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CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY

Atiba Moore
Name
69116
Prison Number
Nevada State Prison
Place of Confinement

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Atiba Malik Moore, Petitioner,)
(Full Name))
vs.)
Greg Smith, Warden, 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-00194)
(k)

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

- Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: Eight Judicial District Court, Clark County, Michelle Leavitt.
- Full date judgment of conviction was entered: 04/14/06. (month/day/year)
- Did you appeal the conviction? Yes ___ No. Date appeal decided: 01/19/06.
- 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: Eight Judicial Clark County 05/18/06. 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: 11/20/07. Have all of the grounds stated in this petition been presented to the state supreme court? Yes ___ No. If no, which grounds have not? _____
- Date you are mailing (or handing to correctional officer) this petition to this court: 3/26/10.
Attach to this petition a copy of all state court written decisions regarding this conviction.

Paid Amt \$ 500 Date 4/7/10
Receipt # 22083 Initials RB

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? _____. 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: ____/____/____. 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: C195697
9. Length and terms of sentence(s): 5-20 count one, 5-20 count three consecutive.
10. Start date and projected release date: 08-01-05 — 08-01-15
11. What was (were) the offense(s) for which you were convicted: Burglary, Fraudulent
use of credit card, Possession of credit card
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	<i>Pro se</i>
arraignment and plea	<u>Darin F. Imlay</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
trial/guilty plea	<u>Darin F. Imlay, Florav. Eichacker</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
sentencing	<u>Atiba M. Moore</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
direct appeal	<u>Sharon G. Dickinson</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1st post-conviction petition	<u>Atiba M. Moore</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
appeal from post conviction	<u>Atiba M. Moore</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
2nd post-conviction petition	<u>Atiba M. Moore</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
appeal from 2nd post-conviction	<u>Atiba M. Moore</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

1 The petitioner can submit a second petition if
2 the first petition was not determined on the merits. In
3 this case the previous petitions were not determined
4 on the merits.

5 To deny the petitioner an opportunity to have this
6 petition determined on the merits would result in a manifest
7 injustice and actual prejudice against the petitioner,
8 because all the grounds that are being raised in this
9 petition are constitutional errors that have affected the outcome
10 of the trial and the outcome of the sentence that was given
11 to the petitioner.

12 It is the petitioners wish to finally have this Petition for
13 a Writ of Habeas Corpus determined on the merits.

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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 5th Amendment right to Due Process of the Law, based on these facts:

My conviction for count 1, Burglary, is unconstitutional in violation of my 5th amendment right to Due Process of the law because, the information filed in my case failed to enumerate each material element of "Fraudulent use of credit or debit card, namely, that I "obtained" anything of value or "used" the credit card and obtained anything of value."

It is the defendant's belief that the information filed is fatally defective because it failed to charge the offense as pled. Therefore the defendant has suffered actual prejudice by the information filed since count 1 (one) Burglary, was predicated upon the defective information filed in count 2, fraudulent use of a debit or credit card.

The Burglary was pled as the defendant "entering with the intent to commit a felony, to-wit: theft and/or fraudulent use of a credit." The information also stated along with the jury instruction #3, that the defendant "committed" the offenses of Burglary, fraudulent use of a credit or debit card, and Possession of a credit card without cardholder's consent. Therefore since the state pled that, in the information, the state would have to prove what was pled in the information beyond a reasonable doubt. (continued on page 3-A)

Exhaustion of state court remedies regarding Ground 1:

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 one continued

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my _____ Amendment right to _____.

based on these facts:

Furthermore, in my direct appeal to the state Supreme court, the state did not object to the court dismissing my conviction for fraudulent use of a credit card. That's the same charge that the Burglary was predicated on and the same offense that the state said the defendant "committed" in the information.

It is understood that one of the essential elements of Burglary is the entry of a building with the intent to commit grand or petit larceny, or any felony. As seen in the information on count 1 Burglary, the state has predicated that necessary intent to commit "any felony," on the charge of Fraudulent use of a credit card. Therefore, the burglary count in the information, as presently drafted, is also fatally defective and constitutes a constitutional error.

► **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: Clark County District Court date petition filed 6 / 9 / 04.

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

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: Because the merits were not directly addressed in the first petition.

If yes, name of court: Clark County District Court date petition filed 3 / 2 / 09.

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: the appeal was submitted without arguments

► **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: In a motion titled "Motion to set aside jury verdict and/or grant a new trial."

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 Amendment right to be present at sentencing and due process of the law, based on these facts:

My right to be present at sentencing and due process of the law was violated when the district judge V. Vega department 2, signed and filed a judgement of conviction that was different from the oral pronouncement of the sentencing judge Michael Douglass. And also when my "motion to correct Amended Judgement of Conviction" was denied.

When the honorable Judge Michael L. Douglass sentenced me on 3-19-04 in district court he said that, "the court will sentence you to 5-20 on count 1. Count 2, 5 to 20, that will be consecutive to count 1. And on count 3, 5 to 20 that will be concurrent with the other counts. Zero days credit."

After a successful appeal of count 2 of the information, the Supreme court issued an order to the district court to amend the Judgement of Conviction to have it say "Jury trial not a plea of guilty, dismiss count 2 and the sentence for that count, and to run the sentence for count 3 consecutive to count 1.

With the order from the Supreme court, and the denial of my "motion to correct Amended Judgement of Conviction", there now exist a direct conflict between an unambiguous oral pronouncement of sentence and the written Judgement of Conviction.

(Continued on page 5-4)

Exhaustion of state court remedies regarding Ground 2:

- ▶ Direct Appeal:

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 2 continued

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my _____ Amendment right to _____,

based on these facts:

The sentencing judge orally pronounced that count three (3) is to be concurrent with the other counts. Not with count one (1) only or count two (2) only, but "the other counts". Therefore, if either count one or count two was to be dismissed, count three should still run concurrent with the count that still stands.

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

Yes No. If no, explain why not: It was believed that the JOC was the same as the oral pronouncement of sentence.

► **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: It was believed that the JOC was the same as the oral pronouncement of sentence.

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: _____

► **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: In a motion titled "Motion to correct Amended Judgement of Conviction." And an appeal to the supreme court when the motion was denied.

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 Amendment right to not be placed in Double Jeopardy, based on these facts:

My conviction for count 3, possession of a credit card without the cardholders consent is unconstitutional because it was a lesser included offense of fraudulent use of a credit card. So when I was charged and convicted and sentenced it was a violation of the Double Jeopardy Clause of the constitution.

When this issue was brought to the supreme court the state conceded saying that, "possession of a credit card is a lesser included offense of fraudulent use of a credit card." The state said in its answering brief, "the defendant in this case could not fraudulently use the credit card of another without possessing the credit card first."

Accordingly, count 3, the conviction for possession of a credit card, is the lesser included of count 2, the conviction for fraudulent use of a credit card. Under Double Jeopardy, the possession of a credit card, count 3, should have been dismissed.

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: Because It was told to me that this issue was moot.

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: _____

▶ **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.

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

[Signature]
(Signature of Plaintiff)

03-22-10
(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 03-22-10.
(Location) (Date)

[Signature]
(Signature)

69116
(Inmate prison number)

From: Ailba M. Moore # 69116

PO Box 607

Nevada State Prison

Carson City, NV. 89702

To: Clerk, U.S. District Court

District of Nevada

400 South Virginia Street

Suite 301

Reno, Nevada 89501

