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

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5 WILLIAM JOSEPH MCCAFFREY, )  
6 Appellant, )  
7 v. )  
8 THE STATE OF NEVADA, )  
9 Respondent. )  
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Clerk of Supreme Court  
Case No. 83388

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13 **APPELLANT'S OPENING BRIEF**

14  
15 Appeal from Dismissal of Petition for Writ of Habeas Corpus  
16 Second Judicial District Court  
District Court case number CR09-1325  
17

18  
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WILLIAM JOSEPH MCCAFFREY, ) Case No. 83388  
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Appellant, )  
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v. )  
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THE STATE OF NEVADA, )  
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Respondent. )  
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The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Edward T. Reed, Esq.
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below:  
Edward T. Reed, PLLC

DATED this 3<sup>rd</sup> day of March, 2022.

/s/ Edward T. Reed  
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WILLIAM MCCAFFREY

## **TABLE OF CONTENTS**

NRAP 26.1 DISCLOSURE .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
ROUTING STATEMENT .....	1
STATEMENT OF ISSUES .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	4
SUMMARY OF THE ARGUMENT.....	6
LEGAL ARGUMENT.....	7
I. <u>THE DISTRICT COURT ERRED IN DISMISSING THE</u>	
<u>APPELLANT’S PETITION WITHOUT A</u>	
<u>HEARING</u> .....	7
CONCLUSION .....	12
CERTIFICATE PURSUANT TO NRAP 28.2 .....	14
CERTIFICATE OF SERVICE .....	16

## **TABLE OF AUTHORITIES**

### **Federal Cases:**

<i>Strickland v. Washington</i> .....	10
466 U.S. 668 (1984)	
<i>Schlup v. Delo</i> ,	
513 U.S. 298, 324-27 (1995) .....	9

### **Federal Laws:**

U.S. Constitution, 6 <sup>th</sup> Amendment .....	12
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### **State Cases:**

<i>Lader v. Warden</i> , .....	7
121 Nev. 682, 686, 120 p.3d 1164, 1166 (2005)	
<i>Mann v. State</i> .....	7
118 Nev. 351, 354, 46 P.3d 1228 (2002)	
<i>Sanchez v. State</i> .....	3
85 Nev. 95, 97-98, 450 P.2d 793, 794-5 (1969)	
<i>Watkins v. State</i> ,	
85 Nev. 102, 450 P.2d 795 (1969) .....	4

### **State Statutes and Rules:**

NRAP 17(a)(1).....	1
NRS 34.575(1) .....	1
NRS 34.726 .....	3,6,8,12
NRS 34.726(1) .....	8
NRS 34.810(1) .....	8
NRS 174.063 .....	6
NRS 200.720.....	2,5
NRS 200.750 .....	2,5

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## **STATEMENT OF THE CASE**

### *Procedural History.*

The Appellant William McCaffrey (Mr. McCaffrey), was charged in an information filed on July 13, 2009, charging him with one count of promotion of a sexual performance of a minor, in violation of NRS 200.720 and NRS 200.750. I AA 0001. On August 14, 2009, he signed a guilty plea memorandum (I AA 0004) and on the same day he entered his plea in the Second Judicial District Court, Department 8, before the Honorable Steven Kosach. I AA 0010. After a penalty hearing Mr. McCaffrey was given a sentence of life in prison with the possibility of parole after 5 years. I AA 0022. After an appeal in which Mr. McCaffrey's appeal was affirmed in case number 54873 on July 15, 2010, and a remittitur was issued on August 10, 2010, he filed a petition for writ of habeas corpus on October 20, 2020 (I AA 0024).

A motion to dismiss the petition was filed by the Respondent State of Nevada on February 4, 2021. I AA 0095. On May 3, 2021, Mr. McCaffrey filed a pro se opposition to the motion to dismiss as an exhibit to an exparte emergency motion. I AA 0110. After Attorney Scott Edwards was appointed by the Court to represent Mr. McCaffrey, he filed a Response to Motion to Dismiss Post Conviction Petition on June 9, 2021. I AA 0145.

