

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

2  
3   MICHAEL ALLEN MACK,

4           Appellant,

5           vs.

6   THE STATE OF NEVADA,

7           Respondent.

**Case No. 83165** Electronically Filed  
Dec 22 2021 09:44 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
**RESPONDENT'S**  
**ANSWERING BRIEF**

8                   **RESPONDENT'S ANSWERING BRIEF**

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1        **STATEMENT OF CASE AND ISSUES PRESENTED FOR REVIEW**

2        Appellant Mack alleges six instances of ineffective counsel:

3        Whether it was ineffective assistance of counsel to allow Mack to enter  
4 his guilty plea while suffering the effects of a stroke.

5        Whether it was ineffective assistance of counsel to conduct an effective  
6 investigation prior to the entry of the guilty plea.

7        Whether it was ineffective assistance of counsel to fail to inform Mack of  
8 the consequences of being a Tier III sex offender prior to the entry of the guilty  
9 plea.

10       Whether it was ineffective assistance of counsel to fail to review the facts  
11 of the case and any offenses with Mack.

12       Whether it was ineffective assistance of counsel to fail to inform Mack of  
13 the consequences of pleading guilty to sexual assault.

14       Whether it was ineffective assistance of counsel to fail to inform Mack of  
15 a potential conflict of interest.

16        **ARGUMENT**

17       Despite many pages of case law, Mack has failed to support his claims  
18 with any specific allegations that if true would entitle him to relief, none.

19       Ineffective assistance of counsel claims has two elements: (1) that  
20 counsel's performance was deficient; and (2) that the deficient performance

1 prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct.  
2 2052, 2064 (1984); *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505  
3 (1984).

4 To meet the first prong, the defendant would have to show that his  
5 attorney's performance fell below an objective standard of reasonableness.

6 *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. To do that, he must first  
7 "identify the acts or omissions of counsel that are alleged not to have been the  
8 result of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066.

9 When scrutinizing the attorney's performance, the reviewing court must be  
10 highly deferential and "indulge a strong presumption that counsel's conduct falls  
11 within the wide range of reasonable professional assistance; that is, the  
12 defendant must overcome the presumption that, under the circumstances, the  
13 challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S.  
14 Ct. at 2065 (citation omitted). "[C]ounsel is strongly presumed to have rendered  
15 adequate assistance and made all significant decisions in the exercise of  
16 reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066.

17 To meet the second prong, prejudice, the defendant would have to  
18 demonstrate "a reasonable probability that, but for counsel's unprofessional  
19 errors, the result of the proceeding would have been different. A reasonable  
20 probability is a probability sufficient to undermine confidence in the outcome."

1 *Id.* at 694, 104 S. Ct. at 2068. Moreover, in order to prevail on such a claim, the  
2 defendant bears the burden of proving the disputed underlying factual  
3 allegations by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001,  
4 1012-13, 103 P.3d 25, 33 (2004).

5 To demonstrate prejudice regarding the decision to enter a guilty plea, a  
6 petitioner must demonstrate a reasonable probability, but for counsel's errors,  
7 petitioner would not have pleaded guilty and would have insisted on going to  
8 trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev.  
9 980, 988, 923 P.2d 1102, 1107 (1996).

10 A habeas petitioner who makes only "bare" or "naked" claims for relief,  
11 unsupported by specific factual allegations that would, if true, entitle the  
12 petitioner to relief, or makes only factual allegations belied or repelled by the  
13 record, will not even be entitled to an evidentiary hearing, much less relief on  
14 those claims. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225  
15 (1984).

16 "Trial management is the lawyer's province: Counsel provides his or her  
17 assistance by making decisions such as 'what arguments to pursue, what  
18 evidentiary objections to raise, and what agreements to conclude regarding the  
19 admission of evidence.'" *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508, 200 L.  
20 Ed. 2d 821, 830 (2018) (citing *Gonzalez v. United States*, 553 U. S. 242, 248,

1 128 S. Ct. 1765, 170 L. Ed. 2d 616 (2008)). "Tactical decisions are virtually  
2 unchallengeable absent extraordinary circumstances." *Howard v. State*, 106  
3 Nev. 713, 722, 800 P.2d 175, 180 (1990), *abrogated on other grounds by Harte*  
4 *v. State*, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000). In the instant  
5 case, the record supports neither a finding that trial counsel's performance was  
6 deficient, nor a finding that the defendant has been prejudiced.

