

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WASHINGTON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Nov 16 2019 07:37 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-19-797610-W

Docket No: 79834

RECORD ON APPEAL

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PROPER PERSON
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ELY, NV 89301

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Original

Case No

Dept. No

FILED

JUN 17 2019

John L. Blum
CLERK OF COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

A-19-797610-W

Dept. XV

Matthew Washington,
Petitioner,

v.

State of Nevada,
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

JUN 17 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

2. Name and location of court which entered the judgment of conviction under attack: 8th Jud Dist Court, Clark County, NV

3. Date of judgment of conviction: June 27, 2014

4. Case number: C-13-294695-1

5. (a) Length of sentence: Life With the Possibility of Parole

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

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

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

7. Nature of offense involved in conviction being challenged: 1st Degree Murder w/1st/1st Attempt Murder

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

(a) Not guilty XX (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: N/A

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

(a) Jury XX (b) Judge without a jury

11. Did you testify at the trial? Yes No XX

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

13. If you did appeal, answer the following:

(a) Name of Court: Nv. Sup Court

(b) Case number or citation: 65998

(c) Result: Order of Affirmance

(d) Date of result: August 12, 2016 (Remittitur 12-19-16)
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

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 X No

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

(a)(1) Name of court: U.S. District Court

(2) Nature of proceeding: 2254

(3) Grounds raised: Ineffective assistance of counsel issues from Direct Appeal

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

(5) Result: Pending

(6) Date of result:

(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: N/A

(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: N/A

(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.)

N/A

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: NO

(b) The proceedings in which these grounds were raised: N/A

(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.) N/A

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.) See Memorandum of points and authorities

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.) This petition is untimely.

See Points and Authorities

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: U.S. Dist. Court of NV.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Clark County Public Defender
direct appeal, Mitchell Posni - post conviction

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: N/A

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.

Legal Argument

Mr. Washington's Writ Of Habeas Corpus (Post-Conviction) Petition Is Not Barred By NRS 34.726 And NRS 34.810, As Good Cause And Prejudice Can Be Shown To Excuse Procedural Defaults

NRS 34.726(1), provides:

Unless there is good cause shown for delay, a petition... must be filed within 1 year after the supreme court issues its remittitur. For the purpose of this subsection, good cause for delay exist if the petitioner demonstrates to the satisfaction of the court:

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

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

See: Dickerson v. State, 967 P.2d 1132, 1133 (Nev. 1998). Pellegrini v. State, 34 P.3d 519, 528 (Nev. 2001)

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NRS 34.810(2), provides;

2. 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 of, if new and different grounds are alleged, the judge or justice finds the failure of the petition to assert those grounds in a prior petition constitutes an abuse of writ.

See: State v. Bennett, 81 P.3d 1 (Nev. 2003); Hogan v. Warden, 860 P.2d 710 (Nev. 1993) (the court held that in order to avoid procedural default under NRS 34.810(2), the defendant has the burden of pleading and proving specific facts that demonstrate both good cause for his failure to present his claim in earlier proceedings and actual prejudice.).

Mr. Washington does not dispute that the instant petition is untimely and successive. However, he can plead and prove specific facts demonstrating

good cause and prejudice to excuse the procedural default rules of NRS 34.726(1).

Furthermore, good cause and prejudice can be demonstrated to excuse the procedural default rules of NRS 34.800 to NRS 34.810, to this successive petition containing new claims for relief.

A. New and Different Grounds

Pursuant to NRS 34.810(2), Mr. Washington, in the instant petition, presents a new and different ground from those raised in the first Writ of habeas corpus (post-conviction) petition. The instant petition will plead and prove specific facts and circumstances to warrant the excuse of the procedural default rules and warrant this Courts consideration on the merits and to grant him the appropriate relief.

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B. Good Cause And Prejudice

Good Cause

Generally, "good cause" means a "substantial reason; one that affords a legal excuse." Colley v. State, 773 P.2d 1229 (Nev. 1989).

In order to show good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rule. Hathaway v. State, 71 P.3d 503 (Nev. 2003); Loveland v. Hatcher, 231 F.3d 640 (9th Cir. 2000).

An impediment external to the defense may be demonstrated by showing "that the factual or legal basis for a claim was not reasonably available to counsel," or "that some interference by officials made compliance impracticable." Murray v. Carrier, 477 U.S. 478, 488, ___ S.Ct. ___ (1986). Pellegrini v. State, 34 P.3d 519, 537 (Nev. 2001).

In Martinez v. Ryan, 132 S.Ct. 1309 (2012), the Court held that the failure of ineffective counsel or pro se petitioner

to raise, in state court initial review collateral proceedings, claims of ineffective assistance of counsel at trial could be "cause" to excuse state - court procedural default.

In Van Nguyen v. Curry, 736 F.3d 1287 (9th Cir 2013), the Court concluded that in following Martinez, that "cause" also extends to post-conviction counsel's ineffectiveness, or when there is no counsel, that the failure to raise claims of appellate counsel's ineffectiveness. *Id.* at 1296.

To avoid the application of the procedural bar, a petitioner must, in claiming actual innocence, show that it is more than likely than not that no reasonable juror would have convicted him absent the constitutional violation.

Schlup v. Delo, ___ U.S. ___, 115 S.Ct. 851 (1995); Pellegrini, 34 F.3d 519, 537 (Nev. 2001).

Mr. Washington can demonstrate good cause for the procedural default by showing: (1) that post-conviction counsel was ineffective in failing to raise the underlying grounds of ineffective assistance of counsel, and (2) that he is, in fact, actually innocent of the crime he stands unlawfully convicted of in this case.

(a) Interference By Officials

Mr. Washington asserts good cause exist to excuse the procedural default rules of the instant petition as he never "verified" his post-conviction counsel to file the first petition of December 19, 2017, as Mr. Washington had never seen the first petition. (Exhibit A)

NRS 34.730(1), states:

A petition must be verified by the petitioner or his counsel. If the petition is verified by counsel, he shall also verify that the petitioner personally authorized him to commence the action."

Here, Mr. Washington did not "personally authorize [counsel] to commence the action" of filing the first post-conviction of December 19, 2017, because he had never seen the first petition and what grounds were raised for Mr. Washington to agree to counsel commencing the action. Oddly, none of Mr. Washington's claims were raised and the claims

that were raised in the timely filed petition were deemed procedurally defaulted.

To add insult to injury, Mr. Washington was totally blind to the contents of the first petition and only had an idea as to what grounds were raised after he received the Order Denying Defendant's Petition For Writ of Habeas Corpus from the Clerk of Court, in mid February 2019. (Exhibit A),

Wherefore, as the first petition filed December 19, 2017 by post-conviction counsel was not authorized to be filed by Mr. Washington pursuant to NRS 34.730, good cause exist to excuse the procedural default rules to allow Mr. Washington to have his claims heard on the merits.

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(b) Ineffective Post-Conviction Counsel

Mr. Washington, similar to *Martinez v. Ryan*, *supra*, relies on the ineffectiveness of his post-conviction counsel to excuse the failure to comply with the procedural rules, not as an independent basis for overcoming his conviction.

On December 19, 2017, Mr. Washington's retained counsel filed his first post-conviction petition with the Clerk of Court. However, in filing the first timely post-conviction, counsel never once allowed Mr. Washington to review the petition, thus, leaving him in the blind as to what grounds were being raised, specifically, those grounds in which Mr. Washington requested of post-conviction counsel to raise.

Furthermore, post-conviction counsel, in refusing to permit Mr. Washington to review the petition, violated MRs 34.730(1) in having Mr. Washington personally authorize counsel to commence the action; never told Mr. Washington as to when the petition was filed and never

provided Mr. Washington with a filed copy of the first post-conviction petition filed December 19, 2017. (Exh. A)

In Martinez, the court recognized, as a practical matter, that if a constitutional claim of ineffective assistance of counsel could not be raised on direct appeal, the initial collateral review proceeding was the functional "equivalent" of a direct appeal. Id. 132 S.Ct. at 1317.

Therefore, when a State requires a prisoner to raise an IAC claim in the post-conviction proceedings, a prisoner may establish cause for a default of an IAC claim in two circumstances:

The first is where the state court did not appoint counsel in the initial-review collateral proceeding for a IAC claim.

The second is where appointed/retained counsel in the proceedings, should have raised the IAC claim, was ineffective under Strickland v. Washington, — U.S. — 104 S.Ct. 2052,

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The centerpiece of Martinez is the fundamental importance of effective assistance of counsel guaranteed by the Sixth Amendment. The Sixth Amendment right to effective counsel applies equally to trial and appellate counsel. Nguyen, 736 F.3d at 1293.

In Nguyen, when addressing the four-part test for excuse of a procedural default of a IAC claim, the procedural default may be excused if there is "Cause" for the default. "Cause" is established under Martinez where:

(1) the claim of ineffective assistance of trial counsel was a substantial claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel' claim; and (4) state law requires that an 'ineffective assistance of trial counsel [claim]... be raised in the initial review collateral review proceeding."

Id. 736 F.3d at 1293.

Mr. Washington, under Martinez and Nguyen, can satisfy the four-part test for "cause" to excuse the procedural default of the underlying grounds.

First, the underlying grounds of ineffective assistance of counsel are "substantial" and should have been raised in the first post-conviction petition.

Second post-conviction counsel was, in fact, ineffective in failing to raise the substantial grounds in the first post-conviction petition.

Third, the first post-conviction petition filed December 19, 2017, is the petition in which the underlying grounds should have been raised; and Fourth, the state law of Nevada requires that IAC claims must be raised in the writ of habeas corpus (post-conviction) proceedings. See Franklin v. State, 877 P.2d 1058 (Nev. 1994).

Here, as Mr. Washington was denied his Sixth Amendment right to effective assistance of counsel at trial and denied effective assistance of counsel in the first post-conviction proceedings when post-conviction counsel failed to raise the underlying IAC claims, such grounds are procedurally

default pursuant to NRS 34.810(2), which is an "objective factor" that is "external" to Mr. Washington and that "cannot fairly be attributed to him." Hathaway, 71 P.3d at 506.

Accordingly, under Martinez, good "cause" exist to excuse the procedurally defaulted underlying grounds and Mr. Washington deserves a chance to assert his Sixth Amendment claims for this Court to consider on the merits.

Prejudice

NRS 34.810(1)(b), requires dismissal of a petition if the grounds could have been raised in a prior petition for post-conviction relief, "unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner." Pellegrini, 34 P.3d at 537; NRS 34.726(1).

"[A]ctual prejudice" requires a showing "not merely that the errors [complained of] created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage,

in affecting the proceedings with error of constitutional dimension," Mitchell v. State, 149 P.3d 33 (Nev. 2006); Hogan v. Warden, 860 P.2d 710, 716 (Nev. 1993).

In the instant case, the prejudicial effect in the instant petition being summarily dismissed on a procedural default rule would be astronomical as the combined constitutional errors in relation to Mr. Washington being denied his constitutional right to effective assistance of counsel under the Sixth Amendment, "have worked to his actual and substantial disadvantage, in affecting the trial proceedings with error of constitutional dimension," Hogan, 860 P.2d at 716, which "had a substantial and injurious effect [and] influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), that "the resulting conviction violates equal due process." Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475 (1991).

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Wherefore, as Mr. Washington has clearly demonstrated good "cause" under Martinez, to excuse the procedural default of the underlying claims, the failure to consider the claims would prejudicially continue the "fundamental miscarriage" of justice". State v. Bennett, 81 P.3d 1 (Nev. 2003).

When considering the totality of the specific facts that have been pled and proven, the circumstances renders Mr. Washington's petition and claims to be ripe for the Court's consideration on the constitutional merits of his claims and grant the appropriate relief.

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C. Miscarriage of Justice

Nevada courts, in line with the U.S. Supreme Court and federal circuit courts have recognized and applied the "miscarriage of justice" exception when considering untimely and successive petitions containing procedurally defaulted claims to which a petitioner fails to show cause and prejudice to excuse the default rules, but yet, presents a claim that violates his rights with such prejudice that failure of the court to consider the claim would amount to a "fundamental miscarriage of justice."

McQuiggin v. Perkins, 569 U.S. 133, 133 S.Ct. 1929 (2013); San Martin v. McNeil, 633 F.3d 1257 (CA11, 2011); Berry v. State, 363 P.3d 1148 (Nev. 2015); Mitchell v. State, 149 P.3d 33 (Nev. 2006).

Mr. Washington, in submitting the instant untimely and second petition, asserts new and different grounds of ineffective assistance of counsel from those raised in his first post-conviction petition and has shown

good cause and prejudice for having to present the underlying IAC claims in a second petition.

In State v. Bennett, 81 P.3d 1 (Nev. 2003), the defendant, in filing his untimely second and successive petition raising new and previously rejected claims and a Brady violation argument, failed to demonstrate good cause and prejudice to overcome the procedural bars.

However, the district court held that the prejudicial impact of the Brady violation, undermines the reliability of the jury's verdict, that applying the procedural bars to preclude consideration of the claim would amount to a fundamental miscarriage of justice. *Id.* 81 P.3d at 6-7.

The district court, despite the defendant's failure to show good cause, applied the "miscarriage of justice" exception and held an evidentiary hearing, even with the State pleading laches, and granted relief. *Id.*

Mr. Washington, if by some account he fails to show good cause and prejudice to the district court's satisfaction to excuse the procedural default rules, the underlying grounds of ineffective assistance

of counsel, assert constitutional violations with a prejudicial impact that seriously diminishes and undermines the confidence and reliability of the jury's verdict of guilt and conviction, whereas, the application of procedural bars to preclude consideration of the claims, "would amount to a fundamental miscarriage of justice." Mitchell, 149 P.3d at 36; see also McQuiggin v. Perkins, — U.S. —, 133 S.Ct. 1924 (2015) (stating: "We have applied the miscarriage of justice exception to overcome various procedural defaults" to include "successive" petitions asserting previously rejected claims).

In Murray v. Carrier, — U.S. —, 106 S.Ct. 2639 (1986), the Court held:

"[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."

Id. at _____.

As the prejudicial impact of the collective constitutional violations undermines the reliability of the jury's verdict to result in a conviction of Mr. Washington, who is actually innocent, this Court is obligated to consider the very underlying claims that produced the unreliable conviction. Anything less would amount to a fundamental miscarriage of justice. See San Martin v. McNeil, 633 F.3d 1257, 1267-68 (CA 11, 2011) ("A court... may consider an untimely petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a "fundamental miscarriage of justice" because it would require that an individual who is actually innocent to remain imprisoned.").

In Herrera v. Collins, 506 U.S. 390 (1993), the Court held:

"The rule, or fundamental miscarriage of justice exception, is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of an innocent person."

Id. at 404-405.

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Mr. Washington's conviction, borne on a constitutional violation, has imprisoned a man actually innocent of the crime he stands convicted under, to a point that this court cannot conclude, with fair certainty, that the jury would have convicted him, absent the constitutional violations. See Schlup v. Delo, — U.S. —, 115 S.Ct. 851,

Wherefore, when considering the totality of the facts and circumstances, whether or not good cause and prejudice is shown, the prejudicial impact of the constitutional violations within the underlying grounds, demands this Court's attention and application of the "miscarriage of justice" exception to overcome all procedural bars to have the instant petition on the merits. Berry, 363 P.3d at 1159, to prevent a continuation of a "fundamental miscarriage of justice." Id. at 1159.

Accordingly, the application of the "miscarriage of justice" exception is clearly warranted in this case.

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Ground One

Trial Counsel Was Ineffective
In Failing To Call Critical
Witnesses At Trial To Prove
Mr. Washington's Innocence,
In Violation Of The Sixth And
Fourteenth Amendment

Under Strickland, 104 S.Ct. 2052 (1984), trial counsel was ineffective in failing to call credible witnesses at trial to demonstrate Mr. Washington's actual innocence, in violation of the Sixth Amendment.

Prior to trial, Mr. Washington informed trial counsel of numerous witnesses he wished to have called to trial to prove his claims of being in the area for the sole purpose of having being called to give his codefendant a ride home and had no knowledge of the crime that was to be committed.

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The witnesses in question are:
Michael Hawkins, Kijohnique and Cordie Allen.

Michael Hawkins would have testified to having overheard the conversation Mr. Washington had with "Little Jessie" asking of Mr. Washington to give Martell Moten (AKA Mace Murder) a ride home and told Mr. Washington that he was on Sherwood street and Sahara. Mr. Washington told "Little Jessie" that he would give him a ride because he would be over that way to see Cordie Allen.

Kijohnique would have testified to to having overhearing Mr. Washington on the phone speaking with a male named "Jessie" who asked Mr. Washington what his plans were for the night and if Mr. Washington could pick up Mace Murder and drop him off by the Eureka.

Cordie Allen would have testified to having texted Mr. Washington and asking if he could come over to her cousin's apartment to talk about their relationship. Mr. Washington had told

Ms. Allen that he would be over there anyway because he had to pick up his friend (Mace Murder) on the next street over and drop him off at home.

When Mr. Washington arrived to Ms. Allen's apartment he was alone and he and Ms. Allen sat in his car as they talked. A few hours later, Mr. Washington received a call from his friend asking if Mr. Washington could take him to the corner store.

Ms. Allen and Mr. Washington went to the next street over and picked up Mr. Washington's friend (whom did not give his name) and drove to the store. The young black male went into the store as Ms. Allen and Mr. Washington remained in the car.

Mr. Washington dropped the man off where he was originally picked up and Mr. Washington and Ms. Allen returned to Ms. Allen's cousin's apartment where they continued talking as they sat in the car into the morning hours.

As Ms. Allen stood outside, she heard gun shots and she seen two cars leave out of

the alley. Both cars stopped and the black male got out of one car and into Mr. Washington's car.

In Warner v State, 729 P.2d 1359 (Nev. 1996), the Court concluded that trial counsel was ineffective in failing to contact and present witnesses constituted inadequate pretrial investigations resulting in ineffective assistance of counsel.

Here, trial counsel was ineffective in failing to present the aforementioned witnesses at Mr. Washington's trial to demonstrate his lack of knowledge and participation in the crime as he was merely giving his friend a ride, amounting to deficient performance that "fell below an objective standard of reasonableness" under the Strickland, 104 S.Ct. 2052 standard.

The prejudicial impact is irreparable as Mr. Washington was deprived of favorable testimony demonstrating his actual innocence and but for counsel's errors in failing to call these witnesses, the results of the trial would have been extremely different. Wiggins v. Smith, 123 S.Ct. 2527 (2003).

Relief is warranted

Ground Two

Trial Counsel Was Ineffective
In Failing To Conduct Adequate
Pretrial Investigations In Securing
Relevant Evidence And Conducting
Independent Scientific Testing
In Violation Of The Sixth And
Fourteenth Amendment

Under Strickland v. Washington,
U.S. ___, 104 S.Ct. 2052 (1984), trial
counsel was ineffective in failing to
secure relevant evidence in preparation
for trial and failing to conduct indepen-
dent scientific testing, in violation of
the Sixth Amendment.

(1) Text Message And Phone Records

Mr. Washington, in maintaining his
innocence, had informed detectives
and trial counsel that he had absolutely
no knowledge of the crime being
committed by his codefendant(s)
and maintained he had just picked
up codefendant Moten/Cear the

Stratosphere. In support of his assertions, Mr. Washington requested of trial counsel to secure his cell phone that was impounded and to retrieve the abundance of text messages and cell phone records to show that he was in the area to visit his female friend and to give codefendant Moten a ride home.

This evidence would have been vital to his defense in proving he was actually innocent of the crimes committed by codefendant Moten and the unnamed individual.

(2). Gun-Shot Residue Evidence

Mr. Washington, on numerous occasions, requested of trial counsel to have his clothing tested for gun-shot residue evidence in preparation for his defense of never having fired a gun.

Upon arrest, Mr. Washington's clothing was impounded as evidence. As no witnesses were able to identify

Mr. Washington as a suspect to the crime, it is assumed his clothing was impounded as evidence for the sole purpose of having the items tested for gun shot residue.

In processing the crime scene a total of 13 cartridge cases; 7 were .40 cartridge cases and 6 were 9 mm.

As these are high caliber weapons, there would be a substantial amount of gun-shot residue produced from the combined 13 shots.

An independent testing of Mr. Washington's clothing would have demonstrated his lack of possessing a weapon used in the shooting.

In Avila v. Galaza, 297 P.3d 911 (9th Cir. 2002), the Court held:

"[a] lawyer who fails to investigate and introduce into evidence, [evidence] that demonstrates his clients' factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance."

Id. at 919.

Under Strickland, trial counsel's failure to secure vital text message and cell phone records demonstrating Mr. Washington was summoned to the area for the sole purpose of giving his codefendant a ride home, and the failure to conduct independent testing on Mr. Washington's clothing to demonstrate he never possessed a firearm amounts to representation that "fell below an objective standard of reasonableness" to demonstrate deficient performance in violation of the Sixth Amendment.

Trial counsel's actions, or lack thereof, in failing to adequately investigate the case for a defense, cannot be deemed a "sound tactical" decision and there is a reasonable probability that but for counsel's errors, the results of the trial would have been extremely different. See Strickland, 104 S.Ct. 2052

Wherefore, counsel's ineffectiveness warrants a new trial.

Relief is warranted

///

Ground Three

Trial Counsel Was Ineffective
In Failing To Object To Jury
Instruction No. 18 On Aiding
And Abetting As Inadequate,
In Violation Of The Sixth
And The Fourteenth Amend.

Trial counsel was ineffective in failing to object to jury Instruction No. 18 on aiding and abetting as being inadequate in accordance with *Sharma v. State*, 56 P.3d 868 (Nev. 2002); *Bolder v. State*, 124 P.3d 191 (Nev. 2005) and *Mitchell v. State*, 149 P.3d 33 (Nev. 2006), affecting Mr. Washington's substantial rights to due process and fair trial.

The State, in charging Mr. Washington with first degree murder with use of a deadly weapon and attempt murder with the use of a deadly weapon, proceeded under three theories of criminal liability, to wit: (1) by directly committing said act, and/or (2) aiding and abetting, and/or (3) conspiring with each other whereby each is vicariously liable.

Based upon the State's theories and charged offenses, the district court provided the jury with Instruction No. 18 on aiding and abetting which run afoul of Sharma, Bolden and Mitchell, to violate due process.

Instruction No. 18, reads in relevant part;

"All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime

with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted."

In Sharma v State, 56 P.3d 868 (Nev. 2002), the Court held that in order for a person to be held accountable for the specific intent crime of another under aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the specific intent that the other person commit the charged crime. *Id.* at 872; see also Mitchell v. State, 149 P.3d 33, 36 (Nev. 2006).

Instruction No. 18, is unconstitutionally inadequate as it does not precisely or remotely track the decision held in Sharma and Mitchell, as it fails to inform the jury that Mr. Washington, the non-shooter and non-participant to the crime, must have knowingly aided and abetted the unnamed and named coconspirators with

the specific intent to kill and attempt to kill.

Actually, instruction No. 18 clearly provides for the jury to find Mr. Washington guilty of the specific intent crime of first degree murder and attempt murder under the aiding and abetting theory simply on "~~criminal intent~~" and not "specific intent" as required by Sharma, Bolder and Mitchell, which erased the statutory mens rea element required for those specific crimes. See Bolder, 124 P.3d at 202 (holding that instruction improperly allowed jury to find the defendant criminally liable under a theory that erased the statutory mens rea element required for the charged crime).

Here, when considering the lack of evidence to show Mr. Washington had directly or actively advised, encouraged, aided, promoted or instigated his codefendants, or any other person, to shoot and kill and attempt to kill the victims, it was paramount for the district court to ensure the jury was properly instructed on aiding and abetting in accordance

with the law under Sharma and Mitchell. See Ho v. Carey, 332 F.3d 587, 594-95 (9th Cir. 2003) (reasoning the jury may have applied incorrect standard in convicting defendant).

Under Strickland v. Washington, 104 S.Ct. 2052 (1984), trial counsel's failure to object to Instruction No. 18 as being inadequate on aiding and abetting amounts to representation that "fell below an objective standard of reasonableness" to demonstrate deficient performance in violation of the Sixth Amendment.

Counsel's actions or lack thereof, creates irreparable prejudice as the inadequate jury instruction has "infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475 (1991).

Wherefore, but for counsel's errors, there is a reasonable probability that the results of the trial would have been extremely different. Wiggins v. Smith, 123 S.Ct. 2527 (2003), thus, warranting a new trial.

Relief is warranted.

Conclusion

Wherefore, based upon the facts and circumstances, Mr. Washington prays this Court will grant the petition in its entirety and order a new trial.

In the alternative, appoint counsel and conduct an evidentiary hearing on the assertion of good cause and prejudice.

Grant any other relief this Court deems appropriate.

Dated this 14th day of June 2019



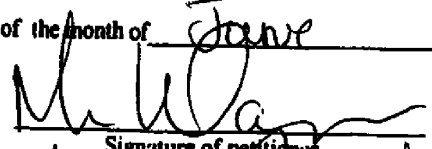
Matthew Washington
#1061467

P.O. Box 1989

Ely, Nv. 89301

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 14th day of the month of June of the year 2019.


Signature of petitioner
Matthew Washington
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

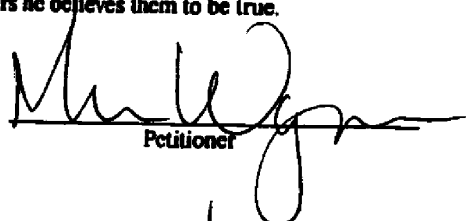

Signature of Attorney (if any)

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

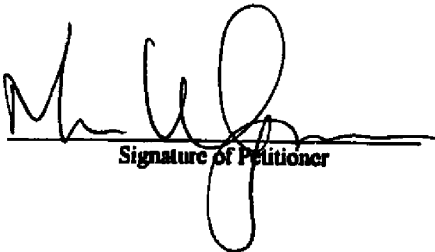
I, Matthew Washington, hereby certify pursuant to N.R.C.P. 5(b), that on this 14th day of the month of June, of the year 2019 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

Respondent prison or jail official

Address

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

Steve Watson
District Attorney of County of Conviction
200 Lewis Avenue
LV. NV. 89155
Address



Signature of Petitioner

AFFIRMATION PURSUANT TO NRS 239B.030

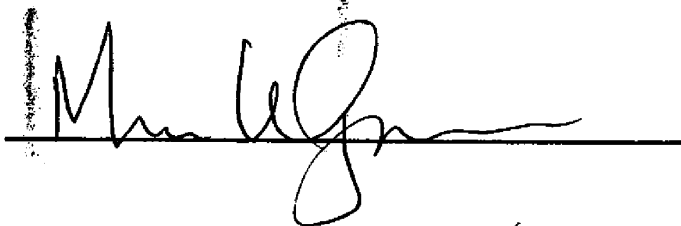
I, Matthew Washington, NDOC# 1061467,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE
ATTACHED DOCUMENT ENTITLED Habeas Corpus
Post-Conviction

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

DATED THIS 14th DAY OF June, 2019.

SIGNATURE:



INMATE PRINTED NAME:

Matthew Washington

INMATE NDOC #

1061467

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

A

Exhibit

A

A

April 10, 2019

Mitchell Posni, ESQ
Attorney at Law
410 S. Rampart Blvd Ste. 390
Las Vegas, Nv. 89145

Re: Case No. C-13-294695-1
Notice of Appeal.

Dear Mr. Posni,

In mid February 2019 I received the Notice of Entry of Order regarding the denial of my post-conviction petition which informed me that I had 33 days to file the Notice of Appeal.

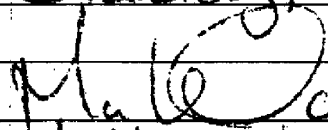
As I retained you for my post conviction proceedings, I would expect of you to file a timely Notice of Appeal. However, as I have not heard from you personally or from your office within the past 30 days, I am at a loss as to the status of my case and whether or not the Notice of Appeal has been timely filed.

Also, in going through my case file, I notice you never provided me with a "filed copy" of the Writ of Habeas Corpus (Post-Conviction) Petition for me to review and for my records. In retaining your office, I would expect I would be entitled to a copy of the petition you filed on my behalf.

Mr. Posin, as I wish to avoid having to deal with any form of procedural bars and defaults in my case, I respectfully request of you to provide me with verification of your having filed a timely Notice of Appeal to the denial of my post-conviction petition and Notice of Entry of Order filed February 13, 2019, and request a copy of the petition (post-conviction) filed on

I appreciate your attention to my concerns and await your prompt response.

Sincerely,



Matthew Washington #1061467
P.O. Box 1989
Ely, Nv. 89301

Matthew Washington #1061467
ESP - P.O. Box 1989
Ely, NV 89301

Confidential

District Court

Clerk of The Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155



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JUN 13 2019
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Matthew Washington #1061467
P.O. BOX 1989
ELY, NV. 89301

FILED

JUN 17 2019

CLERK OF COURT

IN THE 8th DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Matthew Washington
Petitioner,

vs.

State of Nevada
Warden; State of Nevada,
Respondents.

CASE NUMBER: A-19-797610-W
Dept. XV

Dept. No. XV
EX PARTE MOTION FOR
APPOINTMENT OF COUNSEL AND
REQUEST FOR EVIDENTIARY
HEARING

COMES NOW, Washington the Petitioner, in proper person, and moves this Court for its order allowing the appointment of counsel for Petitioner and for an evidentiary hearing. This motion is made and based in the interest of justice.

Pursuant to NRS 34.750(1):

A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petitioner is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:

- (a) The issues presented are difficult;
- (b) The petitioner is unable to comprehend the proceedings, or

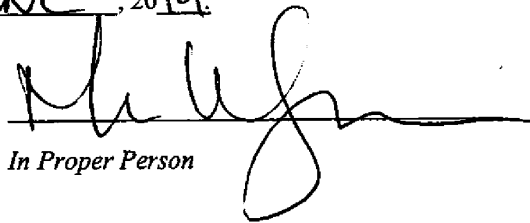
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(c) Counsel is necessary to proceed with discovery.

Petitioner is presently incarcerated at ESD, is indigent and unable to retain private counsel to represent him.

Petitioner is unlearned and unfamiliar with the complexities of Nevada state law, particularly state post-conviction proceedings. Further, Petitioner alleges that the issues in this case are complex and require an evidentiary hearing. Petitioner is unable to factually develop and adequately present the claims without the assistance of counsel. Counsel is unable to adequately present the claims without an evidentiary hearing.

Dated this 14th day of June, 2019.


In Proper Person

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on 14th June, 2019, he served a copy of the foregoing Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing by personally mailing said copy to:

Steve Wolfson

District Attorney's Office

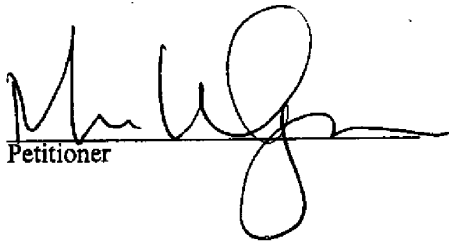
Address:

200 Lewis Avenue

LV, NV. 89155

Warden

Address:


Petitioner

27
FILED

JUL 05 2019

John J. Blum
CLERK OF COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Matthew Washington,

Petitioner,

vs.

State of Nevada,

Respondent,

Case No: A-19-797610-W
Department 15

**ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS**

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on June 17, 2019. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 3 day of September, 2019, at the hour of

8:30 o'clock for further proceedings.

Joe Hardy
District Court Judge BM

A-19-797610-W
OPWH
Order for Petition for Writ of Habeas Corpus
4847061



JUL 02 2019

RECEIVED

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA



Matthew Washington, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

Case No.: A-19-797610-W
Department 15

NOTICE OF HEARING

Please be advised that the Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing in the above-entitled matter is set for hearing as follows:

Date: September 03, 2019
Time: 8:30 AM
Location: RJC Courtroom 11D
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court



1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JOHN NIMAN
6 Deputy District Attorney
7 Nevada Bar #014408
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 MATTHEW WASHINGTON,
13 #2685499

14 Defendant.

CASE NO: A-19-797610-W

DEPT NO: XV

15 STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS
16 CORPUS, MOTION FOR APPOINTMENT OF COUNSEL, AND REQUEST FOR
EVIDENTIARY HEARING

17 DATE OF HEARING: SEPTEMBER 3, 2019
18 TIME OF HEARING: 8:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through JOHN NIMAN, Deputy District Attorney, and hereby submits the
21 attached Points and Authorities in Response to Defendant's Petition for Writ of Habeas
22 Corpus, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

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

26 ///

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 20, 2013, the State filed an Information charging Washington with: Count 1 – Conspiracy to Commit Murder; Count 2 – Murder With Use of a Deadly Weapon; Counts 3, 5, 6 – Attempt Murder With Use of a Deadly Weapon; Count 4 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Count 7 – Battery With Use of a Deadly Weapon; Counts 8-17 – Discharging Firearm At or Into Structure, Vehicle, Aircraft, or Watercraft; and Counts 18-19 – Possession of Firearm by Ex-Felon. On April 7, 2014, the State filed an Amended Information charging Washington with the same Counts 1-17.

Washington’s jury trial began on April 7, 2014. On April 11, 2014, the State filed a Second Amended Information to correct a grammatical error, correct the name of the victim for Count 7, and to remove the substantial bodily harm language from Count 4. On April 16, 2014, the jury found Washington guilty on all counts.

The State then filed a Second Amended Information on April 16, 2014, charging Washington with Possession of Firearm by Ex-Felon. A separate trial was then held regarding the additional count. The jury found Washington guilty.

The penalty hearing was conducted on April 17, 2014. For Count 2, the jury imposed a sentence of life with eligibility for parole after 20 years.

On June 18, 2014, the Court sentenced Washington to the Nevada Department of Corrections as follows: Count 1 – a minimum of 48 months and a maximum of 120 months; Count 2 – life with the possibility of parole after 240 months, with a consecutive term of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon, to run concurrent to Count 1; Count 3 – a minimum of 96 months and a maximum of 240 months, with a consecutive term of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon, to run consecutive to Count 2; Count 4 – a minimum of 48 months and a maximum of 120 months, to run concurrent to Count 3; Count 5 – a minimum of 96 months and a maximum of 240 months, with a consecutive term of a minimum of 60 months

1 and a maximum of 240 months for the use of the deadly weapon, to run consecutive to Count
2 4; Count 6 – a minimum of 96 months and a maximum of 240 months, with a consecutive term
3 of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon,
4 to run consecutive to Count 5; Count 7 – a minimum of 48 months and a maximum of 120
5 months, to run concurrent to Count 6; Counts 8-17 – a minimum of 28 months and a maximum
6 of 72 months for each count, each to run concurrent to the preceding count; and as to the
7 Possession of a Firearm by an Ex-Felon – a minimum of 28 months and a maximum of 72
8 months, to run concurrent with Count 17. The Judgment of Conviction was filed on June 27,
9 2014.

10 On June 30, 2014, Washington filed a pro per Notice of Appeal. On July 17, 2014,
11 through counsel, Washington filed a timely Notice of Appeal. On August 12, 2016, the Nevada
12 Supreme Court affirmed the Judgment of Conviction. Remittitur issued on December 19, 2016.

13 On December 19, 2017, Washington filed a Petition for Writ of Habeas Corpus. The
14 State responded on January 24, 2018. On February 6, 2018, the district court ordered further
15 briefing from the parties. On February 25, 2018, Washington filed his supplemental petition.
16 On March 12, 2018, the State filed a response. On March 16, 2018, Washington filed a reply.
17 The Court denied the petition on March 22, 2018. The Order denying the petition was filed on
18 April 4, 2018. Washington filed a Notice of Appeal on May 1, 2018. A subsequent Order
19 denying the petition was filed on February 12, 2019. The Court of Appeals affirmed the denial
20 on March 14, 2019. Washington v. State, No. 75777 (Mar. 14, 2019). Remittitur issued on
21 April 9, 2019.

22 On June 17, 2019, Washington filed his second Petition for Writ of Habeas Corpus.

23 **ARGUMENT**

24 **I. WASHINGTON’S PETITION IS PROCEDURALLY BARRED**

25 **A. The petition is time-barred**

26 A petition challenging a judgment of conviction’s validity must be filed within one year
27 of the judgment or within one year of the remittitur, unless there is good cause to excuse delay.
28 NRS 34.726(1). The Nevada Supreme Court has held that NRS 34.726 should be construed by

1 its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). The
2 one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of
3 conviction is filed or a remittitur from a timely direct appeal is issued. Dickerson v. State, 114
4 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

5 The one-year time limit for preparing petitions for post-conviction relief under NRS
6 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
7 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
8 evidence presented by the defendant that he purchased postage through the prison and mailed
9 the Notice within the one-year time limit.

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

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

19 Id. (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984)).
20 Additionally, the Court noted that procedural bars “cannot be ignored [by the district court]
21 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
22 has granted no discretion to the district courts regarding whether to apply the statutory
23 procedural bars; the rules *must* be applied.

24 Here, the Judgment of Conviction was filed on June 27, 2014. Washington appealed
25 and remittitur issued on December 19, 2016. Washington filed this second petition on June 17,
26 2019. This is beyond the one-year time bar. Washington acknowledges that his petition is
27 untimely. Petition at 2. Thus, his petition should be dismissed, absent a showing of good cause
28 and prejudice.

1 **B. The petition is successive and an abuse of the writ**

2 NRS 34.810(2) reads:

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

8 (emphasis added).

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

15 The Nevada Supreme Court has stated: "Without such limitations on the availability of
16 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
17 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
18 system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950.
19 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require
20 a careful review of the record, successive petitions may be dismissed based solely on the face
21 of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,
22 if the claim or allegation was previously available with reasonable diligence, it is an abuse of
23 the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-98 (1991).
24 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

25 Here, Washington filed his first Petition for Writ of Habeas Corpus on December 19,
26 2017. The Court denied the petition on March 22, 2018, and the Court of Appeals affirmed the
27 denial on March 14, 2019. Washington does not dispute that the petition is successive. Petition
28 at 2.

1 Washington's second petition is also an abuse of the writ. He raises new allegations
2 that could have been raised in his timely first petition. He contends that his trial counsel was
3 ineffective for failing to interview witnesses, failing to adequately prepare for trial, and failing
4 to object to a jury instruction. Petition at 24-35. These claims were reasonably available for
5 his first, timely petition. Thus, raising them now is an abuse of the writ.

6 **C. Washington fails to show good cause or prejudice**

7 A showing of good cause and prejudice may overcome procedural bars. "To establish
8 good cause, appellants *must* show that an impediment external to the defense prevented their
9 compliance with the applicable procedural rule. A qualifying impediment might be shown
10 where the factual or legal basis for a claim was not reasonably available at the time of default."
11 Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court
12 continued, "appellants cannot manufacture good cause[.]" Id. at 621, 81 P.3d at 526. To
13 establish prejudice, the defendant must show "not merely that the errors of [the proceedings]
14 created possibility of prejudice, but that they worked to his actual and substantial disadvantage,
15 in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden,
16 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152,
17 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason;
18 one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506
19 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any
20 delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

21 **i. Washington fails to show good cause**

22 Washington first claims that he did not know about or authorize his first petition.
23 Petition at 10-11. This is belied by the record. He filed a pro per petition in December 2017,
24 and requested counsel. Counsel was appointed and filed a supplemental petition. Washington
25 also filed a pro per appeal from the denial of that petition and filed an informal brief with the
26 Supreme Court on July 3, 2018. Exhibit 1. He did not allege that he was unaware of the
27 supplemental petition there. Thus, this claim is belied by the record and cannot show good
28 cause.

1 Washington also pleads good cause based on ineffective assistance of post-conviction
2 counsel. Petition at 12. The Nevada Supreme Court has consistently held that there is no right
3 to assistance of post-conviction counsel for noncapital prisoners. Brown v. Warden, 130 Nev.
4 565, 569, 331 P.3d 867, 870 (2014); McKague v. Warden, 112 Nev. 159, 163–65, 912 P.2d
5 255, 257–58 (1996). In Brown, the petitioner asserted “that the ineffective assistance of his
6 prior post-conviction counsel provide[d] cause and prejudice to excuse his failure to comply
7 with Nevada’s procedural rules governing post-conviction habeas petitions.” 130 Nev. at 569,
8 331 P.3d at 870. In reiterating that a claim of ineffective assistance of post-conviction counsel
9 does not constitute good cause for overcoming the post-conviction procedural bars, the Nevada
10 Supreme Court reasoned that “there is no constitutional or statutory right to the assistance of
11 counsel in noncapital post-conviction proceedings, and where there is no right to counsel there
12 can be no deprivation of effective assistance of counsel.” Id. (internal quotations and citations
13 omitted). Washington was not entitled to effective assistance of post-conviction counsel, so
14 this cannot show good cause.

15 **ii. Washington fails to show prejudice**

16 Washington contends that dismissing this petition would be prejudicial because of his
17 ineffective-assistance-of-counsel allegations. Petition at 17. The court assesses ineffective
18 assistance of counsel claims under the Strickland v. Washington, 466 U.S. 668, 104 S. Ct.
19 2052 (1984), two-prong standard. Molina v. State, 120 Nev. 185, 190–91, 87 P.3d 533, 537
20 (2004). “[T]here is no reason for a court deciding an ineffective assistance claim to approach
21 the inquiry in the same order or even to address both components of the inquiry if the defendant
22 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

23 A petitioner arguing ineffective assistance of counsel must assert that defense counsel’s
24 performance fell below the professional standard and that the petitioner was prejudiced.
25 Molina, 120 Nev. at 190, 87 P.3d at 537. There is a strong presumption that counsel’s actions
26 were within the bounds of reasonable assistance. Id. Prejudice requires a showing that if the
27 error did not occur, then the outcome would have been different. Kirksey v. State, 112 Nev.
28 980, 988, 923 P.2d 1102, 1107 (1996). “Effective counsel does not mean errorless counsel,

1 but rather counsel whose assistance is “[w]ithin the range of competence demanded of
2 attorneys in criminal cases.” Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

3 A petitioner is not entitled to relief if his factual allegations and claims are belied by
4 the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). A claim is belied
5 if the record contradicts the factual allegation. Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228,
6 1230 (2002). “Bare” and “naked” allegations also do not entitle a defendant to relief. Hargrove,
7 100 Nev. at 502, 686 P.2d at 225.

8 He first claims that his trial counsel was ineffective for failing to speak to potential
9 witnesses. Petition at 24-27. Counsel represented that he had an investigator who spoke with
10 witnesses and he would determine which if any would be called. Recorder’s Transcript of
11 Proceedings: March 5, 2014, Calendar Call, filed September 4, 2014, at 3. If counsel spoke
12 with them and decided not to call them, then it was a strategic decision. These witnesses likely
13 would not have led to a more favorable outcome because there was overwhelming evidence
14 putting Washington at the shooting. The shooting occurred at about 4:30 am, a neighbor called
15 911 and identified the car minutes after, and the police pulled the identified car over—with
16 Washington and his co-defendant inside—about 7 minutes after the shooting. Recorder’s
17 Transcript of Proceedings: Jury Trial – Day 3, filed September 22, 2014, at 40, 48, 57, 74. Two
18 guns were recovered from the car and shell casings found at the scene were linked to both of
19 those. Recorder’s Transcript of Proceedings: Jury Trial – Day 4 filed September 22, 2014, at
20 13, 17; Recorder’s Transcript of Proceedings: Jury Trial – Day 6, filed September 22, 2014, at
21 50, 59. So even if these witnesses testified that Washington was in that area to meet with his
22 girlfriend, that would likely not have changed the outcome.

23 Further, Washington repeatedly insisted on his speedy trial right as his counsel
24 explained that more investigation needed to be done before going to trial. See Recorder’s
25 Transcript of Proceedings: Motion to Sever Defendants, Status Check Trial Setting and Death
26 Penalty Committee, filed September 4, 2014, at 3-7; Recorder’s Transcript of Proceedings:
27 Motion to Sever, filed September 4, 2014, at 3. While Washington has a right to speedy trial,
28 he cannot later on say that his counsel was ineffective for not doing more investigation when

1 Washington kept pushing for an earlier trial date where counsel would have been even less
2 prepared. Thus, any prejudice is self-inflicted.

3 Washington next claims that his trial counsel was ineffective for failing to adequately
4 prepare for trial. Petition at 27-30. He argues that his counsel should have gathered text
5 messages to show that he was innocent and tested his clothing for gun shot residue to show
6 that there was no residue. Id. First, defense counsel pointed out in closing that the State failed
7 to show that there was any gun shot residue on Washington's clothes. Recorder's Transcript
8 of Proceedings: Jury Trial – Day 7, filed September 22, 2014, at 31, 35. Second, any prejudice
9 is self-inflicted as Washington repeatedly insisted on a speedy trial date where his counsel
10 represented that there was more investigation to be done.

11 Washington then argues that his trial counsel was ineffective for failing to object to a
12 jury instruction on aiding and abetting. Petition at 31-35. He contends that it did not adequately
13 inform the jury that to convict under this theory, the jury needed to find that Washington had
14 a specific intent. Id. However, Instruction 20 stated in part, "Defendant cannot be liable under
15 conspiracy and/or aiding and abetting theory for First Degree Murder and Attempt Murder for
16 acts committed by a co-conspirator, unless Defendant also had requisite specific intent." Thus,
17 the jury was instructed that it had to find that Washington had specific intent under the aiding
18 and abetting theory. Thus, this claim cannot show any prejudice as counsel was not ineffective
19 for failing to object to Instruction 18 on the grounds that the jury was not informed of that.

20 **II. WASHINGTON FAILS TO DEMONSTRATE ACTUAL INNOCENCE**

21 To the extent that Washington is arguing actual innocence, his claim fails. Petition at 5.
22 The United States Supreme Court has held that for a defendant to obtain a reversal of his
23 conviction based on a claim of actual innocence, he must prove that "'it is more likely than
24 not that no reasonable juror would have convicted him in light of the new evidence' presented
25 in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503
26 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995)). A petitioner
27 must show factual innocence, not legal innocence. Calderon, 523 U.S. at 559, 118 S. Ct. at
28 1502.

1 Here, Washington does not argue factual innocence. He does not present any new
2 evidence to reflect that he is factually innocent. His claims as to what potential witnesses
3 would have said does not show that he is factually innocent. Thus, this claim fails.

4 **III. WASHINGTON'S MOTION FOR APPOINTMENT OF COUNSEL** 5 **SHOULD BE DENIED**

6 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
7 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
8 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada
9 Supreme Court similarly observed that “[t]he Nevada Constitution...does not guarantee a right
10 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution’s right to
11 counsel provision as being coextensive with the Sixth Amendment to the United States
12 Constitution.” McKague specifically held that with the exception of NRS 34.820(1)(a)
13 (entitling appointed counsel when petitioner is under a sentence of death), one does not have
14 “any constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at
15 164, 912 P.2d at 258.

16 However, the Nevada Legislature has given courts the discretion to appoint post-
17 conviction counsel so long as “the court is satisfied that the allegation of indigency is true and
18 the petition is not dismissed summarily.” NRS 34.750. Under NRS 34.750, it is clear that the
19 court has discretion in determining whether to appoint counsel. NRS 34.750 reads:

20 A petition may allege that the petitioner is unable to pay the costs
21 of the proceedings or employ counsel. If the court is satisfied that
22 the allegation of indigency is true *and the petition is not dismissed*
23 *summarily*, the court may appoint counsel at the time the court
24 orders the filing of an answer and a return. In making its
25 determination, the court may consider whether:

- 26 (a) The issues presented are difficult;
- 27 (b) The petitioner is unable to comprehend the proceedings; or
- 28 (c) Counsel is necessary to proceed with discovery.

(emphasis added).

Here, Washington is not entitled to appointed counsel. His petition is untimely,
successive, and an abuse of the writ, with no good cause or prejudice shown. The NRS 34.750

1 factors also do not weigh in his favor. First, the issues are not complex. His claim that post-
2 conviction counsel was ineffective is not a cognizable claim because he is not entitled to post-
3 conviction counsel. His claim that he did not know about his first petition is belied by the
4 record. His actual innocence claim fails because he does not allege factual innocence and all
5 of the evidence that he references now was available at trial. Second, there is nothing in the
6 record to suggest that he does not understand the proceedings. Lastly, there are no discovery
7 issues. Thus, Washington's motion should be denied.

8 **IV. WASHINGTON'S EVIDENTIARY HEARING REQUEST SHOULD BE**
9 **DENIED**

10 If a petition can be resolved without expanding the record, then an evidentiary hearing
11 is not required. Mann, 118 Nev. at 356, 46 P.3d at 1231. A defendant is entitled to an
12 evidentiary hearing only if his petition is supported by specific factual allegations, which, if
13 true, would entitle him to relief unless the factual allegations are repelled by the record.
14 Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994); Hargrove, 100 Nev. at 503,
15 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an
16 evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is
17 'belied' when it is contradicted or proven to be false by the record as it existed at the time the
18 claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230.

19 Here, Washington is not entitled to an evidentiary hearing. His petition is time-barred,
20 successive, and an abuse of the writ, with no good cause or prejudice shown. Thus, there is no
21 reason to expand the record with an evidentiary hearing. His request should be denied.

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CONCLUSION

Based on the foregoing, the State respectfully requests that the Petition for Writ of Habeas Corpus, Motion for Appointment of Counsel, and Request for Evidentiary Hearing be denied.

DATED this 14th day of August, 2019.

Respectfully submitted,

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

BY /s/ JOHN NIMAN
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 14th day of August, 2019, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

MATTHEW WASHINGTON, BAC#1061467
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

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

13F18022X/JN/jlh/GANG

Exhibit 1

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

Matthew W. Washington
Appellant,

vs.

State of Nevada
Respondent.

Supreme Court No. 15777

District Court No. C-13-294693-1

FILED

JUL 03 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

APPELLANT'S INFORMAL BRIEF

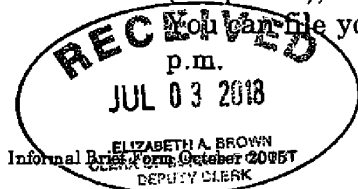
INSTRUCTIONS: If you are an appellant proceeding pro se (without an attorney) in the Nevada Supreme Court, you must file either (1) a brief that complies with Nevada Rule of Appellate Procedure (NRAP) 28(a), or (2) a completed copy of this informal brief form, see NRAP 28(k), with the Nevada Supreme Court on or before the due date, see NRAP 31. In civil appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court may dismiss your appeal. In postconviction criminal appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court or Nevada Court of Appeals may decide your appeal on the record without briefing.

HOW TO FILL OUT THIS FORM: This form must be typed, unless you are incarcerated, in which case it must be clearly handwritten. You do not need to refer to legal authority or the district court record. If you are completing your brief on this form, write only in the space allowed on the form. **Additional pages and attachments are not allowed.** If typing an informal brief, you may either use the lined paper contained in this form or an equivalent number of pages of your own paper. Your brief will be stricken if you fail to follow the directions in this form and the Nevada Rules of Appellate Procedure.

WHERE TO FILE THE BRIEF: You may file your brief in person or by mail.

To file your brief in person: Bring the brief to the Clerk's Office at the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada, or at the Regional Justice Center Clerk's Office (Drop Box), 200 Lewis Street, 17th Floor, Las Vegas, Nevada.

You can file your brief Monday through Friday, 8:00 a.m. to 4:00 p.m.



18-25243

To file your brief by mail: Mail the brief to the Clerk of the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada 89701. **Your brief must be postmarked on or before the due date.**

You must file the original brief and 1 copy with the clerk of the Nevada Supreme Court. If you want the clerk to return a file-stamped copy of your brief, you must file the original form and 2 copies and include a self-addressed, stamped envelope. Documents cannot be faxed or emailed to the Supreme Court Clerk's Office.

Copies of the brief must be mailed or delivered to the other parties to this appeal or to the parties' attorneys, if they have attorneys. You must also include a proper certificate of service or complete the certificate that is attached to the informal brief form.

CAUTION: Pro se parties are prohibited from representing other parties. A pro se party may not complete a brief on behalf of other parties. Pro se parties may collaborate on their briefs, however, provided that if one brief is submitted on behalf of multiple pro se parties, each party must sign and date the brief to confirm that he or she has participated in the preparation of the brief and, by his or her signature, joins in the arguments and representations contained therein.

Judgment or Order You Are Appealing. List the judgment or order that you are appealing from and the date that the judgment or order was filed in the district court.

Filed Date	Name of Judgment or Order
05.01.18.	Petition For Writ of Habeas Corpus

Notice of Appeal. Give the date you filed your notice of appeal in the district court: April 9, 2018

Related Cases. List all other court cases related to this case. Provide the case number, title of the case and name of the court where the case was filed.

Case No.	Case Title	Name of Court
	N/A	

Pro Bono Counsel. Would you be interested in having pro bono counsel assigned to represent you in this appeal?

☒ Yes ☐ No

NOTE: If the court determines that your case may be appropriate for having pro bono counsel assigned, an appropriate order will be entered. Assignment of pro bono counsel is not automatic.

Statement of Facts. Explain the facts of your case. (Your answer must be provided in the space allowed.)

On the evening of November 5, 2013 Matthew Washington drove his friend Martell Moten to a Las Vegas, Nevada apartment complex. Moten, unaware of who was actually inside the residence, on the night in question had an on-going conflict with several individuals living there over money. Moten's intention was to send a "message" to... LaRoy Thomas, Nathan Rawls, Marque Hill, and Ashely Scott that he wanted the money which he believed they owed to him. Several gunshots were fired into their dwelling,

Scott and Thomas were both wounded... Nathan Rawls died as a result of his injuries, his gunshot wounds unfortunately were fatal. The DeSotos who also reside in the same housing complex... Darrin and Lorraine hear the gunshots fired by Moten, and consequently called the police. The DeSotos observed a silver Dodge Magnum leaving the complex, immediately after the shooting... had stopped. An officer with Las Vegas Metropolitan Police Dept. had gotten notification about the late night shooting, along with a description of the automobile seen at the scene, of the life taking gunplay. Hence the officer made the customary vehicle stop. Once the DeSotos were brought in, and they did give a positive identification of the Dodge Magnum, the police took Moten, as well as, Washington into custody. Allegedly at the vehicle stop an officer saw a handgun under the front passenger seat, because... the car doors had been... left open. The authorities impounded the Dodge, a search warrant was executed and the car was thoroughly processed by the crime lab, nothing else related to the suspected shooting was... discovered. Sometime later without the needed, procurement of the legally required new, or second search warrant there is a surprising location of another handgun by a LVMPD detective. The crime scene analyst reported, that they found shell casings from each firearm, at the apartment complex. When Marque Hill, Ashely Scott, and Larry Thomas were seperately interviewed in the aftermath of the shooting incident by... LVMPD, each of them admitted they did not know Washington... nor had... there ever been any interaction, of any kind whatsoever, prior to the night of November 5th, 2013 with one Matthew Washington. Additionally vital in the case at bar is a troublesome conundrum involving, the prosecution's myopic decision to charge Matthew Washington (hereafter Washington)... with murder, with the use of a deadly weapon... conspiracy to commit a murder... 2 counts of battery... also with a deadly weapon, 3 counts of

Attempted murder... 10 excessive counts of discharging a firearm at or into a structure, and lastly the charge... possession of firearm by a... felon. Counsel's ineffective performance before, and during the trial played an enormous part in why a jury returned guilty verdicts on all counts. It is beyond logic, that Washington could be found guilty of murder in a case where another person, in the case now under appellate review, as already accepted responsibility for shooting Nathan Rawls to death. That someone, is Martell Moten, who the record will reflect was in the car with Washington on the night of November 5th 2013. Evidence reveals that Moten knew Ashely Scott, Marque Hill, LaRoy Thomas... as well as the deceased Nathan Rawls. Obviously counsel for the Appellant failed to be superfluous, in the area of overall investigation and pre-trial preparation. This disturbing sub-par conduct of Mitchell Posin, has placed Washington in a sordid state of usurpation.

Statement of District Court Error. Explain why you believe the district court was wrong. Also state what action you want the Nevada Supreme Court to take. (Your answer must be provided in the space allowed).

To begin the district court committed an egregious blunder, by allowing the prosecution to charge Washington with 10 separate counts of the crime, of discharging a firearm at or into a structure. First and foremost counsel's blatant, and circuitous ineffectiveness comes to the forefront... in the case at bar... inasmuch counsel's failure to prevent Appellant's being subjected, to this perilous charge is overtly reprehensible. Counsel did mis-step, in not properly investigating the very viable defense, that Washington never even discharged a firearm, on the night in question. Not a modicum of forensic... nor ballistic evidence confirms that Washington ever handled, or discharged a handgun on the night of November 5th, 2013. Furthermore

the De Sotos NEVER said, they saw Appellant in possession of a firearm. Equally significant... and to the palpable chagrin of the prosecution, not a single victim even knew, or had ever encountered before that tragic night, the Appellant Matthew Washington. Counsel could have easily conveyed to jurors in this (revised) matter, that his client (Washington) had absolutely no motive to shoot anyone, Moten was in conflict with the victims not the Appellant. Mitchell Pbsin failed to investigate thoroughly, or provide minimal quality of reasonable performance, seems to be lucidly clear counsel's myriad of errors, in the case at bar did prejudice the defense. Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004)... Evans v. State, 117 Nev. 610, 622, 28 P.3d 498, 508 (2001)... US v. Padilla-Martinez, 762 F.2d 942 (11th Cir. 1986) Stackland v. Washington, 416 US 468 PD 1Ed 2d 674, 104 S. Ct. 2052... (1984)... US v. Bowie, 221 F.3d 1183 (11th Cir. 2000)... US v. Hamilton, 391 F.3d 1066 (9th Cir. 2004).

Double jeopardy cannot be ignored by this most honorable Tribunal in this judicial setting, since counsel introduced a flawed double jeopardy argument. The discharging of the firearm was a singular event, which did unfold, or occur on one specific night... subsequently to create 10 separate charges out of a singular act violates the stringent, and staunch protects derived from the 5th Amendment of our very own U.S. Constitution. Also Nevada forcefully prohibits against cumulative punishments under an "alternative-offense redundancy" theory. The crime scene analyst on the record, and under oath testified that only 6 shell casing were recovered from one handgun, while the total number of... 7 shell casing came from the other firearm. Yet Appellant was unexplainably charged wrongfully with 10 separate counts... of discharging a gun into, or at a structure when, no evidence exist to substantiate that either weapon was fired 10 times. The

actual, impregnable 5th Amendment double jeopardy clause consistently forbids the state from subdividing a single criminal endeavor into multiple... violations or charges. This most powerful Tribunal must not be remiss, in its unwavering fiduciary obligation to ensure the Constitutional safeguard to not be placed in double jeopardy, being the pivotal right of every American in this great nation, should not... must not be given a narrow, grudging sincere application. JACKSON v. STATE, 128 Nev. 598, 611, 291 P3d. 1274, 1283 (2012) Palazzolo v. Gorceyca, 244 F3d 512 (6th Cir. 2001) US v. Aquilera, 179 F3d. 604 (8th Cir. 1999) US v. DiFrancesco, 449 US 117, 66 LEd. 2d 328, 101 S. Ct. 426 (1980) US v. McClain, 133 F3d 1191 (9th Cir. 1998) Green v. US, 355, US 184, 2 LEd 2d 199, 87 S. Ct. 221 (1961)

Appellate is flummoxed that counsel was so grossly ineffective... in the case at bar. In a capital murder case counsel is mandated by a 6th Amendment constitutional expectation of duty to investigate any and all possible lines of defense tactics, as such this judicial... maxim is strictly observed for the sole purpose of evincing a valid claim of counsel's ineffectiveness. Where Washington is plainly as well as ingenuously prejudice by counsel's inability to convince a jury that Appellate should have never been charged... nor found guilty of the crime of murder... is in itself a foreboding miscarriage of justice. There is a plethora of uncompounded evidence, which counsel failed to utilize to behave his client, and favorably impact the panel of jurors. First... there is Moten's admittance to committing Rawls murder. The lack of evidence connecting Washington's actions to any forensic, and/or ballistic evidence, as it relates to the shooting itself. The record shows that Appellate was no more than a driver on November 5th 2013. There is a severe lack of motive, in regards to Washington's clearly limited

involvement, in the case at bar. This evidence is only augmented by each of the surviving testimony of the victims ... Thomas, Hill, and Scott that concede they did not know Appellant. Cumulative error does very much exist, and therefore entitles Washington to at the very least a new trial... counsel's failure to challenge the second search of the Dodge Magnum, which was essentially a rogue, unauthorized action, counsel did not properly contest the improper testimony of the state's own forensic scientist addressing bullets and shell casing, counsel did not challenge the state's introduction of Appellant's tattoos at the critical penalty phase of the trial, were all hurtful cumulative errors.

Conclusion

Wherefore Appellate prays that this matter is reversed and also remanded in the true interest of justice

DATED this 25th day of JUNE, 2018.

Matthew Washington
Signature of Appellant

Matthew Washington
Print Name of Appellant

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this completed informal brief form upon all parties to the appeal as follows:

- ☐ By personally serving it upon him/her; or
☒ By mailing it by first-class mail with sufficient postage prepaid to the following address(es) (list names and address(es) of parties served):

Mr. STEVEN WOLFSON
District Attorney
200 LEWIS AVE
LAS VEGAS, NV. 89155

DATED this 25th day of JUNE, 2018.

Matthew Washington
Signature of Appellant

Matthew Washington
Print Name of Appellant

P.O. BOX 7000 #1061467
Address

CARSON CITY, NV. 89702
City/State/Zip

N/A
Telephone

Steven D. Grierson

ORDER

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN L. WATERS
Chief Deputy District Attorney
Nevada Bar #006162
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MATTHEW WASHINGTON,
#2685499

Defendant.

CASE NO: A-19-797610-W

DEPT NO: XV

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS...EX PARTE
MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR
EVIDENTIARY HEARING**

DATE OF HEARING: September 03, 2019
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 3rd day of September, 2019, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through STEVEN L. WATERS, Chief Deputy District Attorney, and the Court having heard the arguments of counsel / without argument, based on the pleadings and good cause appearing therefor,

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

WA2013\2013F\180\33\13F18033-ORDR-(WASHINGTON_MATTHEW)-001.DOCX

SEP 12 2019

1 IT IS HEREBY ORDERED that the Defendant's Pro Per Motion for Petition for Writ
2 of Habeas Corpus; Ex Parte Motion for Appointment of Counsel and Request for Evidentiary
3 Hearing, shall be, and it is DENIED, FINDING the following (1) the Petition for Writ of
4 Habeas Corpus was denied for all of the reasons set forth in the State's response; (2) the
5 Petition for Writ of Habeas Corpus was time barred, successive, and an abuse of the Writ
6 process; (3) movant failed to show good cause, or prejudice, to overcome the procedural bars;
7 and (4) the Motion for Appointment of Counsel and Request for Evidentiary Hearing, lacked
8 good cause..

9 DATED this 12th day of September, 2019.

10
11 
DISTRICT JUDGE 40

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

14
15 BY 

16 STEVEN L. WATERS
17 Chief Deputy District Attorney
Nevada Bar #006162

18 CERTIFICATE OF SERVICE

19 I certify that on the 19th day of Sept., 2019, I mailed a copy of the foregoing Order
20 to:

21 MATTHEW WASHINGTON, BAC #1061467
22 ELY STATE PRISON
P. O. BOX 1989
23 ELY, NEVADA 89301

24 BY /s/ J. HAYES
25 Secretary for the District Attorney's Office
26
27

28 13F18033X/jlh/GANG



1 NEOJ

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

4
5 MATTHEW WASHINGTON,

6 Petitioner,

Case No: A-19-797610-W

Dept. No: XV

7 vs.

8 STATE OF NEVADA,

9 Respondent,

NOTICE OF ENTRY OF ORDER

10
11 **PLEASE TAKE NOTICE** that on September 18, 2019, the court entered a decision or order in this
12 matter, 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
15 mailed to you. This notice was mailed on September 23, 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 23 day of September 2019, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

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

24 ☒ The United States mail addressed as follows:

25 Matthew Washington # 1061467
26 P.O. Box 1989
Ely, NV 89301

27 /s/ Debra Donaldson

28 Debra Donaldson, Deputy Clerk

Steven D. Grierson

ORDER
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN L. WATERS
Chief Deputy District Attorney
Nevada Bar #006162
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MATTHEW WASHINGTON,
#2685499

Defendant.

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DEPT NO: XV

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///

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

WA2013\2013F\180\33\13F18033-ORDR-(WASHINGTON_MATTHEW)-001.DOCX

SEP 12 2019

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3 Hearing, shall be, and it is DENIED, FINDING the following (1) the Petition for Writ of
4 Habeas Corpus was denied for all of the reasons set forth in the State's response; (2) the
5 Petition for Writ of Habeas Corpus was time barred, successive, and an abuse of the Writ
6 process; (3) movant failed to show good cause, or prejudice, to overcome the procedural bars;
7 and (4) the Motion for Appointment of Counsel and Request for Evidentiary Hearing, lacked
8 good cause..

9 DATED this 12th day of September, 2019.

10
11 
DISTRICT JUDGE 10

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

14
15 BY 

16 STEVEN L. WATERS
17 Chief Deputy District Attorney
Nevada Bar #006162

18 CERTIFICATE OF SERVICE

19 I certify that on the 19th day of Sept., 2019, I mailed a copy of the foregoing Order
20 to:

21 MATTHEW WASHINGTON, BAC #1061467
22 ELY STATE PRISON
P. O. BOX 1989
23 ELY, NEVADA 89301

24 BY /s/ J. HAYES
25 Secretary for the District Attorney's Office

26
27
28 13F18033X/jlh/GANG

Case No. A-19-797610-W

Dept. No. 15

FILED

SEP 26 2019

Elizabeth A. Brown
CLERK OF COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

State of Nevada

Petitioner/Plaintiff,

vs.

Matthew Washington

Respondent/Defendant.

NOTICE OF APPEAL

Notice is hereby given that Matthew Washington, Petitioner/Defendant
above named, hereby appeals to the Court of Appeals for the State of Nevada from the final
judgment / order (Notice of Entry of order, findings of fact,
Conclusion and law,

Entered in this action on the 3 day of September, 20 19.

Dated this 10 day of September, 20 19.

MOS

Matthew Washington

NDOC # 1061467

Appellant - Pro Per

Ely State Prison

P.O. Box 1989

Ely, Nevada 89301-1989

RECEIVED

SEP 26 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

**RECEIVED
APPEALS**

OCT 15 2019

CLERK OF THE COURT

A-19-797610-W
NOAS
Notice of Appeal
4889707



CERTIFICATE OF SERVICE BY MAIL

I, Washington, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 12 day of September, 20 19, I served a true and correct copy of the above-entitled Notice of Appeal postage prepaid and addressed as follows:

<u>Steve Wolfson</u>	<u></u>
<u>Dist. Attorney</u>	<u></u>
<u>200 Lewis Ave</u>	<u></u>
<u>LV NV 89155</u>	<u></u>
<u></u>	<u></u>

Signature 

Print Name Matthew Washington *106#67-
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

MR. MATTHEW WILSON #100467
Ely P.O. Box 1089
Ely, Nevada 89301

NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES



Supreme Court of Nevada
Office of the Clerk

201 S. Carson Street, Suite 201
Ely, Nevada 89301

93701-478051

U6

SEP 12 2019

ELY STATE PRISON



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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 MATTHEW WASHINGTON,

10 Plaintiff(s),

11 vs.

12 STATE OF NEVADA,

13 Defendant(s),
14

Case No: A-19-797610-W

Dept No: XV

15
16
17 **CASE APPEAL STATEMENT**

18 1. Appellant(s): Matthew Washington

19 2. Judge: Joe Hardy

20 3. Appellant(s): Matthew Washington

21 Counsel:

22 Matthew Washington #1061467
23 P.O. Box 1989
24 Ely, NV 89301-1989

25 4. Respondent (s): State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 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: No
Date Application(s) filed: N/A
9. Date Commenced in District Court: June 17, 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 17 day of October 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: Matthew Washington

1 Case No. A-19-79610-W

Steven D. Grierson

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5 in the 8th Judicial District Court of the
6 State of Nevada and for the County of Clark
7

8 State of Nevada

9 vs

10 Matthew Washington

11
12 Notice of appeal

13 Notice is hereby given that Matthew Washington
14 petitioner Defendant above named hereby appeals
15 to Court of Appeals for the State of Nevada from
16 the final Judgment/Order (Notice of entry of order
17 finding of fact conclusion and law
18 Entered in this action on the 18 day of September
19 2019. Dated this 13 day of October 2019
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23
24 RECEIVED

25 OCT 18 2019

26 CLERK OF THE COURT

27 Matthew Washington
28 Appellant pro per
Elly State Prison
P.O. Box 1989
Elly, Nevada 89301-1989

I, Matthew Washington hereby certify pursuant to Rule 5(B) of the NRCR, that on the 13 day of October 2019 I received a true and correct copy of the above entitled notice of appeal. postage prepaid and addressed as follows:

Steven B. Wafar
Clark County District Attorney
200 Lewis Avenue
Las Vegas NV 89155-2217.

Matthew Washington #1061467

Matthew Washington #1061467

Ely State Prison

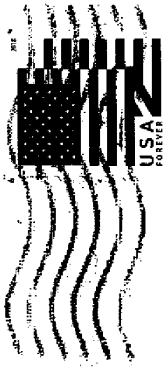
P.O. Box 1989

Ely Nevada 89301-1989

MR. Matthew W. Wainwright #1061467
ESP/PO Box 1989
Elko, Nevada 89301

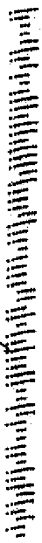
LAS VEGAS NV 890

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Clerk of 1170 Court
200 Lewin Avenue 3rd floor
Las Vegas, Nevada 89155

6510182300 0075



ELY STATE PRISON
OCT 15 2019
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**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK**

MATTHEW WASHINGTON,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-19-797610-W

Dept No: XV

CASE APPEAL STATEMENT

1. Appellant(s): Matthew Washington

2. Judge: Joe Hardy

3. Appellant(s): Matthew Washington

Counsel:

Matthew Washington #1061467
P.O. Box 1989
Ely, NV 89301-1989

4. Respondent (s): State of Nevada

Counsel:

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: No
Date Application(s) filed: N/A
9. Date Commenced in District Court: June 17, 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): N/A
12. Child Custody or Visitation: N/A
13. Possibility of Settlement: Unknown

Dated This 19 day of October 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: Matthew Washington

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

September 03, 2019

A-19-797610-W Matthew Washington, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

September 03, 2019 8:30 AM All Pending Motions

HEARD BY: Hardy, Joe

COURTROOM: RJC Courtroom 11D

COURT CLERK: Kristin Duncan
Rem Lord

RECORDER: Sandra Pruchnic

REPORTER:

PARTIES

PRESENT: Waters, Steven L Attorney

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS...EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

Having reviewed all the pleadings, and hearing no oral arguments from either party, COURT ORDERED the Petition for Writ of Habeas Corpus, and the Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing, were hereby DENIED, FINDING the following: (1) the Petition for Writ of Habeas Corpus was denied for all of the reasons set forth in the State's response; (2) the Petition for Writ of Habeas Corpus was time barred, successive, and an abuse of the Writ process; (3) movant failed to show good cause, or prejudice, to overcome the procedural bars; and (4) the Motion for Appointment of Counsel and Request for Evidentiary Hearing, lacked good cause. The State shall prepare the written Order.

COURT ORDERED a status check regarding the submittal of the written Order, was hereby SET.

NDC

A-19-797610-W

10/3/19 8:30 AM STATUS CHECK: ORDER

CLERK'S NOTE: A copy of this minute order was mailed to: Matthew Washington #1061467 [Ely State Prison P.O. Box 1989 Ely, NV 89301]. (KD 9/4/19)

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated October 31, 2019, 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 88.

MATTHEW WASHINGTON,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),


Case No: A-19-797610-W

Dept. No: XV

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 16 day of November 2019.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk