

Case No. PC-7444A
Dept. No. 1

DAVID H. NEELY III
Nev. Bar No. 3891
3520 East Tropicana Ave., Ste. D
Las Vegas, NV 891218
(702) 565-0716
Attorney for Petitioner

ORIGINAL
FILED
FIFTH JUDICIAL DISTRICT

Electronic Filed
Jul 07 2021 10:43 a.m.

Elizabeth A. Brown
Clerk of Supreme Court
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

MICHAEL ALLEN MACK,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

NOTICE OF APPEAL

TO: THE HONORABLE KIMBERLY WANKER,
Fifth Judicial District Court Judge,

AND TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL.

NOTICE IS HEREBY GIVEN that Petitioner, MICHAEL ALLEN MACK,
by and through his attorney of record, DAVID H. NEELY III, Esq.,
pursuant to NRS 177.015 and NRAP 3B/3C(fastrack), NRAP 3A(civil),
hereby appeals to the Supreme Court of the State of Nevada from
the Order Denying Petition for Writ of Habeas Corpus entered in
the Fifth Judicial District Court in the above matter on June
24, 2021.

SUBMITTED this 2nd day of July, 2021.

DAVID H. NEELY III
Nev. Bar No. 003891
3520 E. Tropicana Ave., #D-1
Las Vegas, NV 89121
Attorney for Petitioner


1
2
3 **CERTIFICATE OF MAILING**

4 I HEREBY CERTIFY that I am an agent or employee of the above
5 referenced Nevada licensed attorney, and that on the 2nd day of
6 July, 2021, I served the above and foregoing NOTICE OF APPEAL by
7 depositing a copy in the United States mails, postage prepaid,
8 addressed to counsel for respondent at his last known address, as
9 indicated below:

10 Kirk Vitto, Esq.
11 Chief Deputy
12 Nye County District Attorney
13 P. O. Box 39
14 Pahrump, NV 89041

15 Aaron Ford, Esq.
16 Nevada Attorney General
17 100 North Carson Street
18 Carson City, Nevada 89701-4717

19 Elizabeth Brown
20 Nevada Supreme Court Clerk
21 201 South Carson Street, #300
22 Carson City, NV 89701


agent or employee of
DAVID H. NEELY, III, ESQ.

Case No. PC-7444A
Dept. No. 1

DAVID H. NEELY III
Nevada State Bar No. 003891
3520 East Tropicana Ave., Ste. D-1
Las Vegas, NV 89121
(702) 565-0716
Attorney for Petitioner

ORIGINAL FILED
FIFTH JUDICIAL DISTRICT

JUL - 2 2021

 Nye County Clerk
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

MICHAEL ALLEN MACK,)	
)	CASE APPEAL STATEMENT
Petitioner,)	
)	
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	

1. Name of appellant filing this case appeal statement:
MICHAEL ALLEN MACK.

2. Identify the judge issuing the decision, judgment, or
order appealed from: Hon. KIMBERLY WANKER, Judge of the Fifth
Judicial District Court.

3. Identify all parties to the proceedings in the district
court: MICHAEL ALLEN MACK, Petitioner, and THE STATE OF NEVADA,
Respondent.

4. Identify all parties involved in this appeal: MICHAEL
ALLEN MACK, Appellant, and THE STATE OF NEVADA, Respondent.

5. Set forth the name, law firm, address, and telephone
number of all counsel on appeal and identify the party or parties
whom they represent: David H. Neely III, Esq., 3520 East
Tropicana Ave., Ste. D-1, Las Vegas, Nevada, 89121 (702) 565-0716
represents Petitioner, MICHAEL ALLEN MACK and Chris Arabia,

1 Esq., Nye County District Attorney, 101 Radar Rd, P.O. Box 593,
2 Tonopah, Nevada, (775) 482-8166 represents Respondent, **STATE OF**
3 **NEVADA.**

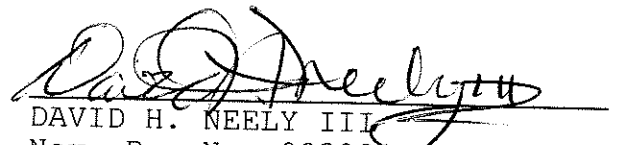
4 6. Indicate whether appellant is represented by appointed
5 or retained counsel in the district court: Appointed counsel.

6 7. Indicate whether appellant is represented by appointed
7 or retained counsel in this appeal: Appointed counsel.

8 8. Indicate whether appellant was granted leave to proceed
9 in forma pauperis, and the date of entry of the district court
10 Order granting such leave: Request to be filed, no order issued
11 as yet.

12 9. Indicate the date the proceedings commenced in the
13 district court: Writ of Habeas Corpus (Post-Conviction) was filed
14 on February 19, 2015.

15 SUBMITTED this 2nd day of July, 2021.

16
17
18 
19 DAVID H. NEELY III
20 Nev. Bar No. 003891
21 3520 E. Tropicana, Ste. D-1
22 Las Vegas, NV 89121
23 Attorney for Petitioner
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF MAILING

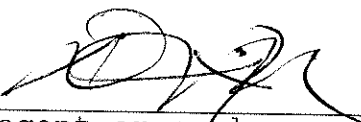
I HEREBY CERTIFY that I am an agent or employee of the above referenced Nevada licensed attorney, and that on the 2nd day of July, 2021, I served the above and foregoing **CASE APPEAL STATEMENT** by depositing a copy in the United States mails, postage prepaid, addressed to counsel for respondent at his last known address, as indicated below:

Chris Arabia, Esq.
District Attorney
Nye County, Nevada
P. O. Box 593
Tonopah, NV 89049

HON. KIMBERLY WANKER
Fifth Judicial District Court
1520 E. Basin Ave., #105
Pahrump, NV 89060

Clerk, Nevada Supreme Court
201 South Carson Street, #300
Carson City, NV 89701

Aaron Ford, Esq.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717


agent or employee of
DAVID H. NEELY, III, ESQ.

Fifth Judicial District Court - Nye County
Case Summary

Run: 07/02/2021
13:17:04

Page 1

Case #: PC0007444
Judge: WANKER, KIMBERLY
Date Filed: 02/19/2015 Department:
Case Type: POST CONVICTION WRIT HABEAS

Respondent	Attorney(s)
THE STATE OF NEVADA	No *Attorney 1* Listed
Respondent	
NEVADA DEPARTMENT OF CORRECTIO	No *Attorney 1* Listed
Respondent	
LOVELOCK CORRECTIONAL CENTER	No *Attorney 1* Listed
Respondent	
LEGRAND, ROBERT	No *Attorney 1* Listed
Petitioner	
MACK, MICHAEL ALLEN	NEELY, DAVID H III
Plaintiff	
STATE OF NEVADA	No *Attorney 1* Listed

Charge: UNLAW USE OF A CONTRO SUB - NRS 453.411 F/E Count 1
Sent:

Disp/Judgment: Date:

Hearings:

Date	Time	Hearing	Court Result
02/21/2017	12:00AM	WRIT OF HABEAS CORPUS	CANC
08/29/2018	1:30PM	WRIT OF HABEAS CORPUS	

Filings:

Date	Filing
02/19/2015	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
02/19/2015	MOTION FOR APPOINTMENT OF COUNSEL; AND REQUEST FOR EVIDENTIARY HEARING
02/23/2015	ORDER APPOINTING DAVID NEELY, ESQ.
04/07/2015	STIPULATION AND ORDER FOR EXTENSION OF TIME TO FILE SUPPLEMENT
07/01/2015	PETITIONER'S SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF POST-CONVICTION WRIT
08/12/2015	ANSWER AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICION)
08/25/2015	ORDER
09/22/2015	AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
05/04/2016	PETITIONER'S OPPOSITION AND REPLY TO STATE'S ANSWER TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS
03/24/2017	MOTION FOR FEES IN EXCESS OF STATUTORY ALLOWANCE (NEELY)

Run: 07/02/2021
13:17:07

Case Summary

Page 2

04/13/2017	ORDER GRANTING FEES IN EXCESS OF STATUTORY ALLOWANCE (NEELY)
11/27/2017	ORDER FOR HEARING ON WRIT OF HABEAS CORPUS
01/26/2018	ORDER TO TRANSPORT PRISONER TO COURT HEARING
07/23/2018	ORDER FOR HEARING ON WRIT OF HABEAS CORPUS
08/02/2018	EX PARTE APPLICATION FOR ORDER TO TRANSPORT PRISONER TO COURT FOR EVIDENTIARY HEARING
08/06/2018	ORDER TO TRANSPORT PRISONER TO COURT FOR HEARING
08/29/2018	Court Minutes
09/12/2018	TRANSCRIPT (WRIT OF HABEAS CORPUS) (8/29/2018)
10/02/2018	MOTION FOR FEES IN EXCESS OF STATUTORY ALLOWANCE
10/04/2018	ORDER GRANTING FEES IN EXCESS OF STATUTORY ALLOWANCE
06/24/2021	ORDER DENYING WRIT OF HABEAS CORPUS
07/02/2021	NOTICE OF APPEAL
07/02/2021	CASE APPEAL STATMENT

FILED
FIFTH JUDICIAL DISTRICT

JUN 24 2021

Nye County Clerk
Deputy

1 Case No. PC7444A

2

3

4

5

6

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

7

MICHAEL ALLEN MACK,

8

Petitioner,

9

ORDER DENYING WRIT OF
HABEAS CORPUS

10

-v-

11

STATE OF NEVADA,

12

Respondent.

13

14

15

History of Case

16

17

18

19

20

21

22

23

24

25

26

27

28

On May 14, 2014, the State filed an Information charging Michael A. Mack ("Mack") with Count I: Sexual Assault, a category "A" felony; Count II: Sexual Assault, a category "A" felony; Count III: Preventing Or Dissuading Victim From Reporting Crime, Commencing Prosecution Or Causing Arrest, a category "D" felony; Count IV: Unlawful Contact With Person With Mental Illness, a Gross Misdemeanor; and, Count V: Abuse Of A Vulnerable Person, a Gross Misdemeanor. Mack was arraigned on May 17, 2013. Mack pled not guilty. Mack waived his right to a speedy trial and both primary and secondary trial setting dates were provided.

On November 26, 2013, the State filed an Amended Information charging Mack with Attempted Sexual Assault, a category "B" felony. A Second Amended Information charging Mack with Attempted Sexual Assault, a category "B" felony was filed December





1 5, 2013, and was filed to correct the omission of the attempt statute, left out of the
2 Amended Information.

3 On December 6, 2013, the case was set for a change of plea. On December 6,
4 2013, Mack pled Guilty Pursuant to Alford to the charge of Attempted Sexual Assault, a
5 category "B" felony. Mack also entered into a Written Guilty Plea Agreement which was
6 filed with the Court at the time of arraignment. At the arraignment on December 6, 2013,
7 the Court thoroughly canvassed Mack on his Alford Plea and on the terms of the written
8 guilty plea agreement and gave him several opportunities to change his mind. Mack
9 decided to proceed with his "Guilty Pursuant to Alford" Plea.

10 On March 21, 2014, Mack appeared before the Court for sentencing. The Court
11 adjudged Mack guilty of Attempted Sexual Assault, a category "B" felony, and sentenced
12 him to a minimum term of 96 and a maximum term of 240 months in the Nevada
13 Department of Corrections. Mack subsequently filed an appeal to the Nevada Supreme
14 Court. The supreme court appeal was dismissed as untimely. Mack then filed a Petition
15 For Writ of Habeas Corpus. The Court appointed David Neely, Esq. to represent Mack.
16 Attorney Neely filed a Supplemental Writ of Habeas Corpus. The Court held a hearing on
17 the Writ on August 29, 2018. The Court, after hearing testimony of trial counsel Thomas
18 Gibson, Esq., and after hearing the arguments of counsel, denied the Writ. The Court
19 outlined in great detail the basis for her denial of the Writ. This can be found in the
20 Transcript of Proceedings, Writ of Habeas Corpus, dated August 29, 2018., filed
21 September 11, 2018. These reasons are summarized below.

22
23 **Issues Before The Court**

24 Mack claims he received ineffective assistance of trial counsel and has alleged
25 several different claims he believes supports his assertion. To prove ineffective assistance
26 of counsel, Mack must demonstrate that his trial counsel's performance was deficient in
27
28



1 that it fell below an objective standard of reasonableness, and resulting prejudice such
2 that there is a reasonable probability that, but for counsel's errors, the outcome of the
3 proceedings would have been different. *Strickland v. Washington*, 466 US 668, 687-88
4 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the
5 test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 US at
6 697. In this case, Mack has failed to satisfy the *Strickland* standard. The Court will now
7 address Mack's 11 assertions.

9 **1. Trial counsel's investigator failed to conduct an effective investigation**
10 **of the case prior to Mack entering an Alford Guilty Plea.**

11 The Court notes that at the time she arraigned Mack on December 6, 2013, the
12 Court addressed with Mack, a letter written to the Court by Mack dated November 19,
13 2013, wherein Mack complained that his attorney, Thomas Gibson, and the investigator,
14 Mark Henry, had not met with him.

15 **THE COURT:**

16
17 Now I have received a letter from you that was dated
18 November 19th, 2013, that you – that was addressed to Mr.
19 Gibson that you had sent me indicating you were concerned
20 because – with the representation because he had not met
21 with you, and Mr. Zane, the investigator, had not met with
22 you. Do you still have concerns regarding Mr. Gibson and Mr.
23 Zane?

24 **THE DEFENDANT:**

25 No, I do not.

26 **THE COURT:**

27 And at this point are you satisfied with the representation
28 that's been provided to you by Mr. Gibson?

///



1 THE DEFENDANT:

2 Yes, Your Honor.

3 MR. GIBSON:

4 Your Honor, may I clarify something? Mark Henry is our
5 investigator.

6 THE COURT:

7 I'm sorry, Mark Henry. I apologize. This said Mark and I
8 assumed it was Mr. Zane.

9 MR. GIBSON:

10 No. Henry

11 THE COURT:

12 So Mr. Henry, okay. And at this point as of today, December
13 6th, 2013, those concerns that you set forth in your November
14 19th letter have all been resolved; is that right?

15 THE DEFENDANT:

16 Yes, Your Honor.

17 MR. GIBSON:

18 Your Honor, for the record Mr. Henry and I have met with Mr.
19 Mack. I met with him on multiple occasions since that letter,
20 and Mr. Henry did at least one meeting with him and was
21 working on the case up until the time we decided to reach this
22 agreement.

23 THE COURT:

24 Okay. Thank you, Mr. Gibson. I appreciate that.

25 Now do you think you've had enough time to discuss all the
26 various aspects of this case with Mr. Gibson?

27 ///



1 THE DEFENDANT:

2 Yes.

3 See: Transcript of Proceedings, Change of Plea, Friday, December 6, 2013, p. 16, ll.
4 2-25; p. 17, ll. 1-12.

5 Thus, by Mack's own admissions, there is no merit to his claim that the investigator
6 Mark Henry failed to properly investigate Mack's claims

7 **2. Trial counsel caused Mack to enter a guilty plea while suffering the effects of**
8 **a stroke.**

9 Mack claims he pled Guilty Pursuant to Alford under the effects of a stroke. The
10 Court thoroughly canvassed Mack at the December 6, 2013 arraignment. The Court
11 asked Mack if he was capable of moving forward on December 6, 2013 and also inquired
12 as to whether Mack needed a continuance.

13
14 THE COURT:

15 You've been provided a copy of the second amended
16 Information wherein you've been charged with attempted
17 sexual assault. It's a violation of Nevada Revised Statute
18 200.336 and Nevada Revised Statute 193.330. It's a category
19 B felony. Do you understand the nature of the charge set forth
20 in the second amended Information?