7 In the instant case, the record supports neither a finding that trial counsel's  
8 performance was deficient, nor a finding that the defendant has been prejudiced.

## 9 I

10 The Opening Brief quotes the District Court's Order Dismissing Writ of  
11 Habeas Corpus where Mack stated he no longer had concerns regarding Trial  
12 Counsel and the investigator. (Appx 0476)

13 Mack then indicated that he was satisfied with the representation of Trial  
14 Counsel and all of his prior concerns had been resolved. (Appx. 0477)

15 The District Court concluded: "by Mack's own admissions, there is no  
16 merit to his claim that the investigator Mark Henry failed to investigate Mack's  
17 claims. (Appx. 0478)

## 18 II

19 Mack then argued Trial Counsel caused him to enter his guilty plea while  
20 suffering the effects of a stroke. Mack quotes page after page of the arraignment

1 wherein the Court gave him multiple chances to continue, or change is mind and  
2 concluded that the assertion of being under the effects of a stroke meritless.  
3 (Appx 0478)

### 4 III

5 Mack claims that Trial Counsel failed to inform him of the consequences  
6 of being a Tier III sex offender. This despite signing the Guilty Plea Agreement  
7 that detail the specific consequences. (Appx. 0257)

8 The District Court concluded: "Mack cannot, in good faith claim he was  
9 unaware of the tier III registration and supervision requirements."

### 10 IV

11 Mack claims that Trial Counsel failed to review the case and discuss  
12 defenses.

13 The District Court concluded that his assertion was unsupported by the  
14 record of the arraignment. (Appx. 0488)

### 15 V

16 Mack claims that Trial Counsel failed to inform him of the consequences  
17 of pleading guilty to attempted sexual assault. This again is belied by the record  
18 wherein the Court went over the maximum possible sentence and registration  
19 requirements detailed in the plea agreement. (0257)

20 ///



1 VI


2 Mack claims that Trial Counsel failed to inform him of a conflict of  
3 interest. The District Court concluded that there was no evidence of a conflict of  
4 interest, and nothing has been offered to support Mack's unsubstantiated claim.  
5 (Appx 0489)

6 **CONCLUSION**

7 The Opening Brief is merely a repeat of previous arguments from the  
8 evidentiary hearing that the District Court found to be without merit. Based on  
9 that the State is requesting the appeal be denied.

10 **DATED** this 21<sup>st</sup> day of December 2021.

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1                                   **CERTIFICATE OF COMPLIANCE**

2           I hereby certify that I have read this appellate brief, and to the best of my  
3 knowledge, information, and belief, it is not frivolous or interposed for any  
4 improper purpose. I further certify that this brief complies with all applicable  
5 Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires  
6 every assertion in the brief regarding matters in the record to be supported by  
7 appropriate references to the record on appeal. I understand that I may be  
8 subject to sanctions in the event that the accompanying brief is not in conformity  
9 with the requirements of the Nevada Rules of Appellate Procedure.

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## VERIFICATION

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 pt. font; or

☐ This brief has been prepared in a monospaced typeface using Microsoft Word in \_\_\_\_\_ with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionately spaced, has a typeface of 14 points or more and contains approximately 1,595 words as per NRAP 32(a)(7)(A)(ii); or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_ words or \_\_\_\_ lines of text; or

☒ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the

1 record to be supported by a reference to the page and volume number, if any, of  
2 the transcript or appendix where the matter relied on is to be found. I understand  
3 that I may be subject to sanctions in the event that the accompanying brief is not  
4 in conformity with the requirements of the Nevada Rules of Appellate Procedure

5 **DATED** this 21<sup>st</sup> day of December 2021.

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