1 On June 21, 2021, the State filed a Reply in Support of the State's Motion to  
2 Dismiss Post-Conviction Petition. I AA 0151. On August 10, 2021, the  
3 district court issued a Notice of Entry of Order Granting Motion to Dismiss  
4 Post-Conviction Petition. I AA 0158.  
5

6 The district court order was based on the argument by the State that  
7 Mr. McCaffrey, in filing a petition for writ of habeas corpus 10 years after  
8 the remittitur issued, was time barred and that there was insufficient  
9 justification submitted by Mr. McCaffrey pursuant to NRS 34.726 to  
10 overcome the time bar. I AA 160. On August 16, 2021, Mr. McCaffrey  
11 filed a pro se Notice of Appeal. I AA 0167. On August 31, 2021, this  
12 Court entered an Order of Limited Remand for Appointment of Counsel,  
13 resulting in the appointment of the undersigned counsel on September 7,  
14 2021.  
15

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18 *Filing of Brief Pursuant to Sanchez v. State.*  
19

20 This opening brief is filed by the undersigned counsel pursuant to  
21 *Sanchez v. State*, 85 Nev. 95, 97-98, 450 P.2d 793, 794-5 (1969), which  
22 states as follows: "Appointed counsel for a defendant who demands an  
23 appeal need not file a request to withdraw if he feels there is no reversible  
24 error to argue on appeal. If after conscientious examination of the record  
25 counsel believes that the appeal is frivolous, then he must file the opening  
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1 brief on the merits of all arguable issues raised by the record together with  
2 an acknowledgment that he does not believe there is merit to the appeal.”  
3 *See also, Watkins v. State*, 85 Nev. 102, 450 P.2d 795 (1969). The  
4 undersigned counsel hereby acknowledges that he does not believe there is  
5 any merit to this appeal. However, the issues and arguments of the  
6 Appellant Mr. McCaffrey are presented in order to allow this Court to  
7 independently review these issues to determine if there is any merit to his  
8 argument.  
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### 13 **STATEMENT OF FACTS**

14 Pursuant to facts stated in the petition for writ of habeas corpus filed  
15 on October 20, 2020, by Mr. McCaffrey, detectives with the Washoe County  
16 Sheriff’s Department on July 9<sup>th</sup> and 10<sup>th</sup>, 2009, downloaded a video  
17 containing child pornography from Mr. McCaffrey’s computer and executed  
18 a search warrant at the home of Mr. McCaffrey. I AA 041-2. The Sheriff’s  
19 office estimated that there were between 500,000 and 1,000,000 images  
20 found on the computer as well as in printed material. I AA 042. However,  
21 Mr. McCaffrey stated in his petition that most of the images found were  
22 images of adults. Id.  
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1           On June 10, 2009, Mr. McCaffrey was arrested and charged with one  
2 count of the promotion of the sexual performance of a minor in violation of  
3 NRS 200.720 and NRS 200.750 and five counts of possession of a visual  
4 presentation depicting sexual conduct of persons under 16 years of age, a  
5 violation of NRS 200.730. I AA 043. He was not arraigned in Justice  
6 Court on the formal charges until June 16, 2009. Id. Pursuant to a plea  
7 agreement, Mr. McCaffrey pled guilty to one count of promotion of a sexual  
8 performance of a minor over the age of 14, which was a legal fiction because  
9 he was charged with promotion of a sexual performance of a minor under  
10 the age of 14. I AA 016.  
11

12           In Mr. McCaffrey's petition, which was admittedly filed some 10  
13 years after the remittitur was issued after Mr. McCaffrey's direct appeal in  
14 case 54873, the main argument made to overcome the one year limitation on  
15 filing a petition for habeas corpus is an argument involving actual  
16 innocence. I AA 033, I AA 122.  
17

18           Mr. McCaffrey maintains that the count to which he plead guilty is  
19 also a legal fiction in the sense that he did not engage in any file sharing. I  
20 AA 066. Mr. McCaffrey also maintains that his counsel was ineffective for  
21 failure to raise several additional issues, including (1) having him sign a plea  
22 agreement which did not contain the required confirmation of counsel found  
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1 in NRS 174.063 (listed for the first time in Mr. McCaffrey's pro se  
2 opposition to the motion to dismiss at I AA 132) (2) violation of the 48 hour  
3 rule, (3) violation of the 60 minute rule (See opposition to motion to dismiss,  
4 I AA 136), (4) violation of Mr. McCaffrey's Miranda warnings, and (5)  
5 search warrant executed without probable cause (See opposition to motion to  
6 dismiss, I AA 135) .  
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### 9 10 **SUMMARY OF THE ARGUMENT**

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12 Mr. McCaffrey maintains that the district court erred in dismissing his  
13 petition without a hearing. He believes that sufficient evidence has been  
14 presented that he is actually innocent of the crime to be able to overcome the  
15 one year requirement for filing these petitions pursuant to NRS 34.726. He  
16 further contends that other reasons exist to overcome the one year  
17 requirement, namely that he was untrained in the law, and that he gave all of  
18 his papers to the attorney who represented him in his motion for  
19 modification, Mary Lou Wilson, and she did not give him back his papers.  
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23 Mr. McCaffrey also listed several grounds for this habeas corpus  
24 petition, which include that the ground to which he plead guilty did not  
25 contain the requirement that there was an actual minor involved in the crime,  
26 and that there was no showing of a "sexual performance," which is required  
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1 by the statute. In addition, there was no evidence that his computer was  
2 acting as a file server, and there is newly discovered evidence that the  
3 detective in his case, Detective Carry, has a propensity to falsify evidence.  
4 All of this should entitle Mr. McCaffrey to an evidentiary hearing.  
5

## 6 7 8 **LEGAL ARGUMENT**

### 9 **I. THE DISTRICT COURT EFFED IN DISMISSING THE** 10 **APPELLANT'S PETITION WITHOUT A HEARING**

#### 11 12 **STANDARD OF REVIEW**

13  
14 The Court defers to the district court's factual findings if they are  
15 supported by substantial evidence and not clearly wrong, and reviews the  
16 district court's application of the law to those facts de novo. *Lader v.*  
17 *Warden*, 121 Nev. 682, 686, 120 p.3d 1164, 1166 (2005). A petitioner has  
18 a right to a post-conviction evidentiary hearing when he asserts claims  
19 supported by specific factual allegations not belied by the record that, if true,  
20 would entitle him to relief. *Mann v. State*, 118 Nev. 351, 354, 46 P.3d  
21 1228 (2002).  
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#### 24 25 **DISCUSSION**

26 Mr. McCaffrey is cognizant of the following statutes pertaining to his  
27 petition for writ of habeas corpus.  
28

1 NRS 34.810(1) reads as follows:

2 1. The court shall dismiss a petition if the court determines that:

3 (a) The petitioner's conviction was upon a plea of guilty or guilty  
4 but mentally ill and the petition is not based upon an allegation that  
5 the plea was involuntarily or unknowingly entered or that the plea was  
6 entered without effective assistance of counsel.

7 NRS 34.726(1) reads as follows:

8 1. Unless there is good cause shown for delay, a petition that  
9 challenges the validity of a judgment or sentence must be filed within  
10 1 year after entry of the judgment of conviction or, if an appeal has  
11 been taken from the judgment, within 1 year after the appellate court  
12 of competent jurisdiction pursuant to the rules fixed by the Supreme  
13 Court pursuant to Section 4 of Article 6 of the Nevada Constitution  
14 issues its remittitur. For the purposes of this subsection, good cause  
15 for delay exists if the petitioner demonstrates to the satisfaction of the  
16 court:

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

18 (b) That dismissal of the petition as untimely will unduly  
19 prejudice the petitioner.

20 This case is brought before this Honorable Court on appeal to allow  
21 this court to review the decision of the district court in which Mr.  
22 McCaffrey's petition for writ of habeas corpus was dismissed by the district  
23 court without an evidentiary hearing, as well as to allow Mr. McCaffrey to  
24 exhaust his state administrative remedies.

25 Mr. McCaffrey first lists several reasons why his petition was filed  
26 after the one year required pursuant to NRS 34.726. The first reason listed  
27 is that he is actually innocent of the crime. I AA 032-4, I AA 122, I AA  
28

1 128-9. Mr. McCaffrey cites *Schlup v. Delo*, 513 U.S. 298, 324-27 (1995),  
2 which states that “to satisfy this actual innocence gateway, a petitioner must  
3 come forward with new reliable evidence not presented at the trial . . .  
4 that demonstrates that it is more likely than not that no reasonable juror  
5 would have found the petitioner guilty beyond a reasonable doubt.” Mr.  
6 McCaffrey cites newly discovered evidence supporting actual innocence,  
7 namely the evidence that has come to light regarding Detective Carry’s  
8 arrest for bigamy, burglary and forgery several years after his investigation  
9 into Mr. McCaffrey’s case, which demonstrates a propensity to falsify  
10 evidence. I AA 128-129.  
11

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14 Another reason given is that Attorney Mary Lou Wilson was  
15 appointed to represent Mr. McCaffrey in a motion for modification in 2014,  
16 and that he gave Ms. Wilson his papers and relied on her to file something,  
17 but that she abandoned his claim about the time he was granted parole and  
18 lost all of his papers. I AA 034-037.  
19

20  
21 Another reason Mr. McCaffrey gave for not filing his petition within  
22 the one year period was that he was untrained in the law. I AA 038. I AA  
23 126. After explaining the reasons why he believed that his filing the  
24 petition beyond the one year period was justified, he went on to list four  
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1 grounds as to why the conviction should be reversed because of ineffective  
2 assistance of counsel.

3 Ground I states that the plea agreement was unconstitutional because  
4 one of the required elements was missing from the charge, namely that the  
5 State did not prove that there was an actual minor involved in the offense.  
6 I AA 059. In addition, there was no nexus to a “sexual performance” that  
7 the State was required to prove, and that he was sentenced to a life sentence  
8 for a crime he did not commit. Id. Mr. McCaffrey went on to state in  
9 ground I that his counsel was ineffective pursuant to *Strickland v.*  
10 *Washington*, 466 U.S. 668 (1984), and his counsel coerced Mr. McCaffrey  
11 into pleading guilty. I AA 060. Since he was coerced, his guilty plea was  
12 not voluntary. I AA 060-4. Therefore, Mr. McCaffrey is entitled to a  
13 hearing as to this issue if it is not barred by the one year limitation of NRS  
14 34.726. Mr. McCaffrey further argues that pleading guilty to a crime that  
15 lacks an essential element, namely that there was no sexual performance of a  
16 minor, equates with actual innocence, which allows the one year limitation  
17 to be overcome. I AA 063.

18 In Ground II Mr. McCaffrey makes the argument that there was no  
19 evidence that his computer was acting as a file server and that no expert  
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1 testimony was ever offered to support that allegation. I AA 066. He  
2 asked for an evidentiary hearing as to this issue. I AA 070.

3 Ground III deals with an allegation that Detective Carry  
4 misrepresented what Mr. McCaffrey did in alleging that Mr. McCaffrey had  
5 a file sharing program, while Mr. McCaffrey denies ever sharing any of the  
6 files on his computer with anyone else. I AA 073. Mr. McCaffrey went  
7 on to allege that newly discovered evidence showed that Detective Carry had  
8 been accused of falsifying the evidence in his own divorce case, which  
9 occurred a number of years after his work in Mr. McCaffrey's case in 2009,  
10 which showed a propensity to engage in dishonest behavior. I AA 074.  
11 Mr. McCaffrey maintains that the failure of his counsel to argue that Mr.  
12 McCaffrey did not "promote" this pornography demonstrated ineffective  
13 assistance of counsel, which called for a hearing in this matter. I AA 075.  
14 Ground IV in the petition alleged cumulative error. I AA 084.

15 Scott Edwards, on behalf of Mr. McCaffrey and in his response to the  
16 motion to dismiss post-conviction petition (I AA 145) listed some additional  
17 grounds for the petition, some of which as noted above were listed in the pro  
18 se opposition to the motion to dismiss. I AA 110 et seq. These were  
19 considered by the district court and were found to be of no merit. I AA  
20 164. These additional grounds are as follows: (1) the guilty plea was  
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1 defective; (2) the 48 hour rule was violated; (3) Miranda rights violation; (4)  
2 petitioner would not have pled guilty if he had known Detective Carry was a  
3 bad cop; (5) Attorney John Petty had no discussion with him about his  
4 appeal; (6) time lost due to Attorney Wilson's abandonment of his case; (7)  
5 the 60 minute rule was violated; (8) the defense counsel and district attorney  
6 colluded against him; (9) the search warrant was illegal. The district court  
7 found these new allegations not entitled to relief because they were bare  
8 naked allegations, and, therefore, do not overcome the procedural bars. I  
9 AA 164.

### 13 CONCLUSION

14 Mr. McCaffrey contends that the district court erred in dismissing his  
15 petition for writ of habeas corpus without a hearing because he listed  
16 sufficient cause to overcome the requirement under NRS 34.726 that his  
17 petition must be filed within one year of the remittitur issuing from his  
18 appeal. He listed actual innocence as a reason why the one year  
19 requirement would not apply in his case, as well as several other reasons  
20 such as being untrained in the law.

24 He also contends that his trial counsel was ineffective and that  
25 therefore his right to effective assistance of counsel under the Sixth  
26 Amendment to the United States Constitution was violated for allowing his  
27



1 plea to go forward to a crime which did not contain all of the elements of the  
2 crime listed in the statute, namely promotion of a sexual performance of a  
3 minor.  
4

5 He respectfully requests that this Honorable Court review the  
6 arguments stated herein and the petition for writ of habeas corpus and other  
7 pleadings listed herein and find that the allegations in his petition for writ of  
8 habeas corpus warrant an evidentiary hearing.  
9

10 Dated this 3<sup>rd</sup> day of March, 2022.  
11  
12

13 /s/ Edward T. Reed  
14 EDWARD T. REED, ESQ.  
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16 ATTORNEY FOR APPELLANT  
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1                   **CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2**

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3           1. I hereby certify that this brief complies with the formatting  
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP  
5 32(a)(5) and the type style requirements of NRAP 32(a)(6) as this brief has  
6 been prepared in a proportionally spaced typeface using Microsoft Word 97-  
7 2003 Compatibility Mode in Times New Roman, 14 points.  
8

9  
10          2. I further certify that this brief complies with the page- or type-  
11 volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief  
12 exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface  
13 of 14 points or more and does not exceed 30 pages.  
14

15          3. Finally I certify that I have read the appellate brief, and to the best  
16 of my knowledge, information and belief, it is not frivolous or interposed for  
17 any improper purpose. I further certify that this brief complies with all  
18 applicable Nevada Rules of Appellate Procedure, in particular NRAP  
19 28(e)(1), which requires every assertion in the brief regarding matters in the  
20 record to be supported by a reference to the page and volume number, if any,  
21 of the transcript or appendix where the matter relied on is to be found. I  
22 understand that I may be subject to sanctions in the event that the  
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1 accompanying brief is not in conformity with the requirements of the  
2 Nevada Rules of Appellate Procedure.

3 DATED this 3<sup>rd</sup> day of March, 2022.  
4

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