

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY R. AMATI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40604

FILED

FEB 10 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. P. [Signature]*  
CHIEF DEPUTY CLERK

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

On March 13, 2000, Amati was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon.<sup>1</sup> Amati was acquitted of two additional murder charges. The district court sentenced him to serve two terms of life with the possibility of parole in 20 years, and two terms of 96 to 210 months. All sentences were imposed to run consecutively. On appeal, this court affirmed the judgment of conviction and sentence.<sup>2</sup> The remittitur issued on October 30, 2001.

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<sup>1</sup>An amended judgment of conviction was entered on March 28, 2002, clarifying that the sentence for attempted murder with the use of a deadly weapon was to run consecutively to the sentence for first-degree murder with the use of a deadly weapon.

<sup>2</sup>Amati v. State, Docket No. 35794 (Order of Affirmance, October 5, 2001).

On November 26, 2001, Amati filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Amati or to conduct an evidentiary hearing. On December 28, 2001, the district court denied Amati's petition without prejudice. Amati did not appeal.

On August 30, 2002, Amati filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Amati or to conduct an evidentiary hearing. On November 27, 2002, the district court denied Amati's petition.<sup>3</sup> This appeal followed.

In his petition, Amati made numerous claims of ineffective assistance of trial counsel.<sup>4</sup> 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 there is a reasonable probability that in the absence

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<sup>3</sup>To the extent that the district court found that Amati's claims were procedurally barred because the petition was successive, we note that the district court erred. See NRS 34.810(2). Amati's claims were not successive because the district court denied his first petition without prejudice.

<sup>4</sup>Amati alleged ineffective assistance of appellate counsel on several of the following claims as well. Consistent with the reasoning discussed below, we find that Amati failed to demonstrate that his appellate counsel was ineffective on these issues.

of counsel's errors, the results of the proceedings would have been different.<sup>5</sup> The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.<sup>6</sup>

First, Amati alleged that trial counsel was ineffective for failing to effectively defend him. Amati failed to support this claim with specific facts and articulate how counsel's performance was deficient in this area.<sup>7</sup> Therefore, we conclude that the district court did not err in denying this claim.

Second, Amati claimed that trial counsel was ineffective for failing to remove a juror after she revealed that she had independently researched information concerning Amati on the internet. After the jury had been empaneled, but prior to opening arguments, juror Michelle Cocuzzi informed the court that she had started to investigate Amati on the Las Vegas Review Journal website. She wrote the court a letter in which she stated that she woke up from a nightmare and found herself researching the defendant on the internet because she wanted to find out if he was currently in jail. She realized what she was doing was wrong and quickly turned off the computer before she found any information on him. Amati's trial counsel asked Cocuzzi if she could be fair, listen to the evidence, and give the defendant a chance. She answered affirmatively.

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<sup>5</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>6</sup>Strickland, 466 U.S. at 697.

<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Amati failed to demonstrate that the results of the proceedings would have been different if Cocuzzi had been removed from the jury. Cocuzzi stated multiple times that she did not find any information concerning Amati on the internet. She further promised that she would not attempt any outside research again. Finally, trial counsel asked her if she could continue to be fair to Amati, and she replied that she could. Therefore, Amati failed to demonstrate that trial counsel was ineffective on this issue.

Third, Amati alleged that trial counsel was ineffective for failing to object to jury instruction seven, which defined conspiracy. He alleged that the State did not present any evidence of a conspiracy to commit murder. Amati was charged with three counts of murder and one count of attempted murder under three alternative theories of principal liability: directly committing the acts, aiding and abetting, and/or conspiring to commit the offenses.<sup>8</sup> "It is settled in this state that evidence of participation in a conspiracy may, in itself, be sufficient evidence of aiding and abetting an act in furtherance of the conspiracy to subject the participant to criminal liability as a principal."<sup>9</sup>

Conspiracy is an agreement between two or more persons to commit a criminal or unlawful act, and is generally established by inference from the conduct of the parties.<sup>10</sup> Here, evidence was introduced

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<sup>8</sup>See NRS 195.020.

<sup>9</sup>Lewis v. State, 100 Nev. 456, 460, 686 P.2d 219, 221-22 (1984).

<sup>10</sup>Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998).

at trial that at least two weapons were used in the murders, and the victims were shot multiple times. Witnesses at each of the murders reported seeing at least two people at the scene. Therefore, sufficient evidence of a conspiracy theory of liability existed to warrant a jury instruction on conspiracy. Amati failed to demonstrate that counsel's objection to jury instruction seven would have aided his defense such that the outcome of the trial would have been altered. We conclude that Amati failed to demonstrate that his trial counsel was ineffective on this issue.

Fourth, Amati claimed that trial counsel was ineffective for failing to object to jury instruction 18, which concerned reasonable doubt. Amati argued that trial counsel should have objected to portions of the instruction that confused the legal standard of proof.<sup>11</sup> The jury instruction correctly stated the law, however. NRS 175.211 provides a statutory definition of reasonable doubt, which the court is required to give juries in criminal cases. The language used in jury instruction 18 was identical to that found in the statute. Furthermore, this court has held

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<sup>11</sup>Specifically, Amati took exception to the following portion of the instruction, defining reasonable doubt:

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt.

*continued on next page . . .*

that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond reasonable doubt and does not shift the burden of proof."<sup>12</sup> Therefore, Amati did not demonstrate that trial counsel was ineffective on this issue.

Fifth, Amati claimed that trial counsel was ineffective for failing to object to jury instruction 24, which discussed witness credibility and believability.<sup>13</sup> Amati argued that counsel should have objected to this instruction and requested an instruction clarifying that prior statements Amati made to law enforcement officers could not be used to impeach his trial testimony nor considered as substantive evidence. The district court would have rejected this proposed jury instruction,

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*... continued*

Doubt to be reasonable must be actual, not mere possibility or speculation.

<sup>12</sup>Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-60 (1991).

<sup>13</sup>Jury instruction 24 was as follows:

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feeling, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollection. If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

however.<sup>14</sup> Out-of-court statements that would otherwise be inadmissible hearsay are admissible if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony."<sup>15</sup> Further, a prior inconsistent statement that meets these requirements is admissible for both impeachment purposes and as substantive evidence.<sup>16</sup> Here, Amati testified at trial and was subject to cross-examination concerning prior inconsistent statements he made to law enforcement officers. These statements were admissible for impeachment purposes and as substantive evidence. Therefore, Amati failed to establish that trial counsel was ineffective for failing to object to jury instruction 24 and failing to offer an alternative instruction.

Sixth, Amati argued that his trial counsel was ineffective for failing to cross-examine a Las Vegas Metropolitan Police Department Detective about a prior statement he made that corroborated Amati's defense. During an interview of another suspect, Detective Bigham stated, "we know from . . . from investigation that one of the guys just kinda stood around." Amati failed to demonstrate how questioning Detective Bigham about this prior statement would have aided his defense

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<sup>14</sup>See Geary v. State, 110 Nev. 261, 265, 871 P.2d 927, 929 (1994) (holding that "a criminal defendant is not entitled to an instruction which incorrectly states the law").

<sup>15</sup>NRS 51.035(2)(a).

<sup>16</sup>See Atkins v. State, 112 Nev. 1122, 1129, 923 P.2d 1119, 1124 (1996).

such that the outcome of the trial would have been altered. Amati was charged with murder and attempted murder under three alternative theories of liability, including conspiracy and aiding and abetting. Testimony that one of the individuals "stood around" would not necessarily absolve Amati of responsibility under these theories. Therefore, Amati did not demonstrate that his counsel was ineffective in this regard.

Seventh, Amati claimed that his trial counsel was ineffective for neglecting to interview Radio Shack employees, who would have corroborated Amati's testimony that he had been "scouting" the store in preparation for a planned burglary. Amati defended his presence at one murder by claiming that he believed the plan was to go on a "scouting run" at Radio Shack, not commit murder. Amati failed to demonstrate that information and testimony from Radio Shack employees would have had a reasonable probability of altering the outcome of the trial. Further, he did not provide witness' names or descriptions of their intended testimony.<sup>17</sup> Therefore, we conclude that Amati failed to establish that his trial counsel was ineffective on this issue.

Eighth, Amati alleged that his trial counsel did not adequately investigate victim Stacie Dooley, an eyewitness to one of the murders. Further, he claimed that trial counsel did not cross-examine her sufficiently. Amati failed to demonstrate that his trial counsel was deficient in this area. Trial counsel vigorously cross-examined Dooley

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<sup>17</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.



regarding her prior statement to police concerning the race of the shooter. Amati did not provide specific facts to support his claim of an inadequate investigation of the witness, nor allege what further cross-examination questions should have been asked.<sup>18</sup> Therefore, Amati failed to establish that his trial counsel was ineffective in this area.

Ninth, Amati claimed that his trial counsel was ineffective for failing to utilize an expert witness with regard to the injury on his thumb. Amati failed to demonstrate that counsel's performance was deficient in this area. Amati testified that he cut his thumb on a car when he was running away from the murder scene after his two friends shot the victim. The State alleged that Amati cut his thumb during the murder when he held the gun improperly. The defense theory was that if Amati had been injured by the gun during the murder, his blood would have been found much closer to the scene of the murder because an arterial cut will bleed heavily. Trial counsel cross-examined an employee of the hospital where Amati was treated for the laceration on his thumb concerning the amount of blood expected from an arterial cut of the type suffered by Amati. Further, Amati testified that as soon as he cut his hand, it began "spewing blood profusely." Amati failed to demonstrate that an expert medical witness would have aided his defense such that the outcome of the trial would have been altered. Therefore, Amati did not establish that his trial counsel was ineffective for not utilizing an expert witness on this issue.

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<sup>18</sup>Id.

Tenth, Amati argued that trial counsel was ineffective for not interviewing Troy Sampson or Edward James, his former co-defendants, or subpoenaing them to testify at trial.<sup>19</sup> Amati claimed that Sampson and James would have corroborated his testimony concerning: (1) "scouting runs" and prior burglaries where the statute of limitations had run, (2) the duration and nature of their relationship, (3) triggering false alarms at stores they intended to burglarize, and (4) the fact that both men stayed with Amati at his home. Amati did not demonstrate that this testimony would have had a reasonable probability of altering the outcome of the trial. Therefore, we find that Amati failed to demonstrate that his trial counsel was ineffective for failing to interview and subpoena James and Sampson.

Eleventh, Amati claimed that trial counsel was ineffective for failing to object to questions asked of Amati by the prosecutor concerning his use of fictitious names on multiple occasions. He claimed that this line of questioning negatively impacted his credibility and believability. Specific instances of conduct relevant to truthfulness may be inquired into on cross-examination, however.<sup>20</sup> The use of a false name when confronted by law enforcement is relevant to truthfulness. Amati did not establish

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<sup>19</sup>Amati, Sampson, and James were charged with three counts of murder and one count of attempted murder on November 24, 1997. On May 19, 1998, charges against Sampson and James were dismissed without prejudice.

<sup>20</sup>NRS 50.085(3).

that this evidence was inadmissible on other grounds.<sup>21</sup> Therefore, he did not demonstrate that trial counsel was ineffective on this issue.

Twelfth, Amati asserted that trial counsel was ineffective for failing to object to remarks concerning reasonable doubt made by the prosecutor during the closing argument. The prosecutor, referring to the jury instruction concerning reasonable doubt, stated

if you take a look at this instruction and then you take a look back and you see how our country was formed and you see the [fulminate] that was created back before we became the United States of America, it was everyday people, farmers, cobblers, ranchers, shipbuilders, people with everyday problems and everyday discussions talking about the troubles of our times . . . People are able to have the more weighty affairs of life and make decisions and evaluate those circumstances in situations and bring those things in here when you sit down there and you decide this case.

Amati contended that the prosecutor impermissibly raised the standard of reasonable doubt by comparing it to the decisions made by the founders of our country. There is no reasonable probability that the outcome of the trial would have been different had trial counsel objected to this statement. The jury was given the proper instruction concerning reasonable doubt. Additionally, the prosecutor quoted the correct statutory definition of reasonable doubt after making the statement Amati

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<sup>21</sup>See NRS 48.035.

claimed was improper.<sup>22</sup> We therefore conclude that Amati did not establish that his trial counsel was ineffective for failing to object to prosecutorial comments concerning reasonable doubt.

Thirteenth, Amati contended that trial counsel was ineffective for failing to object to prosecutorial comments that characterized Amati's testimony as a lie. Amati alleged that the prosecutor made an improper remark when he stated, during closing argument,

Judge Bonaventure tells you that if you believe a witness has lied about any material fact in the case you may disregard his entire testimony and I'm gonna suggest to you that you ought to disregard the entire testimony of Tony Ray Amati because he cannot be believed. He has lied to us.<sup>23</sup>

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<sup>22</sup>See Lord, 107 Nev. at 35, 806 P.2d at 552 (holding that improper explanation by prosecutor concerning reasonable doubt was not prejudicial because proper written instruction was given, and prosecutor stated the correct statutory definition after making the improper statement).

<sup>23</sup>Amati additionally contended that trial counsel should have objected to the following improper comments by the prosecutor:

- (1) "[Amati] is weaving his web of lies through the evidence."
- (2) "The gun belongs to the defendant, it was carried by him, and just another lie he presented to you when he testified."
- (3) "We know, and I've already demonstrated to you, that he has lied to us when he said he didn't have a gun with him during the gun sale."

A prosecutor's "characterization of testimony as a lie is improper argument."<sup>24</sup> Explaining to the jury why the defendant may be lying is permissible, but a prosecutorial statement that the defendant is lying, stated as a fact and conclusion, is not proper.<sup>25</sup> The prosecutor's conclusory statements that Amati lied during his testimony were improper. However, we conclude that Amati failed to prove that the results of his trial would have been different if trial counsel had objected to these statements. Therefore, we find that Amati did not demonstrate that his trial counsel was ineffective on this issue.

Fourteenth, Amati claimed that his trial counsel was ineffective for failing to object to prosecutorial remarks that Amati lost his mobile home after he was arrested. Amati contended that this comment, during closing argument, was not based on any evidence. Amati failed to demonstrate that he was prejudiced by this statement such that the outcome of the trial would have been different if trial counsel had objected to this statement. We therefore conclude that Amati failed to establish that his trial counsel was ineffective on this issue.

Finally, Amati alleged that trial counsel was ineffective for failing to file a motion to sever the three murder charges. Amati claimed

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<sup>24</sup>Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) (stating that a prosecutor's remark that a witness lied on the stand "amounts to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence").

<sup>25</sup>See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990).

that he asked trial counsel to file this motion, but trial counsel refused to do so.<sup>26</sup> Amati argued that this prejudiced him because he was convicted of murder and attempted murder on insufficient evidence due to the improper and prejudicial joinder of two additional murder charges.

NRS 173.115(2) provides that two or more offenses may be charged in the same indictment if they are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Here, the three murder victims were killed during a three month period, were shot multiple times with two or more firearms, and were killed in close geographic proximity to one another. Additionally, firearms used in all three murders were found in Amati's home.

Furthermore, "[i]f . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both

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<sup>26</sup>Prior to trial, counsel informed the district court that

Mr. Amati has consistently asked that we file a motion to sever the trials of the separate counts in this case. And we have not filed that. It was our belief that the court would deny that on a variety of bases, not the least of which that if your Honor were to sever each of the murders to separate trials, the State—and they've confirmed this to us, would then file a motion to admit the other murders in the one trial, as evidence to show identity of the individual that shot. And so—and that pretty clearly would have been granted also . . . But I need to make the record that Mr. Amati had requested that we file that motion. And that we did not file that because it was our opinion that the court would summarily deny it.

charges may be tried together and need not be severed."<sup>27</sup> A review of the record reveals that trial counsel believed that evidence of the other murders would be admissible to show identity of the shooter. NRS 48.045(2) permits admission of evidence of other crimes or wrongs in order to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Trial counsel's refusal to file a motion to sever the three murder charges amounts to a tactical decision. A reasonable tactical choice is entitled to deference.<sup>28</sup> Amati failed to demonstrate that counsel's actions fell below an objective standard of reasonableness.

Further, Amati did not establish that he was prejudiced by joinder of the three murder charges. The jury acquitted Amati of the two charges he argued should have been severed.<sup>29</sup> As discussed below, there was sufficient evidence to convict Amati of the remaining murder charge. Additionally, the district court instructed the jury to consider each charge

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<sup>27</sup>Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

<sup>28</sup>See Riley v. State, 110 Nev. 638, 653, 878 P.2d 272, 281-2 (1994).

<sup>29</sup>Cf. Tabish v. State, 119 Nev. \_\_\_, \_\_\_ 72 P.3d 584 (2003) (finding prejudice where defendant found guilty of multiple improperly joined counts).

and the evidence against it separately.<sup>30</sup> Thus, we conclude that Amati did not establish that trial counsel was ineffective on this issue.<sup>31</sup>

Amati also raised claims of ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*."<sup>32</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>33</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonably probability of success on appeal."<sup>34</sup>

First, Amati alleged appellate counsel was ineffective for failing to challenge the sufficiency of the evidence for his murder conviction on direct appeal. Our review of the record reveals sufficient evidence from which a rational jury could find Amati guilty of the murder of Keith Dyer beyond a reasonable doubt.<sup>35</sup> Amati's blood was found at the scene of the murder, and he had a scar on his thumb consistent with a cut from the improper use of a gun. Additionally, one of the murder

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<sup>30</sup>See *id.* at \_\_\_, 72 P.3d at 591.

<sup>31</sup>Although we do not reject the notion of prejudice in a situation where the defendant is acquitted of all improperly joined counts, we find that Amati failed to establish prejudice in this case.

<sup>32</sup>*Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>33</sup>*Jones v. Barnes*, 463 U.S. 745, 751 (1983).

<sup>34</sup>*Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

<sup>35</sup>See *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).



weapons was found in his bedroom, and this weapon had traces of human blood on it. Because a challenge to the sufficiency of the evidence would not have had a reasonable probability of success on appeal, we find that Amati did not demonstrate that appellate counsel was ineffective on this issue.

Amati next contended that appellate counsel was ineffective for failing to appeal the sufficiency of the evidence for his attempted murder conviction. Our review of the record reveals sufficient evidence from which a rational jury could find Amati guilty of the attempted murder of Stacie Dooley beyond a reasonable doubt.<sup>36</sup> Dooley was shot once in the leg during the murder of Dyer—the victim of the first-degree murder charge for which Amati was convicted. Attempted murder is an act that is done with deliberate intention to unlawfully kill.<sup>37</sup> Under the doctrine of transferred intent, Amati's intent to kill Dyer could be imputed to Dooley.<sup>38</sup> The first-degree murder of Dyer required specific intent.<sup>39</sup> Therefore, a rational jury could find Amati's specific intent to kill Dyer was transferred to Dooley when she was shot one time in the leg. A challenge to the sufficiency of the evidence would not have had a reasonable probability of success on appeal, and we therefore find that

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<sup>36</sup>Id.

<sup>37</sup>Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988).

<sup>38</sup>See Ochoa v. State, 115 Nev. 194, 197-98, 981 P.2d 1201, 1203-04 (1999); NRS 200.030.

<sup>39</sup>NRS 200.030.

Amati failed to demonstrate that appellate counsel was ineffective on this issue.

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.<sup>40</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>41</sup>

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge  
Tony R. Amati  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>40</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>41</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.