

1  
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3  
4 TROY MULLNER

5 Appellant,

6 vs.

7 THE STATE OF NEVADA,

8 Respondent.  
9  
10

S.Ct. No. 71030

D.C. No. C283463

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11 **APPELLANT'S APPENDIX**  
12 **Volume 2: 101-187**

13  
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STEVEN S. OWENS, ESQ.

Troy Mullner  
Inmate # 54371  
High Desert Correctional Facility  
P.O. Box 650  
Indian Springs, Nevada 89070-0650

3

1 charges to be dismissed pursuant to this agreement may be considered by the judge at  
2 sentencing.

3 I have not been promised or guaranteed any particular sentence by anyone. I know  
4 that my sentence is to be determined by the Court within the limits prescribed by statute.

5 I understand that if my attorney or the State of Nevada or both recommend any  
6 specific punishment to the Court, the Court is not obligated to accept the recommendation.

7 I understand that if the State of Nevada has agreed to recommend or stipulate a  
8 particular sentence or has agreed not to present argument regarding the sentence, or agreed  
9 not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor  
10 when the offense could have been treated as a felony, such agreement is contingent upon my  
11 appearance in court on the initial sentencing date (and any subsequent dates if the sentencing  
12 is continued). I understand that if I fail to appear for the scheduled sentencing date or I  
13 commit a new criminal offense prior to sentencing the State of Nevada would regain the full  
14 right to argue for any lawful sentence.

15 I understand if the offense(s) to which I am pleading guilty to was committed while I  
16 was incarcerated on another charge or while I was on probation or parole that I am not  
17 eligible for credit for time served toward the instant offense(s).

18 I understand that if I am not a United States citizen, any criminal conviction will  
19 likely result in serious negative immigration consequences including but not limited to:

- 20 1. The removal from the United States through deportation;
- 21 2. An inability to reenter the United States;
- 22 3. The inability to gain United States citizenship or legal residency;
- 23 4. An inability to renew and/or retain any legal residency status; and/or
- 24 5. An indeterminate term of confinement, with the United States Federal  
Government based on my conviction and immigration status.

25 Regardless of what I have been told by any attorney, no one can promise me that this  
26 conviction will not result in negative immigration consequences and/or impact my ability to  
27 become a United States citizen and/or a legal resident.

28 I understand that the Division of Parole and Probation will prepare a report for the

1 sentencing judge prior to sentencing. This report will include matters relevant to the issue of  
2 sentencing, including my criminal history. This report may contain hearsay information  
3 regarding my background and criminal history. My attorney and I will each have the  
4 opportunity to comment on the information contained in the report at the time of sentencing.  
5 Unless the District Attorney has specifically agreed otherwise, then the District Attorney  
6 may also comment on this report.

#### 7 WAIVER OF RIGHTS

8 By entering my plea of guilty, I understand that I am waiving and forever giving up  
9 the following rights and privileges:

- 10 1. The constitutional privilege against self-incrimination, including the  
11 right to refuse to testify at trial, in which event the prosecution would  
not be allowed to comment to the jury about my refusal to testify.
- 12 2. The constitutional right to a speedy and public trial by an impartial jury,  
13 free of excessive pretrial publicity prejudicial to the defense, at which  
14 trial I would be entitled to the assistance of an attorney, either appointed  
or retained. At trial the State would bear the burden of proving beyond  
a reasonable doubt each element of the offense(s) charged.
- 15 3. The constitutional right to confront and cross-examine any witnesses  
16 who would testify against me.
- 17 4. The constitutional right to subpoena witnesses to testify on my behalf.
- 18 5. The constitutional right to testify in my own defense.
- 19 6. The right to appeal the conviction with the assistance of an attorney,  
20 either appointed or retained, unless specifically reserved in writing and  
21 agreed upon as provided in NRS 174.035(3). I understand this means I  
22 am unconditionally waiving my right to a direct appeal of this  
23 conviction, including any challenge based upon reasonable  
constitutional, jurisdictional or other grounds that challenge the legality  
of the proceedings as stated in NRS 177.015(4). However, I remain free  
to challenge my conviction through other post-conviction remedies  
including a habeas corpus petition pursuant to NRS Chapter 34.

#### 24 VOLUNTARINESS OF PLEA

25 I have discussed the elements of all of the original charge(s) against me with my  
26 attorney and I understand the nature of the charge(s) against me.

27 I understand that the State would have to prove each element of the charge(s) against  
28 me at trial.

1 I have discussed with my attorney any possible defenses, defense strategies and  
2 circumstances which might be in my favor.

3 All of the foregoing elements, consequences, rights, and waiver of rights have been  
4 thoroughly explained to me by my attorney.

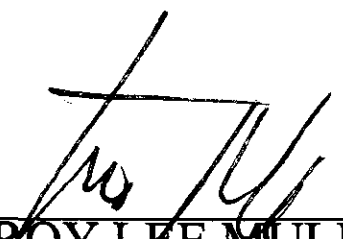
5 I believe that pleading guilty and accepting this plea bargain is in my best interest,  
6 and that a trial would be contrary to my best interest.

7 I am signing this agreement voluntarily, after consultation with my attorney, and I am  
8 not acting under duress or coercion or by virtue of any promises of leniency, except for those  
9 set forth in this agreement.

10 I am not now under the influence of any intoxicating liquor, a controlled substance or  
11 other drug which would in any manner impair my ability to comprehend or understand this  
12 agreement or the proceedings surrounding my entry of this plea.

13 My attorney has answered all my questions regarding this guilty plea agreement and  
14 its consequences to my satisfaction and I am satisfied with the services provided by my  
15 attorney.

16 DATED this 2 day of October, 2013.

17   
18 TROY LEE MULLNER  
Defendant

19 AGREED TO BY:

20   
21 ALICIA A. ALBRITTON  
22 Chief Deputy District Attorney  
Nevada Bar #9492  
23  
24  
25  
26  
27  
28

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of the  
3 court hereby certify that:

- 4 1. I have fully explained to the Defendant the allegations contained in the  
5 charge(s) to which guilty pleas are being entered.
- 6 2. I have advised the Defendant of the penalties for each charge and the  
7 restitution that the Defendant may be ordered to pay.
- 8 3. I have inquired of Defendant facts concerning Defendant's immigration status  
9 and explained to Defendant that if Defendant is not a United States citizen any  
10 criminal conviction will most likely result in serious negative immigration  
11 consequences including but not limited to:
- 12 a. The removal from the United States through deportation;
- 13 b. An inability to reenter the United States;
- 14 c. The inability to gain United States citizenship or legal residency;
- 15 d. An inability to renew and/or retain any legal residency status; and/or
- 16 e. An indeterminate term of confinement, by with United States Federal  
17 Government based on the conviction and immigration status.

18 Moreover, I have explained that regardless of what Defendant may have been  
19 told by any attorney, no one can promise Defendant that this conviction will  
20 not result in negative immigration consequences and/or impact Defendant's  
21 ability to become a United States citizen and/or legal resident.

- 22 4. All pleas of guilty offered by the Defendant pursuant to this agreement are  
23 consistent with the facts known to me and are made with my advice to the  
24 Defendant.
- 25 5. To the best of my knowledge and belief, the Defendant:
- 26 a. Is competent and understands the charges and the consequences of  
27 pleading guilty as provided in this agreement,
- 28 b. Executed this agreement and will enter all guilty pleas pursuant hereto  
voluntarily, and
- c. Was not under the influence of intoxicating liquor, a controlled  
substance or other drug at the time I consulted with the Defendant as  
certified in paragraphs 1 and 2 above.

Dated: This 24 day of October, 2013.

  
ATTORNEY FOR DEFENDANT

ckb



1 IND

2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 ALICIA ALBRITTON  
6 Chief Deputy District Attorney  
7 Nevada Bar #009492  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 TROY LEE MULLNER, #1158825

14 Defendant.  
15

CASE NO: C-12-283463-1

DEPT NO: XXI

14 AMENDED  
15 INDICTMENT

17 STATE OF NEVADA }  
18 COUNTY OF CLARK } ss.

19 The Defendant above named, TROY LEE MULLNER, accused by the Clark County  
20 Grand Jury of the crime(s) of BURGLARY (Category B Felony - NRS 205.060);  
21 ROBBERY (Category B Felony - NRS 200.380); COERCION (Category B Felony - NRS  
22 207.190); BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B  
23 Felony - NRS 205.060); ROBBERY WITH USE OF A DEADLY WEAPON (Category B  
24 Felony - NRS 200.380, 193.165); ATTEMPT ROBBERY (Category B Felony - NRS  
25 200.380, 193.330) and POSSESSION OF FIREARM BY EX-FELON (Category B Felony -  
26 NRS 202.360), committed at and within the County of Clark, State of Nevada, on or between  
27 April 11, 2012 and June 30, 2012, as follows:

28 ///

**EXHIBIT "1"**

1 COUNT 1 - BURGLARY

2 did on or about April 11, 2012, then and there wilfully, unlawfully, and feloniously  
3 enter, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building  
4 occupied by RADIO SHACK, located at 3125 East Tropicana Avenue, Las Vegas, Clark  
5 County, Nevada.

6 COUNT 2 - ROBBERY

7 did on or about April 21, 2012, then and there wilfully, unlawfully, and feloniously  
8 take personal property, to-wit: U.S. currency, from the person of LORAINA ALLSOP, or in  
9 her presence, by means of force or violence, or fear of injury to, and without the consent and  
10 against the will of the said LORAINA ALLSOP.

11 COUNT 3 - COERCION

12 did on or about April 24, 2012, then and there wilfully, unlawfully, and feloniously  
13 use physical force, or the immediate threat of such force, against GREG BEDOHO, with  
14 intent to compel him to do, or abstain from doing, an act which he had a right to do, or  
15 abstain from doing, by forcing said GREG BEDOHO to remain in Subway during the  
16 robbery, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of  
17 said crime.

18 COUNT 4 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

19 did on or about May 2, 2012, then and there wilfully, unlawfully, and feloniously  
20 enter, with intent to commit larceny and/or a felony, to-wit: robbery, that certain building  
21 occupied by SUBWAY, located at 3180 East Desert Inn, Las Vegas, Clark County, Nevada,  
22 the Defendant did possess and/or gain possession of a deadly weapon consisting of a knife  
23 during the commission of the crime and/or before leaving the structure.

24 COUNT 5 - ROBBERY

25 did on or about May 2, 2012, then and there wilfully, unlawfully, and feloniously  
26 take personal property, to-wit: U.S. currency, from the person of SAVANNAH SPEER, or in  
27 her presence, by means of force or violence or fear of injury to, and without the consent and  
28 against the will of the said SAVANNAH SPEER.

1 COUNT 6 – ROBBERY WITH USE OF A DEADLY WEAPON

2 did on or about June 9, 2012, then and there wilfully, unlawfully, and feloniously  
3 take personal property, to-wit: U.S. currency, from the person of ANTWAN WILLIAMS, or  
4 in his presence, by means of force or violence, or fear of injury to, and without the consent  
5 and against the will of the said ANTWAN WILLIAMS, said Defendant using a deadly  
6 weapon, to-wit: a firearm, during the commission of said crime.

7 COUNT 7 - ATTEMPT ROBBERY

8 did on or about June 20, 2012, then and there wilfully, unlawfully, and feloniously  
9 attempt to take personal property, to-wit: U.S. currency, from the person of SEAN WINN,  
10 or in his presence, by means of force or violence, or fear of injury to, and without the  
11 consent and against the will of the said SEAN WINN, by simulating he had a weapon and  
12 demanding money form the cash drawer register.

13 COUNT 8 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

14 did on or about June 29, 2012, then and there wilfully, unlawfully, and feloniously  
15 enter with intent to commit larceny and/or a felony, to-wit: robbery, that certain building  
16 occupied by SUBWAY, located at 183 N. Gibson, Henderson, Clark County, Nevada, the  
17 Defendant did possess and/or gain possession of a deadly weapon consisting of a firearm  
18 during the commission of the crime and/or before leaving the structure.

19 COUNT 9 - ROBBERY WITH USE OF A DEADLY WEAPON

20 did on or about June 30, 2012, then and there wilfully, unlawfully, and feloniously  
21 take personal property, to-wit: U.S. currency, from the person of MIRIAM FIERO, or in her  
22 presence, by means of force or violence or fear of injury to, and without the consent and  
23 against the will of the said MIRIAM FIERO, said Defendant using a deadly weapon, to-wit:  
24 a handgun, during the commission of said crime.

25 COUNT 10 - POSSESSION OF FIREARM BY EX-FELON

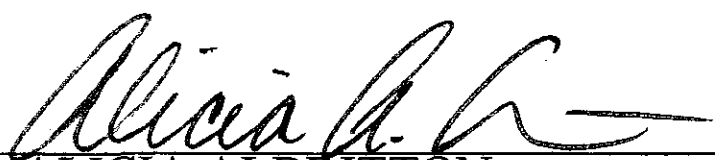
26 did then and there wilfully, unlawfully, and feloniously own or have in his  
27 possession, or under his control, a weapon, to-wit: Daisy/Powerline model 15XT .177  
28 caliber semiautomatic firearm, the said Defendant being an ex-felon, having in 2006 been

1 convicted of Robbery in case C226003 in the Eighth Judicial District Court, Clark County,  
2 Nevada, and/or having in 1997 been convicted of Second Degree Kidnapping in case  
3 C134948 in the Eighth Judicial District Court, Clark County, Nevada, both felonies under  
4 the laws of the State of Nevada.

5 DATED this 21<sup>st</sup> day of October, 2013.

6  
7 STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
8

9  
10 BY

  
ALICIA ALBRITTON  
Chief Deputy District Attorney  
Nevada Bar #009492  
11  
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24 12AGJ033X/12F10411X/ckb  
LVMPD EV# 1206302535;  
25 1206231983; 1206212726;  
1206203821; 1206183052;  
26 1206163157; 1206093269;  
1205273440; 1205024244;  
27 1204244182; 1204244088;  
1204213828; 1204114254;  
28 HPD EV# 12-10819; 12-11376  
(TK12)

## STIPULATION FOR COMPROMISE OF SEIZED PROPERTY

Defendant TROY LEE MULLNER ID# 1158825 CRIMINAL CASE# C-12-283463-1  
Seizing Law Enforcement Agency LAS VEGAS METROPOLITAN POLICE DEPARTMENT; HENDERSON POLICE DEPARTMENT  
Seizure Event Number 1206302535; 1206231983; 1206212726; 1206203821; 1206183052; 1206163157; 1206093269; 1205273440; 1205024244; 1204244182; 1204244088; 1204213828; 1204114254; HPD EV# 12-10819; 12-11376

IT IS HEREBY STIPULATED and AGREED by and between STEVEN B. WOLFSON, Clark County District Attorney through his undersigned Deputy, and the Defendant that a stipulation for compromise be entered into and resolved as part of the negotiations in the aforementioned criminal case(s) pertaining to property impounded or seized by the aforementioned law enforcement agency under the aforementioned event number(s), as follows:

1. PROSECUTOR CHECKS THE APPROPRIATE PARAGRAPHS:

X a. TOTAL FORFEITURE: That Defendant agrees to release and waive any and all right, title and interest in said property as being forfeited to the seizing law enforcement agency and subject to disposition pursuant to Nevada Revised Statutes 179.1175, 179.118 and 179.1185.

Property To Be Forfeited: ANY AND ALL PROPERTY SEIZED IN THE EVENT NUMBERS LISTED ABOVE.

