

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Apr 23 2019 10:41 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-18-783689-W

Docket No: 77797

RECORD ON APPEAL

ATTORNEY FOR APPELLANT

BRIAN O'KEEFE #90244,
PROPER PERSON
1200 PRISON RD.
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT

STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
1 - 3
WILL FOLLOW VIA
U.S. MAIL

RECEIVED
OCT 04 2018
CLERK OF THE COURT

1 PROV
2 BRIAN KERRY O'KEEFE # 90244
3 Lovelock Correctional Center
4 Lovelock, Nevada 89419
5 Plaintiff / PETITIONER In Pro Se

FILED
OCT 30 2018
CLERK OF COURT

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

9 BRIAN KERRY O'KEEFE)
10 Plaintiff)
11 -vs-)
12 THE STATE OF NEVADA)
13 DEFENDANT)

Case No. A-18-783689-W
Dept. No. VII XXX

A-18-783689-W
IPWMC
Inmate Filed - Petition for Writ of Habeas
4792572

PETITION FOR CIVIL WRIT OF CORAM NOBIS
PURSUANT NEVADA CONSTITUTION ARTICLE 6
SECTION 6 BASED UPON NOW RECOGNIZED
TRUJILLO V. STATE, 210 P.3d 594 (NEV. 2013)

• SEE AFFIDAVIT OF BRIAN O'KEEFE ATTACHED

19 Comes now, Brian O'Keefe, pro se, to file this action with the
20 court and department that actually sentenced O'Keefe with express
21 guidance by the federal court.

22 I. JURISDICTION: Nevada Constitution, article 6, § 6(1)
23 and N.R.S. 1.030 authorize the common-law writ of coram nobis for
24 a person who is not in custody on the conviction being challenged.
25 To the extent that Bigness v. State, 209 P.2d 1051 (Nev. 1955),
26 suggested that the common-law writ did not exist in Nevada, has
since been overruled by "Trujillo v. State", supra.

Dated this 27th day, September 2018, pursuant NRS 208.165, Brian K. O'Keefe
Brian K. O'Keefe
Accord Haines v. Kerner, 404 U.S. 519, 520 (1972)
Accord Castro v. United States, 540 U.S. 375, 377 (2003)

AFFIDAVIT OF Brian O'Keefe #90294
040202793

STATE OF NEVADA)
) SS:
COUNTY OF PERMUNG)
)

I, Brian Kerry O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe.
2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.
3. Prosecutor reported count 6 Burglary conviction to which libel was picked up on N.O.T.I.S. as reached by a guilty plea as a simulated fact;
4. Prior counsel S.P.D. Randall Pike stated he had knowledge but it was fixed;
5. C.D.A. S. Kinko reported sub silentio O'Keefe pled guilty as plea;
6. State deprived O'Keefe of his entire "acquittal" as a abuse of process;
7. State court impediment always disavowed as acquiescence with a fundamental miscarriage of justice occurring repeating itself and triggering the continuing violation doctrine adversely to plaintiff's otherwise Judge J. Bell committed intentional act of collusion.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 28th day of September, 2018

Brian K. O'Keefe #90294
Brian K. O'Keefe

II. STATEMENT BY FEDERAL COURT ON PROCEDURAL DUE PROCESS

Based on judgment fully expired, the federal court, case no. 3-14-cr.411-PJS-WAC, expressly opined that where state court's make available said petition for writ of Coram Nobis, such petition must be brought only in the court that actually "sentenced" the petitioner. (id. at ¶ pg. 3, line 21; doc. #6)
The penalty phase was held in department VII, Judge J. Bell, unaware.

III. PROCEDURAL HISTORY RELEVANT

O'Keefe was found "not guilty" of all felonious intent by acquittal verdict on Counts 1, 2, 3, 4, and 5.
However, the jury returned a "legally inconsistent verdict" when finding a guilty verdict on Count 6, felony burglary subsequently acquitting O'Keefe of Counts 1 thru 5 which underpinned Count 6 and was a requisite to sustain the verdict.

• [INCORPORATE HERE BY REFERENCE EXHIBITS 1, 2, 3 ATTACHED. COURT MINUTES / SEC]

Before sentencing, the hearing court Sally Lockner (dept. 23) transferred the case to Judge Bell to conduct penalty phase. The state viz C.D.D.A. KRISTO commits fraud upon the court by implying "sub silentio" that O'Keefe pled guilty covering up the injustice and abuse of process. This simulated fact resulted in a fundamental miscarriage of justice.

IV. POINTS AND AUTHORITIES / LEGAL ARGUMENT

Plaintiff is challenging the deprivation of his acquittals which legally moots Count 6. Prejudice persists by the state repeatedly using the Burglary despite of its voidness. O'Keefe has been impeached with this wrongful judgment. Additionally, parole was denied based on this

1 burglary judgment, used against O'Keefe at parole as an aggravator. (8/20/2018)

2 • [INCORPORATE HERE BY REFERENCE EXHIBIT 4 ATTACHED - TRIAL TRANSCRIPT 3/20/09]

3 • [INCORPORATE HERE BY REFERENCE EXHIBIT 5 ATTACHED - INFORMATION 7/06/07]

4 Pursuant the INFORMATION Count 1 charged: "Battery with INTENT TO COMMIT
5 A CRIME" - did then and there wilfully, unlawfully, and feloniously use force
6 or violence upon the person of another, to wit: Victoria Whitmarsh,
7 with intent to commit sexual assault, by striking the said Victoria Whitmarsh
8 about the head and/or body with his hands.

9 Count 6 charged: "BURGLARY"
10 did then and there wilfully, unlawfully, and feloniously enter, with intent
11 to commit battery and/or sexual assault and/or a felony, to-wit:
12 battery and/or sexual assault, that certain building occupied by Victoria
13 Whitmarsh, located at 2218 North Rancho, No. 2083 Las Vegas, Clark County, Nevada.

14
15 Two big problems act as affirmative defense. • First, O'Keefe lived
16 there in cohabitation.

17 • Second and moreover, O'Keefe was acquitted in
18 order, of all the preceding (5) five felony counts before the jurors
19 reached Count 6, predicated on the prior felony counts 1 to 5.

20
21 Reading the INFORMATION becomes "prima facie evidence" when
22 juxtaposed to the Verdict. (EXHIBIT 1 - JURY VERDICT RETURNED)

23 • SEE EXHIBITS 1, 2, 3, 4, 5. -

24 Delisted by Contreras v. State, 118 Nev. 332,
25 46 P.3d 661 (2002) (While a burglary charge may be based upon an intent
26 to commit any felony when entering a structure, the burglary statute
27 specifically includes "assault or battery on any person" as a felony
28 that may underlie a burglary). Emphasis again, O'Keefe lived there.

Once the jury acquitted O'Keefe of felony counts 1, 2, 3, 4, 5 the requisite felonious intent required to underpin Count 6 Burglary was lost. Therefore, the jury verdict returned amounted to a true legally inconsistent verdict as a complete fundamental miscarriage of justice. However, any error still resulted in lack of jurisdiction or authority to sustain the felony burglary returned. ^{Def.} (XXIII) The trial court had its own independent duty, at that time, to sua sponte correct the verdict instead of remaining silent.

Therefore, "abuse of process" allowed the state to commit fraud upon the UN KNOWING newly assigned sentencing court. Otherwise, two options as fact implied exist. One, Judge S. Bell participated in abuse of [due] process or Judge Bell was surely unaware.

The state presented a simulated fact, reported by C.R.D.A. Susan Kristo, that O'Keefe pled guilty sub silentio. Caseworker reported on N.O.I.E., "stated I pled guilty" to Count 6 which would explain the unconstitutional miscarriage of justice. S.A.D.

LEGAL ARGUMENT

3.] CORAM NOBIS is available when (1) facts not known to the court; (2) facts not withheld; (3) facts that would have prevented entry of judgment. Coram nobis is an extraordinary remedy, one necessary to achieve justice. The common law writ of coram nobis is available in Nevada only for prisoners who are no longer in custody on the judgment being challenged to address errors of fact outside the record that were not known to Judge Bell when ready to sentence O'Keefe. "Otherwise," Judge Stewart Bell, who did not hear the actual trial, would have been committing an act of judicial misconduct by KNOWLEDGE of this simulated fact.

1 B. N.R. Civ. P. Rule 60(b)(4) is available to correct void judgments
2 becoming a fundamental miscarriage of justice based on acts where
3 the court was exceeding its jurisdiction by the legally incon-
4 sistent verdict holding no authority. When the jury decided the
5 first five counts in order, Count 6 became moot and void.

7 C. DEPRIVATION OF ACQUITTAL VERDICTS AS PROTECTED LIBERTY INTERESTS

- 8 • see DAVE v. SOHRER, 408 U.S. 183, 202 (1984); Nev. Const., article I § 2.

9 THE acquittal verdicts Counts 1-5, do not sustain Count 6,
10 verdict of guilty, "Burglary" under statutory law NRS 205.060.

12 Moreover, the acquittal verdicts on Counts 1-5 become a protected
13 liberty interest that can never be waived or forfeited just like
14 the lack of subject-matter jurisdiction. Verdicts in criminal
15 trials become an essential element to jury trials and are heavily
16 guarded by the U.S. and Nevada Constitutions under the 14th Amend.

18 The state would rather create any and all simulated facts as
19 semantics with a cleverly disguised play as here in the case at bar.
20 The record however speaks for itself and DUE PROCESS, A LAW
21 afforded by the 14th Amend. and Nev. Const. art. I § 8(5) prohibit the
22 state from the continual deprivation of all technical intent acquittals.

24 An error of law is an abuse of discretion that Judge Bell did without
25 knowledge. Procedural due process cannot be lost or waived.

26 "The writ of error coram nobis must issue to correct the judgment
27 that the court never had power to enter." • see U.S. v. Peters,

28 30 F.3d 709, 715 (11th Cir. 2002); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974) (same)

D. FACTUAL INNOCENCE is demonstrated by the jury acquittals on counts 1-5 resulting in "actual innocence" which justifies good cause to overcome any bars wrongly attempted by the state.

• See Bountey v. U.S., 523 U.S. 619, 623 (1998). See also Mitchell v. State, 149 P.2d 33, 122 Nev. 1269, 1274 (2006). When a petitioner can prove "UNDISPUTEDLY" and demonstrate that a federal constitutional violation has occurred, where he is deprived of all (5) five felony acquittals which then resulted in a Count 6 conviction of one who is actually innocent, any procedural bar will result in a clear fundamental miscarriage of justice. Fundamental miscarriage of justice also entitles an untimely petition. • See Stokes v. Bennett, 81 P.3d 1 (2003) (19 Nov. 589)

This state caused impediment and interference by state officials is an external force and UNCONSTITUTIONAL. Accord Murray v. Carrier, 471 U.S. 471, 478 (1986).

V. APPOINTMENT OF COUNSEL AND EVIDENTIARY WARRANTED

- THE INTEREST OF JUSTICE DEMAND, WHICH WAS THE PURPOSE OF THE TRIAL:

The certified F.O.C. and court minutes as exhibits attached demonstrate unquestionable "ACTUAL INNOCENCE". The jury had to determine the first five verdicts, Counts 1-5, before they could decide count 6. Bumbling the newly assigned penalty phase court, as Judge D. Bell, was not a constitutionally sufficient means to protect my acquittal verdicts on Counts 1 to 5 which Count 6 was dependent on. Simple misdemeanor battery cannot sustain Count 6. Procedural due process warrants a hearing in the minimum to end the deprivation.

VI. CONCLUSION: The verdict of felony burglary, Count 6 is void. ISSUES WENT OF CORAM NOBIS to hold evidentiary hearing and appoint Counsel.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR CIVIL WRIT OF CORAM NOBIS... to the below address(es) on this 28TH day of September, 2018, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Brice S. O'Keefe No. 2277182.

1) CIVIL Department Clark County Dist. Atty.
200 Lewis Ave.
Las Vegas, NV. 89155-2212

2) ORIGINAL to Clerk of the Court (8TH Jud.)
200 Lewis Ave., 3RD FLOOR
Las Vegas, NV. 89155

Brice S. O'Keefe
Brice S. O'Keefe # 902461
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Petition For CIVIL WRIT OF CORAM NOBIS... filed in District Court Case No. CAC201803 does not contain the social security number of any person.

Dated this 28TH day of September, 2018.

Brice S. O'Keefe
Brice S. O'Keefe
Plaintiff In Pro Se

EXHIBIT 1

TRIAL JUDGE: SALLY COEHRO

CASE C202793

STATE OF NEVADA

CRIMINAL COURT MINUTES

PAGE 9

JURY TRIAL VERDICT BEING
RETURNED

EXHIBIT 1

PAGE: 009

MINUTES DATE: 10/28/04

CRIMINAL COURT MINUTES

04-C-202793-C STATE OF NEVADA

vs O'Keefe, Brian K

CONTINUED FROM PAGE: 008

10/28/04 08:30 AM 03 TRIAL BY JURY

HEARD BY: Sally Loehrer, Judge; Dept. 15

OFFICERS: Theresa Lee, Court Clerk
Lisa Makowski, Reporter/Recorder

PARTIES: STATE OF NEVADA
008190 Miller, Ross J.

Y
Y

0001 D1 O'Keefe, Brian K
000754 Buchanan II, James L.

Y
Y

JURY PRESENT. At the hour of 11:58 A.M. the Jury returned with a VERDICT as follows; CT 1 - GUILTY of BATTERY (M), CT 2 - NOT GUILTY of Sexual Assault, CT 3 - NOT GUILTY of Sexual Assault, CT 4 - NOT GUILTY of Sexual Assault, CT 5 - NOT GUILTY of Attempt Sexual Assault, and CT 6 - GUILTY of BURGLARY (F). Upon inquiry by the Court, neither side requested the jury polled. Court thanked and excused the jury. Mr. Buchanan requested permission to argue for bail, SO ORDERED. Court stated its' concerns regarding deft and the victim getting in contact with one another. The Court will only consider releasing deft if the Court can be assured there will not be any telephone contact, letters, and no personal contact. Deft. concurred. Deft will reside with his father. COURT ORDERED, matter referred to the Division of Parole and Probation for a Pre-Sentence Investigation and Report. COURT ORDERED, O.R. RELEASE is GRANTED with a NO CONTACT ORDER WITH THE VICTIM. Court ADMONISHED Deft re no telephone calls, letters, mail, and no personal contact whatsoever. Deft. required to report to P & P the Monday following his release from custody on 11/1/04, and to bring \$25 in the correct denominations of cash next court date for payment of fees.

O.R.

12/27/04 8:30 A.M. SENTENCING

PRINT DATE: 08/25/09

PAGE: 009

CONTINUED ON PAGE: 010
MINUTES DATE: 10/28/04

EXHIBIT 2

SENTENCING JUDGE: STEWART L. BELL

CASE C202793

STATE OF NEVADA

CRIMINAL COURT MINUTES

PAGE 10

SENTENCING

CT 1 - BATTERY (MISDEMEANOR)

CT 6 - BURGLARY (FELONY)

EXHIBIT 2

PAGE: 010

MINUTES DATE: 12/01/04

CRIMINAL COURT MINUTES

04-C-202793-C STATE OF NEVADA

vs O'Keefe, Brian K

CONTINUED FROM PAGE: 009

12/01/04 08:30 AM 01 STATE'S REQUEST REMAND TO CUSTODY FOR SENTENCING

HEARD BY: Sally Loehrer, Judge; Dept. 15

OFFICERS: Theresa Lee, Court Clerk
Lisa Makowski, Reporter/Recorder

PARTIES: STATE OF NEVADA

007480 Pate, Susan

Y

Y

0001 D1 O'Keefe, Brian K

Y

000754 Buchanan II, James L.

Y

Mr. Buchanan stated the Court granted deft an O.R. release after trial, however, he has a Ohio Child Support case that has a hold on him which is coming up in Justice Court the beginning of this month. He spoke to L.J. O'Neale, and he is putting it on calendar to extradite to Ohio, and Ohio will have to come pick him up. Deft has not been out-of-custody since the trial date. COURT ORDERED, Deft is REMANDED into custody and held WITHOUT BAIL, sentencing date STANDS.

CUSTODY (COC/OHIO)

* 12/27/04 08:30 AM 00 SENTENCING

HEARD BY: Stewart L. Bell, Judge; Dept. 7

OFFICERS: Theresa Lee, Court Clerk
Cheryl Gardner, Reporter/Recorder

PARTIES: STATE OF NEVADA

006024 Krisko, Susan R.

Y

Y

0001 D1 O'Keefe, Brian K

Y

000754 Buchanan II, James L.

Y

DEFT. O'KEEFE ADJUDGED GUILTY of CT 1 - BATTERY (M), and CT 6 - BURGLARY (F). Arguments by counsel. Court inquired re the victim speaker. Ms. Krisko stated she chose not to appear. COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee, a \$150 DNA Analysis Fee, and submit to testing to determine genetic markers; Deft. SENTENCED on CT 6 - to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of ONE-HUNDRED AND TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC); SUSPENDED; placed on PROBATION for an indeterminate period not to exceed FIVE (5) YEARS, and on CT 1 - Deft SENTENCED to CREDIT TIME SERVED. CONDITIONS:

1/ No contact with the victim initiated by deft. (Mr. Buchanan argued the love/hate nature of their relationship and how the victim called deft to

PRINT DATE: 08/25/09

PAGE: 010

CONTINUED ON PAGE: 011

MINUTES DATE: 12/27/04

EXHIBIT 3

CERTIFIED JUDGMENT OF CONVICTION
(JURY TRIAL)

CASE C202793

DEPT No. XV

EXHIBIT 3

1 JOCF
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 200 South Third Street
6 Las Vegas, Nevada 89155-2212
7 (702) 455-4711
8 Attorney for Plaintiff

DISTRICT CO.
CLARK COUNTY,

9 THE STATE OF NEVADA,
10 Plaintiff,

11 vs-
12 BRIAN KERRY OKEEFE,
13 #1447732

14 Defendant.

Case No: C202793

Dept No: XV

15 JUDGMENT OF CONVICTION (JURY TRIAL)

16 The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNT 1 -
17 BATTERY WITH INTENT TO COMMIT A CRIME (Felony); COUNT 2 - SEXUAL
18 ASSAULT (Felony); COUNT 3 - SEXUAL ASSAULT (Felony); COUNT 4 - SEXUAL
19 ASSAULT (Felony); COUNT 5 - ATTEMPT SEXUAL ASSAULT (Felony); and COUNT
20 6 - BURGLARY (Felony), in violation of NRS 200.400; 200.364, 200.366; 193.330,
21 200.364, 200.366; 205.060, and the matter having been tried before a jury, and the
22 Defendant being represented by counsel and having been found guilty of the crime(s) of
23 COUNT I - BATTERY (Misdemeanor); and COUNT VI - BURGLARY (Category B
24 Felony), in violation of NRS 200.481; 205.060; and thereafter on the 27th day of December,
25 2004, the Defendant was present in Court for sentencing with his counsel, [REDACTED]
26 [REDACTED] and good cause appearing therefor,

27 THE DEFENDANT HEREBY ADJUDGED guilty of the crime(s) as set forth in the
28 jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee, a \$150.00 DNA

1 Analysis Fee and submit to testing to determine genetic markers, the Defendant is sentenced
2 as follows: on COUNT 6 - to a minimum of twenty-four (24) months and a maximum of one
3 hundred twenty (120) months in the Nevada Department of Corrections; SUSPENDED;
4 placed on probation for an indeterminate period not to exceed five (5) years, and on COUNT
5 1 - Defendant sentenced to CREDIT FOR TIME SERVED. CONDITIONS: 1) No contact
6 with the victim initiated by Defendant. Court advised Defendant any contact that the victim
7 initiates will not be a problem for him; 2) Search clause/burglary tools; 3) Complete
8 Domestic Violence counseling; 4) Secure and maintain full time employment; 5) Mental
9 Health counseling as deemed necessary by Parole and Probation; 6) Resolve the warrant
10 from the State of Ohio within the next one hundred twenty (120) days; 7) Four (4) hours of
11 community service work each week. Case closed.

12 DATED this 30 day of December, 2004.

13
14 STEWART L. BELE *for* SALLY LOEHRER
15 DISTRICT JUDGE
16
17
18
19
20
21

22
23
24 CERTIFIED COPY
25 DOCUMENT ATTACHED IS A
26 TRUE AND CORRECT COPY OF
27 THE ORIGINAL OR ELECTRONICALLY
28 FILED DOCUMENT ON FILE

2005 JAN -3 P 4:03

27 *Linda B. Riggins*
28 da CLERK

EXHIBIT

4

FRIDAY
MARCH 20, 2009

JURY TRIAL - DAY 5
(2 PAGES)

See Rough Draft Transcript page 95
LINE 17

IMPEACHED WITH BURGLARY

EXHIBIT

4

#001

LCC

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.

CASE NO. C-250630

DEPT. NO. 17

TRANSCRIPT OF
PROCEEDINGS

FILED

JUL 10 2009

CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, MARCH 20, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 5

APPEARANCES:

FOR THE PLAINTIFF:

PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT:

RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

1 A That is correct.
 2 Q Both of those marriages ended because you say due to
 3 alcoholism?
 4 A Yes.
 5 Q Okay. You meet Victoria sometime in October, 2001,
 6 right?
 7 A Yes.
 8 Q And that in April '07, that's when you testified that
 9 you were released from prison from the battery constituting
 10 domestic violence charge.
 11 A Yes.
 12 Q And it is, in fact, true that you served about three
 13 years in custody over that charge; isn't that correct?
 14 A No, sir.
 15 Q You didn't serve three years in custody?
 16 A It was a two to five, sir. You're a prosecutor, you
 17 know better than that.
 18 THE COURT: Sir, answer the question yes or no.
 19 THE WITNESS: On that, no, I did not, sir.
 20 BY MR. SMITH::
 21 Q How much of that two to five did you serve?
 22 A Two.
 23 Q So you're saying you served two years in custody?
 24 A On that charge, yes, sir.
 25 Q Okay. And you also admitted that you weren't honest

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ROUGH DRAFT TRANSCRIPT

1 Q For felony criminal non-support of dependents, and
 2 that's actually two counts, correct?
 3 A Two children, yes, sir.
 4 Q So in total you have four felony convictions,
 5 correct?
 6 MS. PALM: Objection, your Honor. I don't think
 7 that's correct.
 8 MR. SMITH: If it's two counts, it --
 9 THE COURT: It's three separate cases.
 10 MR. SMITH: Three separate cases, but four felony
 11 convictions.
 12 BY MR. SMITH::
 13 Q Is that correct?
 14 A There is the case in Ohio. I guess, if that's the
 15 way it would be classified, a count for each child. I'm --
 16 Q I'm just make sure it's clear. Three separate cases,
 17 but four felony convictions.
 18 A I think they charged me for each child, yeah, it was
 19 one case, Mr. Smith.
 20 Q Okay.
 21 MR. SMITH: Judge, I'm pass the witness.
 22 THE COURT: All right. Any redirect?
 23 MS. PALM: No, your Honor.
 24 THE COURT: All right. Thank you, sir.
 25 THE WITNESS: Thank you.

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ROUGH DRAFT TRANSCRIPT

1 with Cheryl about your ongoing relationship with Victoria
 2 Witmarsh; is that correct?
 3 A That is correct, sir.
 4 MR. SMITH: Court's indulgence. Judge, I'm pass the
 5 witness. Thanks.
 6 THE COURT: All right. If I --
 7 MR. SMITH: Actually, I'm sorry.
 8 THE COURT: All right.
 9 MR. SMITH: I'm sorry.
 10 BY MR. SMITH::
 11 Q I just want to clarify one other thing. Regarding
 12 your prior experience, you get out of the military, and we
 13 obviously know that you've kind of come into some trouble with
 14 the law by way of these felony convictions since you've gotten
 15 out of the military; is that correct?
 16 A That's correct, Mr. Smith.
 17 Q And we've hear that you're a convicted felon for
 18 burglary, right?
 19 A That's correct, Mr. Smith.
 20 Q And also that you're a convicted felon for battery
 21 constituting domestic violence, right?
 22 A That is correct, Mr. Smith.
 23 Q And I want to make sure I get it right. And you're
 24 also convicted out of Ohio -- is it Ohio? Yes, Ohio.
 25 A Yes, sir.

Page 95

ROUGH DRAFT TRANSCRIPT

1 THE COURT: Go down with your -- any other -- oh, I'm
 2 sorry. I'm sorry. I apologize. We have some questions from
 3 the jurors. If you could hand those to the marshal, please.
 4 Counsel approach, please.
 5 (Off-record bench conference).
 6 THE COURT: Mr. O'Keefe, we have, as you know, we
 7 allow questions from the jurors, and we have some questions for
 8 you, all right.
 9 THE WITNESS: Yes, Judge.
 10 THE COURT: One of the jurors, it says when you got
 11 out of the car, did you know Victoria was angry at you?
 12 THE WITNESS: Does that have to be a yes or no,
 13 Judge.
 14 THE COURT: I think at this point it does, and your
 15 attorney or Mr. Smith can follow up.
 16 THE WITNESS: That would have to be --
 17 THE COURT: It says did you -- I'll read it again to
 18 you, sir. When you got out of the car, did you know Victoria
 19 was angry at you?
 20 THE WITNESS: Yes.
 21 THE COURT: And were you in turn angry at her?
 22 THE WITNESS: No, I was happy.
 23 THE COURT: All right. Next question, where was the
 24 knife when you were wadding up the pillowcase?
 25 THE WITNESS: On the bed somewhere. I don't -- on

Page 97

ROUGH DRAFT TRANSCRIPT

000288

EXHIBIT 5

INFORMATION 0202793

COUNT 1 BURGLARY BASED
ON FELONIOUS ENTRY VIA
BATTERY ACQUITTED OF

EXHIBIT 5

#001

LCC:

Shirley Blanton
CLERK

1 INFO
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 SUSAN R. KRISKO
6 Deputy District Attorney
7 Nevada Bar #006024
8 200 South Third Street
9 Las Vegas, Nevada 89155-2212
10 (702) 455-4711
11 Attorney for Plaintiff

12 I.A. 7/13/04
13 9:00 A.M.
14 PD
15 DISTRICT COURT
16 CLARK COUNTY, NEVADA

17 THE STATE OF NEVADA,)

18 Plaintiff,)

19 -vs-)

20 BRIAN KERRY OKEEFE,
21 #1447732)

22 Defendant.)

Case No: C202793
Dept No: V

INFORMATION

23 STATE OF NEVADA }
24 COUNTY OF CLARK } ss.

25 DAVID ROGER, District Attorney within and for the County of Clark, State of
26 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

27 That BRIAN KERRY OKEEFE, the Defendant(s) above named, having committed
28 the crimes of BATTERY WITH INTENT TO COMMIT A CRIME (Felony - NRS
200.400); SEXUAL ASSAULT (Felony - NRS 200.364, 200.366); ATTEMPT SEXUAL
ASSAULT (Felony - NRS 193.330, 200.364, 200.366) and BURGLARY (Felony - NRS
205.060), on or about the 29th day of May, 2004, within the County of Clark, State of
Nevada, contrary to the form, force and effect of statutes in such cases made and provided,
and against the peace and dignity of the State of Nevada,

///

///

1 COUNT 1 - BATTERY WITH INTENT TO COMMIT A CRIME

2 did then and there wilfully, unlawfully, and feloniously use force or violence upon
3 the person of another, to-wit: VICTORIA WHITMARSH, with intent to commit sexual
4 assault, by striking the said VICTORIA WHITMARSH about the head and/or body with his
5 hands.

6 COUNT 2 - SEXUAL ASSAULT

7 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
8 VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: fellatio; by
9 placing his penis on or in the mouth of the said VICTORIA WHITMARSH, against her will.

10 COUNT 3 - SEXUAL ASSAULT

11 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
12 VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: sexual
13 intercourse; by placing his penis into the genital opening of the said VICTORIA
14 WHITMARSH, against her will.

15 COUNT 4 - SEXUAL ASSAULT

16 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
17 VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: anal intercourse
18 by placing his penis into the anal opening of the said VICTORIA WHITMARSH, against
19 her will.

20 COUNT 5 - ATTEMPT SEXUAL ASSAULT

21 did then and there wilfully, unlawfully, and feloniously attempt to sexually assault
22 and subject VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: anal
23 intercourse; by attempting to place his penis into the anal opening of the said VICTORIA
24 WHITMARSH, against her will.

25 ///

26 ///

27 ///

28 ///

1 COUNT 6 – BURGLARY

2 did then and there wilfully, unlawfully, and feloniously enter, with intent to commit
3 battery and/or sexual assault and/or a felony, to-wit: battery and/or sexual assault, that
4 certain building occupied by VICTORIA WHITMARSH, located at 2219 North Rancho, No.
5 2083, Las Vegas, Clark County, Nevada.

