APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN MATTHIAS WATSON, III,
Respondent.

No. 78780

FILED

FEB 10 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Parraguirre, C.J.

Hardesty, J.

Stiglich, J.

Cadish, J.

Silver, J.

Herndon, J.

PICKERING, J., dissenting:

I dissent. I would grant rehearing of this matter.

Pickering, J.

cc: Hon. Michelle Leavitt, District Judge
Attorney General/Carson City
Clark County District Attorney
Resch Law, PLLC d/b/a Conviction Solutions
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN MATTHIAS WATSON, III,
Respondent.

No. 78780

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant John Watson and his wife, Everilda "Evey" Watson, travelled to Las Vegas, Nevada, and while there, Watson killed Evey and disposed of her body. A jury convicted him of first-degree kidnapping and first-degree murder with the use of a deadly weapon and sentenced him to death. This court affirmed the judgment of conviction and death sentence. *Watson v. State*, 130 Nev. 764, 335 P.3d 157 (2014). Watson filed a timely postconviction petition for a writ of habeas corpus, which the district court granted after concluding that trial counsel acted unreasonably by conceding Watson's guilt during closing argument when Watson had insisted on maintaining his innocence. The State appeals. Because we agree with the State that trial counsel did not concede Watson's guilt, we reverse and remand.

The United States Supreme Court has recognized there are circumstances where it may be reasonable for trial counsel to concede a client's guilt. *See, e.g., Florida v. Nixon*, 543 U.S. 175 (2004). "Defense

counsel undoubtedly has a duty to discuss potential strategies with the defendant." *Id.* at 178. Consequently prudent counsel should explain any strategy that approaches a concession. *See id.* at 192 (recognizing that counsel should inform the defendant of the strategy he believes is in the defendant's best interest); *cf. McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) ("Counsel, in any case, must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option." (citation omitted)). But "[w]hen a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy*, 138 S. Ct. at 1509.

Here, the district court concluded that Watson's expressed objective was to maintain his innocence and that trial counsel conceded guilt during closing argument. The State challenges both conclusions. We, however, address only the concession issue because our decision on that issue is dispositive.[1]

Courts generally find a concession of guilt only when it is explicit. For example, an attorney concedes a client's guilt by stating that the jury should find the client guilty of the charged crime or opining that the client is guilty, *see, e.g.*, *Francis v. Spraggins*, 720 F.2d 1190, 1193 n.7 (11th Cir. 1983) ("I think he went in the house and I think he committed the crime of murder probably . . ."), *receded from on other grounds by*

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[1]The State argues that *McCoy* announced a new constitutional rule and does not apply retroactively. We need not address that issue given our conclusion that trial counsel did not concede Watson's guilt.

Presnell v. Kemp, 835 F.2d 1567 (11th Cir. 1988); *People v. Lopez*, 242 Cal. Rptr. 3d 451, 456 (Ct. App. 2019) ("I've never disputed it. He's guilty of it; he should be punished for it."); *People v. Hattery*, 488 N.E.2d 513, 517 (Ill. 1985) (recognizing explicit statement that defendant did everything the State described in opening statement as concession of guilt), or by discouraging the jury from acquitting the client, *State v. Matthews*, 591 S.E.2d 535, 539 (N.C. 2004) ("I'm not saying you should find [my client] not guilty. That's very unusual. And it kind of cuts against the grain of a defense lawyer. But I'm telling you in this case you ought not to find him not guilty because he is guilty of something."). And although the Supreme Court has not explained what counts as "conceding guilt," in *McCoy* the concession was explicit. *See McCoy*, 138 S. Ct. at 1506-07. Defense counsel told the jury during opening statement "there was 'no way reasonably possible' that they could hear the prosecution's evidence and reach 'any other conclusion than Robert McCoy was the cause of these individuals' death'" and "the evidence is 'unambiguous,' 'my client committed three murders'" and then reiterated during closing argument that his client "was the killer." *Id.* While a few courts have found implied concessions of guilt, it is only when "a 'reasonable person' viewing the 'totality of the circumstances' would conclude that counsel conceded the defendant's guilt." *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004). Under either approach, we are not convinced that trial counsel conceded Watson's guilt.

During closing arguments, defense counsel attacked the credibility of witnesses who had testified that Watson openly contemplated killing Evey and that Watson and Evey had been arguing. He challenged the State's theory that Watson killed Evey and then used power tools to

dismember her body in the hotel room, pointing out that there had been no noise complaints and only a small amount of physical evidence was recovered from the hotel room. Given that some forensic evidence was found in the hotel room and Evey had not been seen for several years, defense counsel acknowledged that "[s]omething happened in that room" and "admittedly something happened to Mrs. Watson." But defense counsel nonetheless maintained that the nature and amount of evidence recovered from the room did not in-and-of-itself support a conviction for first-degree murder with the use of a deadly weapon. Counsel then told the jury, "At most – at most, though I don't agree entirely, at most, perhaps you have a second-degree murder. . . [a]nd in all candor, I'd like to stand here and say you have to find [him] not guilty of murder. Well, I'm not an idiot." Counsel continued to argue that the evidence did not support a conviction for first-degree murder, "Admittedly, you may very well find him guilty of second-degree murder, if and only if, you feel that the circumstantial evidence warrants it."

Counsel did not opine that Watson was guilty or implore the jury to find him guilty of any offense. And counsel's acknowledgment of the evidence against Watson and the reality that the victim had not been seen in four years did not amount to a concession of guilt. *See, e.g., United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995) (concluding that counsel's acknowledgment that the events that were the subject of the prosecution occurred and that some prosecution witnesses were telling the truth was not a concession of guilt); *People v. Wiley*, 651 N.E.2d 189, 202-03 (Ill. 1995) (recognizing that admission that defendant may have participated in some events that were the subject of the prosecution was not

a concession of guilt); *Commonwealth v. Richards*, 153 N.E.3d 1226, 1248-49 (Mass. 2020) (holding that counsel did not concede guilt when he admitted defendant's involvement in the homicide as he argued defendant was not guilty of first-degree murder); *State v. Gainey*, 558 S.E.2d 463, 476 (N.C. 2002) (concluding that counsel did not concede guilt even though counsel admitted defendant was present during crime, involved in events attendant to crime, and engaged in other uncharged conduct). Similarly, counsel did not concede guilt by discussing second-degree murder as an alternative to the top charge of first-degree murder. *Cf. State v. Chambers*, 955 N.W.2d 144, 149-50 (Wis. 2021) (concluding that guiding jury toward lesser included offense did not constitute a concession of guilt). Counsel's acknowledgement that the jury could find Watson guilty of second-degree murder was contingent on the jury finding sufficient circumstantial evidence to support that offense, not on counsel's opinion or concession that Watson was guilty of that crime. *Cf. id.* at 151-52 (concluding that counsel's statement that jury should consider lesser included offense was restatement of jury instruction and not a concession of guilt); *People v. Bell*, 562 N.Y.S.2d 681, 682 (App. Div. 1990) (holding that argument that State may have only proven at most lesser included offense was not a concession of guilt). Indeed, the judge who presided over the trial, who heard and observed defense counsel's comments and who then canvassed Watson, stated on the record that the defense attorney did not say, nor did he intend to say, that Watson was guilty. Moreover, when queried by the court, Watson stated that he did not believe that the argument amounted to a concession when it was uttered.

Because counsel's argument did not concede guilt, the district court erred in granting relief on this claim. The district court addressed only this claim in the petition, concluding that its decision in Watson's favor on this claim rendered the other claims moot. On remand, the district court should address the other claims in the petition. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter. We therefore

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

_____, J.
Pickering

_____, J.
Herndon

cc: Hon. Michelle Leavitt, District Judge
Attorney General/Carson City
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Eighth District Court Clerk

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DISTRICT COURT

CLARK COUNTY, NEVADA

JOHN WATSON III,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No.: C230024
Dept. No: XII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Date of Hearing: April 11, 2019
Time of Hearing: 10:30 a.m.

This cause having come on for hearing before the Honorable Michelle Leavitt, District Court Judge, on April 11, 2019, the Petitioner not present but in the custody of the Nevada Department of Corrections and represented by his court-appointed attorney of record, Jamie J. Resch, Esq., and Respondent represented by Steven B. Wolfson, District Attorney, by and through Cal Thoman, Esq., and the Court having considered the matter, including briefs, arguments, and documents on file herein, and now therefore makes the following findings of facts and conclusions of law:

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FINDINGS OF FACT

1. On January 31, 2007, an Indictment was filed that charged John Watson ("Petitioner") with: Count 1, First Degree Kidnapping with Use of a Deadly Weapon, Count 2, Murder with Use of a Deadly Weapon (Open Murder), and Count 3, Robbery with Use of a Deadly Weapon. The State sought the death penalty. Following a jury trial, Petitioner was convicted of Count 1, First Degree Kidnapping, and Count 2, First Degree Murder with Use of a Deadly Weapon. Following a penalty phase proceeding, the jury found two aggravating factors and ultimately sentenced Petitioner to death. Petitioner filed a direct appeal, but his conviction and sentence were affirmed by a divided Nevada Supreme Court on October 2, 2014.

2. On December 17, 2014, Petitioner filed a proper person petition for writ of habeas corpus (post-conviction) with the District Court. Counsel was appointed and a supplemental petition was filed on April 26, 2017. Among other claims, the supplemental petition asserted in Ground Six that trial counsel acted ineffectively by conceding Petitioner's guilt to second degree murder without Petitioner's consent and/or without Petitioner being properly canvassed by the court. The State filed a response to the supplemental petition on April 19, 2018. Petitioner filed a reply on May 11, 2018.

3. On May 14, 2018, Petitioner filed an errata to his May 11, 2018 reply brief, based largely on the Supreme Court's May 14, 2018 decision in McCoy v. Louisiana, 138 S.Ct. 1500 (2018). The Court heard argument on the supplement on October 25, 2018, at which time it was determined supplemental briefing on the McCoy issue would be of assistance. The parties were directed to file supplemental briefs and the matter was scheduled for further argument. On April 11, 2019, the Court heard further argument from the parties on the supplemental McCoy briefing.

4. Based on the entire record of proceedings, arguments by the parties, and evidentiary record already developed, the Court finds that Petitioner has established all necessary underlying facts in support of his claim that counsel conceded guilt to second degree murder without Petitioner's consent. The Court finds, and the State has never contested, that Petitioner has maintained his innocence throughout these proceedings. This is so because Petitioner pled not guilty at his original arraignment and re-asserted his innocence of all charges in a proper person filing dated December 9, 2009 shortly before his trial. Additionally, at trial, Petitioner's plea of not guilty was announced to the jury when the clerk read the charges at the start of trial and, during jury selection, trial counsel informed the jury Petitioner was "100 percent innocent." Petitioner has therefore always maintained that the objective of his defense was that he is innocent of the charged criminal acts and that he wished to pursue an acquittal.

5. The Court further finds that trial counsel conceded Petitioner's guilt to second degree murder during the closing argument on at least three occasions. First, trial counsel argued that:

> Now, admittedly something happened to Mrs. Watson. I'm not so silly that I'm going to stand up here and tell you nothing happened to her. Obviously something happened to her. She didn't go to Guatemala. She hasn't contacted Miriam Alvarez, her cousin who she would see once or twice a month, speak to her on the phone two or three times a week. Her sons have not heard from her. Something happened. The problem here is we don't know exactly what happened to her. In order to convict Mr. Watson of first-degree murder, let alone first degree murder with use of a deadly weapon, there has to be more evidence than what has been presented to you, which is simply circumstantial evidence.

Trial counsel then argued:

> You have other options and the instructions talk about within first degree murder is second degree murder. At most – at most, though I don't agree entirely, at most, perhaps you have a second degree murder. You don't have the evidence of a weapon. What you do have is you have a woman who hasn't been heard

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> from for almost four years. That's true. And in all candor, I'd like to stand here and say you have to find [him] not guilty of murder. Well, I'm not an idiot. I know there is circumstantial evidence here. Basically, the circumstances are she hasn't been located. She hasn't contacted him. And as upsetting as that may be and as difficult as that may be and as bothersome as some of the evidence, theory and testimony that's presented in this case, it still doesn't amount to convicting my client Mr. Watson of first-degree murder.

Finally, trial counsel also argued:

> So lastly, please, read those instructions, review the evidence that was submitted, and most of all, use your common sense. And I propose to you that once you have done that, you will find Mr. Watson not guilty of first degree kidnapping with use of a deadly weapon. You'll find him not guilty of robbery with use of a deadly weapon. Admittedly, you may very well find him guilty of second degree murder, if and only if, you feel that the circumstantial evidence warrants it. You may not. If you don't, then you must find him not guilty of the open murder charge that the State has proposed in the indictment in this case.

The Court finds that the individual and collective effect of these arguments was to concede Petitioner's guilt to the offense of second-degree murder. This finding is further supported by the trial prosecutor's own actions, as after the closing arguments were completed, the prosecutor expressed a concern that trial counsel had conceded Petitioner's guilt to second degree murder.

6. The trial court canvassed Petitioner during a short evidentiary hearing about the concession of guilt by counsel, although the court failed to do so in a closed hearing. The record reflects, and this Court finds, that the State was present for the canvass conducted by the trial court judge. Even so, the trial judge ultimately inquired of Petitioner "did you have that discussion with him and know how he was going to argue" to which Watson responded "No, ma'am." This Court therefore finds that the evidentiary record already establishes that the concession of guilt by counsel during closing arguments was not authorized by Petitioner but

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was instead a surprise to Petitioner and wholly inconsistent with Petitioner's stated objective of maintaining his innocence.

CONCLUSIONS OF LAW

1. "In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to assert a claim for ineffective assistance of counsel, the petitioner must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-pronged test set forth in Strickland. See State v. Love, 109 Nev. 1136, 865 P.2d 322, 323 (1993). Under Strickland, the defendant must show that his counsel's representation fell below an objective standard of reasonableness, and that, absent those errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 697.

2. As further explained in Strickland, certain types of attorney error are so deficient that they transcend Strickland's ineffectiveness inquiry. That is, if there is a partial or complete denial of counsel in a criminal proceeding, the error is "legally presumed to result in prejudice." Id. at 692, see also United States v. Cronic, 466 U.S. 648, 659 (1984) (Identifying "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified").

3. Specific to this case, the Sixth Amendment has long been interpreted to grant the accused the right to decide the objectives of his or her defense. Gannett Co. v. DePasquale, 443 U.S. 368, 382 (1979), Jones v. Barnes, 463 U.S. 745, 751 (1983). In McCoy, the Supreme Court plainly explained what the Sixth Amendment has always held:

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> Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are.

McCoy, 138 S.Ct. at 1508-09, citing ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation"). As the Supreme Court further explained, the highest courts in at least three States have reached a similar conclusion. Id. at 1510.

4. While the McCoy decision did not discuss Nevada law specifically, it very well could have. Like the sister states that were highlighted by the Supreme Court, Nevada has also long held that the Sixth Amendment forbids trial counsel from conceding guilt without the client's permission. Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994). There, the Nevada Supreme Court echoed the same exact holding ultimately reached in McCoy: "When counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." Id, citing State v. Harbison, 337 S.E.2d 504 (N.C. 1985). In both McCoy and Jones, and with the instant case, the concession of guilt was made without the client's permission and during the guilt phase of a capital trial. Id. at 739.

5. The Jones decision further informs that the issue can be resolved within the context of an ineffective assistance of counsel claim, under Strickland, without the need for a further evidentiary hearing. The Jones decision applied Strickland during a direct appeal, and expressly held relief on an ineffective assistance of counsel claim was appropriate:

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> We agree with the analysis of the decisions cited in [Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990)] that defense counsel's statements fell below an objective standard of reasonableness. Coming as they did from Jones' own counsel, the concessions completely eroded any doubt that might have been raised in the juror's minds by Jones' protestations of innocence, and in fact made all of Jones' testimony incredible, since defense counsel essentially asserted that his own client was being untruthful.

Id. at 738.

6. The Court can easily distinguish the instant case from the Nevada Supreme Court's later decisions in Hernandez v. State, 124 Nev. 978, 194 P.3d 1235 (2008), and Armenta-Carpio v. State, 129 Nev.Adv.Opp. 54, 306 P.3d 395 (2013). While both those matters apply Jones, they reached a different result based on the client's agreement in both cases to the "strategy" of conceding guilt for the purpose of potentially obtaining a conviction to fewer or less serious charges. The Nevada Supreme Court's decision in Jones, like the Supreme Court's decision in McCoy, remains the authority this Court must consider and follow where it is established that the accused insisted on maintaining innocence. As a matter of law, there could not have been a "strategy" to concede guilt in this case, as Petitioner expressly disavowed any awareness that counsel would concede his guilt during the closing argument and expressly maintained his innocence.

7. Because the Petitioner maintained his innocence and did not agree to concede guilt, the Court must apply Jones and McCoy. The decision in Jones is clearly binding authority as it is a 1994 decision and Petitioner's trial occurred in 2010. But McCoy applies here as well, because it is a decision dictated by precedent and as a result does not announce a new rule inapplicable to collateral review proceedings. Teague v. Lane, 489 U.S. 288 (1989). The Court finds McCoy did not announce a "new" rule for two reasons. First, the decision itself failed to state that the rule

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announced was new. See Ennis v. State, 122 Nev. 694, 699-700, 137 P.3d 1095 (2006) (Holding, for example, that the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004) was a new rule not dictated by prior precedent because the opinion in Crawford expressly said it was new). Second, both McCoy and Jones rely on the exact same Sixth Amendment precedent in reaching their respective results, including the Supreme Court's 1984 decision in U.S. v. Cronic, 466 U.S. 648 (1984) as one example. The rule announced in McCoy is not new, but in fact is the exact same rule Nevada has followed at least since Jones was decided in 1994.

8. Applying these rules to the instant case, no conclusion can be reached other than that trial counsel acted unreasonably by committing a structural error when he conceded Petitioner's guilt during the guilt phase of his trial. Whether viewed as a structural error of its own right, or, as an error under Strickland as the Nevada Supreme Court determined in Jones, the fact remains counsel's error was indefensible under the Sixth Amendment and therefore violated Petitioner's "fundamental choices about his own defense." McCoy, 138 S.Ct. at 1511.

9. Moreover, both Jones and McCoy expressly foreclose any form of relief other than the grant of a new trial. Jones, 110 Nev. 730, 739 ("Likewise, then counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed"); McCoy, 138 S.Ct. at 1512 ("Because the error was structural, a new trial is the required corrective").

10. The Nevada Supreme Court's holding in Jones makes clear that further evidentiary development is unnecessary with respect to this claim because the claim involves the client's autonomy to choose the objective of the defense. See also McCoy, 138 S.Ct. at 1511 (Court not required to hold evidentiary hearing or apply Strickland prior to granting relief because "the

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violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative"). Therefore, no further evidentiary hearing is required, because the necessary fact that the concession of guilt was unauthorized was already established on the record, at the State's request, during the trial proceedings.

11. The Court therefore **GRANTS** the petition for post-conviction relief on the claim that trial counsel was ineffective for conceding Petitioner's guilt during the guilt phase of the trial. Petitioner's convictions and sentences herein are therefore **VACATED** and the appropriate remedy is that Petitioner must be granted a new trial. The matter is set on calendar in this Department on **June 13, 2019, at 8:30 a.m. for further proceedings** to include setting a trial date and/or possible appointment of trial counsel. Petitioner shall not be discharged from custody but instead will remain in the custody of the State with no bail.

12. Because the Court grants relief on Ground Six of the post-conviction petition, the Court does not reach Petitioner's other claims for relief, which are now moot due to the Court's grant of relief. No opinion is expressed as to the merit of any of Petitioner's claims other than the claim described at length herein.

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ORDER

IT IS HEREBY ORDERED that Petitioner John Watson's Petition for Writ of Habeas Corpus is **GRANTED**, and the Court finds Petitioner was unlawfully deprived of his Sixth Amendment right to determine the objectives of his defense, and;

IT IS FURTHER ORDERED that the convictions and sentences set forth in the judgment of conviction filed August 26, 2010, and amended judgment of conviction filed September 3, 2010 are **VACATED** and that a new trial must be held; and;

IT IS FURTHER ORDERED that the matter is placed on this Court's calendar on **June 13, 2019, at 8:30 a.m. for further proceedings** to include setting a trial date and/or possible appointment of trial counsel. Petitioner to remain in custody with no bail.

Dated this 1 day of May, 2019.

HONORABLE DISTRICT COURT JUDGE

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

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