

# IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LYNN LEWIS,  
Appellant(s),  
vs.  
STATE OF NEVADA,  
Respondent(s),

Electronically Filed  
Jun 26 2014 08:54 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

Case No: C129824  
SC No: 65531

# RECORD ON APPEAL VOLUME 2

ATTORNEY FOR APPELLANT  
GARY L. LEWIS # 47615,  
PROPER PERSON  
P.O. BOX 7000  
CARSON CITY, NV 89702

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON,  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/19/2009	"FIRST AMENDMENT PETITION" WRIT OF HABEAS CORPUS CHAPTER 34 ET SEQ AND * "JUDICIAL NOTICE" FREREVID 201* NEV REV STAT 47.130-47.170	93 - 108
1	03/23/2009	"FIRST AMENDMENT PETITION" WRIT OF HABEAS CORPUS NRS CHAP 34 ET SEQ (AND) "JUDICIAL NOTICE" OF COURT ERROR FREVID 201 NEV REV STAT 47.130 - 47.170	111 - 146
1	05/11/2009	"NOTICE OF APPEAL" TO THE NEVADA SUPREME COURT, DENIAL OF MAY 1, 2009	147 - 151
2	04/24/2014	"NOTICE OF APPEAL, AND ATTACHED STATEMENT OF APPEAL FOR PETITION FOR WRIT OF HABEAS CORPUS"	315 - 315
2	04/24/2014	"PRO SE PETITIONER'S STATEMENT OF APPEAL"	310 - 314
1	06/12/1996	AMENDED INFORMATION	66 - 67
1	05/12/2009	CASE APPEAL STATEMENT	152 - 153
1	03/17/2011	CASE APPEAL STATEMENT	234 - 235
2	04/25/2014	CASE APPEAL STATEMENT	316 - 317
1	02/04/2009	CERTIFICATE OF MAILING	91 - 92
2	06/25/2014	CERTIFICATION OF COPY AND TRANSMITTAL OF RECORD	
1	08/03/1995	CRIMINAL BINDOVER	1 - 13
2	07/09/2012	CRIMINAL ORDER TO STATISTICALLY CLOSE CASE	280 - 280
2	06/25/2014	DISTRICT COURT MINUTES	318 - 333
1	03/01/2011	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	226 - 232
2	03/31/2014	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER	299 - 303
1	06/12/1996	GUILTY PLEA AGREEMENT PURSUANT TO ALFORD DECISION	68 - 73
1	08/15/1995	INFORMATION	14 - 16
1	08/14/1996	JUDGMENT OF CONVICTION (PLEA)	81 - 82
1	09/23/2010	MOTION FOR AN EVIDENTIARY HEARING.	179 - 195
1	02/03/2009	MOTION FOR ORDER OF WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF ALL RECORDS	83 - 90

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	09/23/2010	MOTION TO APPOINT COUNSEL	166 - 178
1	12/01/2009	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	159 - 165
2	10/19/2011	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	244 - 249
1	03/14/2011	NOTICE OF APPEAL	233 - 233
1	06/02/2009	NOTICE OF ENTRY OF DECISION AND ORDER	156 - 158
1	03/17/2011	NOTICE OF ENTRY OF DECISION AND ORDER (CONTINUED)	236 - 240
2	03/17/2011	NOTICE OF ENTRY OF DECISION AND ORDER (CONTINUATION)	241 - 243
2	04/07/2014	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER	304 - 309
2	01/12/2012	ORDER	278 - 279
1	05/29/2009	ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS	154 - 155
1	11/06/2010	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	217 - 217
1	10/27/1995	ORDER FOR PRODUCTION OF INMATE	58 - 59
1	12/14/1995	ORDER FOR PRODUCTION OF INMATE	60 - 61
1	02/23/1996	ORDER FOR PRODUCTION OF INMATE	64 - 65
1	03/09/2009	ORDER GRANTING DEFENDANT'S PRO PER MOTION TO WITHDRAW ATTORNEY OF RECORD	109 - 110
2	03/11/2014	ORDER TRANSFERRING ACTION	281 - 284
2	03/11/2014	PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	285 - 298
1	09/23/2010	PETITION FOR WRIT OF HABEAS CORPUS (POST- CONVICTION)	196 - 216
2	11/29/2011	POSTCONVICTION PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA (NRS 176.0918)	258 - 265
1	07/16/1996	PRE-SENTENCE INVESTIGATION REPORT (UNFILED)	75 - 80

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
		CONFIDENTIAL	
2	11/29/2011	PRO SE MOTION TO WITHDRAW THE ALFORD PLEA FOR THE ENTIRE PROCEEDING WAS IN DIRECT VIOLATION OF THE CONSTITUTION	250 - 257
2	12/14/2011	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA	271 - 277
2	12/14/2011	STATE'S OPPOSITION TO DEFENDANT'S PETITION REQUESTING GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN POSSESSION OF CUSTODY OF THE STATE OF NEVADA	266 - 270
1	12/30/2010	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND OPPOSITION TO DEFENDANT'S MOTIONS FOR AN EVIDENTIARY HEARING AND FOR APPOINTMENT OF COUNSEL	218 - 225
1	01/17/1996	SUBPOENA	62 - 62
1	02/08/1996	SUBPOENA	63 - 63
1	06/14/1996	SUBPOENA	74 - 74
1	09/01/1995	TRANSCRIPT OF HEARING HELD ON AUGUST 1, 1995	17 - 57

**I N D E X**

<b><u>VOLUME:</u></b>	<b><u>PAGE NUMBER:</u></b>
1	1 - 240
2	241 - 333

1           6.     In addition, to find good cause there must be a "substantial reason; one that  
2 affords a legal excuse." Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235,  
3 236, 773 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.  
4 1981). The lack of the assistance of counsel when preparing a petition, and even the failure  
5 of trial counsel to forward a copy of the file to a petitioner, have been found to be non-  
6 substantial, not constituting good cause. See Phelps v. Director Nevada Department of  
7 Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v. State, 111 Nev. 335, 890 P.2d  
8 797 (1995).

9           7.     NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a]  
10 period exceeding five years between the filing of a judgment of conviction, an order  
11 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of  
12 conviction and the filing of a petition challenging the validity of a judgment of  
13 conviction...." The statute also requires that the State plead laches in its motion to dismiss  
14 the petition. NRS 34.800.

15           8.     In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme  
16 Court ruled that the Sixth Amendment provides no right to counsel in post-conviction  
17 proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada  
18 Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a  
19 right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's  
20 right to counsel provision as being coextensive with the Sixth Amendment to the United  
21 States Constitution."

22           9.     NRS 34.750 provides, in pertinent part:

23           "[a] petition may allege that the Defendant is unable to pay the  
24 costs of the proceedings or employ counsel. If the court is  
25 satisfied that the allegation of indigency is true and the petition *is*  
26 *not dismissed summarily*, the court may appoint counsel at the  
time the court orders the filing of an answer and a return. In  
making its determination, the court may consider whether:

27           (a) The issues are difficult;

28           (b) The Defendant is unable to comprehend the proceedings; or

(c) Counsel is necessary to proceed with discovery."  
(emphasis added).

10. Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164.

11. The Nevada Supreme Court has observed that a defendant "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

12. A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief, unless the factual allegations are repelled by the record. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994), Hargrove, 100 Nev. at 503, 686 P.2d at 225. "The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). Defendant's claims were all resolved based on the record without the need to take further evidence so he is not entitled to an evidentiary hearing.

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ORDER


THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, denied.

DATED this 24 day of February, 2011.

  
DISTRICT JUDGE

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY

 for  
FRANK M. PONTICELLO  
Chief Deputy District Attorney  
Nevada Bar #000370

hjc/SVU



IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LYNN LEWIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 57980  
District Court Case No. C129824

FILED

OCT 19 2011

*Tracie Lindeman*  
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 15th day of September, 2011.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this October 12, 2011.

Tracie Lindeman, Supreme Court Clerk

By: Niki Wilcox  
Deputy Clerk



05C129824  
CCJA  
NV Supreme Court Clerks Certificate/Judgm  
1861346



IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LYNN LEWIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57980

**FILED**

SEP 15 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Alingda*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus, a motion to appoint counsel, and a motion for an evidentiary hearing.<sup>1</sup> Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant filed his petition on September 3, 2010, more than 14 years after entry of the judgment of conviction on August 14, 1996.<sup>2</sup> Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.<sup>3</sup> See NRS 34.810(2).

<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>No direct appeal was taken.

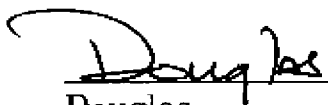
<sup>3</sup>Lewis v. State, Docket No. 53779 (Order of Affirmance, October 28, 2009).

Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice to the State. NRS 34.800(2).

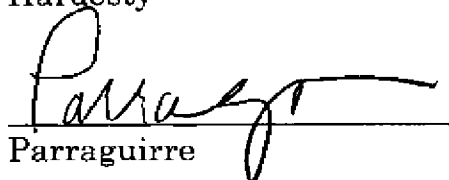
Appellant claimed he had good cause to overcome the procedural bars because he was illiterate and prescribed psychotropic medication. These reasons did not demonstrate good cause for the filing of an untimely and successive post-conviction petition. See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). Moreover, appellant failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in denying the petition as procedurally barred.

In addition, we conclude that the district court did not err in declining to appoint post-conviction counsel or to conduct an evidentiary hearing. See NRS 34.750; NRS 34.770. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Douglas


 J.  
Hardesty

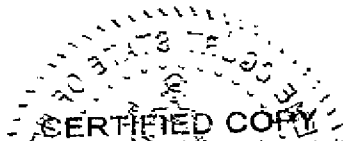
 J.  
Parraguirre

cc: Hon. Michelle Leavitt, District Judge  
Gary Lynn Lewis  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk



SUPREME COURT  
OF  
NEVADA

(O) 1947A 



**CERTIFIED COPY**

This document is a full, true and correct copy of  
the original on file and of record in my office.

DATE October 12, 2011

Supreme Court Clerk, State of Nevada

By [Signature] Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LYNN LEWIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 57980  
District Court Case No. C129824

REMITTITUR

TO: Steven Grierson, District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: October 12, 2011

Tracie Lindeman, Clerk of Court

By: Niki Wilcox  
Deputy Clerk

cc (without enclosures):  
Hon. Michelle Leavitt, District Judge  
Gary Lynn Lewis  
Attorney General/Carson City  
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on OCT 19 2011.

