

Matthew Tjeltveit
83651
Ely State Prison

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COUNSEL/PARTIES OF RECORD	
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CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Matthew TJELTVEIT,)	3:11-cv-00163-RCJ-VPC
Petitioner,)	
vs.)	<u>Motion to Show Cause For</u>
EK McDaniel, et al.,)	<u>Equitable Tolling</u>
Respondents,)	

Comes now, petitioner, Matthew Tjeltveit, acting in pro se, in response to this Honorable Courts Order to show Cause. This Motion is prepared by Inmate Christopher P. Jernigan #71245 as petitioner has no ability to Comprehend the legal matters set against him.

This motion is made pursuant to Fed. R. App. P., Rule 27, Rule 22(a), 28 USC § 2254 and 28 USC § 1631, in good Faith and not for the purpose of delay.

Procedural History

- 1). Judgement of Conviction, June 7, 07 (exhibit P. on File)
- 2). Notice of Appeal, November 7, 07 (exhibit P. 11-12)
- 3). Remittitur issued January 22, 09 (exhibit P. 13)
- 4). Original writ of Habeas Corpus "Mistakenly" Filed in the

U.S. District Court. January 28, 08 (exhibit P. 14)

5). U.S. District Court Orders Petitioner to Send A Five (\$5.00) Filing Fee. April 11, 08, (exhibit P. 15-16)

6). Sent Brass slip payment request for Filing Fee to N.D.O.C. Administration. April 16, 08 (exhibit **)

7). Brass slip payment denied by Administration. May 5, 08 (exhibit **)

8). Sent U.S. district Court proof of Attempt to Comply with order. May 16, 08 (exhibit **)

9). N.D.O.C. Administration denied payment for the second time. June 16, 08 (exhibit P. 17-22)

10). Sent U.S. District Court proof of N.D.O.C.'s Continued hinderance Preventing Compliance with Order. June 19, 08. (exhibit P. 17-22)

11). Family Member sent Five (\$5.00) dollar Filing Fee and proof of the Hinderance. June 23, 08. (Exhibit P. 23-24)

12). U.S. District Court Files Order dismissing writ for want of exhaustion in state Court. June 30, 08. (exhibit P. 25-26)

13). Petitioner Files state post Conviction, August 5, 08 (exhibit P. 27-36)

14) U.S. District Court Files Final dismissal Order on Mistakenly Filed writ of Habeas Corpus. April 28, 09. (exhibit P. 37-40)

15.) 2nd Judicial District Court dismissed writ of Habeas as time barred. February 4, 2010. (exhibit P. 41-45)

16). Notice of Entry by state district Court, March 24, 10 (exhibit 46-52)

17). Notice of Appeal. April 6, 10. (exhibit P. 53-54)

18). Opening brief Filed August 6, 10 (exhibit P. 55-81)

19). NV 9th Ct dismisses Appeal. January 13, 11 (exhibit P. 82-84)

20). Current Habeas Filed in this Court March 3, 11 (exhibit - on File)

21). This Courts Order to show Cause. April 25, 11 (Document 5)

Table of Cites and Cases

- 1) Fed. R. App. P., Rule 22 (a) and Rule 27
- 2) 28 USC § 2254, Rule 12
- 3) 28 USC § 1631
- 4) 28 USC § 2241 (a)
- 5) 28 USC § 2244 (d)(1)
- 6) Koerschner v Warden Case No 3:05-cv-00587-EGR-VPC
- 7) Pace v DiGuglielmo 544 US 408 at 418-30
- 8) Haynes v. Kerner, 92 S. Ct 594
- 9) Hughes v. Rowe, 101 S. Ct 173
- 10) Fontana v. HASKINS, 262 F.3d 871, 877

Table of Exhibits

- 1) Case Appeal Statement P. 11-12 (Notice of Appeal)
- 2) Remittitur P. 13
- 3) Notice of electronic Filing P. 14 (original Habeas writ)
- 4) US dist Ct Order P. 15-16
- 5) letter + Proof to Court P. 17-22
- 6) Proof Family Paid Filing Fee P. 23-24
- 7) US dist Ct Order P. 25-26
- 8) State Habeas writ P. 27-36
- 9) US dist Ct Order P. 37-40
- 10) 2nd Judicial dist Court Order dismissing writ P. 41-45
- 11) Notice of entry, 2nd dist Ct P. 46-52
- 12) Notice of appeal P. 53-54

Table of Exhibits (cont.)

13) Appellant's opening brief P 55-81

14) Order of Affirmance P 82-84

Please note that "(exhibit **)" denotes that these items were sent to the us. dist Court as proof of Compliance with their Order but petitioner Failed to Keep a Copy.

QUESTIONS For the COURT

1) Do the "Intrests of Justice" as defined by Common sense, dictate that a petitioner's meritorious claims would be best served by Justice, if properly adjudicated, or Transferred to the appropriate Court of Jurisdiction, when the original writ was Filed?

2) Does the language "MUST" be transferred to the appropriate Court, pursuant to Fed. R. App. P. 22 (c) create a statutory right under the U.S. Constitution which entitles petitioner to equitable Tolling?

3) Does the language of "Shall be Transferred to the Appropriate Court of Jurisdiction" pursuant to 28 USC § 1631 create a statutory right under the U.S. Constitution which entitles petitioner to equitable Tolling?

4) was petitioners writ, Filed January 28, 2008 in the US district Court (Mistakenly), in compliance with 28 USC § 2244(d)(1). one year time limitations?

5) should this Court Toll the time From the original Filing of January 28, 2008 and Transfer that original writ back to the district Court of Jurisdiction to be properly exhausted?

6) In alternative to question 5). Should the Court toll the time From the Original writ of January 28, 2008 and grant a stay and Absyance so petitioner can exhaust state Court Remedies?

7) Did E.S.P OFFICIALS Create an external impediment, in which sixty eight (68) days elapsed, that was a direct result of Petitioner not being able to File a timely State post Conviction writ of Habeas Corpus?

8) Did petitioner diligently attempt to MAIL out his Five dollar Filing Fee to the U.S district Court on two separate occasions?

9) Does external impediment by prison OFFICIALS constitute an "extraordinary Circumstance"?

10) Does petitioner meet the two prong test for equitable tolling set forth by the U.S. Supreme Court in Pace, at 418.30 of 1) diligence and 2) extraordinary Circumstance?

11) Should the Court grant equitable tolling of Sixty eight (68) days from April 16, 2008 to June 23, 2008; The First attempt to pay the Fee and the date in which a Family Member sent the Fee to the Court?

12) Does the fact that petitioner had his state writ Filed 35 days after U.S. district Court prove his state writ would have been timely Filed if not for "extraordinary Circumstances"?

13) Should the U.S district Court, from the Face of the petition and its Procedural History, reackognized the Complete lack of any state exhaustion and either transferred the petition to the appropriate Court of Jurisdiction or dismissed petition immediately?

14). Does the fact that petitioner was sent a U.S. district Court Habeas packet and instructed to file it in the U.S. district Court by the Prison Law library show that it wasn't a lack of diligence on the part of petitioner?

15). Does petitioner's diligence in attempting to present a factual basis for his claims provide excuse for his negligible shortcomings?

16). Are pro se litigants owed heightened judicial solicitude when acting in a diligent manner?

A reasoned mind must conclude that when Congress drafted and enacted A.E.D.P.A. it was in the hope that state courts would give cases in their charge proper consideration of constitutional issues and to prevent convictions from being relitigated to the point of absurdity.

While A.E.D.P.A. did not have the impact Congress hoped it would on state courts it did not render the federal court system nugatory.

A reasonable mind must conclude that A.E.D.P.A. was not designed to prevent a petitioner who is diligently seeking his first review of meritorious claims of a constitutional nature from ever having those claims decided impartially.

Our judicial system is not infallible, as history can attest, but it is the duty, as guardians of justice, for judges to prevent any injustices wherever possible.

Facts of the Case AND POINTS OF AUTHORITY

1) Petitioner sought instruction and documents (writ of Habeas packet) from the Ely State Prison, hereinafter E.S.P., Law Library and was sent a packet with instructions to file the writ in the U.S. District Court of Nevada.

2) As such Petitioner mistakenly filed his original writ in the U.S. District Court on January 28, 2008, which would have left over five (5) months in the AEDPA statute of limitation bank.

3) Petitioner is untrained in law and subject to an insufficient paging system with no direct access to law clerks as E.S.P. is a locked down maximum security prison. Petitioner had to believe he was sent the right forms and instruction, see Koersbuer v. Warden, Case No. 3:05-cv-00587-ECR-VPC.

4) Pursuant to 28 USC § 2254 Rule 12; Federal Rules of Criminal and Civil Procedure; Extent and Applicability;

"If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal or Civil Procedure, whichever it deems more appropriate, to motions filed under these rules."

5) Pursuant to 28 USC § 1631 and Fed. R. App. P., Rule 22 (a) A writ of Habeas Corpus mistakenly filed in the wrong court should have been "Transferred to the appropriate court of jurisdiction" instead of being dismissed for lack of exhaustion. 28 USC § 2241 (2).

6). While petitioner may have made mistakes, he has diligently sought review of his meritorious claims, even if in the wrong venue. Diligence is a significant standard when judging compliance of a pro se litigant and since petitioner at no time failed to attempt to have his claims reviewed he should meet this standard without difficulty. (see Procedural History exhibits).

7). A 68 day window, where the fault lies with N.D.O.C Administration, see Procedural History # 6 thru # 12, as this petitioner was prevented from complying with the U.S district Courts order of 4-16-08. (exhibit

This is important because once the filing fee was sent by petitioners family, the court addressed the writ in 7 days for lack of exhaustion. Had NDOC allowed petitioner to send out his filing fee on 4-16-08 petitioner would have had approximately 61 (sixty-one) days left on his 1 year clock to timely file his state writ of Habeas Corpus.

This is an objective factor external to petitioner as this impediment was created by N.D.O.C which met the standards of Pace v. Di Guglielmo 544 U.S. 408 at 418, 30. As petitioner (1) diligently sought review and (2) that some extraordinary circumstance stood in his way.

Once the U.S district Court informed petitioner he needed to exhaust state remedies petitioner had his state writ filed 35 days later which would have been a timely filed state writ.

Petitioner should receive 68 days of equitable tolling on this issue alone.

8). Petitioner is owed heightened Judicial Solitude as a pro se litigant and not the same standards as lawyers; see;

a). Haynes v. Kerner, 92 S.Ct 594 (1972)

b). Hughes v Rowe, 101 S.Ct. 173 (1980)

The Ninth Circuit Court took it even further when they "held" in Fontana v. HASKINS 262 F.3d 871, 877 (2001);

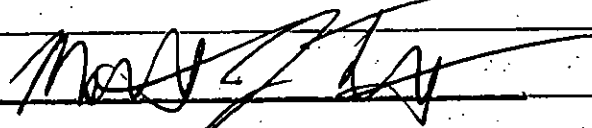
"The Court Acknowledges that in the case of a pro se litigant, it must take a broader view as to the specific legal theories and look to whether the {Facts} state a claim. Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief."

Conclusion

Petitioner beseeches this Court to grant equitable tolling and provide a fair venue in which petitioner can exhaust his claims without undue burdens so that the merits of his claims can be fairly adjudicated.

Dated this 9th day of May, 2011.