21 THE DEFENDANT:

22 Yes, ma'am.

23 THE COURT:

24 And have you had the opportunity to discuss this charge with
25 your attorney, Mr. Gibson?

26 THE DEFENDANT:

27 Yes.



1 THE COURT:

2 And as to the charge set forth in the second amended
3 Information, how do you plead?

4 THE DEFENDANT:

5 Guilty as offered.

6 MR. GIBSON:

7 Under Alford.

8 THE DEFENDANT:

9 Guilty under Alford.

10 THE COURT:

11 You're make a guilty pursuant to Alford plea?

12 THE DEFENDANT:

13 Yes, ma'am.

14 THE COURT:

15 Okay. Alford versus North Carolina is a U.S. Supreme Court
16 decision from 1970 that is essentially --it's a guilty plea but
17 what you're saying is the State can prove -- you're not
18 necessarily admitting that you're guilty, you're saying that the
19 State has sufficient evidence and can prove the allegations
20 set forth in the Information beyond a reasonable doubt if the
21 case went to trial. So I want to be sure you understand that
22 and that's the plea you want to enter.

23 THE DEFENDANT:

24 Yes.

25 THE COURT:

26 Okay. And if you don't, Mr. Mack, it's fine. We're happy to
27 provide you with a trial. It's really up to you. I don't want
28 anyone ever in my courtroom to feel pressured, that they've



1 been pressured --

2 **THE DEFENDANT:**

3 No, I understand, your Honor.

4 **THE COURT:**

5 - - into some type of plea agreement.

6
7 Before I can accept your Alford plea, I want to be certain that
8 the pleas has been knowingly, freely and voluntarily entered
9 into, and, in addition the guilty plea agreement that you
10 signed, that you signed it knowing the terms and conditions of
11 that, knowing and understanding the terms and conditions of
12 that agreement and knowing that you knowingly, freely, and
13 voluntarily entered into that agreement, so I am going to ask
14 you some questions.

15 ...

16 See: Transcript of Proceedings, Change of Plea, Friday, December 6, 2013, p. 6, ll. 8-
17 25; p. 7, ll. 1-25, p. 8, ll. 1-6.

18 Later, in the same canvass the Court told Mack:

19 **THE COURT:**

20 And do you agree that the State has sufficient evidence to
21 prove the charges against you beyond a reasonable doubt to
22 those facts as stated?

23 **THE DEFENDANT:**

24 Well, I don't know if they have

25 **THE COURT:**

26 You know, Mr. Mack, if you don't know, and, like I said, if you
27 don't want to take this plea, that's fine. I've got it set for trial
28 actually, and I can also reset it for trial. So it's really up to you.
29 I don't want you in any way to feel pressured into this plea.

30 ///



1 THE DEFENDANT:

2 Yeah, I understand that, your Honor. I agree.

3 See: Transcript of Proceedings, Change of Plea, Friday, December 6, 2013, p. 9, ll.
4 10-23. Some 20 pages later in the arraignment transcript, the Court again advised
5 Mack:
6

7 THE COURT:

8 Here's your opportunity, Mr. Mack, if you'd like to change your
9 mind. And if you truly feel you don't want to enter this plea,
10 I'm fine with that. I'm happy to set it for trial. What I want to be
11 certain is that you want to enter the -- you enter the plea that
12 you want to enter, that you don't feel pressured or otherwise
13 forced in any way to enter a plea. While we do have it set on
14 calendar next week, I'm even happy to continue the trial if you
15 would like that, if you decide that you want to go to trial,
16 okay?

17 THE DEFENDANT:

18 Yes.

19 THE COURT:

20 So I'm going to ask you now, here's going to be the moment
21 of truth, it's your kind of last and final chance to enter your
22 plea here. Based upon my questions and our discussion here
23 this morning, what is your plea to the charge in the second
24 amended Information of attempted sexual assault, a category
25 B felony?

26 THE DEFENDANT:

27 What is my plea? Guilty. I'm sorry, your Honor.

28 THE COURT:

Okay. And that guilty plea will be entered pursuant to Alford;
is that right?

///



1 **THE DEFENDANT:**

2 Yes.

3 See: Transcript of Proceedings, Change of Plea, Friday, December 6, 2013, p. 24, ll.
4 23-25; p. 25, ll. 1-21.

5 Based upon the numerous opportunities the Court provided to Mack to continue the
6 proceedings or change his mind, the Court finds Mack's assertion that trial counsel made
7 him enter a plea under the effects of a stroke to be without any merit.

8
9 **3. Trial counsel failed to advise Mack of the consequences of being a Tier III**
10 **sex offender prior to the entry of his Alford Guilty Plea.**

11 Mack claims that he had ineffective assistance of counsel because his attorney,
12 Thomas Gibson, Esq. failed to advise him of the consequences of being a Tier III sex
13 offender prior to the entry of the Alford guilty plea. The written Guilty Plea executed by
14 Mack, and the transcript of the arraignment do not support Mack's assertion. First, the
15 written Guilty Plea Agreement contains the following language:

16 **CONSEQUENCES OF SEX OFFENSE**

17
18 I agree to plead guilty to a sex offense, and will be considered
19 a Tier III offender. As a result I understand that I **AM** subject
20 to sex-offender registration requirements as provided for in
 NRS 179D.450, and that I **AM** also subject to the lifetime
 supervision requirements of NRS 176.0931.

21 See: Guilty Plea Agreement, filed December 6, 2013, Page 4, ll. 19-23. Mr. Mack, his
22 attorney, and the Deputy District Attorney all placed their initials next to this provision. The
23 reason for this, is that originally, the parties believed it was a Tier II offense. At the
24 arraignment, the following occurred:

25
26 ///



1 MR. GIBSON:

2 Judge, we have a little housekeeping matter.

3 THE COURT:

4 Sure.

5 MR. GIBSON:

6 We have interlineated that the third "I" to make it a tier III
7 from II.

8 THE COURT:

9 Okay.

10 ...
11 THE COURT:

12 Do you have the executed guilty plea agreement?

13 MR. GIBSON:

14 Right here in front of me.

15 THE COURT:

16 And Mr. Mack initialed that clause, that change?

17 MR. GIBSON:

18 Your Honor, I suggest that both counsel also initial too -

19 THE COURT:

20 Yes.

21 MR. GIBSON:

22 --showing we're all in agreement.

23 See: Transcript of Proceedings, Change of Plea, Friday, December 6, 2013, p. 2, ll. 2-10,
24 22-25; p. 3, ll. 1-6. The Court then did an extensive canvass of Mack regarding the
25
26
27
28



1 registration and supervision requirements for as a sex offender.

2 **THE COURT:**

3 Now I want to cover some things with you about that guilty
4 plea agreement. Do you understand that as a result of your
5 plea, the maximum possible sentence that the court could
6 impose is 20 years in the Nevada Department of Corrections?

7 **THE DEFENDANT:**

8 Yes.

9 **THE COURT:**

10 And I want to be sure that because this is a sex offense, do
11 you understand that you will be required to undergo a
12 psychosexual evaluation?

13 **THE DEFENDANT:**

14 I didn't know that, but, yes.

15 **THE COURT:**

16 But do you understand that that will -- now I'm telling you --
17 And I want to be sure that because this is a sex offense, do
18 you understand that you will be required to undergo a
19 psychosexual evaluation?

20 **THE DEFENDANT:**

21 Yes.

22 **THE COURT:**

23 -- that you will be at some point required to undergo a
24 psychosexual evaluation?

25 **THE DEFENDANT:**

26 Uh-huh.

27 ///



1 THE COURT:

2 Because this is a sex offense, do you understand that you're
3 going to have to have certain sex offender registration
4 requirements and the supervision requirements will be
5 lifetime, they will be lifetime requirements? Do you
6 understand that?

7 THE DEFENDANT:

8 Yes, now.

9 THE COURT:

10 Okay. And has Mr. Gibson talked to you about the registration
11 and the supervision requirements that you're going to be
12 required to follow pursuant to the Nevada Revised States by
13 entering this plea?

14 THE DEFENDANT:

15 He told me that I had to register but I don't know the details of
16 the requirements, the procedure.

17 THE COURT:

18 Would you like -- would you like Mr. Gibson to go through
19 the requirements with you?

20 THE DEFENDANT:

21 Yeah. I don't have the details. I mean, I know I saw it that I
22 have to register.

23 MR. GIBSON:

24 We discussed this yesterday. Remember we talked about the
25 48-hour requirement and that you're required to whenever
26 you change residences?

27 THE DEFENDANT:

28 Yeah. I knew the residence but, I mean, not all when and --

///



1 THE COURT:

2 Do you understand that within 48 hours of entering this
3 plea you're going to be required to register with the Nye
4 County Sheriff's Office as a sex offender?

5 THE DEFENDANT:

6 48 hours of this plea, yeah, register?

7 THE COURT:

8 Right.

9 THE DEFENDANT:

10 Yes.

11 THE COURT:

12 Okay.

13 THE DEFENDANT:

14 I am.

15 THE COURT:

16 Do you understand that as a result of entering this plea that
17 you will have -- you will be subject to lifetime supervision by
18 parole and probation? Do you understand that?

19 THE DEFENDANT:

20 No, I didn't know that, but that's ...

21 THE COURT:

22 Okay. Knowing that --

23 THE DEFENDANT:

24 Okay.

25 ///



1 THE COURT:

2 --now, I'm telling you that you will be required to be subject to
3 lifetime supervision by parole and probation, do you still want
4 to enter your Alford plea?

5 THE DEFENDANT:

6 I guess.

7 THE COURT:

8 Okay. And you're also going to have certain registration
9 requirements. Those registration requirements are going to
10 be with the law enforcement agency. You're going to be in a
11 registry, a sex offense registry. Knowing, by me telling you
12 that, and you're also going to be classified as a category tier
13 three sex offender, do you still want to enter your Alford plea?

14 THE DEFENDANT:

15 Yes.

16 THE COURT:

17 Okay. And do you understand that if you fail to register when
18 you're required to do so, that you can be subject to a
19 separate category D felony?

20 THE DEFENDANT:

21 A separate what, ma'am?

22 THE COURT:

23 Category D felony for failing to register.

24 THE DEFENDANT:

25 Yes.

26 THE COURT:

27 Okay. All right. I also want to be sure that you understand that
28 you may be subject to community notification provisions.



1 designed to reach members of the public likely to encounter
2 you. And knowing that do you still want to enter this Alford
3 plea?

4 **THE DEFENDANT:**

5 Yes.

6 See: Transcript of Proceedings, Change of Plea, Friday, December 6, 2013, p. 18, ll. 24-
7 35, pp 19-21, ll. 1-25; p. 22, ll 1-14. Based upon the forgoing discussion at his
8 arraignment, Mack cannot, in good faith, claim he was unaware of the tier III registration
9 and supervision requirements.

10 **4. Trial counsel failed to review the facts of the case and discuss any**
11 **defenses with Mack.**

12 Mack claims that his trial counsel was ineffective for failing to discuss the facts of
13 the case or the defenses with him. Yet, this assertion by Mack is unsupported by the
14 record of the arraignment in this case. As set forth in detail in Section 1, above, Mack
15 indicated he had enough time to discuss all the aspects of his case with Mr. Gibson his
16 attorney by the time of his arraignment on December 6, 2013. The bald assertion by Mack
17 is contradicted by the record of the proceedings in this case.

18 **5. Trial counsel failed to inform Mack of the consequences of pleading guilty**
19 **(pursuant to Alford) to attempted sexual assault.**

20 Mack claims his counsel was ineffective for failing to inform him of the
21 consequences of pleading guilty pursuant to Alford. Once again, one only needs to look at
22 the transcript of Mack's December 6, 2013 arraignment to find that there is no support for
23 Mack's argument. Not only did the Court advise Mack of the maximum possible sentence
24 that could be imposed in this case, the Court also advised Mack of the registration and
25 supervision requirements of being a Tier III sex offender. See: Transcript of Proceedings,
26
27
28



1 Change of Plea, Friday, December 6, 2013. The Guilty Plea Agreement signed by Mack
2 also outlined the consequences of his Alford guilty plea. See: Guilty Plea Agreement, filed
3 December 6, 2013, Page 2, ll. 3-25, p. 4, ll. 1-13. Mack's argument is without merit.

4 **6. Trial counsel had a conflict of interest during the representation of Mack**
5 **which was never disclosed with Mack.**

6 Mack alleges that some sort of conflict of interest existed between Nye County and
7 Mr. Gibson because Mr. Gibson had a public defender contract with Nye County and the
8 contract was changing, so that somehow prejudiced or affected Mack's case. There is no
9 evidence that that was in fact the case, and nothing has been offered to support Mack's
10 unsubstantiated claim.

11
12 **7. Trial counsel failed to request a continuance of Mack's trial date after he was**
13 **told to do so by Mack, causing Mack to enter a plea while not of sound mind.**

14 Mack claims his attorney was ineffective for failing to get a trial continuance. As
15 detailed in Section 2 above, the Court offered Mack a continuance on at least 3 separate
16 occasions at his arraignment on December 6, 2013 which he declined. Mack's argument
17 is without substantiation. See: Transcript of Proceedings, Change of Plea, Friday,
18 December 6, 2013.

19 **8. Trial counsel failed to inform Mack that the information obtained during the**
20 **psychosexual evaluation could be used against him at sentencing.**

21 Mack asserts that his trial counsel was ineffective for failing to tell him the
22 information obtained from Mack during the psychosexual evaluation could be used
23 against him. Mack was clearly aware that the information obtained by the evaluator, John
24 S. Pacult, could be used by the Court. The Psychosexual Evaluation Report dated
25 February 3, 2014, contains the following:
26



INFORMED CONSENT

Mr. Mack was given a full description of the evaluation process, the risks and benefits involved, and the rationale for the evaluation. He was informed of the use of confrontation, detailed questioning, and explicit language during the interview. He was also advised of the importance of cooperation and honesty in order for the valuation to be effective. The parameters of confidentiality were carefully explained, and, in particular, when it had to be broken in accordance with the law. While acknowledging the Court's directive that he be evaluated, the voluntary nature of the evaluation was emphasized. Comprehension of these issues was confirmed and any questions Mr. Mack had were answered. Written and voluntary consent to proceed was obtained prior to starting the evaluation.

Psychosexual Evaluation, dated February 3, 2014, p. 2. Thus, the Court finds that Mack was well aware of how the information could be used and consented to participating in the psychosexual evaluation. The problem appears to be that Mack did not like Mr. Pacult's result - a finding that Mack was a high risk to reoffend. Mack has failed to establish an ineffective assistance of counsel claim on these facts.

9. Trial counsel failed to use relevant information in his investigation provided by Mack.

At the hearing on the Writ, Attorney Gibson testified and the record in the case was very clear, that there was strong evidence against Mack in this case. In fact, at the time his plea was entered, evidence had been adduced that there were possible additional victims who may have been subjected to sexual abuse by Mack. The psychosexual evaluation noted that in addition to sexual abuse of his mentally retarded adult adopted sister, there was accusations that had arisen that Mack may have also sexually assaulted a mentally retarded adult male in Pahrump. In fact, Mack had originally been charged with two counts of Sexual Assault, each a category A felony; as well as Preventing Or



1 Dissuading Victim From Reporting Crime, Commencing Prosecution Or Causing Arrest, a
2 category "D" felony; Unlawful Contact With Person With Mental Illness, a Gross
3 Misdemeanor; and Abuse Of A Vulnerable Person, a Gross Misdemeanor

4 At the time of arraignment on December 6, 2013, any concerns Mack had with his
5 attorney, he said were resolved. See: Transcript of Proceedings, Change of Plea, Friday,
6 December 6, 2013, p. 16, ll. 2-25; p. 17, ll. 11-12. Thus, the Court finds Mack's assertion of
7 ineffective assistance of counsel with regard to relevant information to be without merit.
8

9 **10. Trial counsel failed to make a motion to have Mack's statements made at the**
10 **time of arrest suppressed.**

11 Mack fails to identify what statements he believes should have been suppressed in
12 this case and has further failed to set forth the legal basis for the Court to suppress that
13 evidence. As Attorney Tom Gibson testified at the Writ hearing, the evidence against
14 Mack was strong, and became stronger as the case progressed with additional possible
15 victims having been identified. Mack offers no insight on the specific statements that
16 should have been suppressed, or the legal basis for the suppression. Since the burden of
17 proof is on Mack, the Court finds that insufficient evidence has been provided to the Court
18 to sustain Mack's claim.
19

20 **11. Trial counsel failed to have trial judge recuse herself from case for bias.**

21 Mack claims his trial counsel was ineffective because he failed to have the Judge
22 recused for bias. Again, this claim is unfounded. Judge Wanker first saw Mack in Court on
23 May 17, 2013. The first thing Judge Wanker did was made a disclosure to all parties that
24 she was active in various community organizations and that she participated in numerous
25 community events and activities. Judge Wanker also disclosed that she was in the
26
27
28



1 Kiwanis organization with Mack and was acquainted with Mack from various community
2 activities including the USDA Commodities Food Drive. Judge Wanker, in accordance
3 with the Nevada Revised Code of Judge Conduct, went through the Judicial Canons and
4 advised the parties that she did not believe that she held any bias or prejudice, and felt
5 she could proceed with the case. The Judge advised the parties however, that if they felt
6 there were any issues they were free to file a motion for recusal. This discussion
7 encompasses the first 13 pages of the arraignment transcript of May 17, 2013. See:
8 Transcript of Proceedings, Arraignment Hearing, dated May 17, 2013, filed July 22, 2013.

9 At the May 17, 2013 hearing, this was the position of Mr. Mack:

10
11 **THE COURT:**

12 I'm not going to waste everybody's time. I mean, if you want
13 to file the motion, I've looked at it, I don't believe that I - I
14 have a bias or prejudice or am required. But nonetheless, you
15 can follow the procedure. But I'll just continue it. And then I'll
allow that.

16 Mr. Gibson, what's your client's - -

17 **MR. GIBSON:**

18 Your Honor, Mr. Mack is comfortable with this Court hearing
19 the matter and we will be making no motion for any type of
change.

20 See: Transcript of Proceedings, Arraignment Hearing, dated May 17, 2013, p. 11, ll. 11-
21 20. filed July 22, 2013. It appears that the bias issue arose for Mack when the Court
22 sentenced him in accordance with the recommendations to a lawful prison sentence. As
23 such, there is no basis for Mack's claim.

24
25 The bottom line is this: the Court thoroughly read and reviewed the file, and lawfully
26 sentenced Mack after he pled guilty pursuant to Alford. Mack was not happy with the
27



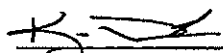
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

sentence he received. This is not, however, a basis for the Court to grant a Petition For Writ of Habeas Corpus. Looking at the totality of the circumstances, and the transcripts of all the proceedings in this case, there simply is no basis for the Court to grant Mack's request for relief. Accordingly,

IT IS HEREBY ORDERED that the Petitioner Michael A. Mack's Petition for Writ of Habeas Corpus is **DENIED**.

Nunc Pro Tunc to August 29, 2018

DATED this 24th day of June 2021.


KIMBERLY A. WANKER
DISTRICT JUDGE

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 24th day of June 2021 she mailed
(or hand delivered) copies of the foregoing **ORDER DENYING WRIT OF HABEAS
CORPUS** to the following:

Nye County District Attorney
Pahrump, Nevada 89060
(placed in folder in Clerk's office)

David Neely, Esq.
3520 E. Tropicana Ave., Suite D-1
Las Vegas, Nevada 89121

Michael A. Mack #117749
Lovelock Correctional Center
1200 Prison Rd.
Lovelock, Nevada 89419

Christel Raimondo

CHRISTEL RAIMONDO, Judicial Clerk to
DISTRICT JUDGE



Fifth Judicial District Court - Nye County

Run: 07/02/2021
13:17:29

Case Summary

Page 1

Case #: PC0007444
Judge: WANKER, KIMBERLY
Date Filed: 02/19/2015 **Department:**
Case Type: POST CONVICTION WRIT HABEAS

Respondent	Attorney(s)
THE STATE OF NEVADA	No *Attorney 1* Listed
Respondent	
NEVADA DEPARTMENT OF CORRECTIO	No *Attorney 1* Listed
Respondent	
LOVELOCK CORRECTIONAL CENTER	No *Attorney 1* Listed
Respondent	
LEGRAND, ROBERT	No *Attorney 1* Listed
Petitioner	
MACK, MICHAEL ALLEN	NEELY, DAVID H III
Plaintiff	
STATE OF NEVADA	No *Attorney 1* Listed

Charge: UNLAW USE OF A CONTRO SUB - NRS 453.411 F/E Count 1
Sent:

Disp/Judgment: **Date:**

Hearings:

Date	Time	Hearing	Court Result
02/21/2017	12:00AM	WRIT OF HABEAS CORPUS	CANC
08/29/2018	1:30PM	WRIT OF HABEAS CORPUS	

Filings:

Date	Filing
02/19/2015	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
02/19/2015	MOTION FOR APPOINTMENT OF COUNSEL; AND REQUEST FOR EVIDENTIARY HEARING
02/23/2015	ORDER APPOINTING DAVID NEELY, ESQ.
04/07/2015	STIPULATION AND ORDER FOR EXTENSION OF TIME TO FILE SUPPLEMENT
07/01/2015	PETITIONER'S SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF POST-CONVICTION WRIT
08/12/2015	ANSWER AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICION)
08/25/2015	ORDER
09/22/2015	AMENDED PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
05/04/2016	PETITIONER'S OPPOSITION AND REPLY TO STATE'S ANSWER TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS
03/24/2017	MOTION FOR FEES IN EXCESS OF STATUTORY ALLOWANCE (NEELY)

Run: 07/02/2021
13:17:30

Case Summary

Page 2

04/13/2017	ORDER GRANTING FEES IN EXCESS OF STATUTORY ALLOWANCE (NEELY)
11/27/2017	ORDER FOR HEARING ON WRIT OF HABEAS CORPUS
01/26/2018	ORDER TO TRANSPORT PRISONER TO COURT HEARING
07/23/2018	ORDER FOR HEARING ON WRIT OF HABEAS CORPUS
08/02/2018	EX PARTE APPLICATION FOR ORDER TO TRANSPORT PRISONER TO COURT FOR EVIDENTIARY HEARING
08/06/2018	ORDER TO TRANSPORT PRISONER TO COURT FOR HEARING
08/29/2018	Court Minutes - JUDGE: KIMBERLY A WANKER CLERK: TERRI PEMBERTON REPORTER: TRACY MANNING BAILIFF: DEPUTY SCHERER APP: KIRK VITTO FOR THE STATE; DAVID NEELY IS PRESENT WITH THE DEFENDANT WHO IS IN CUSTODY COURT CALLS THE MATTER AS A WRIT OF HABEAS CORPUS. COURT OUTLINES THE CASE HISTORY. DEFENSE CALLS THOMAS GIBSON ESQ. AND CLERK SWEARS IN MR GIBSON ESQ. DEFENSE DIRECTLY EXAMINES THE WITNESS IN REGARDS TO HIM BEING THE PAST ATTORNEY OF RECORD FOR THE DEFENDANT. THE STATE OBJECTS. COURT SUSTAINS DEFENSE STANDS. MR VITTO CROSS EXAMINES THE WITNESS. STATE PASSES THE WITNESS STATE ARGUES THAT THE PETITION THAT IS ON MATTER TODAY IS DEFICIENT, AND PETITION SHOULD BE DISMISSED. THE DEFENSE ARGUES IN SUPPORT OF THE PETITION. COURT BRIEFS THE HISTORY FOR THE RECORD. COURT CONTINUES TO REVIEW THE PRIOR CASE HISTORY. COURT FINDS ALL CLAIMS IN THE PETITION TO BE WITHOUT MERIT AND DENIES THE WRIT OF HABEAS CORPUS
09/12/2018	TRANSCRIPT (WRIT OF HABEAS CORPUS) (8/29/2018)
10/02/2018	MOTION FOR FEES IN EXCESS OF STATUTORY ALLOWANCE
10/04/2018	ORDER GRANTING FEES IN EXCESS OF STATUTORY ALLOWANCE
06/24/2021	ORDER DENYING WRIT OF HABEAS CORPUS
07/02/2021	NOTICE OF APPEAL
07/02/2021	CASE APPEAL STATMENT

**OFFICE OF THE NYE COUNTY CLERK
SANDRA L. MERLINO**

Tonopah Office
Nye County Courthouse
P.O. Box 1031
101 Radar Road
Tonopah, Nevada 89049
Phone (775) 482-8127
Fax (775) 482-8133



Pahrump Office
Government Complex
1520 East Basin Avenue
Pahrump, Nevada 89060
Phone (775) 751-7040
Fax (775) 751-7047

CERTIFICATION OF COPY

**STATE OF NEVADA
COUNTY OF NYE**

I, **SANDRA L. MERLINO**, the duly elected, qualifying and acting Clerk of Nye County, in the State of Nevada, and Ex-Officio Clerk of the District Court, do hereby certify that the foregoing is a true, full and correct copy of the original documents in the action entitled:

MICHAEL ALLEN MACK

Petitioner,

vs.

STATE OF NEVADA


Respondent.

Case No. PC7444A

now on file and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court at my office, Pahrump, Nevada, this 2nd day of July 2021.

**SANDRA L. MERLINO
NYE COUNTY CLERK**

By: 
Brittani K. Smith
Deputy Clerk, Pahrump

**OFFICE OF THE NYE COUNTY CLERK
SANDRA L. MERLINO**

Tonopah Office
Nye County Courthouse
P.O. Box 1031
101 Radar Road
Tonopah, Nevada 89049
Phone (775) 482-8127
Fax (775) 482-8133



Pahrump Office
Government Complex
1520 East Basin Avenue
Pahrump, Nevada 89060
Phone (775) 751-7040
Fax (775) 751-7047

Friday, July 2,, 2021

SENT VIA E-FILE

Supreme Court Clerk
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: PC7444A
MICHAEL ALLEN MACK, Petitioner,
vs.
STATE OF NEVADA, Respondent.


Dear Clerk of Court:

I am submitting an appeal packet for an appeal received by Attorney David Neely, III, Esq on behalf of the Defendant. The appeal was filed July 2, 2021, in the above referenced matter. As this is a criminal matter, no fees were collected.

Please feel free to contact me should you have any questions with regard to the foregoing.

Sincerely,

**SANDRA L. MERLINO
NYE COUNTY CLERK**

By 
Brittani K. Smith
Deputy Clerk, Pahrump

cc: David Neely III -Defendant's Counsel
Nye County District Attorney
Honorable Kimberly Wanker