2. That the Defendant hereby authorizes the District Attorney's Office and the seizing law enforcement agency to take such action as is necessary, including, but not limited to, using this agreement to secure a judgment or an ex-parte order in any contemplated or pending companion forfeiture proceeding in order to give full force and effect to this agreement.
3. That the parties agree that this forfeiture, or any subsequent action taken to secure full force and effect of this **agreement**, **does not and will not be considered** as putting the Defendant in jeopardy of life, limb or property for the same offense under the Fifth Amendment of the United States Constitution and under Section Eight of Article One of the Nevada Constitution; and, that this forfeiture, or any subsequent action taken to secure full force and effect of this agreement, does not or will not constitute an excessive fine under the Eighth Amendment of the United States Constitution and under Section Six of Article **One of the Nevada Constitution**.
4. That the parties agree that any breach, withdrawal, repeal, rejection or any other abrogation of the negotiations in the aforementioned criminal case(s) shall not have any effect upon the finality of this stipulation; and, that any breach, withdrawal, repeal, rejection or any other abrogation of this stipulation shall not have any effect upon the finality of the negotiations in the aforementioned criminal case(s).
5. That this Stipulation for Compromise shall incorporate all of the protections attendant to such stipulations as contemplated under the provisions of NRS 48.105 as to all parties named herein; and, this Stipulation for Compromise shall not be construed in any fashion as an admission pertaining to any criminal charges, and shall not and does not constitute an admission of civil liability or fault on the part of any of the undersigned parties, or their present or former agents, servants, employees or others.
6. That the parties agree to accept these terms in full settlement and satisfaction of any and all civil claims and demands which each party or assignees may have against each other, agents and employees on account of the seizure or impoundment of said property.
7. That this Stipulation for Compromise shall forever, and completely bar any action or claim in any tribunal in any matter whatsoever, whether State, Federal or otherwise by the Defendant herein concerning the forfeiture of said property.

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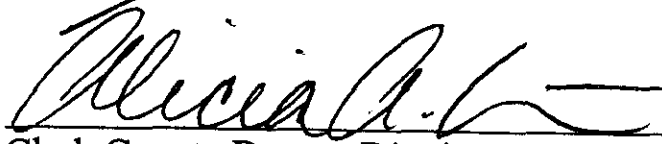
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8. That the respective parties bear their own civil costs and attorney's fees which may have been occasioned and occurred as a result of the seizure and forfeiture of said property.

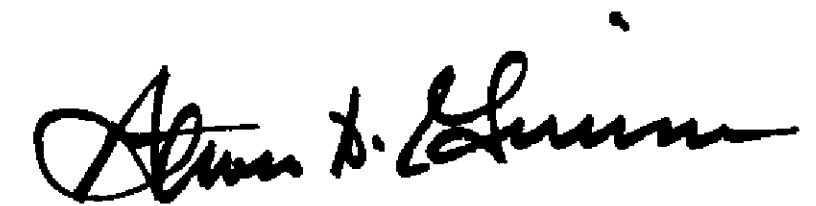
**IT IS SO STIPULATED and AGREED**

Defendant  Date 10/21/13

Attorney for Defendant, Nevada Bar # 3095 Date 10/21/13

 Date 10/21/13  
Clark County Deputy District Attorney, Nevada Bar # 9492

# **EXHIBIT 2**



CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

TROY LEE MULLNER,

Defendant.

CASE NO. C283463-1  
DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

MONDAY, OCTOBER 21, 2013

TRANSCRIPT OF PROCEEDINGS RE:  
DEFENDANT'S MOTION TO DISMISS COUNTS 7 AND 8 OF THE  
INDICTMENT: FIRST DEGREE KIDNAPPING

APPEARANCES:

FOR THE STATE:

ALICIA A. ALBRITTON, ESQ.  
Chief Deputy District Attorney  
ELANA L. GRAHAM, ESQ.  
Deputy District Attorney

FOR THE DEFENDANT:

FRANK P. KOCKA, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER/TRANSCRIBER



1 LAS VEGAS, CLARK COUNTY, NV., MON., OCT. 21, 2013

2  
3 THE COURT: Mr. Mullner, the Court is in possession of a written plea of  
4 guilty which was signed by you. Before I may accept your written plea of guilty, I  
5 must be satisfied that your plea is freely and voluntarily given.

6 Are you making this plea freely and voluntarily?

7 THE DEFENDANT: Yes, I am.

8 THE COURT: Other than what's contained in the written plea of guilty, have  
9 any promises or threats been made to induce you to enter your plea?

10 THE DEFENDANT: No.

11 THE COURT: Are you pleading guilty to the following crimes: Burglary,  
12 Robbery, Coercion, Burglary while in possession of a deadly weapon, Robbery with  
13 use of a deadly weapon, Attempt robbery and possession of a firearm by an ex-felon  
14 because in truth and in fact you are guilty?

15 THE DEFENDANT: Yes.

16 THE COURT: Okay. Before you signed the written plea of guilty, did you  
17 read it?

18 THE DEFENDANT: Yes.

19 THE COURT: Did you understand everything contained in the written plea of  
20 guilty?

21 THE DEFENDANT: I do.

22 THE COURT: Did you also read the Amended Indictment charging you with  
23 the crimes I've just named?

24 THE DEFENDANT: Yes.

25 THE COURT: And did you understand everything contained in that Amended

1 Indictment?

2 THE DEFENDANT: Yeah.

3 THE COURT: And, State, is he pleading guilty to all 10 counts in the  
4 Amended Indictment?

5 MS. ALBRITTON: Yes, Your Honor.

6 THE COURT: All right. And you've read all 10 of the various counts in the  
7 Amended Indictment?

8 THE DEFENDANT: Yeah.

9 THE COURT: And you understood all of them; is that correct?

10 THE DEFENDANT: Uh-huh.

11 THE COURT: All right. Before you signed the written plea of guilty, did you  
12 have a full and ample opportunity to discuss your plea of guilty as well as the charge  
13 to which you're pleading guilty with your attorney Mr. Kocka?

14 THE DEFENDANT: Yes.

15 THE COURT: And did Mr. Kocka answer all of your questions to your  
16 satisfaction?

17 THE DEFENDANT: I believe so.

18 THE COURT: And are you satisfied with the representation thus far that  
19 you've received with Mr. Kocka?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Okay. Did you also discuss and go over with Mr. Kocka the  
22 valuable constitutional rights that you were waiving and giving up by virtue of  
23 pleading guilty in this case?

24 THE DEFENDANT: Yeah, we went over them.

25 THE COURT: Okay. Do you have any questions you want to ask the Court

1 at this time about any of these things, any questions you may have at this time?

2 THE DEFENDANT: No.

3 THE COURT: All right. Let's turn to the Amended Indictment. All right.  
4 We're just going to go through each count. Tell me in your own words what you did  
5 on or about April 11<sup>th</sup>, 2012, here in Clark County, Nevada that causes you to plead  
6 guilty to burglary.

7 MR. KOCKA: Your Honor, before we proceed, if we could, I just caught it and  
8 just discussed it with the State, can we go to page 4.

9 THE COURT: I'm sorry?

10 MR. KOCKA: Page 4 of the guilty plea, line 18.

11 THE COURT: Oh, I understand that I'm eligible for probation. He is not  
12 eligible for probation.

13 MR. KOCKA: Correct. I just wanted to make sure --

14 THE COURT: So that needs to be interlineated?

15 MR. KOCKA: Yes, ma'am.

16 THE COURT: Okay. So I'm going to interlineate the original taking off lines  
17 18 through 20, and then I'm going to initial it, and then I want you to approach and  
18 show your client what I've just interlineated and initialed.

19 MR. KOCKA: Do you want our initials on it as well, Your Honor?

20 THE COURT: That would be good that he understands the change.

21 All right. Mr. Mullner, you understand that you are not eligible for  
22 probation; is that correct?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: All right. And that the charge of robbery with use of a deadly  
25 weapon carries a mandatory prison term. Do you understand that?

1 THE DEFENDANT: Yeah.

2 THE COURT: And so even if I wanted to give you probation, I wouldn't be  
3 able to. Do you understand that?

4 THE DEFENDANT: Yeah.

5 THE COURT: Okay. And you saw where I crossed that out on the guilty plea  
6 agreement, and that's your initial indicating that you see that, and you understand it;  
7 is that right?

8 THE DEFENDANT: Yes.

9 THE COURT: Okay. Any questions about that that you'd like to ask?

10 THE DEFENDANT: No.

11 THE COURT: Okay. All right. Let's turn to Count No. 1 and then tell me in  
12 your own words what you did on or about April 11<sup>th</sup> of 2012, here in Clark County  
13 that causes you to plead guilty to burglary.

14 THE DEFENDANT: Went into Radio Shack and took money from the cash  
15 register.

16 THE COURT: Okay. And was that the Radio Shack on East Tropicana?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Okay. And at the time you entered the Radio Shack did you  
19 intend to commit robbery or to steal money from within the Radio Shack?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. Is that acceptable, State?

22 MS. ALBRITTON: Yes, Your Honor.

23 THE COURT: Moving to Count 2, tell me in your own words what you did on  
24 or about April 21<sup>st</sup>, 2012, here in Clark County that causes you to plead guilty to  
25 robbery.

1 THE DEFENDANT: I --

2 THE COURT: He may not know the name of this clerk. Is this an employee?  
3 What business was this?

4 MS. ALBRITTON: Radio Shack on 7460 West Lake Mead.

5 THE COURT: Okay. So this would be the Radio Shack on West Lake Mead,  
6 and tell me what you did inside of that Radio Shack.

7 THE DEFENDANT: I went into the Radio Shack and wanted the money from  
8 the register.

9 THE COURT: Okay. And there was an employee there, a gal by the name of  
10 Lorraine Alsop?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: Okay. And did you get Ms. Alsop to give you United States  
13 currency?

14 THE DEFENDANT: Yes.

15 THE COURT: And is the way that you did that by showing force or the threat  
16 of force to Ms. Alsop?

17 THE DEFENDANT: Yes.

18 THE COURT: Okay. You threatened her with force? You demonstrated  
19 force in some way?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. State, is that acceptable?

22 MS. ALBRITTON: Yes, Your Honor.

23 THE COURT: All right. Turning to Count 3, tell me in your own words what  
24 you did on or about April 24<sup>th</sup>, 2012, here in Clark County, Nevada that causes you  
25 to plead guilty to coercion.

1 MS. ALBRITTON: For the record, this would be a Subway on 6980 West  
2 Tropicana.

3 THE COURT: Okay. Did you commit a robbery of the Subway?

4 THE DEFENDANT: Yes.

5 THE COURT: Okay. And is this individual, was he a customer or an  
6 employee?

7 MS. ALBRITTON: He's a customer.

8 THE COURT: Okay. And was there a customer there that's been identified  
9 as Greg Bedoho?

10 THE DEFENDANT: I believe so, Your Honor.

11 THE COURT: Okay. There was some customer in there --

12 MR. KOCKA: He wouldn't know the name.

13 THE COURT: I know. He was later identified.

14 There was some customer in there that was a man; is that true?

15 THE DEFENDANT: Yeah.

16 THE COURT: And the customer wanted to leave, and you wouldn't let him  
17 leave during the time you were committing the robbery; is that right?

18 THE DEFENDANT: Yes.

19 THE COURT: And you made this customer stay there by demonstrating or  
20 showing him a firearm; is that true?

21 You brandished a firearm so that the customers and employees could  
22 see it, true?

23 THE DEFENDANT: Yeah.

24 THE COURT: Okay. And so it was pretty clear that you could use the firearm  
25 against the customer if he tried to leave?

1 MR. KOCKA: Actually, I believe what happened factually is that the customer  
2 walked in, by brandishing the firearm, he told him to leave and get out of the store.

3 THE COURT: Oh, the other way?

4 MR. KOCKA: Yes.

5 THE COURT: It says here to remain in the Subway.

6 MS. ALBRITTON: Yeah, he actually had him remain and placed his hands  
7 somewhere, I believe on the counter, on the glass.

8 THE COURT: Okay. Was the point of making this guy remain in the Subway  
9 so he couldn't run out and say, Help, call the police. There's a guy and a gun at the  
10 Subway -- I mean, in the Subway with a gun; is that pretty much what you were  
11 trying to accomplish?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Okay. Is that acceptable, State?

14 MS. ALBRITTON: Court's indulgence.

15 Just for the record, strike the deadly weapon from Count No. 3 of the  
16 coercion. So to remain in the Subway during the robbery.

17 THE COURT: All right. We'll go ahead and interlineate that.

18 So basically, you used force or threats of force to get this customer to  
19 stay in the Subway, right?

20 THE DEFENDANT: I probably told him to put his hands on the counter.

21 THE COURT: Okay. Count 4, Burglary while in possession of a deadly  
22 weapon. Directing your attention to May 2<sup>nd</sup> of 2012, tell me what you did on that  
23 date that causes you to plead guilty to burglary while in possession of a deadly  
24 weapon.

25 THE DEFENDANT: Yeah, I went into the Subway to demand money from the

1 cash register at 3180 East Desert Inn.

2 THE COURT: Okay. And did you either bring a knife with you -- or did you  
3 either bring a knife with you, or did you gain possession of a knife while you were in  
4 the Subway?

5 THE DEFENDANT: I had one with me.

6 THE COURT: You had one with you. So you entered with the deadly  
7 weapon being a knife and you intended, you said, to commit robbery in the Subway;  
8 is that true?

9 THE DEFENDANT: That's true.

10 THE COURT: All right. Is that acceptable, State?

11 MS. ALBRITTON: Yes, Your Honor.

12 THE COURT: Turning to Count 5, Robbery, tell me what you did on May 2<sup>nd</sup>,  
13 2012, in Clark County, Nevada.

14 Is this the same one?

15 MS. ALBRITTON: It is, Your Honor.

16 THE COURT: All right. Once you were in the Subway on that date, did you  
17 actually get one of the employees to turn over US currency to you?

18 THE DEFENDANT: Yes, whether it was a cashier --

19 THE COURT: Okay. And that was using force or the threat of force; is that  
20 correct?

21 THE DEFENDANT: Threat of force.

22 THE COURT: And that was the knife we've already talked about, correct?

23 THE DEFENDANT: Yes.

24 THE COURT: Okay. Count 6, directing your attention to June 9<sup>th</sup> of 2012,  
25 tell me what you did here in Clark County that causes you to plead guilty to robbery



1 with use of a deadly weapon.

2 Which business is that?

3 MS. ALBRITTON: A Subway at 6980 West Tropicana.

4 THE COURT: Okay. What did you do in that Subway?

5 THE DEFENDANT: Went in and demanded money from the cash register  
6 from Antwon Williams.

7 THE COURT: And that would have been the employee there?

8 THE DEFENDANT: Yes.

9 THE COURT: Did you have a firearm with you at that time?

10 MR. KOCKA: Court's indulgence.

11 THE COURT: At some point did you either display a firearm or something  
12 you purported to be a firearm to the employees of the restaurant?

13 THE DEFENDANT: Yes.

14 THE COURT: And the point of doing that was to get them to turn over money  
15 to you; is that right?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: And they did that after you displayed the firearm or threatened  
18 to use the firearm?

19 THE DEFENDANT: Yes

20 THE COURT: Is that okay?

21 MS. GRAHAM: Yes, Your Honor.

22 THE COURT: All right. Count 7, Attempt robbery, tell me what you did on or  
23 about June 20<sup>th</sup> of 2012, here in Clark County, Nevada that causes you to plead  
24 guilty to attempt robbery.

25 What business is June 20<sup>th</sup>?

1 MS. GRAHAM: It's a Radio Shack at 2370 East Serene.

2 THE COURT: So the Radio Shack on East Serene, did you encounter an --

3 MS. GRAHAM: I'm sorry, Your Honor. There were two events on June 20<sup>th</sup>.

4 THE COURT: Mr. Winn works where?

5 MS. ALBRITTON: Mr. Winn works at the Little Caesar's on 10608 South

6 Eastern, Eastern and Horizon Ridge in Henderson, Nevada.

7 THE COURT: Okay. Did you confront an employee of the Little Caesar's and

8 pretend that you had a weapon?

9 THE DEFENDANT: Yeah, I went in and told Sean Winn to give me the

10 money from the cash register.

11 THE COURT: And then what did you do to act like you had a weapon?

12 THE DEFENDANT: I had my hand under my shirt.

13 THE COURT: And was that to simulate a firearm?

14 THE DEFENDANT: Yeah.

15 THE COURT: And because of that did Mr. Winn turn over US currency to

16 you?

17 THE DEFENDANT: No, he thought I was joking.

18 THE COURT: So he didn't turn over --

19 THE DEFENDANT: No, we're talking about the Little Caesar's?

20 THE COURT: Right.

21 THE DEFENDANT: No, he wouldn't.

22 THE COURT: So you attempted to get money and he said, no, you're

23 joking?

24 THE DEFENDANT: Basically, yeah.

25 THE COURT: Okay. Is that acceptable, State?

1 MS. ALBRITTON: Yes, Your Honor.

2 THE COURT: Burglary while in possession of a deadly weapon, Count 8,  
3 directing your attention to June 29<sup>th</sup>, 2012, what did you do here in Clark County,  
4 Nevada that causes you to plead guilty to burglary while in possession of a deadly  
5 weapon for June 29<sup>th</sup>?

6 MS. ALBRITTON: Actually, Your Honor, we can do an interlineation -- I'm  
7 sorry, Your Honor -- multiple counts. It should be June 30<sup>th</sup>, it coincides with Count  
8 No. 9.

9 THE COURT: Okay. So let's interlineate --

10 MS. ALBRITTON: It's a Subway -- two different Subways.

11 THE COURT: One's a Subway in Henderson?

12 MS. ALBRITTON: Actually, that is June 29<sup>th</sup>, the Subway in Henderson.

13 THE COURT: We'll un-interlineate and put the original date back.

14 So June 29<sup>th</sup>, did you enter a Subway on North Gibson in Henderson?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: And did you have a deadly weapon, either when you entered  
17 or at some point did you acquire the deadly weapon in the Subway?

18 THE DEFENDANT: No, I had the little gun.

19 THE COURT: You had the gun with you when you entered, okay. And at the  
20 time you entered, did you intend to commit robbery inside that Subway?

21 THE DEFENDANT: Yeah.

22 THE COURT: Okay. Let's turn to Count 9, Robbery with use of a deadly  
23 weapon. Directing your attention to June 30<sup>th</sup> of 2012, here in Clark County,  
24 Nevada, what did you do that causes you to plead guilty to Count 9, Robbery with  
25 use of a deadly weapon?

1 MS. ALBRITTON: That is the June 30<sup>th</sup> event at Subway at 6150 West  
2 Charleston.

3 THE COURT: Okay. So we're talking about the Subway on West Charleston.

4 THE DEFENDANT: Yeah, went in and demanded money from Mariam Fiero.

5 THE COURT: Okay. And she would have been a clerk or employee in the  
6 Subway?

7 THE DEFENDANT: Correct.

8 THE COURT: And at some point in time did you display a deadly weapon?

9 THE DEFENDANT: I believe I set it on the counter.

10 THE COURT: And was that a handgun?

11 THE DEFENDANT: Yeah.

12 THE COURT: And the point of doing that was to demonstrate the potential  
13 use of force, deadly force; is that true?

14 THE DEFENDANT: Well, yeah.

15 THE COURT: To get her to part with the money basically?

16 THE DEFENDANT: Yeah.

17 THE COURT: All right. Count 10, Possession of firearm by an ex-felon.  
18 Concerning all of the dates, April 11<sup>th</sup>, 2012 to June 30<sup>th</sup>, 2012, do you acknowledge  
19 that you had in your possession or under your control a deadly weapon?

20 MR. KOCKA: As alleged in Count 10, Your Honor, the Daisy/Powerline .177.

21 THE COURT: Right.

22 MR. KOCKA: Caliber air pistol.

23 THE DEFENDANT: Yeah, that's the one.

24 THE COURT: And that was the Daisy/Powerline .177 caliber semiautomatic  
25 firearm; is that true?

1 THE DEFENDANT: Yeah, that's it.

2 THE COURT: And at the time, the dates in question that you had it, do you  
3 acknowledge that you were an ex-felon?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: And that at the time you had already been convicted in 2006 of  
6 robbery here in the Eighth Judicial District Court; is that right?

7 THE DEFENDANT: Yes.

8 THE COURT: Is that true?

9 THE DEFENDANT: Yes.

10 THE COURT: And then in 1997, also here in the Eighth Judicial District  
11 Court, you had been convicted of a second-degree kidnapping; is that correct?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: All right. Is that acceptable, State?

14 MS. ALBRITTON: Yes, Your Honor.

15 THE COURT: All right. Mr. Mullner, the Court finds that your plea of guilty  
16 has been freely and voluntarily given, and your plea of guilty is hereby accepted.  
17 The matter is referred to the Department of Parole and Probation for a presentence  
18 investigation report and set over for rendition of sentence on --

19 THE CLERK: December 19, 9:30.

20 MR. KOCKA: Your Honor, could we just add to the record, this is kind of a  
21 unique circumstance that under the statute by pleading to the charges that he pled,  
22 he'd actually be looking at a mandatory habitual.

23 MS. ALBRITTON: That's correct. He's under the violent mandatory habitual  
24 under NRS 207.012, Subsection 2, and it's actually outlined in the Guilty Plea  
25 Agreement on page No. 4.

1 MR. KOCKA: I just want to make sure that the Court fully advises him of that  
2 so we don't have -- it doesn't become an issue later on.

3 THE COURT: All right. And just directing your attention just to make sure it's  
4 clear, you understand that for the convictions of robbery, burglary while in  
5 possession of a deadly weapon and robbery with use of a deadly weapon, you must  
6 be sentenced under the violent habitual criminal statute to life without the possibility  
7 of parole, life with the possibility of parole, parole eligibility beginning after 10 years  
8 has been served or a definite term of 25 years with your parole eligibility beginning  
9 when a minimum of 10 years has been served.

10 Do you understand that?

11 THE DEFENDANT: Yes, I do.

12 THE COURT: Okay. And you understand that the Court has to sentence you  
13 to one of those three possibilities?

14 THE DEFENDANT: Yes, I do.

15 THE COURT: Okay. So the least amount of time you could get, best case  
16 scenario for you is 25 years with becoming eligible for parole after 10 years has  
17 been served?

18 THE DEFENDANT: I understand that.

19 THE COURT: But that actually if I run everything -- things consecutive and  
20 whatnot, it could actually be a lot longer than that even if you got the 10 to 25. Do  
21 you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: Okay. Any questions on any of that?

24 THE DEFENDANT: No, ma'am.

25 THE COURT: Okay. Anything else, Mr. Kocka?

1 THE DEFENDANT: That will do it. Thank you.

2 THE COURT: Anything else, State?

3 MS. ALBRITTON: No, Your Honor.

4 THE COURT: All right. We'll go ahead and refer this to the Department of  
5 Parole and Probation for the presentence investigation report, and we'll give you a  
6 sentencing date.

7 THE CLERK: December 19, 9:30.

8 MR. KOCKA: Thank you, Your Honor.

9 MS. ALBRITTON: Thank you.

10 -oOo-

11 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video  
12 proceedings in the above-entitled case.

13   
14 JANIE L. OLSEN  
15 Recorder/Transcriber  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

# EXHIBIT 3



CASE NO. C283463-1

DEPT. NO. XXI

FILED

JUN 13 2014

*Alvin L. Johnson*  
CLERK OF COURT

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

TREY L. DOWLING,  
PETITIONER,

V.

WARDEN ELY STATE PRISON

ROBERT BAKER,  
RESPONDENT.

C-12-283463-1  
PWHC  
Petition for Writ of Habeas Corpus  
3905991



petition for writ  
OF HABEAS CORPUS  
(POST CONVICTION)

PETITION

- 1). petitioner is presently RESTRAINED AT THE ELY STATE PRISON, WHITE PINE CO. NEVADA.
- 2). 8th JUDICIAL DISTRICT COURT, CLARK COUNTY, NV. IS THE COURT AND LOCATION WHICH ENTERED THE JUDGMENT UNDER ATTACK.
- 3). DATE OF JUDGMENT OF CONVICTION: FEB. 03, 2014
- 4). CASE NUMBER: C283463-1 DEPT. NO. XXI
- 5). (A) LENGTH OF SENTENCES: Ct. 1: 10 YR. - LIFE;  
Ct. 2: 10 YR. - LIFE; (CS to COUNT 1): Ct. 3: 24 mos. - 72 mos.  
(CS to COUNT 2): Ct. 4: 10 YR. - LIFE (CC to COUNT 3)  
Ct. 5: 10 YR. - to LIFE (CC to COUNT 4)  
Ct. 6: 10 YR. - to LIFE (CC to COUNT 5)  
Ct. 7: 10 YR. - LIFE (CC to COUNT 6)  
Ct. 8: 10 YR. - LIFE (CC to COUNT 7)

RECEIVED

JUN 12 2014

CLERK OF THE COURT

AA129

13

5). Cont. Ct. 9: 10-yr. - Life (CC to count 8)

Ct. 10: 12 mon. - 48 mon. (CS to count 9)

6). Petitioner is not serving any other sentences other than the sentences from the convictions under attack.

7). Nature of offenses involved in conviction being challenged. Ct. 1: Burglary NRS 205.060

Ct. 2; 5: Robbery NRS 200.380

Ct. 3: Coercion NRS 207.190

Ct. 4; 8: Burglary while in the possession of a deadly weapon NRS 205.060

Ct. 6; 9: Robbery with the use of a deadly weapon NRS 200.380, 193.165

Ct. 7: Attempted Burglary NRS 200.380, 193.330

Ct. 10: Possession of Firearm by ex-Felon NRS 202.360

Large Habitual Criminal Statute

8). Petitioner's plea was: Guilty

9). A plea of guilty was negotiated, details are:

Petitioner's attorney negotiated a plea deal of the petitioner pleading guilty to counts 1-10 and receive a 10-25 yr. sentence for being a habitual criminal. That's the only sentence that was supposed to be imposed.

10). Petitioner was not found guilty by a jury.

11). Petitioner did not testify at trial.

12). Petitioner did not appeal from the judgment of conviction.

- 13). SINCE NO appeal FROM THE JUDGMENT OF CONVICTION WAS ~~DELETED~~, NO ANSWER to QUESTION 13.
- 14). PETITIONERS REASON FOR NOT appealing THE JUDGMENT OF CONVICTION IS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL. AS SOON AS PETITIONER WAS SENTENCED to a SENTENCE OTHER THAN THE SENTENCE PROMISED by PETITIONERS ATTORNEY, PETITIONER NOTIFIED ATTORNEY OF RECORD to FILE AN appeal, NOTICE OF APPEAL AND DIRECT APPEAL. PETITIONER NOTIFIED ATTORNEY OF RECORD BOTH VERBALLY AND IN WRITING to FILE THE NOTICE OF APPEAL AND DIRECT appeal. NO appeal WAS EVER FILED.
- 15). PETITIONER FILED A NOTICE OF appeal on his own AS WELL AS A WRIT OF HABEAS CORPUS in THE 8<sup>TH</sup> JUDICIAL DISTRICT COURT CS# C283463-1 DEPT. NO. XXI, ALSO A WRIT OF HABEAS CORPUS in THE NEVADA SUPREME COURT. CASE NO. 65542 BOTH THESE petitions OF HABEAS CORPUS ARE STILL PENDING in COURT, PETITIONER NOTIFIED THE 8<sup>TH</sup> JUDICIAL DISTRICT COURT AS WELL AS THE NEVADA SUP. CRT. THAT ~~THE~~ COUNSEL OF RECORD REFUSES to FILE A NOTICE OF appeal OR DIRECT appeal DESPITE BEING NOTIFIED ON NUMEROUS OCCASIONS VERBALLY AND IN WRITING to do so by PETITIONER. IN ADDITION to THIS COUNSEL OF RECORD REFUSES to send OR give

PETITIONER A COPY OF THE PAPERS ON FILE OF THE RECORD SO THAT PETITIONER MAY EXECUTE AND FILE A PROPER APPEAL ON HIS OWN BEHALF.

PETITIONER HAS NOT RECEIVED A SUPPLEMENTARY HEARING. THE NOTICE OF APPEAL WAS DISMISSED BY THE NEVADA SUP. CRT. ON 5.13.2014 AS UNTIMELY (CASE NO. 65449)

16). GROUND ONE IN THIS PETITION "INEFFECTIVE ASSISTANCE OF COUNSEL" WAS PRESENTED IN A WRIT OF HABEAS CORPUS TO BOTH THE 8<sup>TH</sup> JUD. DIST. CRT. CS# C783463-1 DEPT. NO. XXL AND TO THE NEVADA SUPREME COURT CS# 65542 (STILL PENDING) SINCE PETITIONER ON NUMEROUS OCCASIONS NOTIFIED COUNSEL, TO FILE A DIRECT APPEAL AND NOTICE OF APPEAL, BOTH VERBALLY AND IN WRITING. COUNSEL OF RECORD REFUSED TO DO SO. PETITIONER SOUGHT TO HAVE THE 8<sup>TH</sup> JUD. DIST. CRT. AND NEV. SUP. CRT. ORDER AND COMMAND COUNSEL OF RECORD FILE A NOTICE OF APPEAL AND DIRECT APPEAL TO PROTECT PETITIONER'S (6) AMEND. RIGHT.

17). THE GROUND ONE IN THIS PETITION WAS NOT PRESENTED IN A DIRECT APPEAL OR NOTICE OF APPEAL STATE OR FEDERAL BECAUSE COUNSEL OF RECORD REFUSED TO FILE AN APPEAL OF ANY KIND EVEN THOUGH PETITIONER NOTIFIED COUNSEL NUMEROUS TIMES VERBALLY AND IN WRITING TO DO SO.

- 18). THIS petition IS BEING FILED WELL WITH IN  
A ONE YEAR PERIOD OF THE JUDGEMENT  
OF CONVICTION.
- 19). PETITIONER DOES NOT HAVE ANY OTHER  
petition OR appeal PENDING IN ANOTHER  
COURT STATE OR FEDERAL CHALLENGING THE  
CONVICTION.
- 20). THE ATTORNEY WHO REPRESENTED PETITIONER  
RESULTING IN THIS CONVICTION IS:  
FRANK KOCKA ESQ.  
THE ATTORNEY WHO WAS SUPPOSED TO  
FILE A NOTICE OF APPEAL AND DIRECT  
appeal BUT REFUSED TO DO SO, IS:  
FRANK KOCKA ESQ.
- 21). PETITIONER DOES NOT HAVE ANY FUTURE  
SENTENCES TO SERVE AFTER COMPLETING  
THE SENTENCE IMPOSED BY THE JUDGEMENT  
UNDER ATTACK.
- 22). THE GROUND(S) PETITIONER IS BEING  
UNLAWFULLY HELD ARE:  
GROUND ONE: SIXTH (6) AMENDMENT  
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL  
(DURING THE PLEA NEGOTIATIONS AND OR  
DIRECT APPEAL)

## Ground one Supporting Facts:

IN THE SUMMER OF 2013 PETITIONER FILED A MOTION IN THE 8<sup>TH</sup> JUDICIAL DIST. CRT. REQUESTING TO DISMISS COUNSEL OF RECORD "FRANK KOLKA ESP" PETITIONERS MOTION NOTIFIED THE 8<sup>TH</sup> JUD. DIST. CRT. OF COUNSEL'S FAILURE TO COMMUNICATE WITH PETITIONER AT ALL, FAILURE TO PROVIDE PETITIONER WITH ANY INFORMATION CONCERNING PETITIONERS CASE, FAILURE TO PROVIDE PETITIONER WITH ANY PAPERS INCLUDING THE DISCOVERY IN THIS CASE, FAILURE TO FOLLOW UP ON ANY INFORMATION PETITIONER PROVIDED OR/AND REQUESTED COUNSEL FOLLOW UP ON.

COUNSEL OF RECORD MAINTAINED THIS COURSE OF ACTION THROUGHOUT. COUNSEL OF RECORD FRANK KOLKA ESP. PRESENTED PETITIONER WITH A PLEA AGREEMENT PRIOR TO COURT. IN THIS PLEA AGREEMENT, PETITIONER WOULD PLEAD GUILTY TO COUNTS 1-10 NO ARGUMENT AND IN RETURN PETITIONER WOULD RECEIVE AND BE SENTENCED TO ONE SENTENCE ONLY OF 10-25 YRS. THATS IF NO OTHER SENTENCES WOULD BE IMPOSED.

PETITIONER DISCUSSED THIS WITH COUNSEL FRANK KOLKA ESP. COUNSEL ASSURED AND GUARANTEED PETITIONER THIS INFORMATION WAS CORRECT AND ACCURATE.

ON OCTOBER 24, 2013 WHEN PETITIONER WALKED INTO COURT, COUNSEL PRESENTED PETITIONER WITH A PLEA AGREEMENT TO SIGN PETITIONER

Read over this plea agreement and it was the same plea agreement as before, petitioner signed this plea agreeing to plead guilty to Counts 1-10 and to receive a sentence of 10-25 yrs and no other sentences would be imposed.

Petitioner requested a copy of this plea from Counsel, Frank Kocka Esq. of course petitioner didn't get one; at sentencing petitioner was sentenced to way more than a 10-25 yr. sentence and multiple sentences, violating the plea bargain petitioner signed. Petitioner immediately notified Counsel of Record Frank Kocka Esq. right there in open court to file a notice of appeal and direct appeal. In addition petitioner notified Counsel Frank Kocka Esq. in writing to file a direct appeal. Counsel of Record never filed a notice of appeal, or a direct appeal. Petitioner finally received a copy of the plea agreement to file with this court, this plea agreement is NOT the plea agreement signed by petitioner even though it bears petitioner's signature, pages are switched with the plea bargain petitioner signed and the plea on file with this court. There's absolutely no way on earth petitioner would of signed the plea on file with this court. Counsel of

RECORD FRANK KOCKA ESQ. SWITCHED PAGES FROM THE ORIGINAL PLEA PRESENTED TO PETITIONER BY FRANK KOCKA ESQ. READING PETITIONER AGREES TO PLEAD GUILTY TO COUNTS 1-10 AND RECEIVE ONE SENTENCE OF 10-25-YRS WITH NO OTHER SENTENCES TO BE IMPOSED, WITH THE PLEA ON FILE WITH THIS COURT.

THEN WHEN PETITIONER NOTIFIED COUNSEL FRANK KOCKA ESQ. VERBALLY AND IN WRITING TO FILE A NOTICE OF APPEAL AND DIRECT APPEAL COUNSEL REFUSED TO DO SO. PETITIONER NOTIFIED THIS COURT OF THIS BY WAY OF WRIT OF HABEAS CORPUS AND THE NEVADA SUPREME COURT AS WELL. WHAT COUNSEL OF RECORD DID IS NOT ONLY UNETHICAL BUT ILLEGAL, FURTHER REFUSING TO FILE A NOTICE OF APPEAL AND DIRECT APPEAL VIOLATES PETITIONERS 6 AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.



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

executed at Ely, State prison, on the 9<sup>th</sup>  
day of JUNE 2014.



SIGNATURE OF PETITIONER

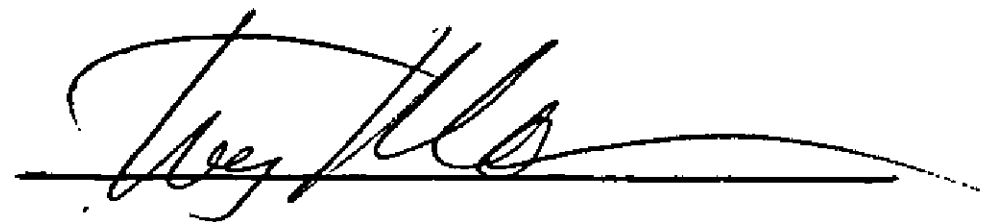
Ely State prison

PO BOX 1989 #54371

Ely, Nevada, 89301

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.



- petitioner -

CERTIFICATE OF SERVICE BY MAIL

I, TROY L. MILLNER, hereby certify pursuant to N.R.C.P.  
5(b), that on this 9<sup>th</sup> day of JUNE, of the year 2014, I mailed a true and  
correct copy of the foregoing ~~petition for writ of habeas corpus~~ petition for  
writ of habeas corpus post conviction;

<u>ATTORNEY GENERAL</u>	<u>COURT CLERK</u>	<u>C.C.DIST. ATT.</u>
Name	Name	Name

<u>100 N. CARSON ST</u>	<u>200 LEWIS AVE. 3RD FL.</u>	<u>200 S. 3RD ST.</u>
<u>CARSON CITY NV</u>	<u>LAS VEGAS NV</u>	<u>LAS VEGAS NV.</u>
<u>89701</u>	<u>8951160</u>	<u>8901</u>
Address	Address	Address

  
\_\_\_\_\_  
Petitioner

**AFFIRMATION PURSUANT TO: N.R.S. 239B.010**

I, HEREBY CERTIFY THAT I AM THE UNDERSIGNED  
INDIVIDUAL AND THAT THE ATTACHED DOCUMENT  
THAT IS ENTITLED: PETITION FOR WRIT OF HABEAS  
CORPUS POST CONVICTION, DOES NOT  
CONTAIN THE SOCIAL SECURITY NUMBER OF ANY  
PERSON, UNDER THE PAINS AND PENALTIES OF  
PERJURY, THIS, 9<sup>th</sup> DAY OF, JUNE, 2014.

SIGNATURE: \_\_\_\_\_

INMATE NAME PRINTED: TROY L. MULLER

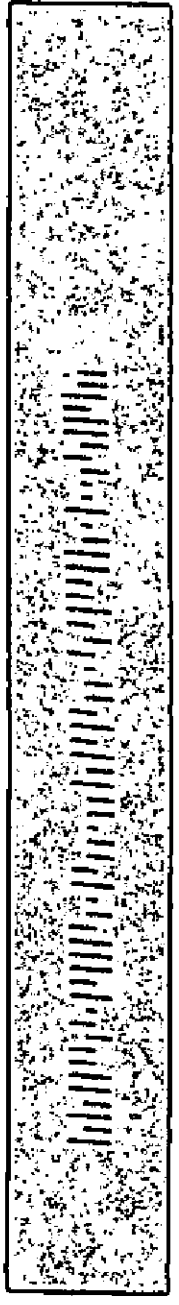
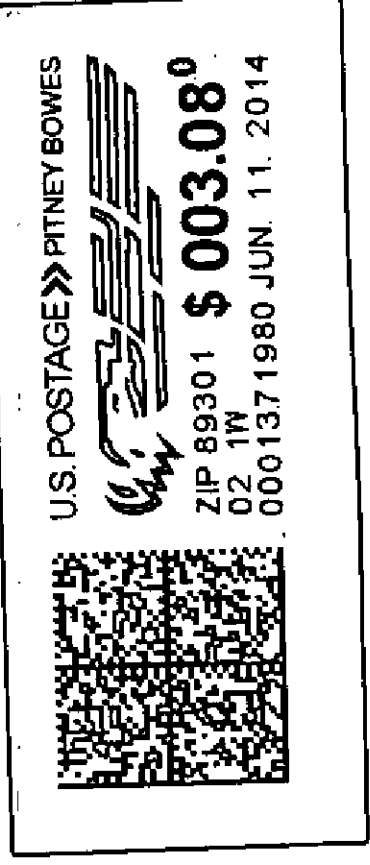
INMATE NUMBER: 54371

ADDRESS: ELY STATE PRISON, P.O. BOX 1989, ELY, NV 89301

T. W. VANNER # 54371  
P.O. Box 1989-ESP.  
ELY NV 89301

CLARK County Clerk of Courts  
200 LEWIS AVE, 3RD FLR.  
LAS VEGAS NV 89155-1160

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CLERK OF COURT  
JUN 11 1980



GOT RW. 6/10/14

10/10/14

# EXHIBIT 4



CLERK OF THE COURT

1 **NOTC**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 Alicia A. Albritton  
6 Chief Deputy District Attorney  
7 Nevada Bar #9492  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 TROY LEE MULLNER, #1158825  
13 Defendant.  
14

Case No. C-12-283463-1

Dept No. XXI

15 **NOTICE OF INTENT TO SEEK PUNISHMENT AS**  
16 **A HABITUAL CRIMINAL**

17 TO: TROY MULLNER, Defendant, and

18 TO: FRANK KOCKA, ESQ., Attorney of Record.

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that in accordance  
20 with the authorization of NRS 207.012, punishment imposed pursuant to the above-stated  
21 habitual felon statue is mandatory if said Defendant TROY LEE MULLNER is found guilty  
22 of ROBBERY (Category B Felony - NRS 200.380); FIRST DEGREE KIDNAPPING  
23 (Category A Felony - NRS 200.310, 200.320); BURGLARY WHILE IN POSSESSION OF  
24 A DEADLY WEAPON (Category B Felony - NRS 205.060); or ROBBERY WITH USE OF  
25 A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165), for which Defendant  
26 is presently charged in the above-entitled action, as Defendant TROY LEE MULLNER has  
27 been previously convicted of THREE (3) prior offenses, as stated in NRS 207.012(2), to wit:

28 //

1           1. That in 2006, the Defendant was convicted in the Eighth Judicial District  
2 Court, Clark County, Nevada for the crime of Robbery, in Case No. C226003.

3           2. That in 1997, the Defendant was convicted in the Eighth Judicial District  
4 Court, Clark County, Nevada for the crime of Second Degree Kidnapping, in Case No.  
5 C134348.

6           3. That in 1984, the Defendant was convicted in the State of South Dakota,  
7 for the crime of First Degree Robbery, in Case No. CR84-147.

8           In addition, NRS 201.012(2) provides, in relevant part, “that the district attorney shall  
9 include a count under this section in any information or shall file a notice of habitual felon if  
10 an indictment is found.” Furthermore, NRS 207.012(3) provides that the trial judge may not  
11 dismiss a count under this section that is included in the indictment or information.

12           Defendant TROY LEE MULLNER, hereinbefore named, is also placed on notice  
13 that, in accordance with the authorization of NRS 207.010, punishment imposed pursuant to  
14 the above-stated habitual criminal statute will be urged upon the Court, if Defendant TROY  
15 LEE MULLNER is found guilty of BURGLARY (Category B Felony - NRS 205.060);  
16 ROBBERY (Category B Felony - NRS 200.380); FIRST DEGREE KIDNAPPING  
17 (Category A Felony - NRS 200.310, 200.320); COERCION (Category B Felony – NRS  
18 207.190); BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B  
19 Felony - NRS 205.060); ROBBERY WITH USE OF A DEADLY WEAPON (Category B  
20 Felony - NRS 200.380, 193.165); ATTEMPT ROBBERY WITH USE OF A DEADLY  
21 WEAPON (Category B Felony - NRS 200.380, 193.330, 193.165); ATTEMPT ROBBERY  
22 (Category B Felony - NRS 200.380, 193.330); or POSSESSION OF FIREARM BY EX-  
23 FELON (Category B Felony - NRS 202.360), for which Defendant is presently charged in  
24 the above-entitled action, as Defendant TROY LEE MULLNER has been previously  
25 convicted of FOUR (4) prior felony offenses.

26 //

27 //

28 //



The STATE OF NEVADA will ask the court to sentence the Defendant as an Habitual Criminal based upon the following felony conviction, to-wit:

1. That in 2006, the Defendant was convicted in the Eighth Judicial District Court, Clark County, Nevada for the crime of Robbery, in Case No. C226003.

2. That in 1997, the Defendant was convicted in the Eighth Judicial District Court, Clark County, Nevada for the crime of Second Degree Kidnapping, in Case No. C134348.

3. That in 1984, the Defendant was convicted in the State of South Dakota, for the crime of First Degree Robbery, in Case No. CR84-147.

4. That in 1984, the Defendant was convicted in the State of South Dakota, for the crime of Third Degree Burglary, in Case No. CR84-142.

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565

BY /s//ALICIA A. ALBRITTON  
ALICIA A. ALBRITTON  
Chief Deputy District Attorney  
Nevada Bar #009492

## CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Notice, was made this 13th day of March, 2013,  
by Electronic Filing to:

FRANK KOCKA, ESQ.  
E-mail Address: frank@kockaandbolton.com

Shellie Warner  
Secretary for the District Attorney's Office

mmw/GCU

# **EXHIBIT 5**

  
CLERK OF THE COURT

JOCP

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TROY LEE MULLNER  
#1158825

Defendant.

CASE NO. C283463-1

DEPT. NO. XXI

AMENDED JUDGMENT OF CONVICTION  
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crimes of COUNT 1 – BURGLARY (Category B Felony) in violation of NRS 205.060, COUNTS 2, 5 – ROBBERY (Category B Felony) in violation of NRS 200.380; COUNT 3 – COERCION (Category B Felony) in violation of NRS 207.190; COUNTS 4, 8 – BURGLARY WHILE IN THE POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS 205.060; COUNTS 6, 9 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 7 – ATTEMPT BURGLARY (Category B Felony) in violation of NRS 200.380, 193.330; and COUNT 10 – POSSESSION OF FIREARM BY EX-FELON (Category B Felony) in

//

1 violation of NRS 202.360; thereafter, on the 23<sup>rd</sup> day of January, 2014 , the Defendant  
2 was present in court for sentencing with his counsel, FRANK KOCKA, ESQ., and good  
3 cause appearing,  
4

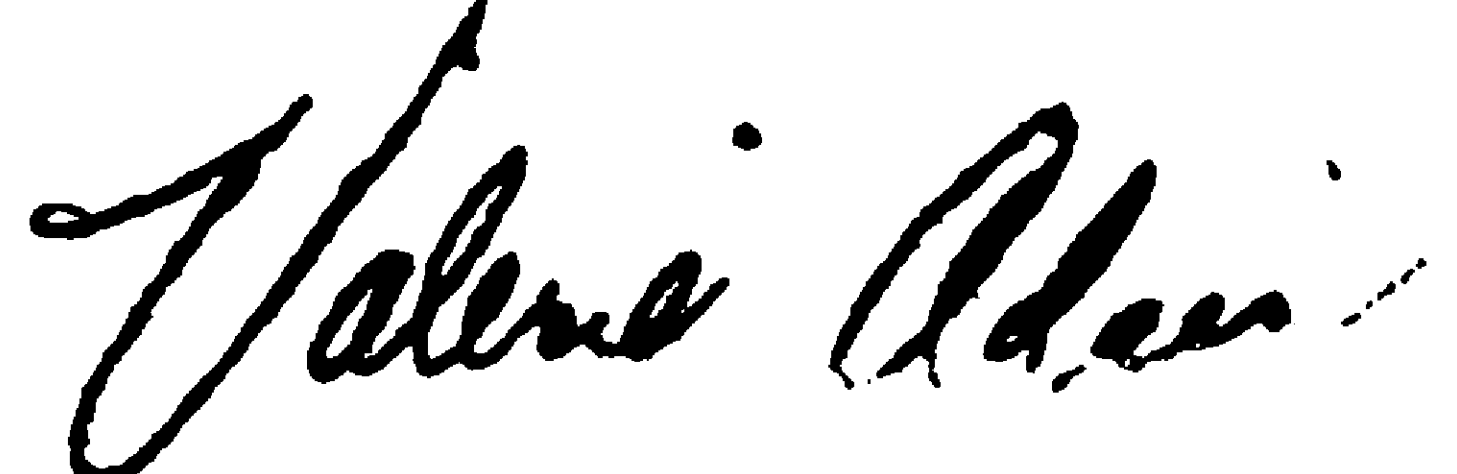
5 THE DEFENDANT WAS THEREBY ADJUDGED guilty under the Large Habitual  
6 Criminal Statue as to COUNTS 1, 2, 4, 5, 6, 7, 8 & 9 of said offenses and, in addition to  
7 the \$25.00 Administrative Assessment, Restitution in the amount of \$3,089.46 plus  
8 \$3.00 DNA Collection Fee, the Defendant is sentenced to the Nevada Department of  
9 Corrections (NDC) as follows: as to COUNT 1 - to a MAXIMUM of LIFE with a  
10 MINIMUM Parole Eligibility of TEN (10) YEARS; and as to COUNT 2 – to a MAXIMUM  
11 of LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 2 to run  
12 CONSECUTIVE TO COUNT 1; COUNT 3 – to a MAXIMUM of SEVENTY-TWO (72)  
13 MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, COUNT  
14 3 to run CONSECUTIVE TO COUNT 2; COUNT 4 – to a MAXIMUM of LIFE with a  
15 MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 4 to run CONCURRENT WITH  
16 COUNT 3; COUNT 5 – to a MAXIMUM of LIFE with a MINIMUM Parole Eligibility of  
17 TEN (10) YEARS, COUNT 5 to run CONCURRENT WITH COUNT 4; COUNT 6 – to a  
18 MAXIMUM of LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 6 to  
19 run CONCURRENT WITH COUNT 5; COUNT 7 – to a MAXIMUM of LIFE with a  
20 MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 7 to run CONCURRENT WITH  
21 COUNT 6; COUNT 8 – to a MAXIMUM of LIFE with a MINIMUM Parole Eligibility of  
22 TEN (10) YEARS, COUNT 8 to run CONCURRENT WITH COUNT 7; COUNT 9 – to a  
23 MAXIMUM of LIFE with a MINIMUM Parole Eligibility of TEN (10) YEARS, COUNT 9 to  
24

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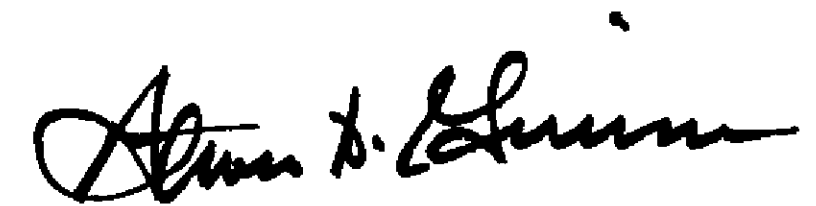
1 run CONCURRENT WITH COUNT 8; COUNT 10 - to a MAXIMUM of FORTY-EIGHT  
2 (48) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS, COUNT  
3 10 to run CONSECUTIVE TO COUNT 9; with FIVE HUNDRED SEVENTY-TWO (572)  
4 DAYS Credit for Time Served. DNA Fee – WAIVED  
5

6 THEREAFTER a clerical error having been discovered, the Amended Judgment  
7 of Conviction is corrected to read as follows: COUNT 7 – ATTEMPT ROBBERY.  
8

9 DATED this 3<sup>rd</sup> day of February, 2014  
10  
11

12   
13 \_\_\_\_\_  
14 VALERIE P. ADAIR  
15 DISTRICT COURT JUDGE  
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# EXHIBIT 6



CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

TROY LEE MULLNER,

Defendant.

CASE NO. C283463-1  
DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

THURSDAY, JANUARY 23, 2014

TRANSCRIPT OF PROCEEDINGS RE:  
SENTENCING

APPEARANCES:

FOR THE STATE:

ALICIA A. ALBRITTON, ESQ.  
Chief Deputy District Attorney

FOR THE DEFENDANT:

FRANK P. KOCKA, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER/TRANSCRIBER

1 LAS VEGAS, CLARK COUNTY, NV., THURS., JAN. 23, 2014

2  
3 THE COURT: State versus Troy Lee Mullner. He is present in custody with  
4 Mr. Kocka. We have Ms. Albritton for the State. We did receive the supplemental  
5 PSI.

6 Ms. Albritton, where are we?

7 MS. ALBRITTON: We already did argument. I'm not going to rehash  
8 anything. The State would just note that it's not necessarily spelled out completely  
9 in the PSI that Counts 2, 4, 5, 6, 8 and 9 are all violent felonies, and due to his priors  
10 and the prior JOCs that have been filed, he's essentially violent, mandatory habitual,  
11 which is the 10 and 25, 10 to life or life without on those counts.

12 On everything else, we've already rehashed and been here enough  
13 times on Mr. Mullner.

14 THE COURT: Okay. And refresh my memory, Ms. Albritton, what is the State  
15 requesting?

16 MS. ALBRITTON: The State was requesting 40 years to life for Mr. Mullner.

17 THE COURT: All right. Thank you.

18 MR. KOCKA: I believe, Your Honor, we actually made it through Count 6 on  
19 the sentencing before --

20 THE COURT: Well, that's when we realized that everything was wrong on  
21 this.

22 MR. KOCKA: I've gone through it and compared line by line the prior PSI on  
23 this one, and this one appears to be right.

24 THE COURT: And this one appears to be correct?

25 MR. KOCKA: Yes, Your Honor.



1 THE COURT: Counsel approach.

2 (Conference at the bench not recorded.)

3 THE COURT: All right. Mr. Mullner, I'll start over on your sentencing. By  
4 virtue of your pleas of guilty, you're hereby adjudged guilty of Count No. 1, Burglary,  
5 Counts 2 and 5, Robbery, Count 3, Coercion, Count 4 and 8, Burglary while in  
6 possession of a deadly weapon, Count 6 and 9, Robbery with use of a deadly  
7 weapon, Count 7, Attempt robbery and Count 10, Possession of a firearm by an ex-  
8 felon.

9 In addition to the \$25 administrative assessment -- you've already given  
10 your DNA so you don't need to do it again -- the \$3 DNA collection fee, whatever  
11 that is, on Count No. 1, you are adjudged guilty under the large habitual criminal  
12 statute and sentenced to a minimum term of 10 years Nevada Department of  
13 Corrections and a maximum term of life.

14 On Count No. 2, Robbery, you are adjudged guilty under the large  
15 habitual criminal statute and sentenced to a minimum term of 10 years Nevada  
16 Department of Corrections and a maximum term of life. That is imposed  
17 consecutively.

18 On Count No. 3, Coercion, you're sentenced to a minimum term of 24  
19 months Nevada Department of Corrections and a maximum term of 72 months.  
20 That is imposed consecutively to the time I gave you on Count No. 2.

21 On Count No. 4, Burglary while in possession of a deadly weapon,  
22 you're adjudged guilty under the large habitual criminal statute and sentenced to a  
23 minimum term of 10 years, maximum term of life. That is imposed concurrently with  
24 Count 3.

25 On Count No. 5, Robbery, you're adjudged guilty under the large

1 habitual criminal statute and sentenced to a minimum term of 10 years, a maximum  
2 term of life. That is imposed concurrently with the time I gave you on Count No. 4.

3 On Count No. 6, Robbery with use of a deadly weapon, you're  
4 adjudged guilty under the large habitual criminal statute. You're sentenced to a  
5 minimum term of life -- I'm sorry, a minimum term of 10 years, a maximum term of  
6 life. That is imposed concurrently with the time I gave you on Count No. 5.

7 On Count No. 7, Attempt robbery, you are adjudged guilty under the  
8 large habitual criminal statute and sentenced to 10 to life. That is imposed  
9 concurrently.

10 On Count No. 8, Burglary while in possession of a deadly weapon,  
11 you're adjudged guilty under the large habitual criminal statute and sentenced to a  
12 minimum term of 10 years, a maximum term of life. That is imposed concurrently.

13 On Count No. 9, Robbery with use of a deadly weapon, you are  
14 adjudged guilty under the large habitual criminal statute and sentenced to 10 to life  
15 imposed concurrently.

16 On Count No. 10, Possession of firearm by an ex-felon, you're  
17 sentenced to a minimum term of 12 months, a maximum term of 48 months. That is  
18 imposed consecutively.

19 You are entitled to a total of -- is this accurate? Yes. 572 days of credit  
20 for time served.

21 MS. ALBRITTON: And, Your Honor, there would be restitution in the amount  
22 of \$3,089.40.

23 THE COURT: All right. Thank you. That restitution will be imposed as well.

24 MS. ALBRITTON: Thank you.

25 MR. KOCKA: Thank you, Your Honor.

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THE CLERK: Can I have the --

MS. ALBRITTON: The sheet with the breakdown? Yes.

MS. ALBRITTON: Thank you.

THE COURT: All right. Thank you.

MR. KOCKA: Thank you, Your Honor.

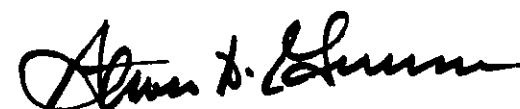
-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case.



---

JANIE L. OLSEN  
Recorder/Transcriber



CLERK OF THE COURT

1 RSPN  
STEVEN B. WOLFSON  
2 Clark County District Attorney  
Nevada Bar #001565  
3 JONATHAN E. VANBOSKERCK  
Chief Deputy District Attorney  
4 Nevada Bar #006528  
200 Lewis Avenue  
5 Las Vegas, Nevada 89155-2212  
(702) 671-2500  
6 Attorney for Plaintiff

7  
8 DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-12-283463-1

12 TROY LEE MULLNER,  
#1158825

DEPT NO: XXI

13 Defendant.  
14

15 STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN  
16 SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

17 DATE OF HEARING: MARCH 8, 2016  
TIME OF HEARING: 9:30 AM

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
19 District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District  
20 Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's  
21 Supplemental Memorandum in Support of Petition for Writ of Habeas Corpus (Post-  
22 Conviction).

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

26 //

27 //

28 //

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On August 15, 2012, the State charged Defendant TROY LEE MULLNER (hereinafter  
4 "Defendant") by way of Indictment with the following: Eleven (11) counts of BURGLARY  
5 (Category B Felony – NRS 205.060); Sixteen (16) counts of ROBBERY (Category B Felony  
6 – NRS 200.380); Two (2) counts of FIRST DEGREE KIDNAPPING (Category A Felony –  
7 NRS 200.310, 200.320); Four (4) counts of COERCION (Category B Felony – NRS 207.190);  
8 Four (4) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON  
9 (Category B Felony - NRS 205.060); Five (5) counts of ROBBERY WITH USE OF A  
10 DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); Two (2) Counts of  
11 ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS  
12 200.380, 193.330, 193.165); Three (3) counts of ATTEMPT ROBBERY (Category B Felony  
13 – NRS 200.380, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON  
14 (Category B Felony – NRS 202.360).

15 Pursuant to negotiations, on October 21, 2013, the State charged Defendant by way of  
16 Amended Indictment with the following: COUNT 1 – BURGLARY (Category B Felony –  
17 NRS 205.060); COUNTS 2 & 5 – ROBBERY (Category B Felony – NRS 200.380); COUNT  
18 3 – COERCION (Category B Felony – NRS 207.190); COUNTS 4 & 8 – BURGLARY  
19 WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060);  
20 COUNTS 6 & 9 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony –  
21 NRS 200.380, 193.165); COUNT 7 – ATTEMPT ROBBERY (Category B Felony – NRS  
22 200.380, 193.330); COUNT 10 – POSSESSION OF FIREARM BY EX-FELON (Category B  
23 Felony – NRS 202.360).

24 On October 21, 2013, a Guilty Plea Agreement was filed, whereby the Defendant  
25 agreed to plead guilty to the charges in the Amended Indictment. The State reserved the full  
26 right to argue, including for habitual criminal treatment. Defendant pleaded guilty that day.  
27 On January 23, 2014, Defendant was adjudged a habitual criminal and sentenced to TEN (10)  
28 YEARS to LIFE on COUNT 1; TEN (10) YEARS to LIFE on COUNT 2 to run consecutive

1 to COUNT 1; TWO (2) to SIX (6) YEARS on COUNT 3 to run consecutive to COUNT 2;  
2 TEN (10) YEARS to LIFE on COUNT 4 to run concurrent to COUNT 3; TEN (10) YEARS  
3 to LIFE on COUNT 5 to run concurrent to COUNT 4; TEN (10) YEARS to LIFE on COUNT  
4 6 to run concurrent with COUNT 5; TEN (10) YEARS to LIFE on COUNT 7 to run concurrent  
5 with COUNT 6; TEN (10) YEARS to LIFE on COUNT 8 to run concurrent with COUNT 7;  
6 TEN (10) YEARS to LIFE on COUNT 9 to run concurrent with COUNT 8; and ONE (1) to  
7 FOUR (4) YEARS on COUNT 10 to run consecutive to COUNT 9. Defendant received FIVE  
8 HUNDRED SEVENTY-TWO (572) DAYS credit for time served. On January 28, 2014, the  
9 Judgment of Conviction was filed. On February 5, 2014, an Amended Judgment of Conviction  
10 was filed to correct a clerical error.

11 On April 15, 2014, Defendant filed an untimely Notice of Appeal. On April 17, 2014,  
12 Defendant filed a document titled "Writ of Mandamus NRS 34.160-34.170." On May 13,  
13 2014, the Nevada Supreme Court dismissed Defendant's appeal due to his failure to timely  
14 file his Notice of Appeal. Remittitur issued on June 12, 2014.

15 On June 13, 2014, Defendant filed a pro per Post-Conviction Petition for Writ of  
16 Habeas Corpus ("Petition"). On June 13, 2014, Defendant filed a Motion for the Appointment  
17 of Counsel and Request for Evidentiary Hearing. The State filed an opposition to the Motion  
18 for the Appointment of Counsel and Request for Evidentiary Hearing on July 8, 2014, noting  
19 that on May 22, 2014, the Court had appointed Jean Schwartz, Esq., as counsel for Defendant  
20 and the request for an evidentiary hearing was premature.

21 On December 3, 2015, Defendant through counsel filed the instant Supplemental  
22 Memorandum in Support of Petition for Writ of Habeas Corpus (Post-Conviction)  
23 ("Supplement"). The State responds as follows, and respectfully requests that this Court order  
24 that Defendant's Supplement be DENIED.

### 25 ARGUMENT

26 Claims asserted in a petition for post-conviction relief must be supported with specific  
27 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100  
28

1 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient,  
2 nor are those belied and repelled by the record. Id.; see also NRS 34.735(6).

3 **I. DEFENDANT'S GUILTY PLEA WAS KNOWINGLY AND VOLUNTARILY**  
4 **ENTERED**

5 The validity of a guilty plea depends on the totality of the circumstances. Bryant v.  
6 State, 102 Nev. 268, 272, 721 P.2d 364, 367 (1986). "[T]he trial court should view the guilty  
7 plea as presumptively valid and the burden should be on the defendant to establish that the  
8 plea was not entered knowingly and intelligently. Id. at 272, 721 P.2d at 368. While trial  
9 courts should be thorough in conducting a guilty-plea canvass, "the failure to utter talismanic  
10 phrases will not invalidate a plea where a totality of the circumstances demonstrates that the  
11 plea was freely, knowingly and voluntarily made." State v. Freese, 116 Nev. 1097, 1104, 13  
12 P.3d 442, 447 (2000). "Defendants can always allege that they did not understand or did not  
13 know about some aspect of their pleas. A canvass, together with a written plea memorandum,  
14 makes a clear and concise record for expeditiously disposing of such allegations." Id. at 1106,  
15 13 P.3d at 448.

16 Defendant claims that counsel "informed him that he would be receiving one sentence  
17 of [10-25 years]" in exchange for his plea of guilty, and that the language of the Guilty Plea  
18 Agreement led him to believe that this was the case. This claim is belied by the record.  
19 Hargrove, 100 Nev. at 502, 686 P.2d at 225. The Guilty Plea Agreement clearly established  
20 that the State retained the right to argue for any sentence, including habitual criminal treatment.  
21 Guilty Plea Agreement, filed October 21, 2013, at 1. Further, the Guilty Plea Agreement fully  
22 informed Defendant of the potential sentence under each count and the sentences he could  
23 receive if punished as a habitual criminal:

24 As to **COUNT 1**, I understand that as a consequence of my plea  
25 of guilty the Court must sentence me to imprisonment in the  
26 Nevada Department of Corrections for a minimum term of not less  
27 than ONE (1) year and a maximum term of not more than TEN  
(10) years. The minimum term of imprisonment may not exceed  
forty percent (40%) of the maximum term of imprisonment. I  
understand that I may also be fined up to \$10,000.00.

28 //

1 As to **COUNTS 2 and 5**, I understand that as a consequence of  
2 my plea of guilty the Court must sentence me to imprisonment in  
3 the Nevada Department of Corrections for a minimum term of  
4 not less than TWO (2) years and a maximum term of not more  
5 than FIFTEEN (15) years. The minimum term of imprisonment  
6 may not exceed forty percent (40%) of the maximum term of  
7 imprisonment[.]

8 As to **COUNT 3**, I understand that as a consequence of my plea  
9 of guilty the Court must sentence me to imprisonment in the  
10 Nevada Department of Corrections for a minimum term of not less  
11 than ONE (1) year and a maximum term of not more than SIX (6)  
12 years. The minimum term of imprisonment may not exceed forty  
13 percent (40%) of the maximum term of imprisonment. I  
14 understand that I may also be fined up to \$5,000.00.

15 As to **COUNTS 4 and 8**, I understand that as a consequence of  
16 my plea of guilty the Court must sentence me to imprisonment in  
17 the Nevada Department of Corrections for a minimum term of  
18 not less than TWO (2) years and a maximum term of not more  
19 than FIFTEEN (15) years. The minimum term of imprisonment  
20 may not exceed forty percent (40%) of the maximum term of  
21 imprisonment. I understand that I may also be fined up to  
22 \$20,000.00.

23 As to **COUNTS 6 and 9**, I understand that as a consequence of  
24 my plea of guilty the Court must sentence me to imprisonment in  
25 the Nevada Department of Corrections for a minimum term of  
26 not less than TWO (2) years and a maximum term of not more  
27 than FIFTEEN (15) years, plus a minimum term of ONE (1)  
28 year and a maximum term of FIFTEEN (15) years, for the  
Deadly Weapon enhancement. The minimum term of  
imprisonment may not exceed forty percent (40%) of the  
maximum term of imprisonment.

As to **COUNT 10**, I understand that as a consequence of my plea  
of guilty the Court must sentence me to imprisonment in the  
Nevada Department of Corrections for a minimum term of not less  
than ONE (1) year and a maximum term of not more than SIX (6)  
years. The minimum term of imprisonment may not exceed forty  
percent (40%) of the maximum term of imprisonment. I  
understand that I may also be fined up to \$5,000.00.

Further, I understand that if I am sentenced under the "small"  
habitual criminal enhancement, the Court must sentence me to a  
term not less than FIVE (5) years and a maximum of TWENTY  
(20) years in the Nevada Department of Corrections. I understand  
that if I am sentenced under the "large" habitual criminal  
enhancement the Court must sentence me to LIFE without the  
possibility of parole; life with the possibility of parole, parole  
eligibility begins after a minimum term of TEN (10) years has  
been served; OR a definite term of TWENTY FIVE (25) years,  
parole eligibility begins after a minimum of TEN (10) years  
has been served. I understand that the law requires me to  
pay an Administrative Assessment Fee.



1 Further, I understand that under NRS 207.012 (2) for the  
2 convictions of ROBBERY, BURGLARY WHILE IN  
3 POSSESSION OF A DEADLY WEAPON, ROBBERY WITH  
4 USE OF A DEADLY WEAPON the Court must sentence me to  
5 LIFE without the possibility of parole in the Nevada Department  
6 of Corrections; LIFE with the possibility of parole, with eligibility  
for parole beginning when a minimum of 10 years has been served  
in the Nevada Department of Corrections; or a definite term  
of 25 years, with eligibility for parole beginning when a  
minimum of 10 years has been served in the Nevada Department  
of Corrections.

7 Id. at 2-4. Further, the Guilty Plea Agreement informed Defendant of the Court's discretion  
8 to order his sentences to run concurrent with or consecutive to each other:

9 I understand that if more than one sentence of imprisonment is  
10 imposed and I am eligible to serve the sentences concurrently, the  
11 sentencing judge has the discretion to order the sentences served  
concurrently or consecutively.

12 Id. at 4. Given that Defendant was informed that the Court could order each count to run  
13 consecutively, and he was informed that the Court was mandated to sentence him as a violent  
14 habitual criminal, Defendant cannot say he was misinformed as to the potential sentence he  
15 would receive and only understood the potential sentence to be a single term of 10-25 years.

16 Even if the Guilty Plea Agreement could be read to "[fail] to state that the habitual  
17 sentence can be applied to each count as opposed to functioning only as one sentence,"  
18 Supplement at 6, the Court cleared up any potential confusion during the guilty plea canvass,  
19 and Defendant acknowledged that he understood the potential for a sentence longer than 10-  
20 25 years:

21 MR. KOCKA: Your Honor, could we just add to the  
22 record, this is kind of a unique  
23 circumstance that under the statute by  
24 pleading to the charges that he pled, he'd  
actually be looking at a mandatory  
habitual.

25 MS. ALBRITTON: That's correct. He's under the violent  
26 mandatory habitual under NRS 207.012,  
Subsection 2, and it's actually outlined in  
the Guilty Plea Agreement on page No. 4.

27 MR. KOCKA: I just want to make sure that the Court  
28 fully advises him of that so we don't have  
– it doesn't become an issue later on.

1 THE COURT:

All right. And just directing your attention just to make sure it's clear, you understand that for the convictions of robbery, burglary while in possession of a deadly weapon and robbery with use of a deadly weapon, you must be sentenced under the violent habitual criminal statute to life without the possibility of parole, life with the possibility of parole, parole eligibility beginning after 10 years has been served or a definite term of 25 years with your parole eligibility beginning when a minimum of 10 years has been served.

8 Do you understand that?

9 DEFENDANT:

Yes, I do.

10 THE COURT:

Okay. And you understand that the Court has to sentence you to one of those three possibilities?

12 DEFENDANT:

Yes, I do.

13 THE COURT:

Okay. **So the least amount of time you could get, best case scenario for you is 25 years with becoming eligible for parole after 10 years has been served.**

16 DEFENDANT:

I understand that.

17 THE COURT:

**But that actually if I run everything – things consecutive and whatnot, it could actually be a lot longer than that even if you got the 10 to 25. Do you understand that?**

20 DEFENDANT:

Yes.

21 THE COURT:

Okay. Any questions on any of that?

22 DEFENDANT:

No, ma'am.

23 Recorder's Transcript of Proceedings, October 21, 2013, at 14-15.<sup>1</sup> Thus, it is clear that  
24 Defendant was informed of the potential of being sentenced consecutively, to more than one  
25 sentence, as a habitual criminal. Because Defendant's claim that he was misinformed of his  
26

27  
28 <sup>1</sup> This canvass also belies Defendant's claim, made within his pro per Petition and noted in the Supplement, that the Guilty Plea Agreement he signed was not the one filed with the Court, as it tracks the language of the Guilty Plea Agreement. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

1 potential sentence is belied by the record, he is not entitled to relief and this claim should be  
2 denied.

3 **II. DEFENDANT WAS NOT DEPRIVED OF APPELLATE RIGHTS**

4 Defendant claims that he repeatedly asked counsel to file a direct appeal, but refused to  
5 do so. Supplement at 7. “[T]rial counsel has a constitutional duty to file a direct appeal in two  
6 circumstances: when requested to do so and when the defendant expresses dissatisfaction with  
7 his conviction, and that the failure to do so in those circumstances is deficient for purposes of  
8 proving ineffective assistance of counsel.” Toston v. State, 127 Nev. \_\_\_, \_\_\_, 267 P.3d 795,  
9 800 (2011). However, Defendant’s claim that he asked his attorney “repeatedly” to file a direct  
10 appeal is a bare allegation unsupported by *specific* facts that show he is entitled to relief.  
11 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

12 Further, any failure of counsel to file a direct appeal cannot be considered deficient  
13 performance because Defendant waived all appellate rights:

14 By entering my plea of guilty, I understand that I am waiving and  
15 forever giving up the following rights and privileges:

16 . . .

17 6. The right to appeal the conviction with the assistance of an  
18 attorney, either appointed or retained, unless specifically reserved  
19 in writing and agreed upon as provided in NRS 174.035(3). I  
20 understand this means I am unconditionally waiving my right to a  
21 direct appeal of this conviction, *including* any challenge based  
upon reasonable constitutional, jurisdictional or other grounds that  
challenge the legality of the proceedings as stated in NRS  
177.015(4). However, I remain free to challenge my conviction  
through other post-conviction remedies including a habeas corpus  
petition pursuant to NRS Chapter 34.

22 Guilty Plea Agreement, filed October 21, 2013, at 6 (emphasis added). “[A] defendant who  
23 has pleaded guilty has a right to appeal from the judgment of conviction, [under] NRS  
24 177.015(4) . . . unless he knowingly and voluntarily waives that right.” Toston, 127 Nev. at  
25 \_\_\_, 267 P.3d at 800. The Nevada Supreme Court has consistently held that a defendant may  
26 waive even those grounds reserved by NRS 177.015(4), and that such a waiver will be

1 enforced. Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999); Cruzado v. State, 110  
2 Nev. 745, 879 P.2d 1195 (1994).<sup>2</sup>

3 It is not reasonable for counsel to file an appeal where a defendant has unconditionally  
4 waived his appellate rights. Therefore, as in this case, a failure to file an appeal where appellate  
5 rights have been unconditionally waived cannot be considered deficient performance for  
6 purposes of ineffective assistance of counsel. Toston, 127 Nev. at \_\_\_, 267 P.3d at 800.

7 As for any claim that counsel failed to inform Defendant of his appellate rights, the  
8 Nevada Supreme Court has explained that trial counsel has no constitutional obligation to  
9 inform or consult with a defendant regarding his right to a direct appeal when the defendant is  
10 convicted pursuant to a guilty plea. Id. at \_\_\_, 267 P.3d at 799 (citing Thomas v. State, 115  
11 Nev. 148, 150, 979 P.2d 222, 223 (1999); Roe v. Flores-Ortega, 528 U.S. 470, 479-80, 120 S.  
12 Ct. 1029, 1036 (2000)). Rather,

13 [t]hat duty arises in the guilty-plea context only when the  
14 defendant inquires about the right to appeal or in circumstances  
15 where the defendant may benefit from receiving advice about the  
right to a direct appeal, 'such as the existence of a direct appeal  
claim that has reasonable likelihood of success.'

16 Id. (quoting Thomas, 115 Nev. at 150, 979 P.2d at 223). If a defendant has grounds for appeal  
17 which were not waived pursuant to the plea agreement, and his counsel misinforms him that  
18 he has no grounds of appeal, such actions may constitute deficient performance. Id.

19 However, importantly, Defendant did not have a right to appeal, because he had waived  
20 that right in his Guilty Plea Agreement. Consequently, counsel cannot be considered to have  
21 rendered deficient performance because under no circumstance could Defendant have  
22 benefitted from receiving advice about a waived direct appeal. Id.

23 Additionally, the alleged appealable issues raised in the Supplement are frivolous and  
24 have no reasonable likelihood of success. Defendant alleges that his sentence amounts to cruel  
25 and unusual punishment. Supplement at 7. However, while the Eighth Amendment to the  
26 United States Constitution and Article 1, Section 6 of the Nevada Constitution prohibit the

27  
28 <sup>2</sup> Any claim that he did not know of his absence of his right to appeal is belied by his Guilty Plea Agreement. Hargrove, 100 Nev. at  
503, 686 P.2d at 225. As discussed above, the Guilty Plea Agreement entered into by Defendant explicitly sets forth not only the limited  
grounds of appeal remaining to a defendant upon entry of a Guilty Plea Agreement, but also his waiver of those rights.

1 imposition of cruel and unusual punishment, the United States Supreme Court has made clear  
2 that “[t]he Eighth Amendment does not require strict proportionality between crime and  
3 sentence.” Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705 (1991)  
4 (Kennedy, J., concurring in part and concurring in the judgment). Regardless of its severity,  
5 “[a] sentence within the statutory limits is not ‘cruel and unusual punishment unless the statute  
6 fixing the punishment is unconstitutional or the sentence is so unreasonably disproportionate  
7 to the offense as to shock the conscience.’” Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246,  
8 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996)). Here,  
9 Defendant’s sentence was within the statutory limits of each statute he was convicted under.  
10 Pursuant to Defendant’s three prior felony convictions, his sentences of 10 years to Life for  
11 COUNTS 1-2 and 4-9 were within the statutory limits of the large habitual criminal statute  
12 and the mandatory violent habitual criminal statute. NRS 207.010; NRS 207.012. As for the  
13 counts where the Court did not impose a sentence under the habitual criminal statutes, each  
14 sentence was within statutory limits. NRS 207.190 (COUNT 3); NRS 202.360 (COUNT 10).

15 Further, under leading United States Supreme Court and Nevada Supreme Court  
16 precedent, Defendant’s sentences under the habitual criminal statutes were not grossly  
17 disproportionate to his crimes. See Ewing v. California, 538 U.S. 11, 30, 123 S. Ct. 1179,  
18 1190 (2003) (finding California’s “Three Strikes” Law and a defendant’s sentence under that  
19 law of 25 years to Life for grand theft not grossly disproportionate to the crime); Sims v. State,  
20 107 Nev. 438, 814 P.2d 63 (1991) (affirming a sentence of life without parole for grand larceny  
21 involving the theft of a purse and wallet containing \$476.00, adjudicated under the habitual  
22 criminal statute). Defendant’s arguments in mitigation would not warrant a finding of gross  
23 disproportionality. Therefore, there is no reasonable likelihood of success of this issue on  
24 appeal and it does not support a duty to inform Defendant of the right to appeal.

25 Defendant also alleges that the convictions used to support habitual criminal treatment  
26 were “stale” and one was committed while he was a juvenile.

27 As to the claim of staleness, “NRS 207.010 makes no special allowance for non-violent  
28 crimes or for the remoteness of convictions; instead, these are considerations within the

1 discretion of the district court.” Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992)  
2 (citing French v. State, 98 Nev. 235, 645 P.2d 440 (1982)). This statute “exists to enable the  
3 criminal justice system to deal determinedly with career criminals who pose a serious threat  
4 to public safety.” Sessions v. State, 106 Nev. 186, 191, 789 P.2d 1242, 1245 (1990). The  
5 Nevada Supreme Court has stated that “it may be an abuse of discretion for the [district] court  
6 to enter a habitual criminal adjudication when the convictions used to support the adjudication  
7 are nonviolent and remote in time.” Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427  
8 (1993); Sessions, 106 Nev. at 191, 789 P.2d at 1245.

9 This Court could not have abused its discretion in punishing Defendant as a habitual  
10 criminal. In Sessions, cited as support for Defendant’s position, the defendant was charged  
11 and convicted of trafficking and possession of marijuana. Id. at 187, 789 P.2d at 1242-43. At  
12 sentencing, the State sought to have defendant sentenced as a habitual criminal, and presented  
13 three prior felonies: a 1959 theft of property in Texas, a 1963 conviction for grand theft in  
14 California, and a 1965 conviction for escape without the use of force in California. Id. at 187-  
15 88, 789 P.2d at 1243. The district court ultimately sentenced defendant as a habitual criminal.  
16 Id. at 188, 789 P.2d at 1243. The Nevada Supreme Court disagreed, concluding that the district  
17 court abused its discretion in sentencing defendant as a habitual criminal because the prior  
18 convictions were twenty-three to thirty years old **and** were non-violent crimes. Id. at 191, 789  
19 P.2d at 1245.

20 Here, the three convictions were 6 years old (Robbery – 2006 – Nevada), 15 years old  
21 (Second Degree Kidnapping – 1997 – Nevada) and 28 years old (First Degree Robbery – 1984  
22 – South Dakota) when Defendant committed his crimes. See Notice of Intent to Seek Habitual  
23 Criminal, filed March 13, 2013, at 2. However, unlike Sessions, Defendant’s convictions  
24 reflect repeat criminal acts with no substantial lapse of time between Defendant’s last  
25 conviction and the current conviction. Further, unlike Sessions, Defendant’s convictions are  
26 for Robbery and Kidnapping, which are violent offenses. Therefore, there would be no  
27 reasonable likelihood of success on Defendant’s proposed staleness claim.

28 //

1 Defendant's claim that the Court was unauthorized to use Defendant's 1984 conviction  
2 to sentence him as a habitual criminal, because Defendant was a juvenile certified for adult  
3 proceedings is unsupported. His citation to State v. Javier, 128 Nev. \_\_\_, 289 P.3d 1994  
4 (2012), is inapposite because that case concerned the type of confinement faced by juvenile  
5 delinquents, not the nature of the proceedings *after* the Juvenile Court has certified a juvenile  
6 for adult adjudication. Instead, "[o]nce the civil proceedings under NRS 62.080 have led to  
7 certification . . . the subject becomes, in the eyes of the criminal law, an adult." Faessel v.  
8 Second Judicial Dist. Court, 106 Nev. 106, 107, 787 P.2d 767, 768 (1990). Further, Defendant  
9 has not shown that he sealed his conviction of this offense, despite being a minor when  
10 committing it. Cf. Zana v. State, 125 Nev. 541, 546, 216 P.3d 244, 247 (2009) (the act of  
11 sealing a juvenile's records erases the official record of his involvement with the criminal  
12 justice system). Defendant's argument is frivolous, unsupported by authority, and would not  
13 have any likelihood of success on appeal.

14 Therefore, Defendant fails to show that he could have presented appealable issues with  
15 reasonable likelihood of success, which would trigger a duty by counsel to advise Defendant  
16 of any appellate rights. Considering that Defendant waived his appellate rights by operation  
17 of his Guilty Plea Agreement, and the absence of any appealable issues, this claim should be  
18 denied.<sup>3</sup>

### 19 **III. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

20 Defendant requests an evidentiary hearing throughout his Petition. NRS 34.770  
21 determines when a defendant is entitled to an evidentiary hearing:

22 //

---

23 <sup>3</sup> Within Defendant's pro per Petition, he makes several claims that counsel does not appear to adopt in the Supplement. Because of this,  
24 the Court should consider these claims abandoned. In any case, these pro per claims do not merit relief. Each of these claims are bare,  
25 naked allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Defendant claims a failure to communicate. However, the United States  
26 Supreme Court has held that a defendant is not entitled to a meaningful relationship with counsel. Morris v. Slappy, 461 U.S. 1, 13-14,  
27 103 S. Ct. 1610, 1616 (1983). Further, he does not show any prejudice he suffered based on this alleged failure to communicate. Also,  
28 while Defendant claims that counsel failed to provide him with information on his case or discovery, he again fails to show any prejudice  
he could suffer from any failure. Finally, Defendant's claim that counsel failed to follow-up on information Defendant provided to him  
and failed to conduct requested follow-up, this failure to investigate claim is a bare failure-to-investigate claim. Hargrove, 100 Nev. at  
502, 686 P.2d at 225. Further, a defendant who contends his attorney was ineffective because he did not adequately investigate must  
show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d  
533, 538 (2004). Defendant fails to demonstrate that further investigation would have led to a different outcome. Therefore, these claims  
made within Defendant's pro per Petition should be denied if not deemed abandoned.

1. 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. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held*.

2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). 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, 110 Nev. at 1331, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that “[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Here, an evidentiary hearing is unwarranted because the petition may be resolved without expanding the record. Mann, 118 Nev. at 356, 46 P.3d at 1231; Marshall, 110 Nev. at 1331, 885 P.2d at 605. As explained above, Defendant’s claims fail to sufficiently allege ineffective assistance of counsel or an involuntary guilty plea on their face. Defendant was clearly informed about the potential sentences he could receive, and waived all appellate rights. Therefore, no evidentiary hearing is warranted in order to deny such claims. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Accordingly, Defendant’s request for an evidentiary hearing must be denied.

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1 CONCLUSION

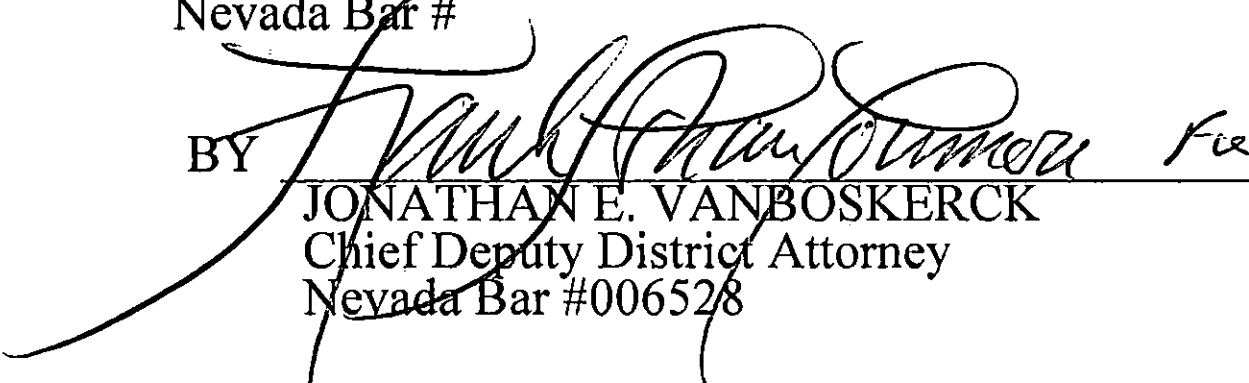
2 Based upon the foregoing, the State respectfully requests that Defendant's Supplement  
3 be DENIED.

4 DATED this 27th day of January, 2016.

5 Respectfully submitted,

6 STEVEN B. WOLFSON  
7 Clark County District Attorney  
8 Nevada Bar #

9 BY

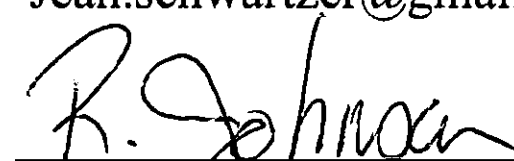
  
10 JONATHAN E. VANBOSKERCK  
11 Chief Deputy District Attorney  
12 Nevada Bar #006528

13 CERTIFICATE OF SERVICE

14 I certify that on the 27th day of January, 2016, I e-mailed a copy of the foregoing State's  
15 Response to Defendant's Supplemental Memorandum in Support of Petition for Writ of  
16 Habeas Corpus (Post-Conviction), to:

17 JEAN J. SCHWARTZER, Esq.  
18 Jean.schwartz@gmail.com

19 BY

  
20 R. JOHNSON  
21 Secretary for the District Attorney's Office  
22  
23  
24  
25  
26  
27

28 MB/JEV/rj/M-1

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**March 08, 2016**

C-12-283463-1      State of Nevada  
vs  
Troy Mullner

**March 08, 2016      9:30 AM      Petition for Writ of Habeas Corpus      Petition's Pro Per  
Petition for Writ of  
Habeas Corpus**

**HEARD BY:** Adair, Valerie

**COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Denise Husted

**RECORDER:** Susan Schofield

**REPORTER:**

**PARTIES**

**PRESENT:** Allen, Betsy      Attorney for the Defendant  
Jones, Tierra D.      Attorney for the State  
State of Nevada      Plaintiff

**JOURNAL ENTRIES**

- Ms. Allen submitted. The Court noted that the defendant's allegation is that he was denied his right to an appeal. COURT ORDERED, an Evidentiary Hearing is set for that reason as well as to make a determination if the defendant was advised of the habitual criminal status.

NDC

4/4/16 9:00 AM EVIDENTIARY HEARING: APPEAL/WHAT DEFENDANT WAS TOLD AT SENTENCING

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**May 02, 2016**

---

C-12-283463-1      State of Nevada  
                                 vs  
                                 Troy Mullner

---

**May 02, 2016      10:00 AM      Evidentiary Hearing: Appeal / What Defendant Was Told  
Regarding The Sentencing**

**HEARD BY:** Adair, Valerie

**COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Natalie Ortega

**RECORDER:** Susan Schofield

**PARTIES**

**PRESENT:**      Albritton, Alicia A.      Attorney for State  
                         Mullner, Troy Lee      Defendant  
                         Schwartzer, Jean J.      Attorney for Deft.

**JOURNAL ENTRIES**

- Ms. Schwartzer advised Deft. wanted to withdraw his Request to Withdraw. Upon Court's inquiry, Deft. acknowledged he wanted to withdraw the Motion to Withdraw the Guilty Plea, and the guilty plea will stand. Argument by Ms. Schwartzer. The Deft. should not have been adjudicated under the large habitual, and he had the right to appeal. Troy Mullner SWORN and TESTIFIED. Frank Kocka SWORN and TESTIFIED. Presentation of evidence concluded. Further arguments by Ms. Schwartzer regarding Defendant's right to appeal and ineffective counsel. COURT ORDERED, MATTER TAKEN UNDER ADVISEMENT for further review.

5/9/16 DECISION (CHAMBERS)

NDC

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**May 24, 2016**

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C-12-283463-1      State of Nevada  
                                 vs  
                                 Troy Mullner

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**May 24, 2016      9:30 AM      Decision**

**HEARD BY:** Adair, Valerie      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Jill Chambers

**RECORDER:** Susan Schofield

**REPORTER:**

**PARTIES**

**PRESENT:**      Flinn, William W.      Attorney for State  
                                 Schwartzer, Jean J.      Attorney for Deft  
                                 State of Nevada      Plaintiff

**JOURNAL ENTRIES**

- Court noted Deft. was not present but it was not necessary for him to be present. Court ADVISED counsel that after reviewing the entire record as well as the testimony, FINDS the Deft. did request an appeal and DIRECTED Ms. Schwartzer that her appointment would continue. Court FURTHER DIRECTED Ms. Schwartzer to prepare the order with the Court's findings. Colloquy regarding the notice of appeal. Following a conference at the bench, Court SET matter for Status Check.

6/14/16 9:30 AM STATUS CHECK: ORDER



CLERK OF THE COURT

1 **FLC**  
2 **JEAN J. SCHWARTZER, ESQ.**  
Nevada Bar No. 11223  
3 **LAW OFFICE OF JEAN J. SCHWARTZER**  
10620 Southern Highlands Parkway, Suite 110-473  
4 Las Vegas, Nevada 89141  
Phone: (702) 979-9941  
5 Fax: (702) 447-5044  
Email: jean.schwartzter@gmail.com  
6 Counsel for Petitioner

7  
8 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**  
9 **STATE OF NEVADA FOR THE COUNTY OF CLARK**

10  
11 TROY LEE MULLNER ) Case No.: C283463  
12 ) Dept No.: XXI  
Petitioner, )  
13 vs. )  
14 THE STATE OF NEVADA, )  
15 Respondent. )

16  
17 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

18 DATE OF HEARING: May 24, 2016

19 TIME OF HEARING: 9:30 AM

20 THIS CAUSE having come on for hearing before Honorable Valerie Adair, District Court  
21 Judge, on the 24<sup>th</sup> day of May, 2015, the Petitioner not being present, represented by JEAN J.  
22 SCHWARTZER, ESQ., the Respondent being represented by STEVEN B. WOLFSON, ESQ., District  
23 Attorney, by and through WILLIAM FINN, ESQ., Deputy District Attorney, the Court having  
24 considered the matter, including briefs, argument, testimony at an evidentiary hearing and documents  
25 on file herein, now therefore, the Court makes the following findings of facts and conclusions of law:

26 ///

27 ///

28 ///

**FINDINGS OF FACT**

1. On August 15, 2012, the State charged Mullner TROY LEE MULLNER ("Mullner") by way of Indictment with the following: Eleven (11) counts of BURGLARY (Category B Felony – NRS 205.060); Sixteen (16) counts of ROBBERY (Category B Felony – NRS 200.380); Two (2) counts of FIRST DEGREE KIDNAPPING (Category A Felony – NRS 200.310, 200.320); Four (4) counts of COERCION (Category B Felony – NRS 207.190); Four (4) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 200.380, NRS 193.165); Two (2) Counts of ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165); Three (3) counts of ATTEMPT ROBBERY (Category B Felony – NRS 200.380, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360).

2. Pursuant to negotiations, on October 21, 2013, the State charged Mullner by way of Amended Indictment with the following: One(1) count of BURGLARY (Category B Felony – NRS 205.060); Two (2) counts of ROBBERY (Category B Felony – NRS 200.380); One (1) count of COERCION (Category B Felony – NRS 207.190); Two (2) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 200.380, NRS 193.165); Two (2) Counts of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); One (1) count of ATTEMPT ROBBERY (Category B Felony – NRS 200.380, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360).

3. On October 21, 2013, Mullner was arraigned on the Amended Indictment, and a Guilty Plea Agreement ("GPA") was filed. The State reserved the full right to argue, including for habitual criminal treatment. Mullner pleaded guilty to the charges alleged in the Amended Indictment.

4. On January 23, 2014, Mullner was adjudged a habitual criminal and sentenced to TEN (10) YEARS to LIFE on Count 1; TEN (10) YEARS to LIFE on COUNT 2 to run consecutive to Count 1; TWO (2) to SIX (6) YEARS on COUNT 3 to run consecutive to COUNT 2; TEN (10) YEARS to LIFE on COUNT 4 to run concurrent to Count 3; TEN (10) YEARS to LIFE on COUNT 5

1 to run concurrent to Count 4; TEN (10) YEARS to LIFE on COUNT 6 to run concurrent to COUNT  
2 5; TEN (10) YEARS to LIFE on COUNT 7 to run concurrent to COUNT 6; TEN (10) YEARS to  
3 LIFE on COUNT 8 to run concurrent to COUNT 7; TEN (10) YEARS to LIFE on COUNT 9 to run  
4 concurrent to COUNT 8; and ONE (1) to FOUR (4) YEARS on COUNT 10 to run consecutive to  
5 COUNT 9. Mullner received FIVE HUNDRED SEVENTY-TWO (572) DAYS credit for time served.

6 5. On January 28, 2014, the Judgment of Conviction was filed. On February 5, 2014, an  
7 Amended Judgment of Conviction was filed because of a clerical error which was corrected to read as  
8 follows; COUNT 7 – ATTEMPT ROBBERY.

9 6. On April 15, 2014, Mullner filed an untimely pro per Notice of Appeal.

10 7. On April 17, 2014, Mullner filed a Writ of Mandamus. On May 13, 2014, the Nevada  
11 Supreme Court issued an Order of Dismissal because Mullner's untimely filed his Notice of Appeal.  
12 Remittur issued on June 12, 2014.

13 8. On June 13, 2014, Mullner filed a timely Petition for Writ of Habeas Corpus (Post-  
14 Conviction).

15 9. On June 13, 2014, Mullner filed a Motion for Appointment of Counsel and Request for  
16 Evidentiary Hearing.

17 10. On May 22, 2014, the Court appointed Jean J. Schwartzer, Esq. as counsel for Mullner.

18 11. On December 3, 2015, through counsel, Mullner filed a Supplemental Memorandum of  
19 Points and Authorities in Support of his Petition for Writ of Habeas Corpus (Post-Conviction). On  
20 January 27, 2016, the State filed a Response to Mullner's Supplemental Memorandum of Points and  
21 Authorities in Support of his Petition for Writ of Habeas Corpus.

22 12. On March 8, 2016, the Court heard argument on Mullner's Petition for Writ of Habeas  
23 Corpus (Post-Conviction) and his Supplemental Memorandum of Points and Authorities in Support of  
24 his Petition for Writ of Habeas Corpus (Post-Conviction) and set an evidentiary hearing on the claims  
25 raised in said pleadings *relating to the denial of his right to appeal* pursuant to NRS 34.770.

26 13. On May 2, 2016, an evidentiary hearing was held wherein Mullner and his trial counsel,  
27 Frank Kocka, Esq., testified.

28 14. Prior to testimony being presented at the evidentiary hearing on May 2, 2016, Mullner

1 orally withdrew his request to withdraw his guilty plea.

2 14. At the evidentiary hearing held on May 2, 2016, Mullner testified that he asked his  
3 attorney, Mr. Kocka, to file a direct appeal for the first time in Court on January 23, 2014 after  
4 Mullner was sentenced. Mullner also testified that he asked Mr. Kocka again to file a direct appeal via  
5 written correspondence within a few weeks of January 23, 2014.

6 15. At the evidentiary hearing held on May 2, 2016, Mr. Kocka testified that he did not  
7 recall Mullner asking him to file a direct appeal. Mr. Kock also testified that he agreed that the  
8 following issues could have been raised on appeal: 1) Mullner's sentence amounts to cruel and  
9 unusual punishment; and 2) the District Court erred in adjudicating Muller a large habitual criminal  
10 based upon stale prior convictions.

11 16. Mullner requested *by written correspondence* that his attorney, Mr. Kocka, file a direct appeal on his behalf.

12 17. Mr. Kocka did not file the requested direct appeal.

### 14 CONCLUSIONS OF LAW

15  
16 1. The United States Supreme Court requires courts to review three factors when  
17 determining whether a defendant was deprived of his right to an appeal: 1) whether the defendant  
18 asked counsel to file an appeal; 2) whether the conviction was the result of a trial or a guilty plea; and  
19 3) whether the defendant had any non-frivolous issues to raise on appeal. Roe v. Ortega, 528 U.S.  
20 470, 480, 120 S. Ct. 1029, 1036 (2000).

21 2. The Nevada Supreme Court has held that the court can assess the credibility of  
22 witnesses when conducting an evidentiary hearing to determine whether a defendant was deprived of  
23 an appeal. Barnhart v. State, 122 Nev. 301, 130 P.3d 650, 652 (2006).

24 3. Mullner was deprived of his right to a direct appeal and is entitled to a direct appeal  
25 with the assistance of appointed counsel.



**ORDER**

THEREFORE, based upon the foregoing Findings of Fact, Conclusions of Law,


**IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief requesting a direct appeal is granted;

**IT IS ALSO ORDERED** that, pursuant to Rule 4(c)(1)(B)(ii), Jean J. Schwartz, Esq. is appointed to represent petitioner in his direct appeal from his conviction and sentence.

**IT IS ALSO ORDERED** that, pursuant to Rule 4(c)(1)(B)(iii) of the Nevada Rules of Appellate Procedure, the District Court clerk shall prepare and file, within five (5) days of the entry of the District Court's order, a notice of appeal from the Judgment of Conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms in the Nevada Rules of Appellate Procedure.

DATED this ~~16~~ 17 day of June, 2016.

  
DISTRICT JUDGE 

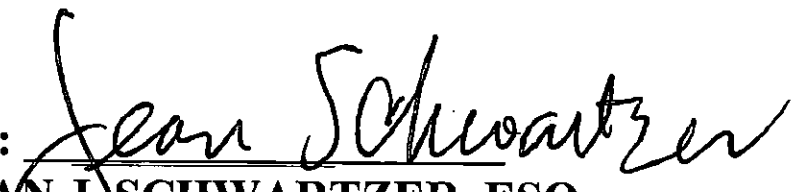
  
JEAN J. SCHWARTZER, ESQ.  
Nevada Bar No. 11223  
LAW OFFICE OF JEAN J. SCHWARTZER

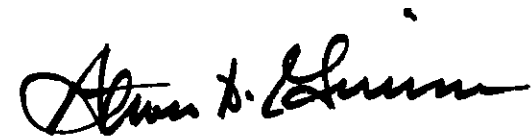
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**CERTIFICATE OF SERVICE**

**IT IS HEREBY CERTIFIED** by the undersigned that on 14<sup>th</sup> day of June, 2016, I served a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** to:

William Flinn, Esq.  
Deputy District Attorney  
Email: William.Flinn@clarkcountyda.com

BY:   
**JEAN J. SCHWARTZER, ESQ.**  
Nevada Bar No. 11223  
Law Office of Jean J. Schwartzer



CLERK OF THE COURT

NEO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

TROY MULLNER,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-12-283463-1

Dept No: XXI

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

**PLEASE TAKE NOTICE** that on August 10, 2016, 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 August 11, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

**CERTIFICATE OF MAILING**

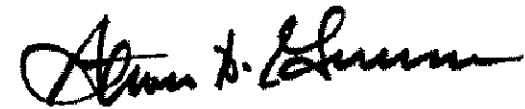
I hereby certify that on this 11 day of August 2016, I placed a copy of this Notice of Entry in:

☒ 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:  
Troy Mullner # 54371                      Jean J. Schwartzter, Esq.  
P.O. Box 650                                  10620 Southern Highlands Pkwy, Suite 110-473  
Indian Springs, NV 89070                  Las Vegas, NV 89141

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk



CLERK OF THE COURT

1 **FLC**  
2 **JEAN J. SCHWARTZER, ESQ.**  
Nevada Bar No. 11223  
3 **LAW OFFICE OF JEAN J. SCHWARTZER**  
10620 Southern Highlands Parkway, Suite 110-473  
4 Las Vegas, Nevada 89141  
Phone: (702) 979-9941  
5 Fax: (702) 447-5044  
Email: jean.schwartzter@gmail.com  
6 Counsel for Petitioner

7  
8 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**  
9 **STATE OF NEVADA FOR THE COUNTY OF CLARK**

10  
11 TROY LEE MULLNER } Case No.: C283463  
12 Petitioner, } Dept No.: XXI  
13 vs. }  
14 THE STATE OF NEVADA, }  
15 Respondent. }

16  
17 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

18 DATE OF HEARING: May 24, 2016

19 TIME OF HEARING: 9:30 AM

20 THIS CAUSE having come on for hearing before Honorable Valerie Adair, District Court  
21 Judge, on the 24<sup>th</sup> day of May, 2015, the Petitioner not being present, represented by JEAN J.  
22 SCHWARTZER, ESQ., the Respondent being represented by STEVEN B. WOLFSON, ESQ., District  
23 Attorney, by and through WILLIAM FINN, ESQ., Deputy District Attorney, the Court having  
24 considered the matter, including briefs, argument, testimony at an evidentiary hearing and documents  
25 on file herein, now therefore, the Court makes the following findings of facts and conclusions of law:

26 ///

27 ///

28 ///

**FINDINGS OF FACT**

1. On August 15, 2012, the State charged Mullner TROY LEE MULLNER ("Mullner") by way of Indictment with the following: Eleven (11) counts of BURGLARY (Category B Felony – NRS 205.060); Sixteen (16) counts of ROBBERY (Category B Felony – NRS 200.380); Two (2) counts of FIRST DEGREE KIDNAPPING (Category A Felony – NRS 200.310, 200.320); Four (4) counts of COERCION (Category B Felony – NRS 207.190); Four (4) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 200.380, NRS 193.165); Two (2) Counts of ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165); Three (3) counts of ATTEMPT ROBBERY (Category B Felony – NRS 200.380, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360).

2. Pursuant to negotiations, on October 21, 2013, the State charged Mullner by way of Amended Indictment with the following: One(1) count of BURGLARY (Category B Felony – NRS 205.060); Two (2) counts of ROBBERY (Category B Felony – NRS 200.380); One (1) count of COERCION (Category B Felony – NRS 207.190); Two (2) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 200.380, NRS 193.165); Two (2) Counts of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); One (1) count of ATTEMPT ROBBERY (Category B Felony – NRS 200.380, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360).

3. On October 21, 2013, Mullner was arraigned on the Amended Indictment, and a Guilty Plea Agreement ("GPA") was filed. The State reserved the full right to argue, including for habitual criminal treatment. Mullner pleaded guilty to the charges alleged in the Amended Indictment.

4. On January 23, 2014, Mullner was adjudged a habitual criminal and sentenced to TEN (10) YEARS to LIFE on Count 1; TEN (10) YEARS to LIFE on COUNT 2 to run consecutive to Count 1; TWO (2) to SIX (6) YEARS on COUNT 3 to run consecutive to COUNT 2; TEN (10) YEARS to LIFE on COUNT 4 to run concurrent to Count 3; TEN (10) YEARS to LIFE on COUNT 5

1 to run concurrent to Count 4; TEN (10) YEARS to LIFE on COUNT 6 to run concurrent to COUNT  
2 5; TEN (10) YEARS to LIFE on COUNT 7 to run concurrent to COUNT 6; TEN (10) YEARS to  
3 LIFE on COUNT 8 to run concurrent to COUNT 7; TEN (10) YEARS to LIFE on COUNT 9 to run  
4 concurrent to COUNT 8; and ONE (1) to FOUR (4) YEARS on COUNT 10 to run consecutive to  
5 COUNT 9. Mullner received FIVE HUNDRED SEVENTY-TWO (572) DAYS credit for time served.

6 5. On January 28, 2014, the Judgment of Conviction was filed. On February 5, 2014, an  
7 Amended Judgment of Conviction was filed because of a clerical error which was corrected to read as  
8 follows; COUNT 7 – ATTEMPT ROBBERY.

9 6. On April 15, 2014, Mullner filed an untimely pro per Notice of Appeal.

10 7. On April 17, 2014, Mullner filed a Writ of Mandamus. On May 13, 2014, the Nevada  
11 Supreme Court issued an Order of Dismissal because Mullner's untimely filed his Notice of Appeal.  
12 Remittur issued on June 12, 2014.

13 8. On June 13, 2014, Mullner filed a timely Petition for Writ of Habeas Corpus (Post-  
14 Conviction).

15 9. On June 13, 2014, Mullner filed a Motion for Appointment of Counsel and Request for  
16 Evidentiary Hearing.

17 10. On May 22, 2014, the Court appointed Jean J. Schwartz, Esq. as counsel for Mullner.

18 11. On December 3, 2015, through counsel, Mullner filed a Supplemental Memorandum of  
19 Points and Authorities in Support of his Petition for Writ of Habeas Corpus (Post-Conviction). On  
20 January 27, 2016, the State filed a Response to Mullner's Supplemental Memorandum of Points and  
21 Authorities in Support of his Petition for Writ of Habeas Corpus.

22 12. On March 8, 2016, the Court heard argument on Mullner's Petition for Writ of Habeas  
23 Corpus (Post-Conviction) and his Supplemental Memorandum of Points and Authorities in Support of  
24 his Petition for Writ of Habeas Corpus (Post-Conviction) and set an evidentiary hearing on the claims  
25 raised in said pleadings *relating to the denial of his right to appeal* pursuant to NRS 34.770.

26 13. On May 2, 2016, an evidentiary hearing was held wherein Mullner and his trial counsel,  
27 Frank Kocka, Esq., testified.

28 14. Prior to testimony being presented at the evidentiary hearing on May 2, 2016, Mullner

1 orally withdrew his request to withdraw his guilty plea.

2 14. At the evidentiary hearing held on May 2, 2016, Mullner testified that he asked his  
3 attorney, Mr. Kocka, to file a direct appeal for the first time in Court on January 23, 2014 after  
4 Mullner was sentenced. Mullner also testified that he asked Mr. Kocka again to file a direct appeal via  
5 written correspondence within a few weeks of January 23, 2014.

6 15. At the evidentiary hearing held on May 2, 2016, Mr. Kocka testified that he did not  
7 recall Mullner asking him to file a direct appeal. Mr. Kock also testified that he agreed that the  
8 following issues could have been raised on appeal: 1) Mullner's sentence amounts to cruel and  
9 unusual punishment; and 2) the District Court erred in adjudicating Muller a large habitual criminal  
10 based upon stale prior convictions.

11 16. Mullner requested <sup>by written correspondence</sup> that his attorney, Mr. Kocka, file a direct appeal on his behalf.

12 17. Mr. Kocka did not file the requested direct appeal.

### 13 14 CONCLUSIONS OF LAW

15  
16 1. The United States Supreme Court requires courts to review three factors when  
17 determining whether a defendant was deprived of his right to an appeal: 1) whether the defendant  
18 asked counsel to file an appeal; 2) whether the conviction was the result of a trial or a guilty plea; and  
19 3) whether the defendant had any non-frivolous issues to raise on appeal. Roe v. Ortega, 528 U.S.  
20 470, 480, 120 S. Ct. 1029, 1036 (2000).

21 2. The Nevada Supreme Court has held that the court can assess the credibility of  
22 witnesses when conducting an evidentiary hearing to determine whether a defendant was deprived of  
23 an appeal. Barnhart v. State, 122 Nev. 301, 130 P.3d 650, 652 (2006).

24 3. Mullner was deprived of his right to a direct appeal and is entitled to a direct appeal  
25 with the assistance of appointed counsel.

**ORDER**

THEREFORE, based upon the foregoing Findings of Fact, Conclusions of Law,

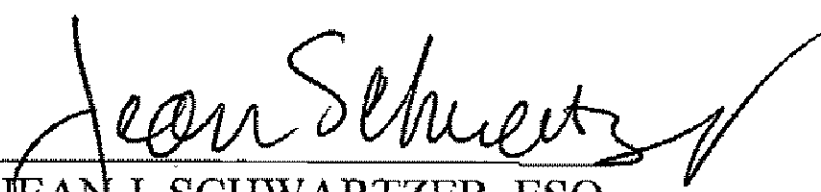
**IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief requesting a direct appeal is granted;

**IT IS ALSO ORDERED** that, pursuant to Rule 4(c)(1)(B)(ii), Jean J. Schwartzer, Esq. is appointed to represent petitioner in his direct appeal from his conviction and sentence.

**IT IS ALSO ORDERED** that, pursuant to Rule 4(c)(1)(B)(iii) of the Nevada Rules of Appellate Procedure, the District Court clerk shall prepare and file, within five (5) days of the entry of the District Court's order, a notice of appeal from the Judgment of Conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms in the Nevada Rules of Appellate Procedure.

DATED this ~~14~~ 17 day of June, 2016.

  
DISTRICT JUDGE 

  
JEAN J. SCHWARTZER, ESQ.  
Nevada Bar No. 11223  
LAW OFFICE OF JEAN J. SCHWARTZER



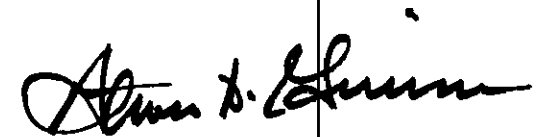
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**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED by the undersigned that on 14th day of June, 2016, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to:

William Flinn, Esq.  
Deputy District Attorney  
Email: William.Flinn@clarkcountyda.com

BY: Jean J. Schwartzer  
JEAN J. SCHWARTZER, ESQ.  
Nevada Bar No. 11223  
Law Office of Jean J. Schwartzer



CLERK OF THE COURT

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**  
7 **STATE OF NEVADA IN AND FOR**  
8 **THE COUNTY OF CLARK**  
9

10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 TROY LEE MULLNER,

14 Defendant,

Case No: C-12-283463-1

Dept No: XXI

15  
16  
17 **NOTICE OF APPEAL**

18 Notice is hereby given that the Defendant above named, hereby appeals to the Supreme  
19 Court of Nevada from the Judgment of Conviction (Plea of Guilty) entered in this action on  
20 January 28, 2014 and the Amended Judgment of Conviction (Plea of Guilty) entered in this  
21 action on February 5, 2014.

22 STEVEN D. GRIERSON, CLERK OF THE COURT

23  
24 /s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

25  
26 CERTIFICATE OF MAILING

27 I hereby certify that on this 11 day of August 2016, I placed a copy of this Notice of Appeal in:

28 ☒ 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:  
Troy Mullner # 54371                      Jean J. Schwartzer, Esq.  
P.O. Box 650                                10620 Southern Highlands Pkwy., Suite 110-473  
Indian Springs, NV 89070                Las Vegas, NV 89141

- ☒ This appeal was electronically submitted to the Clerk of the Supreme Court.

/s/ Heather Ungermann  
Heather Ungermann, Deputy Clerk