IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM S. MANCIANO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36159

FILED
MAR 27 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 13, 1997, the district court convicted appellant, after a jury trial, of one count of first degree arson (Count I), three counts of attempted murder (Counts II-IV), and one count of maiming or disfiguring another person's animal (Count V). The district court sentenced appellant to serve the following terms: for Count I, a minimum term of twenty six months to a maximum term of one hundred and twenty months in the Nevada State Prison; for each of Counts II-IV, a minimum term of thirty-two months to a maximum term of one hundred and forty-four months in the Nevada State Prison; and for Count V, a term of one year in the Clark County Detention Center. The district court imposed the terms for Counts I-IV to run consecutively to each other and the term for Count V to run

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concurrently to the other counts. This court dismissed appellant's direct appeal.[1]

On March 14, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 24, 2000, the district court denied appellant's petition. This appeal followed.

Appellant raised eight claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[2] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[3]

First, appellant claimed that his trial counsel was ineffective in failing to challenge inconsistencies in the statements and testimony of Miss Tisheena Christensen, a witness for the State. Appellant failed to

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[1]See Manciano v. State, Docket No. 30396 (Order Dismissing Appeal, September 1, 1999).

[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]See Strickland, 466 U.S. at 697.

demonstrate that his counsel's performance was deficient in this regard. Our review of the record on appeal reveals that appellant's trial counsel conducted a thorough cross-examination of Miss Christensen. On cross-examination of Miss Christensen, appellant's trial counsel explored and exposed the alleged inconsistencies in Miss Christensen's testimony and prior statements. Appellant's trial counsel also exposed the alleged inconsistencies through his examination of other witnesses. Thus, the district court did not err in rejecting this claim.

Second, appellant claimed that his trial counsel failed to investigate a statement made by Miss Christensen that she had known appellant because she had played "kick the can" with appellant. Appellant argued that if his trial counsel had sought the names and addresses of Miss Christensen's friends that trial counsel would have learned that she was lying and mistaken in her identification of appellant. Appellant's trial counsel was not ineffective for failing to investigate this statement. First, appellant failed to adequately support this claim by specifying the names or descriptions of any of Miss Christensen's friends.[4] As the district court concluded, whether or not Miss Christensen ever played "kick the can" with appellant was a "trivial point" and "minute detail." Miss Christensen's testimony about "kick the can" was in response to a question as to how she knew it was appellant whom she observed dunking a cat in a bucket of "Pine Sol" colored liquid on the driveway of the Manley

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[4]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

residence the morning the garage of the Manley residence was set fire to.[5] Miss Christensen testified that she knew appellant because he was the boyfriend of Heather Workman, who lived next door at the Manley residence, she had played "kick the can" with appellant, and she had seen appellant at least five times at the Manley residence. Appellant acknowledged in his habeas corpus petition that he had an intimate relationship with Heather Workman and that he was staying in the Manley residence at the time of the fire. Heather Workman testified that Miss Christensen had been at the Manley residence and had been in the same room with appellant. As the district court concluded, even assuming that Miss Christensen had never played "kick the can" with appellant, her testimony otherwise revealed that she knew who appellant was prior to her identification of appellant as the perpetrator of the crimes. Thus, the district court did not err in rejecting this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to challenge the first degree arson statute as vague. Appellant offered no explanation or argument for why the first degree arson statute should be considered vague.[6] Therefore, the district court did not err in rejecting this claim.

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[5]Tisheena Christensen also testified that she observed appellant preparing to dunk a second cat into the bucket and holding a cigarette lighter. The second cat was found several days later at a neighbor's house suffering from severe chemical and fire burns.

[6]Hargrove, 100 Nev. 498, 686 P.2d 222.

Fourth, appellant claimed that his trial counsel should have challenged the jury instruction relating to first degree arson because there was insufficient evidence to convict him of first degree arson. The district court properly instructed the jury on the elements of first degree arson. This court already determined on direct appeal that substantial evidence was presented to support the jury's verdict on this offense. Therefore, the district court properly rejected this claim.

Fifth, appellant argued that his trial counsel should have formulated a defense that the crime committed was only fourth degree arson because the garage was unoccupied at the time of the fire. Appellant was mistaken about the elements of first and fourth degree arson. There is no occupancy requirement in the crime of first degree arson. NRS 205.010 provides that "[a] person who willfully and maliciously sets fire to or burns or causes to be burned . . . any . . . dwelling house or other structure or mobile home, whether occupied or vacant . . . is guilty of arson in the first degree." The attached garage of the Manley residence was set fire to in two separate locations. John Manley, Crystal Manley, and Heather Workman were asleep in the Manley residence at the time the fires were set. The interior of the house was damaged by smoke. The fire investigators determined that the fires were not the result of an accident but rather the fires were willfully started by human hands. Appellant's trial counsel was not ineffective in failing to argue for fourth degree arson as the fires set at the Manley

residence went beyond an attempt to set fire to the garage.[7] The garage was burned in two separate locations. Appellant's trial strategy was to argue that appellant was not the person that committed the arson and that no one saw him light anything on fire. Therefore, the district court did not err in denying this claim.

Sixth, appellant argued that his trial counsel was ineffective for failing to perform a reasonable, independent investigation and failing to interview witnesses. Appellant also argued that his trial counsel was ineffective at trial, in jury selection, and at sentencing. Appellant failed to offer any specific facts supporting these claims in the petition and response filed in the district court. Thus, appellant's counsel was not ineffective in this regard.[8]

Seventh, appellant argued that his trial counsel was ineffective in failing to inform appellant of a possible plea bargain. In his habeas corpus petition, appellant did not even attempt to describe the nature of the plea bargain. In his response to the State's opposition, appellant argued only that he "would have considered the offer and had

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[7]NRS 205.025, fourth degree arson, provides that "[a] person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in NRS 205.010 . . . or who commits any act preliminary thereto or in furtherance thereof, is guilty of arson in the fourth degree."

NRS 205.005 defines "set fire to" to mean "whenever any part thereof or anything therein shall be scorched, charred or burned."

[8]Hargrove, 100 Nev. 498, 686 P.2d 222.

the opportunity to enter a plea for a lesser period of time than he is now serving." However, appellant again did not offer any specific facts about the nature of the offer. The district court denied this claim on the ground that the record was devoid of any offer and that appellant failed to state that he would have taken the offer. Because appellant failed to state that he would have taken the offer rather than going to trial, appellant failed to demonstrate that there is a reasonable probability of success that the results of the proceedings would have been different. Thus, we conclude that the district court did not err in determining that appellant's trial counsel was not ineffective in this regard.

Eighth, appellant argued that his trial counsel was ineffective for failing to challenge portions of the prosecutor's opening arguments. Appellant failed to demonstrate a reasonable probability that the results of the proceedings would have been different had trial counsel objected to the prosecutor's opening argument. Appellant's trial counsel thoroughly pursued the alleged discrepancies between the State's opening argument and the evidence presented during the trial.[9] Appellant failed to demonstrate a reasonable probability that the results of the trial would have been different if counsel had objected.

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[9]Lord v. State, 107 Nev. 28, 32-33, 806 P.2d 548, 550-51 (1991) (holding that error was harmless where prosecutor overstated the evidence in opening statement because defense counsel clarified error on cross-examination and in closing argument and jury was instructed that argument by counsel is not evidence).

Next, appellant raised nine claims of ineffective assistance of appellate counsel.[10] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[11] Appellate counsel is not required to raise every non-frivolous issue on appeal.[12] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[13] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[14]

First, appellant claimed that his appellate counsel was ineffective for failing to challenge whether there was probable cause to arrest appellant at the scene of the crime and whether the fire investigator was required to obtain a warrant before arresting appellant.

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[10]To the extent that appellant raised any of his claims independently from his ineffective assistance of appellate counsel claims, appellant waived these issues. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel should have raised the claims on direct appeal.

[11]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[12]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[13]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[14]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Appellant failed to demonstrate his appellate counsel was ineffective because these claims would not have had a reasonable probability of success on appeal. NRS 171.124 provides that a peace officer "may . . . without a warrant, arrest a person . . . when a felony or gross misdemeanor has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it."[15] There was reasonable cause to believe that appellant had committed the charged crimes. Appellant was arrested based upon Miss Christensen's statements to the fire investigator regarding her observation of a man dunking a cat in a bucket of liquid, Miss Christensen's identification of appellant as that man, the discovery of a bucket in the driveway that matched the description of the bucket given by Miss Christensen, a chemical odor detected in the bucket, the rapidity of the smoke that Miss Christensen observed in relation to the dunking of the cat, and a determination by the fire investigators that the fires were arson. Later, the justice's court found probable cause to arrest. Thus, appellant failed to demonstrate his counsel was ineffective.

Second, appellant claimed that his appellate counsel was ineffective in failing to argue that the investigators violated his Miranda[16] rights.[17] Appellant claimed that he was entitled to be informed that he

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[15]See also NRS 289.250 (providing that an arson investigator designated as a peace officer has the powers of a peace officer).

[16]Miranda v. Arizona, 384 U.S. 436 (1966).

[17]To the extent that appellant argued that Investigator Ben Hoge lied when he testified that he was present when appellant was first

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was a suspect and that he was "in custody" when the investigators questioned him in the street in front of the Manley residence as fire crews continued to work on the scene. Appellant failed to demonstrate that his appellate counsel was ineffective because this issue would not have had a reasonable probability of success on appeal. A person is only entitled to Miranda warnings when he is interrogated in official "custody."[18] The record demonstrates that appellant was not in official custody when he was first approached and questioned by fire investigators at the scene of the fire.[19] Rather, the fire investigators, after speaking with Miss Christensen about her observations, approached appellant and Heather Workman and asked the couple to tell the investigators what had happened. The investigators then asked appellant to go down the street toward their vehicle away from the noise and confusion of the scene. When confronted with the allegation that appellant had been observed

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questioned, appellant's claim was patently without merit. Investigator Hoge and Investigator Richard Ortiz testified that they initially approached appellant on the street and asked him to tell them what had happened. There was no testimony that Investigator Hoge was present in the vehicle with Investigator Ortiz during the interview that followed the Miranda warnings.

[18]Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996).

[19]Factors that the court will consider in determining whether a defendant is in custody include: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." Id. at 155, 912 P.2d at 252.

dunking a cat in a bucket, appellant denied the allegation and denied that he had been outside that morning. Investigator Hoge then left appellant with Investigator Ortiz to continue the investigation. Investigator Ortiz testified that prior to questioning appellant in the vehicle that he Mirandized appellant and that appellant indicated that he understood his rights and waived his rights. This conversation was tape-recorded. The police report also indicates that appellant had been Mirandized and that he had waived his rights. Appellant continued to deny any knowledge or involvement. Thus, appellant failed to demonstrate that his counsel was ineffective.

Third, appellant claimed that his appellate counsel was ineffective for failing to challenge whether there was sufficient evidence to hold a preliminary hearing and whether there was sufficient evidence to warrant a trial. Again, appellant failed to demonstrate that his counsel was ineffective because this issue did not have probability of success on appeal. There was no basis for a challenge to the justice's court's conducting a preliminary hearing. Appellant was arrested and charged with several felony offenses and one gross misdemeanor. A criminal complaint was filed. Thus, a preliminary hearing was warranted due to the fact that appellant did not waive the preliminary examination.[20] Further, there was sufficient evidence to bind appellant over for trial in

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[20]NRS 171.196(2).

the district court.[21] Miss Christensen identified appellant as the man she observed in the morning in the driveway of the Manley residence dunking a cat into a bucket shortly before she smelled smoke at the Manley residence. The garage of the Manley residence was set fire to that morning in two separate spots. Fire investigators had determined that the fires were not the result of an accident. Further, one of the cats that Miss Christensen had observed in the driveway was discovered three days later suffering from severe burns. Appellant's fingerprint was found on the bucket that Miss Christensen described to the investigators. Thus, appellant's appellate counsel was not ineffective.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to challenge whether Mr. Randall McPhail, the crime scene analyst, should have been allowed to testify as an expert witness because Mr. McPhail had only been on the job for three months and had not yet been certified. Again, appellant failed to demonstrate that this claim possessed a reasonable probability of success on appeal. First, Mr. McPhail's testimony at trial was not in the nature of expert testimony; rather, Mr. McPhail testified about processing the crime scene and lifting two fingerprints off the bucket. Mr. David Horn, a senior crime scene analyst who qualified as an expert, testified that he had supervised Mr. McPhail that morning. Even assuming that Mr. McPhail had testified as

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[21]NRS 171.206 ("If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold him to answer in the district court.").

an expert, Mr. McPhail could have qualified as an expert because of his specialized training and knowledge.[22] Mr. McPhail testified that he had received training through Metro in processing a crime scene at the crime scene analyst academy. A portion of that training was dedicated to fingerprints. Mr. McPhail further testified that he was in the last phase of his training when he processed the crime scene in the instant case and that he had completed his training by the time of trial. Mr. McPhail possessed specialized knowledge and training relating to the lifting of a fingerprint. Thus, appellant's appellate counsel was not ineffective for failing to challenge the admission of this testimony.[23]

Fifth, appellant claimed that his appellate counsel was ineffective for failing to challenge whether Miss Christensen's testimony was not credible due to inconsistencies in her statements and testimony. This claim did not possess a reasonable probability of success on appeal. As noted above, appellant's trial counsel thoroughly cross-examined Miss

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[22]NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."); see also Freeman v. Davidson, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989) ("An expert witness need not be licensed to testify as an expert, as long as he or she possesses special knowledge, training and education.").

[23]To the extent that appellant argued that the justice's court improperly determined that Mr. McPhail qualified as an expert for purposes of the preliminary hearing, we conclude that this claim lacked merit for the reasons discussed above.

Christensen regarding the alleged inconsistencies in her testimony. This court determined on direct appeal that there was substantial evidence to affirm the convictions. It is for the jury to determine the weight and credibility to give conflicting testimony.[24] Thus, appellant failed to demonstrate that his appellate counsel was ineffective in failing to challenge this testimony.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that appellant was denied exculpatory evidence relating to Josie, a certified accelerant detection canine. Josie was taken to examine the fire on the exterior of the garage and did not alert to the use of any accelerants. Appellant claimed that crime scene investigators should have had Josie also sniff appellant, appellant's clothing, bedsheets, the bedroom that he had occupied, and other areas of the Manley residence and yard. This claim would not have had a reasonable probability of success on appeal. The record does not demonstrate that the State's failure to gather this evidence through the use of Josie was attributable to negligence, gross negligence or bad faith.[25] Appellant's trial counsel presented to the jury the State's failure to have Josie conduct a broader search. Investigator Cliff Mitchell, Josie's

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[24]Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[25]Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (holding that in order to prevail on a failure to gather evidence claim a defendant must establish that the evidence was likely to have been material and that failure to gather the evidence was a result of negligence, gross negligence or bad faith).

handler, had Josie conduct a free search of the backyard area, including the exterior area of the garage that had been set fire to and declined to have Josie search the interior of the garage for safety concerns. Investigator Mitchell did not recall if he was told about the cat dunking observation before or after he conducted his investigation at the scene. Investigator Hoge testified that he did not have Josie sniff appellant or his clothing because appellant was already at the Clark County Detention Center when Investigator Mitchell and Josie arrived on the scene. Appellant failed to demonstrate that the failure to further utilize Josie was the result of negligence, gross negligence or bad faith. No accelerants were discovered at the sites of the fires or in the bucket. Therefore, even assuming that Josie had searched more broadly and did not alert to the use of accelerants, this fact would not necessarily have exculpated appellant. Thus, appellant failed to demonstrate that his appellate counsel was ineffective.

Seventh, appellant claimed that his appellate counsel was ineffective for failing to argue that he was deprived of crucial evidence regarding the garage, which could have proven to be exculpatory, due to the fact that the garage was torn down prior to the preliminary hearing. This claim was entirely speculative and did not have a reasonable probability of success on appeal. First, appellant failed to offer any specific facts regarding the alleged exculpatory evidence. Further, there is no indication that the State caused the garage to be torn down. Appellant's private investigator was allowed to view photographs taken by the State and to walk through the Manley residence. Thus, appellant

failed to demonstrate that his appellate counsel was ineffective for failing to raise this claim.

Eighth, appellant claimed that his appellate counsel was ineffective for failing to argue that there was reasonable doubt that he was outside the dwelling before the fire, that the State had not proven all of the elements of the offenses beyond a reasonable doubt, that there was insufficient evidence to sustain his convictions, and that the jury should have been given instructions on the offenses because insufficient evidence was presented at trial. This court addressed the substance of these issues in appellant's direct appeal, and our prior decision is the law of the case.[26] This court dismissed that appeal, concluding that there was substantial evidence to support the conviction. Although appellant may arguably have refined his arguments, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."[27]

Finally, appellant claimed that his appellant counsel was ineffective for failing to argue that the district court erred in instructing the jury that it was not necessary to prove premeditation and deliberation to prove attempted murder. Appellant also claimed that the district court

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[26]Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("'The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.'") (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969), vacated in part on other grounds by Walker v. Nevada, 408 U.S. 935 (1972), and mandate conformed to Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972)).

[27]Hall, 91 Nev. at 316, 535 P.2d at 799.

should have instructed the jury that the fires could have been the result of an accident. There was no reasonable probability of success on appeal for these claims. This court has consistently held that failure to object to a jury instruction or to request a special instruction precludes appellate consideration.[28] Appellant's trial counsel did not object to any jury instructions and did not request that the district court instruct the jury that the fires were accidental in nature. Moreover, these claims lacked merit. The district court properly instructed the jury that the State did not have to prove premeditation and deliberation to prove attempted murder.[29] Appellant was not entitled to a jury instruction that the jury could find the fires were accidents because no evidence supported this statement.[30] The fire investigators testified that the fires were not accidentally set. Appellant's theory of defense at trial was not that the fires were accidental but rather that he did not set the fires. Thus, appellant failed to demonstrate his appellate counsel was ineffective.

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[28]Etcheverry v. State, 107 Nev. 782, 784, 821 P.2d 350, 351 (1991).

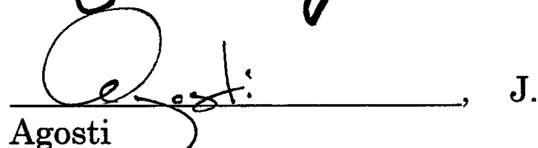
[29]Keys v. State, 104 Nev. 736, 740-41, 766 P.2d 270, 273 (1988) ("Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill. This is all there is to it. There is no need for the prosecution to prove any additional elements such as, say, premeditation and deliberation.").

[30]Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) ("A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it.").

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[31] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[32]

_______________, J.
Young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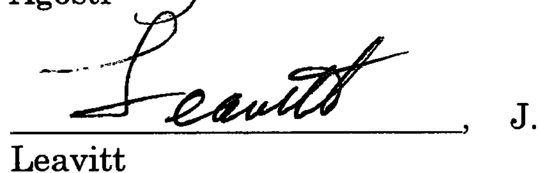
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cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
William S. Manciano
Clark County Clerk

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[31]Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[32]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.