Respectfully



Matthew T. Jeltsoit #

PO Box 1989

Ely, NV 89301

No. CR05-2796

Dept. No. FILED

2007 NOV -7 AM 8:38

IN THE Second JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF Washoe

HOWARD W. CONYERS
BY [Signature]
DEPUTY

Matthew Tjeltveit }

Petitioner/Plaintiff, }

v. }

State of Nevada }

Respondent/Defendant.

CASE APPEAL STATEMENT

1. Name of Appellant filing this appeal statement: Matthew Tjeltveit
2. Identify the judge issuing the decision, judgment, or order appealed from: Steven P. Elliott
3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited): Daniel Greco, John Calvert, Steven Elliot, Kenneth Peate, and Jenny Hubach.
4. Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited): Daniel Greco, John Calvert, Steven Elliot, Kenneth Peate, and Jenny Hubach
5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and identify the parties or party whom they represent:

Jenny Hubach
Attorney Conflict Group
360 W. Liberty Street
Reno, NV 89501
Address
(775) 786-4211
Telephone Number

John Calvert
Attorney Conflict Group
360 W. Liberty Street
Reno, NV 89501
Address
(775) 324-6259
Telephone number

Daniel Greco
Attorney District Attorney
75 Court Street
Reno, NV 89520
Address
(775) 328-3200
Telephone number

Matthew Tjeltveit
Represents

Matthew Tjeltveit
Represents

State
Represents

6. Indicate whether appellant was represented by appointed or retained counsel in the district court: Appointed Counsel Retained Counsel Pro Per

7. Indicate whether appellant was represented by appointed or retained counsel on appeal:

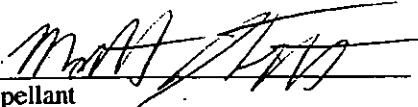
Appointed Counsel Retained Counsel Pro Per

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: Yes No

Date: 11/30/05

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed): Date: 11/30/05

Dated this 29 day of October, 2007


Appellant
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true and correct copy of the fore going Notice of Appeal, Case Appeal Statement, was mailed to:

Second Judicial District Court
of Nevada in Washoe Co. / clerk
75 Court Street
Reno, NV 89520

Dated this 29 day of October, 2007

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JAMES TJELTVEIT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 50518

District Court Case No. CR052796

REMITTITUR

TO: Howard W. Conyers, Washoe District Court Clerk

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

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

DATE: January 22, 2008

Tracie Lindeman, Clerk of Court

By: 
Deputy Clerk

cc (without enclosures):
Hon. Steven P. Elliott, District Judge
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Matthew James Tjeltveit

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on _____.

District Court Clerk

①

08-01138

Other Events

3:08-cv-00054-LRH-VPC Tjeltveit v. McDaniel et al
HABEAS

United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered on 1/28/2008 at 4:09 PM PST and filed on 1/28/2008

Case Name: Tjeltveit v. McDaniel et al

Case Number: 3:08-cv-54

Filer:

Document Number: 2(No document attached)

Docket Text:

NOTICE to Plaintiff from USDC: Please be advised that case against defendant McDaniel, et al. has been received and assigned case number **3:08-cv-00054-LRH-VPC**. All future papers sent to the court for this case must include this number. Any correspondence with the court should be mailed to the Clerk's Office and not directly to the assigned judges.

This case has been submitted for review and action by a judicial officer. This review process may take several weeks. Plaintiff will be notified as soon as further action has been taken and will receive copy of all orders filed. **(no image attached)** (KL)

3:08-cv-54 Notice has been electronically mailed to:

3:08-cv-54 Notice has been delivered by other means to:

Matthew Tjeltveit
83651
Ely State Prison
P.O.Box 1989
Ely, NV 89301

[Faint, illegible text, likely a stamp or footer]

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MATTHEW TJELTVEIT,

Petitioner,

vs.

E.K. MCDANIEL, *et al.*,

Respondents.

3:08-cv-00054-LRH-VPC

ORDER

Matthew Tjeltveit, a Nevada prisoner, has filed an application for leave to proceed *in forma pauperis* (docket #1), a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254 (attached at docket #1), and a motion for appointment of counsel (attached at docket #1).

Based on the information submitted by petitioner regarding his financial status, the application for leave to proceed *in forma pauperis* will be denied. Petitioner must pay the \$5 filing fee.

Petitioner also has asked this court to provide him with appointed counsel to assist with his habeas corpus petition. There is no constitutional right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993). The decision to appoint counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). However, counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is a person of such limited education as to be incapable of

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1 fairly presenting his claims. See *Chaney*, 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423 F.2d
2 948 (8th Cir. 1970).

3 The petition in this action is organized and raises the issues in a clear and understandable
4 manner. It does not appear that counsel is justified in this instance. The motion shall be denied.

5 **IT IS THEREFORE ORDERED** that petitioner's application for leave to
6 proceed *in forma pauperis* (docket #1) is **DENIED**. Petitioner shall have **thirty (30) days** from the
7 entry of this order to have the filing fee of five dollars (\$5) sent to the Clerk, as ordered below. If
8 petitioner fails to do so, this action may be dismissed.

9 **IT IS FURTHER ORDERED** that the Clerk shall **SEND** to petitioner two copies of this
10 Order.

11 **IT IS FURTHER ORDERED** that petitioner is ordered to arrange to have one copy of this
12 Order sent to the Clerk, with a check for \$5 attached. Petitioner may do so by sending a copy of the
13 Order along with a "brass slip" to Inmate Services for issuance of the check.

14 **IT IS FURTHER ORDERED** that the Clerk shall **FILE AND DOCKET** the motion for
15 appointment of counsel (attached at docket #1).

16 **IT IS FURTHER ORDERED** that petitioner's motion for appointment of counsel is
17 **DENIED**.

18 DATED this 11th day of April, 2008.



20
21 LARRY R. HICKS
22 UNITED STATES DISTRICT JUDGE
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6-15-08

Clerk of the U.S. District Court,

I have enclosed the order that should have been returned to you before the 11th of May. However it's tardiness is through no fault of my own. Enclosed also, are the original envelope stamped by the prison with the date, and the original denial of my attempt to brass slip the \$5.00 filing fee. Both of which I tried to send on the 16th of May. Then on the 12th of June it was again returned to me unsent, for no apparent reason, as I sent it unaccompanied by a brass slip and with proper postage. I have now had to send this to family, and have them send it to you. I have also enclosed a second attempt to brass slip the filing fee, that was denied, even though I have the \$5.00 in my second Trust fund. The Second Trust fund, although the prison will remove money for store or medical fees, for some reason they refused to brass slip from it. So I pray that you do not dismiss my case based on the tardiness of this order as I made every effort to return it on time.

COPY

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Sincerely,

Case # 3:09-cv-00054-LRH-VPC Matthew Tjeltveit # 9365

~~Matthew Tjeltveit~~

ESP

P.O. Box 1989

Ely, NV 89301

COPY

Brass Slip on 2nd Attempt to pay U.S dist
Court Filing Fee

2.75

So ok
6/4
att

6728

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
INMATE ACCOUNT TRANSACTION
REQUEST

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
INMATE ACCOUNT TRANSACTION
REQUEST

Date 5-16-09 NO 1338432

To: Inmate Services

I hereby authorize my account to be charged in the amount
of \$ 5.00 Five Dollars)

Please pay to United States District
Court, District of Nevada

Signature Matthew Tjeltveit
Print name Matthew Tjeltveit

ID No. 83651 Institution ESP

Approved by [Redacted]

Transfer	Purchase Order	Postage	Other
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White Inmate Services
Canary Institution Copy
Pink Inmate Copy

DOC 509 (Rev. 2/06)

COPY

Date 5-16-09 NO 1338432

To: Inmate Services

I hereby authorize my account to be charged in the amount
of \$ 5.00 Five Dollars)

Please pay to United States District
Court, District of Nevada

Signature Matthew Tjeltveit
Print name Matthew Tjeltveit

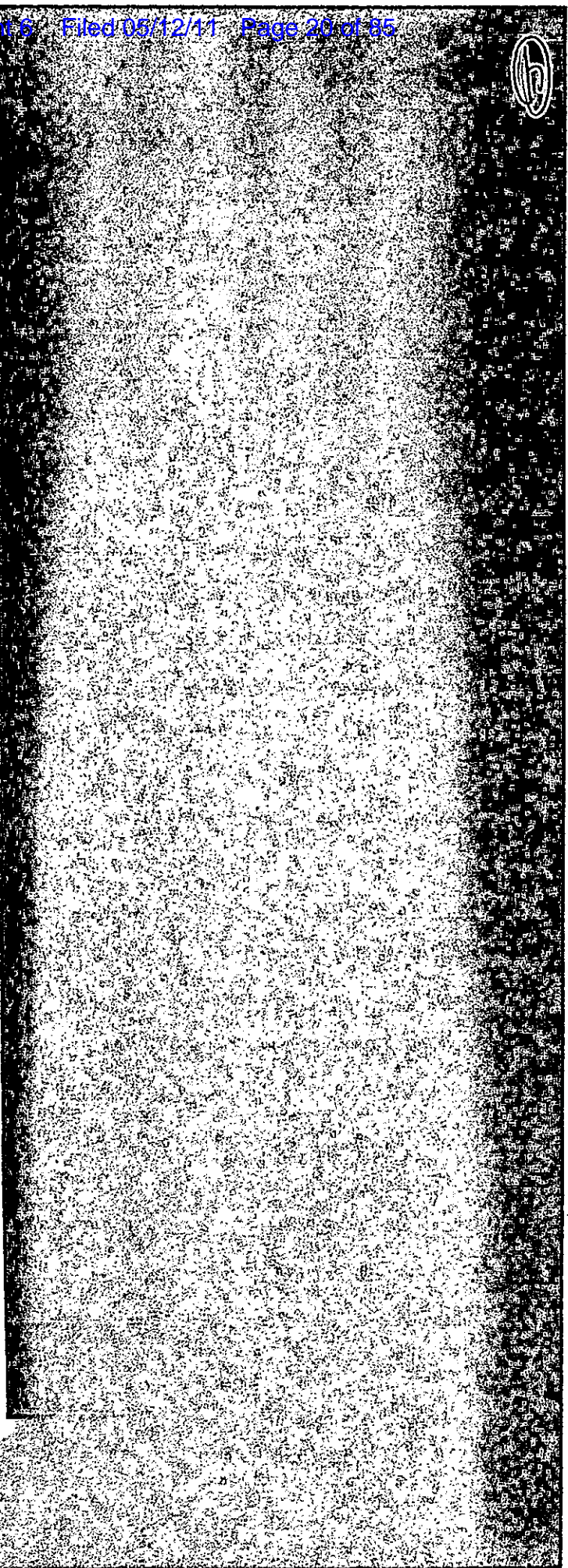
ID No. 83651 Institution ESP

Approved by [Redacted]

Transfer	Purchase Order	Postage	Other
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White Inmate Services
Canary Institution Copy
Pink Inmate Copy

DOC 509 (Rev. 2/06)



Matthew Tjelveit #53651
ISP
P.O. Box 1989
Reno, NV 89301

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Clerk, U.S. District Court
District of Nevada
400 S. Virginia St. Room:301
Reno, NV 89501

Confidential

Legal Mail



ELY STATE PRISON

MAY 15 2008

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Handwritten: 2008

Handwritten: 7:00 PM

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Legal Mail

ELY STATE PRISON

MAY 16 2008

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Handwritten: Inspected by F.D. [unclear] 5/14/08

Account/Inmate: 83651 Last: TJELTVEIT First: MATTHEW STS: J
 Institution: ESP Effective Date: 7/10/2007 Unit: 6 Cell: 28
 Mail Add1: Wing: A Bed: B
 Add2: Add3:
 City: St: Zip:

Type options, press Enter.

5=Display 7=Freeze

Sel	Fund	Description	Fund Balance	Frozen Y/N	Typ
-	TRUST	TRUST FUND	2.75	N	T
-	TRUS2	SECOND TRUST FUND	17.45	N	T
-	DEPT	DEPARTMENT CHARGES FUND	.00	N	D
-	SAVE	SAVINGS FUND	163.74	N	S

ORIGINAL

Proves I had the funds
to send out a \$5.00 Filing
fee!

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BOARD OF COMMISSIONERS
JIM GIBBONS
Governor
CATHERINE CORTEZ MASTO
Attorney General
ROSS MILLER
Secretary of State



STATE OF NEVADA DEPARTMENT OF CORRECTIONS



HOWARD SKOLNIK
Director

Northern Administration
P.O. Box 7011 Carson City, NV 89702
Phone: (775) 887-3316 Fax: (775) 887-3361

Support Services
Inmate Banking

6A28

MEMO

Date: 6/4/2008

To: Law Library Supervisor

From: Inmate Banking Services

A28

Re: U.S. District Court Brass Slip/s

Inmate: Matthew Tjeltveit Back # 83651 Institution ESP

The enclosed brass slip is being returned for the following reason(s):

The inmate does not have sufficient funds to process this brass slip. *Trust 2.75*

Brass slip must have approval signature by an authorized institutional personnel. Please sign and return to Inmate Banking Services.

The inmate did not attach a properly addressed and/or stamped envelope to forward to the court.

Other: _____

Copy

Inmate Banking Services

ORIGINAL

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UNITED STATES
U.S. District Court
District of Nevada
Northern Division

* 70020686 - DM
June 26, 2008

Code	Case #	Qty	Amount
WRIT H/C	08-54v	1 @	5.00
DS CR			5.
TOTAL +			10.00

COPY

FROM: JULIA KIM SALES
124 E 13TH ST #10
LONG BEACH, CA 90803

COPY

COPY

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

US District Court
District of NV
400 S. Virginia St
Room 301
Reno, NV 89501

2. Article Number

(Transfer from service label)

7008 0500 0000 1288 5172

PS Form 3811, February 2004

Domestic Return Receipt

102585-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *Jam McDonald*

Agent
 Addressee

B. Received by (Printed Name)

MAY 26 2008

D. Is delivery address different from item 17
If YES, enter delivery address below: Yes No

3. Service Type

Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

Julia Ann Sales
 Louis S. Sales
 124 E. 12th St 10
 Long Beach, CA 90813

90-3986/1222
 BRANCH 40342

6-23-2008 Date

\$ 5.00

Dollars

Pay to the order of U.S. District CAT, District of NY

Five dollars and ⁰⁰/₁₀₀

BANCO POPULAR
 BANCO POPULAR NORTH AMERICA
 151 EAST 5TH STREET
 LONG BEACH, CA 90802

For DEPOSIT 3:08 -CV-00054 -LRH-VPC

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SECURITY FEATURES Details on Back

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MATTHEW TJELTVEIT,)	
)	
Petitioner,)	3:08-cv-00054-LRH-VPC
)	
vs.)	<u>ORDER</u>
)	
E.K. MCDANIEL, <i>et al.</i> ,)	
)	
Respondents.)	

This action is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by petitioner Matthew Tjeltveit, a Nevada prisoner. This Court previously ordered the petitioner to show cause why the instant petition for writ of habeas corpus should not be dismissed, as it appeared that petitioner’s claims were unexhausted (docket #7). Petitioner has not responded to this Court’s order and has not shown that his claims are exhausted, therefore the Court will dismiss the petition without prejudice.

A state prisoner must exhaust all available state remedies prior to filing a federal habeas corpus petition. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982). The state courts must be given a fair opportunity to act on each claim before those claims are presented in a habeas petition to the federal district court. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). Furthermore, a claim will remain unexhausted until a petitioner has sought review from the highest available state court through direct appeal or collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004). A habeas petitioner must “present the state courts with the same claim he urges upon the federal court” in order to allow a state court to correct violations of federal rights. *Picard v. Connor*,

6

1 404 U.S. 270, 276 (1971); *Duncan v. Henry*, 513 U.S. 364, 365 (1995).

2 According to items 3 and 4 of the petition, petitioner did appeal from his conviction, however
3 the appeal was dismissed without a chance to raise any issues, and petitioner did not seek state post-
4 conviction relief. *See also* pages 4, 6, and 8 of the petition (admitting failure to exhaust grounds for
5 relief). From the face of the petition, therefore, petitioner has admitted that his claims for relief have
6 not yet been exhausted in state court. As all of petitioner's claims remain unexhausted, the petition
7 will be dismissed without prejudice. *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006)
8 (finding that a court need not hold a petition in abeyance pending exhaustion if the petition contains
9 only unexhausted claims).

10 Furthermore, the Court will deny petitioner a certificate of appealability. In order to proceed
11 with an appeal from this court, petitioner must receive a certificate of appealability. 28 U.S.C. §
12 2253(c)(1). Generally, a petitioner must make "a substantial showing of the denial of a
13 constitutional right" to warrant a certificate of appealability. *Id.* The Supreme Court has held that a
14 petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the
15 constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

16 Where a court has dismissed a petitioner's habeas corpus petition on procedural grounds,
17 however, the determination of whether a certificate of appealability issues becomes a two-part test.
18 The Supreme Court has stated that under such circumstances:

19 A COA should issue when the prisoner shows...that jurists of reason
20 would find it debatable whether the petition states a valid claim of the
21 denial of a constitutional right and that jurists of reason would find it
22 debatable whether the district court was correct in its procedural ruling.

23 *Id.* *See also Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). Therefore, in order to obtain a
24 COA in cases dismissed on procedural grounds, petitioner has the burden of demonstrating both that
25 he was denied a valid constitutional right *and* that jurists of reason would find it debatable whether
26 the court's procedural ruling was correct. In cases where there is a plain procedural bar to a
27 petitioner's claims and the district court is correct to invoke that procedural bar to dispose of the
28 case, "a reasonable jurist could not conclude either that the district court erred in dismissing the

1 petition or that the petitioner should be allowed to proceed further.” *Slack*, 529 U.S. at 484.

2 In the present case, petitioner’s habeas petition is being dismissed without prejudice as the
3 petition contains only unexhausted claims. No reasonable jurist could conclude that this Court’s
4 procedural ruling was in error. Petitioner is not entitled to a certificate of appealability.

5 **IT IS THEREFORE ORDERED** that the petition (docket #8) is **DISMISSED WITHOUT**
6 **PREJUDICE.**

7 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**
8 **ACCORDINGLY.**

9 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of appealability.

10 DATED this 28th day of April, 2009.

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14 LARRY R. HICKS
15 UNITED STATES DISTRICT JUDGE
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Case No. CR-0592796

Dept. No. 10

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HOWARD W. CONYERS

BY C. Galindo

DEPUTY

IN THE Second JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Washoe

Matthew J. Tjeltveit
Petitioner,

v.

E. K. McDaniel
Respondent.

**PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)**

INSTRUCTIONS:

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

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COPY

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

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison in White Pine county.

2. Name and location of court which entered the judgment of conviction under attack: Second Judicial District Court of the State of Nevada in and for the County of Washoe, in Reno, Nevada

3. Date of judgment of conviction: 6-7-07

4. Case number: CR05-2796

5. (a) Length of sentence: Life with possibility of parole after 20 years w/like sentence consecutive for use of Elicom.

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

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

7. Nature of offense involved in conviction being challenged: Murder in the First degree.

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

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

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

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

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

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

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: 50518

(c) Result: Dismissed

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JAMES TJELTVEIT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50518

FILED

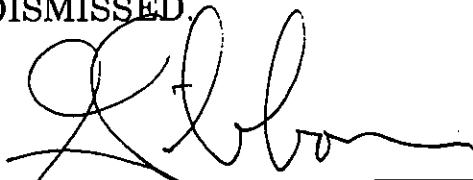
ORDER DISMISSING APPEAL

DEC 27 2007
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

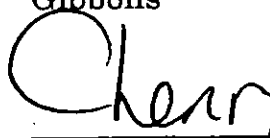
This is a proper person appeal from a judgment of conviction. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

This court's preliminary review of this appeal reveals a jurisdictional defect. Specifically, the district court entered the judgment of conviction on June 7, 2007. Appellant did not file the notice of appeal, however, until November 7, 2007, well after the expiration of the thirty-day appeal period prescribed by NRAP 4(b). An untimely notice of appeal fails to vest jurisdiction in this court.¹ Accordingly, we conclude that we lack jurisdiction to consider this appeal, and we

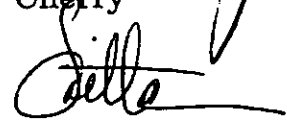
ORDER this appeal DISMISSED.



Gibbons J.



Cherry J.



Saitta J.

¹See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

cc: Hon. Steven P. Elliott, District Judge
Matthew James Tjeltveit
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

(d) Date of result: 12-27-07
(Attach copy of order or decision, if available.)

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

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

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

(a)(1) Name of court: United States District Court
(2) Nature of proceeding: Habeas Corpus

(3) Grounds raised: Procedural Violations, ineffective assistance of counsel, and procedural prejudice.

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

(5) Result: Notice that state relief options have not been exhausted.

(6) Date of result: 6-30-09

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

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

(1) Name of court: Second Judicial District Court of Nevada
(2) Nature of proceeding: Pre-trial Petition for writ of Habeas Corpus

(3) Grounds raised: Procedural Violations, procedural prejudice, and ineffective assistance of counsel.

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

(5) Result: petition was ignored by the court

(6) Date of result: _____

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

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

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

(1) First petition, application or motion? Yes No
Citation or date of decision: _____

(2) Second petition, application or motion? Yes No
Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes No
Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) I have no attorney, and have proceeded as advised by the Ely State Prison Law Library clerk.

(a) Ground One: Ineffective assistance of Counsel

Supporting FACTS (Tell your story briefly without citing cases or law.): I requested that my attorney, John Calvert, appeal my conviction, and he agreed, but did not appeal. Furthermore John Calvert did not argue my case, or object to any statements made by the DA, he also made minimal effort to discuss my case with me pretrial, and I was not notified of any plea agreements, yet dates were made for them in court.

(b) Ground Two: Procedural Violations

Supporting FACTS (Tell your story briefly without citing cases or law.): I was arrested and charged with a criminal complaint, then without dismissing the complaint the DA pursued, gained, and recharged me with a grand jury indictment

(c) Ground Three: Procedural prejudice

Supporting FACTS (Tell your story briefly without citing cases or law.): I filed a pre-trial petition for writ of Habeas corpus on 11-9-06, and it was ignored, I never heard from the court on response to this pre-trial petition.

(d) Ground Four: Procedural Violations

Supporting FACTS (Tell your story briefly without citing cases or law.): I Was never given a psychological evaluation to determine competency.

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

EXECUTED at Ely State Prison, on the 17 day of the month of July of the year 2008.



Signature of petitioner

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

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

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



Petitioner

Attorney for petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Petition for Writ of Habeas Corpus
(Title of Document)

filed in District Court Case No. CR 05-2796

Does not contain the social security number of any person.

-OR-

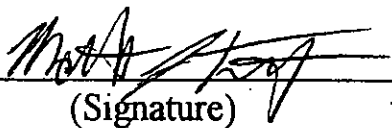
Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.


(Signature)

7-17-08
(Date)

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MATTHEW TJELTVEIT,)	
)	
Petitioner,)	3:08-cv-00054-LRH-VPC
)	
vs.)	<u>ORDER</u>
)	
E.K. MCDANIEL, <i>et al.</i> ,)	
)	
Respondents.)	

Matthew Tjeltveit., a Nevada prisoner, has filed a pro se petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 (attached at docket #1) and has paid the appropriate filing fee (docket #5). The petition will be ordered filed, docketed and served upon the respondents, however, the respondents will not yet be required to respond to it.

It appears to the Court that the grounds for relief in the petition are currently unexhausted in state court. Petitioner is advised that he must first present his grounds for relief to a state court before a federal court may review the merits of the issues he raises. To exhaust a claim, petitioner must have "fairly presented" that specific claim to the Supreme Court of Nevada. *See Picard v. Conner*, 404 U.S. 270,275-76 (1971); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984). A federal court cannot hear a mixed petition that contains both exhausted and unexhausted claims for habeas corpus relief. *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). After reviewing the petition in this case, it appears to the Court that all of petitioner's claims may be unexhausted.

According to items 3 and 4 of the petition, petitioner did appeal from his conviction, however

1 the appeal was dismissed without a chance to raise any issues, and petitioner did not seek state post-
2 conviction relief. *See also* pages 4, 6, and 8 of the petition (admitting failure to exhaust grounds for
3 relief). From the face of the petition, therefore, petitioner has admitted that his claims for relief have
4 not yet been exhausted in state court. If this information is inaccurate, then petitioner should file an
5 amended petition showing when and how he exhausted his stated grounds for relief.

6 **IT IS THEREFORE ORDERED** that the Clerk shall **FILE AND DOCKET** the petition
7 for writ of habeas corpus (attached at docket #1).

8 **IT IS FURTHER ORDERED** that the Clerk shall **SERVE** a copy of the petition for writ of
9 habeas corpus (and a copy of this order) upon respondents by certified mail. Respondents shall not
10 answer or otherwise respond to the petition until further order of the Court.

11 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** in which to file an
12 amended petition showing when and how he exhausted the stated grounds for relief. Petitioner's
13 failure to comply in a timely manner will result in the dismissal of his petition. Petitioner is advised
14 that the Court must dismiss the within petition if petitioner is unable to demonstrate how and when
15 he fully exhausted all claims for relief in his petition.

16 DATED this 27th day of June, 2008.

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20 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case #

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

MATTHEW TJELTVEIT,

Petitioner,

V.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 3:08-cv-00054-LRH-VPC

E.K. MCDANIEL, et al.,

Respondents.

 Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

 Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

 X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the #8 petition is DISMISSED WITHOUT PREJUDICE. IT IS FURTHER ORDERED that petitioner is DENIED a certificate of appealability.

April 28, 2009

LANCE S. WILSON

Clerk

/s/ Kalani Lizares

Deputy Clerk

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Clerk of the Court
Transaction # 1303233

1 Code: **2922**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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IN AND FOR THE COUNTY OF WASHOE

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* * *

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MATTHEW JAMES TJELTVEIT,

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Petitioner,

Case No.: CR05P2796

11

vs.

Dept. No.: 10

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E.L. McDANIEL, WARDEN,

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Respondent.

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**ORDER GRANTING MOTION TO DISMISS PETITION AND SUPPLEMENTAL
PETITION FOR WRIT OF HABEAS CORPUS (POST-COINVICTION)**

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18

Presently before the Court is a Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed by Respondent STATE OF NEVADA (hereafter "Respondent") on January 5, 2010. Following, on January 12, 2010, Petitioner MATTHEW JAMES TJELTVEIT (hereafter "Petitioner") filed an Opposition to Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Subsequently, on January 19, 2010, Respondent filed a Reply to Opposition to Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Contemporaneously with its Reply, Respondent filed a Request for Submission, submitting the matter for the Court's consideration.

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As part of its Motion to Dismiss, Respondent argues that the Court should dismiss Petitioner's Petition because Petitioner failed to timely file said Petition. In his Opposition

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1 to Respondent's Motion to Dismiss, Petitioner contends that although he filed his Petition
2 late, pursuant to NRS 43.726(1), he had good cause for his delay, and therefore, dismissal
3 is not warranted.

4 According to the record before the Court, on June 7, 2007, this Court convicted
5 Petitioner, pursuant to a jury verdict, of first-degree murder with the use of a firearm.
6 Thereafter, on November 7, 2007, Petitioner filed a Notice of Appeal, which the Nevada
7 Supreme Court dismissed on December 27, 2007. Following, on January 22, 2008, the
8 Supreme Court issued its remittitur. Subsequently, on August 5, 2008, Petitioner filed a
9 post-conviction petition for writ of habeas corpus.

10 A petition for writ of habeas corpus (post-conviction) must be filed within one year
11 after entry of the judgment of conviction or, if an appeal is taken, within one year after the
12 issuance of remittitur. NRS 34.726(1). However, when an appeal is taken, the one-year
13 period to file begins to run from the issuance of remittitur only when then direct appeal is
14 filed timely. *See Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).
15 Furthermore, if the petitioner's petition is untimely, it is procedurally barred and must be
16 dismissed absent a showing of good cause. NRS 34.726(1), NRS 34.810

17 In making a showing of good cause, a petitioner must demonstrate that the delay
18 was through no fault of his own and that dismissal of the petition as untimely would unduly
19 prejudice petitioner. NRS 34.726(1). The statement of good cause must appear on the
20 face of the petition. NRS 34.735 (requiring a petitioner to state the reason for filing an
21 untimely petition in the petition itself). Furthermore, the statement of good cause must
22 allege specific facts that demonstrate the delay was not the fault of petitioner. *See*
23 *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2007); *see also Thomas v.*
24 *State*, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004) (stating that "a petitioner for post-
25 conviction relief is entitled to an evidentiary hearing only if he supports his claims with
26 specific factual allegations that if true would entitle him to relief"). It is the petitioner who
27 bears the burden of establishing the factual allegations in support of his petition. *Id.*

28 ///

1 A petitioner may establish good cause by showing that he reasonably believed his
2 counsel timely filed an appeal and that the petitioner filed a habeas corpus petition within a
3 reasonable time after learning that a direct appeal had not been filed. *Hathaway*, 119 Nev.
4 at 255, 71 P.3d at 508.

5 In the present matter, it is undisputed that Petitioner failed to file timely, his direct
6 appeal with the Nevada Supreme Court. As such, the time Petitioner had to file his Petition
7 for Habeas Corpus (Post-Conviction) was one year from the date this Court entered its
8 judgment of conviction. NRS 34.726(1). Furthermore, it is undisputed that Petitioner
9 failed to file his Petition for Writ of Habeas Corpus (Post-Conviction) within one year
10 following this Court's entry of the judgment of conviction. Therefore, Petitioner's Petition
11 for Writ of Habeas Corpus was untimely absent a showing of good cause. *Id.*

12 Upon examination by the Court, the Court does not believe Petitioner plead
13 sufficient facts that would permit this Court to make a determination as to the existence of
14 good cause regarding Petitioner's delay. Specifically, Petitioner never specified when he
15 attempted to contact his counsel, nor when and how Petitioner first learned his counsel
16 failed to file timely a direct appeal. Without knowledge of this information, the Court
17 cannot determine whether Petitioner's delay in filing his Petition was reasonable.

18 Furthermore, based on the record before the Court, Petitioner was notified by the
19 Supreme Court on December 27, 2007, that his direct appeal was rejected. Therefore,
20 Petitioner still had more than five months to file timely his Petition for Writ of Habeas
21 Corpus (Post-Conviction). However, Petitioner did not file his Petition until more than
22 seven months following the Supreme Court's dismissal of Petitioner's appeal. Given this
23 time period, even if an unlawful impediment prevented Petitioner from timely filing a direct
24 appeal, the Court does not believe that such an impediment affected Petitioner's ability to
25 file timely his Petition. *See Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1060 (9th
26 Cir. 2007).

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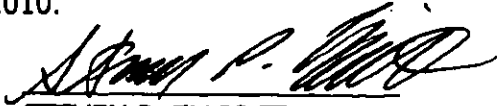
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NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) is **GRANTED**.

IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) is **DISMISSED**.

IT IS FINALLY ORDERED that Petitioner's Supplement to Petition for Writ of Habeas Corpus is **DISMISSED**.

DATED this 4 day of February, 2010.


STEVEN P. ELLIOTT
District Judge

CERTIFICATE OF MAILING

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

AZIZ MERCHANT, ESQ. for MATTHEW TJELTVEIT
JOSEPH PLATER, III, ESQ. for STATE OF NEVADA

DATED this 4 day of February, 2010.



HEIDI HOWDEN
Judicial Assistant

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HOWARD W. CONYERS

BY *[Signature]*
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MATTHEW JAMES TJELTVEIT,

Petitioner,

CASE NO: CR05P2796

VS.

DEPT. NO.: 10

THE STATE OF NEVADA,

Respondent,

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on February 4, 2010 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 the 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 the 24th day of March, 2010.

HOWARD W. CONYERS

Clerk of the Court

By *[Signature]*

Deputy Clerk

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Howard W. Conyers
Clerk of the Court
Transaction # 1303233

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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IN AND FOR THE COUNTY OF WASHOE

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MATTHEW JAMES TJELTVEIT,

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Petitioner,

Case No.: CR05P2796

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vs.

Dept. No.: 10

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E.L. McDANIEL, WARDEN,

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Respondent.

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**ORDER GRANTING MOTION TO DISMISS PETITION AND SUPPLEMENTAL
PETITION FOR WRIT OF HABEAS CORPUS (POST-COINVICTION)**

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As part of its Motion to Dismiss, Respondent argues that the Court should dismiss Petitioner's Petition because Petitioner failed to timely file said Petition. In his Opposition

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1 to Respondent's Motion to Dismiss, Petitioner contends that although he filed his Petition
2 late, pursuant to NRS 43.726(1), he had good cause for his delay, and therefore, dismissal
3 is not warranted.

4 According to the record before the Court, on June 7, 2007, this Court convicted
5 Petitioner, pursuant to a jury verdict, of first-degree murder with the use of a firearm.
6 Thereafter, on November 7, 2007, Petitioner filed a Notice of Appeal, which the Nevada
7 Supreme Court dismissed on December 27, 2007. Following, on January 22, 2008, the
8 Supreme Court issued its remittitur. Subsequently, on August 5, 2008, Petitioner filed a
9 post-conviction petition for writ of habeas corpus.

10 A petition for writ of habeas corpus (post-conviction) must be filed within one year
11 after entry of the judgment of conviction or, if an appeal is taken, within one year after the
12 issuance of remittitur. NRS 34.726(1). However, when an appeal is taken, the one-year
13 period to file begins to run from the issuance of remittitur only when then direct appeal is
14 filed timely. See *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132; 1133-34 (1998).
15 Furthermore, if the petitioner's petition is untimely, it is procedurally barred and must be
16 dismissed absent a showing of good cause. NRS 34.726(1), NRS 34.810

17 In making a showing of good cause, a petitioner must demonstrate that the delay
18 was through no fault of his own and that dismissal of the petition as untimely would unduly
19 prejudice petitioner. NRS 34.726(1). The statement of good cause must appear on the
20 face of the petition. NRS 34.735 (requiring a petitioner to state the reason for filing an
21 untimely petition in the petition itself). Furthermore, the statement of good cause must
22 allege specific facts that demonstrate the delay was not the fault of petitioner. See
23 *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2007); see also *Thomas v.*
24 *State*, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004) (stating that "a petitioner for post-
25 conviction relief is entitled to an evidentiary hearing only if he supports his claims with
26 specific factual allegations that if true would entitle him to relief"). It is the petitioner who
27 bears the burden of establishing the factual allegations in support of his petition. *Id.*

28 ///

1 A petitioner may establish good cause by showing that he reasonably believed his
2 counsel timely filed an appeal and that the petitioner filed a habeas corpus petition within a
3 reasonable time after learning that a direct appeal had not been filed. *Hathaway*, 119 Nev.
4 at 255, 71 P.3d at 508.

5 In the present matter, it is undisputed that Petitioner failed to file timely, his direct
6 appeal with the Nevada Supreme Court. As such, the time Petitioner had to file his Petition
7 for Habeas Corpus (Post-Conviction) was one year from the date this Court entered its
8 judgment of conviction. NRS 34.726(1). Furthermore, it is undisputed that Petitioner
9 failed to file his Petition for Writ of Habeas Corpus (Post-Conviction) within one year
10 following this Court's entry of the judgment of conviction. Therefore, Petitioner's Petition
11 for Writ of Habeas Corpus was untimely absent a showing of good cause. *Id.*

12 Upon examination by the Court, the Court does not believe Petitioner plead
13 sufficient facts that would permit this Court to make a determination as to the existence of
14 good cause regarding Petitioner's delay. Specifically, Petitioner never specified when he
15 attempted to contact his counsel, nor when and how Petitioner first learned his counsel
16 failed to file timely a direct appeal. Without knowledge of this information, the Court
17 cannot determine whether Petitioner's delay in filing his Petition was reasonable.

18 Furthermore, based on the record before the Court, Petitioner was notified by the
19 Supreme Court on December 27, 2007, that his direct appeal was rejected. Therefore,
20 Petitioner still had more than five months to file timely his Petition for Writ of Habeas
21 Corpus (Post-Conviction). However, Petitioner did not file his Petition until more than
22 seven months following the Supreme Court's dismissal of Petitioner's appeal. Given this
23 time period, even if an unlawful impediment prevented Petitioner from timely filing a direct
24 appeal, the Court does not believe that such an impediment affected Petitioner's ability to
25 file timely his Petition. *See Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1060 (9th
26 Cir. 2007).

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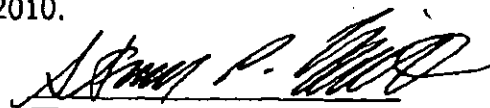
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NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) is **GRANTED**.

IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) is **DISMISSED**.

IT IS FINALLY ORDERED that Petitioner's Supplement to Petition for Writ of Habeas Corpus is **DISMISSED**.

DATED this 4 day of February, 2010.

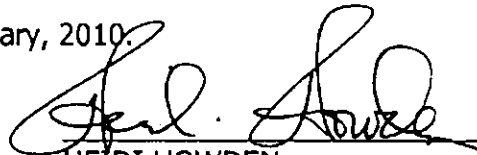

STEVEN P. ELLIOTT
District Judge

CERTIFICATE OF MAILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

AZIZ MERCHANT, ESQ. for MATTHEW TJELTVEIT
JOSEPH PLATER, III, ESQ. for STATE OF NEVADA

DATED this 4 day of February, 2010.


HEIDI HOWDEN
Judicial Assistant

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CERTIFICATE OF SERVICE

Case No. CR05P2796

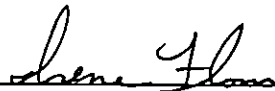
Pursuant to NRCP 5 (b), I certify that I am an employee of the Second Judicial District Court, and that on the 24th day of March, 2010, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the attached document, addresses to:

WASHOE COUNTY DISTRICT
ATTORNEY'S OFFICE
APPELLATE DIVISION
(Inter-office mail)

ATTORNEY GENERAL'S OFFICE
100 N. CARSON STREET
CARSON CITY, NV 89701-4717

MATTHEW JAMES TJELTVEIT, #83651
ELY STATE PRISON
P.O. BOX 1989
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AZIZ N. MERCHANT, ESQ.
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Irene Flores
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7 Fax: 775-337-8401
8 Attorney for Petitioner Matthew James Tjeltveit

9
10
11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
12
13 IN AND FOR THE COUNTY OF WASHOE
14
15

16 MATTHEW JAMES TJELTVEIT, Case No.: CR05P2796
17 Dept: 10

18
19 Petitioner,

20 vs.

21 E.K. MCDANIEL, WARDEN,
22 ELY STATE PRISON, and;
23 THE STATE OF NEVADA,
24 Respondents.

25
26 NOTICE OF APPEAL

27 Notice is hereby given that Matthew James Tjeltveit, petitioner above-named, hereby
28 appeals to the Supreme Court of Nevada from an Order granting the State's motion to dismiss his
post-conviction petition on February 4, 2010. Notice of entry of the court's order was served by
the district court clerk pursuant to NRS 34.575 and NRS 34.830 on March 24, 2010.

Affirmation Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the
social security number of any person.

1 Dated: April 6, 2010

2 X/s/ Aziz N. Merchant
3 Aziz N. Merchant, Esq.
4 Nevada Bar No.: 10148
5 Merchant Law Firm, Ltd.
6 100 N. Arlington Ave., Suite 290
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8 Ph: 775-337-8400
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10 Certificate of Service

11 I hereby certify that on 4/6/2010, I electronically filed the foregoing with the Clerk of the
12 Court by using the ECF system which will send a notice of electronic filing to the following:

13 JOSEPH PLATER, ESQ. for STATE OF NEVADA
14 AZIZ MERCHANT, ESQ. for SHAWN MICHAEL THOMAS

15 Hard Copy mailed to:

16 Ely State Prison
17 Attn: Matthew Tjeltveit
18 Inmate # 83651
19 PO BOX 1989
20 Ely, NV 89301

21 April 6, 2010

22 /S/Aziz N. Merchant, Esq.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 55773

MATTHEW JAMES TJELTVEIT,
APPELLANT,

VS.

E.K. MCDANIEL, WARDEN, ELY STATE
PRISON; AND THE STATE OF NEVADA
RESPONDENTS.

APPELLANT'S OPENING BRIEF

APPEAL FROM A DENIAL OF A POST-CONVICTION PETITION

*Second Judicial District
State of Nevada
The Honorable Steven P. Elliott Presiding*

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12 his procedural default for filing his post-conviction petition about two-months late

13 when Matthew properly pled good cause for the delay under NRS 34.726(1) on the

14 face of his petition and supplemental petition in that he reasonably believed his counsel

15 had filed an appeal on his behalf and Matthew did in fact file his habeas corpus petition

16 within a reasonable time after learning that his counsel had not filed a direct appeal.... 5

17

18 B. The district court erred in dismissing Matthew’s claim that his trial counsel

19 Calvert’s decision to pursue a self-defense theory of the case fell below an objective

20 standard of reasonableness that prejudiced Matthew in violation of his right to effective

21 assistance counsel under the federal constitution’s 5th, 6th, 8th and 14th amendments. ... 9

22

23 C. Matthew’s trial counsel Calvert’s failure to ask for a jury instruction on when

24 Matthew formed the requisite intent to commit the alleged robbery of the victim fell

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1 JURISDICTIONAL STATEMENT

2 This is an appeal from a denial of a post-conviction petition. The district court
3 clerk served notice of entry of the district court's order on March 24, 2010. V2 JA 450.¹
4 A notice of appeal was timely filed on April 6, 2010. V2 JA 457. This Court has
5 jurisdiction pursuant to NRAP 4(b) and NRS 34.575(1).
6

7
8 STATEMENT OF THE ISSUES

- 9 1. Did the district court err in ruling that Matthew did not plead good cause to excuse
10 his procedural default for filing his post-conviction petition about two-months late
11 when Matthew properly pled good cause for the delay under NRS 34.726(1) on the
12 face of his petition and supplemental petition in that he reasonably believed his
13 counsel had filed an appeal on his behalf and Matthew did in fact file his habeas
14 corpus petition within a reasonable time after learning that his counsel had not
15 filed a direct appeal?
- 16 2. Did the district court err in dismissing Matthew's claim that his trial counsel
17 Calvert's decision to pursue a self-defense theory of the case fell below an
18 objective standard of reasonableness that prejudiced Matthew in violation of his
19 right to effective assistance counsel under the federal constitution's 5th, 6th, 8th
20 and 14th amendments?
- 21 3. Did Matthew's trial counsel Calvert's failure to ask for a jury instruction on when
22 Matthew formed the requisite intent to commit the alleged robbery of the victim
23 fell below an objective standard of reasonableness that prejudiced Matthew in
24 violation of his right to effective assistance counsel under the federal
25 constitution's 5th, 6th, 8th and 14th amendments?
- 26 4. Does Matthew have a valid appeal deprivation claim under Nevada Rules of
27 Appellate Procedure 4(c) that went into effect July 1, 2009?

28

¹ V stands for Volume and JA stands for Joint Appendix.

1
2 STATEMENT OF THE CASE

3 This is an appeal from a denial of a post-conviction petition. The district court
4 convicted the petitioner Matthew James Tjeltveit (Matthew) pursuant to jury verdict of
5 first-degree murder with the use of a firearm on June 7, 2008. V2 JA 386. Matthew was
6 sentenced to life with the possibility of parole after 20-years with an equal consecutive
7 term for use of a firearm. Id. Matthew's trial counsel John Calvert (Calvert) thereafter
8 failed to file an appeal as promised. V2 JA 403, 419. Matthew then filed an untimely
9 *pro per* notice of appeal on November 7, 2007 that this Court dismissed on December 27,
10 2007. V2 JA 388, 392. Matthew then filed a *pro per* habeas petition on August 5, 2008.
11 V1 JA 397. Counsel was appointed who filed a supplement. V2 JA 410, 413. The State
12 moved to dismiss the petition, Matthew opposed and the State replied to the opposition.
13 V2 JA 423, 430, 437. The district court then dismissed the petition as procedurally
14 defaulted without considering the merits of Matthew's claims. V2 JA 445. Notice of
15 entry of order was served on March 24, 2010. V2 JA 450. This timely appeal followed.
16 V2 JA 457.

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22 STATEMENT OF THE FACTS

23 Matthew was charged by indictment with murder with the use of a firearm on
24 December 7, 2005. V1 JA 1. Attorney Calvert represented Matthew during trial. V1 JA
25 5. During trial the State produced five separate witnesses, all of whom recounted to the
26 jury that Matthew admitted to shooting the victim after the victim threatened to chop his
27 son up into little pieces and mail him to Matthew. V1 JA 78-79, 85. (Ashlee Reedy,
28

1 friend of Matthew), V1 JA 110, 112, 114 (Jason Holder, friend of Matthew), V1 JA 192-
2 193, 196-197. (Krystal Gari, former live-in girlfriend with Matthew and had son
3 together), V1 JA 208-209. (Krista Gaddis, acquaintance and on friendly terms with
4 Matthew), and V1 JA 214, 216-218, (Breanne Cambra, formerly engaged to Matthew and
5 still has feelings for Matthew). Jason Holder, a friend of Matthew, testified in the most
6 blunt terms, stating that Matthew told him that he “fucked up” and “snapped” and that the
7 victim was dead. V1 JA 114. Matthew first called his friend Jason Holder, who was with
8 his girlfriend Ashlee Reedy, after the killing. Ashlee Reedy initially picked up the phone
9 in the early morning hours immediately after the killing and noted Matthew’s panicked,
10 stressed-out, nervous and scared voice. V1 JA 81-82. The State asked Ashlee Reedy, to
11 whom Matthew confided immediately after the killing: “Q: So it was in response to that
12 statement by [the victim] about the defendant’s children and cutting them into pieces and
13 sending them to him, according to the defendant, that caused him to react and shoot the
14 victim in the head. Ashlee answered “A: Correct.” V1 JA 88. The State never
15 attempted in their case-in-chief to impeach any witness that presented Matthew as having
16 only shot the victim in reaction to the victim’s threat against Matthew’s son. Instead, the
17 State focused on showing the jury that Matthew in fact did kill the victim in reaction to a
18 threat against Matthew’s son and presented witnesses consistent with that theory. See
19 generally, V1 JA 8-229, V2 JA 230-269. Matthew also testified and did not deny killing
20 the victim. V2 JA 237. Matthew also never disputed that he was in possession of the
21 victim’s possessions such as his car after the victim’s death. V2 JA 242.
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1 When settling jury instructions, the prosecutor submitted a felony murder jury
2 instruction that failed to define attempted robbery as alleged in the State's indictment.
3 V2 JA 358. Matthew's trial attorney Calvert did not object to any jury instructions and
4 did not object specifically to the felony murder jury instruction. V2 JA 276-277. A self-
5 defense jury instruction was also submitted to the jury despite the lack of any evidence.
6
7 V2 JA 367-368

8 Matthew was convicted pursuant to jury verdict of first-degree murder with the
9 use of a firearm on June 7, 2007. V2 JA 386. Matthew's trial attorney Calvert agreed to
10 file Matthew's appeal but did not. Matthew attempted but was unable to contact his
11 attorney through collect calls and letters sentencing. V2 JA 403, 419. Matthew then filed
12 an untimely *pro per* notice of appeal that this Court dismissed on December 27, 2007.
13
14 V2 JA 388, 392. Matthew then filed a habeas petition on August 5, 2008, about two-
15 months past the timely one-year deadline contained in NRS 34.726(1). The Court
16 appointed counsel, who argued in a supplement that Matthew had pled good cause to
17 overcome his procedural default in compliance with Hathaway v. State, 119 Nev. 248, 71
18 P.3d 503 (2003), based upon an appeal deprivation claim. V2 JA 410, 419. Matthew
19 also argued that trial counsel Calvert was ineffective and prejudicial for arguing his case
20 as self-defense as opposed to voluntary manslaughter, for failing to request a jury
21 instruction on when Matthew formed the intent to rob the victim and finally, for
22 unlawfully depriving Matthew of a direct appeal pursuant to NRAP 4(c). V2 JA 413-
23 422. The State filed a motion to dismiss with Matthew opposing. The State replied. V2
24 JA 423, 430,437. The district court then dismissed the petition as procedurally barred
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1 and did not consider any of Matthew's claims on the merits. This timely appeal
2 followed. V2 JA 457.

3
4 SUMMARY OF THE ARGUMENT

5 The district court erred in dismissing Matthew's petition as procedurally defaulted
6 because he filed his petition about two-months late. Matthew pled a valid appeal
7 deprivation claim in compliance with Hathaway v. State, 119 Nev. 248, 71 P.3d 503
8 (2003) to excuse his procedural default alleging that his attorney agreed but failed to file
9 a direct appeal. V2 JA 403, 419. Matthew then filed a habeas petition about two-months
10 late, far sooner than the petitioner in Hathaway, who filed his petition over a year past the
11 deadline for filing a timely habeas petition. The district court likewise erred in failing to
12 consider Matthew petition on the merits, which alleged several theories of prejudicial
13 ineffective assistance of counsel and a valid appeal deprivation claim under NRAP 4(c).
14 Matthew's trial attorney Calvert was ineffective for pursuing a self-defense theory of the
15 case when he should have pursued a voluntary manslaughter theory. At trial, the State
16 produced five witnesses who testified that Matthew impulsively shot the victim in
17 reaction to his threat to chop up Matthew's son into little pieces and mail his son to him.
18 V1 JA 78-79, 85. (Ashlee Reedy, friend of Matthew), V1 JA 110, 112, 114 (Jason
19 Holder, friend of Matthew), V1 JA 192-193, 196-197. (Krystal Gari, former live-in
20 girlfriend with Matthew and had son together), V1 JA 208-209. (Krista Gaddis,
21 acquaintance and on friendly terms with Matthew), and V1 JA 214, 216-218, (Breanne
22 Cambra, formerly engaged to Matthew and still has feelings for Matthew). Matthew also
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1 testified and did not deny killing the victim. V2 JA 237. Calvert was likewise
2 ineffectively prejudicial for failing to request an instruction on afterthought robbery.
3 Matthew admitted to being in possession of the victim's possessions after his murder but
4 testified that he shot the victim, not to rob, but only in reaction to the victim's threat
5 against his son. V2 JA 237. Lastly, Matthew raised a valid appeal deprivation claim
6 under NRAP 4(c), alleging that the prosecutor failed to submit a proper felony murder
7 instruction, completely omitted the definition of attempted robbery from the felony
8 murder instruction and thereby committed prosecutorial conduct of a constitutional
9 dimension. V2 JA 418. The erroneous felony murder jury instruction was plain error and
10 was not harmless beyond a reasonable doubt.
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14 Matthew requests reversal and remand with the district court ordered to conduct an
15 evidentiary hearing on his habeas petition.
16

17 ARGUMENT

18
19 A. THE DISTRICT COURT ERRED IN RULING THAT MATTHEW DID NOT
20 PLEAD GOOD CAUSE TO EXCUSE HIS PROCEDURAL DEFAULT FOR
21 FILING HIS POST-CONVICTION PETITION ABOUT TWO-MONTHS LATE
22 WHEN MATTHEW PROPERLY PLED GOOD CAUSE FOR THE DELAY
23 UNDER NRS 34.726(1) ON THE FACE OF HIS PETITION AND
24 SUPPLEMENTAL PETITION IN THAT HE REASONABLY BELIEVED HIS
25 COUNSEL HAD FILED AN APPEAL ON HIS BEHALF AND MATTHEW
26 DID IN FACT FILE HIS HABEAS CORPUS PETITION WITHIN A
27 REASONABLE TIME AFTER LEARNING THAT HIS COUNSEL HAD NOT
28 FILED A DIRECT APPEAL.

29
30 "A district court's findings of fact are entitled to deference and will not be
31 disturbed on appeal if they are supported by substantial evidence." Browning v. State,

1 Nev. ___, ___, 188 P.3d 60, 70 (2008). “However, the district court’s conclusions of law
2 are reviewed de novo.” Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

3 In Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003), this Court adopted the 9th
4 Circuit test in Loveland v. Hatcher, 231 F.3d 640, 644 (9th Cir. 2000), holding that “a
5 petitioner can establish good cause for the delay under NRS 34.726(1) if the petitioner
6 establishes that the petitioner reasonably believed that counsel had filed an appeal and
7 that the petitioner filed a habeas corpus petition within a reasonable time after learning
8 that a direct appeal had not been filed.” Hathaway, 119 Nev. at 255, 71 P.3d at 508.
9

10 Matthew properly pled good cause in both his original and supplemental petition
11 but the district court dismissed his petition as failing to plead good cause in compliance
12 with Hathaway because Matthew “never specified when he attempted to contact his
13 counsel [Calvert], nor when and how [Matthew] first learned his counsel failed to file
14 timely a direct appeal.” The district court went on to state that “[w]ithout knowledge of
15 this information, the court cannot determine whether [Matthew’s] delay in filing his
16 Petition was reasonable.” V2 JA 447. The district court appears to have imposed its own
17 standard in determining whether Matthew delay was reasonable based upon the pled facts
18 without any reference to the actual standard. Loveland, as adopted in Hathaway, only
19 requires that Matthew establish he reasonably believed that his counsel Calvert would file
20 a direct appeal on his behalf and that Matthew filed a habeas corpus petition within a
21 reasonable time after learning that a direct appeal had not been filed. Hathaway, 119
22 Nev. at 255, 71 P.3d at 508. In Matthew’s original petition, Matthew pled that he
23 requested Calvert appeal his conviction. Calvert agreed to appeal his conviction but then
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1 in fact did not appeal his conviction. 2 JA 403. In Matthew's supplemental petition,
2 Matthew pled that his trial counsel Calvert unlawfully deprived him of his right to
3 directly appeal his very serious first-degree murder with the use of a firearm conviction.
4 Matthew pled that if granted an evidentiary hearing, Matthew would testify regarding his
5 appeal deprivation claim as follows: Calvert told Matthew immediately after sentencing
6 that he would appeal his conviction. Matthew then immediately after sentencing was
7 unable to contact Calvert regarding his appeal because his attorney did not visit him,
8 respond to his letters or accept his phone calls. V2 JA 419.

11 Matthew then did plead that he attempted to contact his counsel through phone
12 calls and letters that went unanswered. This directly contradicts the district court's,
13 findings regarding attorney/client contact and thus the district court's findings are not
14 supported by substantial evidence. Regarding the reasonable belief requirement of
15 Hathaway, Matthew did plead that he reasonably believed that his trial counsel Calvert
16 did file a direct appeal because Calvert told him he would file an appeal. This of course
17 assumes that when an attorney tells a client he is going to do something, he in fact will
18 truthfully do as he states.

21 Based upon Hathaway, Matthew also filed his habeas petition within a reasonable
22 time after learning that his trial counsel Calvert did not file a direct appeal. In Hathaway,
23 the petitioner Hathaway was convicted pursuant to guilty plea of, among other crimes,
24 one-count of first-degree murder and sentenced to what amounted to life with the
25 possibility of parole on December 11, 1998. On November 6, 2001, Hathaway filed a
26 *pro per* habeas petition. This was over two-years after his judgment of conviction issued
27
28

1 and over one-year past the deadline for filing a timely habeas petition per NRS 34.726(1).
2 In spite of Hathaway pleading guilty pursuant to guilty plea—and as a practical, realistic
3 matter not likely to get any relief on direct appeal from his judgment of conviction—and
4 also in spite of filing his *pro per* habeas petition over one-year past the deadline for filing
5 a timely habeas petition as contained in NRS 34.726 (1), this Court remanded
6 Hathaway's petition for an evidentiary hearing. Hathaway, 119 Nev. at 253, 71 P.3d at
7 505. Matthew in contrast only filed his *pro per* habeas petition about two-months late, as
8 Matthew's judgment of conviction issued on June 7, 2007 and Matthew filed his *pro per*
9 habeas petition on August 5, 2008. V2 JA 386, 397. Matthew was also convicted
10 pursuant to jury verdict, not guilty plea, and is likely to receive relief through the claims
11 raised in his supplemental habeas corpus petition.
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15 In conclusion, the facts of Hathaway are nearly identical to Matthew's case. In
16 Hathaway, the petitioner alleged that he requested his attorney file an appeal, the
17 petitioner's attorney affirmatively indicated that he would file an appeal, he believed that
18 his attorney had filed an appeal on his behalf and that he filed his habeas petition within a
19 reasonable time after learning that his attorney had not filed an appeal. On these facts,
20 the Nevada Supreme Court reversed and remanded Hathaway's petition for an
21 evidentiary hearing on whether Hathaway established good cause to excuse his
22 procedural default because these pled facts, if true, would excuse his procedural default.
23 Hathaway, 119 Nev. at 254-55, 71 P.3d at 507-508. In Matthew's case, Matthew did
24 plead facts analogous to these as discussed above. Consequently, Matthew is entitled to
25 an evidentiary hearing on whether his alleged procedural default is excused under NRS
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1 34.726(1). Moreover, Matthew would also be unduly prejudiced because Matthew raised
2 the following post-conviction claims set out below that would entitle Matthew to relief
3 from his first-degree murder conviction. All of these claims were properly raised in the
4 district court but the district court declined to consider them because the district court
5 incorrectly found Matthew's habeas petition to be procedurally defaulted. V2 JA 413,
6 445.
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9 **B. THE DISTRICT COURT ERRED IN DISMISSING MATTHEW'S CLAIM**
10 **THAT HIS TRIAL COUNSEL CALVERT'S DECISION TO PURSUE A SELF-**
11 **DEFENSE THEORY OF THE CASE FELL BELOW AN OBJECTIVE**
12 **STANDARD OF REASONABLENESS THAT PREJUDICED MATTHEW IN**
13 **VIOLATION OF HIS RIGHT TO EFFECTIVE ASSISTANCE COUNSEL**
14 **UNDER THE FEDERAL CONSTITUTION'S 5TH, 6TH, 8TH AND 14TH**
15 **AMENDMENTS.**

16 To state a claim for relief based upon ineffective assistance of counsel requires
17 both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687-
18 688 (1984). Both components must be shown and an insufficient showing on either
19 prong precludes relief. Strickland, 466 U.S. at 697. A petitioner is only entitled to an
20 evidentiary hearing on claims supported by specific facts not belied by the record, which
21 if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686
22 P.2d 222, 225 (1984).
23

24 This claim was properly pled in the supplement in the district court. V2 JA 413-
25 416.
26

27 Matthew's trial counsel should not have pursued a self-defense theory that
28 suggested Matthew was protecting his child against an unsubstantiated threat that the

1 victim had no present ability to perform at the time the victim uttered the threat. Instead,
2 trial counsel should have pursued a voluntary manslaughter theory that would have result
3 in Matthew being acquitted of first-degree murder and convicted of voluntary
4 manslaughter. Calvert's performance in pursuing a self-defense theory of the case fell
5 below an objective standard of reasonableness that prejudiced Matthew. Instead, Calvert
6 should have pursued a voluntary manslaughter theory of the case. Calvert's ineffective
7 self-defense theory of the case along with trial counsel providing a self-defense jury
8 instruction to the jury prejudiced Matthew. But for Calvert's ineffectiveness in pursuing a
9 self-defense theory of the case that prejudiced Matthew, he would have been acquitted of
10 first-degree murder and instead would have been convicted of voluntary manslaughter.
11 The prejudice that inured to Matthew is substantial. First degree murder carries a
12 maximum penalty of life without the possibility of parole whereas voluntary
13 manslaughter carries a maximum penalty of 10 years with minimum parole eligibility of
14 1 year. See NRS 200.0304(b), NRS 200.080.

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19 The State's case that Matthew killed the victim was about as airtight as a case
20 could be because Matthew admitted killing the victim to five separate individuals, all of
21 whom were Matthew's friends or acquaintances and all of whom were called during the
22 State's case-in-chief. V1 JA 78-79, 85. (Ashlee Reedy, friend of Matthew), V1 JA 110,
23 112, 114 (Jason Holder, friend of Matthew), V1 JA 192-193, 196-197. (Krystal Gari,
24 former live-in girlfriend with Matthew and had son together), V1 JA 208-209. (Krista
25 Gaddis, acquaintance and on friendly terms with Matthew), and V1 JA 214, 216-218,
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1 (Breanne Cambra, formerly engaged to Matthew and still has feelings for Matthew).

2 Matthew also testified and did not deny killing the victim. V2 JA 237.

3 The sole question for the jury was whether the killing should be punished as first-
4 degree murder or manslaughter as self-defense was factually impossible. The jury
5 however never was faced with such a dichotomous decision. Instead, Matthew's trial
6 counsel pursued a self-defense theory of the case that any lawyer objectively looking at
7 the facts of this case should have known would convince no rational juror to acquit
8 Matthew.
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11 Matthew testified and admitted to shooting the victim in the head after he
12 threatened to cut up his son and send his son to him in pieces. In Matthew's own words,
13 he "snapped" and "immediately" shot his erstwhile friend in the face. V2 JA 237. Rather
14 than rebut the contention of voluntary manslaughter, the State's case-in-chief focused on
15 calling witnesses to whom Matthew admitted killing the victim immediately after he
16 threatened to cut up his son. Ashley Reedy, a friend of Matthew's, testified that Matthew
17 told her that he had shot the victim in the head in response to the victim threatening to cut
18 up his son into pieces. V1 JA 87. Jason Holder, a friend of Matthew, testified in even
19 more blunt terms, stating that Matthew told him that he "fucked up" and "snapped". V1
20 JA 114. The State never attempted in their case-in-chief to impeach any witness that
21 presented Matthew as having only shot the victim in reaction to his threat regarding
22 Matthew's son. Instead, the State focused on showing the jury that Matthew in fact did
23 kill the victim. The State through its own case-in-chief left open i.e. created a factual
24 dispute regarding whether the killing was premeditated and deliberate or the result of a
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1 rash impulse where the voice of reason and humanity did not intervene. In short, it was
2 the State that created the factual dispute of whether the victim's murder should be
3 punished as first-degree murder or voluntary manslaughter. Yet, trial counsel ignored the
4 weakness (or perhaps invitation) in the State's case to argue voluntary
5 manslaughter and instead pursued a self-defense theory supported by absolutely no
6 evidence at trial.
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9 But for trial counsel's ineffectiveness in pursuing a self-defense theory of the case
10 supported by no evidence, Matthew would have been acquitted of first degree murder and
11 convicted of voluntary manslaughter. If granted an evidentiary hearing, Matthew's trial
12 counsel Calvert would testify as follows: Calvert would admit that had he actually
13 discussed and reviewed the facts of this case with Matthew, and based upon the standard
14 of what a reasonable lawyer would do, he would have declined to pursue a self-defense
15 theory of the case because no rational jury would have found that Matthew acted in self-
16 defense under these circumstances. Calvert would admit that that this is the classic case
17 of a factual dispute regarding whether the defendant committed voluntary manslaughter
18 and that but for his ineffectiveness, Matthew would have been acquitted of first degree
19 murder and convicted of manslaughter. Trial counsel would admit that his theory of the
20 case fell below an objective standard of reasonableness and that his theory of the case
21 prejudiced Matthew because self-defense was supported by no evidence, but voluntary
22 manslaughter was supported by ample evidence.
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27 Matthew would testify as follows: Matthew never agreed with Calvert to pursue a
28 self-defense theory of the case or any other theory for that matter. In fact, Calvert never

1 discussed his trial strategy with his client. Had trial counsel thoroughly and properly
2 discussed trial strategy with Matthew, Matthew would testify that his sole focus at trial
3 would be to convince the jury to acquit him of first-degree murder and convict him of
4 voluntary manslaughter.
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6 C. MATTHEW'S TRIAL COUNSEL CALVERT'S FAILURE TO ASK FOR A
7 JURY INSTRUCTION ON WHEN MATTHEW FORMED THE REQUISITE
8 INTENT TO COMMIT THE ALLEGED ROBBERY OF THE VICTIM FELL
9 BELOW AN OBJECTIVE STANDARD OF REASONABLENESS THAT
10 PREJUDICED MATTHEW IN VIOLATION OF HIS RIGHT TO EFFECTIVE
11 ASSISTANCE COUNSEL UNDER THE FEDERAL CONSTITUTION'S 5TH,
12 6TH, 8TH AND 14TH AMENDMENTS.

13 Based upon the evidence produced at trial, there was a substantial dispute as to
14 whether Matthew shot the victim because of the victim's threat to cut his son up into little
15 pieces or did so to rob the victim of his possessions. This is important because the State
16 proceeded upon alternate theories of first degree murder as allowed by law; felony
17 murder with robbery or attempted robbery being the underlying felony and murder
18 occurring with malice, premeditation and deliberation. V1 JA 1. Matthew never
19 disputed that he was in possession of the victim's possessions such as his car after the
20 killing. V2 JA 242. The question is whether Matthew formed the intent to rob before or
21 after the killing. Jury instruction 21 defined felony murder in the context of the State's
22 theory of robbery. V2 JA 358. Trial counsel however made no request for an instruction
23 that if the intent to commit the robbery or attempted robbery of the victim was formed
24 after the killing, then the State has not proven that Matthew is guilty of felony murder
25 beyond a reasonable doubt because the requisite intent to commit robbery was not present
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1 during the killing. In other words, if the jury found that Matthew did it fact kill the
2 victim in reaction to the victim's comments about his son and only after killing the victim
3 did Matthew panic and take the victim's car, then Matthew could not be guilty as a matter
4 of law of felony murder based upon the State's theory.
5

6 This claim was properly pled in a supplement in the district court. V2 JA 416-
7 418.

8 Matthew's behavior immediately after the killing supports the theory that Matthew
9 shot the victim impulsively in reaction to the victim's threat towards his son and only
10 after did Matthew panic and drive off in the victim's car. Matthew first called his friend
11 Jason Holder, who was with his girlfriend Ashlee Reedy. Ashlee Reedy initially picked
12 up the phone in the early morning hours immediately after the killing and noted
13 Matthew's panicked voice. V1 JA 81. Matthew's voice was also stressed-out, nervous
14 and scared. V1 JA 82. The State's own question and subsequent answer by Ahslee
15 Reedy supports Matthew's potential defense to felony murder that he did not intend to
16 rob the victim but only took the victim's car after he panicked.
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20 Q: So it was in response to that statement by [the victim] about the defendant's
21 children and cutting them into pieces and sending them to him, according to the
22 defendant, that caused him to react and shoot the victim in the head.

23 A: Correct.

24 V1 JA 88. The State did not produce a single witness that produced a different
25 reason for why Matthew shot the victim.

26 The defendant need not be the one to present evidence that supports his theory of
27 defense. Rosas v. State, 122 Nev. 1258, 147 P.3d 1101, 1108 (2006). Calvert should
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1 have immediately noticed this pattern in the testimony of the State's witnesses and asked
2 for an instruction that the jury make a determination whether Matthew formed the intent
3 to rob before or after the killing.

4 The evidence for traditional first-degree murder requiring premeditation,
5 deliberation, willfulness and malice aforethought was weak. The State submitted general
6 jury verdict forms without requiring unanimity as to the theory of first-degree murder as
7 allowed by Schad v. Arizona, 501 U.S. 524 (1991) and Crawford v. State, 121 Nev. 746,
8 750, 121 P.3d 582, 586 (2005). It is likely that the jury convicted Matthew of first-degree
9 murder based upon felony murder without any consideration of when he formed the
10 intent to rob. But for Calvert's ineffectiveness in failing to request an instruction
11 regarding a jury determination of when Matthew formed the intent to rob the victim,
12 Matthew would have been acquitted of felony murder. The jury would have also unlikely
13 convicted Matthew of traditional first-degree murder and instead convicted Matthew of
14 voluntary manslaughter. Of course, the prosecution is going to disagree. But the point is
15 that it was ultimately for the jury to decide whether or not Matthew formed the intent to
16 rob before or after the killing and Matthew's ineffective trial counsel Calvert prevented
17 the jury from making this determination.

18 If granted an evidentiary hearing, Matthew would testify that he did not form the
19 intent to take the victim's vehicle until after he impulsively shot the victim in the head as
20 a result of the victim threatening to cut up his son. He only took the vehicle after he
21 panicked as confirmed by the State's own witnesses presented during the State's case-in-
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1 chief. He would testify credibly and the jury would have believed and acquitted him of
2 first-degree murder and convicted him of voluntary manslaughter.

3 Calvert would admit that he should have asked for a jury instruction regarding the
4 precise timing of Matthew's formation of the intent to rob. Calvert would admit that but
5 for his failing to ask for an instruction regarding a jury determination of when Matthew
6 formed the intent to rob, Matthew would have been acquitted of first-degree murder and
7 convicted of manslaughter.
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10 D. MATTHEW HAS A VALID APPEAL DEPRIVATION CLAIM UNDER
11 NEVADA RULES OF APPELLATE PROCEDURE 4(C) THAT WENT INTO
12 EFFECT JULY 1, 2009.

13 Nevada Rule of Appellate Procedure 4(c) allows for the untimely notice of appeal
14 from a judgment of conviction, provided a post-conviction petition for writ of habeas
15 corpus has been timely filed and asserts a viable claim that the petitioner was unlawfully
16 deprived of the right to a timely direct appeal. This claim was conceded by the State as
17 proper if Matthew filed a timely post-conviction petition. V2 JA 427. Matthew has
18 argued in this appeal that the district court erred in ruling his habeas petition is
19 procedurally defaulted.
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21
22 The following valid claims for relief on direct appeal were raised in the
23 supplement in the district court. V2 JA 418-421. These claims are presented for the
24 Court's review because Matthew presented the district court with valid and meritorious
25 claims for relief that he would assert on direct appeal and further reinforces that ruling
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1 Matthew's habeas petition as procedurally defaulted would result in a fundamental
2 miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

3 Matthew's trial counsel Calvert unlawfully deprived him of his right to directly
4 appeal his very serious conviction of first-degree murder with the use of a firearm. If
5 granted an evidentiary hearing, Matthew would testify as follows regarding his appeal
6 deprivation claim. Matthew was told by Calvert immediately after sentencing that he
7 would appeal his conviction. Matthew was then immediately after sentencing unable to
8 contact Calvert regarding his appeal because Calvert did not visit him, respond to his
9 letters or accept his phone calls. Matthew then filed a *pro per* notice of appeal that was
10 dismissed by the Nevada Supreme Court in an unpublished written opinion on December
11 27, 2007 from which the remittitur issued on January 25, 2008. If allowed to directly
12 appeal his conviction, he would raise the following issues which would likely result in
13 reversal and remand of his case for a new trial.
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18 Plain error and prosecutorial misconduct so infected Matthew's jury instructions
19 that these instructional errors require this Court to reverse and remand Matthew's first
20 degree murder conviction with use of a firearm for a new trial. Calvert never objected to
21 any jury instructions. This Court must then review the jury instructions for plain error.
22 Garcia v. State, 121 Nev. 327, 334, 113 P.3d 836 840 (2005). This Court has a duty to
23 protect Matthew's right to reversal and remand of his case because the errors were so
24 plain and patently prejudicial that this court must *sua sponte* step in and protect
25 Matthew's right to a fair trial. McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739,
26 745 (1998).
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1 The State proceeded upon alternate theories of first degree murder as allowed by
2 law; felony murder with robbery or attempted robbery being the underlying felony and
3 murder occurring with malice, premeditation and deliberation. V1 JA 1. When settling
4 jury instructions at the close of trial, the district court settled all instructions with the
5 exception of instruction 21, the felony murder jury instruction which the prosecution
6 apparently did not provide to either the court or Calvert prior to the morning of March 21,
7 2009, when jury instructions were settled in chambers. V2 JA 273, 276. Instruction 21,
8 the felony murder jury instruction, was then produced by the State's attorney in chambers
9 after lunch and prior to afternoon closing arguments. Calvert did not object to instruction
10 21. This is despite instruction 21 being an incorrect statement of felony murder as
11 alleged by the State. V2 JA 277. The State proceeded upon alternate theories of first
12 degree murder as allowed by law; felony murder with robbery or attempted robbery being
13 the underlying felony and murder occurring with malice, premeditation and deliberation.
14 V1 JA 1. Yet, the State's instruction 21 nowhere references any instruction on the
15 elements of attempted robbery. V2 JA 358. Instead State's jury instruction 21 references
16 the robbery or attempted robbery as an element of felony murder and does go on to define
17 robbery but completely leaves out any definition or explanation of the elements of
18 attempted robbery. Id. In fact, nowhere in any of the jury instructions is an attempt under
19 Nevada law properly defined in the context of felony murder and attempted robbery.

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26 The jury cannot logically convict someone of a crime for which they do not know
27 the elements. As a result, Matthew's conviction must be overturned and his case
28 remanded for a new trial with a proper felony murder jury instruction.

1 This Court should also consider the aforementioned instructional error claim in the
2 context of prosecutorial misconduct. First, the Court must determine whether the
3 prosecutor's conduct of submitting an incomplete and hence incorrect jury instruction
4 was improper; and two, the court must consider whether the improper jury instruction
5 submitted by the prosecutor warrants reversal. Valdez v. State, __ Nev. __, __, 196 P.3d
6 465, 476 (2008). Submitting an improper and incomplete jury instruction is improper.
7 The question then becomes whether an improperly instructed jury reaching a verdict
8 based upon faulty instructions should be overturned and reversed. This question turns on
9 whether the prosecutorial misconduct of improperly instructing a jury on the elements of
10 felony murder as alleged by the State is of a constitutional dimension. If the prosecutor
11 improperly instructing the jury is of a constitutional dimension, then this Court must
12 reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not
13 contribute to the verdict. Id.

14 The prosecutor submitting an incomplete and improper jury instruction constitutes
15 prosecutorial misconduct of a constitutional dimension that requires reversal of
16 Matthew's murder conviction. Likewise, the erroneous felony murder jury instruction
17 constitutes plain error that requires reversal. Each claim separately and even more so
18 together combine to render Matthew's murder conviction constitutionally infirm, leaving
19 this court with only to reverse and remand Matthew's case for a new trial.

20 It is respectfully requested that this court find that Matthew has presented a valid
21 appeal deprivation claim and allow Matthew to directly appeal his judgment of
22 conviction on first degree murder in accordance with the provisions of NRAP 4(c).
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1 CONCLUSION

2 Matthew did plead good cause to overcome his alleged procedural default in filing
3 his habeas petition about two-months late. It is respectfully requested that this Court
4 reverse and remand with the district court instructed to grant Matthew an evidentiary
5 hearing on his allegations regarding his alleged procedural default as well as the merits of
6 his petition.
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9 Respectfully submitted this 30 day of July, 2010
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12 X Ajiz N. Merchant

13 Counsel for Appellant Matthew James Tjeltveit
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Certificate of Compliance

I, Aziz Neal Merchant, ESQ, certify as follows pursuant to NRAP 28.2.

I have read this brief before signing it.

To the best of my knowledge, information and belief, this brief is not frivolous or interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

To the best of my knowledge, this brief complies with all Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number, if any, of the appendix of the matter relied on is to be found.

7/30/10
Date

Aziz N. Merchant
Aziz Neal Merchant, ESQ.

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Certificate of Service

I certify that I, Aziz Neal Merchant, ESQ., e-filed a copy of the forgoing document, Appellant's Opening Brief, which will send electronic notice to the following:

- Aziz Neal Merchant for Appellant
- Joseph Plater for Respondent
- Catherine Cortez Masto for Respondent

7/30/10

Aziz N. Merchant

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JAMES TJELTVEIT,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL AND THE STATE OF
NEVADA,
Respondents.

No. 55773

FILED

JAN 13 2011

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

ORDER OF AFFIRMANCE


This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant filed his petition on August 5, 2008, more than one year after entry of the judgment of conviction on June 7, 2007. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See NRS 34.726(1).


On appeal, appellant claims that the district court erred in denying his claim that he had good cause to overcome the procedural bar because he asked trial counsel to appeal his conviction and trial counsel failed to do so. Appellant fails to demonstrate that the district court erred in denying his good cause claim. In order to establish good cause for the delay based upon a petitioner's mistaken belief that counsel had filed a direct appeal, a petitioner must establish "that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas petition within a reasonable time after learning that a direct appeal had not been filed." Hathaway v. State, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003). Appellant appears to have known by November 7, 2007,

that trial counsel did not file an appeal because appellant filed a proper person notice of appeal from his judgment of conviction. Further, appellant should have known that counsel did not file an appeal when his appeal was dismissed for being untimely on December 27, 2007, and the remittitur was issued on January 22, 2008. Tieltveit v. State, Docket No. 50518 (Order Dismissing Appeal, December 27, 2007). Therefore, appellant still had more than five months to file a timely petition and waiting over seven months to file was unreasonable.¹ Accordingly, the district court did not err in denying the petition as procedurally barred, and we

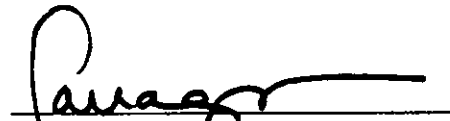
ORDER the judgment of the district court AFFIRMED.



Saitta J.



Hardesty J.



Parraguirre J.

¹We note that because appellant was convicted pursuant to a jury trial, trial counsel had an obligation to consult with appellant regarding whether appellant wanted to appeal his conviction. See Lozada v. State, 110 Nev. 349, 356, 871 P.2d 944, 948 (1994). Therefore, it was reasonable for appellant to believe that trial counsel had filed an appeal and appellant did not have to demonstrate that he requested an appeal in order to make an appeal deprivation claim. However, as stated above, appellant waited an unreasonable amount of time to file his petition, and his claim is procedurally barred.

cc: Hon. Steven P. Elliott, District Judge
Merchant Law Firm, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

AFFIRMATION PURSUANT TO: N.R.S. 239B.010

I, HEREBY CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT THAT IS ENTITLED: Motion to Show Cause For
Equitable Tolling, DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON, UNDER THE PAINS AND PENALTIES OF PERJURY, THIS, 9th, DAY OF, MAY, 2011.

SIGNATURE: 

INMATE NAME PRINTED: MATTHEW TSELTEIT

INMATE NUMBER: 83651

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

CERTIFICATE OF SERVICE

I, Matthew Tjeltnet, do hereby certify pursuant to FRCP 5(b) that on this 9th day of MAY, 2011, I served a true and correct copy of the foregoing, Motion to Show Cause For Equitable Tolling

BY GIVING SAME TO A PRISON GUARD AT THE Ely State Prison to deposit in the U.S. Mail, sealed in an envelope, postage pre paid, addressed to the following:

Attorney General
100 North Carson St.
Carson City, NV
89701

U.S. District Court District of NV
400 S. Virginia Room # 301
Reno, NV 89501

By: Matthew Tjeltnet #83651

Ely State Prison
P.O. Box 1989
Ely, Nevada 89301