

APPENDIX

EXHIBITS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT GORDON JOHNSTON, et
al.,

3:18-cv-00449-HDM-CBC

Petitioner,

ORDER

vs.

THE STATE OF NEVADA, et al.

Defendants.

The undersigned Judge having determined that recusal is warranted, IT IS ORDERED that the undersigned Judge recuses himself from this action.

IT IS FURTHER ORDERED that this matter be referred to the
Chief Judge for reassignment

It is so Ordered.

Dated this 24th day of September, 2018.

Howard D. McFadden

UNITED STATES DISTRICT JUDGE

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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 ROBERT GORDON JOHNSTONE,

Case No. 3:18-cv-00449-MMD-CBC

10 Petitioner,

ORDER

11 v.

12 THE STATE OF NEVADA, *et al.*,

13 Respondents.

14 Petitioner Robert Gordon Johnstone has submitted what he styles as a Federal
15 Rule of Civil Procedure 60(b) motion for relief from judgment (ECF No. 1-1). He appears
16 to seek to challenge his 1976 Nevada state judgment of conviction. However, Johnstone
17 has not properly commenced a federal habeas matter. 28 U.S.C. § 1915(a)(2) and Local
18 Rule LSR 1-2. A motion for relief from judgment would be appropriate in a case that had
19 already been litigated and in which judgment had been entered. Instead, Johnstone
20 attempted to initiate a new action. The Court notes that it does not appear that Johnstone
21 has any other federal habeas action pending in this Court. If Johnstone seeks to file a
22 federal habeas petition, he must file it on the Court's 28 U.S.C. § 2254 habeas corpus
23 form and include either the \$5.00 filing fee or a fully completed application to proceed *in*
24 *forma pauperis*.

25 Thus, the present action will be dismissed without prejudice as improperly
26 commenced.

27 It is therefore ordered that this action is dismissed without prejudice.

28 ///

1 It is further ordered that a certificate of appealability is denied, as jurists of reason
2 would not find the Court's dismissal of this improperly commenced action without
3 prejudice to be debatable or incorrect.

4 It is further ordered that Petitioner's application for leave to proceed *in forma*
5 *pauperis* (ECF No. 5) and motion for appointment of counsel (ECF No. 6) are both denied
6 as moot.

7 It is further ordered that the Clerk enter judgment accordingly and close this case.

8 DATED THIS 22nd day of October 2018.



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10 MIRANDA M. DU
11 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROBERT GORDON JOHNSTONE,

Case No. 3:18-cv-00533-MMD-CBC

Petitioner,

Y.

ORDER

STATE OF NEVADA, *et al.*,

Respondents.

I. DISCUSSION

On November 8, 2018, this Court denied Petitioner's motion to proceed *in forma pauperis* and directed him to pay the filing fee in order to proceed with his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 3.) He has complied with that order and paid the required fee. (ECF No. 4.)

With his petition, Petitioner seeks to set aside Nevada convictions on two counts of first-degree murder entered in 1976. The Court notes that petitioner has brought previous actions under 28 U.S.C. § 2254, at least one of which (CV-N-94-370-ECR) culminated in a denial on the merits. In that proceeding, the Ninth Circuit Court of Appeals affirmed this Court's final order dismissing the petition. See *Johnstone v. Dir., Nevada Dep't of Prison*, Case No. 98-16476, 1999 WL 639195 (9th Cir. Aug. 19, 1999). The United States Supreme Court subsequently denied petitioner's petition for writ of certiorari. See *Johnstone v. Bayer*, 529 U.S. 1058 (2000).

If a petitioner has previously filed an application for habeas relief under section 2254 which has been denied on the merits, the court cannot grant relief with respect to a

1 claim that was presented in the prior application. 28 U.S.C. § 2244(b)(1). In addition, the
2 court cannot grant relief with respect to a claim that was not presented in the prior
3 application unless:

4 (A) the applicant shows that the claim relies on a new rule of
5 constitutional law, made retroactive to cases on collateral review by the
6 Supreme Court, that was previously unavailable; or

7 (B)(I) the factual predicate for the claim could not have been
8 discovered previously through the exercise of due diligence; and

9 (ii) the facts underlying the claim, if proven and viewed in light of the
10 evidence as a whole, would be sufficient to establish by clear and
11 convincing evidence that, but for constitutional error, no reasonable
12 factfinder would have found the applicant guilty of the underlying offense.

13 28 U.S.C. § 2244(b)(2). Moreover, § 2244(b)(3) requires a petitioner to obtain leave from
14 the appropriate court of appeals before filing a second or successive petition in the district
15 court.

16 Petitioner has failed to secure an order from the court of appeals authorizing this
17 action as required by § 2244(b)(3). Therefore, this Court is without jurisdiction to consider
18 the habeas petition filed herein. See *Burton v. Stewart*, 549 U.S. 147, 153 (2007).

19 II. CERTIFICATE OF APPEALABILITY

20 If petitioner seeks to appeal this decision, he must first obtain a certificate of
21 appealability. See 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to the
22 court of appeals from a final order in a habeas corpus proceeding unless a circuit justice
23 or judge issues a certificate of appealability); *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir.
24 2005) (per curiam) (holding that a certificate of appealability is required when the district
25 court dismisses a motion on the ground that it is an unauthorized, successive collateral
26 attack). A certificate of appealability may issue only if the petitioner "has made a
27 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In
28 addition, when a § 2254 petition is denied on procedural grounds, a certificate of
appealability should issue only when the petitioner shows that reasonable jurists "would

1 find it debatable whether the district court was correct in its procedural ruling." *Slack v.*
2 *McDaniel*, 529 U.S. 473, 484 (2000).

3 Petitioner has not made a substantial showing that a reasonable jurist would find
4 it debatable whether this Court is correct in dismissing his petition on procedural grounds.
5 Therefore, the Court denies a certificate of appealability.

6 **III. CONCLUSION**

7 It is therefore ordered that the Clerk shall file the petition for writ of habeas corpus
8 (currently docketed as ECF No. 1-1). The petition is dismissed for lack of jurisdiction. The
9 Clerk shall enter judgment accordingly.

10 It is further ordered that the Clerk shall also file Petitioner's motion for appointment
11 of counsel (currently docketed as ECF No. 1-2). The motion is denied as moot.

12 It is further ordered that a certificate of appealability is denied.

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14 DATED THIS 27th day of November 2018.



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16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 2 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT GORDON JOHNSTONE,

Petitioner-Appellant,

v.

STATE OF NEVADA; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 18-17348

D.C. No. 3:18-cv-00533-MMD-CBC
District of Nevada,
Reno

ORDER

Before: SILVERMAN and CALLAHAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

CLOSED,APPEAL,HABEAS,IFP,P5

**United States District Court
District of Nevada (Reno)
CIVIL DOCKET FOR CASE #: 3:18-cv-00533-MMD-CBC**

Johnstone v. The State of Nevada et al

Assigned to: Judge Miranda M. Du

Referred to: Magistrate Judge Carla Baldwin Carry

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 11/06/2018

Date Terminated: 11/27/2018

Jury Demand: None

Nature of Suit: 530 Habeas Corpus
(General)

Jurisdiction: Federal Question

Petitioner**Robert Gordon Johnstone**represented by **Robert Gordon Johnstone**

11780

Northern Nevada Correctional Center
PO Box 7000
Carson City, NV 89702
PRO SE

V.

Respondent**Nevada, State of**represented by **Adam P. Laxalt**

Nevada Attorney General

100 North Carson Street

Carson City, NV 89701

775-684-1100

Fax: 775-684-1108

Email: usdcfilings@ag.nv.gov

LEAD ATTORNEY**ATTORNEY TO BE NOTICED****Respondent****Nevada Attorney General**

Date Filed	#	Docket Text
11/06/2018	<u>1</u>	MOTION/APPLICATION for Leave to Proceed in forma pauperis, filed by Petitioner Robert Gordon Johnstone. (Attachments: # <u>1</u> Petition for a Writ of Habeas Corpus, # <u>2</u> Motion for Appointment of Counsel, # <u>3</u> Civil Cover Sheet, # <u>4</u> Exhibit)(KW) (Entered: 11/07/2018)
11/07/2018		Case assigned to District Judge Miranda M. Du and Magistrate Judge Carla Baldwin Carry. (WJ) (Entered: 11/07/2018)

11/07/2018	<u>2</u>	NOTICE from USDC advising case against State of Nevada, et al., has been received and assigned case number 3:18-cv-00533-MMD-CBC . (KW) (Entered: 11/07/2018)
11/08/2018	<u>3</u>	ORDER that the IFP Application (ECF No. <u>1</u>) is denied ; petitioner will have until 12/8/2018 to have the \$5 filing fee sent to the clerk; Failure to comply will result in the dismissal of this action; Clerk directed to send petitioner two copies of this order (<i>Mailed to P on 11/8/2018</i>). Signed by Judge Miranda M. Du on 11/8/2018. (Copies have been distributed pursuant to the NEF - LH) (Entered: 11/08/2018)
11/26/2018	<u>4</u>	RECEIPT of Payment: \$ 5.00 , receipt number NVRNO-004366. (no image attached) (DRM) (Entered: 11/26/2018)
11/27/2018	<u>5</u>	ORDER - Clerk directed to file the petition for writ of habeas corpus (currently docketed as ECF No. <u>1</u> -1) and Petitioner's motion for appointment of counsel (currently docketed as ECF No. <u>1</u> -2); the petition is dismissed for lack of jurisdiction; the motion is denied as moot ; a certificate of appealability is denied ; Clerk directed to enter judgment. Signed by Judge Miranda M. Du on 11/27/2018. (Copies have been distributed pursuant to the NEF - LH) (Entered: 11/27/2018)
11/27/2018	<u>6</u>	PETITION for Writ of Habeas Corpus by Robert Gordon Johnstone. Filed and dismissed for lack of jurisdiction per ECF No. <u>5</u> Order. (LH) (Entered: 11/27/2018)
11/27/2018	<u>7</u>	MOTION for Appointment of Counsel by Petitioner Robert Gordon Johnstone. Filed and denied as moot per ECF No. <u>5</u> Order. (LH) (Entered: 11/27/2018)
11/27/2018	<u>8</u>	JUDGMENT. Signed by Clerk of Court Debra K. Kempf on 11/27/2018. (Copies have been distributed pursuant to the NEF - LH) (Entered: 11/27/2018)
12/04/2018	<u>9</u>	MOTION - <i>Application for Certificate of Probable Cause</i> , by Petitioner Robert Gordon Johnstone. (KR) (Entered: 12/04/2018)
12/04/2018	<u>11</u>	NOTICE OF APPEAL as to ECF No. <u>5</u> Order, by Petitioner Robert Gordon Johnstone. Filing fee \$ 505 (NOT PAID). E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. Notice of Appeal NEF and PACER Docket sheet mailed to P on 12/10/2018. Filed and distributed per ECF No. <u>10</u> Order. (LH) (Entered: 12/10/2018)
12/10/2018	<u>10</u>	ORDER that directs the Clerk to docket ECF No. <u>9</u> as a Notice of Appeal as of the date it was filed and to electronically notify the AG, as counsel for the Respondents (<i>E-service on 12/10/2018</i>); the Court stands by its decision to deny a COA and therefore denies Petitioner's motion (ECF No. <u>9</u>). Signed by Judge Miranda M. Du on 12/10/2018. (Copies have been distributed pursuant to the NEF - LH) Modified on 12/10/2018 to reference NOA (LH). (Entered: 12/10/2018)

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 18-17348

Docketed: 12/11/2018

Nature of Suit: 3530 Habeas Corpus

Termed: 04/02/2019

Robert Johnstone v. State of Nevada, et al

Appeal From: U.S. District Court for Nevada, Reno

Fee Status: Due

Case Type Information:

- 1) prisoner
- 2) state
- 3) 2254 habeas corpus

Originating Court Information:

District: 0978-3 : 3:18-cv-00533-MMD-CBC

Trial Judge: Miranda M. Du, District Judge

Date Filed: 11/06/2018

Date	Date Order/Judgment	Date NOA	Date Rec'd
Order/Judgment:	EOD:	Filed:	COA:
11/27/2018	11/27/2018	12/04/2018	12/10/2018

Prior Cases:

15-73361 **Date Filed:** 11/03/2015 **Date Disposed:** 02/26/2016 **Disposition:** Second
 Petition Denied - Judge Order

Current Cases:

None

ROBERT GORDON JOHNSTONE (State
 Prisoner: #11780)

Petitioner - Appellant,

Robert Gordon Johnstone
 [NTC Pro Se]
 NNCC - NORTHERN NEVADA
 CORRECTIONAL CENTER
 P.O. Box 7000
 Carson City, NV 89702-7000

v.

STATE OF NEVADA
 Respondent - Appellee,

Aaron Darnell Ford, Esquire
 Direct: 775-684-1100
 [COR NTC Dep State Aty Gen]
 AGNV - Nevada Office of the Attorney General
 100 North Carson Street
 Carson City, NV 89701

ATTORNEY GENERAL FOR THE STATE OF NEVADA Respondent - Appellee,	Aaron Darnell Ford, Esquire Direct: 775-684-1100 [COR NTC Dep State Aty Gen] (see above)
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ROBERT GORDON JOHNSTONE,

Petitioner - Appellant,

v.

STATE OF NEVADA; ATTORNEY GENERAL FOR THE STATE OF NEVADA,

Respondents - Appellees.

12/11/2018	<u>1</u>	Open 9th Circuit docket: needs certificate of appealability. Date COA denied in DC: 11/27/2018. Record on appeal included: Yes. (Electronic: PACER) [11117104] (RT) [Entered: 12/11/2018 12:12 PM]
12/17/2018	<u>2</u>	Filed Appellant Robert Gordon Johnstone motion for certificate of appealability. Deficiencies: No certificate of service. [11126561] (NAC) [Entered: 12/19/2018 02:09 PM]
12/19/2018	<u>3</u>	Filed Appellant Robert Gordon Johnstone motion to appoint counsel. Deficiencies: No certificate of service. [11126567] (NAC) [Entered: 12/19/2018 02:11 PM]
01/08/2019	<u>4</u>	Attorney Adam Paul Laxalt in 18-17348 substituted by Attorney Aaron Darnell Ford in 18-17348 [11144881] (RY) [Entered: 01/08/2019 10:35 AM]
04/02/2019	<u>5</u>	Filed order (BARRY G. SILVERMAN and CONSUELO M. CALLAHAN) The request for a certificate of appealability (Docket Entry No. [2]) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012). Any pending motions are denied as moot. DENIED. [11250068] (OC) [Entered: 04/02/2019 12:06 PM]
04/08/2019	<u>6</u>	Filed Appellant Robert Gordon Johnstone letter dated 04/03/2019 re: status of case; request for docket sheet. Paper filing deficiency: None. (Sent copy of Public docket 4/10/2019) [11258928] (NAC) [Entered: 04/10/2019 09:51 AM]