6
7 DAVID ROGER
DISTRICT ATTORNEY
8 Nevada Bar #002781

9 BY /s/ S. Krisko

10 SUSAN R. KRISKO
11 Deputy District Attorney
Nevada Bar #006024

12
13 Names of witnesses known to the District Attorney's Office at the time of filing this
14 Information are as follows:

15	<u>NAME</u>	<u>ADDRESS</u>
16	HORN, David R.	LVMPD P#1928
17	STEIBER, Raymond C.	LVMPD P#3542
18	MONIOT, Timothy Sanford	LVMPD P#4664
19	MORGENSTERN, Kevin John	LVMPD P#4665
20	RAMIREZ, Vicente R.	LVMPD P#4916
21	KELLY, Shanan D.	LVMPD P#6836
22	MAJORS, William J.	LVMPD P#7089
23	BARRERA, Roger	LVMPD P#8050
24	WHITMARSH, Victoria	2992 Orchard Mesa Dr., Henderson, NV 89052
25	EBBERT, Linda	UMC/SANE, 1800 W. Charleston, LVN 89102
26	TURON, Besse Tobias	2219 N. Rancho Dr., LVN 89107
27	CUSTODIAN OF RECORDS	LVMPD – Records
28	CUSTODIAN OF RECORDS	LVMPD – Dispatch


	<u>NAME</u>	<u>ADDRESS</u>
1		
2	CUSTODIAN OF RECORDS	UMC, 1800 W. Charleston, LVN 89102
3	PENO, Tammy	2219 N. Rancho, LVN
4	LNU, Tracy	Budget Suites
5	LNU, Missy	Budget Suites
6		
7		
8		
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23		
24		
25		
26	DA#04F09774X/rad	
27	LVMPD EV#0405292232	
28	BAT W/INT; S/A; ATT S/A; BURG - F (TK4)	

10/12/2016 10:00 AM
10/12/2016 10:00 AM
10/12/2016 10:00 AM
10/12/2016 10:00 AM

Shelby D. (Graham)
(10/12/2016 10:00 AM)
10/12/2016 10:00 AM
10/12/2016 10:00 AM

10/12/2016 10:00 AM

Lovelock Correctional Center



US POSTAGE >> PINEY BOM

ZIP 89419 \$ 002.26
02 4M
000340875 OCT 16 201

Brian O'Keefe
90244

Lovelock Corral - 27K
1200 Prison Rd.
Lovelock, NV. 89419

Lovelock Correctional Center

U.S. POSTAGE >> PITNEY BOWES



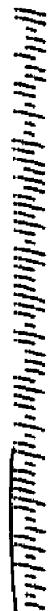
ZIP 89419 \$000.470
02 4W
0000340675 OCT 17 2018

INMATE LEGAL
MAIL CONFIDENTIAL

Clark of the Court
200 Lewis Ave., 3rd Flr.
Las Vegas, NV. ~~89155~~ 89155
← ATTN: CIVIL CLERK

FOR CIVIL WRIT OF HABEAS CORPUS
? (LEGAL MAIL)

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OCT 30 2018

[Signature]
CLERK OF COURT

1 Name BRIAN O'KEEFE - L.C.C.

2 Address 1200 PRISON ROAD

3 City LOVELOCK State NEVADA 89419

4 Email N/A

5 Telephone N/A

6 District Court
7 Clark County, Nevada
8

9 BRIAN KERRY O'KEEFE

11 Plaintiff,

12 vs.

13 THE STATE OF NEVADA

15 Defendant

Case No.:

A-18-783689-W

Department:

VII XXX

17 Notice of ~~Motion~~ PETITION

18 Please take notice that the hearing on PETITION FOR CIVIL WRIT OF CORAM NOBIS

20 will be heard on 12/5/2018 in Department XXX Floor 14 Courtroom A

21 at the hour of 9:00 A AM/PM.

23 Dated this 28th day of September, 2018

24 A-18-783689-W
NOTM
Notice of Motion
4782579



[Signature] # 90244
Brian K. O'Keefe

Notice of Motion - I

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FORM 24.070
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32 - 43
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NOV 30 2018

CLERK OF COURT

1 MOTION
2 BRIAN KERRY O'KEEFE # 90244
3 Lovelock Correctional Center
4 1200 Prison Road
5 Lovelock, Nevada 89419

6 Plaintiff In Pro Se

7 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF CLARK

9 * * * * *

10 BRIAN KERRY O'KEEFE,)

11 Plaintiff,)

12 -vs-

13 THE STATE OF NEVADA,)

14 Defendant.)

Case No. A-18-783687-W

Dept. No. XXX

15 MOTION FOR JUDGMENT ON THE PLEADINGS WITH
16 NOTICE PROVIDED BY AFFIDAVIT THAT THE STATE
17 FAILED TO FILE ANY TYPE OF RESPONSE DESPITE
18 SERVICE OF SAID PETITION AS A MATTER OF LAW
19 WITH CONSEQUENCES AS ADMISSION UNDER NRCVP 8(d)

20 Pursuant N.R.Civ. P. Rule 12(c)

21 Comes now Brian O'Keefe as plaintiff to humbly serve and file this action.
22 Plaintiff served said petition for Coram Nobis by mail on 9/28/2018
23 with the court clerk actually filing said action on 10/20/2018.

24 As of November 26th 2018, no timely or untimely response, answer or
25 opposition has been filed in accordance with any rule, e.g. - N.R.Civ.P.
26 Rules 7(a), Rule 8(c), Rule 8(d), Rule 9, Rule 12, E.D.C.R. 2.20, etc.

27 This action is made with all papers on file and the following Points
28 And authorities made by affidavit. Respectfully Submitted,

Dated November 26, 2018 pursuant Nev. Civ. 165, by: Brian L. O'Keefe

Attest: HAINES T. KERNER, 404 W. 5th St., 520 (1972) LOVELOCK CORRECTIONAL CENTER
Pro Per # 90244

RECEIVED
NOV 30 2018
CLERK OF THE COURT

1 AFFIDAVIT OF Brian Leroy O'Hecke
 2 STATE OF NEVADA, Civil Case No. A-18-723622-W
 3) SS:
 4 COUNTY OF Parsonage

5 I, Brian O'Hecke, the undersigned, do hereby swear that all the
 6 following statements are true and correct, to the best of my own knowledge and of my
 7 own volition.

- 8 1. My name is Brian O'Hecke.
- 9 2. I am over 19 years of age, I reside at Lovelock Correctional Center, 1200
 10 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this
 11 affidavit and I have personal knowledge of the facts stated herein.
- 12 3. Mailed and served the defendant re Civil Dept. Clark County District Attorney, Petition
 13 with a Notice of Petition at 200 Lewis Avenue, Las Vegas Nevada 89105-2212 on 1/18/2018.
- 14 4. Said Petition filed on 10/30/2018 with Informa Paperis approved on Nov. 4-18-723622-W.
- 15 5. Petition raised "alternative defenses" of lack of jurisdiction and fraud which
 16 was required to be addressed or otherwise considered submitted by law.
- 17 6. As of November 26, 2018 (Monday) plaintiff has received no type of response.
- 18 7. Hearing is set to 12/18/2018, Dept. ~~828~~ (Wednesday) at 09:00 A.M.
- 19 8. Plaintiff takes this action thereby invoking N.E. Civil P. Rule 8 (d) where
 20 its evident and implied, by no response, that petition for writs relief filed
 21 10/30/2018 is meritorious and a consent to granting of the same. See also
 22 Eighth District Court Rule ("E.D.C.R.") 2.20 (same).
- 23 9. A Motion via N.E.C.V.P. 12(b) is designed to provide this "Court" a means
 24 of disposing of cases when facts are not in dispute and a judgment on the merits
 25 is appropriate.

26 [Continued]

can be achieved by focusing on the content of the pleadings and only questions of law remain. (* REEMER v. RUTHILL DRUG CO., 138 Nev. 132, 734 P.2d 1239 (1987)).

10. Language "upon such terms as are just" applies to final judgments. Subsection (b) of N.R.C.P. 60(d) invests the "Court" with the discretionary power to relieve a party from a final judgment that is void. (* see Davis v. Steen, 87 Nev. 148, 483 P.2d 894 (1971)); see also PHILLIPS "Substantive Fact," substantive.

11. E.D.C.F. 2.20 within (10) days after service of [petition] motion, the opposing party "MUST" serve and file written opposition thereto. Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion is meritorious and a consent to granting of the same.

12. Plaintiff O'Keefe ~~was~~ the Park Board utilized this Volta felony
13. Breach of contract in my D.S.I. as the main and one of the allegations
14. to deny my Park on 8/21/2018 triggering, again, collateral consequences
15. and triggering the Continuing Violation Doctrine which is the basis
16. of the Original Petition of Curran Mobilia filed October 30, 2018
17. in Department XXX assigned case no. A-18-783689 in which was
18. once then timely served now in the State's possession for over 60 days
19. with nobody filing a Notice of Appearance (Proceeding or ANY RESPONSE).

20. I declare under penalty of perjury that the foregoing is true and correct, and
21. that this document is executed without benefit of a notary pursuant to NRS 208.165
22. and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

23. Dated this 26th (Monday) day of November, 2018.

24. (E.D. Judicial Case No. A-18-783689-W)

25. by: Brian L. O'Keefe #90244
26. Brian L. O'Keefe
27. Loveback Court, CTR.
28. 1200 Prison Rd.
Loveback, Nev. 89419
Pro per / #90244

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Motion For Judgment On The Pleadings - N.R. Cap. to the below address(es) on this 20th day of November (Monday), 2018, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Express Ship No. 227 2018 227 2018

1) Civil Dept. Clark County Dist. Atty.
200 Lewis Ave.
Las Vegas, Nevada 89155-2212

2) Original to Clerk of the Court (8th Judicial Dist. Ct.)
200 Lewis Avenue, 3rd Floor, Las Vegas, Nevada 89155

Brian L. O'Kall
Brian L. O'Kall # 2299
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

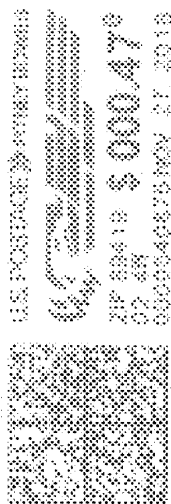
The undersigned does hereby affirm that the preceding Motion For Judgment On The Pleadings - N.R. Cap. filed in District Court Case No. 2-18-76369-W does not contain the social security number of any person.

Dated this 20th day of November (Monday), 2018

Brian L. O'Kall
Brian L. O'Kall
Plaintiff In Pro Se

Brian O'Keefe #90244
Lovelock Corr. Ctr.
P.O. Box 1000
Lovelock, Nev. 89409

Lovelock Correctional Center

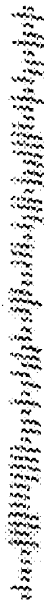


INMATE LEGAL
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Prison Slip No. 2276009
Legal Mail

Clerk of the Court (P.O. Box 1000)
200 Lewis Ave., 3RD FLR.
Las Vegas, Nevada 89155

0000040875 NOV 27 2018



Steven D. Grierson

NOAS
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

BRIAN KERRY O'KEEFE,)

Plaintiff,)

Case No. A-18-783689-W

-vs-)

Dept. No. XXX

THE STATE OF NEVADA)

Defendant.)

• SEE ATTACHED APPLICATION TO PROCEED IN
FORMA PAUPERIS WITH FINANCIAL CERTIFICATE

CIVIL - NOTICE OF APPEAL 1

NOTICE IS GIVEN that Plaintiff, Brian Kerry O'Keefe,
in pro se, hereby appeals to the Nevada Supreme Court the
denial of the unopposed noticed served petition despite N.R.Civ.P. 12(c) Motion
as filed/entered on the 5th day of December, 2018,
(complete if applicable) and the _____

_____, as filed/entered on the _____ day of
_____, 20____, in the above-entitled Court.

Dated this 18th day of December, 2018.

Brian K O'Keefe
Brian K O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

FN1: Court failed to address that
Count 1 conviction returned by jury
was on the lesser included simple misdemeanor battery and that the state
used one INFORMATION that charged (6) six counts. INVOKED N.R.Civ.P. 8(d).
STATE FILED NO OPPOSITION ALSO INVOKING EDCR 2.20.

Case Number: A-18-783689-W

090-72 WROF 11201
CLERK OF THE COURT
DEC 24 2018

RECEIVED

1
2 **CERTIFICATE OF SERVICE**

3 I do certify that I mailed a true and correct copy of the
4 foregoing NOTICE OF APPEAL to the below address(es) on this
5 18th day of December, 2018, by placing same in the
6 U.S. Mail via prison law library staff: Box Slip No. 2273779

7 Steven Greison, Clerk of Court (8TH JUD.)
8 200 Lewis Avenue, 3RD Floor
9 Las Vegas, Nevada 89158

10
11
12
13
14
15
16
17 Brian L. O'Keefe
18 Brian L. O'Keefe # 90248
19 Lovelock Correctional Center
20 1200 Prison Road
21 Lovelock, Nevada 89419

22 Petitioner In Pro Se

23 **AFFIRMATION PURSUANT TO NRS 239B.030**

24 The undersigned does hereby affirm that the preceding
25 NOTICE OF APPEAL filed in District Court Case No. A783689-W
26 does not contain the social security number of any person.

27 Dated this 18th day of December, 2018,

28 Brian L. O'Keefe
Brian L. O'Keefe

Petitioner In Pro Se

27

FILED
DEC 24 2018
CLERK OF COURT

MOTN

Brian Kerry O'Keefe #90244
(Name)
L.C.C. 1200 Prison Road
(Mailing Address)
Lovelock, Nevada 89419
(City, State, Zip)

In Proper Person

In The EIGHTH Judicial District Court of the State of Nevada
In and for THE COUNTY OF CLARK

BRIAN KERRY O'KEEFE)
)
Plaintiff)
vs.)
THE STATE OF NEVADA, et al.)
Defendants)

Case No. A-18-783689-W
Dept. No. XXX

● CASE-OF-FIRST-IMPRESSION

MOTION TO ALTER OR AMEND JUDGMENT OF 12/5/18 DENYING PETITION
WHERE STATE ADMITTED PLAINTIFF'S ALLEGATIONS BY N.R.CIV.P. 8(d), EDCR 2.20

I Brian Kerry O'Keefe, plaintiff, appearing in Proper Person,
request that the Court enter an Order granting me the following: (see page 3)

● POINTS AND AUTHORITIES - (JURISDICTION)

Pursuant N.R.Civ.P. 59(e), this Court has inherent authority to "ALTER OR AMEND" its judgment, orally, on 12/5/2018 denying plaintiff's Civil Writ of Coram Nobis based on these grounds, "where" the court misalleged, and omitted the fact that the jury returned a simple proffered lesser-included-offense of Count 1 "misdemeanor-battery" to the Count 1 BATTERY WITH INTENT TO COMMIT A CRIME, NRS 200.400 (F) and closed out Count 1, with credit time served, which is manifested in the certified Doc attached to the petition as EXHIBIT 3. (see also - EXHIBIT 1 CRIMINAL COURT MINUTES) (same) Also, "where" the court failed to divulge that this case, 0202793, was charged by a single INFORMATION filed 7/6/2004, with (6) counts arising from the same set of facts.

Page 1 of 3

INVOLVE HAINES T. KERNER, to 4 U.S. 511, 520 (RT2) (per curiam)

FN1: INFORMATION ENCOMPASSED COUNTS 1, 2, 3, 4, 5, 6 IN A SINGLE CHARGING DOCUMENT, Battery Lesser included misdemeanor was via jury instruction on Count 1 BATTERY (F)

A-18-783689-W
MOT
4806409



LCC LL 26.045

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DEC 24 2018
CLERK OF THE COURT

5

1 This Motion is made and based upon the accompanying Memorandum of Points and
2 Authorities: I. Rule of LAW - N.R.Civ.P. 8(d) and EDCR 2.20 and EDCR 3.20
3 This court's 12/8/18 journal entry denying petition goes completely contrary to the Rule of Law.
4 N.R.Civ.P. 8(d) (Effect of Failure to Deny) Averments in a pleading to which a responsive
5 pleading is required are admitted WHEN not denied in the [required] responsive pleading.
6 Also, EDCR 2.20 and 3.20 prescribe, "opposing party must serve and file written
7 notice of nonopposition or opposition thereto," ... "Failure of the opposing party to
8 serve and file written opposition may be construed as an admission that the petition
9 is meritorious and a consent to granting the same." Moreover, plaintiff filed
10 also a timely N.R.Civ.P. 12(C), filed 11/30/18, which could be construed as a
11 Rule 56 Summary Judgment, based on a true simple question of law, "undisputed."
12 This court is required not to raise defense issues or ignore plaintiff's valid
13 "miscarriage of justice" and Count 6 averment of Burglary conviction being VOID
14 based on lack of felonious intent. IN FACT, this civil petition brought
15 to address the deprivation of civil rights, FEDERAL, to due process and equal
16 protection, mandates this court to apply the correct law. Delineated by
17 Bateman v. U.S. Postal, 231 F.3d 1220, 1223 (9th Cir. 2000) ("Holding courts are indepen-
18 dently obliged to apply the correct law, regardless if none of the parties briefed it,
19 or implicitly briefed it wrong, or failed to brief it at all.")
20 Clearly, the state not
21 only admitted plaintiff's averments, they waived any and all defenses by failing to oppose.
22

23 II. COUNT 1 (F) BATTERY WITH INTENT TO COMMIT CRIME OR COUNT 1 (M) BATTERY as lesser.
24 The Court recognizes plaintiff was convicted of Count 1 BATTERY (Misdemeanor), yet
25 misrepresents contrary to Nev. Const., article 15 § 2 (Oath of Office) that the jury's
26 acquittal of Count 1 (Felony) Battery - NRS 200.400, fails to supply the requisite
27 felonious INTENT for Count 6, Burglary based on the intent to commit any felony
28 when entering a structure. The Count 1 (M) Battery conviction cannot sustain the

1 This Motion is made and based upon the accompanying Memorandum of Points and
2 Authorities:

3 required felonious intent required by statutory law as N.E.S. 205-660.
4

5 III. TRANSFERRED INTENT AND DOCTRINE OF "NO SCITUR A SOCIIS"

6 • SEE A.G.O. No. 2002-15 (MARCH 21, 2002)

7 A simple Count 1 misdemeanor battery conviction cannot supply the felonious
8 "transferred intent," required for Count 6 Burglary. Noting Count 6 was
9 predicated on the criminal intent of felonious Count 1 (F) Battery with
10 intent to commit a crime charged as either Count 1, 2, 3, 4, 5 and
11 any combination of the first five felony counts for the alleged event
12 on May 29, 2004 charged via a single INFORMATION (C202793) filed 7/6/2004.
13

14 N.E.S. 205.060 (1) provides: "A person who, ..., enters any ... apartment ... with
15 the intent to commit ... battery on any person or any felony is guilty of burglary.

16 The Attorney General Opinion ("A.G.O.") No. 2002-15 delineated the doctrine
17 of "no scitur a sociis" provides that a word is known by the company it keeps
18 and gathers meaning from the words around it. See Babbitt v. Sweet Homes ...,
19 518 U.S. 687, 702 (1995) citing Orr Ditch Co. v. Dist. Ct., 64 Nev. 138, 146 (1947).

20 Moreover, C.J. MAUPIN concurring in State of Nevada v. Contreras, 18 Nev. 332 (2002)
21 that while a burglary charge may be based upon an intent to commit any felony, as
22 charged via Plaintiff's Count 1 (F) BATTERY WITH INTENT TO COMMIT A CRIME N.E.S. 205.900,
23 when entering a structure, the burglary statute specifically includes "assault or
24 battery on any person" as a felony that may underlie a burglary. Emphasis,
25 without the jury returning a felony conviction on Counts 1, 2, 3, 4 or 5 before
26 coming to Count (6) Felony Burglary, the jury verdict of guilty on Count 6 must
27 be stricken and voided under N.E.Cr.P. 60(B)(4) or by GRANT OF WRIT OF CORAM NOBIS.

28 IV. CONCLUSION without a "felony" Count 1 conviction, and with acquittal on Counts 2,
3, 4 and 5, the guilty verdict returned on Count 6 became a defective verdict, now voidable.

Amend judgment and order "hearing."

• GRANT "PPW" of Coram Nobis

1
2 This document does not contain the Social Security number of any
3 person.

4 I declare under penalty of perjury under the law of the State of
5 Nevada that the forgoing is true and correct.

6 DATED this 19th day of December, 2018

7
8
9
10
11
12 CERTIFICATE OF SERVICE

13 Pursuant to NRCP 5(b), the undersigned hereby certifies that on this
14 date, I deposited a true and correct copy of the foregoing Motion in the U.S.
15 Mail with postage pre-paid thereon, addressed to:

16 Clerk of Court (8TH JUD. DIST. CT.)
(Name of other Party)

CLARK COUNTY DISTRICT ATTORNEY Civil Dept.
(Name of other Party)

17 200 Lewis Ave., 3RD FLR.
(Address)

200 Lewis Avenue
(Address)

18 Las Vegas, Nevada 89155
(City, State, Zip)

Las Vegas, Nevada 89155-2212
(City, State, Zip)

20
21 Dated this 18th day of December, 2018

22
23 B. L. O'Shaughnessy
24 (Signature)

55

RECEIVED

JUL 24 2018 FORM 24.070

CLERK OF THE COURT

1 Name BRIAN KERRY O'KEEFE
2 Address LOVELOCK CORRECTION CENTER
3 City 1200 PRISON ROAD State
4 Email LOVELOCK NEVADA 89419
5 Telephone # 90244

District Court
Clark County, Nevada

BRIAN KERRY O'KEEFE

Plaintiff,

vs.

THE STATE OF NEVADA, et al.

Defendant(s)

Case No.: A-18-783689-W

Department: XXX

Notice of Motion

Please take notice that the hearing on MOTION TO ALTER OR AMEND JUDGMENT OF

12/5/18 DENYING PETITION WHERE STATE ADMITTED... BY N.L.Civ.P. 8(d), EDCR 2.20

will be heard on January 30, 2019 in Department XXY Floor 14 Courtroom A

at the hour of 9:00 AM/PM.

Dated this 19th day of December, 2018

A-18-783689-W
NOTM
Notice of Motion
4806410



By: Brian K. O'Keefe pro per #90244
Brian K O'Keefe

Notice of Motion - 1

FILED
DEC 24 2018
Clerk of Court

THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
57 - 62
WILL FOLLOW VIA
U.S. MAIL



1 ASTA

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4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 BRIAN KERRY O'KEEFE,

10 Plaintiff(s),

11 vs.

12 STATE OF NEVADA,

13 Defendant(s),
14

Case No: A-18-783689-W

Dept No: XXX

15
16 **CASE APPEAL STATEMENT**
17

18 1. Appellant(s): Brian K. O'Keefe

19 2. Judge: Jerry A. Wiese

20 3. Appellant(s): Brian K. O'Keefe

21 Counsel:

22 Brian K. O'Keefe 90244
23 1200 Prison Rd.
24 Lovelock, NV 89419

25 4. Respondent (s): State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89101

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5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A
- Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A
6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No
7. Appellant Represented by Appointed Counsel On Appeal: N/A
8. Appellant Granted Leave to Proceed in Forma Pauperis**: Yes, October 30, 2018
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: N/A
Date Application(s) filed: N/A
9. Date Commenced in District Court: October 30, 2018
10. Brief Description of the Nature of the Action: Civil Writ
Type of Judgment or Order Being Appealed: Dismissal
11. Previous Appeal: No
Supreme Court Docket Number(s): N/A
12. Child Custody or Visitation: N/A
13. Possibility of Settlement: Unknown

Dated This 29 day of December 2018.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Brian K. O'Keefe

27

FILED
JAN 16 2019
CLERK OF COURT

Brian O'Keefe #90244
(Name)
LOVELOCK CORR. CTR. 1200 Prison Rd.
(Mailing Address)
Lovelock Nevada 89419
(City, State, Zip)

In Proper Person

In The EIGHTH Judicial District Court of the State of Nevada

In and for THE COUNTY OF CLARK

BRIAN KERRY O'KEEFE)
Plaintiff)
vs.)
THE STATE OF NEVADA)
Defendant)

8.C.N. Case No. 77797
NOA has no effect until
entry of order.

Case No. A-B-783689-W
Dept. No. XXX

(SEE EXHIBIT "A" CASE SUMMARY ATTACHED (2 PGS.))

* Case of First Impression

MOTION COURT TO ADJUDICATE RULE 59(e) MOTION AND/OR
ENTER ORDER DENYING BY WRITTEN ENTRY

I, Brian Kerry O'Keefe, plaintiff, appearing in Proper Person,
request that the Court enter an Order granting me the following:

1.) a decision resulting from the MOTION TO ALTER OR AMEND
JUDGMENT pursuant Nev. R. Civ. P. 59(e) in plaintiff's favor;

2.) or, enter "formal" judgment denying A.S.A.P.

3.) Forwarded Copy to plaintiff O'Keefe, at Lovelock
Correctional Center, 1200 Prison Road, Lovelock NV. 89419.

4.) RECOGNIZE a "FUNDAMENTAL MISCARriage OF JUSTICE" with
where moral turpitude has occurred as the fundamental basis of their act.
ACTUAL INNOCENCE APPLIES. Page 1 of 3

INVOKE HAINES V. KERNER, 404 U.S. 51, 520 (1972) per curiam

FN1: FILED 1/03/2019, 8.C.N. No. 77797, IN FORMA PAUPERIS APPEAL GRANTED. WAITING
ON THIS COURT TO ADJUDICATE NEV. R. CIV. P. 59(e) MOTION; Final Order.

A-18-783689-W
MOT
Motion
4809184

RECEIVED
JAN 16 2019
LCC LL 26.045
CLERK OF THE COURT

1 This Motion is made and based upon the accompanying Memorandum of Points and
2 Authorities: (SEE EXHIBIT "A" CASE SUMMARY A-18-783689-W printed 12/26/18 attached.)

3 Pursuant "formal law" (procedural law) this honorable
4 court is required to provide an equitable ruling consisting
5 of the written entry of ORDER.

6 Plaintiff's protected
7 "liberty interests" are generated by here the DUE PROCESS
8 CLAUSES of their own force, Nev. Const., art. 1 § 8(5)
9 and the "DUE PROCESS CLAUSE" with "Liberty CLAUSE" of the
10 U.S. Constitutional XIV Amendment. Moreover, Nevada
11 Const., article 6 § 6(1) and N.R. 8 1.030 authorize the
12 common law writ of coram nobis as delineated and now
13 recognized by the Nevada Supreme Court in TRUJILLO v. STATE,
14 310 P.3d 594 (Nev. 2013) in which this court is required
15 by the judicial canons (2.26) to remain equitable and
16 perform all tasks to include final adjudication
17 by way of a final order being entered.

18
19 This Court cannot dispute a decision ^{ignoring} denying
20 plaintiff's Motion for a Judgment on the Pleadings
21 filed 11/30/2018 occurred when the decision
22 was pronounced on 12/5/2018 in the minute order.

23 (• SEE OATH OF OFFICE, Nev. Const. Article 18 § 2)

24 Humbly, plaintiff begs this Court to alter his
25 judgment, granting his Motion pursuant Nev. R. Civ P. 59(e)
26 with certification of intent to Amend² where plaintiff
27 can motion the Nevada Supreme Court under case no. 77797
28 and remand back to this Court. Otherwise file final
Order in writing denying.

Page 2 of 3 /

FN2: spare judicial economy/administration where as a matter-of-law, simple battery
count 3 misdemeanor intent cannot supply felonious transferred intent to sustain
count 6 based on felonious intent by law- see also "WHITE", 330 P.3d 482, 484 (Nev. 2014)

EXHIBIT A

CASE SUMMARY

8TH CASE NO. A-18-783689-W printed 12/12/18

- See ENTRY 11/30/2018 MOTION FOR JUDGMENT ON PLEADINGS
- see 2/80 ENTRY 12/05/2018 (COURT
" ORDERED " PETITION " DENIED ")

EXHIBIT A

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY**CASE NO. A-18-783689-W**

Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

§
 §
 §
 §
 §
 §

Location: **Department 30**
 Judicial Officer: **Wiese, Jerry A.**
 Filed on: **10/30/2018**
 Cross-Reference Case Number: **A783689**
 Defendant's Scope ID #: **1447732**

CASE INFORMATIONCase Type: **Other Civil Writ**

Case
 Status: **10/30/2018 Open**

DATE**CASE ASSIGNMENT****Current Case Assignment**

Case Number **A-18-783689-W**
 Court **Department 30**
 Date Assigned **10/30/2018**
 Judicial Officer **Wiese, Jerry A.**







PARTY INFORMATION

Plaintiff **O'Keefe, Brian Kerry**

Pro Se

Defendant **Nevada State of**

DATE**EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**

10/19/2018	 Application to Proceed in Forma Pauperis Filed By: Plaintiff O'Keefe, Brian Kerry	
10/30/2018	 Inmate Filed - Petition for Writ of Habeas Corpus Party: Plaintiff O'Keefe, Brian Kerry <i>Petition for Writ of Coram Nobis</i>	
10/30/2018	 Order to Proceed In Forma Pauperis Granted for: Plaintiff O'Keefe, Brian Kerry	
10/30/2018	 Notice of Motion Filed By: Plaintiff O'Keefe, Brian Kerry <i>Petition for Civil Writ</i>	
10/30/2018	 Filed Under Seal Filed By: Plaintiff O'Keefe, Brian Kerry	
11/30/2018	 Motion Filed By: Plaintiff O'Keefe, Brian Kerry <i>Motion for Judgment on the Pleadings with Notice Provided by Affidavit that the State failed to File any Type of Response Despite Service of Said Petition as a Matter of Law with Consequences as Admission Under NRCJP, 8 (d)</i>	

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-18-783689-W

HEARINGS

12/05/2018

 **Petition (9:00 AM)** (Judicial Officer: Wiese, Jerry A.)

Events: 10/30/2018 Notice of Motion

Notice of Petition for Civil Writ of Coram Nobis

Denied:

Journal Entry Details:

No parties present. Court ADVISED, it appeared the State was properly noticed with the Motion, no opposition was filed, however, in reading the petition, Court NOTED, Plaintiff was convicted of counts 1 and 6 and found not guilty on all of the sexual assault charges.

Furthermore, the Court, was not convinced the acquittal on counts 2 to 5 required an acquittal on counts 1 and 6, as they were independent charges, consequently, ORDERED, Petition DENIED.

This document does not contain the Social Security number of any person.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

DATED this 9th day of January, 2019

CLARK COUNTY DISTRICT ATTORNEY REGISTERED PARTICIPANT
OF CM/ECF FILING SYSTEM.

CERTIFICATE OF SERVICE

Pursuant to NRCP-5(b), the undersigned hereby certifies that on this date, I deposited a true and correct copy of the foregoing Motion in the U.S. Mail with postage pre-paid thereon, addressed to:

Clerk of Court

(Name of other Party)

200 Lewis Ave 3RD FLR

(Address)

Las Vegas NV 89155-1160

(City, State, Zip)

Clark County District Attorney

(Name of other Party)

200 Lewis Ave

(Address)

Las Vegas NV 89155

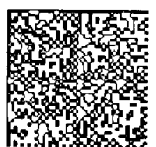
(City, State, Zip)

Dated this 9th day of January, 2019

[Signature]
(Signature)

Brian O'Leary #90244
Lawlock Corr. Ctr.
1200 Prison Rd.
Lawlock, NV. 89419

Lawlock Correctional Center



U.S. POSTAGE® FIRST CLASS
ZIP 89419 \$000.68
02 4M
0000340675 JAN 10 2019

Boys Ship No. 2285093
LEGAL MAIL

Clerk of the Court (8th Judicial)
200 Court Ave., 3rd Fl.
Las Vegas, NV. 89158
INMATE LEGAL
MAIL CONFIDENTIAL

RECEIVED
JAN 6 2019
LIBRARY

27

FILED
JAN 16 2019
CLERK OF COURT

1 Name Brian Kerry O'Keefe
2 Address LOVELOCK COLL. CTR.
3 City 1200 Prison Rd. State
4 Email Lovelock Nevada 89419
5 Telephone

District Court
Clark County, Nevada

9 BRIAN KERRY O'KEEFE
10
11 Plaintiff,
12
13 vs.
14 THE STATE OF NEVADA
15 Defendant

Case No.: A-18-783689-W
Department: XXX

• SEE EXHIBIT "A" CASE SUMMARY
ATTACHED DATED 12/12/18
(2 PGS.)

Notice of Motion

18 Please take notice that the hearing on MOTION COURT TO ADJUDICATE RULE 59 (e)
19 MOTION AND/OR ENTER ORDER DENYING BY WRITTEN ENTRY
20 will be heard on February 20, 2019 in Department XXX Floor 14 Courtroom A
21 at the hour of 9:00 AM/PM

Dated this 9th day of January, 2019

Brian K O'Keefe #90244
pro per

A-18-783689-W
NOTM
Notice of Motion
4809185



CC L FORM 24.070

RECEIVED
JAN 16 2019
CLERK OF THE COURT

24

FILED
JAN 17 2019
CLERK OF COURT

1 MOTN
2 Brian Kerry O'Keefe # 90244
3 Lovelock Correctional Center
4 1200 Prison Road
5 Lovelock, Nevada 89419
6 Plaintiff In Pro Se

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

9 BRIAN KERRY O'KEEFE)
10 Plaintiff)
11 -vs-)
12 THE STATE OF NEVADA et al.)
13 Defendant(s))

Case No. A-18-783689-W
Dept. No. XXX

• WILL FILE NEW NOA OR SEE ATTACHED ENH.
(AMENDED N.D.A. WILL BE FILED IF NEEDED)
SUBSEQUENT ENTRY WRITTEN ORDER

EX PARTE MOTION FOR COURT TO TAKE JUDICIAL
NOTICE THAT PREMATURE NOTICE OF APPEAL HAS
NO EFFECT ON JURISDICTION TO WHICH DISTRICT
COURT RETAINS JURISDICTION PURSUANT COMMON LAW
AND PURSUANT N.R.A.P. 4(2)(6) (PREMATURE NOTICE OF APPEAL)
WHEREAS O'KEEFE ALSO MOTIONED F.C.N. BY COPY AS EXHIBIT "A"



LCC LL FORM 24-014

CLERK OF THE COURT

18 Comes Now Brian O'Keefe, pro se, to humbly provide notice, pursuant, e.g.-
19 express opinion delineated in Southern Nev. Homebuilders Ass'n vs. City of
20 N. Las Vegas, 112 Nev. 297, 913 P.2d 1276 (1996), specifically listed under
21 N.R.A.P. 3A (Civil Actions; Standing to appeal; appealable determinations),
22 that O'Keefe's premature N.D.A. has no effect on this Court's authority.
23 • (Plaintiff mistakenly thought written order had been filed.)
24 O'Keefe admits, in his previous motion, he listed that this Court could
25 certify its intent to hear the Petition, which is not required.
26 Concluding, this Court can hear the action and decide without
27 the N.D.A. having any legal force based that, and on, its being
premature. Any final decision denying, will simply be re-appealed.
Hopefully, this will not be the case - by: Brian L. O'Keefe
Dated this 11th day of January 2019 pursuant Nev 208.105. Brian L. O'Keefe
INVOKES HAINES v. KERNER, 404 U.S. 519, 520 (1972) (per curiam); Nev. Const., article I § 2.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Ex Parte Motion For Court... Pursuant Common Law to the below address(es) on this 11th day of January, 2019, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Braso Slip No. 2285092

Steven Brisson, Clerk of Court
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155-1160

- All registered users and participants of the CM/ECF system will be served by the clerk of the court.

Brian K. O'Keefe
Brian K. O'Keefe # 90244
 Lovelock Correctional Center
 1200 Prison Road
 Lovelock, Nevada 89419

Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding EX PARTE MOTION ... Pursuant Common Law filed in District Court Case No. A-18-783689-W does not contain the social security number of any person.

Dated this 11th day of January, 2019.

Brian K. O'Keefe
Brian K. O'Keefe

Plaintiff In Pro Se

EXHIBIT A

MOTION MAILED 1/11/2019
TO Nevada Supreme Court

DIXIE OR STAY

APPEAL NO. 77797

8TH Dist. Case NO. A703689

Dept. - XXV

EXHIBIT A

#001

LCC

Copy

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE
Appellant
-vs-
THE STATE OF NEVADA
Respondents

Case No. 77797

MOTION TO DISMISS EXISTING APPEAL AS
SUCH CASE NO. 77797 FOR EIGHTH JUDICIAL
DISTRICT COURT HAS NOT ENTERED A
FINAL JUDGMENT AND HAS SCHEDULED
A HEARING ON O'KEEFE'S N.R.C.P. 59(e)
MOTION SCHEDULED JANUARY 30, 2019 09:00AM

Comes Now, Brian O'Keefe, plaintiff still truly, in pro se, to humbly request this Court either "stay" the current appeal until disposition of the written notice of a "possible" denial of O'Keefe's Motion to ALTER OR AMEND JUDGMENT pursuant Nev. R.C.P. 59(e) timely filed or, (FOR JUDICIAL ECONOMY / ADMINISTRATION)

dismiss appeal no. 77797, "without prejudice," for O'Keefe the right to file new Notice of Appeal [even amended N.O.A.] subsequent any denial, where the new notice of appeal will be filed within (30) days after written notice of said denial of 59(e) Motion.

• SEE Able Elec. Inc. v. Kaufman, 104 Nev. 29, 752 P.2d 216 (1988); N.R.A.P. 4

O'Keefe was notified by the district court, in a minute order, that the Court denied petition on 12/5/2018 where O'Keefe filed a 59(e) Motion and NOA simultaneously filed on 12/24/2018. However, Court never filed final order.

but instead scheduled hearing for 59(e) motion on 1/20/2019. Brian O'Keefe
Dated January 11, 2019 pursuant NRS 208.125, by: Brian O'Keefe

FN 1: STAY PROCEEDINGS UNTIL DISPOSITION OF HEARING 1/20/2019 AND NOTICE OF DECISION. IF O'Keefe is notified of a denial, appellant then will file Amended NOA.

LCC LL FORM 28.014

S.C.N. No. 77797 CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing
(check appropriate box)

☐ Opening Brief

☐ Reply Brief

☒ Motion: MOTION TO DISMISS [OR STAY]...

☐ Petition: _____

☐ Other: _____

to the below address(es) on this 11th day of January, 2019, by
placing same in the hands of prison staff for posting in the U.S. Mail, per

Nev.R.App.P. 25: Prison Slip No. 2285092

EIGHTH JUDICIAL DISTRICT COURT DEPT. XXV
via CLERK OF THE COURT 8TH JUDICIAL
200 LEWIS AVE., 3RD FLOOR
ATTN: FUDGE WIDBE, TERRY A.
Las Vegas, Nevada 89155

Attorney For NO PARTIES APPEARED

☒ and ORIGINAL AND ONE COPY to:

Chak A. the COURT
Nevada Supreme Court
2nd S. Carson Street
Suite 201
Carson City, Nevada 89701

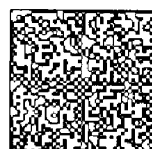
Brian K. O'Keefe
Brian K. O'Keefe # 90211
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff

In Pro Per

Brian O'Keefe #90244
Lovelock CORR. CRT.
1200 Tison Rd.
Lovelock, NV. 89419

Lovelock Correctional Center



U.S. POSTAGE PITNEY BOWES
ZIP 89419 \$000.470
02 4W
0000340675 JAN 14 2019

Clerk of the Court 874 Supreme Dist Ct.

200 Lewis Avenue, 3RD Floor

Las Vegas, NV 89155-1160

INMATE LEGAL

MAIL CONFIDENTIAL
5510136300 COTS

Burt Ship Mo. 2285092

LEGAL MAIL

LOVELOCK CORRECTIONAL CENTER

JAN 11 2019

RECEIVED

1 NOTICE
2 Brian Kerry O'Keefe # 90244
3 Lovelock Correctional Center
4 1200 Prison Road
5 Lovelock, Nevada 89419

FILED
JAN 22 2019
CLERK OF COURT

6 Plaintiff In Pro Se

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

9 * * * * *

10 BRIAN KERRY O'KEEFE,)
11 plaintiff,)
12 -vs-)
13 THE STATE OF NEVADA,)
14 defendant.)

● CASE-OF- FIRST- IMPRESSION
Case No. A-18-783689-W
Dept. No. XXX

● (SEE ATTACHED EXHIBIT "A")

JUDICIAL NOTICE PURSUANT N.R.S. 47.150(2)
OF MOTION FOR LEAVE OF COURT TO FILE
JUDICIAL NOTICE PURSUANT N.R.S. 47.140
THAT THE LAW-OF-THE- NEVADA- SUPREME COURT ...
THEREFORE APPEALABLE UNDER N.R.A.P. 3A(b)(1)



A-18-783689-W
MOT
Mallon
4811648

RECEIVED LCC 11 FORM 24.014

JAN 22 2019

CLERK OF THE COURT

15 COMES NOW, Brian O'Keefe, plaintiff pro per, to humbly keep this
16 court apprised of the "result" (see EXHIBIT "A") derived by the
17 "CAUSE" of the "ORDER REDESIGNATING APPEAL", FILED on 1/10/2019.

● (JUDICIAL NOTICE AS ADVISEMENT TO FUTURE CASES MAKING AN APPEAL)

18 O'Keefe only wished to have the Nevada Supreme Court
19 recognize their own law-of-the- N.S.C. as delineated by their
20 own rules as N.R.A.P. 3A(b)(1) and common law decision of
21 Trujillo v. Nevada, 129 Nev. Adv. Rep. 75 (Oct. 10, 2013) where any denial
22 of a petition for a writ of coram nobis is treated as a civil appeal.

23 Dated this 14th day of January 2019 pursuant NRS-208.165, by: Brian K. O'Keefe
24 INVOKES HAINES v. KERNER, 404 U.S. 519, 520 (1972) (per curiam); Brian K. O'Keefe
25 see also Nev. Const., art. I § 2 pro per # 90244

EXHIBIT A

- 8TH CASE NO. A-18-783689-W

SUPREME COURT OF NEVADA CASE NO. 77797

FROM 8TH JUDICIAL DISTRICT COURT

HONORABLE JERRY A. WIEBE, District Judge

Dept. XXV

COPY OF JUDICIAL NOTICE

FILED IN S.C.N. BY

MAIL ON 1/15/2019 (Tuesday)

BRASS SLIP NO. 2285003

EXHIBIT A

#001

LCC

Court's
copy

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE

Case No. 77797

#90244

Appellant

8TH JUDICIAL CODE NO. A-18-783689-W

-VS-

THE STATE OF NEVADA

* CASE OF FIRST IMPRESSION

Respondent

MOTION FOR LEAVE OF COURT TO FILE

JUDICIAL NOTICE PURSUANT N.R.S. 47.140

THAT THE LAW OF THE NEVADA SUPREME

COURT IS SUCH THAT A PETITION FOR A

WRIT OF CORAM NOBIS ON APPEAL IS

TREATED AS A CIVIL APPEAL BY THE "HOLDINGS"

OF THIS COURT IN TRUJILLO v. STATE, 129 NEV. ADV. REP. 75

FILED OCTOBER 10, 2013 BY GIBBONS, DOUGLAS AND

SARITA, IS THEREFORE APPEALABLE UNDER N.R.A.P. 3A(6)(1)

• INVOICE Nev. Const. Article I § 2 (3); U.S. XIV Const. Amend and TRUJILLO v. State, supra.

