 3 and 4 – Sexual Assault (Felony – NRS
7 200.364, 200.366).

8 On May 4, 1981, a jury found Petitioner guilty of all counts.

9 On June 2, 1981, Petitioner was sentenced as follows: Count 1 – 15 years for the
10 Robbery, plus a consecutive 15 years for the Deadly Weapon in Commission of a Crime;
11 Count 2 – life with the possibility of parole, plus a consecutive term of life with the possibility
12 of parole for the Deadly Weapon in Commission of a Crime, to be served consecutive to Count
13 1; Count 3 – life with the possibility of parole, concurrent to Counts 1 and 2; and Count 4 –
14 life with the possibility of parole, concurrent to Counts 1 and 2. The Judgment of Conviction
15 reflecting the same was filed on July 29, 1981.

16 On June 19, 1981, Petitioner appealed the Judgment of Conviction. On April 21, 1983,
17 the Nevada Supreme Court dismissed the appeal. Remittitur issued on May 10, 1983.

18 On February 2, 1994, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
19 Conviction) ("First Petition"). On February 28, 1994, the District Court granted in part and
20 denied in part Petitioner's First Petition.

21 On June 7, 1999, Petitioner filed a second Petition for Writ of Habeas Corpus (Post-
22 Conviction) ("Second Petition"). The State filed its Response on August 4, 1999. On August
23 12, 1999, the District Court denied Petitioner's Second Petition. On August 18, 1999, Findings
24 of Fact, Conclusions of Law, and Order reflecting the same was filed. Petitioner appealed the
25 denial of his Second Petition on August 31, 1999. The Nevada Supreme Court affirmed the
26 Court's denial on July 10, 2001. Remittitur issued on August 7, 2001.

27 On November 19, 2001, Petitioner filed a third Petition for Writ of Habeas Corpus
28 (Post-Conviction) ("Third Petition"). On January 23, 2002, the State filed its Response. The

1 District Court denied Petitioner's Third Petition on January 24, 2002. Findings of Fact,
2 Conclusions of Law, and Order reflecting the same was filed on February 14, 2002. Petitioner
3 appealed the Court's denial of his Third Petition on March 20, 2002. On February 6, 2003, the
4 Nevada Supreme Court reversed the judgment of the District Court and remanded the matter.
5 Remittitur issued on March 4, 2003.

6 On February 19, 2003, Petitioner filed a fourth Petition for Writ of Habeas Corpus
7 (Post-Conviction) ("Fourth Petition"). On April 3, 2003, the Attorney General filed its
8 Response. On May 1, 2003, the District Court denied Petitioner's Third and Fourth Petitions.
9 Findings of Fact, Conclusions of Law, and Order reflecting the same were filed on May 14,
10 2003, and May 15, 2003 respectively. Petitioner appealed the denial of his Third and Fourth
11 Petitions on May 7, 2003. The Nevada Supreme Court affirmed the Court's denial of
12 Petitioner's Fourth Petition on March 5, 2004. Remittitur issued on March 30, 2004.

13 On September 1, 2004, Petitioner filed a fifth Petition for Writ of Habeas Corpus (Post-
14 Conviction) ("Fifth Petition"). On October 12, 2004, the State filed its Response. On October
15 19, 2004, the District Court denied Petitioner's Fifth Petition. Findings of Fact, Conclusions
16 of Law, and Order reflecting the same were filed on November 1, 2004.

17 On May 13, 2005, Petitioner filed a sixth Petition for Writ of Habeas Corpus (Post-
18 Conviction) ("Sixth Petition"). On June 5, 2005, the State filed its Response. On July 5, 2005,
19 the District Court dismissed Petitioner's Sixth Petition. Findings of Fact, Conclusions of Law,
20 and Order reflecting the same were filed on July 25, 2005. Petitioner appealed the denial of
21 his Sixth Petition on August 9, 2005. The Nevada Supreme Court affirmed the Court's denial
22 of Petitioner's Sixth Petition on November 15, 2005. Remittitur issued on December 13, 2005.

23 On July 7, 2011, Petitioner filed a seventh Petition for Writ of Habeas Corpus (Post-
24 Conviction) ("Seventh Petition"). On October 21, 2011, the State filed a Motion to Dismiss.
25 On October 25, 2011, the District Court granted the State's Motion to Dismiss and ordered the
26 clerk of the court to transfer the Petition to the Seventh Judicial District.

27 On June 14, 2013, Petitioner filed an eighth Petition for Writ of Habeas Corpus (Post-
28 Conviction) ("Eighth Petition"). On July 10, 2013, the District Court denied Petitioner's

1 Eighth Petition. Petitioner appealed the Court's denial of his Eighth Petition on July 22, 2013.
2 On February 20, 2014, the Nevada Supreme Court affirmed the Court's denial of Petitioner's
3 Eighth Petition. Remittitur issued on February 20, 2014.

4 On September 7, 2016, Petitioner filed a ninth Petition for Writ of Habeas Corpus (Post-
5 Conviction) ("Ninth Petition"). On October 25, 2016, the District Court denied Petitioner's
6 Ninth Petition. Findings of Fact, Conclusions of Law, and Order reflecting the same were filed
7 on November 2, 2016. Petitioner appealed the denial of his Ninth Petition on November 9,
8 2016. On July 12, 2017, the Nevada Supreme Court reversed and remanded the District Court's
9 denial and ordered that Petitioner's Ninth Petition be sent to the Seventh Judicial District.
10 Remittitur issued on December August 14, 2017.

11 On November 29, 2017, the Seventh Judicial District entered an order recommending
12 that Petitioner's Judgment of Conviction be amended. On March 2, 2018 an Amended
13 Judgment of Conviction was filed. Petitioner's sentence was amended to reflect the following
14 correction: Count 3 to run concurrently to Count 2; and Count 4 to run consecutive to Count
15 3. On June 14, 2018, Petitioner appealed the Amended Judgment of Conviction and filed a
16 Writ of Mandamus seeking the Nevada Supreme Court to direct the Nevada Department of
17 Corrections to accurately calculate his sentence. The Nevada Court of Appeals dismissed the
18 appeal on January 17, 2019.

19 On February 1, 2019, Petitioner filed his tenth Petition for Writ of Habeas Corpus
20 Pursuant to NRS 34.500(2); (9) ("Tenth Petition"). On February 7, 2019. Petitioner filed a
21 Motion to Amend the Petition for Writ of Habeas Corpus and supplemented his argument. On
22 April 18, 2019, the District Court denied Petitioner's Tenth Petition. Findings of Fact,
23 Conclusions of Law, and Order reflecting the same were filed on April 22, 2019. On May 20,
24 2019, Petitioner appealed the denial of his Tenth Petition. On January 14, 2020, the Nevada
25 Supreme Court Affirmed the Court's denial. Remittitur issued February 25, 2020.

26 On February 6, 2020, Petitioner filed the instant and eleventh Petition for Writ of
27 Habeas Corpus (Post-Conviction) ("Eleventh Petition"). On March 18, the District Court
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ordered “the State to respond to the Petition for the limited purpose of determining whether the instant petition is procedurally time barred.” The State’s response follows.

ARGUMENT

I. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS PROCEDURALLY TIME BARRED PURSUANT TO NRS 34.726

A petitioner must raise all grounds for relief in a timely filed first post-conviction Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). A petitioner must challenge the validity of their judgment or sentence within one year from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and begins to run from the date the judgment of conviction is filed or remittitur issues from a timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The Nevada Supreme Court has explained that:

[C]onstruing NRS 34.726 to provide such an extended time period would result in an absurdity that the Legislature could not have intended. A judgment of conviction may be amended at any time to correct a clerical error or to correct an illegal sentence. Because the district court may amend the judgment many years, even decades, after the entry of the original judgment of conviction, restarting the one-year time period for all purposes every time an amendment occurs would frustrate the purpose and spirit of NRS 34.726. Specifically, it would undermine the doctrine of finality of judgments by allowing petitioners to file post-conviction habeas petitions in perpetuity.

Id.

This timeline does not change if an Amended Judgment of Conviction is filed. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). The Nevada Supreme Court has explained that when claims raised in a Petition for Writ of Habeas Corpus challenge the initial conviction, direct appeal, or could have been raised before the judgment of conviction was amended, the clock to raise those claims begins to run when the original judgment of conviction is filed or remittitur issues. Id. at 541, 96 P.3d at 765.

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1 “Application of the statutory procedural default rules to post-conviction habeas
2 petitions is mandatory,” and “cannot be ignored [by the district court] when properly raised by
3 the State.” State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d
4 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court rejected
5 a habeas petition filed two days late despite evidence presented by the defendant that he
6 purchased postage through the prison and mailed the Notice within the one-year time limit.
7 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district courts
8 have a duty to consider whether claims raised in a petition are procedurally barred, and have
9 no discretion regarding whether to apply the statutory procedural bars. Riker, 121 Nev. at 233,
10 112 P.3d at 1075.

11 Here, the Petitioner’s first Judgment of Conviction was filed on July 29, 1981, and
12 Remittitur issued on May 10, 1983. Petitioner’s Amended Judgment of Conviction was filed
13 on June 14, 2018, amending Count 3 to run concurrently to Count 2, and Count 4 to run
14 consecutively to Count 3. Petitioner’s appeal challenging the Amended Judgment of
15 Conviction was dismissed on January 17, 2019.

16 In this Eleventh Petition, Petitioner alleges he was denied his Sixth Amendment Right
17 to Autonomy and Effective Counsel. Eleventh Petition at 5. As the Eleventh Petition does not
18 challenge any change made in the Amended Judgment of Conviction, the clock to raise this
19 claim began to run on May 10, 1983, when Remittitur issued on his direct appeal. The instant
20 petition was filed 36 years past the one-year deadline. As such, absent a showing of good
21 cause, the Eleventh Petition must be denied as procedurally time barred.

22 **II. PETITIONER HAS NOT ESTABLISHED GOOD CAUSE**

23 To avoid procedural default, under NRS 34.726, a petitioner has the burden of pleading
24 and proving specific facts that demonstrate good cause for his failure to present his claim in
25 earlier proceedings or comply with the statutory requirements, and that he will be unduly
26 prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev.
27 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104 Nev. 656,
28 659, 764 P.2d 1303, 1305 (1988). “A court must dismiss a habeas petition if it presents claims

1 that either were or could have been presented in an earlier proceeding, unless the court finds
2 both cause for failing to present the claims earlier or for raising them again and actual prejudice
3 to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

4 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the
5 following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner will
6 be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726. To meet the
7 first requirement, “a petitioner must show that an impediment external to the defense prevented
8 him or her from complying with the state procedural default rules.” Hathaway v. State, 119
9 Nev. 248, 252, 71 P.3d 503, 506 (2003). “A qualifying impediment might be shown where the
10 factual or legal basis for a claim was not reasonably available at the time of default.” Clem v.
11 State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). However, “appellants cannot attempt to
12 manufacture good cause[.]” Id. at 621, 81 P.3d at 526. To find good cause there must be a
13 “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252,
14 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
15 (1989)). Examples of good cause include interference by State officials and the previous
16 unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d
17 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the
18 petitioner. NRS 34.726(1)(a).

19 A petitioner raising good cause to excuse procedural bars must do so within a
20 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34
21 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
22 generally Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07 (stating that a claim reasonably
23 available to the petitioner during the statutory time period did not constitute good cause to
24 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
25 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
26 453 120 S. Ct. 1587, 1592 (2000).

27 Petitioner claims he has good cause for two reasons: 1) McCoy v. Louisiana, 138 S. Ct.
28 1500 (2018), announced a new applicable and retroactive constitutional rule; 2) the prison

1 prevented his access to the courts in violation of Bounds v. Smith, 430 U.S. 817, 821, 97. S.Ct.
2 1491, 1494 (1997) (abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174 (1996)).
3 Eleventh Petition at 12-14. Neither claim amounts to good cause.

4 **A. McCoy does not provide good cause to overcome the procedural bars.**

5 Petitioner claims the McCoy decision, which was issued over three decades after
6 Petitioner's Judgment of Conviction was affirmed, applies retroactively to his case and
7 establishes that his counsel committed structural error when he conceded Petitioner's guilt to
8 sexual assault without his consent. Eleventh Petition at 12. However, McCoy is not a proper
9 basis for good cause because it does not apply to post-conviction habeas proceedings, does not
10 stand for the proposition Petitioner claims it does, is not retroactive, and was not a new rule.

11 First, McCoy was decided on direct appeal, and the Court explicitly stated that it was
12 not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is
13 improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions
14 are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State, 110
15 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

16 Second, McCoy does not require counsel to obtain their client's consent before
17 conceding their guilt, as Petitioner claims. Eleventh Petition at 12. Instead, McCoy held that
18 "it is unconstitutional to allow defense counsel to concede guilt over the defendant's
19 *intransigent and unambiguous objection*" and that such an error is structural. 138 S.Ct. at 1511.
20 (emphasis added). A review of the law leading up to McCoy further dispels Petitioner's claim.
21 Fifteen years ago, the US Supreme Court held that no "blanket rule demand[s] the defendant's
22 explicit consent" to the strategic concession of guilt. Florida v. Nixon, 543 U.S. 175, 192
23 (2004). Instead, the Court held that when counsel informs the defendant of the strategy and
24 the defendant thereafter neither approves nor protests the strategy, the strategy may be
25 implemented. Id. at 181. Almost a decade later, the Nevada Supreme Court analyzed Nixon
26 and explicitly adopted its rationale. Armenta-Carpio v. State, 129 Nev. 531, 306 P.3d 395
27 (2013). The Court noted that Nixon had "expressly rejected" framing the concession of guilt
28 as the functional equivalent of a guilty plea. Id. (citing Nixon, 543 U.S. at 188, 125 S.Ct. at

1 561). As such, unless the defendant vociferously and unambiguously objects to counsel
2 admitting guilt, it is Nixon, and not McCoy, that governs. The rule announced in McCoy did
3 not create any new rights except when a defendant does object in such a manner. While it
4 appears that Petitioner testified in his defense, Petitioner does not allege that he objected to
5 counsel's argument. Therefore, McCoy would not even apply to Petitioner's claim.

6 Third, McCoy is not retroactive and neither the US Supreme Court nor the Nevada
7 Supreme Court has held as much. With narrow exception, "new constitutional rules of criminal
8 procedure will not be applicable to those cases which have become final before the new rules
9 are announced." Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989). In Colwell
10 v. State, the Nevada Supreme Court delineated a three-step analysis to determine retroactivity:
11 1) determine if a holding established a new constitutional rule; 2) if a rule is new but not
12 constitutional, it does not apply retroactively; and 3) if the rule is not new, then it applies to
13 finalized cases on collateral review and retroactivity is not at issue. 118 Nev. 807, 819-22, 59
14 P.3d 463, 471-73 (2002). New constitutional rules will apply in cases in which there is a final
15 judgment only if: 1) The rule establishes that it is unconstitutional to proscribe certain conduct
16 or impose certain punishment based on the class of offender or the status of the offense; or 2)
17 The rule establishes a procedure "without which the likelihood of an accurate conviction is
18 seriously diminished." Id. at 820, 59 P.3d at 472.

19 While McCoy was a new constitutional rule, as Petitioner's conviction was final at the
20 time McCoy was announced, unless one of the exceptions provided for in Colwell applies, it
21 is not retroactive. McCoy does not fit under either exception. It did not establish that it is
22 unconstitutional to proscribe certain conduct or impose certain punishments based on the class
23 of offender; and it does not impose a new procedural rule designed to improve the accuracy of
24 criminal convictions. McCoy demands that defendants assert the right clearly and
25 straightforwardly before it can be applied and does not alter procedure. McCoy, 138 S.Ct at
26 1507. Next, McCoy was based more on the Sixth amendment right to a jury trial, rather than
27 concern about the relative accuracy of judicial vs. jury findings. Therefore, as Petitioner's
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1 conviction was final when McCoy was decided, and McCoy does not fall under either of the
2 exceptions articulated in Colwell, it is not retroactive and cannot amount to good cause.

3 Fourth, McCoy is not new law in Nevada. Two decades prior to McCoy, the Nevada
4 Supreme Court held that if counsel undermines the “client’s testimonial disavowal of guilt
5 during the guilt phase of the trial,” counsel is ineffective. Jones v. State, 110 Nev. 730, 739,
6 877 P.2d 1052, 1057 (1994). This is precisely the rule announced in McCoy. In fact, the
7 McCoy Court explained that many state supreme courts had already held as the Nevada
8 Supreme Court held in Jones: that counsel may not admit guilt when the defendant
9 “vociferous[ly] and repeated[ly] protest[s].” Id. Accordingly, McCoy provides nothing that
10 was not already available under Nevada law. Any claim based on Petitioner’s alleged objection
11 to conceding guilt has been available to him under Jones since 1994. Petitioner cannot now
12 claim that he has good cause to raise this claim which has therefore been available to him for
13 25 years.

14 As McCoy is inapplicable to Petitioner’s claim, it cannot be the basis for good cause
15 for delay in raising this claim. The Court should dismiss Petitioner’s Eleventh Petition as
16 untimely.

17 **B. Petitioner was not denied access to the courts.**

18 Next, Petitioner claims that he has good cause because he raised this claim in a prior
19 petition which was denied for an incorrect filing. Eleventh Petition at Petitioner explains that
20 he did so because he did not have access to the prison law library which consisted of a paging
21 system, and he therefore did not know how to correctly file a Petition. Id. at 13. Petitioner
22 claims this restricted his access to the courts in violation of Bounds v. Smith, 430 U.S. 817,
23 821, 97. S.Ct. 1491, 1494 (1977) Petitioner filed his Tenth Petition pursuant to NRS 34.360
24 through NRS 34.680 which this Court denied as procedurally barred. The Nevada Court of
25 Appeals affirmed that dismissal because it reached the correct result for the wrong reason
26 pursuant to Wyatt v. State, 86 Nev. 249, 298, 468 P.2d 338, 341 (190). Order of Affirmance
27 at 1. Specifically, the Court explained that while this Court should not have dismissed the
28 Tenth Petition as a procedurally barred Petition for Writ of Habeas Corpus, dismissal was

1 nevertheless correct because his claim was not properly raised. Id. at 2. When the Court did
2 so, it directed Petitioner to raise his claims in a correctly filed Petition for Writ of Habeas
3 Corpus, but expressly chose not to address whether his claims was procedurally barred. Id. at
4 2, fn. 1. Petitioner then filed this Eleventh Petition.

5 First, Petitioner's understanding of Bounds is incorrect. Bounds holds that prisons
6 cannot restrict an inmate's access to the courts by denying materials needed to write habeas
7 petitions or appeals, or by requiring inmates pay docket fees to file those documents. Id. at
8 822-23., 97. S.Ct. 1495. That is not what happened here. Petitioner makes no allegation that
9 the prison prevented him from filing this or any petition. Indeed, he cannot as this is
10 Petitioner's eleventh petition and he has filed appeals challenging the denial of eight out of ten
11 of his prior petitions. It is therefore clear that the prison is not preventing him from filing
12 anything. As such, Bounds cannot establish good cause for Petitioner.

13 Moreover, Bounds was abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
14 (1996)). In Lewis, the US Supreme Court specifically held that "Bounds did not create an
15 abstract, freestanding right to a law library or legal assistance, an inmate cannot establish
16 relevant actual injury simply by establishing that his prison's law library or legal assistance
17 program is subpar in some theoretical sense." Id. Instead, a petitioner must show that
18 deficiencies in the prison's legal assistance facilities resulted in a dismissal of a complaint for
19 failure to satisfy some technical requirement. Id. As such, Petitioner's dissatisfaction with the
20 prison law library does not provide good cause to overcome the procedural bar.

21 Petitioner cannot claim that Lewis applies because his Tenth Petition was not rejected
22 on a technicality. Instead the Court concluded that his claims were not properly raised in the
23 pleading filed. Order of Affirmance at 2. While Petitioner asserts that his lack of legal
24 knowledge prevented him from knowing that he had to file a Petition for Writ of Habeas
25 Corpus, that claim is belied by the fact that it was the Tenth Petition for Writ of Habeas Corpus
26 he filed. As such, it is clear that Petitioner knew the proper procedure for challenging his
27 Judgment of Conviction was through a Petition for Writ of Habeas Corpus. He cannot now
28 claim ignorance of that process.

1 Therefore, Petitioner has failed to establish good cause for delay. Petitioner is alleging
2 no new information he just gained access to that would make it reasonable to wait nearly four
3 decades to challenge his counsel's ineffectiveness. As such, the Court should dismiss
4 Petitioner's Eleventh Petition.

5 **III. PETITIONER HAS NOT ESTABLISHED PREJUDICE.**

6 To establish prejudice, petitioners must show "not merely that the errors of [the
7 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
8 disadvantage, in affecting the state proceedings with error of constitutional dimensions."
9 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.
10 Fraday, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

11 Petitioner claims he can demonstrate actual prejudice pursuant McCoy. Eleventh
12 Petition at 14. Petitioner explains that McCoy precluded his counsel from conceding his guilt
13 to one of the sexual assaults and that counsel doing so amounts to structural error. Id. at 9-11.

14 Petitioner's claim is belied by the record. Counsel never conceded his guilt. Petitioner's
15 provided excerpts of the closing argument establish that after counsel finished arguing that
16 there was not enough evidence of Petitioner's guilt of Counts 1 or 2, he explained that if he
17 ended his argument then, all the jury could find him guilty of was sexual assault. Recorder's
18 Transcript of Hearing, Jury Trial: Friday May 1, 1981, Monday May 4, 1981, at 476. Counsel
19 then proceeded to argue that there was no proof beyond a reasonable doubt that he was guilty
20 of sexual assault. Id. at 476-82. Counsel referenced Petitioner's testimony, attacked the victim's
21 credibility, and argued how Petitioner's actions were not that of someone who committed a
22 crime. Id. 482-83; 486-87. Finally, counsel concluded his arguments by stating that "every act
23 done in this case is consistent with innocence," and asked the jury to return a verdict of "Not
24 Guilty." Id. 478.

25 At no point did counsel tell the jury Petitioner was guilty of sexual assault. Therefore,
26 Petitioner's claim is belied by the record and this Court must dismiss his Eleventh Petition as
27 procedurally time barred with no good cause or prejudice shown.

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CONCLUSION

Based on the foregoing, the State respectfully requests this Court DENY Petitioner's
Petition for Writ of Habeas Corpus.

DATED this 10th day of April, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY /s/ ALEXANDER CHEN
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing response was made this 10th
day of April, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOEL BURKETT, BAC #16111
N.N.C.C.
P.O. BOX 7000
CARSON CITY, NV 89702

BY /s/ J. MOSLEY
Secretary for the District Attorney's Office

JOEL BURKETT 16111
N.N.C.C.
PO BOX 7000
CARSON CITY, NV
89702

FILED

MAY 29 2020

Ann. & Blum
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff

vs.

JOEL BURKETT

Defendant

DEPT. NO. XII

CASE NO. A-19-788633-W

OPPOSITION TO
STATE RESPONSE

Comes Now, Joel Burkett, Pro Se,
Petitioner and hereby submit
his opposition to the States
Response to the Petition for
Writ of Habeas Corpus Post-Conviction.

LEGAL ARGUMENT

THE STATE CONTENDS McCoy 138 Sct 1500, (2018) IS NOT A NEW RULE OF LAW. HOWEVER, THIS ARGUMENT IS BELIED BY JUSTICE ALITO'S DISSENT, WHERE HE WRITES "THE COURT'S NEWLY DISCOVERED FUNDAMENTAL RIGHT" CLEARLY IS A NEW RULE & RIGHT.

MORE OVER, THIS COURT IN ITS PRIOR ORDER DATED APRIL 18, 2018 STATED MCCOY'S RULING WOULD OVERCOME THE PROCEDURAL BARS THIS COURT CANNOT NOW CLAIM OTHERWISE.

NOR HAS THE STATE STATED OR SHOWN BURKEIT HAS ACCESS TO A LAW LIBRARY OR PERSON TRULY IN LAW. Douglas v. Smith, 430 U.S. 817 (1977) Lewis v. Casey, 518 U.S. 343 (1996)

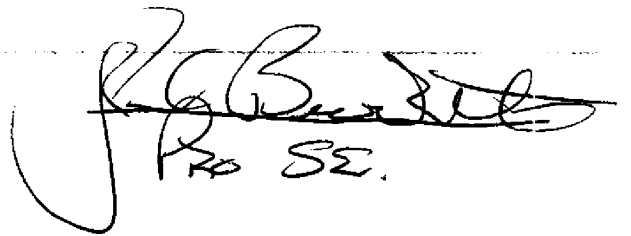
THUS, THE ARGUMENT IS UNAVOIDED,

LIKELISE, ITS CLEAR, FROM THE WRIT, AND JURY INSTRUCTIONS 20, THAT TRIAL COUNSELS

CONCESSIONS/STIPULATIONS
WAS NOTHING MORE THAN A
GUILTY PLEA AND TRIAL COUNSEL
DOES NOT HAVE THE AUTHORITY
TO PLEA ME GUILTY
JURY INSTRUCTIONS DO ALONG WITH
COUNSEL'S CONCESSIONS/STIPULATIONS
WAS PREJUDICE TO BURKETT
BECAUSE IT WAS A GUILTY PLEA
NOTHING LESS THE JURY WAS
LEFT WITH NOTHING TO BE BACK
AND SO HAD TO SIGN A
GUILTY VERDICT

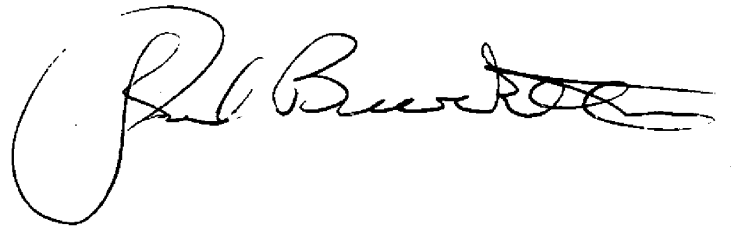
BURKETT'S WRIT MUST ISSUE

DATED THIS 13 DAY OF APR 2020


PRO SE.

CERTIFICATE OF SERVICE

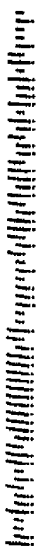
I, JOE DUKKEN, HEREBY CERTIFY
PURSUANT TO N.R.C.P. 5(b) THAT
ON THE 13 DAY OF APRIL 2020
I MAILED A TRUE COPY OF THE
FOREGOING OPPOSITION TO STATES
RESPONSE TO ALEXANDER CHEN
CHIEF DEPUTY DISTRICT ATTORNEY
DATED THIS 13 DAY OF APRIL 2020



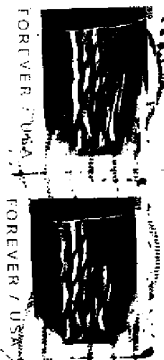
Joe B. Kest 16111
P.O. Box 7000
Chattanooga, TN
37602

Clerk of Court
200 Lewis Ave
3rd Floor
Chattanooga, TN
37602-2212

8510136300



NEED BY 2020
14 APR 2020 PM 2 L



RECEIVED
APR 14 2020
NCCG

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FILED

AUG 07 2020

CLERK OF COURT

JOEL BURKETT
(Name) 16111

(I.D. No.)
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, NV 89702

Movant, In Proper Person

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

JOEL BURKETT
Plaintiff/Movant

vs.

THE STATE OF NEVADA
Defendant/Respondent

Case No.: A-19-788633-W

Dept. No.: XII

REQUEST FOR SUBMISSION

COMES NOW, JOEL BURKETT, in proper person, and respectfully
requests submission of his pleading, to wit: WRIT OF HABEAS CORPUS POST-CON filed
in this court on FEBRUARY 6, 2020, for adjudication on the merits.

This request is made pursuant to the applicable District Court Rules, and Nevada Rules of Civil
Procedure.

Respectfully submitted this 23 day of July, 2020.

By: [Signature]

RECEIVED
JUL 28 2020
CLERK OF THE COURT

CERTIFICATE OF SERVICE

I, Joel Barker certify that on this date I did serve a true and correct copy of the foregoing pleading upon Respondent(s), via U.S. Mail, by placing same in the United States Postal Service (Prison Mail System), postage being fully prepaid, and addressed to:

Alexander Chen
200 Lewis Ave
Las Vegas, NV
89153-2212

AND

Dated this 23 day of July, 2020.

By: [Signature]
Movant, In Proper Person

AFFIRMATION PURSUANT TO NRS 239B.030

** I certify that the foregoing document DOES NOT contain the social security number of any Persons.

7-23-2020
(Date)

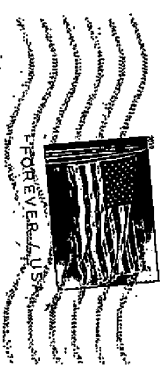
[Signature]
(Signature)

NORTHERN NEVADA CORRECTIONAL CENTER

JUN 28 2020

JOEL BUCKETT 16000
NNCC
PO BOX 7000
CARSON CITY, NV
89203

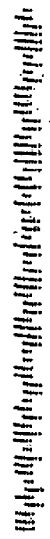
RENO NV 895
24 JUL 2020 PM 2 L



CLERK OF COURT

200 LEGAL'S AVE
3RD FLOOR
LAS VEGAS, NV
89155-2212

8910186300



27

1 JOEL BURKETT # 16111
2 Northern Nevada Correctional Center
3 Post Office Box # 7000
4 Carson City, Nevada 89702-7000

FILED
SEP 16 2020
CLERK OF COURT

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

9 JOEL BURKETT,
10 Plaintiff
11 v.
12 WILLIAM A. GITTERE,
13 Defendant,

Case No: A-19-788633-W
Dept. No: 12

16 NOTICE OF COURT'S FAILURE TO ENTER WRITTEN ORDER
17 DENYING PETITION FOR WRIT OF HABEAS CORPUS, AND
18 MOTION FOR ENTRY OF WRITTEN ORDER

20 COMES NOW Plaintiff, JOEL BURKETT, by and through
21 his proper person and hereby submits the instant
22 Notice and Motion.

23 The instant Notice and Motion is made and is
24 predicated upon the attached memorandum of
25 points and authorities, appended exhibits and all
26 papers and pleadings on file in the above entitled
27 case.

RECEIVED
SEP 08 2020
CLERK OF THE COURT

APPENDIX OF ATTACHED EXHIBITS

1.

2

3

Exhibit # 1: COURT MINUTES, Clark County

4

District Court, Case No. A-19-788633-W,

5

dated May 19, 2020.

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(i)

1. MEMORANDUM OF POINTS AND AUTHORITIES

3 I. Nature of Notice and Motion:

5 The Plaintiff hereby notices the Court and
6 the Parties of the Court's failure to enter a written
7 Order denying Plaintiff's Petition For Writ of Habeas
8 Corpus and vacating the hearing scheduled for
9 May 19, 2020; and he moves the Court for the
10 entry of an Order pursuant to the Court's May 19,
11 2020 Minute Order. See, Appended Exhibit #1.

13 II. Statement of Relevant Facts:

15 On May 19, 2020 this Court had conducted
16 proceedings, in chambers, relative to the Plaintiff's
17 Petition For Writ of Habeas Corpus, filed on February 1, 2019.
18 A brief Minute Order was prepared on May 19, 2020 from
19 the Journal Entries, which stated that:

20 "The court reviewed the pleadings submitted and
21 hereby denies petitioner's twelfth petition for
22 writ of Habeas Corpus. The petition is time barred.

23 The petition is also successive.

24 Mr. Chen, Esq. to prepare the Order for the
25 Court. The hearing scheduled for May 19, 2020
26 is vacated.

27 CLERKS NOTE: The above minute order has been
28 distributed to: Alexander.Chen@clarkcountycda.com"

1 However, the record does not reflect that the state
2 had prepared "the Order for the court," or that the
3 Court had filed such Order or entered same.

4 5 III. Argument:

6
7 The Plaintiff is entitled to the benefit of a
8 written Order, relative to this Court's denial of
9 his Petition For writ of Habeas Corpus.

10
11 Due Process requires that the Court enter
12 a written decision relative to this Court's denial
13 of his Petition For writ of Habeas Corpus, filed
14 on February 1, 2019. Whereas, an Order
15 denying a Petition For writ of Habeas Corpus is
16 an appealable Order, and the Court's entry of
17 a written Order functions to commence the
18 accrual of the time limitation period for the
19 filing of a Notice of Appeal. Therefore, until this
20 Court enters a written Order the Plaintiff is
21 precluded from commencing an appeal, because
22 there exists no appealable Order until a written
23 order is signed by a judge and entered by the
24 Court clerk.

25 26 IV. Conclusion:

27
28 The Plaintiff is entitled to receive a

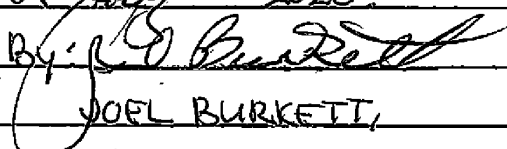
1. written Order denying his February 1, 2019
2. Petition For writ of Habeas Corpus, where such an
3. Order is a necessary prerequisite to his exercise
4. of his right to appeal.

6. II. Verification:

8. Under penalty of perjury, I JOEL BURKETT,
9. do hereby verify that I have read the content of
10. the foregoing Notice and Motion, and that same is
11. true and correct of my own personal information,
12. knowledge and belief.

13. The foregoing Notice and Motion does not
14. contain the Social Security Number of any person.

15. DATED this 31 day of Aug 2020.

16. By: 
17. JOEL BURKETT,
18. Plaintiff, in pro. per.

19. III

20. CERTIFICATE OF SERVICE VIA U.S. MAIL

22. I, JOEL BURKETT do hereby certify that on this
23. day of 2020, that I mailed a true and
24. correct copy of the foregoing document, addressed to:
25. Clark County District Attorney

26. 200 Lewis Ave.

27. Las Vegas, Nevada 89155

28. By: 
JOEL BURKETT,

EXHIBIT #1

EXHIBIT #1

A-19-788633-W

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

May 19, 2020

A-19-788633-W Joel Burkett, Plaintiff(s)
vs.
William A Gittere, Defendant(s)

May 19, 2020 08:00 AM Minute Order

HEARD BY: Leavitt, Michelle **COURTROOM:** Chambers

COURT CLERK: Pannullo, Haly

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

The court reviewed the pleadings submitted and hereby denies petitioners twelfth Petition For Writ of Habeas Corpus. The petition is time barred. The petition is also successive.

Mr. Chen, Esq. to prepare the Order for the court. The hearing scheduled for May 19, 2020 is vacated.

CLERK'S NOTE: The above minute order has been distributed to:
Alexander.Chen@clarkcountyda.com hvp/5/19/20

Printed Date: 5/20/2020

Page 1 of 1

Minutes Date:

May 19, 2020

Prepared by: Haly Pannullo

Joel Burkett 1611
Nuc
10 Box 7000
Carbon City. ND
89702

Clerk of Court
200 Lewis St
3rd Floor
Lewiston, ND
59155

10/10/10 10:00 AM

Hasler
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US POSTAGE
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FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

JOEL BURKETT, aka,
Raymond Haire, #609533
Defendant.

CASE NO: A-19-788633-W
XII
DEPT NO: (Twelfth Petition)

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

DATE OF HEARING: MAY 19, 2020
TIME OF HEARING: 8:00 AM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 19 day of MAY, 2020, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, , and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On January 19, 1981, Joel Burkett ("Petitioner") was charged with Count 1 – Robbery
4 and Use of a Deadly Weapon in Commission of a Crime (Felony – NRS 200.380, 193.165);
5 Count 2 – First-Degree Kidnapping and Use of Deadly Weapon in Commission of a Crime
6 (Felony – NRS 200.310, 193.165); and Counts 3 and 4 – Sexual Assault (Felony – NRS
7 200.364, 200.366).

8 On May 4, 1981, a jury found Petitioner guilty of all counts.

9 On June 2, 1981, Petitioner was sentenced as follows: Count 1 – 15 years for the
10 Robbery, plus a consecutive 15 years for the Deadly Weapon in Commission of a Crime;
11 Count 2 – life with the possibility of parole, plus a consecutive term of life with the
12 possibility of parole for the Deadly Weapon in Commission of a Crime, to be served
13 consecutive to Count 1; Count 3 – life with the possibility of parole, concurrent to Counts 1
14 and 2; and Count 4 – life with the possibility of parole, concurrent to Counts 1 and 2. The
15 Judgment of Conviction reflecting the same was filed on July 29, 1981.

16 On June 19, 1981, Petitioner appealed the Judgment of Conviction. On April 21,
17 1983, the Nevada Supreme Court dismissed the appeal. Remittitur issued on May 10, 1983.

18 On February 2, 1994, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
19 Conviction) ("First Petition"). On February 28, 1994, the District Court granted in part and
20 denied in part Petitioner's First Petition.

21 On June 7, 1999, Petitioner filed a second Petition for Writ of Habeas Corpus (Post-
22 Conviction) ("Second Petition"). The State filed its Response on August 4, 1999. On August
23 12, 1999, the District Court denied Petitioner's Second Petition. On August 18, 1999,
24 Findings of Fact, Conclusions of Law, and Order reflecting the same was filed. Petitioner
25 appealed the denial of his Second Petition on August 31, 1999. The Nevada Supreme Court
26 affirmed the Court's denial on July 10, 2001. Remittitur issued on August 7, 2001.

27 On November 19, 2001, Petitioner filed a third Petition for Writ of Habeas Corpus
28 (Post-Conviction) ("Third Petition"). On January 23, 2002, the State filed its Response. The

1 District Court denied Petitioner's Third Petition on January 24, 2002. Findings of Fact,
2 Conclusions of Law, and Order reflecting the same was filed on February 14, 2002.
3 Petitioner appealed the Court's denial of his Third Petition on March 20, 2002. On February
4 6, 2003, the Nevada Supreme Court reversed the judgment of the District Court and
5 remanded the matter. Remittitur issued on March 4, 2003.

6 On February 19, 2003, Petitioner filed a fourth Petition for Writ of Habeas Corpus
7 (Post-Conviction) ("Fourth Petition"). On April 3, 2003, the Attorney General filed its
8 Response. On May 1, 2003, the District Court denied Petitioner's Third and Fourth Petitions.
9 Findings of Fact, Conclusions of Law, and Order reflecting the same were filed on May 14,
10 2003, and May 15, 2003 respectively. Petitioner appealed the denial of his Third and Fourth
11 Petitions on May 7, 2003. The Nevada Supreme Court affirmed the Court's denial of
12 Petitioner's Fourth Petition on March 5, 2004. Remittitur issued on March 30, 2004.

13 On September 1, 2004, Petitioner filed a fifth Petition for Writ of Habeas Corpus
14 (Post-Conviction) ("Fifth Petition"). On October 12, 2004, the State filed its Response. On
15 October 19, 2004, the District Court denied Petitioner's Fifth Petition. Findings of Fact,
16 Conclusions of Law, and Order reflecting the same were filed on November 1, 2004.

17 On May 13, 2005, Petitioner filed a sixth Petition for Writ of Habeas Corpus (Post-
18 Conviction) ("Sixth Petition"). On June 5, 2005, the State filed its Response. On July 5,
19 2005, the District Court dismissed Petitioner's Sixth Petition. Findings of Fact, Conclusions
20 of Law, and Order reflecting the same were filed on July 25, 2005. Petitioner appealed the
21 denial of his Sixth Petition on August 9, 2005. The Nevada Supreme Court affirmed the
22 Court's denial of Petitioner's Sixth Petition on November 15, 2005. Remittitur issued on
23 December 13, 2005.

24 On July 7, 2011, Petitioner filed a seventh Petition for Writ of Habeas Corpus (Post-
25 Conviction) ("Seventh Petition"). On October 21, 2011, the State filed a Motion to Dismiss.
26 On October 25, 2011, the District Court granted the State's Motion to Dismiss and ordered
27 the clerk of the court to transfer the Petition to the Seventh Judicial District.
28

1 On June 14, 2013, Petitioner filed an eighth Petition for Writ of Habeas Corpus (Post-
2 Conviction) ("Eighth Petition"). On July 10, 2013, the District Court denied Petitioner's
3 Eighth Petition. Petitioner appealed the Court's denial of his Eighth Petition on July 22,
4 2013. On February 20, 2014, the Nevada Supreme Court affirmed the Court's denial of
5 Petitioner's Eighth Petition. Remittitur issued on February 20, 2014.

6 On September 7, 2016, Petitioner filed a ninth Petition for Writ of Habeas Corpus
7 (Post-Conviction) ("Ninth Petition"). On October 25, 2016, the District Court denied
8 Petitioner's Ninth Petition. Findings of Fact, Conclusions of Law, and Order reflecting the
9 same were filed on October 31, 2016. Petitioner appealed the denial of his Ninth Petition on
10 November 9, 2016. On July 12, 2017, the Nevada Supreme Court reversed and remanded the
11 District Court's denial and ordered that Petitioner's Ninth Petition be sent to the Seventh
12 Judicial District. Remittitur issued on December August 14, 2017.

13 On November 29, 2017, the Seventh Judicial District entered an order recommending
14 that Petitioner's Judgment of Conviction be amended. On March 2, 2018 an Amended
15 Judgment of Conviction was filed. Petitioner's sentence was amended to reflect the
16 following correction: Count 3 to run concurrently to Count 2; and Count 4 to run consecutive
17 to Count 3. On June 14, 2018, Petitioner appealed the Amended Judgment of Conviction and
18 filed a Writ of Mandamus seeking the Nevada Supreme Court to direct the Nevada
19 Department of Corrections to accurately calculate his sentence. The Nevada Court of
20 Appeals dismissed the appeal on January 17, 2019.

21 On February 1, 2019, Petitioner filed his tenth Petition for Writ of Habeas Corpus
22 Pursuant to NRS 34.500(2); (9) ("Tenth Petition"). On February 7, 2019 Petitioner filed a
23 Motion to Amend the Petition for Writ of Habeas Corpus and supplemented his argument.
24 On April 18, 2019, the District Court denied Petitioner's Tenth Petition. Findings of Fact,
25 Conclusions of Law, and Order reflecting the same were filed on April 22, 2019. On May 20,
26 2019, Petitioner appealed the denial of his Tenth Petition. On January 14, 2020, the Nevada
27 Supreme Court Affirmed the Court's denial. Remittitur issued February 25, 2020.

1 On August 5, 2019, Petitioner filed his eleventh Petition for Writ of Habeas Corpus
2 Pursuant to NRS 34.500(2); (9) ("Eleventh Petition"). On October 10, 2019, the State filed
3 its response. On October 16, 2019, the District Court denied Petitioner's Eleventh Petition.

4 On February 6, 2020, Petitioner filed the instant and twelfth Petition for Writ of
5 Habeas Corpus (Post-Conviction) ("Twelfth Petition"). On March 18, the District Court
6 ordered "the State to respond to the Petition for the limited purpose of determining whether
7 the instant petition is procedurally time barred." On April 10, 2020 the State filed a Response
8 to Petitioner's Twelfth Petition. On May 19, 2020 this Court reviewed the pleadings and
9 issued a Minute Order denying Petitioner Twelfth Petition.

10 ANALYSIS

11 **I. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS** 12 **PROCEDURALLY TIME BARRED PURUSANT TO NRS 34.726**

13 A petitioner must raise all grounds for relief in a timely filed first post-conviction
14 Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523
15 (2001). A petitioner must challenge the validity of their judgment or sentence within one
16 year from the entry of judgment of conviction or after the Supreme Court issues remittitur
17 pursuant to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and
18 begins to run from the date the judgment of conviction is filed or remittitur issues from a
19 timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
20 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

21 The Nevada Supreme Court has explained that:

22 [C]onstruing NRS 34.726 to provide such an extended time period would
23 result in an absurdity that the Legislature could not have intended. A
24 judgment of conviction may be amended at any time to correct a clerical
25 error or to correct an illegal sentence. Because the district court may
26 amend the judgment many years, even decades, after the entry of the
27 original judgment of conviction, restarting the one-year time period for all
28 purposes every time an amendment occurs would frustrate the purpose
and spirit of NRS 34.726. Specifically, it would undermine the doctrine of
finality of judgments by allowing petitioners to file post-conviction
habeas petitions in perpetuity.

1 Id.

2 This timeline does not change if an Amended Judgment of Conviction is filed.
3 Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). The Nevada Supreme Court
4 has explained that when claims raised in a Petition for Writ of Habeas Corpus challenge the
5 initial conviction, direct appeal, or could have been raised before the judgment of conviction
6 was amended, the clock to raise those claims begins to run when the original judgment of
7 conviction is filed or remittitur issues. Id. at 541, 96 P.3d at 765.

8 “Application of the statutory procedural default rules to post-conviction habeas
9 petitions is mandatory,” and “cannot be ignored [by the district court] when properly raised
10 by the State.” State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112
11 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court
12 rejected a habeas petition filed two days late despite evidence presented by the defendant that
13 he purchased postage through the prison and mailed the Notice within the one-year time
14 limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district
15 courts have a duty to consider whether claims raised in a petition are procedurally barred,
16 and have no discretion regarding whether to apply the statutory procedural bars. Riker, 121
17 Nev. at 233, 112 P.3d at 1075.

18 Here, the Petitioner’s first Judgment of Conviction was filed on July 29, 1981, and
19 Remittitur issued on May 10, 1983. Petitioner’s Amended Judgment of Conviction was filed
20 on June 14, 2018, amending Count 3 to run concurrently to Count 2, and Count 4 to run
21 consecutively to Count 3. Petitioner’s appeal challenging the Amended Judgment of
22 Conviction was dismissed on January 17, 2019.

23 In this Twelfth Petition, Petitioner alleges he was denied his Sixth Amendment Right
24 to Autonomy and Effective Counsel. Twelfth Petition at 5. As the Twelfth Petition does not
25 challenge any change made in the Amended Judgment of Conviction, the clock to raise this
26 claim began to run on May 10, 1983, when Remittitur issued on his direct appeal. The instant
27 petition was filed 36 years past the one-year deadline. As such, absent a showing of good
28 cause and prejudice, the Twelfth Petition must be denied as procedurally time barred.

///

1 **II. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS BARRED**
2 **AS SUCCESSIVE**

3 Courts must dismiss successive post-conviction petitions if a prior petition was
4 decided on the merits and a petitioner fails to raise new grounds for relief, or if a petitioner
5 does raise new grounds for relief but failure to assert those grounds in any prior petition was
6 an abuse of the writ. NRS 34.810(2); See State v. District Court (Riker), 121 Nev. 225, 231,
7 112 P.3d 1070, 1074 (2005). In other words, if the claim or allegation was previously
8 available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later
9 petition. McClesky v. Zant, 499 U.S. 467, 497-98, 111 S.Ct. 1454, 1472 (1991). “Successive
10 petitions may be dismissed based solely on the face of the petition.” Ford v. Warden, 111
11 Nev. 872, 882, 901 P.2d 123, 129 (1995). Successive petitions will only be decided on the
12 merits if the petitioner can show good cause and prejudice for failing to raise the new
13 grounds in their first petition. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d
14 944, 950 (1994).

15 Petitioner is claiming that he is entitled to relief pursuant to the US Supreme Court’s
16 decision in McCoy v. Louisiana, 138 S. Ct. 1500, 200 L.Ed 2d 821 (2018), because counsel
17 allegedly conceded guilt over his objection at trial. Twelfth Petition at 9-14. However,
18 Petitioner claimed counsel was ineffective for conceding his guilt in his Fourth, Sixth, and
19 Tenth Petitions, all of which were properly denied by this Court. Petitioner is abusing the
20 writ by continuing to raise a claim already denying by this court and this Court may only
21 consider the merits of Petitioner’s claim if he can establish good cause and prejudice. NRS
22 38.810(3).

23 **III. PETITIONER HAS NOT ESTABLISHED GOOD CAUSE**

24 To avoid procedural default, under NRS 34.726, a petitioner has the burden of
25 pleading and proving specific facts that demonstrate good cause for his failure to present his
26 claim in earlier proceedings or comply with the statutory requirements, and that he will be
27 unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109
28 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104

1 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court must dismiss a habeas petition if it
2 presents claims that either were or could have been presented in an earlier proceeding, unless
3 the court finds both cause for failing to present the claims earlier or for raising them again
4 and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498,
5 523 (2001).

6 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate
7 the following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner
8 will be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726. To meet
9 the first requirement, “a petitioner must show that an impediment external to the defense
10 prevented him or her from complying with the state procedural default rules.” Hathaway v.
11 State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “A qualifying impediment might be
12 shown where the factual or legal basis for a claim was not reasonably available at the time of
13 default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). However, “appellants
14 cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526. To find good cause
15 there must be a “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119
16 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773
17 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and
18 the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv.
19 Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be
20 the fault of the petitioner. NRS 34.726(1)(a).

21 A petitioner raising good cause to excuse procedural bars must do so within a
22 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34
23 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
24 generally Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07 (stating that a claim reasonably
25 available to the petitioner during the statutory time period did not constitute good cause to
26 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
27 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S.
28 446, 453 120 S. Ct. 1587, 1592 (2000).

1 Petitioner claims he has good cause for two reasons: 1) McCoy v. Louisiana, 138 S.
2 Ct. 1500 (2018), announced a new applicable and retroactive constitutional rule; 2) the
3 prison prevented his access to the courts in violation of Bounds v. Smith, 430 U.S. 817, 821,
4 97. S.Ct. 1491, 1494 (1997) (abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
5 (1996). Twelfth Petition at 12-14. Neither claim amounts to good cause.

6 **A. McCoy does not provide good cause to overcome the procedural bars.**

7 Petitioner claims the McCoy decision, which was issued over three decades after
8 Petitioner's Judgment of Conviction was affirmed, applies retroactively to his case and
9 establishes that his counsel committed structural error when he conceded Petitioner's guilt to
10 sexual assault without his consent. Twelfth Petition at 12. However, McCoy is not a proper
11 basis for good cause because it does not apply to post-conviction habeas proceedings, does
12 not stand for the proposition Petitioner claims it does, is not retroactive, and was not a new
13 rule.

14 First, McCoy was decided on direct appeal, and the Court explicitly stated that it was
15 not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is
16 improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions
17 are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State,
18 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

19 Second, McCoy does not require counsel to obtain their client's consent before
20 conceding their guilt, as Petitioner claims. Twelfth Petition at 12. Instead, McCoy held that
21 "it is unconstitutional to allow defense counsel to concede guilt over the defendant's
22 *intransigent and unambiguous objection*" and that such an error is structural. 138 S.Ct. at
23 1511. (emphasis added). A review of the law leading up to McCoy further dispels
24 Petitioner's claim. Fifteen years ago, the US Supreme Court held that no "blanket rule
25 demand[s] the defendant's explicit consent" to the strategic concession of guilt. Florida v.
26 Nixon, 543 U.S. 175, 192 (2004). Instead, the Court held that when counsel informs the
27 defendant of the strategy and the defendant thereafter neither approves nor protests the
28 strategy, the strategy may be implemented. Id. at 181. Almost a decade later, the Nevada

1 Supreme Court analyzed Nixon and explicitly adopted its rationale. Armenta-Carpio v. State,
2 129 Nev. 531, 306 P.3d 395 (2013). The Court noted that Nixon had “expressly rejected”
3 framing the concession of guilt as the functional equivalent of a guilty plea. Id. (citing
4 Nixon, 543 U.S. at 188, 125 S.Ct. at 561). As such, unless the defendant vociferously and
5 unambiguously objects to counsel admitting guilt, it is Nixon, and not McCoy, that governs.
6 The rule announced in McCoy did not create any new rights except when a defendant does
7 object in such a manner. While it appears that Petitioner testified in his defense, Petitioner
8 does not allege that he objected to counsel’s argument. Therefore, McCoy would not even
9 apply to Petitioner’s claim.

10 Third, McCoy is not retroactive and neither the US Supreme Court nor the Nevada
11 Supreme Court has held as much. With narrow exception, “new constitutional rules of
12 criminal procedure will not be applicable to those cases which have become final before the
13 new rules are announced.” Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989).
14 In Colwell v. State, the Nevada Supreme Court delineated a three-step analysis to determine
15 retroactivity: 1) determine if a holding established a new constitutional rule; 2) if a rule is
16 new but not constitutional, it does not apply retroactively; and 3) if the rule is not new, then
17 it applies to finalized cases on collateral review and retroactivity is not at issue. 118 Nev.
18 807, 819-22, 59 P.3d 463, 471-73 (2002). New constitutional rules will apply in cases in
19 which there is a final judgment only if: 1) The rule establishes that it is unconstitutional to
20 proscribe certain conduct or impose certain punishment based on the class of offender or the
21 status of the offense; or 2) The rule establishes a procedure “without which the likelihood of
22 an accurate conviction is seriously diminished.” Id. at 820, 59 P.3d at 472.

23 While McCoy was a new constitutional rule, as Petitioner’s conviction was final at the
24 time McCoy was announced, unless one of the exceptions provided for in Colwell applies, it
25 is not retroactive. McCoy does not fit under either exception. It did not establish that it is
26 unconstitutional to proscribe certain conduct or impose certain punishments based on the
27 class of offender; and it does not impose a new procedural rule designed to improve the
28 accuracy of criminal convictions. McCoy demands that defendants assert the right clearly

1 and straightforwardly before it can be applied and does not alter procedure. McCoy, 138 S.Ct
2 at 1507. Next, McCoy was based more on the Sixth amendment right to a jury trial, rather
3 than concern about the relative accuracy of judicial vs. jury findings. Therefore, as
4 Petitioner's conviction was final when McCoy was decided, and McCoy does not fall under
5 either of the exceptions articulated in Colwell, it is not retroactive and cannot amount to
6 good cause.

7 Fourth, McCoy is not new law in Nevada. Two decades prior to McCoy, the Nevada
8 Supreme Court held that if counsel undermines the "client's testimonial disavowal of guilt
9 during the guilt phase of the trial," counsel is ineffective. Jones v. State, 110 Nev. 730, 739,
10 877 P.2d 1052, 1057 (1994). This is precisely the rule announced in McCoy. In fact, the
11 McCoy Court explained that many state supreme courts had already held as the Nevada
12 Supreme Court held in Jones: that counsel may not admit guilt when the defendant
13 "vociferous[ly] and repeated[ly] protest[s]." Id. Accordingly, McCoy provides nothing that
14 was not already available under Nevada law. Any claim based on Petitioner's alleged
15 objection to conceding guilt has been available to him under Jones since 1994. Petitioner
16 cannot now claim that he has good cause to raise this claim which has therefore been
17 available to him for 25 years.

18 As McCoy is inapplicable to Petitioner's claim, it cannot be the basis for good cause
19 for delay in raising this claim. The Court dismisses Petitioner's Twelfth Petition as untimely.

20 **B. Petitioner was not denied access to the courts.**

21 Next, Petitioner claims that he has good cause because he raised this claim in a prior
22 petition which was denied for an incorrect filing. Twelfth Petition at 2-9. Petitioner explains
23 that he did so because he did not have access to the prison law library which consisted of a
24 paging system, and he therefore did not know how to correctly file a Petition. Id. at 13.
25 Petitioner claims this restricted his access to the courts in violation of Bounds v. Smith, 430
26 U.S. 817, 821, 97. S.Ct. 1491, 1494 (1977) Petitioner filed his Tenth Petition pursuant to
27 NRS 34.360 through NRS 34.680 which this Court denied as procedurally barred. The
28 Nevada Court of Appeals affirmed that dismissal because it reached the correct result for the

1 wrong reason pursuant to Wyatt v. State, 86 Nev. 249, 298, 468 P.2d 338, 341 (190). Order
2 of Affirmance at 1. Specifically, the Court explained that while this Court should not have
3 dismissed the Tenth Petition as a procedurally barred Petition for Writ of Habeas Corpus,
4 dismissal was nevertheless correct because his claim was not properly raised. Id. at 2. When
5 the Court did so, it directed Petitioner to raise his claims in a correctly filed Petition for Writ
6 of Habeas Corpus, but expressly chose not to address whether his claims was procedurally
7 barred. Id. at 2, fn. 1. Petitioner then filed this Twelfth Petition.

8 First, Petitioner's understanding of Bounds is incorrect. Bounds holds that prisons
9 cannot restrict an inmate's access to the courts by denying materials needed to write habeas
10 petitions or appeals, or by requiring inmates pay docket fees to file those documents. Id. at
11 822-23., 97. S.Ct. 1495. That is not what happened here. Petitioner makes no allegation that
12 the prison prevented him from filing this or any petition. Indeed, he cannot as this is
13 Petitioner's twelfth petition and he has filed appeals challenging the denial of eight out of ten
14 of his prior petitions. It is therefore clear that the prison is not preventing him from filing
15 anything. As such, Bounds cannot establish good cause for Petitioner.

16 Moreover, Bounds was abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
17 (1996)). In Lewis, the US Supreme Court specifically held that "Bounds did not create an
18 abstract, freestanding right to a law library or legal assistance, an inmate cannot establish
19 relevant actual injury simply by establishing that his prison's law library or legal assistance
20 program is subpar in some theoretical sense." Id. Instead, a petitioner must show that
21 deficiencies in the prison's legal assistance facilities resulted in a dismissal of a complaint for
22 failure to satisfy some technical requirement. Id. As such, Petitioner's dissatisfaction with
23 the prison law library does not provide good cause to overcome the procedural bar.

24 Petitioner cannot claim that Lewis applies because his Tenth Petition was not rejected
25 on a technicality. Instead the Court concluded that his claims were not properly raised in the
26 pleading filed. Order of Affirmance at 2. While Petitioner asserts that his lack of legal
27 knowledge prevented him from knowing that he had to file a Petition for Writ of Habeas
28 Corpus, that claim is belied by the fact that it was the Tenth Petition for Writ of Habeas

1 Corpus he filed. As such, it is clear that Petitioner knew the proper procedure for challenging
2 his Judgment of Conviction was through a Petition for Writ of Habeas Corpus. He cannot
3 now claim ignorance of that process.

4 Therefore, Petitioner has failed to establish good cause for delay. Petitioner is alleging
5 no new information he just gained access to that would make it reasonable to wait nearly
6 four decades to challenge his counsel's ineffectiveness. As such, the Court dismisses
7 Petitioner's Twelfth Petition.

8 **IV. PETITIONER HAS NOT ESTABLISHED PREJUDICE.**

9 To establish prejudice, petitioners must show "not merely that the errors of [the
10 proceedings] created possibility of prejudice, but that they worked to his actual and
11 substantial disadvantage, in affecting the state proceedings with error of constitutional
12 dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting
13 United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

14 Petitioner claims he can demonstrate actual prejudice pursuant McCoy. Twelfth
15 Petition at 14. Petitioner explains that McCoy precluded his counsel from conceding his guilt
16 to one of the sexual assaults and that counsel doing so amounts to structural error. Id. at 9-11.

17 Petitioner's claim is belied by the record. Counsel never conceded his guilt.
18 Petitioner's provided excerpts of the closing argument establish that after counsel finished
19 arguing that there was not enough evidence of Petitioner's guilt of Counts 1 or 2, he
20 explained that if he ended his argument then, all the jury could find him guilty of was sexual
21 assault. Recorder's Transcript of Hearing, Jury Trial: Friday May 1, 1981, Monday May 4,
22 1981, at 476. Counsel then proceeded to argue that there was no proof beyond a reasonable
23 doubt that he was guilty of sexual assault. Id. at 476-82. Counsel referenced Petitioner's
24 testimony, attacked the victim's credibility, and argued how Petitioner's actions were not
25 that of someone who committed a crime. Id. 482-83; 486-87. Finally, counsel concluded his
26 arguments by stating that "every act done in this case is consistent with innocence," and
27 asked the jury to return a verdict of "Not Guilty." Id. 478.

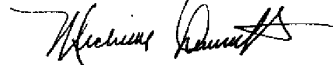
1 At no point did counsel tell the jury Petitioner was guilty of sexual assault. Therefore,
2 Petitioner's claim is belied by the record and this Court dismisses his Twelfth Petition as
3 procedurally time barred with no good cause or prejudice shown.

4 **ORDER**

5 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction
6 Relief shall be, and it is, hereby denied.

7 DATED this ____ day of September, 2021.

Dated this 13th day of September, 2021

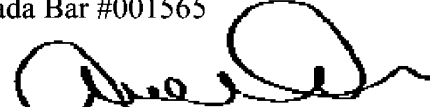


DISTRICT JUDGE

208 B58 F5EF F39A
Michelle Leavitt
District Court Judge

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

13 BY


14 ALEXANDER CHEN
15 Chief Deputy District Attorney
16 Nevada Bar #10539
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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Joel Burkett, Plaintiff(s)

CASE NO: A-19-788633-W

7 vs.

DEPT. NO. Department 12

8 William A Gittere, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
14 case as listed below:

15 Service Date: 9/13/2021

16 Eileen Davis

eileen.davis@clarkcountyda.com

17 Alexander Chen

Alexander.chen@clarkcountyda.com

18 If indicated below, a copy of the above mentioned filings were also served by mail
19 via United States Postal Service, postage prepaid, to the parties listed below at their last
20 known addresses on 9/14/2021

21 Joel Burkett

ESP
P.O. Box 1989
Ely, NV, 89301

22 Steven Wolfson

Juvenile Division - District Attorney's Office
601 N Pecos Road
Las Vegas, NV, 89101



1 NEFF

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5 JOEL BURKETT,

6 Petitioner,

Case No: A-19-788633-W

Dept No: XII

7 vs.

8 WILLIAM A. GITTERE,

9 Respondent,

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

11 PLEASE TAKE NOTICE that on September 13, 2021, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 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 September 16, 2021.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 16 day of September 2021, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:
Clark County District Attorney's Office
23 Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:
25 Joel Burkett # 16111
P.O. Box 7000
26 Carson City, NV 89702

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

JOEL BURKETT, aka,
Raymond Haire, #609533
Defendant.

CASE NO: A-19-788633-W
DEPT NO: XII
(Twelfth Petition)

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

DATE OF HEARING: MAY 19, 2020
TIME OF HEARING: 8:00 AM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 19 day of MAY, 2020, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, , and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On January 19, 1981, Joel Burkett ("Petitioner") was charged with Count 1 – Robbery
4 and Use of a Deadly Weapon in Commission of a Crime (Felony – NRS 200.380, 193.165);
5 Count 2 – First-Degree Kidnapping and Use of Deadly Weapon in Commission of a Crime
6 (Felony – NRS 200.310, 193.165); and Counts 3 and 4 – Sexual Assault (Felony – NRS
7 200.364, 200.366).

8 On May 4, 1981, a jury found Petitioner guilty of all counts.

9 On June 2, 1981, Petitioner was sentenced as follows: Count 1 – 15 years for the
10 Robbery, plus a consecutive 15 years for the Deadly Weapon in Commission of a Crime;
11 Count 2 – life with the possibility of parole, plus a consecutive term of life with the
12 possibility of parole for the Deadly Weapon in Commission of a Crime, to be served
13 consecutive to Count 1; Count 3 – life with the possibility of parole, concurrent to Counts 1
14 and 2; and Count 4 – life with the possibility of parole, concurrent to Counts 1 and 2. The
15 Judgment of Conviction reflecting the same was filed on July 29, 1981.

16 On June 19, 1981, Petitioner appealed the Judgment of Conviction. On April 21,
17 1983, the Nevada Supreme Court dismissed the appeal. Remittitur issued on May 10, 1983.

18 On February 2, 1994, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
19 Conviction) ("First Petition"). On February 28, 1994, the District Court granted in part and
20 denied in part Petitioner's First Petition.

21 On June 7, 1999, Petitioner filed a second Petition for Writ of Habeas Corpus (Post-
22 Conviction) ("Second Petition"). The State filed its Response on August 4, 1999. On August
23 12, 1999, the District Court denied Petitioner's Second Petition. On August 18, 1999,
24 Findings of Fact, Conclusions of Law, and Order reflecting the same was filed. Petitioner
25 appealed the denial of his Second Petition on August 31, 1999. The Nevada Supreme Court
26 affirmed the Court's denial on July 10, 2001. Remittitur issued on August 7, 2001.

27 On November 19, 2001, Petitioner filed a third Petition for Writ of Habeas Corpus
28 (Post-Conviction) ("Third Petition"). On January 23, 2002, the State filed its Response. The

1 District Court denied Petitioner's Third Petition on January 24, 2002. Findings of Fact,
2 Conclusions of Law, and Order reflecting the same was filed on February 14, 2002.
3 Petitioner appealed the Court's denial of his Third Petition on March 20, 2002. On February
4 6, 2003, the Nevada Supreme Court reversed the judgment of the District Court and
5 remanded the matter. Remittitur issued on March 4, 2003.

6 On February 19, 2003, Petitioner filed a fourth Petition for Writ of Habeas Corpus
7 (Post-Conviction) ("Fourth Petition"). On April 3, 2003, the Attorney General filed its
8 Response. On May 1, 2003, the District Court denied Petitioner's Third and Fourth Petitions.
9 Findings of Fact, Conclusions of Law, and Order reflecting the same were filed on May 14,
10 2003, and May 15, 2003 respectively. Petitioner appealed the denial of his Third and Fourth
11 Petitions on May 7, 2003. The Nevada Supreme Court affirmed the Court's denial of
12 Petitioner's Fourth Petition on March 5, 2004. Remittitur issued on March 30, 2004.

13 On September 1, 2004, Petitioner filed a fifth Petition for Writ of Habeas Corpus
14 (Post-Conviction) ("Fifth Petition"). On October 12, 2004, the State filed its Response. On
15 October 19, 2004, the District Court denied Petitioner's Fifth Petition. Findings of Fact,
16 Conclusions of Law, and Order reflecting the same were filed on November 1, 2004.

17 On May 13, 2005, Petitioner filed a sixth Petition for Writ of Habeas Corpus (Post-
18 Conviction) ("Sixth Petition"). On June 5, 2005, the State filed its Response. On July 5,
19 2005, the District Court dismissed Petitioner's Sixth Petition. Findings of Fact, Conclusions
20 of Law, and Order reflecting the same were filed on July 25, 2005. Petitioner appealed the
21 denial of his Sixth Petition on August 9, 2005. The Nevada Supreme Court affirmed the
22 Court's denial of Petitioner's Sixth Petition on November 15, 2005. Remittitur issued on
23 December 13, 2005.

24 On July 7, 2011, Petitioner filed a seventh Petition for Writ of Habeas Corpus (Post-
25 Conviction) ("Seventh Petition"). On October 21, 2011, the State filed a Motion to Dismiss.
26 On October 25, 2011, the District Court granted the State's Motion to Dismiss and ordered
27 the clerk of the court to transfer the Petition to the Seventh Judicial District.
28

1 On June 14, 2013, Petitioner filed an eighth Petition for Writ of Habeas Corpus (Post-
2 Conviction) ("Eighth Petition"). On July 10, 2013, the District Court denied Petitioner's
3 Eighth Petition. Petitioner appealed the Court's denial of his Eighth Petition on July 22,
4 2013. On February 20, 2014, the Nevada Supreme Court affirmed the Court's denial of
5 Petitioner's Eighth Petition. Remittitur issued on February 20, 2014.

6 On September 7, 2016, Petitioner filed a ninth Petition for Writ of Habeas Corpus
7 (Post-Conviction) ("Ninth Petition"). On October 25, 2016, the District Court denied
8 Petitioner's Ninth Petition. Findings of Fact, Conclusions of Law, and Order reflecting the
9 same were filed on October 31, 2016. Petitioner appealed the denial of his Ninth Petition on
10 November 9, 2016. On July 12, 2017, the Nevada Supreme Court reversed and remanded the
11 District Court's denial and ordered that Petitioner's Ninth Petition be sent to the Seventh
12 Judicial District. Remittitur issued on December August 14, 2017.

13 On November 29, 2017, the Seventh Judicial District entered an order recommending
14 that Petitioner's Judgment of Conviction be amended. On March 2, 2018 an Amended
15 Judgment of Conviction was filed. Petitioner's sentence was amended to reflect the
16 following correction: Count 3 to run concurrently to Count 2; and Count 4 to run consecutive
17 to Count 3. On June 14, 2018, Petitioner appealed the Amended Judgment of Conviction and
18 filed a Writ of Mandamus seeking the Nevada Supreme Court to direct the Nevada
19 Department of Corrections to accurately calculate his sentence. The Nevada Court of
20 Appeals dismissed the appeal on January 17, 2019.

21 On February 1, 2019, Petitioner filed his tenth Petition for Writ of Habeas Corpus
22 Pursuant to NRS 34.500(2); (9) ("Tenth Petition"). On February 7, 2019 Petitioner filed a
23 Motion to Amend the Petition for Writ of Habeas Corpus and supplemented his argument.
24 On April 18, 2019, the District Court denied Petitioner's Tenth Petition. Findings of Fact,
25 Conclusions of Law, and Order reflecting the same were filed on April 22, 2019. On May 20,
26 2019, Petitioner appealed the denial of his Tenth Petition. On January 14, 2020, the Nevada
27 Supreme Court Affirmed the Court's denial. Remittitur issued February 25, 2020.

1 On August 5, 2019, Petitioner filed his eleventh Petition for Writ of Habeas Corpus
2 Pursuant to NRS 34.500(2); (9) ("Eleventh Petition"). On October 10, 2019, the State filed
3 its response. On October 16, 2019, the District Court denied Petitioner's Eleventh Petition.

4 On February 6, 2020, Petitioner filed the instant and twelfth Petition for Writ of
5 Habeas Corpus (Post-Conviction) ("Twelfth Petition"). On March 18, the District Court
6 ordered "the State to respond to the Petition for the limited purpose of determining whether
7 the instant petition is procedurally time barred." On April 10, 2020 the State filed a Response
8 to Petitioner's Twelfth Petition. On May 19, 2020 this Court reviewed the pleadings and
9 issued a Minute Order denying Petitioner Twelfth Petition.

10 ANALYSIS

11 **I. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS** 12 **PROCEDURALLY TIME BARRED PURUSANT TO NRS 34.726**

13 A petitioner must raise all grounds for relief in a timely filed first post-conviction
14 Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523
15 (2001). A petitioner must challenge the validity of their judgment or sentence within one
16 year from the entry of judgment of conviction or after the Supreme Court issues remittitur
17 pursuant to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and
18 begins to run from the date the judgment of conviction is filed or remittitur issues from a
19 timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
20 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

21 The Nevada Supreme Court has explained that:

22 [C]onstruing NRS 34.726 to provide such an extended time period would
23 result in an absurdity that the Legislature could not have intended. A
24 judgment of conviction may be amended at any time to correct a clerical
25 error or to correct an illegal sentence. Because the district court may
26 amend the judgment many years, even decades, after the entry of the
27 original judgment of conviction, restarting the one-year time period for all
28 purposes every time an amendment occurs would frustrate the purpose
and spirit of NRS 34.726. Specifically, it would undermine the doctrine of
finality of judgments by allowing petitioners to file post-conviction
habeas petitions in perpetuity.

1 Id.

2 This timeline does not change if an Amended Judgment of Conviction is filed.
3 Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). The Nevada Supreme Court
4 has explained that when claims raised in a Petition for Writ of Habeas Corpus challenge the
5 initial conviction, direct appeal, or could have been raised before the judgment of conviction
6 was amended, the clock to raise those claims begins to run when the original judgment of
7 conviction is filed or remittitur issues. Id. at 541, 96 P.3d at 765.

8 “Application of the statutory procedural default rules to post-conviction habeas
9 petitions is mandatory,” and “cannot be ignored [by the district court] when properly raised
10 by the State.” State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112
11 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court
12 rejected a habeas petition filed two days late despite evidence presented by the defendant that
13 he purchased postage through the prison and mailed the Notice within the one-year time
14 limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district
15 courts have a duty to consider whether claims raised in a petition are procedurally barred,
16 and have no discretion regarding whether to apply the statutory procedural bars. Riker, 121
17 Nev. at 233, 112 P.3d at 1075.

18 Here, the Petitioner’s first Judgment of Conviction was filed on July 29, 1981, and
19 Remittitur issued on May 10, 1983. Petitioner’s Amended Judgment of Conviction was filed
20 on June 14, 2018, amending Count 3 to run concurrently to Count 2, and Count 4 to run
21 consecutively to Count 3. Petitioner’s appeal challenging the Amended Judgment of
22 Conviction was dismissed on January 17, 2019.

23 In this Twelfth Petition, Petitioner alleges he was denied his Sixth Amendment Right
24 to Autonomy and Effective Counsel. Twelfth Petition at 5. As the Twelfth Petition does not
25 challenge any change made in the Amended Judgment of Conviction, the clock to raise this
26 claim began to run on May 10, 1983, when Remittitur issued on his direct appeal. The instant
27 petition was filed 36 years past the one-year deadline. As such, absent a showing of good
28 cause and prejudice, the Twelfth Petition must be denied as procedurally time barred.

///

1 **II. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS BARRED**
2 **AS SUCCESSIVE**

3 Courts must dismiss successive post-conviction petitions if a prior petition was
4 decided on the merits and a petitioner fails to raise new grounds for relief, or if a petitioner
5 does raise new grounds for relief but failure to assert those grounds in any prior petition was
6 an abuse of the writ. NRS 34.810(2); See State v. District Court (Riker), 121 Nev. 225, 231,
7 112 P.3d 1070, 1074 (2005). In other words, if the claim or allegation was previously
8 available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later
9 petition. McClesky v. Zant, 499 U.S. 467, 497-98, 111 S.Ct. 1454, 1472 (1991). “Successive
10 petitions may be dismissed based solely on the face of the petition.” Ford v. Warden, 111
11 Nev. 872, 882, 901 P.2d 123, 129 (1995). Successive petitions will only be decided on the
12 merits if the petitioner can show good cause and prejudice for failing to raise the new
13 grounds in their first petition. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d
14 944, 950 (1994).

15 Petitioner is claiming that he is entitled to relief pursuant to the US Supreme Court’s
16 decision in McCoy v. Louisiana, 138 S. Ct. 1500, 200 L.Ed 2d 821 (2018), because counsel
17 allegedly conceded guilt over his objection at trial. Twelfth Petition at 9-14. However,
18 Petitioner claimed counsel was ineffective for conceding his guilt in his Fourth, Sixth, and
19 Tenth Petitions, all of which were properly denied by this Court. Petitioner is abusing the
20 writ by continuing to raise a claim already denying by this court and this Court may only
21 consider the merits of Petitioner’s claim if he can establish good cause and prejudice. NRS
22 38.810(3).

23 **III. PETITIONER HAS NOT ESTABLISHED GOOD CAUSE**

24 To avoid procedural default, under NRS 34.726, a petitioner has the burden of
25 pleading and proving specific facts that demonstrate good cause for his failure to present his
26 claim in earlier proceedings or comply with the statutory requirements, and that he will be
27 unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109
28 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104

1 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court must dismiss a habeas petition if it
2 presents claims that either were or could have been presented in an earlier proceeding, unless
3 the court finds both cause for failing to present the claims earlier or for raising them again
4 and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498,
5 523 (2001).

6 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate
7 the following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner
8 will be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726. To meet
9 the first requirement, “a petitioner must show that an impediment external to the defense
10 prevented him or her from complying with the state procedural default rules.” Hathaway v.
11 State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “A qualifying impediment might be
12 shown where the factual or legal basis for a claim was not reasonably available at the time of
13 default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). However, “appellants
14 cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526. To find good cause
15 there must be a “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119
16 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773
17 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and
18 the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv.
19 Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be
20 the fault of the petitioner. NRS 34.726(1)(a).

21 A petitioner raising good cause to excuse procedural bars must do so within a
22 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34
23 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
24 generally Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07 (stating that a claim reasonably
25 available to the petitioner during the statutory time period did not constitute good cause to
26 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
27 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S.
28 446, 453 120 S. Ct. 1587, 1592 (2000).

1 Petitioner claims he has good cause for two reasons: 1) McCoy v. Louisiana, 138 S.
2 Ct. 1500 (2018), announced a new applicable and retroactive constitutional rule; 2) the
3 prison prevented his access to the courts in violation of Bounds v. Smith, 430 U.S. 817, 821,
4 97. S.Ct. 1491, 1494 (1997) (abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
5 (1996). Twelfth Petition at 12-14. Neither claim amounts to good cause.

6 **A. McCoy does not provide good cause to overcome the procedural bars.**

7 Petitioner claims the McCoy decision, which was issued over three decades after
8 Petitioner's Judgment of Conviction was affirmed, applies retroactively to his case and
9 establishes that his counsel committed structural error when he conceded Petitioner's guilt to
10 sexual assault without his consent. Twelfth Petition at 12. However, McCoy is not a proper
11 basis for good cause because it does not apply to post-conviction habeas proceedings, does
12 not stand for the proposition Petitioner claims it does, is not retroactive, and was not a new
13 rule.

14 First, McCoy was decided on direct appeal, and the Court explicitly stated that it was
15 not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is
16 improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions
17 are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State,
18 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

19 Second, McCoy does not require counsel to obtain their client's consent before
20 conceding their guilt, as Petitioner claims. Twelfth Petition at 12. Instead, McCoy held that
21 "it is unconstitutional to allow defense counsel to concede guilt over the defendant's
22 *intransigent and unambiguous objection*" and that such an error is structural. 138 S.Ct. at
23 1511. (emphasis added). A review of the law leading up to McCoy further dispels
24 Petitioner's claim. Fifteen years ago, the US Supreme Court held that no "blanket rule
25 demand[s] the defendant's explicit consent" to the strategic concession of guilt. Florida v.
26 Nixon, 543 U.S. 175, 192 (2004). Instead, the Court held that when counsel informs the
27 defendant of the strategy and the defendant thereafter neither approves nor protests the
28 strategy, the strategy may be implemented. Id. at 181. Almost a decade later, the Nevada

1 Supreme Court analyzed Nixon and explicitly adopted its rationale. Armenta-Carpio v. State,
2 129 Nev. 531, 306 P.3d 395 (2013). The Court noted that Nixon had “expressly rejected”
3 framing the concession of guilt as the functional equivalent of a guilty plea. Id. (citing
4 Nixon, 543 U.S. at 188, 125 S.Ct. at 561). As such, unless the defendant vociferously and
5 unambiguously objects to counsel admitting guilt, it is Nixon, and not McCoy, that governs.
6 The rule announced in McCoy did not create any new rights except when a defendant does
7 object in such a manner. While it appears that Petitioner testified in his defense, Petitioner
8 does not allege that he objected to counsel’s argument. Therefore, McCoy would not even
9 apply to Petitioner’s claim.

10 Third, McCoy is not retroactive and neither the US Supreme Court nor the Nevada
11 Supreme Court has held as much. With narrow exception, “new constitutional rules of
12 criminal procedure will not be applicable to those cases which have become final before the
13 new rules are announced.” Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989).
14 In Colwell v. State, the Nevada Supreme Court delineated a three-step analysis to determine
15 retroactivity: 1) determine if a holding established a new constitutional rule; 2) if a rule is
16 new but not constitutional, it does not apply retroactively; and 3) if the rule is not new, then
17 it applies to finalized cases on collateral review and retroactivity is not at issue. 118 Nev.
18 807, 819-22, 59 P.3d 463, 471-73 (2002). New constitutional rules will apply in cases in
19 which there is a final judgment only if: 1) The rule establishes that it is unconstitutional to
20 proscribe certain conduct or impose certain punishment based on the class of offender or the
21 status of the offense; or 2) The rule establishes a procedure “without which the likelihood of
22 an accurate conviction is seriously diminished.” Id. at 820, 59 P.3d at 472.

23 While McCoy was a new constitutional rule, as Petitioner’s conviction was final at the
24 time McCoy was announced, unless one of the exceptions provided for in Colwell applies, it
25 is not retroactive. McCoy does not fit under either exception. It did not establish that it is
26 unconstitutional to proscribe certain conduct or impose certain punishments based on the
27 class of offender; and it does not impose a new procedural rule designed to improve the
28 accuracy of criminal convictions. McCoy demands that defendants assert the right clearly

1 and straightforwardly before it can be applied and does not alter procedure. McCoy, 138 S.Ct
2 at 1507. Next, McCoy was based more on the Sixth amendment right to a jury trial, rather
3 than concern about the relative accuracy of judicial vs. jury findings. Therefore, as
4 Petitioner's conviction was final when McCoy was decided, and McCoy does not fall under
5 either of the exceptions articulated in Colwell, it is not retroactive and cannot amount to
6 good cause.

7 Fourth, McCoy is not new law in Nevada. Two decades prior to McCoy, the Nevada
8 Supreme Court held that if counsel undermines the "client's testimonial disavowal of guilt
9 during the guilt phase of the trial," counsel is ineffective. Jones v. State, 110 Nev. 730, 739,
10 877 P.2d 1052, 1057 (1994). This is precisely the rule announced in McCoy. In fact, the
11 McCoy Court explained that many state supreme courts had already held as the Nevada
12 Supreme Court held in Jones: that counsel may not admit guilt when the defendant
13 "vociferous[ly] and repeated[ly] protest[s]." Id. Accordingly, McCoy provides nothing that
14 was not already available under Nevada law. Any claim based on Petitioner's alleged
15 objection to conceding guilt has been available to him under Jones since 1994. Petitioner
16 cannot now claim that he has good cause to raise this claim which has therefore been
17 available to him for 25 years.

18 As McCoy is inapplicable to Petitioner's claim, it cannot be the basis for good cause
19 for delay in raising this claim. The Court dismisses Petitioner's Twelfth Petition as untimely.

20 **B. Petitioner was not denied access to the courts.**

21 Next, Petitioner claims that he has good cause because he raised this claim in a prior
22 petition which was denied for an incorrect filing. Twelfth Petition at 2-9. Petitioner explains
23 that he did so because he did not have access to the prison law library which consisted of a
24 paging system, and he therefore did not know how to correctly file a Petition. Id. at 13.
25 Petitioner claims this restricted his access to the courts in violation of Bounds v. Smith, 430
26 U.S. 817, 821, 97. S.Ct. 1491, 1494 (1977) Petitioner filed his Tenth Petition pursuant to
27 NRS 34.360 through NRS 34.680 which this Court denied as procedurally barred. The
28 Nevada Court of Appeals affirmed that dismissal because it reached the correct result for the

1 wrong reason pursuant to Wyatt v. State, 86 Nev. 249, 298, 468 P.2d 338, 341 (190). Order
2 of Affirmance at 1. Specifically, the Court explained that while this Court should not have
3 dismissed the Tenth Petition as a procedurally barred Petition for Writ of Habeas Corpus,
4 dismissal was nevertheless correct because his claim was not properly raised. Id. at 2. When
5 the Court did so, it directed Petitioner to raise his claims in a correctly filed Petition for Writ
6 of Habeas Corpus, but expressly chose not to address whether his claims was procedurally
7 barred. Id. at 2, fn. 1. Petitioner then filed this Twelfth Petition.

8 First, Petitioner's understanding of Bounds is incorrect. Bounds holds that prisons
9 cannot restrict an inmate's access to the courts by denying materials needed to write habeas
10 petitions or appeals, or by requiring inmates pay docket fees to file those documents. Id. at
11 822-23., 97. S.Ct. 1495. That is not what happened here. Petitioner makes no allegation that
12 the prison prevented him from filing this or any petition. Indeed, he cannot as this is
13 Petitioner's twelfth petition and he has filed appeals challenging the denial of eight out of ten
14 of his prior petitions. It is therefore clear that the prison is not preventing him from filing
15 anything. As such, Bounds cannot establish good cause for Petitioner.

16 Moreover, Bounds was abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
17 (1996)). In Lewis, the US Supreme Court specifically held that "Bounds did not create an
18 abstract, freestanding right to a law library or legal assistance, an inmate cannot establish
19 relevant actual injury simply by establishing that his prison's law library or legal assistance
20 program is subpar in some theoretical sense." Id. Instead, a petitioner must show that
21 deficiencies in the prison's legal assistance facilities resulted in a dismissal of a complaint for
22 failure to satisfy some technical requirement. Id. As such, Petitioner's dissatisfaction with
23 the prison law library does not provide good cause to overcome the procedural bar.

24 Petitioner cannot claim that Lewis applies because his Tenth Petition was not rejected
25 on a technicality. Instead the Court concluded that his claims were not properly raised in the
26 pleading filed. Order of Affirmance at 2. While Petitioner asserts that his lack of legal
27 knowledge prevented him from knowing that he had to file a Petition for Writ of Habeas
28 Corpus, that claim is belied by the fact that it was the Tenth Petition for Writ of Habeas

1 Corpus he filed. As such, it is clear that Petitioner knew the proper procedure for challenging
2 his Judgment of Conviction was through a Petition for Writ of Habeas Corpus. He cannot
3 now claim ignorance of that process.

4 Therefore, Petitioner has failed to establish good cause for delay. Petitioner is alleging
5 no new information he just gained access to that would make it reasonable to wait nearly
6 four decades to challenge his counsel's ineffectiveness. As such, the Court dismisses
7 Petitioner's Twelfth Petition.

8 **IV. PETITIONER HAS NOT ESTABLISHED PREJUDICE.**

9 To establish prejudice, petitioners must show "not merely that the errors of [the
10 proceedings] created possibility of prejudice, but that they worked to his actual and
11 substantial disadvantage, in affecting the state proceedings with error of constitutional
12 dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting
13 United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

14 Petitioner claims he can demonstrate actual prejudice pursuant McCoy. Twelfth
15 Petition at 14. Petitioner explains that McCoy precluded his counsel from conceding his guilt
16 to one of the sexual assaults and that counsel doing so amounts to structural error. Id. at 9-11.

17 Petitioner's claim is belied by the record. Counsel never conceded his guilt.
18 Petitioner's provided excerpts of the closing argument establish that after counsel finished
19 arguing that there was not enough evidence of Petitioner's guilt of Counts 1 or 2, he
20 explained that if he ended his argument then, all the jury could find him guilty of was sexual
21 assault. Recorder's Transcript of Hearing, Jury Trial: Friday May 1, 1981, Monday May 4,
22 1981, at 476. Counsel then proceeded to argue that there was no proof beyond a reasonable
23 doubt that he was guilty of sexual assault. Id. at 476-82. Counsel referenced Petitioner's
24 testimony, attacked the victim's credibility, and argued how Petitioner's actions were not
25 that of someone who committed a crime. Id. 482-83; 486-87. Finally, counsel concluded his
26 arguments by stating that "every act done in this case is consistent with innocence," and
27 asked the jury to return a verdict of "Not Guilty." Id. 478.

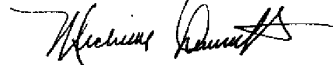
1 At no point did counsel tell the jury Petitioner was guilty of sexual assault. Therefore,
2 Petitioner's claim is belied by the record and this Court dismisses his Twelfth Petition as
3 procedurally time barred with no good cause or prejudice shown.

4 **ORDER**

5 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction
6 Relief shall be, and it is, hereby denied.

7 DATED this ____ day of September, 2021.

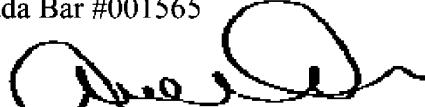
Dated this 13th day of September, 2021



DISTRICT JUDGE

208 B58 F5EF F39A
Michelle Leavitt
District Court Judge

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

13 BY 
14 ALEXANDER CHEN
15 Chief Deputy District Attorney
16 Nevada Bar #10539
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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Joel Burkett, Plaintiff(s)

CASE NO: A-19-788633-W

7 vs.

DEPT. NO. Department 12

8 William A Gittere, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
14 case as listed below:

15 Service Date: 9/13/2021

16 Eileen Davis

eileen.davis@clarkcountyda.com

17 Alexander Chen

Alexander.chen@clarkcountyda.com

18 If indicated below, a copy of the above mentioned filings were also served by mail
19 via United States Postal Service, postage prepaid, to the parties listed below at their last
20 known addresses on 9/14/2021

21 Joel Burkett

ESP
P.O. Box 1989
Ely, NV, 89301

22
23 Steven Wolfson

Juvenile Division - District Attorney's Office
601 N Pecos Road
Las Vegas, NV, 89101

Steven D. Grierson

JOEL BURKETT # 16111

Northern Nevada Correctional Center

Post Office Box # 7000

Carson City, Nevada 89702-7000

DISTRICT COURT
CLARK COUNTY, NEVADA

JOEL BURKETT,
Petitioner,
VS,
WILLIAM A. GITTERE,
Respondent,

Case No. A-19-788633-W
Dept. No. XII

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, that the Petitioner, JOEL BURKETT, hereby appeals to the Supreme Court of The State of Nevada, from the Judgment (Findings of Fact, Conclusions of Law AND Order), entered by the above named Court on September 16, 2021.

The foregoing document does not contain the social security number of any person.

DATED this 24th day of September 2021.

By: *Joel Burkett*
JOEL BURKETT,
Petitioner, in pro. per.

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CLERK OF THE COURT

CERTIFICATE OF SERVICE VIA U.S. MAIL

I, JOEL BURKETT, do hereby certify that on this 24th day of September 2021, that I mailed a true and correct copy of the foregoing Notice of Appeal, addressed to:

ALEXANDER CHEN, ESQ (ODA)
% Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

and,

ARROW FORD, ESQ
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

By: 
JOEL BURKETT.

JOE BUREK 1611
N.W.C.
P.O. BOX 7000
CARSON CITY, NV
89702

RENO NV 894

25 OCT 2021 P 2:11

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CLERK OF THE COURT
CLARK COUNTY DISTRICT COURT

200 LEWIS AVE. 3RD FLOOR

LAS VEGAS, NEVADA

89155

8910136300





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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

10 JOEL BURKETT,

11 Plaintiff(s),

12 vs.

13 WILLIAM A. GITTERE,

14 Defendant(s),
15

Case No: A-19-788633-W

Dept No: XII

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Joel Burkett

20 2. Judge: Michelle Leavitt

21 3. Appellant(s): Joel Burkett

22 Counsel:

23 Joel Burkett #16111
24 P.O. Box 7000
Carson City, NV 89702-7000

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

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

A-19-788633-W

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5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A
- Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A
6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No
7. Appellant Represented by Appointed Counsel On Appeal: N/A
8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: Yes,
Date Application(s) filed: February 6, 2020
9. Date Commenced in District Court: February 1, 2019
10. Brief Description of the Nature of the Action: Civil Writ
- Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus
11. Previous Appeal: Yes
- Supreme Court Docket Number(s): 78868
12. Child Custody or Visitation: N/A
13. Possibility of Settlement: Unknown

Dated This 3 day of November 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Joel Burkett

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

May 19, 2020

A-19-788633-W Joel Burkett, Plaintiff(s)
vs.
William A Gittere, Defendant(s)

May 19, 2020 **8:00 AM** **Minute Order**

HEARD BY: Leavitt, Michelle **COURTROOM:** Chambers

COURT CLERK: Haly Pannullo

RECORDED:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- The court reviewed the pleadings submitted and hereby denies petitioners twelfth Petition For Writ of Habeas Corpus. The petition is time barred. The petition is also successive.

Mr. Chen, Esq. to prepare the Order for the court. The hearing scheduled for May 19, 2020 is vacated.

CLERK'S NOTE: The above minute order has been distributed to:
Alexander.Chen@clarkcountyda.com hvp/5/19/20

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated January 3, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 177.

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 20 day of January 2022.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk