

No. 04-99003

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TERRY JESS DENNIS,)
)
Petitioner-Appellant,)
)
vs.)
)
MICHAEL BUDGE, et al.)
)
Respondents-Appellees.)
)
)
)
_____)

D.C. No. CV-S-04-0798-PMP

*Appeal from the United States District Court
for the District of Nevada*

RESPONDENTS' ANSWERING BRIEF

BRIAN SANDOVAL
Attorney General
ROBERT E. WIELAND
Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Telephone: (775) 688-1818

FRANNY FORSMAN
Federal Public Defender
MICHAEL PESSETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
Telephone: (702) 388-6577

Attorney for Respondent-Appellee

Attorney for Petitioner-Appellant

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No. 04-99003

UNITED STATES COURT OF APPEALS

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TERRY JESS DENNIS,

Petitioner-Appellant,

vs.

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Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP

RESPONDENTS' ANSWERING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of a United States District Court, District of Nevada dismissing an application for petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody. EOR 1909. Although the federal district court granted a certificate of appealability, the federal district court did not indicate which specific issue or issues satisfy the showing required by 28 U.S.C. § 2253(c)(2) as required by 28 U.S.C. § 2253(c)(3). The federal district court merely stated that Butko's appeal "raises a substantial question for review by

a court of appeals regarding his Petition for Writ of Habeas Corpus.” Therefore, this Court does not have jurisdiction.

The only conceivable question that could be before this Court is whether the federal district court, based on what it could properly consider, erred in its determination that Butko does not have standing under Article III of the United States Constitution to pursue a federal habeas petition pursuant to 28 U.S.C. § 2254 by a person in state custody as a “next friend” on behalf of Terry Dennis.

This Court would have jurisdiction over that precise question pursuant to 28 U.S.C. § 2253 and no other. 28 U.S.C. § 2253 (c); *Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999) (*per curiam*).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. To the extent that this Court has jurisdiction at all, the question would be whether the federal district court erred in its determination that Butko does not have standing under Article III of the United States Constitution to pursue a federal habeas petition pursuant to 28 U.S.C. § 2254 by a person in state custody as a “next friend” on behalf of Terry Dennis.

STANDARDS OF REVIEW

This action is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA).

2254(d) states:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e)(1) states:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

A state court's factual finding regarding competence is entitled to deference.

Demosthenes v. Baal, 495 U.S. 731, 737 (1990).

28 U.S.C. § 2254(e)(2) states:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

- (A) the claim relies on—

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
- (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The AEDPA “placed a new restriction on the power of the federal courts to grant writs of habeas corpus to state prisoners.” *Williams v. Taylor*, 529 U.S. 362, 399 (2000). *Williams* now sets forth the AEDPA standard of review of merits determinations. The Supreme Court previously recited that § 2254(d) created a “new highly deferential standard for evaluating state court rulings.” *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Early v. Packer*, 537 U.S. 3 (2002); *Woodford v. Visciotti*, 537 U.S. 19 (2002); *Lindh v. Murphy*, 521 U.S. 320, 334 n.7 (1997). De novo review is no longer appropriate; deference to state court factual findings is. *Jeffries v. Wood*, 114 F.3d 1484, 1498 (9th Cir. 1997).

Section 2254(d)(1)’s “clearly established” phrase “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412. In other words, “clearly

established Federal law” under 28 U.S.C. § 2254(d)(1) is the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision. *Williams*, 529 U.S. at 405.

A state decision is “contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” *Williams v. Taylor*, 459 U.S. 362, 405-406. *See also Bell v. Cone*, 535 U.S. 685, 694 (2002).

State courts are presumed to know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). 28 U.S.C. § 2254(d)’s “highly deferential standard for evaluating state-court rulings demands that state court decisions are to be given the benefit of the doubt. *Id.* *See also Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997).

Under the ‘unreasonable application’ clause, a federal habeas court may grant a writ if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Williams v. Taylor*, 529 U.S. 406, 413 (2000). The “unreasonable application” clause requires the state court decision to be more than incorrect or erroneous. *Williams*, 529 U.S. at 410. The state court’s application of

clearly established law must be objectively unreasonable. *Williams*, 529 U.S. at 409.

Avoiding the pitfalls of 28 U.S.C. § 2254(d) does not require citation of Supreme Court cases. Indeed, it does not even require awareness of Supreme Court cases, so long as neither the reasoning nor the result of the state-court decision contradicts them. *Early v. Packer*, 537 U.S. 3, 8 (2002).

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Lawyer v. Department of Justice*, 521 U.S. 567, 580 (1997); *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000); *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1149 (9th Cir. 2000). "Review under the clearly erroneous standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993); *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992); *Alder v. Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000). "If the [trial court's] account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently." *Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.*, 104 F.3d 1137, 1141 (9th Cir. 1997). Thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them

cannot be clearly erroneous.” *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998); *Duckett v. Godinez*, 109 F.3d 533, 535 (9th Cir. 1997) (internal quotation omitted). On appeal, this Court can not reweigh the evidence or second-guess the trial court's credibility choices. *Hockett v. United States*, 730 F.2d 709, 714 (11th Cir. 1984). The clearly erroneous standard of review applies to findings of both subsidiary and ultimate facts, *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982), and to inferences drawn from the evidence. *See generally United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

This Court may affirm on any ground supported by the record even if it differs from the rationale of the district court. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995).

The dismissal on procedural grounds of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody is reviewed *de novo*. *Hasan v. Galaza*, 254 F.3d 1150, 1153 (9th Cir. 2001).

De novo review means a review of the matter “from the same position as the district court.” *Lake Mohave Boat Owner's Ass'n. v. National Park Serv.*, 138 F.3d 759, 762 (9th Cir. 1998); *Nevada Land Action Ass'n. v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). Obviously, the matter is not reviewed from the same position as the district court if the court of appeals

considers matters, evidence, cases or arguments not presented to the federal district court.

A claim or an issue that is being presented for the first time on appeal is not cognizable by this court. *See People of Territory of Guam v. Taitano*, 849 F.2d 431 (9th Cir. 1990). *See also Willard v. California*, 812 F.2d 461, 465 (9th Cir. 1987); *Bolker v. Commissioner of Internal Revenue*, 760 F.2d 1039 (9th Cir. 1985). Habeas claims that are not raised in the petition before the district court are not cognizable on appeal. *Belgarde v. Montana*, 123 F.3d 1210, 1215 (9th Cir. 1997).

The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases. Fed. R. App. P. 10(a). *See also* 9th Cir. R. 10-2.

That which was not admitted as evidence before the federal district court is not part of the clerk's record and cannot be part of the record on appeal. *Kirshner v. Uniden Corporation of America*, 842 F.2d 1074, 1077 (9th Cir. 1988); *See also United States v. Walker*, 601 F.2d 1051, 1054-1055 (9th Cir. 1979).

The appeal is decided on the basis of the record before the trial judge when his decision was made. *Walker*, 601 F.2d at 1055 ("We are here concerned only with the record before the trial judge when his decision was made.") (emphasis added);

Heath v. Helmick, 173 F.2d 156, 156-57 (9th Cir. 1949) (“The cause must be tried here upon the record made at the original trial.”).

STATEMENT OF THE CASE¹

Purported petitioner Terry Jess Dennis (hereinafter Dennis) was charged by information with first-degree murder with the use of a deadly weapon for the March 1999 willful, deliberate and premeditated strangulation murder of Ilona Straumanis. EOR 1698. Dennis was evaluated by a psychiatrist, determined to be competent to stand trial, and entered a guilty plea to the charge against him. *Id.* Prior to accepting his guilty plea, the state district court thoroughly canvassed Dennis, finding him competent to enter a plea and that his plea was knowingly and voluntarily entered. *Id.* See *Dennis v. State*, 116 Nev. 1075, 1076-1081, 13 P.3d 434, 435-438 (2000). Ultimately, a three-judge panel sentenced Dennis to death. *Id.*

Dennis took a direct appeal to the Nevada Supreme Court. EOR 1698. See *Dennis v. State*, 116 Nev. 1075, 1076-1081, 13 P.3d 434, 435-438 (2000). In that appeal Dennis claimed that the imposition of the death penalty where it was “solely predicated upon three (3) prior felony aggravators that were each several years old – was excessive given the facts of the case and the character of the defendant.” CR 13, Exhibit 20 at 11-16.

The Nevada Supreme Court affirmed Dennis' conviction and sentence of death. EOR 1698.

On April 10, 2001, Dennis filed a timely petition for writ of habeas corpus (post-conviction). EOR 1698. The district court appointed counsel who supplemented the petition. EOR 1698-1699.

On June 4, 2003, the state district court dismissed the petition without an evidentiary hearing. EOR 1699. After Dennis appealed to the Nevada Supreme Court, the State moved for a remand. *Id.* The State's motion was based on letters Dennis addressed to the district court and the Washoe County District Attorney dated September 9 and 17, 2003, respectively. *Id.* In those letters, Dennis expressed his desire to withdraw his appeal to the Nevada Supreme Court and requested assistance in doing so, stating that he had shared with his counsel, Karla Butko, his desire to withdraw the appeal but Butko was "doing all she [could] to delay things." *Id.*

The Nevada Supreme Court granted the State's motion and remanded the matter to the state district court for further proceedings to determine Dennis's competency and the validity of any waiver of his appeal. EOR 1699.

On November 7, 2003, Butko then moved the district court for permission to withdraw from representation. EOR 1657, 1699. Butko alleged that Dennis's

¹ Reference will be made to the excerpts submitted by the purported "next-friend"

desire to waive his appeal and proceed to execution was so repugnant to her that she could no longer represent Dennis. Id. On November 7, 2003, the district court granted Butko's motion and appointed replacement counsel, Scott Edwards. REOR 1699. The court then ordered a competency evaluation by a psychiatrist. EOR 1699.

Dr. Thomas E. Bittker, a psychiatrist, conducted the evaluation and in a written report opined (1) Dennis "does have sufficient present ability to consult with his attorney with a reasonable degree of factual understanding"; (2) he "has a rational and factual understanding of the proceedings[,] ...is fully aware of the charges that he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty [and] is also aware of the legal options available to him and the consequences of his not proceeding with these options"; (3) he "is currently taking medications that are reasonable and consistent with the diagnosis of bipolar disorder, and his primary psychiatric problems, alcohol, amphetamine, and cocaine dependence, are contained by virtue of the total institutional control in his life"; and (4) "[t]he medications that he is taking are not having any unusual effect on [his] ability to make decisions in behalf of his own interest, and to cooperate with counsel to participate in the court hearing." EOR 1699. Dr. Bittker also diagnosed Dennis with a variety of other

as "EOR ____" and Respondents' excerpts as "REOR ____."

disorders including post-traumatic stress disorder, attention deficit hyperactivity disorder and mixed personality disorder with antisocial, cyclothymic borderline and schizoid features. EOR 1700. To these opinions, Dr. Bittker added:

[O]n the other hand, [Dennis] has sustained over the years episodes of suicidal ideation, suicide attempts, and self-destructive behavior, which heralded both the instant offense and his current legal strategy. I believe, with a reasonable degree of medical certainty, that [Dennis's] desire to both seek the death penalty and to refuse appeals in his behalf are directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-hatred.

Clearly, an alternative to consider is whether or not [Dennis's] view of himself is simply a realistic incorporation of society's view of his "monstrous" behavior. On the other hand, it is conceivable and, in my mind, likely that both the defendant's offense and his current court strategy spring from his psychiatric disorder and his substance abuse disorder, that he wishes to die and he wishes to be certain of a reasonably humane death. Consequently, the death penalty, as provided by the state, is quite congruent with both his intent and his psychiatric disorder.

EOR 1700.

On December 4, 2003, the district court conducted a hearing at which Dennis was present with replacement counsel, Scott W. Edwards. EOR 1700. The state district court thoroughly canvassed Dennis on the issues of his competence and waiver of rights. EOR 1701. On December 22, 2003, the court entered a detailed, written order finding that Dennis was competent to waive his rights and to

decide whether to forgo further litigation that might delay or overturn his execution and that he voluntarily, knowingly and intelligently waived his rights to pursue further relief, including his appeal with respect to his state petition for writ of habeas corpus (post-conviction). EOR 1701.

On February 2, 2004, Dennis filed a motion to voluntarily withdraw his appeal from the denial/dismissal of his state petition for writ of habeas corpus (post-conviction). EOR 1701. In the motion, Dennis's counsel, Edwards, stated that Dennis consented to the voluntary withdrawal of his appeal, having had the benefit of Edward's explaining to him the legal consequences of withdrawing the appeal, including that he cannot thereafter seek to reinstate the appeal and that any issues that were or could have been brought in the appeal are forever waived. EOR 1701.

On March 12, 2004, the Nevada Supreme Court dismissed Dennis's appeal. EOR 1698-1699. The Nevada Supreme Court found that substantial evidence supports the state district court's determination that Dennis is competent to make a rational choice to forgo further and possibly life-saving litigation, including the appeal to the Nevada Supreme Court. EOR 1702. The Nevada Supreme Court also found that the evidence likewise supports the district court's determination that Dennis's waiver of rights and decision to withdraw his appeal were voluntary, not the result of any improper influence, and are knowingly and intelligently made.

EOR 1706. The Nevada Supreme Court granted Dennis's motion to voluntarily dismiss his appeal. EOR 1706.

The state district court issued a warrant of execution on May 17, 2004. EOR 1708-1710. Dennis's execution has been set for July 22, 2004 at 9:00 p.m.

On or about June 14, 2004, more than seven (7) months after Butko sought to be and was relieved as Dennis's counsel because she disagreed with Dennis's desire to waive his appeal and proceed to execution, more than three (3) months after the Nevada Supreme Court dismissed Dennis's appeal, with absolutely no involvement by Butko in the interim, and without authority from Dennis, Butko, purporting to be a next-friend, filed a next-friend petition for writ of habeas corpus in the federal district court.² In the petition, with respect to the claims sought to be raised, Butko stated, "Petitioner incorporates the claims and factual allegations raised in the state habeas petition and briefing on appeal from denial of the state habeas petition, Exs. 26, 27 43, as if fully set forth herein." The federal public defender and Butko have filed the action and are both licensed attorneys, they sought the appointment of counsel, purportedly on behalf of Dennis.

Respondents moved to dismiss the petition. EOR 1773-1786. Respondents submitted additional exhibits. REOR 1-435.

² No court has heard from Butko regarding Dennis until this eleventh hour "action" was presented to the federal district court barely a month before Dennis's scheduled execution.

The federal district court conducted a hearing on July 1, 2004. EOR 1796-1875. At that hearing Butko presented no evidence whatsoever indicating that there had been any change in Dennis's condition since the state court determination regarding his competence. EOR 1796-1875, 1902.

Following the hearing, the federal district court entered an order denying Butko standing. EOR 1889-1903.

The federal district court issued a certificate of appealability. EOR 1907.

Butko has filed her opening brief. Respondents submit their answering brief.

STATEMENT OF FACTS

The facts that control this action are those made by the Nevada courts. Those facts are found, without limitation, predominantly in EOR 655-660; 662-717; 1135-1137; 1146-1147; 1149-1151; 1512-1513; 1655-1661; 1698-1706; and 1714-1721. Respondents adopt the factual findings and recitations therein and incorporate them herein as if set out in full. The findings therein are presumptively correct. 28 U.S.C. § 2254(e)(1). Butko had the burden of rebutting that presumption by clear and convincing evidence. *Id.*

Dennis is capable of assisting in his own defense and understanding the nature of legal proceedings he may pursue to avoid or delay imposition of the death penalty. EOR 1658, ll. 21-23.

Dennis has sufficient present ability to consult with his attorney with a reasonable degree of understanding, and he has a rational and factual understanding of the legal proceedings. EOR 1660, ll. 8-10.³

Dennis does not suffer from any disease or mental defect that prevents him from making a rational choice among his various legal options – including whether to pursue any further litigation that may save his life. EOR 1658, ll. 18-21.

The Nevada Supreme Court found the district court's factual findings to be supported by substantial evidence and affirmed the findings. EOR 1698-1706. As noted above, all of the state-court factual, including those found and recited by the state district court and the Nevada Supreme Court, are entitled to a presumption of correctness which may be rebutted only upon a showing of clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Additionally, the federal district court made its own factual determinations. The federal district court found, as did the state courts, that Dennis understands his legal position and the options available to him, and he is able to make rational choices. EOR 1902.

The federal district court found that Dennis displayed understanding, rationality and overall competence at the extensive canvass conducted by the

³ Indeed, as the federal district court correctly noted, Butko conceded below that Dennis meets the standard of competency with respect to the second *Rumbaugh*

federal district court at the July 1, 2004, hearing. EOR 1902. The federal district court found that Dennis is competent to make his own decision to waive his right to pursue federal habeas relief in federal court. EOR 1902-1903.

Those factual findings, as well as any other made by the federal district court, are binding on this court unless they are found to be clearly erroneous.

DENIAL OF FACTUAL ALLEGATIONS

Respondents deny each and every factual allegation contained in the purported "next-friend" federal habeas petition save and except those expressly found to exist by a Nevada court of competent jurisdiction. Respondents deny each and every factual allegation or assertion in Butko's opening brief save and except those expressly found to exist by a Nevada court of competent jurisdiction or by the federal district court in its order filed July 7, 2004.

ARGUMENT

**A. Karla Butko Has No Standing To Bring This Action. Therefore,
The Action Should Be Dismissed.**

In *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990), the Supreme Court held that a next-friend federal habeas action requires the showing of incompetence or other disability and that the next friend's are dedicated to the interests of the petitioner by a significant relationship.

inquiry. EOR 1827-1828. Butko takes issue only with Dennis' volitional capacity,

The Court held:

A “next friend” does not himself become a party to the habeas action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. Most important for present purposes, “next friend” standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for “next friend” standing. First, a “next friend” must provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the “next friend” must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a “next friend” must have some significant relationship with the real party in interest. The burden is on the “next friend” clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

These limitations on the “next friend” doctrine are driven by the recognition that “it was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends.” Indeed, if there were no restriction on “next friend” standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of “next friend.”

Whitmore, 495 U.S. at 163-164. (citations and internal punctuation omitted).

the third *Rumbaugh* inquiry. *Id.*

As noted above, one necessary condition for “next friend” standing in federal court is a showing by the proposed “next friend” that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to the court, or other similar disability. *Whitmore v. Arkansas*, 495 U.S. at 165. See *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (state competency determinations entitled to deference). That prerequisite for “next friend” standing is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded. *Id.*

Conclusory allegations are insufficient to establish standing. *Brewer v. Lewis*, 989 F.2d 1021, 1026 (9th Cir. 1993); *Massie v. Woodford*, 244 F.3d 1192, 1197 (9th Cir. 2001).

The factual findings by the Nevada state courts which include findings of Dennis’s competency are presumptively correct. 28 U.S.C. § 2254(e)(1). *Demosthenes v. Baal*, 495 U.S. at 737. Those presumptively correct factual findings are found without limitations predominantly in EOR 655-660; 662-717; 1135-1137; 1146-1147; 1149-1151; CR 4, 1512-1513; 1698-1706; and 1714-1721. They are adopted by Respondents as if set out in full herein. The Nevada courts’ findings that Dennis is competent are presumptively correct. 28 U.S.C. § 2254(e)(1). *Demosthenes v. Baal*, 495 U.S. 731, 734, 737 (1990). The proposed

next friend has the burden of rebutting those factual findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Even in the absence of an express finding of competence by the state courts, a defendant who alleges insanity in his habeas corpus petition may be presumed to be competent, since the trial court judge would not have otherwise allowed the trial to proceed. 28 U.S.C. § 2254(e)(1). *Ford v. Wainwright*, 477 U.S. 399, 425-426 (1986).

- 1. Butko has no standing to bring this action because she has not met her burden of showing that Dennis is incompetent.**

Dennis is presumed to be competent. The Nevada courts have found Dennis to be competent to waive further proceedings. EOR 1655-1660; 1698-1706. As noted above, those factual findings are presumptively correct. 28 U.S.C. § 2254(e)(1). *Demosthenes v. Baal*, 495 U.S. 731, 734, 737 (1990). Butko has the burden of rebutting those factual findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Butko has the burden of clearly proving that Dennis is incompetent. *Whitmore v. Arkansas*, 495 U.S. at 149, 165 (1990).

Butko has presented no declaration or evidence apart from that which was presented to the state district court that would amount to meaningful evidence that Dennis is not currently competent. Butko does not show that Dennis's decision to forgo further proceedings is not "the product of a free and deliberate choice."

Comer v. Stewart, 215 F.3d 910, 917 (9th Cir. 2000). Therefore, Butko has no standing.

Past mental illness is not enough to upset a current determination that habeas corpus petitioner is competent, as will bar a non-party from being granted standing to appear as “next friend” of petitioner. *Massie v. Woodford*, 244 F.3d 1192 (9th Cir. 2001); *Brewer v. Lewis*, 989 F.2d 1021, 1025, 1026 & n.6 (9th Cir. 1993) (opinions by doctors who never met petitioner and by physician who examined and found him competent several years before but speculates, based on information not available at that time, that condition may have deteriorated is inconclusory and insufficient to outweigh substantial evidence demonstrating competence and also concluding that when four experts who had examined petitioner determined he suffered from personality disorder yet all agreed he was competent, neither petitioner’s long-standing mental problems, nor even his current belief that after his execution he and the girlfriend he murdered would live together on another planet, constitute “meaningful evidence” that petitioner was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision); *Vargas v. Lambert*, 159 F.3d 1161, 1170-71 (9th Cir.) (staying execution because next friend presented meaningful evidence that condemned was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make rational decisions; condemned was

currently being medicated with psychotropics, sleeping sixteen hours a day, and one expert diagnosed condemned as psychotic), *stay vacated by Lambert v. Vargas*, 525 U.S. 925 (1998); *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992), and *Rumbaugh v. Procnier*, 753 F.2d 395 (5th Cir. 1985), (defendant in both cases was suffering from a mental disorder but was able to rationally choose between his options of pursuing an appeal or waiving further legal rights.)

Furthermore, the Nevada Courts' determinations that Dennis competently waived his rights to further appeal are presumptively correct. EOR 1655-1660; 1698-1706. 28 U.S.C. § 2254(e)(1). The state courts relied on the proper standard. EOR 1698-1706. *Franklin v. Francis*, 144 F.3d 429 (6th Cir. 1998). Therefore, pursuant to 28 U.S.C. § 2254(d), because the Nevada Supreme Court decision was not contrary to or did not involve an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, this court is bound by the determination of the Nevada Supreme Court that Dennis was competent to waive further proceedings. Because he is competent, Butko does not have standing to pursue a writ of habeas corpus on Dennis's behalf.

Butko argues that this Court should not defer to the state court findings. First, Butko argues that the state courts applied the wrong standard in determining Dennis's competency. Butko is incorrect. The state district court was aware of

Rees. EOR 1613.⁴ Moreover, the terms in which the state district court stated its factual findings make clear that the court effectively applied the *Rees/Rumbaugh* standard.

Moreover, Butko's argument that the state court applied the wrong legal test misses the point. This Court, as the federal district court was obliged to, must defer to the state court's factual findings pursuant to 28 U.S.C. § 2254(e)(1). The question of Dennis' competence does not involve the adjudication of a claim on the merits.

Butko's argument that "lay judges" are incapable of making the necessary legal and/or factual findings is wholly without merit. The logical extension of that argument is that no state or federal judge is capable of making or competent to make any determination whatsoever with respect to the competency of any defendant. The logical extension of that argument is that no state or federal judge is capable of making or competent to make any determination whatsoever with respect to the competence of the defendant to waive his right to further appeals. The logical extension of that argument is that the "lay judges" must always defer to the opinion of a psychologist or a psychiatrist, notwithstanding the court's own observations and canvass of a defendant. No authority exists for such a

⁴ The federal district court referred to Exhibit 52 at 9, however, that is a typographical error. The correct reference is to Exhibit 51 at 9, which is reflected in EOR 1613.

proposition as Butko offers. Indeed, a court's competency findings are frequently and necessarily based upon the court's own observations of an individual. This Court should note that the state district judge was well aware of Dennis and had observed him through numerous proceedings. Indeed, the state district judge's order reflects and considers that awareness. EOR 1655-1660.

Butko's asserts that the state court finding that "Dennis does not suffer from any disease or mental defect that prevents him from making a rational choice among his various legal options – including whether to pursue any further litigation that may save his life" – was contrary to Dr. Biitker's report. Butko is wrong. Dr. Biitker's report did not directly address the third *Rumbaugh* inquiry. Dr. Biitker did not state an opinion that Dennis was unable to make a rational choice. Rather, Dr. Biitker's report stated that Dennis's decision to forego appeals is "directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-hatred," that Dennis's decision "spring[s] from his psychiatric disorder and his substance abuse disorder," and that his decision "is quite congruent with both his intent and his psychiatric disorder." EOR 1602-1603. Even when the federal district judge questioned Dr. Biitker at the July 1 hearing, Dr. Biitker avoided providing an opinion in the terms of the third *Rumbaugh* inquiry. EOR 1858-1860. Butko failed to demonstrate by clear and convincing evidence from the opinion stated by Dr. Biitker that Dennis suffers from a mental

disease or defect that *prevents* him from making a rational choice among his options. It was up to the state court to make a finding in that regard. The state court weighed the evidence before it, resolved conflicts in the evidence, and concluded that the answer was no. EOR 1619-1623.

Nothing presented to the court by Butko – including her arguments regarding the state proceedings, and the testimony of Dr. Biitker at the July 1 hearing – and nothing in the federal district court’s canvass of Dennis, shows by clear and convincing evidence that any of the state court findings were erroneous.

Butko’s argument that the state court proceedings, leading to findings regarding Dennis’s competency, did not comport with due process because they were not adversarial is utterly without merit. The state court appointed a neutral psychiatrist to examine Dennis and report on his competence. EOR 1590-1591. As the federal district court pointed out, the state court proceedings were a fair and effective means of resolving the question of Dennis’s competence. Butko cited no authority supporting the proposition that the state court’s procedure led to a deprivation of Dennis’ constitutional due process rights. Moreover, although not constitutionally required, Dennis was represented by counsel. EOR 1657. Butko has presented no authority whatsoever that the State’s procedure was such that the state court findings do not warrant deference pursuant to 28 U.S.C. § 2254(e)(1).

Butko's argument provides no basis for any assertion that the state court findings do not warrant deference pursuant to 28 U.S.C. § 2254(e)(1).

The federal district court correctly noted that Butko presented no meaningful evidence, indeed, no evidence whatsoever, indicating that there has been any change in Dennis's condition since the state-court determination regarding his competence. *Demosthenes v. Baal*, 495 U.S. 731, 736 (1990) (no evidentiary hearing warranted without a showing of "meaningful evidence" of incompetency). *See also Wells ex rel. Kehne v. Arave*, 18 F.3d 656, 658 (9th Cir. 1994). As the federal district court correctly noted, the understanding, rationality and overall competence of Dennis displayed at the extensive canvass conducted by that court at the July 1 hearing, is quite congruent with the factual findings made by the state court which establish Dennis's competence within the meaning of *Rees* and *Rumbaugh*. EOR 1800-1819, 1902. In sum, Dennis understands his legal position and the options available to him, and he is able to make rational choices. EOR 1902.

The federal district court also found, as did the state courts, that Dennis is understands his legal position and the options available to him, and he is able to make rational choices. EOR 1902. The federal district court found that Dennis displayed understanding, rationality and overall competence at the extensive canvass conducted by the federal district court at the July 1, 2004, hearing. EOR

1902. The federal district court found that Dennis is competent to make his own decision to waive his right to pursue federal habeas relief in federal court. EOR 1902-1903.

The findings made by the federal district court are not clearly erroneous. Given that the federal district court has found that Dennis is competent to waive his rights, no further consideration need be given to any other issue presented by Butko.

The answer to the third *Rumbaugh* question is essentially a factual question. *Rumbaugh v. Procunier*, 753 F.2d 395, 398-399 (5th Cir. 1985). As such, the federal district court's finding is protected by the shield and buckler of Fed.R.Civ.P 52(a) and must be accepted unless shown to be clearly erroneous. *Rumbaugh*, 753 F.2d at 399. The federal district court had the opportunity to question and canvass Dennis and did so. EOR 1796-1875. The federal district court found Dennis competent to make his own decision to waive his right to pursue habeas corpus relief. EOR 1902-1903. The federal district court found that Butko had failed to demonstrate that Dennis suffers from a mental disease or defect that *prevents* him from making a rational choice among his options. EOR 1901-1902.

The federal district court correctly found that nothing presented to it – including Butko's arguments regarding the state proceedings, and the testimony of Dr. Biitker at the July 1 hearing –and nothing in the court's canvass, showed by

clear and convincing evidence that any fo the state court findings were erroneous.
EOR 1902.

Furthermore, the federal district court correctly afforded the state court factual findings the deference mandated by 28 U.S.C. § 2254(e)(1). The court correctly concluded on the basis of those factual findings and on the basis of its own canvass of Dennis is competent to make his own decision to waive his right to pursue habeas corpus relief in federal court. The court correctly concluded that Butko does not qualify for “next friend” standing. The court correctly dismissed Butko’s petition.

The Supreme Court when rejecting the Ninth Circuit’s view that the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial, stated in *Godinez v. Moran*, 509 U.S. 389, 397-399 (1993),

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for “reasoned choice” among the alternatives available to him. How this standard is different from (much less higher than) the *Dusky* standard – whether the defendant has a “rational understanding” of the proceedings – is not readily apparent to us. In fact, respondent himself opposed certiorari on the ground that the difference between the two standards is merely one of “terminology.” Brief in Opposition at 4, and he devotes little space in his brief on the merits to a defense of the Ninth Circuit’s standard, see, e.g., Brief for Respondent 17-18, 27, 32; see also Tr. of Oral Arg. 33 (“Due process does not require [a] higher standard, [it] requires a

separate inquiry”). [Footnote 9: We have used the phrase “rational choice” in describing the competence necessary to withdraw a certiorari petition, *Rees v. Payton*, 384 U.S. 312, 314, 86 S.Ct. 1505, 1506, 16 L.Ed.2d 583 (1966) (per curiam), but there is no indication in that opinion that the phrase means something different from “rational understanding.”] But even assuming that there is some meaningful distinction between the capacity for “reasoned choice” and a “rational understanding” of the proceedings, we reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.

Butko’s argument is, in actuality, the same argument that the Supreme Court rejected in *Godinez*.

In *Dusky v. United States*, 362 U.S. 402 (1960), the Supreme Court held that a defendant is competent to stand trial when he “has sufficient ability to consult with his attorney with a reasonable degree of rational understanding” and “has a rational as well as a factual understanding of the proceedings against him.” *Dusky*, 362 U.S. at 402 (1960). In *Rees v. Peyton*, 384 U.S. 312 (1966), the Supreme Court held that in order to determine whether a prisoner is competent to forgo further habeas litigation, the trial court must determine whether the prisoner has the “capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or, on the other hand, whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.” *Rees v. Peyton*, 384 U.S. at 314 (1966). Courts have

held that the *Dusky* standard for determining whether one is competent to stand trial is necessarily the same standard in determining whether one is competent to waive appeals or other litigation as enunciated in *Rees*. See *Groseclose v. Dutton*, 594 F.Supp. 949, 957 n.4 (D.C. Tenn. 1984); *Franz v. State*, 296 Ark. 181, 188, 754 S.W.2d 839, 843 (1988).

The state district court's canvass of Dennis and its findings of fact satisfy *Rees*. In *Franklin v. Francis*, 144 F.3d 429, 433 (1998), the Sixth Circuit held that the *Rees* "test is not in the conjunctive but rather is alternative. Either the condemned has the ability to make a rational choice with respect to proceeding or he does not have the capacity to waive his rights as a result of his mental disorder. This conclusion is in line with all of the Supreme Court decisions and other court decisions since *Rees* was decided in 1966." *Franklin*, therefore, observes that a prisoner may suffer from a mental disorder but still be able to rationally choose between his options of pursuing an appeal or waiving further legal rights. *Id.* See also *Godinez v. Moran*, 509 U.S. 389, 401 n. 12 (1993) ("The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings."); *State v. Berry*, 75, 659 N.E.2d 796, 796 (Ohio 1996) (holding that "[a] capital defendant is mentally competent to abandon any and all challenges to his death sentence, ... if he has the mental

capacity to understand the choice between life and death and make a knowing and intelligent decision not to pursue further remedies”).

Here, Dr. Biitker found that Dennis “has a rationale and factual understanding of the proceedings [and] is fully aware of the charges he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty.” EOR 1602. Dr. Biitker found that Dennis is “aware of the legal options available to him and the consequences of his not proceeding with these options.” EOR 1602. Dr. Biitker further determined that “[t]he medications he is taking are not having any unusual effect on the defendant’s ability to make decisions in behalf of his own interest, and to cooperate with counsel or to participate in the court hearing.” *Id.* The state district court found “Dennis was lucid during the court’s canvass, and understood the court’s questions and the purpose of the hearing. Dennis answered the court’s questions with intelligence and insight.” EOR 1658. Dennis told the district court he wanted the death penalty because he “took a life and I’m ready to pay for that with mine.” EOR 1659.

It is apparent therefore that Dennis has the ability to make a rational choice whether to continue or waive further litigation. *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987) (*Rees*’s requirement that the prisoner have the capacity to appreciate his position and to make a rational choice requires only that he be

cognizant of his factual circumstances, and that his choice be logical, the product of reason, without determining whether the prisoner was reasoning from premises or values that were “within the pale of those our society accepts as rational”). He “has the capacity to appreciate his position,” *Rees, supra*, because he “understands the choice between life and death,” and because he “understands the choice between life and death,” and “he fully comprehends the ramifications of his decision to waive further legal proceedings.” *Id.* Even if he has a mental disorder, there is no evidence the disorder prevents him from making a rational decision to forgo further litigation. *Smith v. Armontrout*, 812 F.2d 1050, 1056 (8th Cir. 1987) (rejecting the idea that where there is a possibility of a mental disorder affects a prisoner’s decision-making capacity, the prisoner must be deemed incompetent). Indeed, the district court so found. *Id.* at 142. The findings of the state district court meet the *Rees* standard.

Moreover, this case is differentiated from *Miller ex rel. Jones v. Stewart*, 231 F.3d 1248 (9th Cir. 2000), because there was a hearing on Dennis’s competency to choose to die or the voluntariness of his decision. *Miller ex rel. Jones v. Stewart*, 231 F.3d at 1252. Additionally, the federal district court conducted its own hearing.

The essence of Butko’s argument is that Dennis is suicidal and, therefore, incompetent. Butko’s argument must be rejected. This Court cannot conclude as a

matter of law that a person who finds his life situation intolerable and who welcomes an end to the life experience is necessarily legally incompetent to forgo further legal proceedings which might extend that experience. *Rumbaugh*, 753 F.2d at 403, citing *Gilmore v. Utah*, 429 U.S. 1012 (1976).

2. Even if Dennis is not competent, Butko is not truly dedicated to Dennis's best interests.

Article III of the United States Constitution requires that a plaintiff have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691 (1962). The significant-relationship requirement goes a long way towards ensuring the existence of "such a personal stake" in next friend standing cases as well. One who has some significant relationship with the real party in interest is much more likely to experience the real party's injury in fact in a personal way. One with no significant relationship by contrast, is much more likely to be utilizing the real party's injury as an occasion for entry into policy-laden proceedings of all sorts. *Hamdi v. Rumsfeld*, 294 F.3d 598, 605 (4th Cir. 2002).

"[H]owever worthy and high-minded the motives of "next friends" may be, they inevitably run the risk of making the actual defendant a pawn to be

manipulated on a chessboard larger than his own case.” *Lenhard v. Wolff*, 443 U.S. 1306, 1312, 100 S.Ct. 3 (1979).

Butko’s opposition to the death penalty does not give her standing. The logical conclusion of a decision supporting standing on that basis would be that any person who opposes the death penalty or the enforcement of the death penalty would have next friend standing. That, obviously, is absurd. Just as obviously, Butko’s opposition to Dennis’s decision does not give her standing.

The fact that Butko withdrew from representing Dennis because she found his desire to cease further litigation and accept his punishment does not satisfy the requirement the next friend be dedicated to Dennis’s best interests. Frankly, a competent litigant is the captain of his own ship and he, not his attorney, is the one who decides whether or not to continue to litigate. The Supreme Court recognized that this is true even in capital litigation. *Whitmore v. Arkansas*, 495 U.S. 149 (1990). Where the real party in interest explicitly makes a competent decision to forgo further proceedings, “next friends” who wish to proceed contrary to the real party in interests wishes have no standing. *Davis v. Austin*, 492 F.Supp. 273, 275-276 (N.D.Ga. 1980).

Butko has filed the petition because she perceives that there are rights to be vindicated. There is a difference between being “uninvited because you are meant to be excluded” and being “uninvited but welcome.” In this case, the evidence

shows that Dennis affirmatively objects to Butko's efforts. No friend or relative has come forth on Dennis's behalf. There is no evidence that Butko sought authorization to bring the action on Dennis's behalf or even obtained implied authority to do so. To allow Butko's appearance would violate the second prong of the *Whitmore-Massie* test.

Indeed, Butko terminated her relationship with Dennis she informed the state court that his decision to discontinue litigation was repugnant to her. Moreover, to the extent that Butko voiced any concern about Dennis's competency, that issue was addressed by the court.

Butko has no substantial relationship with Dennis. Butko abandoned her client for her own personal beliefs. She wanted to advance her own agenda rather than her client's. Butko was delaying the post-conviction litigation as much as she could. 1572, 1699. Clearly, that and the fact that Butko failed to supply the district court with the documentation showing that she voluntarily absented herself from further representation of Dennis is additional evidence that Butko, rather than advancing Dennis's interests, is bent on advancing her own. Butko fails in this prong. *Hauser v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000).

It should also be noted that at the federal district court's hearing that Dennis had sent Michael Pescetta, apparent counsel for Butko, a letter informing Pescetta that he did not want Pescetta to interfere. EOR 1802.

3. Butko does not have a significant relationship with Dennis and, therefore, is not a "next friend." *Whitmore v. Arkansas*, 495 U.S. at 163-164, 110 S.Ct. at 1727.

Butko does not claim to be a relative of Dennis or even a friend to Dennis. Butko apparently does claim to be an attorney who formerly represented Dennis. The next friend must show some relationship or other evidence that would suggest that the next friend is truly dedicated to the interests of the real party in interest. The Eleventh Circuit Court of Appeals in *Ford v. Haley*, 195 F.3d 603, 605 & n.1 (11th Cir. 1999), *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000), has concluded that "some significant relationship" does exist when the would-be next friend has served in a prior proceeding as counsel for the real party in interest and did so with his consent. However, the circumstances presented in this matter are markedly different from those presented in *Ford* and *Hauser*.

Butko found Dennis's decision not to continue to pursue the appeal from the denial of his state petition for writ of habeas corpus (post-conviction) so repugnant that she moved to be relieved as his attorney. EOR 1657, 1699. Butko terminated the attorney-client relationship. EOR 1657, 1699. The logical extension of granting such a person next friend status would be that any attorney who withdraws from representation of a client because that attorney does not accept the decision(s) of his client to cease litigation has next friend standing. That, of

course, is absurd. Butko's motivation is to promote her personal opposition to her former client's decision and to coerce her former client to follow her wishes rather than his.

The transcript of the hearing and Dennis's letters disclose that he did not consent to Butko's continued representation. Exhibits 42, 47, 52 and 56.

It is significant to note that the last attorney to represent Dennis with his consent, Scott Edwards, has not made any next friend application.

The basis upon which Butko is pressing the issue is not even one of her own making. Rather, Butko is being used to advance the arguments of Pescetta who was denied permission to appear as amicus curiae before the Nevada Supreme Court. EOR 1666-1682, 1701-1702.

CONCLUSION

This action was brought in bad faith, without basis in law or in fact, by officious intermeddlers whose only desire is to advance their own agenda, to frustrate or delay by whatever means possible the execution of sentence lawfully imposed in state court. This action is brought by people who simply wish to impose their own views on a competent prisoner who does not want to pursue further action. Butko has no standing to bring the action. The Nevada state court's findings of competency are binding on this court. 28 U.S.C. § 2254(e)(1). It is the disingenuous for an attorney to claim that she is the "next friend" of a convicted

person when the attorney terminated her relationship with her client because of her personal beliefs. Respondents note, as this court should, that not once did Butko personally express to the state courts or to the federal district court any personal belief that Dennis is or was incompetent. The state courts and the federal district court have addressed any concern that Butko or anyone else might have had about Dennis's competency.

The Nevada court's findings are binding on this Court. 28 U.S.C. § 2254(e)(1). The burden is on Butko to rebut those findings by clear and convincing evidence. *Id.* Butko did not rebut those findings.

Moreover, the federal district court, based upon its own canvass and review of the record determined that Dennis is competent to waive further litigation. The federal district court's findings are binding on this Court. Those findings are not clearly erroneous.

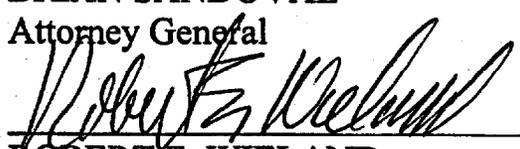
This Court should affirm the decision of the federal district court.

STATEMENT OF RELATED CASES

Respondents know of no related cases.

RESPECTFULLY SUBMITTED this 14th day of July 2004.

BRIAN SANDOVAL
Attorney General

By: 

ROBERT E. WIELAND
Senior Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit rule 35-4 or 40-1, the attached Respondents'

Answering Brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 9,045 words;

or,

Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text);

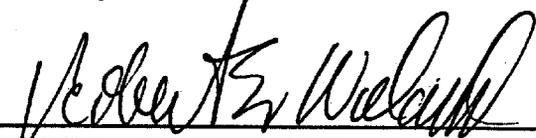
or,

In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

RESPECTFULLY SUBMITTED this 14th day of July 2004.

BRIAN SANDOVAL
Attorney General

By:

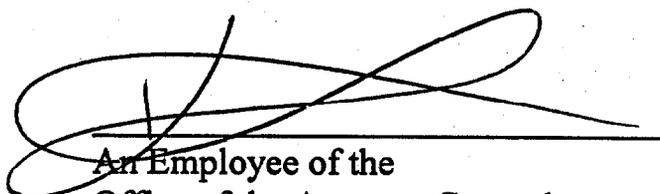

ROBERT E. WIELAND
Senior Deputy Attorney General
Nevada Bar No. 890
Criminal Justice Division
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 688-1818

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 14th day of July 2004, I served a copy of the foregoing RESPONDENTS' ANSWERING BRIEF, by placing said document in the U.S.

Mail, postage prepaid, addressed to:

FRANNY A. FORSMAN
Federal Public Defender
MICHAEL PESSETTA
330 South Third Street, Suite 700
Las Vegas, Nevada 89101



An Employee of the
Office of the Attorney General