Comes now, Brian O'Keefe, plaintiff pro per, to humbly advise this Court's, ostensibly, "staff attorney" to the law of the Nevada Supreme Court on the issue at hand, concerning the treatment of the denial of a petition for coram-nobis on appeal.

• (SEE ORDER REDESIGNATING APPEAL, NO. 77797 FILED JAN. 10, 2019)

Pursuant the "HOLDINGS" of this Court, by a (3) JUDGE PANEL, unless this Court chooses now, "sua-sponte," to take this matter to an "EN-BANC COURT," as already delineated by Judges GIBBONS, "DOUGLAS" WHO WRITE OPINION, and SARITA, the issue has already been adjudicated thereby invoking "Judicial Estoppel" and or "Collateral Estoppel" as "issue preclusion." Future cases, such as O'Keefe, may depend on it. Respectfully Submitted, Brian O'Keefe

INVOKE HAINES v. KERNER, 404 U.S. 519, 520 (1972) (per curiam) and Nev. Const. art. I § 2.

Dated this 14th day of January 2019 pursuant NRS 208.165/208.166 & 1746.

EXHIBIT "A"

LCC LL FORM 28.014

1 CERTIFICATE OF SERVICE

2 I do certify that I mailed a true and correct copy of the foregoing
 3 (check appropriate box)

4 ☐ Opening Brief

5 ☐ Reply Brief

6 ☐ Motion: _____

7 ☐ Petition: _____

8 ☒ Other: JUDICIAL NOTICE

9 to the below address(es) on this 15th day of JANUARY, 2019, by
 10 placing same in the hands of prison staff for posting in the U.S. Mail, per

11 Nev.R.App.P. 25: BREXID SVP No. 2285003

12 Clerk of the Court

13 Nevada Supreme Court

14 201 S. Carson St.

Suite 201

Prison City, Nevada 89701

15 Attorney For _____

16 ☒ and

17 EIGHTH JUDICIAL CLERK OF COURT

18 200 LEWIS AVE.

19 3RD FLOOR

ATTN: CASE NO. A-18-703609-W

Las Vegas, Nevada 89155

21 Brian K. O'Keefe

22 Brian K. O'Keefe # 90254

23 Lovelock Correctional Center

24 1200 Prison Road

Lovelock, Nevada 89419

25 Plaintiff

In Pro Se

Brian Kerry O'Keefe
#90244
LOVELOCK CORR. CTR.
1200 Prison Rd.
LOVELOCK, NV. 89419

Lovelock Correctional Center

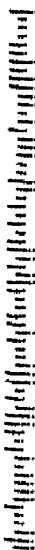


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Alert of the Court (8711 Jud. Dist. Ct.)
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Las Vegas, Nevada 89155

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MAR 21 2019

CLERK OF COURT

MOTN
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

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

BRIAN KERRY O'KEEFE
Plaintiff
-vs-
THE STATE OF NEVADA, et al.
Defendant(s)

Case No. A-18-783689-W
Dept. No. XXX
SEE AFFIDAVIT ATTACHED

MOTION THE COURT TO TAKE JUDICIAL
NOTICE C.S. GIBBONS OF THE NEVADA
SUPREME COURT HAS NOTICED AND PROVIDED
THIS COURT OPPORTUNITY TO RECONSIDER ITS
DECEMBER 5, 2018 DECISION WHEN FILING ORDER
AS AN EQUITABLE MEANS BASED ON EXHIBIT 3

Comes Now, Brian O'Keefe, pro se plaintiff, to humbly
request this Court reconsider its oral denial on 12/05/18.

This Court must recognize the attached certified J.O.C.,
to the original Petition for Civil Writ of Coram Nobis as
EXHIBIT 3, manifest a jury verdict on Count 1 as a
simple misdemeanor. Moreover, the INFORMATION filed was a
single charging instrument, for the Count 6 (F) Burglary
was based on any of the first five felony counts to sustain
the required felonious entry. (see EXHIBIT 5, INFORMATION 0202723)

Dated March 17, 2019 pursuant NRS 206.165, by Brian K. O'Keefe
INVOKE HAINES v. KERNER, 404 U.S. 515, 520 (1972) (per curiam); N.R. Civ. P. 8.
(simple pleading, pro se leniency mandated.)

A-18-783689-W
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MAR 21 2019

CLERK OF THE COURT

LCC LL FORM 24.014

AFFIDAVIT OF Brian Kerry O'Keefe

STATE OF NEVADA)
COUNTY OF PERKINS) SS:

CASE NO. A-18-783689-W

I, Brian Kerry O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian Kerry O'Keefe.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. This Court, J. Wiene, has now been issued an ORDER from the C.J. GIBBONS of the Nevada Supreme Court to, ostensibly, reconsider his 12/05/18 decision and enter the formal decision. (see son case No. 77797, order filed 3/11/19)

4. Remember, the Court Rooms are for the people with real issues that this Court is and has been elected to hear and render equitable decisions.

5. Recognize the "Rule of Law" and your own Oath of Office, given under Nev. Const., Article 15 § 2.

6. Reconsider Plaintiff O'Keefe's "PRAYER FOR RELIEF" in his Petition For CIVIL WRIT OF CORAM NOBIS which indicated in Section V, page 6, APPOINTMENT OF COUNSEL AND EVIDENTIARY WARRANTED to conclusion which requested this Court to issue WRIT [ORDER] of Coram Nobis and hold hearing SINCE THIS COURT WAS NOT CONVINCED pursuant your oral decision 12/5/18 (id. ¶ 6 of Petition for Coram Nobis filed Oct 30 2018) see Section V and VI., CONCLUSION

- 2 -

7. Recognize this act as a serious fundamental-
misconduct of justice, as a case of first-
impression, where this Court has a duty
to correct this gross past judicial error where
the state clearly did not follow the letter
of the law and we all "know" why.

8. Realize, petitioner O'Keefe is only seeking the
proper remedy by law and is not asking
this Court to commit simulated facts but to
do the correct thing and issue ultimately
the writ of Coram Nobis to fix this voidable
judgment that is nothing but a defective verdict.

9. Recognize generally speaking, the "exhaustion doctrine"
was created for state courts to fix their own
errors by having the opportunity to do such and
if this Court honestly, and truly does not
know that a simple misdemeanor battery, or a proper
challenge cannot sustain a felonious intent requirement,
then this Court needs briefing and evidentiary hearing.

I declare under penalty of perjury that the foregoing is true and correct, and
that this document is executed without benefit of a notary pursuant to NRS 208.165
and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Sunday 17th day of March, 2019

Don L. O'Keefe

A-18-783689-W

/// Petition Denied August 20, 2018 based on this Voidable Judgment.
/// Petition for Writ of Coram Nobis is the last
/// step possible (remedy) for an expired case, criminal.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION THE COURT TO TAKE JUDICIAL NOTICE ... to the below address(es) on this 18th day of March, 2019, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Brass Slip No. 2285837

Clerk of the Court
Steven Grierson, 8TH Jud. Dist. Ct.
200 Lewis Ave., 3RD FLR
Las Vegas, Nevada 89108

Clerk to Serve Clark County Dist. Attorney
via cm/ecf electronic filing system where
District Attorney is registered cm/ecf participant.

Brian K. O'Keefe
Brian K. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Motion the Court to Take Judicial Notice ... filed in District Court Case No. A-18-783689-W does not contain the social security number of any person.

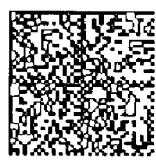
Dated this 18th day of March, 2019.

Brian K. O'Keefe
Brian K. O'Keefe
Plaintiff In Pro Se

- 4 -

Brian O'Neel # 80244
LOVELOCK CORR. CTR.
1200 Terison Rd.
LOVELOCK, NV. 89749

Lovelock Correctional Center

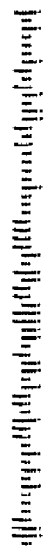


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Steven Brewer, Clerk of Court
200 Lewis Ave., 3RD FLR
CAR NEVAS, NV. 89155

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MAR 21 2019

CLERK OF COURT

SUPP
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Defendant In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,)
Plaintiff,)
-vs-)
BRIAN KERRY O'KEEFE,)
Defendant.)

Case No. 08C250630

Dept. No. XVII

A-18-783889-W
SUPP
Supplemental
4824798



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MAR 21 2019

CLERK OF THE COURT

SUPPLEMENTAL AUTHORITY OF
• DOTSON v. NEVADA, 114 NEV. 582 (1998)
WHERE THE LAW OF THE SUPREME COURT IS
NRS 209.151(1)(d) IS INAPPLICABLE TO
CHAPTER 34 HABEAS CORPUS ACTIONS, PERIOD!

LCC LL FORM 24-014

COMES NOW, Brian O'Keefe, pro per, to humbly bring to this Court's attention the authority of the Nevada Supreme Court in Dotson v. THE STATE OF NEVADA, supra which effects the state's entire argument. Naturally, the state cannot have it both ways where the state argues it is an improper civil action O'Keefe files, and a challenge via a post 34 action challenging his judgment of conviction, contrary to "Dotson". Civil actions are appropriate in criminal cases involving abuse of process with moral turpitude and a lack of equitable decisions by the state. Dated this 17th day of March 2019, pursuant NRS 208.165, by Brian K. O'Keefe INVOLVE HAINES v. KERRICK, 404 US 58, 520 (1972); Nev. Const., Art. I & 2. Brian K. O'Keefe

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Supplemental Authority Dotsen v. Nevada, 114 Nev. 582 to the below address(es) on this 18th day of March, 2019, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

Brian O'Keefe
Brian O'Keefe # 90244
 Lovelock Correctional Center
 1200 Prison Road
 Lovelock, Nevada 89419
Defendant In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Supplemental Authority --- filed in District Court Case No. CZ50670 does not contain the social security number of any person.

Dated this 18th day of March, 20 19

Brian O'Keefe
Brian O'Keefe
Defendant In Pro Se

2A

FILED

MAR 21 2019

[Signature]
CLERK OF COURT

1 Name Brian Kerry O'Keefe
2 Address L.O.C. 1200 Prison Road
3 City Loveock, Nevada State 89419
4 Email _____
5 Telephone _____

District Court
Clark County, Nevada

9 BRIAN KERRY O'KEEFE
10 _____
11 Plaintiff,
12 _____
13 vs.
14 THE STATE OF NEVADA, et al.
15 _____
16 Defendant

Case No.: A-18-783689-W

Department: XXX

Notice of Motion

18 Please take notice that the hearing on MOTION THE COURT TO TAKE JUDICIAL
19 NOTICE C.J. BIBBONS OF THE NEVADA SUPREME COURT ... EXHIBIT 3
20 will be heard on _____, 2019 in Department XXX Floor _____ Courtroom _____
21 at the hour of _____ AM/PM.

Dated this 17th day of MARCH, 2019

Brian K. O'Keefe #90244

RECEIVED

A-18-783689-W
NOTM
Notice of Motion
4824799



Notice of Motion - I

CCCL FORM 24,070

CLERK OF THE COURT



**DISTRICT COURT
CLARK COUNTY, NEVADA**

BRIAN O'KEEFE,)
)
Plaintiff,) Case No. A-18-783689-W
vs.) Dept. XXX
)
THE STATE OF NEVADA,)
)
Defendant.)
_____)

ORDER

This matter, having come before the court on December 5, 2018, on a Defendant's Writ of Mandamus or, in the Alternative, Writ of Coram Nobis, and the court being fully advised in the premises herein, does hereby find the following:

FINDINGS OF FACT

1. An Information was filed on July 6, 2004, charging Brian Kerry O'Keefe, (hereinafter "Defendant") with one count of Battery With Intent To Commit A Crime (Felony — NRS 200.400), three counts of Sexual Assault (Felony — NRS 200.364, 200.366), one count of Attempt Sexual Assault (Felony — NRS 193.330, 200.364, 200.366), and one count of Burglary (Felony — NRS 205.060).
2. Defendant pled not guilty to the charges alleged against him. Trial commenced on October 25, 2004 and concluded on October 28, 2004. The jury returned a verdict of guilty for count one - Battery (Misdemeanor); and count six - Burglary (Category B Felony). Defendant was sentenced on December 27, 2004, on count six to a minimum

1 of twenty-four months and a maximum of one hundred twenty months in the Nevada
2 Department of Corrections. Defendant's sentence was suspended and he was placed
3 on probation for an indeterminate period not to exceed five (5) years. For count one
4 Defendant was sentenced to credit for time served.
5

6 3. The Judgment of Conviction was filed on January 3, 2005. Defendant's Notice of
7 Appeal was filed on February 1, 2005. The Nevada Supreme Court affirmed
8 Defendant's Conviction of January 23, 2006. See O'Keefe v. State, Order of
9 Affirmance No. 44644 (Jan. 23, 2006). Remittitur issued on December 13, 2006.
10

11 4. Defendant filed a Petition for Writ of Mandamus seeking transcripts, his file, etc. on
12 July 24, 2006. The State filed its Opposition on August 7, 2006. The Order denying
13 this Petition was filed August 17, 2006. On October 19, 2006, Defendant filed a
14 Motion for New Trial and a Supplement to that motion on November 14, 2006. The
15 motion was denied on December 18, 2006. Defendant filed a Notice of Appeal on
16 December 26, 2006. The Nevada Supreme Court affirmed the district court's denial of
17 Defendant's Motion for New Trial on March 24, 2008; Remittitur issued April 18,
18 2008. See O'Keefe v. State, Order of Affirmance Nos. 48673 and 49329 (March 24,
19 2008).
20
21

22 5. Defendant filed a Petition for Writ of Habeas Corpus on February 5, 2007. Defendant
23 filed a Supplement to his Petition on February 15, 2007. The State filed its Opposition
24 on April 6, 2007. The court denied his Petition April 11, 2007. Defendant filed a
25 Notice of Appeal on April 19, 2007. The Findings of Fact, Conclusions of Law, and
26 Order was filed May 17, 2007, with Notice of Entry on May 21, 2007. The Nevada
27
28

1 Supreme Court affirmed the district court's denial of Defendant's Petition on March
2 24, 2008; Remittitur issued April 18, 2008. See O'Keefe v. State, Order of Affirmance
3 Nos. 48673 and 49329 (March 24, 2008).

4
5 6. An Order Honorably Discharging Probationer was filed September 10, 2008,
6 discharging Defendant from Probation. An Order for Disposal of Exhibits was filed
7 October 17, 2012.