HEATHER UNGERMANN  
Deputy District Court Clerk

GARY LYNN LEWIS  
POST OFFICE BOX 208  
INDIAN SPRINGS NEVADA 89070  
# 47615  
IN PROPER PERSONA

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED  
NOV 29 2011  
CLERK OF COURT

GARY LYNN LEWIS,  
- VS - DEFENDANT.  
STATE OF NEVADA,  
PLAINTIFF. /

CASE NO. C-129824  
DEPT NO. VH

X11

12/22/11

" PRO SE MOTION TO WITHDRAW THE  
ALFORD PLEA FOR THE ENTIRE PROCEEDINGS  
WAS IN DIRECT VIOLATION OF THE CONSTITUTION. "

95C129824  
MOT  
Motion  
1704285



COME NOW THE PRO SE DEFENDANT, (SEE: HAYES V. KERNER,  
404 US 519 (1972)) BRINGS BEFORE THIS HONORABLE COURT  
A CONSTITUTIONAL CHALLENGE TO THE ENTIRE GUILTY PLEA  
PROCEDURE (SEE: HOLLIS V. STATE, 95 NEV. 664 (1979)).

THIS MOTION IS BASE ON PAPERS AND PLEADING FILED HEREIN  
MEMORANDUM POINTS AND AUTHORITY HERETO, AND ANY AND  
ALL ORAL ARGUMENT THIS COURT DEEM NECESSARY.

### I.) STATEMENT OF FACTS.

THE DEFENDANT HAS CLAIMED ACTUAL INNOCENCE THROUGH  
OUT THIS ENTIRE JUDICIAL PROCEEDINGS, AND THE DEFENDANT  
CLEARLY STATES THAT HE DID NOT WILLINGLY AND INTELLIGENTLY  
WAIVE HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL

9

1 GARY LYNN LEWIS - 47615

2 / In Propria Personam  
3 Post Office Box 208 S.D.C.C.  
4 Indian Springs, Nevada 89018

5 **DISTRICT COURT**  
6 **CLARK COUNTY, NEVADA**

7  
8 GARY LYNN LEWIS )  
9 VS DEFENDANT. )  
10 STATE OF NEVADA )  
11 PLAINTIFF. )

Case No. C-129824

Dept No. VII

Docket \_\_\_\_\_

13  
14 **NOTICE OF MOTION**

15 **YOU WILL PLEASE TAKE NOTICE, that** MOTION TO WITHDRAW

16 GUILTY PLEA

17 will come on for hearing before the above-entitled Court on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,

18 at the hour of \_\_\_\_ o'clock \_\_\_\_ M. In Department \_\_\_\_, of said Court.

19  
20 CC:FILE

21  
22 **DATED:** this 17 day of NOVEMBER, 2011.

23  
24 BY: Gary Lewis # 47615  
25 /In Propria Personam

26  
27 **RECEIVED**

28 **NOV 29 2011**

**CLERK OF THE COURT**



TRIAL, AS REQUIRED BY THE UNITED STATES CONSTITUTION AND THE STATES EQUIVALENT.

THE DEFENDANT STATES THAT THE COURT AND THE DEFENDANT'S COURT APPOINTED COUNSEL KNEW THAT THE DEFENDANT HAD A SECOND GRADE COMPREHENSION LEVEL, AND DURING THIS ENTIRE LEGAL PROCEDURE THE DEFENDANT WAS SUBJECTED TO EXTREMELY HIGH DOSAGES OF PSYCH-MEDICATION.

THE DEFENDANT'S COUNSEL FAILED TO PERFORM TO THE STANDARDS OF STRECKLAND V. WASHINGTON, FOR THIS PLEA WAS NOT CLEARLY EXPLAINED TO THE DEFENDANT PURSUANT TO A SECOND GRADE COMPREHENSION LEVEL, NOR DID THE COURT INQUIRE THE PHYSICIAN DOCTOR TO TESTIFY AS TO THE EFFECTS OF THE MEDICATION THE DOCTOR HAD PRESCRIBED THIS DEFENDANT.

### III.) MEMORANDUM POINTS AND AUTHORITY.

THE DEFENDANT BRINGS A CONSTITUTIONAL CHALLENGE TO THE COURT PLEA PROCEDURE, IN WHICH THE COURT ACCEPTED AN UNCONSTITUTIONAL ALFORD PLEA IN DIRECT VIOLATION OF THE LAW.

THE DEFENDANT HAD A CONSTITUTIONAL RIGHT TO A FULL AND FAIR LEGAL PROCEEDINGS THAT WOULD ALLOW THIS DEFENDANT TO WILLINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO A TRIAL... YET THE COURT DOES NOT SHOW HOW THE

DEFENDANT WHO READING AND COMPREHENSION LEVEL  
"WAS KNOWN TO BE AT A SECOND GRADE LEVEL AND  
THE LEGAL PRESENTED CONTRACT IS WRITTEN FOR A  
LAY PERSON WHO HAS AT LEAST A SIXTH GRADE  
EDUCATION. (SEE: HATHWAY V. STATE, 119 NEV. 248 (2003))

THE MEDICATION WHICH IS MIND ALTERING  
WAS NEVER ADDRESS BY THE COURT WHICH IS ALSO  
A "DUE-PROCESS VIOLATION", FOR THE COURT HAS A DUTY  
AND A OBLIGATION TO INQUIRE ON TO ALL MEDICATION  
THAT CAN HAVE A MIND CHANGING EFFECT. (SEE:  
MEAN V. STATE, 120 NEV. 1001 (NEV 2002)).

A.) " THE PLAINTIFF CAN NOT CLAIM LACHES  
AS A DEFENSE IN GOOD FAITH. "

THE DEFENDANT CLAIM ACTUAL INNOCENCE, HE HAS LEARNED  
TO READ AND WRITE, AND COMPREHENDED AT A FIFTH  
GRADE LEVEL OVER THE YEARS TO REACH SUCH THIS 2011 YEAR  
WHERE THIS CONSTITUTIONAL CHALLENGE NOW IS MADE AND  
THE STATE IS NOT PREJUDICE FOR THE GUILTY PLEA PROCEEDURE  
WAS NOT CONSTITUTIONAL AS REQUIRED BY LAW. (SEE: HATHWAY  
V. STATE, SUPRA ) (SEE EDWARD V. CARPENTER, 529 US  
466 (2000)) THE DEFENDANT WOULD BE PREJUDICE BY THIS  
COURT IF THIS COURT DID NOT WITHDRAW THIS PLEA ,

### III.) CONCLUSION

THIS DEFENDANT BRINGS A CONSTITUTIONAL CHALLENGE TO THE GUILTY PLEA PROCEDURE, AS A MATTER OF LAW. THE DEFENDANT CLAIMS THAT HE DID NOT WILLINGLY AND INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHT TO A FULL AND FAIR TRIAL.

THE DEFENDANT DEMANDS THAT THIS GUILTY PLEA BE VOIDED AND THIS DEFENDANT BE PROVIDED HIS DAY IN COURT. . . . THIS DEFENDANT ALSO CLAIMS A DUE PROCESS VIOLATION FOR THIS COURT DID NOT EXCEPT ANY EVIDENCE BY THE PLAINTIFF THAT WOULD PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID COMMIT THE ALLEGED CRIME WHICH MUST BE REQUIRED BY LAW UNDER THE ALFONZO PLEA.

THE ILLEGAL EXCEPTANCE OF THE GUILTY PLEA BY THE EIGHT JUDICIAL DISTRICT COURT WAS IN VIOLATION OF THE DEFENDANTS CONSTITUTIONAL RIGHTS AND MUST BE VOID AS A MATTER OF LAW.

THE SIXTH AMENDMENT REQUIRE THE COURT TO COMPLY WITH THE WELL ESTABLISH CONSTITUTIONAL RIGHTS OF A DEFENDANT DURING A ENTIRE GUILTY PLEA PROCEEDINGS THEREFORE INVALIDATING THIS GUILTY PLEA PROCEEDING IN ITS ENTIRETY.

1 WHEREFORE, CARY LEWIS, prays that the court grant ALL OF THE  
2 relief to which he may be entitled in this proceeding.

3 EXECUTED at S.D. C.C.  
4 on the 17 day of NOVEMBER, 2011.

5  
6 Cary Lewis  
7 Signature of Petitioner

8 **VERIFICATION**

9 Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is  
10 the Petitioner named in the foregoing petition and knows the contents thereof, that the pleading is  
11 true and correct of his own personal knowledge, except as to those matters based on information and  
12 belief, and to those matters, he believes them to be true.

13  
14 Cary Lewis  
15 Signature of Petitioner

16  
17 DEFENDANT  
18 Attorney for Petitioner

19  
20  
21  
22  
23  
24  
25 LE  
26  
27  
28

**CERTIFICATE OF SERVICE BY MAILING**

I, \_\_\_\_\_, hereby certify, pursuant to NRCP 5(b), that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, I mailed a true and correct copy of the foregoing, "\_\_\_\_\_"  
by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

DESTITUTE ATTORNEY  
200 LEWIS  
LAS VEGAS NV  
89155

ATTORNEY GENERAL  
100 N CARSON ST  
CARSON CITY NEVADA  
89701

CC:FILE

**DATED:** this 17 day of NOVEMBER, 2011.

Henry Lewis # 47675  
/In Propria Personam  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
**IN FORMA PAUPERIS:**

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION

TO WITHDRAW  
(Title of Document)

filed in District Court Case number C-129824

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-OR-

B. For the administration of a public program or for an application  
for a federal or state grant.

Harry Lewis  
Signature

11-17-07  
Date

GARY LEWIS  
Print Name

DEFENDANT  
Title

56  
**FILED**

NOV 29 2011

CASE NO.

C-129824

DEPT. NO.

VII-17

*John H. Hines*  
CLERK OF COURT

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

GARY LYNN LEWIS

Petitioner

vs.

STATE OF NEVADA,

Respondent

12/22/11  
**POSTCONVICTION PETITION  
REQUESTING A GENETIC MARKER  
ANALYSIS OF EVIDENCE WITHIN  
THE POSSESSION OR CUSTODY  
OF THE STATE OF NEVADA  
(NRS 176.0918)**

TO: THE CLERK OF THE COURT FOR CLARK COUNTY,  
(County Where Petitioner Was Convicted)  
STATE OF NEVADA; THE ATTORNEY GENERAL OF THE STATE OF NEVADA,  
AND; THE OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF  
NEVADA, COUNTY OF CLARK,  
(County of District Attorney Where Petitioner Was Convicted)

1. I, GARY LYNN LEWIS, am the Petitioner in this matter. This  
(Name of Petitioner / Convicted Inmate)  
Petition requests this Court to issue an Order for a Genetic Marker Analysis of evidence  
pursuant to NRS 176.0918.

2. Petitioner is informed and believes, and on the basis of such belief, alleges in good  
faith that the State of Nevada, or a political subdivision of the State of Nevada, has  
possession and control evidence in the form of Genetic Marker information relating to the  
investigation or prosecution that resulted in Petitioner's Judgment of Conviction.

1

95C129824  
MOT  
Motion  
1704298



3. The Petitioner was convicted of committing all of the following Category A or Category B felony / felonies:

Crime's NRS	Title of Crime	Category A or B	Date of Conviction
200.364	SEXUAL ASSAULT	A	6-12-96

Crime's NRS	Title of Crime	Category A or B	Date of Conviction
-------------	----------------	-----------------	--------------------

Crime's NRS	Title of Crime	Category A or B	Date of Conviction
-------------	----------------	-----------------	--------------------

Crime's NRS	Title of Crime	Category A or B	Date of Conviction
-------------	----------------	-----------------	--------------------

4. (If applicable) The Petitioner was sentenced to death and the date set for the execution is N/A  
(Date of Execution if known)

5. Pursuant to NRS 176.0918(3)(a), the following information identifies the specific evidence either known or believed by the Petitioner to be in the possession or custody of the State of Nevada that can be subject to Genetic Marker Analysis. (Set forth the identity of such evidence here)

SERIOLOGY STANDARD VCT
SEXUAL ASSAULT VCT



6. Pursuant to NRS 176.0918(3)(b), the following is the Petitioner's rationale as to why a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through Genetic Marker Analysis of the evidence identified in paragraph 5. (Set forth your rationale here)

FOR THE PETITIONER IS ACTUALLY INNOCENT  
DID NOT HAVE ANY CONTACT WITH THE VICTIM

7. Pursuant to NRS 176.0918(3)(c), the type of Genetic Marker Analysis the Petitioner is requesting to be conducted on the evidence identified in paragraph 5 is:

DNA COMPARISON

8. [If applicable] Pursuant to NRS 176.0918(3)(d), the following are the results of all prior Genetic Marker Analysis performed on the evidence in the trial which resulted in the Petitioner's conviction. (Set forth all of such evidence here)

NONE

9. (If applicable) Pursuant to NRS 176.0918(3)(e), the following is a statement of the Petitioner that the type of Genetic Marker Analysis the Petitioner is requesting was not available at the time of trial or, if it was available, that the failure to request Genetic Marker Analysis before the Petitioner was convicted was not a result of a strategic or tactical decision as part of the representation of the Petitioner at the trial. (Set forth the applicable facts here)

THE PETITIONER WAS MISLEAD AND UNEDUCATED  
WHERE THE APPOINTED COUNSEL FAILED TO ACT  
IN THE BEST INTEREST OF THIS PETITIONER

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PRAYER FOR GRANTING OF PETITION**

The petitioner respectfully requests that the Court, pursuant to NRS 176.0918, grant the Petitioner's POSTCONVICTION PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA and the Petitioner requests this Court to issue an Order for a Genetic Marker Analysis of evidence pursuant to NRS 176.0918 (8).

Dated this 1 day of OCTOBER, 2011

*Shirley Lewis*  
(Petitioner's Signature Here)

**DECLARATION OF PETITIONER**

I, GARY LYNN LEWIS, declare and attest under penalty of perjury of the laws of the State of Nevada that the information contained in this Petition does not contain any material misrepresentation of fact and that I have a good faith basis for relying on particular facts for the request.

Dated this 1 day of OCTOBER, 2011

*Gary Lewis*  
(Petitioner's/Declarant's Signature here)

DOC 2083 (04/10)

## AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Request

FOR GENETIC MARKER

(Title of Document)

filed in District Court Case number C-179824

☒ Does not contain the social security number of any person.

**-OR-**

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

**B. For the administration of a public program or for an application for a federal or state grant.**

Signature

11-17-011  
Date

CARY KENZ  
Print Name

DEFENDANT  
Title

45193  
Box 208  
Indian Springs, NEB 68070

CONFIDENTIAL

LEGAL MAIL 99

Clerk Court  
200 Lewis Ave  
Indian Springs, NEB 68070

3763

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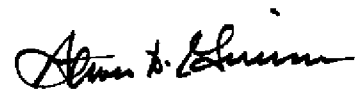
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SOUTHERN DESERT  
CORRECTIONAL CENTER  
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OUTGOING  
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CLERK OF THE COURT

**OPPS**

DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
JAMES SWEETIN  
Chief Deputy District Attorney  
Nevada Bar #005144  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

GARY LYNN LEWIS,  
#1302110

Defendant.

CASE NO: 95C129824

DEPT NO: XII

**STATE'S OPPOSITION TO DEFENDANT'S PETITION REQUESTING GENETIC  
MARKER ANALYSIS OF EVIDENCE WITHIN POSSESSION OR CUSTODY OF  
THE STATE OF NEVADA**

DATE OF HEARING: December 22, 2011

TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Opposition to Defendant's Petition Requesting Genetic Marker Analysis Of Evidence Within Possession Of The State Of Nevada.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

///

///

1 **POINTS AND AUTHORITIES**

2  
3 **STATEMENT OF THE CASE**

4 On August 15, 1995, Gary Lewis (hereinafter “Defendant”) was charged by way of  
5 Information with one (1) count of Sexual Assault with a Minor Under Sixteen Years of Age  
6 (Felony – NRS 200.364, 200.366). Thereafter, Defendant entered into negotiations with the  
7 State and on June 12, 1996, the State filed an Amended Information charging Defendant  
8 with one (1) count of Sexual Assault.

9 Defendant entered into a Guilty Plea Agreement with the State on June 12, 1996,  
10 whereby he agreed to plead guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970),  
11 to the charge as alleged in the Amended Information. In exchange for Defendant’s *Alford*  
12 plea, the State agreed to recommend concurrent time between this case and Defendant’s  
13 other case, C122079. The State retained the right to argue at the rendition of sentence.  
14 Defendant was present in court with counsel on August 2, 1996, and sentenced to LIFE with  
15 the possibility of parole to be served concurrently with C122079. Defendant received no  
16 credit for time served. The Judgment of Conviction was filed on August 14, 1996.  
17 Defendant did not file a direct appeal.

18 Defendant filed a “First Amendment Petition” Writ of Habeas Corpus on February  
19 19, 2009. The district court held a hearing on Defendant’s petition on February 26, 2009.  
20 The Court ultimately concluded that Defendant’s petition was time-barred and that  
21 Defendant made no attempt to demonstrate good cause. The Order denying Defendant’s  
22 petition was filed on May 29, 2009.<sup>1</sup> Defendant filed a Notice of Appeal on May 11, 2009.  
23 The Nevada Supreme Court affirmed the denial of Defendant’s petition on October 28, 2009.  
24 Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28, 2009). Remittitur  
25

26  
27 <sup>1</sup> Defendant filed an additional petition on March 23, 2009. On May 1, 2009, the district court determined that this  
28 petition was not a proper amendment or supplement as the original petition had been denied by the court. The Nevada  
Supreme Court determined that the district court did not abuse its discretion in declining to permit the original petition to  
be amended or supplemented after it was denied. Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28,  
2009).



1 issued on November 24, 2009.

2 Defendant filed a second petition for writ of habeas corpus (post-conviction) and  
3 motions for an evidentiary hearing and appointment of counsel on September 23, 2010. The  
4 State filed a response and motion to dismiss on December 30, 2010. The court filed its  
5 Findings of Fact, Conclusions of Law and Order denying Defendant's Petition on March 1,  
6 2011. Defendant filed a Notice of Appeal on March 14, 2011. The Nevada Supreme Court  
7 affirmed the denial of Defendant's Petition on September 15, 2011. Lewis v. Nevada,  
8 Docket No. 57980. Remittitur issued on October 12, 2011.

9 Defendant filed the instant Petition Requesting Genetic Marker Testing on November  
10 29, 2011. The State's response is as follows.

### 11 **ARGUMENT**

#### 12 **I. Defendant's Request for Genetic Marker Testing Should be Denied**

13 Defendant purports to seek DNA testing of a serology standard kit and sexual assault  
14 kit he believes to be in the custody of the State of Nevada. Defendant apparently thinks the  
15 tests would exculpate him. NRS 176.0918 states that:

16 [A] person convicted of a category A or B felony who is under sentence  
17 of imprisonment for that conviction and who otherwise meets the requirements  
18 of this section may file a post-conviction petition requesting a genetic marker  
19 analysis of evidence within the possession or custody of the State which may  
20 contain genetic marker information relating to the investigation or prosecution  
21 that resulted in the judgment of conviction.

22 The statute, however, further provides the petition must include, without limitation:

- 23 (a) Information identifying specific evidence either known or believed to be  
24 in the possession or custody of the State that can be subject to genetic  
25 marker analysis;
- 26 (b) *The rationale for why a reasonable possibility exists that the petitioner*  
27 *would not have been prosecuted or convicted if exculpatory results had*  
28 *been obtained through a genetic marker analysis of the evidence*  
*identified in paragraph (a);*
- 29 (c) *An identification of the type of genetic marker analysis the petitioner*  
30 *is requesting to be conducted on the evidence identified in paragraph (a);*
- 31 (d) If applicable, the results of all prior genetic marker analysis performed  
32 on evidence in the trial which resulted in the petitioner's conviction; and

1       (e) *A statement that the type of genetic marker analysis the petitioner is*  
2       *requesting was not available at the time of trial or, if it was available, that*  
3       *the failure to request genetic marker analysis before the petitioner was*  
4       *convicted was not a result of a strategic or tactical decision as part of the*  
5       *representation of the petitioner at the trial.*

6       Id. (emphasis added).

7       Defendant fails to establish even a prima facie entitlement to DNA testing under NRS  
8       176.0918. First, Defendant fails to demonstrate how a genetic marker analysis of these kits  
9       would not have resulted in his prosecution for this crime. In this case, “exculpatory”  
10      evidence could be a *lack* of physical evidence such as semen. However, it is unclear whether  
11      Defendant ejaculated. Therefore, even if the test produced no semen inculcating him in the  
12      crime, he has failed to show a reasonable probability exists that he would not have been  
13      prosecuted for the crime. There was extensive evidence presented at preliminary hearing  
14      that Defendant sexually assaulted a seven (7) year-old boy by luring him into an apartment  
15      basement with sunflower seeds and anally raping him, including the victim’s testimony and  
16      the victim’s mother’s testimony. Moreover, at the time of this sexual assault, Defendant was  
17      on probation for another incident where he had anal intercourse with a boy. Finally,  
18      Defendant pled guilty to the crime pursuant to North Carolina v. Alford, 400 U .S. 25  
19      (1970). Defendant cannot demonstrate the exculpatory value of performing this genetic  
20      marker examination.

21      Second, Defendant fails to identify what type of genetic marker analysis he wishes to  
22      have performed.

23      Third, Defendant fails to demonstrate that a type of genetic marker analysis was not  
24      available to him at the time of his plea.

25      Thus, given Defendant’s failure to meet NRS 176.0918’s threshold prerequisites, his  
26      petition should be denied.

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**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court deny Defendant's Petition Requesting Genetic Marker Testing.

DATED this 14th day of December, 2011.

Respectfully submitted,

DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781

BY /s/ James Sweetin  
JAMES SWEETIN  
Chief Deputy District Attorney  
Nevada Bar #005144

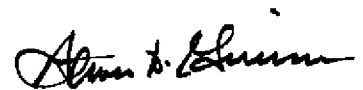
**CERTIFICATE OF MAILING**

I hereby certify that service of the above and foregoing was made this 14th day of December, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GARY LYNN LEWIS BAC #47615  
SOUTHERN DESERT CORRECTIONAL CENTER  
P.O. BOX 208  
INDIAN SPRINGS, NV 89070

BY: /s/ J. Motl  
Secretary for the District Attorney's Office

jg/JS/jm/SVU



CLERK OF THE COURT

**OPPS**  
**DAVID ROGER**  
Clark County District Attorney  
Nevada Bar #002781  
**JAMES SWEETIN**  
Chief Deputy District Attorney  
Nevada Bar #005144  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

GARY LYNN LEWIS,  
#1302110

Defendant.

CASE NO: 95C129824

DEPT NO: XII

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO WITHDRAW GUILTY  
PLEA**

DATE OF HEARING: December 22, 2011  
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Opposition to Defendant's Motion To Withdraw Guilty Plea.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2  
3 **STATEMENT OF THE CASE**

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5 Information with one (1) count of Sexual Assault with a Minor Under Sixteen Years of Age  
6 (Felony – NRS 200.364, 200.366). Thereafter, Defendant entered into negotiations with the  
7 State and on June 12, 1996, the State filed an Amended Information charging Defendant  
8 with one (1) count of Sexual Assault.

9 Defendant entered into a Guilty Plea Agreement with the State on June 12, 1996,  
10 whereby he agreed to plead guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970),  
11 to the charge as alleged in the Amended Information. In exchange for Defendant’s *Alford*  
12 plea, the State agreed to recommend concurrent time between this case and Defendant’s  
13 other case, C122079. The State retained the right to argue at the rendition of sentence.  
14 Defendant was present in court with counsel on August 2, 1996, and sentenced to LIFE with  
15 the possibility of parole to be served concurrently with C122079. Defendant received no  
16 credit for time served. The Judgment of Conviction was filed on August 14, 1996.  
17 Defendant did not file a direct appeal.

18 Defendant filed a “First Amendment Petition” Writ of Habeas Corpus (post-  
19 conviction) on February 19, 2009. The district court held a hearing on Defendant’s petition  
20 on February 26, 2009. The Court ultimately concluded that Defendant’s petition was time-  
21 barred and that Defendant made no attempt to demonstrate good cause. The Order denying  
22 Defendant’s petition was filed on May 29, 2009.<sup>1</sup> Defendant filed a Notice of Appeal on  
23 May 11, 2009. The Nevada Supreme Court affirmed the denial of Defendant’s petition on  
24 October 28, 2009. Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28,

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26  
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28

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<sup>1</sup> Defendant filed an additional petition on March 23, 2009. On May 1, 2009, the district court determined that this petition was not a proper amendment or supplement as the original petition had been denied by the court. The Nevada Supreme Court determined that the district court did not abuse its discretion in declining to permit the original petition to be amended or supplemented after it was denied. Lewis v. Nevada, Docket No. 53779 (Order of Affirmance, Oct. 28, 2009).

2009). Remittitur issued on November 24, 2009.

Defendant filed a second petition for writ of habeas corpus (post-conviction) and motions for an evidentiary hearing and appointment of counsel on September 23, 2010. The State filed a response and motion to dismiss on December 30, 2010. The court filed its Findings of Fact, Conclusions of Law and Order denying Defendant's Petition on March 1, 2011. Defendant filed a Notice of Appeal on March 14, 2011. The Nevada Supreme Court affirmed the denial of Defendant's Petition on September 15, 2011. Lewis v. Nevada, Docket No. 57980. Remittitur issued on October 12, 2011.

Defendant filed the instant Motion to Withdraw Guilty Plea on November 29, 2011. The State's response is as follows.

### **ARGUMENT**

#### **I. DEFENDANT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED HIS GUILTY PLEA**

"[A] motion to withdraw a plea of guilty...may be made only before sentence is imposed or imposition of sentence is suspended" unless it is necessary "to correct manifest injustice." NRS 176.165; Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). The determination of whether there was a "manifest injustice" depends on whether the plea was entered voluntarily and knowingly. Baal, 106 Nev. at 72, 787 P.2d at 394. In determining whether a guilty plea was freely, knowingly, and voluntarily entered, the Court reviews the totality of the circumstances surrounding the plea. Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986) (*superseded by statute*). However, a guilty plea is presumptively valid. Wilson v. State, 99 Nev. 362, 373, 664 P.2d 328, 334 (1983). In addition, when a guilty plea is accepted by the trial court after proper canvassing as to whether the defendant freely, knowingly, and intelligently entered his plea, such plea will be deemed properly accepted. Baal, 106 Nev. at 72, 787 P.2d at 394. However, the failure to conduct a ritualistic oral canvass does not require that the plea be invalidated. State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

Because of the age of this case the transcript of the plea canvass is not available;

1 therefore, the State will refer to the Guilty Plea Agreement.

2 In the present case, Defendant argues that his plea was not knowing and voluntary.  
3 The crux of Defendant's argument is that he did not understand the plea because he  
4 comprehends at a second grade level and was on anti-psychotic medicine at the time he  
5 entered his plea.

6 Defendant signed a Guilty Plea Agreement ("GPA") in which he acknowledged that  
7 his plea was knowing, voluntary, and intelligent:

8 "I understand that the consequences of my plea of guilty by way of the Alford  
9 decision are that I will be imprisoned for a period of LIFE, with the possibility of  
10 parole; or twenty-five (25) years; with a mandatory minimum of ten (10) years being  
11 served before I am eligible for parole." (GPA at 2).

12 "I understand that I am not eligible for probation for the offense to which I am  
13 pleading guilty." (GPA at 2).

14 "I understand that if more than one sentence of imprisonment is imposed and I am  
15 eligible to serve the sentences concurrently, the sentencing judge has the discretion to  
16 order the sentences concurrently or consecutively." (GPA at 2).

17 "I have not been promised or guaranteed any particular sentence by anyone. I know  
18 that my sentence is to be determined by the court within the limits prescribed by  
19 statute. I understand that if my attorney or the State or both recommend any specific  
20 punishment to the Court, the Court is not obligated to accept the recommendation."  
21 (GPA at 2).

22 "By entering my plea of guilty...I understand that I am waiving and forever giving up  
23 the following rights and privileges:

24 6. The right to appeal the conviction, with the assistance of an attorney,  
25 either appointed or retained, unless the appeal is based upon reasonable  
26 constitutional jurisdictional or other grounds that challenge the legality of  
27 the proceedings and except as otherwise provided in subsection 3 of NRS  
28 174.035." (GPA at 4).

29 "I have discussed the elements of all of the original charge(s) against me with my  
30 attorney and **I understand the nature of the charge(s) against me.**" (GPA at 4)  
31 (Emphasis added).

32 "I have discussed with my attorney any possible defense, defense strategies and

1 circumstances which might be in my favor.” (GPA at 4).

2 “All the foregoing elements, consequences, rights and waiver of rights have been  
3 thoroughly explained to me by my attorney.” (GPA at 4).

4 “I believe that pleading guilty by way of the Alford decision and accepting this plea  
5 bargain is in my best interest, and that a trial would be contrary to my best interest.”  
(GPA at 4).

6 “I am signing this voluntarily, after consultation with my attorney, and I am not acting  
7 under duress or coercion or by virtue of any promises of leniency, except for those set  
8 forth in this agreement.” (GPA at 4).

9 **“I am not now under the influence of any intoxicating liquor, a controlled  
10 substance or other drug which would impair my ability to comprehend or  
11 understand this agreement or the proceedings surrounding my entry of this  
plea.”** (GPA at 5) (Emphasis added).

12 “My attorney has answered all my questions regarding this guilty plea agreement and  
13 its consequences to my satisfaction and I am satisfied with the services provided by  
14 my attorney.” (GPA at 5).

15 The GPA is replete with evidence that Defendant understood the terms of his guilty  
16 plea and had discussed with his attorney the consequences stemming therefrom. Moreover,  
17 the GPA specifically states Defendant was not under the influence of any drug which would  
18 impair his ability to understand the agreement or the circumstances surrounding it.  
19 Consequently, Defendant’s plea was irrefutably entered freely, knowingly, and voluntarily.  
20 Looking at the totality of the circumstances, therefore, Defendant has not satisfied his burden  
21 of proving that “manifest injustice” (as defined in NRS 176.165) exists to warrant the  
22 withdrawal of his plea. Therefore, Defendant is not entitled to relief.

## 23 **II. THE STATE PLEADS EQUITABLE LACHES**

24 Defendant’s motion is barred by the doctrine of equitable laches. Hart v. State, 116  
25 Nev. 558, 1 P.3d 969 (2000). The Nevada Supreme Court has held that in applying the  
26 doctrine of laches to an individual case, several factors should be considered, including, “(1)  
27 whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has  
28 arisen from the defendant’s knowing acquiescence in existing conditions; and (3) whether



1 circumstances exist that prejudice the State.” Hart, 116 Nev. at 563-64, 1 P.3d at 972. In  
2 addition to finding that equitable laches must be considered to determine whether manifest  
3 injustice exists, the Court also found that a delay of less than a year can be a significant  
4 enough delay to bar relief in a post-conviction motion to withdraw a guilty plea. Id.

5 Defendant entered into his Guilty Plea Agreement over fifteen (15) years ago on June  
6 12, 1996. Although Defendant proffers the explanation for his delay in filing this motion  
7 that he now comprehends at a fifth grade level, such a delay is inexcusable, especially given  
8 that the facts pertinent to Defendant’s motion were available to him from the moment he  
9 entered his plea. Additionally, if Defendant were allowed to withdraw his plea, the State  
10 would suffer extreme prejudice because it would have to call long-lost witnesses whose once  
11 vivid recollections have faded and re-gather evidence that may be lost or destroyed due to  
12 the lengthy passage of time. Therefore, the doctrine of equitable laches must be applied in  
13 the instant matter and Defendant’s motion should be denied.

14 **CONCLUSION**

15 For the foregoing reasons, the State respectfully requests that this Court deny  
16 Defendant’s Motion to Withdraw Guilty Plea.

17  
18 DATED this 14th day of December, 2011.

19 Respectfully submitted,

20 DAVID ROGER  
21 Clark County District Attorney  
22 Nevada Bar #002781

23  
24 BY /s/ James Sweetin  
25 JAMES SWEETIN  
26 Chief Deputy District Attorney  
27 Nevada Bar #005144  
28

1 CERTIFICATE OF MAILING

2  
3 I hereby certify that service of the above and foregoing was made this 14th day of  
4 December, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

5  
6 GARY LYNN LEWIS BAC #47615  
7 SOUTHERN DESERT CORRECTIONAL CENTER  
8 P.O. BOX 208  
9 INDIAN SPRINGS, NV 89070

10 BY: /s/ J. Motl  
11 Secretary for the District Attorney's Office  
12  
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jg/JS/jm/SVU

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1 **ORDR**

2 MARY-ANNE MILLER  
3 Clark County District Attorney  
4 Nevada Bar #001419  
5 JAMES SWEETIN  
6 Chief Deputy District Attorney  
7 Nevada Bar #005144  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

CLERK

JURY

DISTRICT COURT  
CLARK COUNTY, NEVADA

95C129824  
ORDR  
Order  
1745600



10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 GARY LYNN LEWIS,  
14 #1302110

15 Defendant.

Case No. C129824  
Dept No. XII

17 ORDER

18 DATE OF HEARING: December 22, 2011

19 TIME OF HEARING: 8:30 A.M.

20 THIS MATTER having come on for hearing before the above entitled Court on the  
21 22nd day of December, 2012, the Defendant not being present, represented in proper person,  
22 the Plaintiff being represented by MARY-ANNE MILLER, District Attorney, through  
23 JAMES SWEETIN, Chief Deputy District Attorney, and the Court having heard the  
24 arguments of counsel and good cause appearing therefor,

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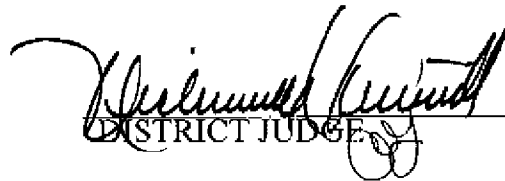
CLERK OF THE COURT

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1 IT IS HEREBY ORDERED that the Defendant's Motion to Withdraw the Alford Plea  
2 for the Entire Proceeding was in Direct Violation of the Constitution, shall be, and it is  
3 DENIED.

4 IT IS HEREBY ORDERED that the Defendant's Petition Requesting Genetic Marker  
5 Analysis of Evidence within Possession or Custody of the State of Nevada, shall be, and it is  
6 no ruling.

7 DATED this 17th day of January, 2012.

8  
9  
10   
DISTRICT JUDGE

11  
12 MARY-ANNE MILLER  
13 DISTRICT ATTORNEY  
Nevada Bar #001419

14   
15 JAMES SWEETIN  
16 Chief Deputy District Attorney  
Nevada Bar #005144

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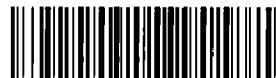
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FILED

JUL 09 2012

*Allen J. Leavitt*  
CLERK OF COURT

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3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA

95C129824  
COSCC  
Criminal Order to Statistically Close Case  
1897618



6 \*\*\*\*\*  
7 THE STATE OF NEVADA VS GARY L CASE NO.: 95C129824  
8 LEWIS DEPARTMENT 12

9  
10 CRIMINAL ORDER TO STATISTICALLY CLOSE CASE

11 Upon review of this matter and good cause appearing,  
12 IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to  
13 statistically close this case for the following reason:

14 **DISPOSITIONS:**

- 15 ☐ Nolle Prosequi (before trial)  
16 ☐ Dismissed (after diversion)  
17 ☐ Dismissed (before trial)  
18 ☒ Guilty Plea with Sentence (before trial)  
19 ☐ Transferred (before/during trial)  
20 ☐ Bench (Non-Jury) Trial  
21 ☐ Dismissed (during trial)  
22 ☐ Acquittal  
23 ☐ Guilty Plea with Sentence (during trial)  
24 ☐ Conviction  
25 ☐ Jury Trial  
26 ☐ Dismissed (during trial)  
27 ☐ Acquittal  
28 ☐ Guilty Plea with Sentence (during trial)  
29 ☐ Conviction  
30 ☐ Other Manner of Disposition

DATED this 5 day of July, 2012.

*Michelle Leavitt*  
MICHELLE LEAVITT  
DISTRICT COURT JUDGE

RECEIVED

JUL 09 2012

CLERK OF THE COURT

MICHELLE LEAVITT  
DISTRICT JUDGE  
DEPARTMENT TWELVE  
LAS VEGAS, NEVADA 89155

FILED REC'D & FILED

MAR 11 3 07 PM 2014 MAR -4 PM 3:25

ALAN GLOVER  
CLERK OF THE COURT BY *[Signature]* DEPUTY

**In The First Judicial District Court of the State of Nevada  
In and for Carson City**

GARY L. LEWIS,

Plaintiff,

vs.  
STATE OF NEVADA,

Defendant.

) Case No.: 14 EW 00007 1B

) Dept. No.: 1

*0129824*

) ORDER TRANSFERRING ACTION

The Clerk of the First Judicial District Court of the State of Nevada, in and for Carson City having received on the 25<sup>th</sup> day of February, 2014, the following listed documents and having "Received" stamped same: **PETITION FOR WRIT OF HABEAS CORPUS,**

Under NRS 34.738(1),

A petition that challenges the validity of a conviction or sentence must be filed with the clerk of the district court for the county in which the conviction occurred. Any other petition must be filed with the clerk of the district court for the county in which the petitioner is incarcerated.

Petitioner challenges conviction.

IT IS HEREBY ORDERED that the action be transferred to the Clerk of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, for all further proceedings.

RECEIVED

MAR 10 2014

CLERK OF THE COURT

96C129824  
ORDR  
Order  
3663881



Order Transferring Action - 1

*n*


DATED this 27 day of February, 2014.

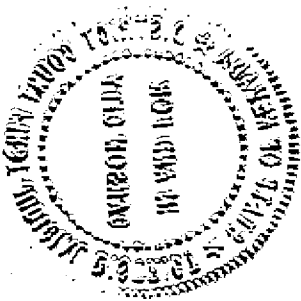
E. J. Russell  
DISTRICT JUDGE

Order Transferring Action - 2

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the Office of the Carson City District Court Clerk, Carson City, Nevada, and that on the 4 day of October, 2013, I served the foregoing ORDER TRANSFERRING ACTION by depositing for mailing a true copy thereof to: [Petitioner's name & address] and to Catherine Cortez-Masto, Attorney General, 100 North Carson Street, Carson City, NV 89701.

\_\_\_\_\_



Order Transferring Action - 3



**CERTIFIED COPY**

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

Date September 4, 2014

Alan Glover, City Clerk and Clerk of the First Judicial District Court of the State of Nevada, in and for Carson City.

By [Signature] Deputy

Per NRS 239 Sec. 8 the SSN may be redacted, but in no way affects the legality of the document.

Case No. \_\_\_\_\_

Dept. No. \_\_\_\_\_

24  
**FILED**

MAR 11 3 07 PM '14

*Ann L. Schum*  
CLERK OF THE COURT

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

-000-

GARY L. LEWIS

Petitioner,

vs.

**C129824**  
PETITION FOR WRIT  
OF HABEAS CORPUS  
(POST CONVICTION)

Respondent.  
STATE OF NEVADA

95C129824  
PWHC  
Petition for Writ of Habeas Corpus  
3663863



INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

CLERK OF THE COURT

MAR 10 2014

RECEIVED

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

#### PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: NORTHERN NEVADA CORRECTION CENTER

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: 7-16-96

4. Case number: 95C129874

5. (a) Length of sentence: LIFE

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes      No X

If "yes" list crime, case number and sentence being served at

this time: \_\_\_\_\_

7. Nature of offense involved in conviction being challenged: SEXUAL ASSAULT

8. What was your plea? (check one)

(a) Not Guilty \_\_\_\_\_

(b) Guilty \_\_\_\_\_

(c) Guilty but mentally ill \_\_\_\_\_

(d) Nolo Contendere X

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury \_\_\_\_\_ (b) Judge without a jury \_\_\_\_\_

11. Did you testify at the trial? Yes \_\_\_\_\_ No X

12. Did you appeal from the judgment of conviction?

Yes \_\_\_\_\_ No X

13. If you did appeal, answer the following:

(a) Name of court: N/A

(b) Case number or citation: N/A

(c) Result: N/A

(d) Date of result: N/A

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not:

ATTORNEY STATED IT WOULD BE USELESS TO APPEAL DO  
TO THE ENTITLING OF THE ALFORD PICA THERE IS NO APPEAL DUE TO  
THE SENTENCE.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes      No X

16. If your answer to No. 15 was "yes", give the following information:

(a) (1) Name of court: EIGHTH JUDICIAL DISTRICT COURT

(2) Nature of proceedings: MOTION REQUESTING A  
GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION  
OR CUSTODY OF THE STATE OF NEVADA (N.R.S. 176.0918)

(3) Grounds raised: EVIDENCE WAS NOT TESTED

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes      No X

(5) Result: MOTION REFERRED TO JUDGE DENUE ESQ

(6) Date of result: 12-22-01

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: COURT MINUTES

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: N/A

(2) Nature of proceedings: N/A

- (3) Grounds raised: N/A
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes      No
- (5) Result: N/A
- (6) Date of result: N/A
- (7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

- (1) First petition, application or motion?  
Yes      No       
Citation or date of decision: N/A
- (2) Second petition, application or motion?  
Yes      No       
Citation or date of decision: N/A
- (3) Third or subsequent petitions, applications or motions?  
Yes      No       
Citation or date of decision: N/A

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed

five handwritten or typewritten pages in length.) THE COURT APPOINTED GREG DENUE ESQ TO DETERMINE WHETHER OR NOT IT WOULD BE ADVANTAGEOUS TO DO THE ANALYSIS OF THE DNA EVIDENCE PURSUANT NRS. 176.0918 AND NOTHING HAS BEEN DONE TO THIS DATE.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: NONE

(b) The proceedings in which these grounds were raised:

N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

NONE

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NONE

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) THE MARTINEZ V. BOES, 137 S. Ct. 1309 (2018) RESENT RULING FROM THE NINTH CIRCUIT COURT OF APPEAL WHICH MANDATES THAT INEFFECTIVE ASSISTANCE OF COUNSEL RETURNS BACK TO THE HABEAS CORPUS STAGES OVER COMING ANY PROCEDURAL BAR. (See 736 F. 3d 1287 (2013 9TH CIR))

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

If yes, state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

ROBERT D. CARUSO D.P.D

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

If yes, specify where and when it is to be served, if you know:

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.



1 (a) Ground one:

2 ACTUAL INNOCENSE

3  
4  
5  
6 Supporting Facts:

7 IF THE D.N.A WOULD HAD BEEN TESTED PURSUANT TO  
8 N.R.S. 176.0918 IT WOULD HAD PROVED THIS PETITIONER'S  
9 ACTUAL INNOCENSE FOR THIS PETITIONER NEVER COMMITTED ANY  
10 CRIME AND ENTERED THE AFFORD PLCA IN FEAR AND NO EDUCATION  
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1. Ground two:

2. INEFFECTIVE ASSISTANCE OF COUNSEL

6. Supporting Facts:

7. FOR FAILING TO DEMAND THE TESTING OF THE D.N. A PRIOR  
8. TO ALLOWING THE ENTERANCE OF A ALFORD PLEA FOR THE  
9. ATTORNEY ADVISED THIS PETITIONER TO ENTER A ALFORD PLEA  
10. OVER THE PETITIONER INFORMING COUNSEL THAT HE WAS ACTUALLY  
11. INNOCENT

THREE  
(b) Ground ~~State~~:

EXCESSIVE INCARCERATION IN WHICH  
THE NEVADA DEPARTMENT OF PRISON IS APPLYING  
DUE TO PAROLE IS NOT A RIGHT

Supporting Facts:

THE PRISON SENTENCE WAS THE MINIMUM OF  
TEN YEARS THE NEVADA STATE PRISON HAS DISREGARDED  
THE MINIMUM PRISON SENTENCE TO UNOBTAIN DUE TO PAROLE  
IS NOT A RIGHT THIS PETITIONER HAS SPENT 24 YEARS  
IN PRISON THE ALLEGED VICTIM IS 30 YEARS OLD NOW

## VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

⑧ Gay Lynn Lewis - 4765  
Petitioner

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing  
PETITION FOR WRIT OF HABEAS CORPUS to the below addresses on this 20 day of  
FEBRUARY, 2014, by placing same into the hands of prison law library  
staff for posting in the U.S. Mail, pursuant to N.R.C.P. 5:

ATTORNEY GENERAL  
1003 N. CARSON ST  
CARSON CITY, NEVADA  
89701  
Nevada 89701

Day Lynn Lewis  
Signature of Petitioner In Pro Se

/ / /

/ / /

/ / /

- 11 -

1 WHEREFORE, petitioner prays that the court grant petitioner  
2 relief to which he may be entitled in this proceeding.

3 EXECUTED at NORTHERN NEVADA CORR CT, Nevada on the 20  
4

5 Day of FEBRUARY, 2014.  
6  
7  
8  
9

(X) Dany L. Lewis - 47615  
10  
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**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, WRIT OF

HABEAS CORPUS

(Title of Document)

filed in case number: 95C129824

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet  
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 2-20-04

Gary L. Lewis - 4765  
(Signature)

GARY L. LEWIS  
(Print Name)

IN PRO-SE  
(Attorney for)

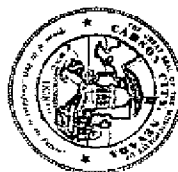
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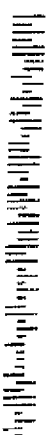


**ALAN GLOVER**  
DISTRICT COURT CLERK  
886 East Musser Street, Suite 3031  
Carson City, Nevada 89701-4775

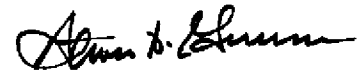
Eighth Judicial District Court  
Clark County  
200 Lewis Avenue  
Las Vegas, NV 89155



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1 ORDR



CLERK OF THE COURT

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5 GARY L. LEWIS, ) Case No.: C129824  
6 Petitioner, ) DEPT. No.: XII  
7 vs. )  
8 THE STATE OF NEVADA, )  
9 Respondent. )

10 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

11 FINDINGS OF FACT

12 1. On August 15, 1995, the State of Nevada ("State") charged Gary L. Lewis  
13 ("Defendant") by way of Information with SEXUAL ASSAULT WITH A MINOR UNDER  
14 SIXTEEN YEARS OF AGE (Felony - NRS 200.364, 200.366).

15 2. On June 12, 1996, the State filed an Amended Information charging the  
16 Defendant with SEXUAL ASSAULT (Felony - NRS 200.364, 200.366) and the Defendant,  
pursuant to *North Carolina v. Alford*, pled guilty to the charge in the Amended Information.

17 3. On August 2, 1996, the District Court adjudged the Defendant guilty and  
18 sentenced the Defendant to the Nevada Department of Prisons for a term of LIFE WITH THE  
19 POSSIBILITY OF PAROLE, to be served CONCURRENTLY with C122079. Defendant  
received ZERO days credit for time served.

20 4. On August 14, 1996, the District Court entered the Judgment of Conviction.

21 5. On February 19, 2009, the Defendant filed a "First Amendment Petition Writ  
22 of Habeas Corpus [sic]."

23 6. On February 26, 2009, the District Court denied the Defendant's Petition for  
24 Writ of Habeas Corpus.

25 7. On March 23, 2009, the Defendant filed a "First Amendment Petition Writ of  
Habeas Corpus [sic]."

26 8. On May 1, 2009, the District Court ordered that the "First Amended Petition"  
27 that was filed on March 23, 2009 was an improper amendment or supplement as the original  
28 petition was orally denied by the District Court.

3314  
MICHELLE LEAVITT  
DISTRICT JUDGE  
DEPARTMENT TWELVE  
LAS VEGAS, NEVADA 89155



- 1           9.       On May 11, 2009, the Defendant filed a Notice of Appeal.
- 2           10.       On June 2, 2009, the District Court entered the Notice of Entry of Order
- 3       Denying Defendant's Petition for Writ of Habeas Corpus.
- 4           11.       On October 28, 2009, The Supreme Court Of The State Of Nevada affirmed
- 5       the judgment of the District Court. Remittitur issued November 24, 2009.
- 6           12.       On September 23, 2010, the Defendant filed a Petition for Writ of Habeas
- 7       Corpus (Post-Conviction). The State filed its response on December 30, 2010.
- 8           13.       On January 27, 2011, the District Court denied the Defendant's Petition for
- 9       Writ of Habeas Corpus (Post-Conviction). The Notice of Entry of Findings of Fact,
- 10       Conclusions Of Law, and Order was filed on March 17, 2011.
- 11           14.       On March 14, 2011, the Defendant filed a Notice of Appeal.
- 12           15.       On September 15, 2011, The Supreme Court Of The State Of Nevada affirmed
- 13       the judgment of the District Court. Remittitur issued October 12, 2011.
- 14           16.       On November 29, 2011, the Defendant filed a "Motion to Withdraw the *Alford*
- 15       Plea for [sic] the Entire Proceeding was in Direct Violation of the Constitution." The State
- 16       filed its opposition on December 14, 2011.
- 17           17.       On December 22, 2011, the District Court denied the Defendant's "Motion to
- 18       Withdraw the *Alford* Plea for [sic] the Entire Proceeding was in Direct Violation of the
- 19       Constitution."
- 20           18.       On March 11, 2014, the Defendant filed a Petition for Writ of Habeas Corpus
- 21       (Post-Conviction).

### 22                               CONCLUSIONS OF LAW

- 23           1.       NRS 34.726(1), governing "Limitations on time to file...", requires that a
- 24       petition for a writ of habeas corpus "must be filed within 1 year after entry of the judgment of
- 25       conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme
- 26       Court issues its remittitur." Late-filing of a petition may be excused from procedural default if
- 27       the Petitioner can establish good cause for delay in bringing the claim. *Id.* Good cause for
- 28       late-filing consists of a showing that: (1) "delay is not the fault of the petitioner"; and (2)
- "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.* at (1)(a)-(b).
2.       To avoid dismissal the defendant must plead and prove specific facts that
- demonstrate good cause for his failure to present claims before and actual prejudice. *See State*
- v. District Court*, 121 Nev. 225, 232, 112 P.3d 1070, 1074 (2005).
3.       In order to demonstrate good cause, a petitioner must show that an impediment
- external to the defense prevented him or her from complying with the state procedural default
- rules. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

1  
2 4. The court may excuse the failure to show good cause where the prejudice from  
3 a failure to consider the claim amounts to a fundamental miscarriage of justice. *Pellegrini v.*  
4 *State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

5 5. NRS 34.726 applies to successive petitions. *Pellegrini v. State*, 117 Nev. 860,  
6 870, 34 P.3d 519, 526 (2001).

7 6. NRS 34.810(2), governing "Additional reasons for dismissal of petition,"  
8 requires that "[a] second or successive petition must be dismissed if the judge or justice  
9 determines that it fails to allege new or different grounds for relief and that the prior  
10 determination was on the merits or, if new and different grounds are alleged, the judge or  
11 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
12 constituted an abuse of the writ."

13 7. The petitioner has the burden of pleading and proving specific facts that  
14 demonstrate both good cause for failing to present a claim or for presenting a claim again and  
15 actual prejudice. NRS 34.810(3). *See also State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d  
16 676, 681 (2003).

17 8. A court must dismiss a habeas petition if it presents claims that either were or  
18 could have been presented in an earlier proceeding, unless the court finds both cause for  
19 failing to present the claims earlier or for raising them again and actual prejudice to the  
20 petitioner. *Evans v. State*, 117 Nev. 609, 621-622, 28 P.3d 498, 507 (2001).

21 9. Unlike initial petitions which certainly require a careful review of the record,  
22 successive petitions may be dismissed based solely on the face of the petition. *Ford v.*  
23 *Warden*, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).

24 10. Application of the statutory procedural default rules to post-conviction habeas  
25 petitions is mandatory. *State v. District Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070,  
26 1074 (2005).

27 11. Meritless, successive and untimely petitions clog the court system and  
28 undermine the finality of convictions. *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 950  
(1994).

12 NRS 34.745(4), governing "Summary dismissal of successive petitions,"  
13 requires that "if the petition is a second or successive petition challenging the validity of a  
14 judgment of conviction or sentence and if it plainly appears from the face of the petition or an  
15 amended petition and documents and exhibits that are annexed to it, or from records of the  
16 court that the petitioner is not entitled to relief based on any of the grounds set forth in  
17 subsection 2 of NRS 34.810, the judge or justice shall enter an order for its summary  
18 dismissal and cause the petitioner to be notified of the entry of the order."

19 13. The Defendant failed to file the petition within one year after the District Court  
20 entered the judgment of conviction on August 14, 1996.

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28  
**MICHELLE LEAVITT**  
DISTRICT JUDGE

DEPARTMENT TWELVE  
LAS VEGAS, NEVADA 89155

1 14. The Defendant failed to establish good cause for the delay in filing the petition  
2 and prejudice to the Defendant.

3 15. The petition is successive as the District Court previously denied the  
4 Defendant's post-conviction petitions that were filed on February 19, 2009, and September  
5 23, 2010.

6 16. The petition neither sets forth good cause for the Defendant's failure to present  
7 these claims in the prior petitions nor actual prejudice to the Defendant.

8 **ORDER**

9 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus  
(Post-Conviction) shall be, and it is, hereby DENIED.

10 Dated this 27 day of March, 2014.

11  
12   
13 MICHELLE LEAVITT  
14 DISTRICT COURT JUDGE  
15 DEPARTMENT XII  
16 EIGHTH JUDICIAL DISTRICT COURT  
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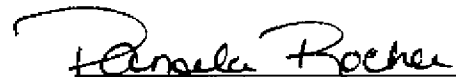
**CERTIFICATE OF MAILING**

I hereby certify that on the 31<sup>st</sup> day of March, 2014, I placed a copy of the Findings of Fact, Conclusions of Law, and Order in the U.S. Mail, postage prepaid to:

Gary L. Lewis #47615  
Northern Nevada Correctional Center  
P.O. Box 7000  
Carson City, NV 89702

Steven B. Wolfson  
Clark County District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Catherine Cortez Masto  
Nevada Attorney General  
555 E. Washington, Suite 3900  
Las Vegas, NV 89101-1068

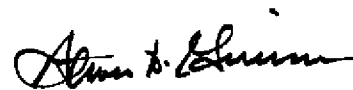
  
Pamela Rocha  
Judicial Executive Assistant  
Department XII  
Eighth Judicial District Court

C129824

Gary L. Lewis

vs.

The State of Nevada



CLERK OF THE COURT

NEO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

GARY L. LEWIS,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 95C129824

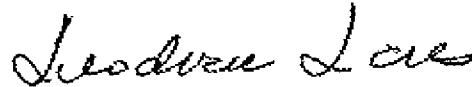
Dept No: XII

**NOTICE OF ENTRY OF FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND  
ORDER**

**PLEASE TAKE NOTICE** that on March 31, 2014, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on April 7, 2014.

STEVEN D. GRIERSON, CLERK OF THE COURT



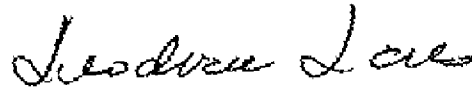
Teodora Jones, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 7 day of April 2014, I placed a copy of this Notice of Entry in:  
The bin(s) located in the Regional Justice Center of:  
Clark County District Attorney's Office  
Attorney General's Office Appellate Division-

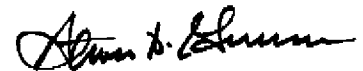
☒ The United States mail addressed as follows:

Gary L. Lewis # 47615  
P.O. Box 7000  
Carson City, NV 89702



Teodora Jones, Deputy Clerk

1 ORDR



CLERK OF THE COURT

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5 GARY L. LEWIS, ) Case No.: C129824  
6 Petitioner, ) DEPT. No.: XII  
7 vs. )  
8 THE STATE OF NEVADA, )  
9 Respondent. )

10 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

11 FINDINGS OF FACT

12 1. On August 15, 1995, the State of Nevada ("State") charged Gary L. Lewis  
13 ("Defendant") by way of Information with SEXUAL ASSAULT WITH A MINOR UNDER  
14 SIXTEEN YEARS OF AGE (Felony – NRS 200.364, 200.366).

15 2. On June 12, 1996, the State filed an Amended Information charging the  
16 Defendant with SEXUAL ASSAULT (Felony – NRS 200.364, 200.366) and the Defendant,  
pursuant to *North Carolina v. Alford*, pled guilty to the charge in the Amended Information.

17 3. On August 2, 1996, the District Court adjudged the Defendant guilty and  
18 sentenced the Defendant to the Nevada Department of Prisons for a term of LIFE WITH THE  
19 POSSIBILITY OF PAROLE, to be served CONCURRENTLY with C122079. Defendant  
received ZERO days credit for time served.

20 4. On August 14, 1996, the District Court entered the Judgment of Conviction.

21 5. On February 19, 2009, the Defendant filed a "First Amendment Petition Writ  
22 of Habeas Corpus [sic]."

23 6. On February 26, 2009, the District Court denied the Defendant's Petition for  
24 Writ of Habeas Corpus.

25 7. On March 23, 2009, the Defendant filed a "First Amendment Petition Writ of  
Habeas Corpus [sic]."

26 8. On May 1, 2009, the District Court ordered that the "First Amended Petition"  
27 that was filed on March 23, 2009 was an improper amendment or supplement as the original  
28 petition was orally denied by the District Court.

33114  
MICHELLE LEAVITT  
DISTRICT JUDGE  
DEPARTMENT TWELVE  
LAS VEGAS, NEVADA 89155

- 1           9.       On May 11, 2009, the Defendant filed a Notice of Appeal.
- 2           10.       On June 2, 2009, the District Court entered the Notice of Entry of Order  
3 Denying Defendant's Petition for Writ of Habeas Corpus.
- 4           11.       On October 28, 2009, The Supreme Court Of The State Of Nevada affirmed  
5 the judgment of the District Court. Remittitur issued November 24, 2009.
- 6           12.       On September 23, 2010, the Defendant filed a Petition for Writ of Habeas  
7 Corpus (Post-Conviction). The State filed its response on December 30, 2010.
- 8           13.       On January 27, 2011, the District Court denied the Defendant's Petition for  
9 Writ of Habeas Corpus (Post-Conviction). The Notice of Entry of Findings of Fact,  
10 Conclusions Of Law, and Order was filed on March 17, 2011.
- 11           14.       On March 14, 2011, the Defendant filed a Notice of Appeal.
- 12           15.       On September 15, 2011, The Supreme Court Of The State Of Nevada affirmed  
13 the judgment of the District Court. Remittitur issued October 12, 2011.
- 14           16.       On November 29, 2011, the Defendant filed a "Motion to Withdraw the *Alford*  
15 Plea for [sic] the Entire Proceeding was in Direct Violation of the Constitution." The State  
16 filed its opposition on December 14, 2011.
- 17           17.       On December 22, 2011, the District Court denied the Defendant's "Motion to  
18 Withdraw the *Alford* Plea for [sic] the Entire Proceeding was in Direct Violation of the  
19 Constitution."
- 20           18.       On March 11, 2014, the Defendant filed a Petition for Writ of Habeas Corpus  
21 (Post-Conviction).

### 22                               CONCLUSIONS OF LAW

- 23           1.       NRS 34.726(1), governing "Limitations on time to file..." requires that a  
24 petition for a writ of habeas corpus "must be filed within 1 year after entry of the judgment of  
25 conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme  
26 Court issues its remittitur." Late-filing of a petition may be excused from procedural default if  
27 the Petitioner can establish good cause for delay in bringing the claim. *Id.* Good cause for  
28 late-filing consists of a showing that: (1) "delay is not the fault of the petitioner"; and (2)  
"dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.* at (1)(a)-(b).
2.       To avoid dismissal the defendant must plead and prove specific facts that  
demonstrate good cause for his failure to present claims before and actual prejudice. *See State*  
*v. District Court*, 121 Nev. 225, 232, 112 P.3d 1070, 1074 (2005).
3.       In order to demonstrate good cause, a petitioner must show that an impediment  
external to the defense prevented him or her from complying with the state procedural default  
rules. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

1  
2 4. The court may excuse the failure to show good cause where the prejudice from  
3 a failure to consider the claim amounts to a fundamental miscarriage of justice. *Pellegrini v.*  
4 *State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

5 5. NRS 34.726 applies to successive petitions. *Pellegrini v. State*, 117 Nev. 860,  
6 870, 34 P.3d 519, 526 (2001).

7 6. NRS 34.810(2), governing "Additional reasons for dismissal of petition,"  
8 requires that "[a] second or successive petition must be dismissed if the judge or justice  
9 determines that it fails to allege new or different grounds for relief and that the prior  
10 determination was on the merits or, if new and different grounds are alleged, the judge or  
11 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
12 constituted an abuse of the writ."

13 7. The petitioner has the burden of pleading and proving specific facts that  
14 demonstrate both good cause for failing to present a claim or for presenting a claim again and  
15 actual prejudice. NRS 34.810(3). *See also State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d  
16 676, 681 (2003).

17 8. A court must dismiss a habeas petition if it presents claims that either were or  
18 could have been presented in an earlier proceeding, unless the court finds both cause for  
19 failing to present the claims earlier or for raising them again and actual prejudice to the  
20 petitioner. *Evans v. State*, 117 Nev. 609, 621-622, 28 P.3d 498, 507 (2001).

21 9. Unlike initial petitions which certainly require a careful review of the record,  
22 successive petitions may be dismissed based solely on the face of the petition. *Ford v.*  
23 *Warden*, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995).

24 10. Application of the statutory procedural default rules to post-conviction habeas  
25 petitions is mandatory. *State v. District Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070,  
26 1074 (2005).

27 11. Meritless, successive and untimely petitions clog the court system and  
28 undermine the finality of convictions. *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 950  
(1994).

12. NRS 34.745(4), governing "Summary dismissal of successive petitions,"  
requires that "if the petition is a second or successive petition challenging the validity of a  
judgment of conviction or sentence and if it plainly appears from the face of the petition or an  
amended petition and documents and exhibits that are annexed to it, or from records of the  
court that the petitioner is not entitled to relief based on any of the grounds set forth in  
subsection 2 of NRS 34.810, the judge or justice shall enter an order for its summary  
dismissal and cause the petitioner to be notified of the entry of the order."

13. The Defendant failed to file the petition within one year after the District Court  
entered the judgment of conviction on August 14, 1996.



1 14. The Defendant failed to establish good cause for the delay in filing the petition  
2 and prejudice to the Defendant.


3 15. The petition is successive as the District Court previously denied the  
4 Defendant's post-conviction petitions that were filed on February 19, 2009, and September  
5 23, 2010.

6 16. The petition neither sets forth good cause for the Defendant's failure to present  
7 these claims in the prior petitions nor actual prejudice to the Defendant.

8 **ORDER**

9 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus  
(Post-Conviction) shall be, and it is, hereby DENIED.

10 Dated this 27 day of March, 2014.

11  
12   
13 MICHELLE LEAVITT  
14 DISTRICT COURT JUDGE  
15 DEPARTMENT XII  
16 EIGHTH JUDICIAL DISTRICT COURT  
17  
18  
19  
20  
21  
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23  
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28


**CERTIFICATE OF MAILING**

I hereby certify that on the 31<sup>st</sup> day of March, 2014, I placed a copy of the Findings of Fact, Conclusions of Law, and Order in the U.S. Mail, postage prepaid to:

Gary L. Lewis #47615  
Northern Nevada Correctional Center  
P.O. Box 7000  
Carson City, NV 89702

Steven B. Wolfson  
Clark County District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Catherine Cortez Masto  
Nevada Attorney General  
555 E. Washington, Suite 3900  
Las Vegas, NV 89101-1068

  
Pamela Rocha  
Judicial Executive Assistant  
Department XII  
Eighth Judicial District Court

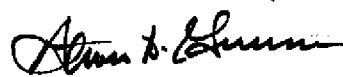
C129824

Gary L. Lewis

vs.

The State of Nevada

GARY L. LEWIS  
POST OFFICE BOX 7000  
CARSON CITY, NEVADA 89702  
# 47615  
IN PRO SE

  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \*

GARY L. LEWIS, CASE NO. C-129824  
-VS- PETITIONER. DEPT NO. XII  
STATE OF NEVADA,  
RESPONDENT /

"PRO SE PETITIONER'S STATEMENT OF APPEAL"

THIS PETITIONER DEMANDS THAT THIS COURT VIEW THIS PRO SE, PLEADING UNDER THE LEGAL PRINCIPAL FOUND IN HARRIS V. KERNER, 404 U.S. 519 (1972) AND APPLY THE FUNDAMENTAL FAIRNESS DOCTRINE TO SUCH AN APPEAL.

THE EIGHT JUDICIAL DISTRICT COURT ORDERED THE APPOINTMENT OF GREG DENUE ESQ, TO DETERMINE WHETHER OR NOT IT WOULD BE ADVANTAGEOUS TO DO ANALYSIS OF THE DNA EVIDENCE WHICH IS MANDATORY UNDER N.R.S. 176.0918 ) WHICH SUCH STATUTE HAS BEEN MADE RETROACTIVE BY LAW.

GREG DENUE ESQ, HAS NEVER ACTED ON THE ORDER OF THE COURT WHICH WAS MADE DECEMBER 22, 2011 THEREFORE THE PETITIONER SOUGHT AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

THIS NEVADA SUPREME COURT MUST VIEW THIS MATTER

1 OF 2

FOR JUSTICE DELAYED IS JUSTICE DENIED BY LAW. AND  
FOR THE COURT APPOINTED COUNSEL TO IGNORE THE ORDER  
OF THE COURT IS CLEARLY A MANIFEST OF JUSTICE.

RELIEF SOUGHT.

THIS NEVADA SUPREME COURT MUST INTERVENE AND  
ORDER THAT D.N.A. ANALYSIS BE TAKEN ON THE  
D.N.A. EVIDENCE IN WHICH THE STATE CLAIM TO HAVE  
HAD PRIOR TO THE PETITIONER ENTERING A PLEA OF GUILT.

THE COURT SHALL ALSO ORDER THE PETITIONER RELEASE  
IF THE STATE CAN NOT PRODUCE ANY D.N.A. EVIDENCE  
TO BE ANALYSIS, AND APPOINTMENT OF NEW COUNSEL IF NEEDED.  
THE ORDER OF THIS COURT SHALL BE FORTH.

DATED: APRIL 2, 2014

(X)

2 OF 2

CERTIFICATE OF SERVICE BY MAIL

Pursuant to FRCP Rule 5 (b), I hereby certify that I am the petitioner named herein and that on this

17 day of APRIL, 2014, I mailed a true and correct copy of the foregoing:

NOTICE OF APPEAL to the following:

DISTRICT ATTORNEY

700 LEWIS AVE

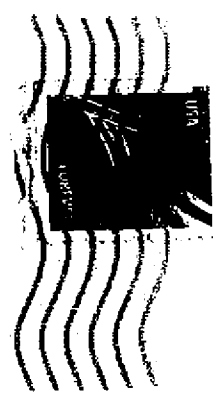
LAS VEGAS NEVADA

89101

(X) Day Lyn Davis  
Petitioner in PRO. PER.

18837  
 STEVEN PERRY  
 P.O. BOX 7000  
 CARSON CITY NEVADA 89702

RENO NV 895  
 21 APR 2014 PM 2 T

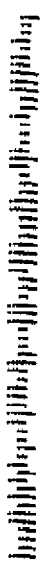


CLERK OF COURT  
 200 LEWIS AVE  
 LAS VEGAS NEVADA

RECEIVED  
 APR 21 2014  
 CLERK OF COURT

89101

89101\$5300



APR 16 2014

NORTHERN NEVADA  
CORRECTIONAL CENTER

GARY L. LEWIS  
P.O. BOX 7000  
CARSON CITY, NEVADA 89702  
# 47615  
IN PRO SE

*Allen D. Blum*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

GARY, L. LEWIS, CASE NO. 95C129824

-VS- PETITIONER, DEPT NO. XII

STATE OF NEVADA,

RESPONDENT /

" NOTICE OF APPEAL, AND ATTACHED  
STATEMENT OF APPEAL FOR PETITION FOR  
WRIT OF HABEAS CORPUS. "

NOTICE IS HEREBY GIVEN THAT GARY L. LEWIS, HEREBY  
APPEALS THE JUDGMENT ENTERED BY THIS HONORABLE COURT  
ON ~~RECEIVED~~ MARCH 31, 2014.

DATED: APRIL 10, 2014

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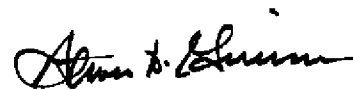
GARY L. LEWIS - 47615

P.O. BOX 7000

CARSON CITY, NEVADA 89702

5





CLERK OF THE COURT

ASTA

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff(s),

vs.

GARY L. LEWIS,

Defendant(s),

Case No: 95C129824  
Dept No: XII

**CASE APPEAL STATEMENT**

1. Appellant(s): Gary L. Lewis
2. Judge: Michelle Leavitt
3. Appellant(s): Gary L. Lewis

Counsel:

Gary L. Lewis #47615  
P.O. Box 7000  
Carson City, NV 89702

4. Respondent: The State of Nevada

Counsel:

Steven B. Wolfson, District Attorney  
200 Lewis Ave.  
Las Vegas, NV 89101  
(702) 671-2700

5. Respondent's Attorney Licensed in Nevada: Yes
6. Appellant Represented by Appointed Counsel In District Court: Yes

- 1 7. Appellant Represented by Appointed Counsel On Appeal: N/A  
2 8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A  
3 9. Date Commenced in District Court: August 3, 1995  
4 10. Brief Description of the Nature of the Action: Criminal  
5 Type of Judgment or Order Being Appealed: Writ of Habeas Corpus  
6 11. Previous Appeal: Yes  
7 Supreme Court Docket Number(s): 53779, 57980  
8 12. Child Custody or Visitation: N/A  
9

10 Dated This 25 day of April 2014.

11 Steven D. Grierson, Clerk of the Court

12   
13

14 Heather Ungermann, Deputy Clerk  
15 200 Lewis Ave  
16 PO Box 551601  
17 Las Vegas, Nevada 89155-1601  
18 (702) 671-0512  
19  
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THE SEALED PORTION  
OF THESE MINUTES  
WILL FOLLOW VIA  
U.S. MAIL.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor****COURT MINUTES****January 27, 2011**

---

95C129824

The State of Nevada vs Gary L Lewis

---

**January 27, 2011****8:30 AM****All Pending Motions****HEARD BY:** Leavitt, Michelle**COURTROOM:** RJC Courtroom 14D**COURT CLERK:** April Watkins**RECORDER:** Kerry Esparza**REPORTER:****PARTIES****PRESENT:**Ponticello, Frank M.  
State of NevadaAttorney  
Plaintiff**JOURNAL ENTRIES**

- DEFT'S PETITION FOR WRIT OF HABEAS CORPUS...DEFT'S PRO PER MOTION TO APPOINT COUNSEL...DEFT'S PRO PER MOTION FOR EVIDENTIARY HEARING

Court FINDS petition is successive, time barred, no good cause and ORDERED, petition and motions DENIED. State to prepare the order.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Gary Lewis, BAC#47615, S.D.C.C., P.O. Box 208, Indian Springs, NV 89070. aw

PRINT DATE: 06/25/2014

Page 14 of 16

Minutes Date:

August 16, 1995

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor****COURT MINUTES****December 22, 2011**

95C129824

The State of Nevada vs Gary L Lewis

**December 22, 2011      8:30 AM      All Pending Motions****HEARD BY:** Smith, Douglas E.**COURTROOM:** RJC Courtroom 14D**COURT CLERK:** Susan Jovanovich**RECORDER:** Kerry Esparza**REPORTER:****PARTIES**

**PRESENT:** Ponticello, Frank M.      Attorney  
State of Nevada      Plaintiff

**JOURNAL ENTRIES**

- Deft. not present; incarcerated in the Nevada Department of Corrections (NDC).

DEFENDANT'S PRO PER MOTION TO WITHDRAW THE ALFORD PLEA FOR THE ENTIRE PROCEEDING WAS IN DIRECT VIOLATION OF THE CONSTITUTION

COURT ORDERED, Motion DENIED.

DEFENDANT'S PRO PER POST CONVICTION PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA (NRS 176.0918)

Court stated it is not sure if there is evidence for testing. Mr. Ponticello advised State filed a written opposition, further noting he will not argue this as Deft. is not present in Court. Thereafter, State submitted on the pleadings. Court reviewed the Motion, noting it is inclined to allow to have testing, due to Deft. entering a plea pursuant to Alford. Court further noted Deft. needs to provide three points on the equitable laches arguments, including whether or not there was excusable delay,

PRINT DATE: 06/25/2014

Page 15 of 16

Minutes Date: August 16, 1995

implied review, and if circumstances exist whether or not prejudiced by the State. COURT ORDERED, no ruling will be done at this time on this motion; Greg Denu, Esq. is hereby APPOINTED to review the motion to determine whether or not it would be advantageous to do analysis of the DNA evidence.

NDC

CLERK'S NOTE: A copy of the above minute order has been delivered by regular mail to: Gary Lewis #47615, S.D.C.C., P.O. BOX 208, Indian Springs, NV 89070. /// sj

# Certification of Copy and Transmittal of Record

State of Nevada }  
County of Clark } SS:

Pursuant to the Supreme Court order dated June 4, 2014, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the above referenced case. The record comprises two volumes with pages numbered 1 through 333.

STATE OF NEVADA,

Plaintiff(s),

vs.

GARY L. LEWIS,

Defendant(s).

Case No: C129824  
Dept No: XII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 25 day of June 2014.

Steven D. Grierson, Clerk of the Court



Teodora Jones, Deputy Clerk