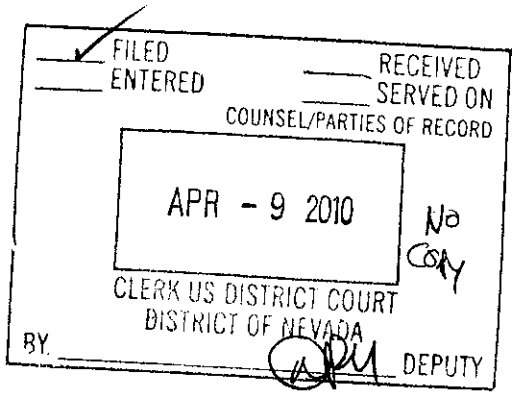


Charles Summers
Name
81256
Prison Number
N.N.C.C.
Place of Confinement

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Charles Anthony Summers, Petitioner,
(Full Name)

vs.

James Benedetti, Respondent,
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner)

and

The Attorney General of the State of Nevada

CASE NO: 3:10-CV-00674
(To be supplied by the Clerk)

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)

---

1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: Eighth Judicial District Court Clark County Stewart Bell.
2. Full date judgment of conviction was entered: June / 30th / 2005. (month/day/year)
3. Did you appeal the conviction? ✓ Yes ___ No. Date appeal decided: 12 / 28 / 2006.

4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court? ✓ Yes ___ No. If yes, name the court and date the petition was filed: Valerie Adair ___ 12 / 21 / 2007. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? ✓ Yes ___ No. Date the appeal was decided: 8 / 25 / 2009. Have all of the grounds stated in this petition been presented to the state supreme court? ✓ Yes ✓ No. If no, which grounds have not? Ground one.

5. Date you are mailing (or handing to correctional officer) this petition to this court: 4 / 6 / 10.

Attach to this petition a copy of all state court written decisions regarding this conviction.

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? ___ Yes ✓ No. If no, what was the prior case number ? 3:09-cv-000674. And in what court was the prior action filed? _____.

Was the prior action ___ denied on the merits or ✓ dismissed for procedural reasons (check one). Date of decision: 12 / 10 / 2009. Are any of the issues in this petition raised in the prior petition? ___ Yes ✓ No. If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this successive petition? ___ Yes ___ No.

7. Do you have any petition, application, motion or appeal (or by any other means) now pending in any court regarding the conviction that you are challenging in this action? ___ Yes ✓ No. If yes, state the name of the court and the nature of the proceedings: _____

_____.

8. Case number of the judgment of conviction being challenged: C98299.

9. Length and terms of sentence(s): 2 Life without - 8 to 20 - 8 to 20 - 2 to 6.

10. Start date and projected release date: June 21 2005.

11. What was (were) the offense(s) for which you were convicted: murder, attempt murder assault with a deadly weapon.

12. What was your plea? ___ Guilty ✓ Not Guilty ___ Nolo Contendere. If you pleaded guilty or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement:

_____.

13. Who was the attorney that represented you in the proceedings in state court? Identify whether the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed	Retained	*Pro se*
arraignment and plea	Joseph Garaventa		✓	
trial/guilty plea	Alzora B. Jackson / Randall H. Pike	✓		
sentencing	Alzora B. Jackson	✓		
direct appeal	Elizabeth McMahon	✓		
1st post-conviction petition	Charles Summers			✓
appeal from post conviction	Charles Summers			✓
2nd post-conviction petition				
appeal from 2nd post-conviction				

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 4th, 5th, 6th, 14th Amendment right to U.S. Constitution, based on these facts:

petitioner was denied his 6th Amendment right to effective counsel at trial, who is willing to testify on behalf of petitioner, providing evidence of above asserted claim

Remedy: Hearing to establish petitioners claim and/or order granting writ of Habeas to release petitioner or grant him a new trial with my 6th Amendment U.S. Constitution right to effective trial counsel.

Exhaustion of state court remedies regarding Ground 1:

- **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

___ Yes ✓ No. If no, explain why not: The public defender office died My first appeal.

- **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

✓ Yes ✓ No. If no, explain why not: I tried but the judge didn't want to hear me.

If yes, name of court: Judge Valerie Adair date petition filed 12/21/2007.

Did you receive an evidentiary hearing? ___ Yes ✓ No. Did you appeal to the Nevada Supreme Court? ✓ Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? ✓ Yes ___ No. If no, explain why not: _____

- **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

- **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: _____

State concisely every ground for which you claim that the state court conviction and/or sentence is

unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th, 14th Amendment right to U.S. Constitution, based on these facts:

Petitioner was denied access to the courts by Nev. Sct. Justice and later D.D.A conflict of interest and bias, Delay of Due process on appeal. Justice Nancy Becker was given through her campaign during my direct appeal and when she lost she was immediately hired by the district attorney's office with the highest paid salary and a made up position. It's plain to see that justice Becker violated the Cannon Rule ([redacted]) it was said during her campaign that she was more likely to vote on the side of her friends rather than the law. The reasonable thing to do was to recuse herself specially since her vote was the deciding vote on a 4-3 decision.

Remedy: order granting petitioner immediate release for Denial of access to the court and Delay of Due process.

Exhaustion of state court remedies regarding Ground 2:

- **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

√ Yes ___ No. If no, explain why not: _____

_____.

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

√ Yes ___ No. If no, explain why not: _____

_____.

If yes, name of court: Supreme Court of Nevada date petition filed 4/5/07.

Did you receive an evidentiary hearing? ___ Yes √ No. Did you appeal to the Nevada Supreme Court? √ Yes ___ No. If no, explain why not: _____

_____.

If yes, did you raise this issue? √ Yes ___ No. If no, explain why not: _____

_____.

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____

_____.

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

_____.

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

_____.

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: _____

_____.

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two

extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th 6th 14th Amendment right to U.S. Constitution, based on these facts:

Petitioner was ridiculed/demoralized while D.A. was in conflict against petitioner because Juror was [redacted] The Mother of former Girl-friend, and when The Trial court didn't Get caught up in The flirtatious atmosphere mainly Light of The D.A/State witness (Romantic couples) exchanges as just basically fun/cute when in fact it seriously bares down on The integrity of The court. Kathy Barrett stated her daughter had a personal relationship 2 years prior To TRIAL. [redacted] She Shouldn't been allowed To sit on The jury. Trial Counsel should of challenged her but even if They did and The Judge denied it There was no peremptory challenges left so She would've still ended up on The jury. Which is why TRIAL Counsel was ineffective

Remedy: order of IMMEDIATE release based on denial of fair Trial but forced To endure A TRIAL D.A. Mockery, sham To impress A CLIA.

Exhaustion of state court remedies regarding Ground 3:

- **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

✓ Yes ___ No. If no, explain why not: _____

_____.

▸ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

✓ Yes ___ No. If no, explain why not: _____

_____.

If yes, name of court: Supreme Court date petition filed 12/21/2007.

Did you receive an evidentiary hearing? ___ Yes ✓ No. Did you appeal to the Nevada Supreme Court? ✓ Yes ___ No. If no, explain why not: _____

_____.

If yes, did you raise this issue? ✓ Yes ___ No. If no, explain why not: _____

_____.

▸ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____

_____.

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

_____.

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

_____.

▸ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: _____

_____.

WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

Ground-4

I allege that my state court conviction and/or sentence are unconstitutional in violation of my 14th, 5th, 6th, 4th Amendment Right to U.S. Constitution based on these facts: Trial counsel was ineffective in failing to properly and personally interview states witness. officer Joel Crawford was allowed to get on the stand and say a female stopped him while he was patrolling his area and stated the subject which they should be looking for, for the murder at the LA Palms was shady when ask if she had first hand knowledge she stated no street information, officer Crawford didn't take this persons information down or pass it on so the detectives could talk to her. But now he got on the stand. If Trial counsel questioned officer Crawford before hand they could've objected to him being put on the stand. officer Crawford testimony was a sham for the jury. Trial counsel will testify to this.

Remedy: Immediate release from custody petitioner is innocent based on herein above, there is no evidence.

Exhaustion of state court remedies regarding Ground 3:

- **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

___ Yes X No. If no, explain why not: public defender office did my appeal.

- **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

√ Yes ___ No. If no, explain why not: _____.

If yes, name of court: Supreme Court date petition filed 12/21/2007.

Did you receive an evidentiary hearing? ___ Yes √ No. Did you appeal to the Nevada Supreme Court? √ Yes ___ No. If no, explain why not: _____.

If yes, did you raise this issue? √ Yes ___ No. If no, explain why not: _____.

- **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____.

If yes, name of court: _____ date petition filed ___/___/___.

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____.

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____.

- **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes ___ No. If yes, explain: _____.

_____
(Name of person who wrote this complaint if not Plaintiff)

Charles Summers
(Signature of Plaintiff)

4-1-10
(Date)

_____
(Signature of attorney, if any)

_____

_____

_____
(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.** See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at Nevada State Prison on 4-1-10.
(Location) (Date)

Charles Summers
(Signature)

86754
(Inmate prison number)

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ANTHONY SUMMERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51520

ORDER OF AFFIRMANCE

This is a proper person 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; Valerie Adair, Judge.

On June 30, 2005, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, assault with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve terms totaling life without the possibility of parole. This court affirmed the judgment of conviction on appeal. Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006). The remittitur issued on January 23, 2007.

On December 21, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 17, 2008, the district court denied the petition. This appeal followed.

In his petition, appellant raised six claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that but for counsel's errors there would be a reasonable probability of a different outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to request a psychiatric examination for appellant and for failing to request a competency hearing for appellant. Appellant claimed that prior to trial, trial counsel had his mental health evaluated by Dr. Ken Sura, but that trial counsel did not advise the district court of his mental health problems. Appellant also claimed that he suffered from depression and behavioral problems since childhood. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the test for determining competency is "'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)) (alteration in original). As appellant was evaluated by a doctor at the behest of his counsel prior to trial, appellant

failed to demonstrate that requesting the district court to order a psychiatric examination would have had a reasonable probability of altering the proceedings. Further, appellant failed to demonstrate that that his alleged depression or behavioral problems precluded him from aiding his counsel or understanding the charges against him. Accordingly, appellant failed to demonstrate this claim had a reasonable probability of altering the outcome of the proceedings and we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to request additional peremptory challenges. Appellant claimed that the failure to request additional peremptory challenges resulted in a biased jury. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 175.051(1) provides that, with an offense that is punishable by death, each side is entitled to eight peremptory challenges. There is no provision allowing for additional peremptory challenges. Appellant failed to demonstrate that had trial counsel requested additional peremptory challengers there was a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to argue that the jury was biased due to the presence of a juror who was acquainted with counsel for the State. This court considered and rejected the underlying claim on direct appeal. Because this court has rejected the merits of the underlying claim, appellant cannot demonstrate that he was prejudiced. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to interview Officer Joel Cranford prior to trial. Appellant claimed that the failure to interview Officer Cranford allowed a key witness to "slip through the cracks." Appellant failed to demonstrate that his trial counsel's performance was deficient or he was prejudiced. Officer Cranford testified that a woman approached him and told him that she had heard from others that appellant was involved in the murder. Officer Cranford testified that the woman did not have firsthand information and that she wanted her identity to remain confidential. Officer Cranford testified that this unnamed woman was how the police first came to view appellant as a suspect. Prior to trial, appellant's counsel attempted to obtain information concerning the woman's identity, but were unable to do so because the State prosecutors also did not have that information. Counsel questioned Officer Cranford concerning the reasons why he withheld her identify. As the woman did not have firsthand knowledge of the incident, appellant failed to demonstrate that any testimony she may have provided would have been admissible. See NRS 51.035; NRS 51.065. Thus, appellant failed to demonstrate that had his counsel performed additional pretrial questioning of Officer Cranford there was a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to question Andrew Bowman about a conversation between Bowman and appellant in which appellant stated that Fred Ameen committed the murder. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The district court ruled that, if the defense admitted appellant's statements,

the State would then be permitted to present evidence of appellant's felony convictions. During a hearing outside of the presence of the jury, appellant's trial counsel stated that, because of appellant's criminal history, a tactical decision had been made that Bowman would not be questioned about appellant's statements. Appellant failed to demonstrate that these statements would have had a reasonable probability of a different outcome at trial because the jury heard testimony from a defense witness that Fred Ameen committed the murders and nevertheless found appellant guilty of the murder. Therefore, the district court did not err in denying this claim.

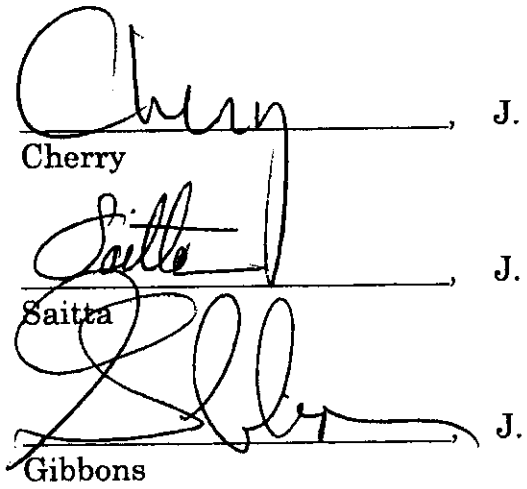
Sixth, appellant claimed that his trial counsel was ineffective for failing to object to the district court's abuse of discretion in permitting an employee of the district attorney's office to read into the record the preliminary hearing testimony from an unavailable witness. Appellant failed to demonstrate that he was prejudiced. Appellant failed to explain why he was prejudiced by the manner in which the unavailable witness' testimony was read into the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Thus, appellant failed to demonstrate that had his trial counsel objected to an employee of the district attorney's office reading missing witness testimony there was a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.[1]

---

[1]Appellant claimed his appellate counsel was ineffective for failing to raise this claim on direct appeal. For the reasons stated above, we conclude that appellant failed to demonstrate that there was a reasonable probability of success on direct appeal for this claim. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Charles Anthony Summers
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

---

[2]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

Charles Summers #86756
E.S.P.
Box 1989
Ely. NV. 89301

IN THE SUPREME COURT OF THE STATE OF Nevada

Charles Summers,
Appellant,

V.

STATE OF Nevada,
Respondent,

Case No. 51520

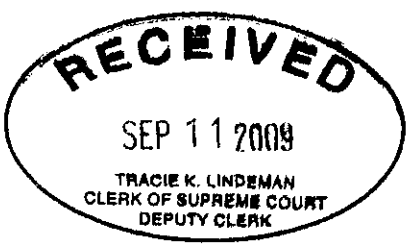
Motion of Leave to Proceed and informa Pauperis
N.R.A.P. 46(B),(C)

Petitioner, Charles Summers, now moves this Honorable Court to grant Leave to proceed and in forma Pauperis under Habeas proceedings and upon N.R.A.P. 46.(B),(C) to Petitioner, Petitioner has already been declared indigent by the District Court and assures this Court Petitioner Has no monies or Stocks/bonds ect. and now moves this Court for relief.

Dated this 30TH day of August, 2009.

Very Respectfully Submitted,

Charles Summers
Charles Summers
(Petitioner / Appellant).



Charles Summers #86756
E.S.P.
Box 1989
Ely, NV. 89301

IN THE SUPREME Court OF THE STATE OF Nevada

Charles Summers,)
Appellant,)
V.)
STATE OF Nevada,)
Respondent,)

Case No. 51520

Appeal — Motion to appoint Counsel to file effective Habeas Petition to avoid Due Process Violation pursuant to N.R.S. 34.750, Lewis V. Casey, Koerschner. Decisions (Citing Access to the Courts). N.R.A.P. 46(B),(C).

Petitioner, Charles Summers, now moves this Court under the following Points and Authorities citing recent Decisions by the U.S. District Courts upon Access to the Courts by N.D.O.P. (E.S.P. officials). Pursuant to N.R.A.P. 27 now moves this Court for relief unforseen upon the following, Exhibits, and this Courts prior adoption of Griffin V. IL. cited in E.S.D.C.V. St. (Infra).

Dated this 30th day of August, 2009.

Very Respectfully Submitted,

Charles Summers
Charles Summers
(Petitioner/Appellant).

Points And Authorities

Petitioner was forced to provide some sort of post conviction Habeas Corpus Pleading at the District Court Level without the assistance of a Law Clerk trained in the Law nor guaranteed Access to the Courts and by Due Process of Law upon N.D.O.P. (E.S.P.) officials December 21, 2007 Due to Petitioner placement in an ad.seg. unit (unit #1) at Ely State Prison at that time, which rendered an ineffective filing of a Habeas Pleading only citing in-effective assistance of Counsel Grounds. Violations of Due Process Access to the Courts Have been going on for several years within the N.D.O.P. within Lock down units, especially at E.S.P. and expressly in direct violation of A.R.'s and I.P.'s for which was recently admitted to by N.D.O.P. (E.S.P.) officials and the Attorney Generals office within an order by Chief Justice Hunt of U.S. Dist. Ct. (D. Nev.) citing: Moxley V. Neven 2:07-CV-01123-RLH-GWF on 9-29-08 (See: Exhibit "A") ID. See also: Aparicio V. McDaniel 3:07-CV-00427-LRH-VPC citing: John Tole Moxley V. Neven (D. Nev. 9-29-08) (Unpublish both Moxley and Aparicio under Habeas Corpus Proceedings, Aparicio #62 motion for stay was granted by U.S. Dist. Ct. Judge Hicks of Reno Court and appointment of Counsel #56 was granted citing: Moxley V. Neven (unpublished opinion). ID.

Moxley V. Neven was established under the same provision as Koerschner V. Warden[1] eliminating from N.D.O.P. (Lore Lock) based upon policy which was argued extensively by Moxley to U.S. Dist. Ct. C.J. Hunt and Respondents to which was presented to the Federal Court for decisions (Exhibit "A") wherein it is clear that several institutional procedures are in question and several A.R.'s and I.P.'s are being violated along with U.S. Const. Amendments are being Violated and continue to be violated with no end in sight.[2] Lewis V. Casey 518 U.S. 343 (1996) cited in Moxley V. Neven order (other citations omitted) (Exhibit "A" pg. 7-12): upon issue of providing access to the Courts.

Petitioners case in the instant case is:

1): Complex
2): issues presented are complex and difficult
3): Petitioner is unable to comprehend How to proceed and in this writers opinion ignorant of the Law (substantive and Procedural, and has no access to anyone trained adequately in the law to assist him.
4): Has Mental problems and very Little comprehension of exactly what he needs to do
5): needs appointed Counsel to assist/proceed with discovery
6): Needs Counsel to acquire record to provide effective Habeas-

1 508 F. Supp. 2d. 849 (D. Nev. 2007).
2 Farrell V. U.S. 336 U.S. 511 (1949), (Exhibit "A" 7, 13-15) ID.

7): Needs to Amend Habeas Pleading on several Grounds with someone trained in the Law and access to that Person trained in the Law.

8): Petitioners access to those trained in the Law and Law Library and access to the Courts is unlawfully Limited Due to placement in unit, accessible unit, and now Petitioner is ad. seg. unit #2 still no access to Law Library or Law clerk.

The District Court (in the instant case) cited Petitioners Habeas Pleading before Her (Volerie Adair) Had no case Law in support and was a basis for denying Petitioners Habeas Corpus Pleading, on the record, in open Court, at the Hearing upon Petitioners Habeas Decision. ID. (on or about 4.17.08), (See: D.C. min. or trans. of Hearing). ID. The District Court Erred in Denying Petitioners Motion to appoint Counsel under NRS. 34.750 as Petitioner clearly Qualifies under statute. ID.

Petitioner did file with Habeas Pleading for appointment of Counsel motion (Boilerplate) which is only to provide minimum standing and not actual standing under the interests of Justice and concerns regarding Limitations placed upon Petitioners access to the Courts and upon personal comparison of Summers and Moxley, Aparicio and showing made ect. ect. a Stay of the instant Case and appointment of Counsel is warranted based upon prima facie showing. (Exhibit "A") ID. NRAP. 46 (c) ID.

Petitioner Has also Had His copy of the PDS office file destroyed by water pipe breaking and was provided an incomplete copy of file by Counsel Pike, Petitioner now Has no complete record for which to amend Habeas Petition nor a way to get the Clerks copy upon an Indigent Defendant as provided by Pikes Letter to Petitioner. (See: Exhibit "B") ID. Dated 8.17.09.

What remains of Petitioners file according to Mr. Pike is not even close to what Petitioner needs to use for an effective Habeas Pleading (Amendment), Petitioner Doesn't even Have the original Habeas Pleading filed in District Court to Amend the Habeas Pleading by someone (who knows what it even entails) much less to be amended. This Court adopted Griffin V. Ill. 351 US. 12 cited in: E. J. D.C. V St. ID. which provides all indigent Defendants must be provided with a complete record for appeal even if its Destroyed by unforseen water Leak.

Conclusion

Petitioner now moves this Court to: (1) Appoint Counsel, (2) order entire record from this Court and Clark County Clerks Office be produced to Petitioner, (3) Stay Case until record is provided for petition to be amended (By District Courts order) or (By this Courts order) and any other Relief this Honorable Court Deem proper.

Petitioner, under penalty of perjury, swears the above stated and attached are all true and correct to the best of my knowledge.

Dated this 30th Day of August 2009.

Very Respectfully Submitted

Charles Summers

Charles Summers
(Petitioner/Appellant).

Certificate of Service

Petitioner Certifies that a true and correct copy of the attached was Mailed on below stated Date and to below Listed parties by and through the U.S. Mail by N.D.O.P. officials.

Dated 9th day of September, 2009.

Supreme Court Clerk (Nev.).
201 N. Carson St. #201
Carson City, NV. 89701

David Roger (DA.)
200 S. Third St
L.V. NV. 89155

Catherine Masto (A.G.)
100 N. Carson St.
Carson City, NV. 89701 4717

Charles Summers
Charles Summers
(Petitioner/Appellant).

Exhibit "A"

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN TOLE MOXLEY,

Petitioner,

vs.

NEVEN, *et al.*

Respondents.

2:07-cv-01123-RLH-GWF

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on the petitioner's motion (#8) for appointment of counsel.

Petitioner's motion follows upon policy and/or procedure changes at Ely State Prison ("Ely"). The majority of the inmates at the maximum security prison, including petitioner Moxley, do not have physical access to the prison law library. Under the policy, inmates may use a "paging system" to request copies of legal materials. If a sufficiently specific request is made, the materials then are to be printed from a searchable Westlaw® CD-ROM system and distributed to the inmate in his cell.[1] Inmate assistance also is available, to a degree, by inmates with varying levels of training or experience.

[1]According to respondents, legal books still are available to inmates to check out [subject to availability], but the subscriptions to the hard copy books are being discontinued in favor of the searchable CD-ROM system. Cases and legal materials covered by the hard copy subscriptions that are published after the subscriptions expire will be available only via the CD-ROM system.

The Court, through Judge Reed, previously granted a motion for appointment of federal habeas counsel in *Koerschner v. Warden*, 508 F.Supp.2d 849 (D.Nev.2007), due to the Court's substantial concerns as to the constitutional adequacy of the legal resources at the Lovelock Correctional Center ("Lovelock") and the resulting impact upon the petitioner's right of access to the courts in the habeas matter. In *Koerschner*, the Nevada Department of Corrections (NDOC) employed a similar policy at Lovelock that relied upon the combination of a paging system together with assistance by inmate legal assistants. Under the minimum qualifications required by the Lovelock policy, inmates could be qualified to provide assistance merely by being able to read and write at a ninth grade level and by not having any disciplinary infractions in the preceding twelve months.

The Ely policy differs in some respects from the Lovelock policy, however. The Ely policy, as described by the respondents, makes a number of what appear to be improvements over the Lovelock policy, in particular with regard to the paging system.

However, the Ely policy does not appear to be a finished product at this point. The respondents assert that the institutional procedure in question is being revised based upon certain new security concerns at the facility and further due to a new governing administrative regulation having been approved by the Board of Prison Commissioners.[2] As of the conclusion of the briefing and supplemental briefing, the institutional procedure still was undergoing revision.[3]

The Court accordingly will defer a more definitive consideration of the Ely policy, along the lines of *Koerschner*, to another day and case. In the present case, the Court will appoint counsel for petitioner out of an abundance of caution. On the one hand, substantial issues are presented regarding the sufficiency of the legal resources provided at Ely for prisoner access to the courts, but sound judicial practice counsels in favor of deferring extended consideration of the already-implemented, yet still-unfinished, policy. On the other hand, this

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[2]#15, at 6.

[3]#21-2, Affidavit of Debra Lightsey, ¶ 5.

is an ongoing habeas case, and the Court does not have the luxury of time to wait until potentially much later in the case to definitively address the issue and appoint counsel at an exceedingly late juncture in the case. Given the Court's continuing – subject to a full review of the issue – concerns regarding the access to court issue, the Court will appoint counsel for petitioner and move this case forward, to ensure that the interests of justice under 18 U.S.C. § 3006A(a)(2) are satisfied.

The Court further will take the continuing issue into account on future motions for counsel by other petitioners housed at Ely, pending a more definitive order in another case once a final institutional procedure is issued.

While the Court defers a more definitive consideration of the Ely policy at this time, it notes the following.

First, the Court does not read *Koerschner* as charily as respondents.

Respondents assert that *Koerschner* stands for the proposition that "the issue of access to the courts is properly addressed within the framework of a civil rights lawsuit brought pursuant to 42 U.S.C. § 1983."[4] What *Koerschner* instead emphasized was that the action was not a civil rights action and that the issue of access to the courts was being addressed "solely in connection with a determination of whether the interests of justice require the appointment of counsel for this petitioner in this habeas action." 508 F.Supp.2d at 850. Both the language and outcome in *Koerschner* affirm that access to courts issues also are properly addressed in connection with determining whether to appoint counsel in a habeas matter. The Court's consideration of access to courts issues is not restricted to the civil rights context.[5]

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[4]#15, at 2. Respondents cite to *Koerschner* in this Court's records as if it were an unpublished decision. Respondents in future shall use the official reporter citation to this published opinion of the Court, as required by Local Rule LR 7-3(b). The official reporter citation was available when the opposition was filed. See #9, at 1, lines 23-24.

[5]Respondents note in this regard that "[o]ne of the difficulties in inmates bringing these kinds of access to courts issues within a *habeas corpus* case, is that they have not used the grievance process to exhaust their administrative remedies." #15, at 4. Be that as it may, the Court will not turn a blind eye to

(continued...)

Respondents further assert as follows regarding *Koerschner*:

> In *Koerschner*, the inmate listed many complaints with the correspondence system. Unfortunately, these went unrebutted, and the court took them as a fact. . . .

#15, at 8. *Koerschner* did summarize, in the factual background, the petitioners' sworn declarations detailing their actual experience with attempts to access legal resources at Lovelock. 508 F.Supp.2d at 855-56. The Court's analysis in *Koerschner*, however, turned upon the principal features of the Lovelock policy itself, based upon the respondents' own supporting exhibits. 508 F.Supp.2d at 859-61. If respondents hold the view that *Koerschner* was based merely upon the fact that inmate declarations were not rebutted, respondents have missed the thrust of the Court's decision in that case.[6]

Second, the paging system under the Ely policy, at least as presented in the briefing, appears to make a number of improvements over the paging system at Lovelock.

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[5](...continued)
access to courts issues when considering possible appointment of counsel in a habeas matter. Nor will the Court shunt the issue off to another action by telling the petitioner that he instead must file a civil rights action after exhausting administrative remedies. In discharging its duty under 18 U.S.C. §3006A(a)(2), this Court will consider all issues pertinent to the question of whether the interests of justice require appointment of counsel, including access to courts issues. The Court will do so without regard to exhaustion of administrative remedies, which is a requirement that applies to a civil rights action, not to a motion for counsel in a habeas matter. *Cf. Koerschner*, 508 F.Supp.2d at 861 (" Respondents urge that petitioner must demonstrate actual injury in order to obtain such relief. However, as the respondents themselves have emphasized, this is a habeas matter, not a prison civil rights action. It is this Court's charge under 18 U.S.C. § 3006A(a)(2) to appoint counsel when "the interests of justice so require," not merely passively to wait for actual constitutional injury first to fully manifest itself, possibly months or years into an ongoing habeas case.").

Respondents' overarching implication that access to courts issues are not appropriately considered in habeas is unpersuasive. Access to courts issues will be considered by this Court in determining whether to appoint habeas counsel.

[6]The Court further is not sanguine that *Koerschner* is explained away by the Court's alleged failure to distinguish between a constitutional "correspondence" system and unconstitutional "paging" systems. See #15, at 2-3 & 7 n.4. The mere fact that the Ninth Circuit described the system as a "correspondence" system in a civil rights case in which it upheld the grant of summary judgment on the facts presented does not signify that there is a dichotomy between constitutional "correspondence" systems and unconstitutional "paging" systems. *See Keenan v. Hall*, 83 F.3d 1083, 1093-94 (9th Cir. 1996). Respondents do not cite any case law actually drawing a distinction of constitutional import between a "correspondence" system and a "paging" system. It would appear that the terms are interchangeable terms for this manner of distributing legal materials and that the distinction between the two terms is one without a difference. The Court's analysis here and in *Koerschner* turns upon how the system functions, not upon nomenclature.

Judge Reed described the Lovelock policy on paging as follows in *Koerschner*:

> The paging system now being employed at Lovelock arguably may be more restrictive and inadequate than those found constitutionally deficient in past cases. The policy not only limits an inmate such as petitioner to five specifically identified cases or items per request, but it further provides that the inmate may not *keep* a printout of a case more than three days and may not have more than five cases or other legal materials in his cell at any time. Over and above the difficulty of knowing specifically what to request in advance, it would be exceedingly difficult for anyone, much less a lay inmate, to prepare and file meaningful legal papers to present constitutional claims under such restrictions on access to, retention, and use of supporting authority. Moreover, even for an inmate who knows what he needs to see in advance, he must attempt to convey his requests through and to persons who potentially have attained the reading level only of a freshman in high school. Worse yet, if the inmate does not know what specific citations or materials to ask for in advance, his only recourse is to ask for assistance from a person who may only have a ninth grade reading level and a clean recent disciplinary record as his qualifications, who then will ask another similarly "qualified" inmate in the not improbable event that he does not know the answer.
>
> This Court accordingly has substantial doubts as to whether the paging system employed at Lovelock, standing alone, is constitutionally adequate as a method of providing assistance via a prison law library.

508 F.Supp.2d at 859-60 (emphasis in original); *see also id.*, at 851-52 (detailed description of the paging policy, referencing the respondents' exhibits).

In contrast, under the Ely paging system, as described by the respondents in the briefing, inmates may check out up to ten items at a time for a period of ten days. These free checked-out copies of cases or other materials are printed from the CD-ROM system on pink paper to denote that they remain NDOC property. There are no limits upon the number of times that an inmate may renew a checkout. If an inmate instead wishes to keep a permanent copy of the case, he may have a copy of the case printed on white paper for ten cents a page, subject to the availability of either personal funds or remaining credit on his $100.00 copy credit limit with the institution.[7]

[7]The Court makes no findings of fact as to any feature of the Ely policy. Any subsequent decision by this Court concerning the final policy will be based upon the terms of the policy itself.

These differences in the Ely paging system appear to mark an improvement over the Lovelock paging system reviewed in *Koerschner*. The Court leaves for another day the question of whether these changes, either alone or viewed together with the degree of legal assistance provided at Ely, lead to a different result than in *Koerschner*. At present, a finalized Ely policy remains a work in progress.

Third, substantial concerns remain regarding inmate access to qualified legal assistance under the policy – both with respect to minimum requirements for training and experience and with regard to the inmate's ability to effectively access such legal assistance.

Respondents maintain that a number of inmate legal assistants have extensive training and/or experience, including a former attorney who was disbarred following his conviction.[8] The key point to the Court, however, is the *minimum* level of training required under the policy to be a legal assistant.[9] Not every inmate will be regularly assisted by the former lawyer.

The Court's focus is on the qualifications both of the inmates working in the law library itself and of the inmates who go out to the units. Part of the concern in *Koerschner* was that, in sharp contrast to the description of the policy in the briefing and affidavit in that case, the actual policy itself substantially restricted meaningful access to and interaction with a qualified legal assistant. *See* 508 F.Supp.2d at 853-55 & 860-61. It appears quite possible to the Court, in reviewing the current unfinished product, that the inmates bringing legal materials to the housing units and interfacing with the unit inmates will be the less experienced members of the inmate staff. That is, it would appear that the more extensively trained or experienced inmates may well be in the library itself, leaving the inmate seeking assistance to communicate with the more experienced and trained assistants only through request forms and/or through an intermediary having only a minimal level of training or experience.

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[8]The Court assumes for purposes of the present discussion that the circumstances of the conviction did not reflect adversely upon the former attorney's technical competence to do legal work and instead was due to a conviction unrelated to such technical competence.

[9]In *Koerschner*, a legal assistant need only be able to read and write at a ninth grade level and have a clean disciplinary record for the prior twelve months. See 508 F.Supp.2d at 852-53, 857-58, & 860.

The Court understands that prohibition of direct contact between prisoners in different custody classifications often is an institutional necessity for security, particularly in a maximum security facility. Respondents may wish to consider, however, whether there are feasible means, without compromising security interests, to allow meaningfully functional interaction between qualified legal assistants and inmates who effectively are in a locked down status. Both the qualifications of the legal assistants and the degree of meaningful functional access to those assistants becomes all the more critical when the inmates otherwise can access the legal resources of the law library only indirectly through a paging system. *Cf. Koerschner*, 508 F.Supp.2d at 859-60 (expressing substantial doubts as to the constitutional adequacy both of the Lovelock paging system standing alone and of the paging system taken together with the level of legal assistance provided). The Constitution proscribes no specific methodology for assuring inmate access to the courts. *See,e.g., Lewis v. Casey*, 518 U.S. 343, 350-51 & 361-63, 116 S.Ct. 2174, 2179-80 & 2185-86, 135 L.Ed.2d 606 (1996). The methodology selected by prison officials, however, must not be "a promise to the ear, broken to the hope"[10] vis-à-vis providing a right of access to the courts.[11]

The Court, again, leaves a more definitive consideration of all such issues for another case, following the final revision and implementation of the institutional procedure. In the present habeas case, on the showing made, the Court finds that the interests of justice warrant the appointment of counsel, in light of continuing concerns regarding limitations placed on the petitioner's access to the courts, the potential presence of nonfrivolous claims, and the overall complexity of the case and issues presented.[12]

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[10] *Cf. Farrell v. United States*, 336 U.S. 511, 516, 69 S.Ct. 707, 710, 93 L.Ed. 850 (1949)(opinion for the Court by Justice Jackson).

[11] *Cf. Koerschner*, 508 F.Supp.2d at 861 ("The Lovelock procedures quite arguably provide the appearance of both [adequate law libraries and adequate assistance] but the substance of neither.").

[12] The Court finds that petitioner, while able to pay the filing fee, is financially eligible. See #4. The Court makes no implicit holding that an evidentiary hearing is required as to any claim or issue, that all of the claims are nonfrivolous, or that the petition or claims therein may not be subject to viable defenses.

IT THEREFORE IS ORDERED that petitioner's motion (#8) for appointment of counsel is GRANTED. The counsel appointed will represent petitioner in all federal proceedings related to this matter, including any appeals or *certiorari* proceedings, unless allowed to withdraw.

IT FURTHER IS ORDERED that the Federal Public Defender for the District of Nevada shall have thirty (30) days to undertake direct representation of the petitioner or to indicate to the Court an inability to represent the petitioner in these proceedings. If the Federal Public Defender is unable to represent petitioner, the Court then shall appoint alternate counsel.

IT FURTHER IS ORDERED that, if the Federal Public Defender is able to represent petitioner and files a notice of appearance herein, counsel shall state in the notice of appearance whether, as of counsel's preliminary review, it appears that more than one hundred and fifty (150) days likely will be necessary to prepare and file an amended petition, taking into account the anticipated investigation and other steps necessary for preparing the pleading. A deadline for the filing of an amended petition will be set after counsel has filed a notice of appearance, in the order confirming the specific appointment. The Court anticipates setting the deadline for 150 days based upon the current record.

The Clerk of Court shall send a copy of this order to respondents' counsel, the Federal Public Defender, the *pro se* petitioner, and the CJA Coordinator for this Division.

The staff attorney assigned to this case additionally is directed to distribute a copy of this order to the Judges of the Court and to the *pro se* staff attorneys.

DATED: September 29, 2008.

Roger L. Hunt

ROGER L. HUNT
Chief United States District Judge

Office of the Special Public Defender

Exhibit "B"

330 S. Third Street, Suite #800
P.O. Box 552316
Las Vegas, NV 89155-2316
(702) 455--6265
Fax: (702) 455-6273

August 17, 2009

Charles Summers, No. 86756
Ely State Prison
P.O. Box 1989
Ely NV 89301

Re: Summers v. State

Dear Charles:

Pursuant to your previous requests, we have previously forwarded you a copy of the transcript of the trial and penalty phase. Additionally, we provided you with the testimony of Terrance Collins and James Aleman. On January 12, you informed me that your copy was destroyed as a result of a broken water pipe in your cell. I had what remains of your files delivered to me from storage, and I am providing you as much as I have available.

I have previously provided you a copy of the Court minutes denying your post conviction relief. I did not see a notice of appeal of this ruling filed, and believe that you are now actively involved in Federal Court by this time.

Our office has also previously provided you with a copy of the Order we received from the Nevada Supreme Court on your case, and the following documents:

1. Order Denying Motions
2. 122 Nev., Advance Opinion 112
3. Petition for Rehearing and Motion to Recuse the Clark County District Attorney's Office from further involvement in the case
4. Motion to Allow Late Filing of Petition for Rehearing
5. Motion to Recall Remittitur
6. Ex Parte Motion to Re-Appoint Counsel for Appeal

As your post conviction motion involved allegations of ineffective assistance of counsel, we were relieved as your attorneys by that motion. I have attempted to respond to your letters, and was waiting in my office for your telephonic appointment on Monday, however, you did not call.

The transcript that we are sending you now is our last copy. As we are no longer your attorneys, we cannot expend County funds to order and purchase another transcript from the clerks office. As I am providing you the last of what we have, if it is destroyed or lost, my office cannot replace it. You know the hazards of keeping this record in your cell.

I am enclosing herewith the following portions of the file, **which will be the final copies that I can provide you:**

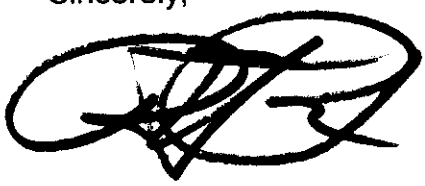
- Jury instructions,
- Penalty Phase volume 1 and 2
- Your NDOC records
- Notice of entry of Order for post conviction matter
- Temporary custody record
- Homicide file index
- Coroners Investigation
- Statement of Nila Hicks
- Statement of Marylou Johnson
- Pleadings
- Autopsy
- Statement of Andrew Davis
- Rogers/Hardy reports
- Statement of Albert Page
- Statement of Champagne Higgins
- Statement of Dwight Brandon
- Statement of Travione Jackson
- Incident report LLV031203000142
- Crime scene report (Hardy)
- Crime stoppers report
- Evidence impound report
- Officer Kelly Property report
- Prior convictions
- Statement of Fredrick Ameen

- Opening Brief
- Responding Brief
- Supplemental Authority
- Reply Brief
- Supreme Court Opinion
- All volumes of the record on appeal which contains the transcript.

I'm sorry that I am unable to provide you the photographs or the actual recordings as they are not allowed in the prison. The Nevada Supreme Court has entered a recent decision about the necessity of post conviction counsel, so you may receive some relief in Federal Court.

Continuing to wish you well, I remain,

Sincerely,



Randall H. Pike
Assistant Special Public Defender

Enclosure

RHP/ra

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ANTHONY SUMMERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51520

FILED

OCT 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING PETITION

On August 25, 2009, this court entered an order of affirmance. The remittitur issued on September 22, 2009, and this case was closed. On October 6, 2009, appellant filed a "petition to recall remittitur" with this court. No good cause appearing this court denies the petition. This matter has been closed, and this court directs that the clerk of this court not accept any further proper person documents in this matter.

It is so ORDERED.

_____, C.J.

cc: Hon. Valerie Adair, District Judge
Charles Anthony Summers
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ANTHONY SUMMERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51520

FILED

AUG 25 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person 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; Valerie Adair, Judge.

On June 30, 2005, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, assault with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve terms totaling life without the possibility of parole. This court affirmed the judgment of conviction on appeal. Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006). The remittitur issued on January 23, 2007.

On December 21, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 17, 2008, the district court denied the petition. This appeal followed.

In his petition, appellant raised six claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that but for counsel's errors there would be a reasonable probability of a different outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to request a psychiatric examination for appellant and for failing to request a competency hearing for appellant. Appellant claimed that prior to trial, trial counsel had his mental health evaluated by Dr. Ken Sura, but that trial counsel did not advise the district court of his mental health problems. Appellant also claimed that he suffered from depression and behavioral problems since childhood. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the test for determining competency is "'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)) (alteration in original). As appellant was evaluated by a doctor at the behest of his counsel prior to trial, appellant

failed to demonstrate that requesting the district court to order a psychiatric examination would have had a reasonable probability of altering the proceedings. Further, appellant failed to demonstrate that that his alleged depression or behavioral problems precluded him from aiding his counsel or understanding the charges against him. Accordingly, appellant failed to demonstrate this claim had a reasonable probability of altering the outcome of the proceedings and we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to request additional peremptory challenges. Appellant claimed that the failure to request additional peremptory challenges resulted in a biased jury. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 175.051(1) provides that, with an offense that is punishable by death, each side is entitled to eight peremptory challenges. There is no provision allowing for additional peremptory challenges. Appellant failed to demonstrate that had trial counsel requested additional peremptory challengers there was a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to argue that the jury was biased due to the presence of a juror who was acquainted with counsel for the State. This court considered and rejected the underlying claim on direct appeal. Because this court has rejected the merits of the underlying claim, appellant cannot demonstrate that he was prejudiced. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to interview Officer Joel Cranford prior to trial. Appellant claimed that the failure to interview Officer Cranford allowed a key witness to "slip through the cracks." Appellant failed to demonstrate that his trial counsel's performance was deficient or he was prejudiced. Officer Cranford testified that a woman approached him and told him that she had heard from others that appellant was involved in the murder. Officer Cranford testified that the woman did not have firsthand information and that she wanted her identity to remain confidential. Officer Cranford testified that this unnamed woman was how the police first came to view appellant as a suspect. Prior to trial, appellant's counsel attempted to obtain information concerning the woman's identity, but were unable to do so because the State prosecutors also did not have that information. Counsel questioned Officer Cranford concerning the reasons why he withheld her identify. As the woman did not have firsthand knowledge of the incident, appellant failed to demonstrate that any testimony she may have provided would have been admissible. See NRS 51.035; NRS 51.065. Thus, appellant failed to demonstrate that had his counsel performed additional pretrial questioning of Officer Cranford there was a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to question Andrew Bowman about a conversation between Bowman and appellant in which appellant stated that Fred Ameen committed the murder. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The district court ruled that, if the defense admitted appellant's statements,

the State would then be permitted to present evidence of appellant's felony convictions. During a hearing outside of the presence of the jury, appellant's trial counsel stated that, because of appellant's criminal history, a tactical decision had been made that Bowman would not be questioned about appellant's statements. Appellant failed to demonstrate that these statements would have had a reasonable probability of a different outcome at trial because the jury heard testimony from a defense witness that Fred Ameen committed the murders and nevertheless found appellant guilty of the murder. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to object to the district court's abuse of discretion in permitting an employee of the district attorney's office to read into the record the preliminary hearing testimony from an unavailable witness. Appellant failed to demonstrate that he was prejudiced. Appellant failed to explain why he was prejudiced by the manner in which the unavailable witness' testimony was read into the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Thus, appellant failed to demonstrate that had his trial counsel objected to an employee of the district attorney's office reading missing witness testimony there was a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.[1]

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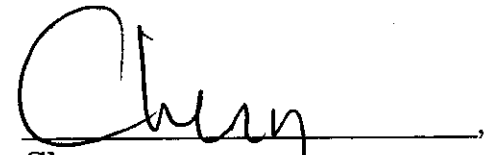
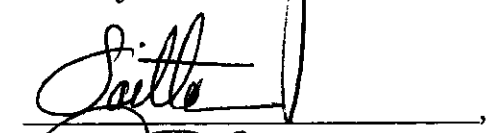
[1]Appellant claimed his appellate counsel was ineffective for failing to raise this claim on direct appeal. For the reasons stated above, we conclude that appellant failed to demonstrate that there was a reasonable probability of success on direct appeal for this claim. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

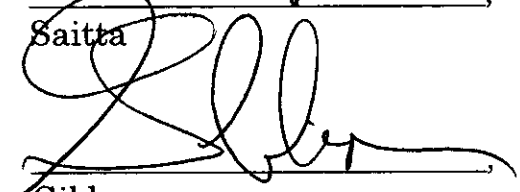
ORDER the judgment of the district court AFFIRMED.[2]



_____, J.
Cherry



_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Charles Anthony Summers
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[2]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

FILED

NOED

MAR 31 7 33 AM '08

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

CHARLES SUMMERS,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C198299
Dept No: XXI

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that on March 28, 2008, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on March 31, 2008.

CHARLES J. SHORT, CLERK OF THE COURT

By: _____
Brandi J. Wendel, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 31 day of March 2008, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the Clerk of the Court:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:
Charles Summers # 86756
P.O. Box 1989
Ely, NV 89301

Randall Pike, Esq.
330 S. Third St., 8th Flr.
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_____
Brandi J. Wendel, Deputy Clerk

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ORDR
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Attorney for Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

CHARLES SUMMERS,
#12219161

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C198299
DEPT NO: XXI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: March 6, 2008
TIME OF HEARING: 9:30 a.m.

THIS CAUSE having come on for hearing before the Honorable Judge Valerie Adair, District Judge, on the 6th day of March, 2008, the Petitioner being present, represented by Randall H. Pike, the Respondent being represented by David Roger, District Attorney, by and through Frank M. Ponticello, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

1. On January 26, 2004 Charles Anthony Summers (hereinafter "Defendant") was charged by way of information with Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165), Burglary While in Possession of a Firearm (Felony – NRS 205.060), and two (2) counts of Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165).

2. On April 19 2004, the State filed an amended information which dropped the charge of Burglary While in Possession of a Firearm (Felony – NRS 205.060).

3. Following a jury trial, Defendant was found guilty of Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); one (1) count of Assault With Use of a Deadly Weapon (NRS 200.471(2)(b)); and one (1) count of Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165).

4. Defendant was sentenced on June 21, 2005 for Count 1 to a maximum term of life without the possibility of parole, plus an equal and consecutive maximum term of life without the possibility of parole for use of a deadly weapon in the Nevada Department of Corrections (NDC). For Count 2, Defendant was sentenced to two (2) to six (6) years. For Count 3, Defendant was sentenced to eight (8) to twenty (20) years, plus an equal and consecutive eight (8) to twenty (20) years for use of a deadly weapon. All counts run concurrent with each other.

5. A Judgment of Conviction was entered on June 30, 2005, Defendant's appeal was denied on March 16, 2007.

6. On December 21, 2007, Defendant filed his Petition for Writ of Habeas Corpus, Motion for the Appointment of Counsel and Request for Evidentiary Hearing.

7. On January 30, 2008, the State filed its response to Defendant's petition.

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8. On February 20, 2008, Defendant filed a Proper Person Motion to Permit Accused to be Present at All Proceedings.

9. Defendant received effective assistance of trial counsel.

10. Trial counsel was not ineffective for failing request a psychological evaluation of Defendant because Counsel had no reason to request a psychological exam or seek a competency hearing in this case.

11. Trial counsel was not ineffective for failing to personally interview potential witnesses.

12. Trial counsel was effective with respect to cross-examining State's witnesses.

13. Trial counsel was not ineffective for failing to request additional peremptory challenges during *voir dire* because such a request would have been futile.

14. Trial counsel was not ineffective for failing to object when a member of the District Attorney's staff read the transcribed testimony of an unavailable witness into the record because such an objection would have been futile.

15. Defendant received effective assistance of appellate counsel.

16. Appellate counsel was not ineffective for not pursuing Defendant's claim that having a District Attorney Deputy read the transcribed testimony of an unavailable witness into the record was improper.

17. At trial and on appeal, Defendant received effective assistance of counsel. Even if this Court assumes that Defendant's counsel's performance was in any way deficient, Defendant has not shown a reasonable probability that but for such deficiencies he would have received a better result. Therefore, Defendant was not prejudiced by any such deficiencies.

18. Defendant is not entitled to appointment of an attorney because there is no argument appointed counsel could make that would not be considered either futile or frivolous.

19. Defendant is not entitled to an evidentiary hearing because his allegations were able to be resolved without the need to expand the record.

20. There will be no future proceedings for which Defendant will need to be present.

CONCLUSIONS OF LAW

1. In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

2. Under this test, the defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada).

3. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970).

4. Trial counsel is presumed to be effective and this presumption "can only be overcome by 'strong and convincing proof to the contrary.'" Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991), quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981).

5. In Nevada, there is a "long-established precedent concerning the presumption of sanity and the basis for overcoming this presumption." Williams v. State, 110 Nev. 1182, 1185, 885 P.2d 536, 538 (1994).

6. "In the absence of reasonable doubt regarding an accused's competence, the district judge need not invoke the statutory procedure to determine competency." Martin v. State, 96 Nev. 324, 325, 608 P.2d 502, 503 (1980).

7. A Defendant may be legally competent even though he has mental problems. *See* Calambro v. District Court, 114 Nev. 961, 964 P.2d 794 (1998); *See also* Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995).

8. As a general principle, counsel cannot be deemed ineffective for failing to make futile objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

9. A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have made a favorable outcome more probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

10. Deciding which witnesses to interview, and whether to do it "personally" or by investigation is for counsel to determine, not the Defendant. Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

11. Cross-examining witnesses is a strategic decision that is at counsel's sole discretion. Strickland, 466 U.S. 668, 104 S.Ct. 2052; Rhyne, 118 Nev. 1, 38 P.3d 163.

12. NRS 175.051 states:

> **NRS 175.051 Number of peremptory challenges.**
> 1. If the offense charged is punishable by death or by imprisonment for life, each side is *entitled to eight peremptory challenges*.
> 2. If the offense charged is punishable by imprisonment for any other term or by fine or by both fine and imprisonment, each side is *entitled to four peremptory challenges*. (Emphasis added).

13. The standard for appellate counsel is the same as for trial counsel. Browning v. State, 120 Nev. 347, 91 P.3d 39 (2004). In regards to appellate counsel, the United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 836-837

(1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994).

14. The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S. Ct. at 2065, 2068. See Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

15. In order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

16. The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id.

17. "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

18. In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution ... does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel

provision as being coextensive with the Sixth Amendment to the United States Constitution."

19. NRS 34.750 provides, in pertinent part:

> [a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily,* the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.
> (Emphasis added).

20. Under NRS 34.750, the court has discretion in determining whether to appoint counsel.

21. A Defendant "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

22. Under Marshall v. State, an evidentiary hearing should be granted to a defendant if alleged facts that would justify relief are not belied by the record. 110 Nev. 1328, 885 P.2d 603 (1994).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief, the Request for Evidentiary Hearing, the Motion for Appointment of Counsel, and the Proper Person Motion to Permit Accussed to Be Present at All Proceedings shall be, and they are, hereby denied.

DATED this 24th day of March, 2008.

Valerie Adair
DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
H. LEON SIMON
Deputy District Attorney
Nevada Bar #000411