8
9 7. On December 6, 2013, Defendant filed a Petition for Writ of Mandamus or, in the
10 Alternative, Writ of Coram Nobis in C202793. The State filed a response on. On
11 January 29, 2014, the Court heard and denied the Petition for Writ of Mandamus or,
12 in the Alternative, Writ of Coram Nobis .

13
14 8. On October 30, 2018, Defendant filed the instant Writ of Mandamus or, in the
15 Alternative, Writ of Coram Nobis in A-18-783689-W, which was heard and denied on
16 December 5, 2018 and which was decided upon its merit.

17
18 9. Defendant appealed the denial of his Writ of Mandamus or, in the Alternative, Writ of
19 Coram Nobis in A-18-783689-W to the Supreme Court;

20 10. On March 11, 2019, the Nevada Supreme Court issued an order in Appeal case
21 77797 instructing the district court to enter a "*written order memorializing the court's*
22 *decision made on December 5, 2018*", within 60 days. This Order is issued to satisfy
23 that instruction.
24

25 CONCLUSIONS OF LAW

26 1. Pursuant to State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005),
27 it is mandatory for the Court to address the statutory procedural default rules when
28

1 considering post-conviction habeas petitions;

2 2. The mandatory provisions of NRS 34.726 state:

3 1. Unless there is good cause shown for delay, a petition that challenges the validity
4 of a judgment or sentence must be filed within 1 year after entry of the judgment of
5 conviction or, if an appeal has been taken from the judgment, within 1 year after
6 the supreme court issues its remittitur. For the purpose of this subsection, good
cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

7 (a) That the delay is not the fault of the petitioner; and

8 (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.
9

10 3. NRS 34.810(1) (b) (2) requires a court to dismiss a petition if the petitioner's
11 conviction was the result of a trial and the grounds for the petition could have been
12 raised in a direct appeal. A petitioner can avoid dismissal if he meets the burden of
13 pleading and proving specific facts that demonstrate good cause for his failure to
14 present a timely claim and actual prejudice. NRS 34.810(3);
15

16 4. In *Gonzales v. State*, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court
17 rejected a habeas petition that was filed two days late, pursuant to the "clear and
18 unambiguous" mandatory provisions of NRS 34.726(1). *Gonzales* reiterated the
19 importance of filing the petition with the district court within one year mandate,
20 absent a showing of "good cause" for the delay in filing. *Gonzales*, 53 P.3d at 902.
21

22 5. In order to demonstrate good cause, a petitioner must show that an impediment
23 external to the defense prevented him or her from complying with the state procedural
24 default rules." *Hathaway v. State*, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
25 *Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); *Lozada v. State*,
26 110 Nev. 349, 353 871 P.2d 944, 946 (1994); *Passanisi v. Director*, 105 Nev. 63, 769
27
28

1 P.2d 72 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252
2 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988). Such an external
3 impediment could be ‘that the factual or legal basis for a claim was not reasonably
4 available to counsel, or that ‘some interference by officials’ made compliance
5 impracticable.” Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478,
6 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
7 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).
8

- 9
10 6. To find good cause there must be a “substantial reason: one that affords a legal
11 excuse.” Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773
12 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
13 1981). The lack of assistance of counsel when preparing a petition, and even the
14 failure of trial counsel, not to forward a copy of the file to a petitioner, have been
15 found to be non-substantial, not constitution good cause. See Phelps v. Director
16 Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v.
17 State, 111 Nev. 335, 890 P.2d 797 (1995).
18
19
20 7. NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if “[a]
21 period exceeding five years between the filing of a judgment of conviction, an order
22 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
23 conviction and the filing of a petition challenging the validity of a judgment of
24 conviction....” The statute also requires that the State plead laches in its motion to
25 dismiss the petition. NRS 34.800(2).
26
27 8. A colorable showing of actual innocence may excuse a failure to demonstrate good
28

1 cause under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117
2 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842 921
3 P.2d 920, 922 (1996). “[A]ctual innocence’ means factual innocence, not mere legal
4 insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). “To avoid
5 application of the procedural bar to claims attacking the validity of the conviction, a
6 petitioner claiming actual innocence must show that it is more likely than not that no
7 reasonable juror would have convicted him absent a constitutional violation.”
8
9 *Pellegrini*, 117 Nev. At 887, 34 P.3d at 537 (citing *Schlup v. Delo*, 513 U.S. 298, 327
10 (1995)).
11

12 DISCUSSION

13 Upon review of Defendant’s Writ of Mandamus or, in the Alternative, Writ of Coram
14 Nobis, the Court failed to address in its Order denying Defendant’s Writ the following: 1)
15 the procedural default rules which apply to Defendant’s petition, 2) the prejudice to the State
16 in responding to the petition or to conduct a retrial, due to the age of the case, and 3) whether
17 Defendant was actually innocent and a failure to consider his petition would result in a
18 fundamental miscarriage of justice.
19
20

21 Defendant’s petition was thirteen years after the judgment of conviction was entered in
22 this case and also four years after the Nevada Supreme Court issued a Remittitur on
23 Defendant’s first appeal. Defendant’s first Petition for Writ of Habeas, filed on July 14,
24 2003, and was denied due to the one year procedural time bar found in NRS 34.726.
25

26 The Petition for Writ of Habeas at issue in this order was filed on October 30, 2018, and
27 could have been denied, as it was successive pursuant to 34.810, and it was time barred
28

1 pursuant to NRS 34.726(1), since it was filed more than one year after the conviction.

2 Additionally, NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if
3 “[a] period exceeding five years between the filing of a judgment of conviction, an order
4 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
5 conviction and the filing of a petition challenging the validity of a judgment of
6 conviction....” The statute also requires that the State plead laches in its motion to dismiss
7 the petition. NRS 34.800(2).
8

9 To overcome procedural barriers to filing successive and time barred petitions, a
10 petitioner must demonstrate good cause for delay. To demonstrate good cause, a petitioner
11 must show that an impediment external to the defense prevented him or her from complying
12 with the state procedural default rules. Such an external impediment could be ‘that the
13 factual or legal basis for a claim was not reasonably available to counsel, or that ‘some
14 interference by officials’ made compliance impracticable.” *Hathaway*, 71 P.3d at 506
15 (citations omitted). There was no such showing in the present case.
16
17

18 To find good cause there must be a “substantial reason: one that affords a legal excuse.”
19 *Hathaway*, 71 P.3d at 506 (citations omitted). No such substantial reason has been provided
20 to this Court.
21

22 A colorable showing of actual innocence may excuse a failure to demonstrate good cause
23 under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860,
24 887, 34 P.3d 519, 537 (2001) (additional citations omitted).
25

26 Although, Defendant failed to demonstrate good cause in filing his time barred
27 successive petition, his petition was based on a claim of actual innocence, and this court
28

1 wants to be sure that an innocent man is not living with a felony conviction that would be
2 improper, and consequently, this Court undertakes the following analysis.

3 Mr. O'Keefe argues that because he was acquitted on Counts 1-5, the underlying basis
4 for his conviction of Burglary (Count 6) was not present, and consequently, he should have
5 been acquitted of Count 6 also. Mr. O'Keefe is incorrect that he was acquitted of Counts 1-
6 5. In fact, he was found guilty of Count 1 - Battery (M), and found not guilty of Counts 2-5.
7 (See Verdict, dated Oct 28, 2004, attached hereto).
8

9 Burglary is defined as follows:
10

11 Except as otherwise provided in subsection 5, a person who, by day or night, enters any
12 house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or
13 other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane,
14 glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or
battery on any person or any felony, or to obtain money or property by false pretenses, is
guilty of burglary.

15
16 (NRS 205.060[1]), emphasis added.

17 When Mr. O'Keefe's case was tried to a jury, the Jury was instructed that "Battery means
18 any willful and unlawful use of force or violence upon the person of another. Any person
19 who commits a battery upon another with the specific intent to commit a Sexual Assault is
20 guilty of the offense of Battery With Intent to Commit Sexual Assault." (See Instruction 4,
21 attached hereto).
22

23 The Jury was further instructed that "Every person who, by day or night, enters any
24 apartment with the intent to commit battery and/or sexual assault and/or a felony therein is
25 guilty of burglary." (See Instruction 12, attached hereto).
26

27 It is interesting to note that apparently while deliberating, the Jury had a question for the
28

1 Court as follows: "Please clarify the difference between "battery with intent to commit a
2 crime: and battery. Does the "intent to commit a crime" have to include sexual assault?"
3 The Court's response was "Please refer to and re-read Instructions number 3 and 4." (See
4 Juror Question and Response, attached hereto). Thereafter, the Jury returned a verdict of
5 guilty with regard to battery, but not with the "intent to commit a crime."
6

7 The Jury may have been confused because Instruction 4 discusses the possibility of a
8 conviction for "Battery With Intent to Commit Sexual Assault," but the Jury Verdict Form
9 did not provide that as an option. The Verdict form only provided the options of "Battery
10 With Intent to Commit a Crime" or "Battery." (See Verdict Form)
11

12 Regardless of whether the Jury was confused by the instructions or the verdict form, the
13 Jury did convict the Defendant of "battery" (which means that they found a willful and
14 unlawful use of force or violence upon the person of another), and "burglary," (which means
15 that they found that the Defendant entered an apartment with the intent to commit battery or
16 a felony therein). The Defendant's argument that the conviction of battery cannot support
17 the conviction of burglary is simply inconsistent with the language of NRS 205.060. That
18 statute specifically indicates that a person who enters an apartment or other structure with
19 the intent to commit a battery, is guilty of burglary. (See NRS 205.060).
20
21

22 O'Keefe argues in his Writ of Coram Nobis that he lived and cohabited in the apartment
23 which he was charged with entering. (See pg. 3 of Writ of Coram Nobis). The Nevada
24 Supreme Court has held that "one cannot burglarize his own home so long as he has an
25 absolute right to enter the home." *State v. White*, 130 Nev. 533, 539, 330 P.3d 482 (2014).
26 The Court further indicated that "ownership may be one factor to consider, [but] the
27
28

1 appropriate question is whether the alleged burglar has an absolute, unconditional right to
2 enter the home.” *Id.*¹ Other than Mr. O’Keefe’s allegation or contention that he “lived
3 there,” there is no evidence supporting an “absolute, unconditional right to enter the home.”
4 Without more of a record, and without any supporting evidence being submitted by Mr.
5 O’Keefe, this Court must assume, based upon the conviction, that he did not have such an
6 “absolute, unconditional right to enter the home.”
7


8 Based upon all of the information, evidence, and documentation submitted to this Court,
9 the Court cannot find that Defendant has established his actual innocence. The evidence
10 and argument submitted are simply insufficient to support Mr. O’Keefe’s Petition for Writ of
11 Coram Nobis.
12

13 **ORDER**

14 Defendant’s Writ of Mandamus or in the Alternative Writ of Coram Nobis is denied
15 as time barred and successive and his claim of actual innocence is unfounded, therefore, his
16 Petition is hereby dismissed.
17

18 IT IS SO ORDERED.

19 DATED and DONE this 22 day of March, 2019.


20
21 
22
23 JERRY A. WIESE II
24 DISTRICT COURT JUDGE, DEPT. XXX
25

26
27 ¹ In *State v. White*, the evidence indicated that although White had orally agreed to stay elsewhere during the
28 week, he still maintained an absolute right to enter the residence and did not forfeit any possessory right he had in it. Further, he could not be ejected or prevented from entering the residence, especially since he still retained his keys to the house and entered it on a weekly basis to stay with his children on weekends. The Court notes that no similar evidence of Mr. O’Keefe’s possessory interest in the residence was presented in the Writ of Coram Nobis.

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Defendant.

**NOTICE OF ENTRY OF
ORDER: ORDER**



DISTRICT COURT JUDGE

1 **CERTIFICATE OF SERVICE**

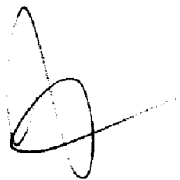
2
3 I hereby certify that on the date filed, a copy of this Order was electronically served
4 through the Eighth Judicial District Court EFP system, or, if no e-mail was provided,
5 mailed or placed in the Clerk's Office attorney folder for:

6 Brian O'Keefe
7 #90244
8 Lovelock Correctional Center
9 1200 Prison Road
10 Lovelock, NV 89419

11 Steven Wolfson
12 Clark County District Court Attorney
13 200 Lewis Avenue
14 Las Vegas, NV 89155-2212

15 The Supreme Court of Nevada
16 Elizabeth Brown, Clerk of the Court
17 408 East Clark Avenue
18 Las Vegas, NV 89101

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Tatyana Ristic, JEA



DISTRICT COURT
CLARK COUNTY, NEVADA

BRIAN O'KEEFE,

Plaintiff,

vs.

THE STATE OF NEVADA,

Defendant.

Case No. A-18-783689-W

Dept. XXX

ORDER

This matter, having come before the court on December 5, 2018, on a Defendant's Writ of Mandamus or, in the Alternative, Writ of Coram Nobis, and the court being fully advised in the premises herein, does hereby find the following:

FINDINGS OF FACT

1. An Information was filed on July 6, 2004, charging Brian Kerry O'Keefe, (hereinafter "Defendant") with one count of Battery With Intent To Commit A Crime (Felony — NRS 200.400), three counts of Sexual Assault (Felony — NRS 200.364, 200.366), one count of Attempt Sexual Assault (Felony — NRS 193.330, 200.364, 200.366), and one count of Burglary (Felony — NRS 205.060).
2. Defendant pled not guilty to the charges alleged against him. Trial commenced on October 25, 2004 and concluded on October 28, 2004. The jury returned a verdict of guilty for count one - Battery (Misdemeanor); and count six - Burglary (Category B Felony). Defendant was sentenced on December 27, 2004, on count six to a minimum

1 of twenty-four months and a maximum of one hundred twenty months in the Nevada
2 Department of Corrections. Defendant's sentence was suspended and he was placed
3 on probation for an indeterminate period not to exceed five (5) years. For count one
4 Defendant was sentenced to credit for time served.
5

- 6 3. The Judgment of Conviction was filed on January 3, 2005. Defendant's Notice of
7 Appeal was filed on February 1, 2005. The Nevada Supreme Court affirmed
8 Defendant's Conviction of January 23, 2006. See O'Keefe v. State, Order of
9 Affirmance No. 44644 (Jan. 23, 2006). Remittitur issued on December 13, 2006.
10
11 4. Defendant filed a Petition for Writ of Mandamus seeking transcripts, his file, etc. on
12 July 24, 2006. The State filed its Opposition on August 7, 2006. The Order denying
13 this Petition was filed August 17, 2006. On October 19, 2006, Defendant filed a
14 Motion for New Trial and a Supplement to that motion on November 14, 2006. The
15 motion was denied on December 18, 2006. Defendant filed a Notice of Appeal on
16 December 26, 2006. The Nevada Supreme Court affirmed the district court's denial of
17 Defendant's Motion for New Trial on March 24, 2008; Remittitur issued April 18,
18 2008. See O'Keefe v. State, Order of Affirmance Nos. 48673 and 49329 (March 24,
19 2008).
20
21 5. Defendant filed a Petition for Writ of Habeas Corpus on February 5, 2007. Defendant
22 filed a Supplement to his Petition on February 15, 2007. The State filed its Opposition
23 on April 6, 2007. The court denied his Petition April 11, 2007. Defendant filed a
24 Notice of Appeal on April 19, 2007. The Findings of Fact, Conclusions of Law, and
25 Order was filed May 17, 2007, with Notice of Entry on May 21, 2007. The Nevada
26
27
28

1 Supreme Court affirmed the district court's denial of Defendant's Petition on March
2 24, 2008; Remittitur issued April 18, 2008. See O'Keefe v. State, Order of Affirmance
3 Nos. 48673 and 49329 (March 24, 2008).

- 4
- 5 6. An Order Honorably Discharging Probationer was filed September 10, 2008,
6 discharging Defendant from Probation. An Order for Disposal of Exhibits was filed
7 October 17, 2012.
- 8
- 9 7. On December 6, 2013, Defendant filed a Petition for Writ of Mandamus or, in the
10 Alternative, Writ of Coram Nobis in C202793. The State filed a response on. On
11 January 29, 2014, the Court heard and denied the Petition for Writ of Mandamus or,
12 in the Alternative, Writ of Coram Nobis .
- 13
- 14 8. On October 30, 2018, Defendant filed the instant Writ of Mandamus or, in the
15 Alternative, Writ of Coram Nobis in A-18-783689-W, which was heard and denied on
16 December 5, 2018 and which was decided upon its merit.
- 17
- 18 9. Defendant appealed the denial of his Writ of Mandamus or, in the Alternative, Writ of
19 Coram Nobis in A-18-783689-W to the Supreme Court;
- 20
- 21 10. On March 11, 2019, the Nevada Supreme Court issued an order in Appeal case
22 77797 instructing the district court to enter a "*written order memorializing the court's*
23 *decision made on December 5, 2018*", within 60 days. This Order is issued to satisfy
24 that instruction.

25 CONCLUSIONS OF LAW

- 26 1. Pursuant to State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005),
27 it is mandatory for the Court to address the statutory procedural default rules when
28

1 considering post-conviction habeas petitions;

2 2. The mandatory provisions of NRS 34.726 state:

3 1. Unless there is good cause shown for delay, a petition that challenges the validity
4 of a judgment or sentence must be filed within 1 year after entry of the judgment of
5 conviction or, if an appeal has been taken from the judgment, within 1 year after
6 the supreme court issues its remittitur. For the purpose of this subsection, good
cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

7 (a) That the delay is not the fault of the petitioner; and

8 (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.
9

10 3. NRS 34.810(1) (b) (2) requires a court to dismiss a petition if the petitioner's
11 conviction was the result of a trial and the grounds for the petition could have been
12 raised in a direct appeal. A petitioner can avoid dismissal if he meets the burden of
13 pleading and proving specific facts that demonstrate good cause for his failure to
14 present a timely claim and actual prejudice. NRS 34.810(3);

15
16 4. In *Gonzales v. State*, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court
17 rejected a habeas petition that was filed two days late, pursuant to the "clear and
18 unambiguous" mandatory provisions of NRS 34.726(1). *Gonzales* reiterated the
19 importance of filing the petition with the district court within one year mandate,
20 absent a showing of "good cause" for the delay in filing. *Gonzales*, 53 P.3d at 902.
21

22
23 5. In order to demonstrate good cause, a petitioner must show that an impediment
24 external to the defense prevented him or her from complying with the state procedural
25 default rules." *Hathaway v. State*, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
26 *Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); *Lozada v. State*,
27 110 Nev. 349, 353 871 P.2d 944, 946 (1994); *Passanisi v. Director*, 105 Nev. 63, 769
28

1 P.2d 72 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252
2 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988). Such an external
3 impediment could be 'that the factual or legal basis for a claim was not reasonably
4 available to counsel, or that 'some interference by officials' made compliance
5 impracticable." Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478,
6 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
7 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).
8

- 9
10 6. To find good cause there must be a "substantial reason: one that affords a legal
11 excuse." Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773
12 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
13 1981). The lack of assistance of counsel when preparing a petition, and even the
14 failure of trial counsel, not to forward a copy of the file to a petitioner, have been
15 found to be non-substantial, not constitution good cause. See Phelps v. Director
16 Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v.
17 State, 111 Nev. 335, 890 P.2d 797 (1995).
18
19
20 7. NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if "[a]
21 period exceeding five years between the filing of a judgment of conviction, an order
22 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
23 conviction and the filing of a petition challenging the validity of a judgment of
24 conviction...." The statute also requires that the State plead laches in its motion to
25 dismiss the petition. NRS 34.800(2).
26
27 8. A colorable showing of actual innocence may excuse a failure to demonstrate good
28

1 cause under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117
2 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842 921
3 P.2d 920, 922 (1996). “[A]ctual innocence’ means factual innocence, not mere legal
4 insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). “To avoid
5 application of the procedural bar to claims attacking the validity of the conviction, a
6 petitioner claiming actual innocence must show that it is more likely than not that no
7 reasonable juror would have convicted him absent a constitutional violation.”
8
9 *Pellegrini*, 117 Nev. At 887, 34 P.3d at 537 (citing *Schlup v. Delo*, 513 U.S. 298, 327
10 (1995)).
11

12 DISCUSSION

13 Upon review of Defendant’s Writ of Mandamus or, in the Alternative, Writ of Coram
14 Nobis, the Court failed to address in its Order denying Defendant’s Writ the following: 1)
15 the procedural default rules which apply to Defendant’s petition, 2) the prejudice to the State
16 in responding to the petition or to conduct a retrial, due to the age of the case, and 3) whether
17 Defendant was actually innocent and a failure to consider his petition would result in a
18 fundamental miscarriage of justice.
19
20

21 Defendant’s petition was thirteen years after the judgment of conviction was entered in
22 this case and also four years after the Nevada Supreme Court issued a Remittitur on
23 Defendant’s first appeal. Defendant’s first Petition for Writ of Habeas, filed on July 14,
24 2003, and was denied due to the one year procedural time bar found in NRS 34.726.
25

26 The Petition for Writ of Habeas at issue in this order was filed on October 30, 2018, and
27 could have been denied, as it was successive pursuant to 34.810, and it was time barred
28

1 pursuant to NRS 34.726(1), since it was filed more than one year after the conviction.

2 Additionally, NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if
3 “[a] period exceeding five years between the filing of a judgment of conviction, an order
4 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
5 conviction and the filing of a petition challenging the validity of a judgment of
6 conviction....” The statute also requires that the State plead laches in its motion to dismiss
7 the petition. NRS 34.800(2).
8

9 To overcome procedural barriers to filing successive and time barred petitions, a
10 petitioner must demonstrate good cause for delay. To demonstrate good cause, a petitioner
11 must show that an impediment external to the defense prevented him or her from complying
12 with the state procedural default rules. Such an external impediment could be ‘that the
13 factual or legal basis for a claim was not reasonably available to counsel, or that ‘some
14 interference by officials’ made compliance impracticable.” *Hathaway*, 71 P.3d at 506
15 (citations omitted). There was no such showing in the present case.
16
17

18 To find good cause there must be a “substantial reason: one that affords a legal excuse.”
19 *Hathaway*, 71 P.3d at 506 (citations omitted). No such substantial reason has been provided
20 to this Court.
21

22 A colorable showing of actual innocence may excuse a failure to demonstrate good cause
23 under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860,
24 887, 34 P.3d 519, 537 (2001) (additional citations omitted).
25

26 Although, Defendant failed to demonstrate good cause in filing his time barred
27 successive petition, his petition was based on a claim of actual innocence, and this court
28

1 wants to be sure that an innocent man is not living with a felony conviction that would be
2 improper, and consequently, this Court undertakes the following analysis.

3 Mr. O'Keefe argues that because he was acquitted on Counts 1-5, the underlying basis
4 for his conviction of Burglary (Count 6) was not present, and consequently, he should have
5 been acquitted of Count 6 also. Mr. O'Keefe is incorrect that he was acquitted of Counts 1-
6 5. In fact, he was found guilty of Count 1 - Battery (M), and found not guilty of Counts 2-5.
7 (See Verdict, dated Oct 28, 2004, attached hereto).
8

9
10 Burglary is defined as follows:

11 Except as otherwise provided in subsection 5, a person who, by day or night, enters any
12 house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or
13 other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane,
14 glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or
15 **battery** on any person or any felony, or to obtain money or property by false pretenses, is
16 guilty of burglary.

17
18 (NRS 205.060[1]), emphasis added.
19

20 When Mr. O'Keefe's case was tried to a jury, the Jury was instructed that "Battery means
21 any willful and unlawful use of force or violence upon the person of another. Any person
22 who commits a battery upon another with the specific intent to commit a Sexual Assault is
23 guilty of the offense of Battery With Intent to Commit Sexual Assault." (See Instruction 4,
24 attached hereto).

25 The Jury was further instructed that "Every person who, by day or night, enters any
26 apartment with the intent to commit battery and/or sexual assault and/or a felony therein is
27 guilty of burglary." (See Instruction 12, attached hereto).

28 It is interesting to note that apparently while deliberating, the Jury had a question for the

1 Court as follows: "Please clarify the difference between "battery with intent to commit a
2 crime: and battery. Does the "intent to commit a crime" have to include sexual assault?"
3 The Court's response was "Please refer to and re-read Instructions number 3 and 4." (See
4 Juror Question and Response, attached hereto). Thereafter, the Jury returned a verdict of
5 guilty with regard to battery, but not with the "intent to commit a crime."

7 The Jury may have been confused because Instruction 4 discusses the possibility of a
8 conviction for "Battery With Intent to Commit Sexual Assault," but the Jury Verdict Form
9 did not provide that as an option. The Verdict form only provided the options of "Battery
10 With Intent to Commit a Crime" or "Battery." (See Verdict Form)

12 Regardless of whether the Jury was confused by the instructions or the verdict form, the
13 Jury did convict the Defendant of "battery" (which means that they found a willful and
14 unlawful use of force or violence upon the person of another), and "burglary," (which means
15 that they found that the Defendant entered an apartment with the intent to commit battery or
16 a felony therein). The Defendant's argument that the conviction of battery cannot support
17 the conviction of burglary is simply inconsistent with the language of NRS 205.060. That
18 statute specifically indicates that a person who enters an apartment or other structure with
19 the intent to commit a battery, is guilty of burglary. (See NRS 205.060).

22 O'Keefe argues in his Writ of Coram Nobis that he lived and cohabited in the apartment
23 which he was charged with entering. (See pg. 3 of Writ of Coram Nobis). The Nevada
24 Supreme Court has held that "one cannot burglarize his own home so long as he has an
25 absolute right to enter the home." *State v. White*, 130 Nev. 533, 539, 330 P.3d 482 (2014).
26 The Court further indicated that "ownership may be one factor to consider, [but] the
27
28

1 appropriate question is whether the alleged burglar has an absolute, unconditional right to
2 enter the home." *Id.*¹ Other than Mr. O'Keefe's allegation or contention that he "lived
3 there," there is no evidence supporting an "absolute, unconditional right to enter the home."
4 Without more of a record, and without any supporting evidence being submitted by Mr.
5 O'Keefe, this Court must assume, based upon the conviction, that he did not have such an
6 "absolute, unconditional right to enter the home."
7

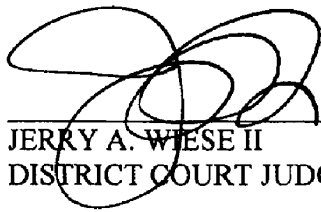
8 Based upon all of the information, evidence, and documentation submitted to this Court,
9 the Court cannot find that Defendant has established his actual innocence. The evidence
10 and argument submitted are simply insufficient to support Mr. O'Keefe's Petition for Writ of
11 Coram Nobis.
12

13 **ORDER**

14 Defendant's Writ of Mandamus or in the Alternative Writ of Coram Nobis is denied
15 as time barred and successive and his claim of actual innocence is unfounded, therefore, his
16 Petition is hereby dismissed.
17

18 IT IS SO ORDERED.

19 DATED and DONE this 22 day of March, 2019.

20
21 
22 _____
23 JERRY A. WIESE II
24 DISTRICT COURT JUDGE, DEPT. XXX
25

26
27 ¹ In *State v. White*, the evidence indicated that although White had orally agreed to stay elsewhere during the
28 week, he still maintained an absolute right to enter the residence and did not forfeit any possessory right he had in it. Further, he could not be ejected or prevented from entering the residence, especially since he still retained his keys to the house and entered it on a weekly basis to stay with his children on weekends. The Court notes that no similar evidence of Mr. O'Keefe's possessory interest in the residence was presented in the Writ of Coram Nobis.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

December 05, 2018

A-18-783689-W Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

December 05, 2018 9:00 AM Petition

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Vanessa Medina

RECORDER:

REPORTER: Kimberly Farkas

PARTIES

PRESENT:

JOURNAL ENTRIES

- No parties present. Court ADVISED, it appeared the State was properly noticed with the Motion, no opposition was filed, however, in reading the petition, Court NOTED, Plaintiff was convicted of counts 1 and 6 and found not guilty on all of the sexual assault charges. Furthermore, the Court, was not convinced the acquittal on counts 2 to 5 required an acquittal on counts 1 and 6, as they were independent charges, consequently, ORDERED, Petition DENIED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

January 30, 2019

A-18-783689-W Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

January 30, 2019 9:00 AM Motion

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Vanessa Medina

RECORDER:

REPORTER: Kimberly Farkas

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- No parties present. COURT NOTED it could not make sense of the pleadings, and ORDERED, matter OFF CALENDAR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

February 20, 2019

A-18-783689-W Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

February 20, 2019 9:00 AM Motion

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Phyllis Irby

RECORDER:

REPORTER: Kimberly Farkas

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- The Court noted it has already ruled on this matter. COURT ORDERED, OFF CALENDAR.

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated April 3, 2019, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 116.

BRIAN KERRY O'KEEFE,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-18-783689-W

Dept. No: XXX

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 23 day of April 2019.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk