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U.S. COURT OF APPEALS

JUL 21 2017

Form 12: Appendix to the Rules

UNITED STATES COURT of APPEALS for the NINTH CIRCUIT
95 Seventh Street
San Francisco, California 94103

FILED 7/21/17 JMR
DATE INITIA

**Application for Leave to File Second or Successive Petition
Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255**

Docket Number 17-72096
(to be provided by court)

Petitioner's name DOUGLAS HARRY WARENBACK

Prisoner registration number 1112924

Address High Desert State Prison, P.O. Box 650,
Indian Springs, Nevada, 89070-0650

Instructions - Read Carefully

- (1) This application, whether handwritten or typewritten, must be legible and signed by the petitioner under penalty of perjury. An original and five (5) copies must be provided to the Clerk of the Ninth Circuit. The application must comply with 9th Circuit Rule 22-3, which is attached to this form.
- (2) All questions must be answered concisely. Add separate sheets if necessary.
- (3) The petitioner shall serve a copy of this application and any attachments on respondent and must complete and file a proof of service with this application.
- (4) The petitioner shall attach to this application copies of the magistrate judge's report and recommendation and the district court's opinion in any prior federal habeas proceeding under 28 U.S.C. § 2254 or § 2255 or state why such documents are unavailable to petitioner.

→ please see page 7.

You Must Answer the Following Questions:

- (1) What conviction(s) are you challenging?
A "Fictitious" charge, Nevada Revised Statute ("NRS")
201.300 ["(a)"], pandering of a child.

(2) In what court(s) were you convicted of these crime(s)?

Nevada State: 8th Judicial district court, Clark County
Nevada

(3) What was the date of each of your conviction(s) and what is the length of each sentence?

jud. Filed December 17, 2013, 48-120 months, case no. C-13-286735-1

For questions (4) through (9), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.

(4) With respect to each conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under 28 U.S.C. § 2254 or § 2255?

Yes No

(a) In which federal district court did you file a petition or motion?

U.S. District Court, District of Nevada

(b) What was the docket number? 2:15-cv-01789-APG-VCF ; Pending

Submitted on 9/17/15, formally filed 11/11/16,

(c) On what date did you file the petition/motion? dismissed dismissed with leave to amend on
2/13/17, amended petition filed 3/13/17.

(5) What grounds were raised in your previous habeas proceeding?

(list all grounds and issues previously raised in that petition/motion)

pending grounds: 1) 14th amend. on "falsified" transcripts, 2) Ineffective
assistance of counsel, IAC, on perjury in the arrest warrant, 3) IAC
on right to cross-examine the victim speaker at sentencing, 4) IAC
on "counsel waived the procedural defects" so that the defendant
could plead to the fictitious charge.

(6) Did the district court hold an evidentiary hearing? Yes No Not applicable, pending

(7) How did the district court rule on your petition/motion? pending

District court **dismissed** petition/motion
if yes, on what grounds? _____

District court **denied** petition/motion;

- District court granted relief;
if yes, on what claims and what was the relief?

(Attach copies of all reports and orders issued by the district court.)

- (8) On what date did the ^{state} district court decide your petition/motion?
December 13, 2016
- (9) Did you file an appeal from that disposition? Yes No
- (a) What was the docket number of your appeal? 71902
- (b) How did the court of appeals decide your appeal? affirmed, July 12, 2017
- (10) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief. Summarize briefly the facts supporting each ground or issue.

See pages: 5-7, 12

See page 10, (9) for statement of the ground

- (11) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when?
See pages: 9-11
- (12) For each ground/issue raised, was this claim raised in any prior federal petition/motion? (list each ground separately)
no.
- (13) For each ground/issue raised, does this claim rely on a new rule of constitutional law? (list each ground separately and give case name and citation for each new rule of law)

see page: no.

- (14) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you? (list each ground separately) _____

See page: 8, "a" and "b".

- (15) For each ground/issue raised, does the newly discovered evidence establish your innocence? How? indirectly;

I am challenging a collateral consequence of my conviction.

See page:

- (16) For each ground/issue raised, does the newly discovered evidence establish a federal constitutional error? Which provision of the Constitution was violated and how?

Yes, 1st amend. due process of law,

See page: 8, "c".

- (17) Provide any other basis for your application not previously stated.

Date:

July 16, 2017

Signature:

[Handwritten Signature]

Proof of Service on Respondent MUST be Attached.

Successive Habeas Corpus Federal petition:

Ground to be raised, see page 10, (5)

The following is the original motion paraphrased, filed in state district court on 10/4/16.

On page 2 of NSC's affirmance⁽⁶⁾ order, lines 6-7 states, "; see also 1997 Nev. Stat., ch 137, § 2, at 295-96 (Former version of NRS 201.300)." The relevant portion of that statute states, "1. A person who, (a) Induces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution; --- 2. A person who is found guilty of pandering: --- (b) A child, (2) --- if no physical force --- category B, -- 1-10 years."

Based on my judgement of conviction, joc, on a 10 year maximum sentence the correct legal syntax of my conviction must be stated as, "NRS 201.300 (1)(a), pandering; NRS 201.300 (2)(b)(2), a child, if no physical force".

In the affirmance, the NSC concluded my joc had a "typographical" error⁽¹⁾, a "clerical error", see footnote 2 of the affirmance, page 2; that instead of 201.300(a) the joc should say 201.300. However, with or without "(a)" still contradicts the said legal statute: 201.300 (1)(a)(2)(b)(2).

This contradiction is explained at my plea hearing, filed on 3/24/14, page 3, line 13, "--- Both the State and the Defense agree this is a fictitious plea ---". The NSC failed to acknowledge this fact as stated in the motion (page 6, lines 14-15). However, it is the NSC itself, the same justices, that established ~~this fact~~, as the "law of my case", acknowledging the said fact in its affirmance⁽⁷⁾ of my original state habeas petition, in case no. 66294, stating at page 3, lines 5-6, "--- counsel waived the procedural defects⁽²⁾ so that he [I, the defendant] could plead to the fictitious charge. Counsel did not waive any other procedural defects.". The "other" is the foundation of the motion.

(6) see pages 9 and 10 of this application. (7) see page 12 of this application.

In the motion I claimed that attaching sex-offender registration to a fictitious charge is an "other" procedural defect not waived by counsel because 201.300 (or with "(a)"), specifically not stated as the legal syntax "(1)(a), (2)(b)(2)", does not legal conform to, citing from the motion affirmation, page 3, lines 3-4, "... offense involving pandering or prostitution pursuant to NRS 201.300 to 201.340, inclusive." [1790.210(3), 2007], see the motion, page 4, lines 8-18.

"Other" was further supported by another case law, *Nollett v. State* 118 Nev. 346 (2002), stating, "We conclude that Nevada's sex offender registration and notification is a collateral consequence of a guilty plea --- notification and advisement of a collateral consequence of a criminal conviction is not a prerequisite to the entry of a constitutionally valid plea." (See page 9, lines 7-16 of the motion). Where "could plead"

~~Therefore, I believe I properly and legally concluded that counsel did not waive~~ ^{are} the "prerequisite" defects that were required to be waived by counsel to enter a "constitutionally valid plea".

Therefore, I believe I properly and legally concluded that counsel did not waive the collateral procedural defect attaching sex-offender registration to the fictitious charge.

By the NSC ignoring my case law and *Nollette* case law in its affirmance clearly demonstrated the Court erred, violating my "constitutionally valid plea" (14th amendment due process of law) by subjecting me to sex-offender registration illegally.

① In the affirmance, page 1, lines 5-6 stated, "Wareback asserted his judgement of conviction contained a typographical error --- " The NSC actually contradicts my statement from the motion, page 5, lines

24-25, "Later, it will be demonstrated this is not a "typographical error" that one might allege." This, and the NSC ignoring the facts and ~~ex~~ claims I made in my motion indicate the erroneous behavior of the Court.

② I am appealing "counsel waived" in my pending Federal petition, ground 4.

Response to instruction #4, "... state why such documents are unavailable to petitioner."

On the envelope ③ states "NSF 3763" ④, this indicates I am on the prison's "\$100 copy limit" budget. Unless this Court can provide a special extension order ⑤ that would allow me to provide 7 copies of orders; 1 for original, 5 copies per instruction #1, and 1 to the Respondent, I am only able to provide handwritten copies of orders.

③ On the envelope, I instructed the Clerk to preserve the envelope.

④ "NSF" means "not sufficient funds"; I am indigent, therefore the prison provides a "one-time \$100 legal copy budget".

⑤ At the law library I am constantly observing numerous other inmates who have exhausted their \$100 copy limit budget, and are subsequently unable to get an extension on their limit even with a Federal or state court order. The prison, NOOC, appears to not respond, grievance etc. Therefore, I will only use my copy budget in "extreme" situations only. Note: I estimated total copy cost = \$11.70, 9 pages of orders + 9 pages of application x 7 distributions, copies are \$0.10 each.

- A) The "newly discovered evidence" is the NSC's statement in its affirmance order, see page 12, ^{line 19} ~~lines 24-27~~ of this application. The NSC's statement established the foundation for the motion to correct illegal sentence pursuant to 176.555. Therefore, it would have been impossible to include ~~this~~ the claim of this motion in my original state habeas corpus petition which ^{the petition} ~~is~~ the basis for the pending federal petition.
- B) The timeliness of this application for a successive federal petition relies on 176.555, "Correction of illegal sentence; The court may correct an illegal sentence at any time." Because there is no statute of limitation on 176.555, ~~the~~ 28 U.S.C. § 2244 1 year limit began on July 12, 2017, the file date of NSC's affirmance order.
- C) The violation of federal law, 14th amend. right to due process of law, occurred when the NSC ~~st~~ set forth the "law of my case" on what defects counsel did and did not waive to enter a "constitutionally valid plea". It took time for me to realize what an "other" procedural defect(s) ^{was,} that was not waived by counsel, and to determine the proper, appealable procedure to make the claim of this found defect.

In the Court of Appeals of the State of Nevada

DOUGLAS HARRY WARENBACK,
APPELLANT,
VS.
THE STATE OF NEVADA,
RESPONDENT.

No. 71902

Filed JUL 12 2017

Order of Affirmance

Douglas Harry Warenback appeals from an order of the district court denying a motion to correct an illegal sentence, ¹ Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

"lines 5-6"
"page 1"

In his motion filed on October 4, 2016, Warenback claimed that his sentence was illegal. Warenback asserted his judgement of conviction contained a typographical error as it stated he committed pandering of a child pursuant to "NRS 201.300 (a)," but the statute did not actually contain such a subsection. Warenback claimed the error in the judgement of conviction meant his crime was not actually covered under the statute requiring sex offender registration and therefore, the district court improperly imposed a sentence requiring him to register as a sex offender upon his release from custody. Warenback failed to demonstrate his sentence was facially illegal or the district court lacked jurisdiction. See *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

"lines 3-4"
"page 2"

When Warenback committed his offense, NRS Chapter 179D required persons convicted of crimes involving a child, including an "offense involving pandering or prostitution pursuant to NRS 201.300 to 201.340, inclusive," to register as sex offenders following release from custody.

"lines 6-7"
"page 2"

See 2007 Nev. Stat., ch 16, § 16(3), at 2757 (former version of NRS 179D.0357); see also 1997 Nev. Stat., ch 137, § 2, at 295-96

(former version of NRS 201.300). As Warenback's offense was clearly encompassed by that provision, he did not demonstrate the typographical error in the judgement of conviction deprived the district court of the authority to order Warenback to register as a sex offender. Therefore, we conclude the district court did not err in denying Warenback's motion. Accordingly, we ORDER the judgement of the district court AFFIRMED.²

Silver, C.J. ; Tao, J.; Gibbons, J.

① This appeal has been submitted for decision without oral argument, NRAP 34(F)(3).

② We note the district court can correct a clerical error at any time, see NRS 176.565, and therefore, it should correct the clerical error in the judgement of conviction by entering a corrected judgement of conviction ~~specifia~~ specifying NRS 201.300 as the statute identifying Warenback's crime.

③ Statement of the ground: I allege my state court sentence is unconstitutional, in violation of my 14th Amendment right to due process of law by illegally subjecting me to sex-offender registration.

Only relevant order included (of 2 orders)

District Court, Clark County, Nevada

Filed

12/13/2016

THE STATE OF NEVADA,

PLAINTIFF,

-VS-

DOUGLAS WARENBACK,

aka Douglas Harry Warenback,

#2859794, Defendant.

CASE NO: C-13-286735-1

DEPT NO: XIX

Order denying Defendant's pro per motion to correct illegal sentence pursuant to NRS 176.555 or in the alternative motion for reconsideration. Date of hearing: November 3, 2016

Time of hearing: 8:30 a.m.

This matter having come on for hearing before the above entitled court on the 2nd day of November, 2016, ---

COURT noted the offense occurred on 09/03/2002 [sic - 2002 should be 2012] any statutes applicable on that date would govern whether or not Defendant would register as a sex offender. Further, under the revision in 2007 NRS 179D is applicable 7/3/2012

[sic "7" should be "9"] and is outlined in 201.300. Additionally, sex registration is mandated by Nevada Law in this case; therefore, not a procedural defect. COURT ORDERED, Defendant's Pro Per Motion to correct illegal sentence pursuant to NRS 176.555, or in the alternative motion for reconsideration, shall be, and it is DENIED.

Dated this 8th day of December, 2016 William Kephart

DISTRICT JUDGE

only relevant portion included

In the Court of Appeals of the State of Nevada

DOUGLAS HARRY WARENBACK
APPELLANT,
vs.,
THE STATE OF NEVADA,
RESPONDENT.

No. 66294

Filed APR 14 2015

Order of Affirmance

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus, Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his petition filed on May 12, 2014, appellant Douglas Warenback claimed that he received ineffective assistance of counsel. ---

--- Third, Warenback claimed that counsel was ineffective for stating that Warenback would waive all procedural defects when he pleaded to a fictitious charge. This claim is belied by the record. Warenback was thoroughly canvassed regarding the fictitious charge and counsel waived the procedural defects so that he could plead to the fictitious charge. Counsel did not waive any other procedural defects. Therefore, the district court did not err in denying this claim. ---

--- Having considered Warenback's contentions and concluded that he is not entitle [d] to relief, we ORDER the judgement of the district court AFFIRMED.

Gibbons, C.J.; Tao, J.; Silver, J.

"lines 5-6"
"page 3"

Affidavit and Proof of Service

Under penalty of perjury the foregoing 12 pages are true and correct.

Respectfully submitted,

July 16, → 2017

 Douglas Warenback
applicant, defendant, in proper
person, #1112924, High Desert
State Prison, P.O. Box 650
Indian Springs, Nevada
89070-0650

Proof of Service:

I, Douglas Warenback hereby certify that on July 16, 2017, I mailed an original true and correct document "application for leave to file second or successive petition under 28 U.S.C. § 2254" to the Clerk of the U.S. Court of Appeals for the 9th circuit.

I also served^① the Respondent, the attorney general of the State of Nevada, a "notice of application".

July 16, 2017

 Douglas Warenback
defendant, #1112924, HDSP

① Prison "outgoing legal mail" requirement: all mail addressed to the attorney general requires inspection. Due to limited access to the law library where this inspection occurs, I will be serving the respondent no later than 2 weeks from the date of this mailing.