

Case No. DC-CV-20-69

Dept.: 1

FILED
2021 MAY 27 PM 2:49

ELKO COUNTY DISTRICT COURT
Electronically Filed
Jun 14 2021 10:07 a.m.
Elizabeth A. Brown
CLERK DEPUTY
Clerk of Supreme Court

**IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF ELKO**


TENNILLE RAE WHITAKER,
Petitioner,

v.
JERRY HOWELL, WARDEN,
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER.
Respondent.

NOTICE OF APPEAL

NOTICE is hereby given that TENNILLE RAE WHITAKER, Appellant above named, hereby appeals to the Supreme Court of Nevada from the final judgment entered in this action on the 27th day of APRIL 2021.

Dated this 27 day of MAY 2021.


GARY D. WOODBURY
Attorney for Defendant
1053 Idaho St.
Elko, NV 89801

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By Delivering to:

AND


Kimberly Dawson
KIMBERLY DAWSON

Case No. DC-CV-20-69

Dept.: 1

2021 MAY 27 PM 2:49

ELKO CO DISTRICT COURT

CLERK _____ DEPUTY 

**IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF ELKO**

TENNILLE RAE WHITAKER,
Petitioner,

v.

JERRY HOWELL, WARDEN,
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER.
Respondent.

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement: *Tennille Rae Whitaker*
2. Identify the judge issuing the decision, judgment or order appealed from: *Honorable Kriston N. Hill.*
3. Identify each appellant and the name and address of counsel for each appellant: *Tennille Rae Whitaker is the Appellant. Counsel is Gary D. Woodbury. 1053 Idaho St. Elko, Nevada, 89801.*
4. Identify each respondent and the name and address of appellant counsel, if known for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel): *The State of Nevada, Department of Corrections, is the respondent. Counsel for Respondent is the Elko County District Attorney, 540 Court Street, 2nd Floor. Elko, Nevada 89801.*
5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission): *All attorneys are licensed to practice law in the state of Nevada.*

1 6. Indicate whether appellant was represented by appointed or retained counsel in the district
2 court: *Retained counsel.*

3 7. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of
4 entry of the district court order granting such leave: *No order to proceed in forma pauperis was
5 requested or granted.*

6 8. Indicate the date the proceedings commenced in the district court (e.g., date complaint,
7 indictment, information, or petition was filed): *A Petition for post-conviction writ of habeas
8 corpus was filed on July 28, 2020 in the Fourth Judicial District Court.*


9 9. Provide a brief description of the nature of the action and result in the district court, including
10 the type of judgment or order being appealed and the relief granted by the district court: *The
11 Petition for a post-conviction writ of habeas corpus alleged that Petitioner received ineffective
12 assistance of counsel after her entry of plea up to and including sentencing.
13 The District Court denied the Petition on April 27, 2012. A Motion for Reconsideration was filed
14 by Petitioner on May 7, 2021. The District Court denied the Motion for Reconsideration on May
15 24, 2021.*

16 10. Indicate whether the case has previously been the subject of an appeal to or original writ
17 proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the
18 prior proceeding: *An appeal was filed after sentencing. The Caption is Tennille Rae Whitaker
19 vs. the State of Nevada. The docket number is 77294.*

20 11. Indicate whether this appeal involves child custody or visitation: *Child custody is not
21 involved.*

22 12. If this is a civil case, indicate whether this appeal involves the possibility of settlement:
23 *There is no possibility of settlement.*

24 Dated this 27 day of MAY 2021.

25 
26 GARY D. WOODBURY
27 Nevada State Bar # 1915
28 Attorney for Defendant
1053 Idaho St.
Elko, NV 89801
775-738-8006

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CERTIFICATE OF SERVICE

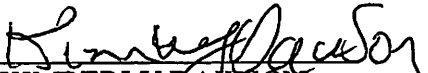
Pursuant to NRCP 5(b), I certify that I, KIMBERLY DAWSON, on the 27 day of May 2021 served the foregoing CASE APPEAL STATEMENT by delivering, mailing or by facsimile transmission or causing to be delivered, mailed, or transmitted by facsimile transmission, a copy of said document to the following:

By Delivering to:

THE HONORABLE KRISTON HILL
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

AND


ELKO COUNTY DEPUTY DISTRICT ATTORNEY
540 COURT ST, 2ND FLOOR
ELKO, NV 89801


KIMBERLY DAWSON

Case No. DC-CV-20-69

Dept.: 1

FILED
2021 MAY 27 PM 2:50
ELKO CO DISTRICT COURT

CLERK _____ DEPUTY 

**IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF ELKO**

TENNILLE RAE WHITAKER,
Petitioner,

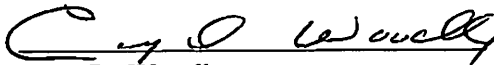
v.
JERRY HOWELL, WARDEN,
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER.
Respondent.

NO TRANSCRIPT REQUEST

CERTIFICATE THAT NO TRANSCRIPT IS BEING REQUESTED.

Notice is hereby given that TENNILLE RAE WHITAKER is not requesting the
preparation of transcripts for this appeal.

Dated this 27 day of May 2021.


Gary D. Woodbury
Nevada Bar # 1915
1053 Idaho Street
775-738-8006

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By delivering to:

ELKO COUNTY DISTRICT ATTORNEY
540 COURT STREET, 2ND FLOOR
ELKO, NV 89801

Kimberly Dawson
KIMBERLY DAWSON

Case Summary

DC-CV-20-69 - WHITAKER, TENNILLE VS. WARDEN - HOWELL, JERRY

Court: DC-CV-20-69

Agency: Elko County Clerk's Office

Type: Civil

CaselD: 20-73565

Status: Closed

Received Date: 7/28/2020

Status Date: 4/28/2021

Age: 317 days Active Age: 317 days

Involvements

HILL, KRISTON Judge -

PORTER, NANCY Judge, Inactive -

WHITAKER, TENILLE Appellant -

WOODBURY, GARY Attorney -

WARDEN - HOWELL, JERRY Respondent -

Name Attributes

For: TENILLE WHITAKER

Name Record Source - Name Record Converted
from JALAN - District Attorney

Issues

1. CVC42 - Civil Writ - Writ of Habeas Corpus Occurred: 7/28/2020

Civil Writ - Writ of Habeas Corpus

Related Cases

Companion Case

ECDC-CRFP-17-3893 - STATE OF NEVADA VS.

Court: ECDC-CRFP-17-3893

Type: Criminal

Status: Closed

Agency: Elko County Clerk's Office

Status Date: 10/8/2018

Case History

Date	Event Type Desc	Status
	Awaiting Charging Decision - Case Status	
	Case Status Change	
	Pending - Case Status	
	Case Status Change	
	Closed - Case Status	
	Case Status Change	
7/28/2020	CIVIL COVERSHEET - Document	
7/28/2020	VERIFIED PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) - Document	
7/28/2020	- Case Notes	
	WOODBURY RUNNER HAD COPIES FOR THE DA'S OFFICE	

Case Summary

8/28/2020	ORDER DIRECTING RESPONSE - Document	
9/9/2020	RETURN TO PETITION FOR WRIT OF HABEAS CORPUS - Document	
	A SEALED ENVELOPE IS ATTACHED TO PLEADING	
9/10/2020	NOTE ADDED TO FILE - Case Notes	
	EMAILED COPY OF PETITION FOR WRIT TO NICOLE FAIRFIELD/AG'S OFFICE, nfairfield@ag.nv.gov	
10/12/2020	ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS - Document	
4/2/2021	REQUEST FOR REVIEW PETITION AND ANSWER - Document	Order Filed
4/28/2021	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS - Document	
4/28/2021	NOTICE OF ENTRY OF ORDER - Document	
	ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS	
5/7/2021	MOTION FOR RECONSIDERATION - Document	
5/7/2021	NOTICE OF MOTION - Document	
5/14/2021	OPPOSITION TO MOTION TO RECONSIDER - Document	
5/17/2021	REPLY TO OPPOSITION TO MOTION TO RECONSIDERATION - Document	
5/21/2021	REQUEST FOR REVIEW RE PETITIONER'S MOTION - Document	
5/24/2021	ORDER DENYING MOTION FOR RECONSIDERATION - Document	
5/27/2021	Appeal Bond - District Court - BOND For: WHITAKER, TENILLE Amount \$500.00 POSTED BY GARY D. WOODBURY. CHECK #2354 / 1053 IDAHO ST, ELKO NV 89801	Posted

Case Summary

5/27/2021 NOTICE OF APPEAL - Document

5/27/2021 CASE APPEAL STATEMENT- Document

5/27/2021 NO TRANSCRIPT REQUEST - Document

5/27/2021 DEPOSIT OF \$500.00 APPEAL BOND FOR
TENILLE WHITAKER, POSTED BY
WOODBURY ESQ - Document
CK # 2354
RECEIPT # 21-EC-CL-1409 PLACED IN WOODBURY ESQ'S P/U BOX

5/28/2021 Check - Payment
Payer Payment Amount
GARY D WOODBURY \$24.00
ON BEHALF OF TENILLE WHITAKER

6/10/2021 CLERK'S CERTIFICATION - Document
COPY FILED WITH THE SUPREME COURT ALONG WITH ALL REQUIRED DOCUMENTS

Bonds

For	Bond Dt	Bond Type	Bond Status	Modified DT	Amount	Amt Paid	Paid By
2 - TENILLE WHITAKER	5/27/2021	Appeal Bond - District Court	Posted	5/27/2021	\$500.00	\$500.00	WOODBURY, GARY D. on 5/27/2021
History							
	Bond Dt	For	Type	Status	Amount		
	5/27/2021	TENILLE WHITAKER	Appeal Bond - District Court		\$500.00		
			POSTED BY GARY D. WOODBURY. CHECK#2354 1053 IDAHO ST, ELKO NV 89801				

Case Obligations

Obligation	Pay By	Due Date	Obligation Amount	Amount Paid	Balance Due
DC Supreme Court Appeal NRS 19.013 \$24	2--WHITAKER, TENILLE-APPEAL TO SUPREME COURT	5/27/2021	\$24.00	\$24.00	\$0.00
Total Personal Obligation(s):			\$24.00	\$24.00	\$0.00
Total Case Obligation(s):			\$24.00	\$24.00	\$0.00

1 CASE NO. DC-CV-20-69

2 DEPT. NO. 1

FILED
2021 APR 27 PM 2:20
ELKO CO DISTRICT COURT
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6 IN THE FOURTH JUDICIAL DISTRICT COURT
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
8

9 TENILLE WHITAKER,

10 Petitioner,
11 V.

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

12 JERRY HOWELL, WARDEN
13 FLORENCE MCCLURE WOMEN'S
14 CORRECTIONAL CENTER,

15 Respondent.
16 _____ /

17 On July 28, 2020, Petitioner Tenille Whitaker filed the instant verified petition for writ of
18 *habeas corpus*, alleging that her trial counsel was ineffective for decisions made and actions not
19 taken at sentencing, and that the court would have sentenced her differently had counsel been
20 effective. On August 28, 2020, this Court directed the District Attorney's Office to file a response
21 to the petition. On October 12, 2020, the District Attorney's Office filed a response to the petition.
22 For the reasons stated below, the petition is DENIED.

I. Mandatory Dismissal

23 Preliminarily, it appears that the Court must dismiss this petition pursuant to NRS
24 34.810(1)(a), as the petition was "not based upon an allegation that the plea was involuntarily or
25 unknowingly entered or that the plea was entered without effective assistance of counsel." Petitioner
26 has alleged deficient performance by trial counsel at sentencing which she believes negatively

1 impacted the sentence imposed by the Court; she does not link this deficient performance up to her
2 entry of plea, however, so it appears that these claims fall outside the limited scope of postconviction
3 *habeas corpus* petitions challenging judgments based on guilty pleas.

4 As the issue of the correct interpretation of NRS 34.810(1)(a) is currently before the Nevada
5 Supreme Court,¹ however, the Court will also address the petition on the merits.

6 **II. Ineffective Assistance of Counsel**

7 To show ineffective assistance of counsel, Petitioner must show first, that trial counsel's
8 representation of her fell below an objective standard of reasonableness, and second, that trial
9 counsel's deficient performance prejudiced her defense, meaning that there is a reasonable
10 probability that, but for trial counsel's mistakes, the results of the proceeding at issue (here, the
11 sentencing hearing) would have been different. Strickland v. Washington, 466 US 668, 688 (1984);
12 Warden v. Lyons, 100 Nev 430, 432 (1984). A court may address the Strickland prongs in any order.
13 Strickland at 697. To warrant an evidentiary hearing, Petitioner must make specific factual
14 allegations not belied by the record that, if true, would entitle her to relief. Hargrove v. State, 100
15 Nev. 498, 502-03 (1984).

16 **A. Trial Counsel's Sentencing Argument (Issues Addressed)**

17 Petitioner first states that trial counsel's sentencing argument focused almost exclusively on
18 whether the victims were "pupils" under NRS 201.540, whether Petitioner had committed the crimes
19 to which she pled no contest, and the fact that trial counsel indicated to the Court that he had not
20 looked at the legislative history of NRS 201.450. Petitioner additionally states that trial counsel had
21 been injured and hospitalized shortly before sentencing and as a result had been in irregular
22 communication with Petitioner for a significant period of time before sentencing, and, further, that
23 trial counsel informed the Court that he was unprepared and confused, but the Court did not inquire
24 further and trial counsel did not seek a continuance. Petitioner does not state how any of the above

25
26 ¹ See Gonzales v. Nevada, No. 78152 (NV. Sup. Ct, filed on Feb. 20, 2019).

1 falls below an objective standard of reasonableness, nor how the results of the sentencing hearing
2 would have been different had trial counsel acted differently.

3 Trial counsel did spend time correcting the Pre-Sentence Investigation ("PSI") report's
4 interchanging the words "pupil" and "student" and "student aide" when asked by the Court if he saw
5 any errors or omissions in the PSI and did spend time making argument as to whether the victims
6 in this case were "pupils" under NRS 201.450. When asked for his argument as to sentencing, trial
7 counsel continued to discuss the meaning of the word "pupil" as well as whether Petitioner should
8 have pled No Contest or gone to trial. He also made arguments as to the constitutionality of NRS
9 201.450, alleging that the statute is overbroad and/or void for vagueness.

10 In addition to the above, however, trial counsel eventually acknowledged that his client had
11 pled to the underlying offenses and did provide argument as to how the Court should sentence
12 Petitioner. Specifically, trial counsel focused on the mitigating factors of Petitioner's psychosexual
13 evaluation, which found her to be a low risk of reoffending; her going to counseling; her guilt and
14 remorse; the allegation that her students initiated the sexual contact with her; that she would be
15 interested in serving her probation outside of Elko County, away from her victims' families; and the
16 good character testimonies of Petitioner's pastor, father, and friend. Trial counsel also made a point
17 to make sure the Court was not considering the letter sent from a group of people living in Wells,
18 some of whom were not victims pursuant to NRS 176.015. Petitioner does not show how trial
19 counsel discussing the definition of "pupils," correcting the PSI, and making comments as to whether
20 Petitioner should have pled No Contest or not fell below an objective standard of reasonableness
21 when those comments were coupled with trial counsel's actual sentencing argument and discussion
22 of mitigating factors. Further, Petitioner has not shown a reasonable probability that her sentence
23 would have been lesser without those comments being made. Without those comments, trial counsel
24 still would have addressed the same mitigating factors he eventually did. The Court finds Petitioner
25 has not met her burden for an evidentiary hearing as to trial counsel's "pupils" argument.

26 ///

1 Further, the Court finds Petitioner has not met her burden as to the allegations that trial
2 counsel had been hospitalized, uncommunicative with Petitioner, and unprepared and confused at
3 the sentencing hearing. Petitioner has provided no factual support for her allegations that trial
4 counsel was hospitalized or uncommunicative; a bald allegation will not suffice to set an evidentiary
5 hearing. Further, trial counsel did not state that he was unprepared and confused at the sentencing
6 hearing; rather, he stated that he had not delved into the legislative history of NRS 201.450.
7 Petitioner has not shown that trial counsel's failure to look into the legislative history of NRS
8 201.450 fell below an objective standard of reasonableness, or that, had he done so, Petitioner's
9 resulting sentence would have been lower. The Court therefore declines to set an evidentiary hearing
10 as to these allegations.

11 **B. Trial Counsel's Sentencing Argument (Issues not Addressed)**

12 Petitioner next states that trial counsel should have addressed the following issues at the
13 sentencing hearing:

14 whether Petitioner deliberately initiated any of the relationships with her victims; whether
15 Petitioner had mental health problems and, if so, what they were; whether Petitioner refused
16 treatment for her mental health problems; whether the suicide of one of Petitioner's victims was
17 attributable to Petitioner's relationship with him; whether a significant number of Wells residents
18 feared and opposed Petitioner returning to the community; whether the victims who left Wells did
19 so because of their humiliation at having engaged in sexual behaviors with Petitioner; and whether
20 a victim impact statement can properly include the public's point of view about sentencing.

21 Pertinently, trial counsel's sentencing argument did address who initiated the sexual
22 relationships (1), Petitioner's ongoing mental health counseling (3), the first victim's suicide and
23 how it was distant in both time and location from his relationship with Petitioner (4), and the
24 inappropriateness of the written letter or petition from the citizens of Wells (7). The question of
25 Petitioner's mental health diagnoses (2) was addressed in the psychosexual evaluation that trial
26 counsel had had prepared for Petitioner, and which found her to be suffering from borderline

1 personality disorder, ADHD, and major depressive disorder. The Court weighed and considered all
2 of the above at sentencing.

3 Petitioner alleges that trial counsel should have gone into who initiated the sexual
4 relationships further by advising the Court that Petitioner's first victim forced himself on her with
5 kisses and eventually forced her to engage in oral sex with him when she was inebriated. Petitioner
6 does not deny that she engaged in repeated, consensual, sexual contact with the victims in this case
7 outside of those unwanted kisses and oral sex. Although Petitioner states that there were rumors at
8 the school about her engaging in sexual contact with her pupils, Petitioner admits that she was
9 neither forced nor blackmailed into engaging in these additional sexual contacts with the victims.
10 Having pled to consensually engaging in sexual relations with her pupils, Petitioner cannot now (or
11 at sentencing) allege that these acts were actually nonconsensual. Trial counsel not raising this issue
12 was not objectively unreasonable.

13 As to whether a significant number of Wells residents feared and opposed Petitioner
14 returning to Wells (5), and whether the victims who left Wells did so because of Petitioner's
15 presence therein (6), Petitioner has not shown how trial counsel's addressing these issues in his
16 sentencing argument would have had a reasonable probability of changing the ultimate sentencing
17 decision, nor how not addressing them was objectively unreasonable.

18 Petitioner next alleges that trial counsel should have advised the Court that Petitioner and her
19 husband were having marital difficulties and that Petitioner was drinking heavily at the time she
20 engaged in sexual relations with her pupils. This information was already provided to the Court in
21 the psychosexual evaluation. Trial counsel not bringing this information up a second time was not
22 objectively unreasonable.

23 1. Failure to Update Psychosexual Evaluation Prior to Sentencing

24 Petitioner next alleges that the psychosexual evaluation should have been updated
25 immediately prior to sentencing. Petitioner does not allege what an updated psychosexual evaluation
26 would have shown. She states instead that the current psychosexual evaluation stated that she had

1 not followed the medical consultation recommended by Mr. Ing, the preparer of the evaluation, and
2 that, if asked, Petitioner would have told the Court that she had obtained an MRI and had followed
3 up with a physician to see if she had any identifiable medical conditions which might explain her
4 criminal behaviors. Trial counsel already addressed Petitioner's history of consistently attending her
5 counseling sessions, so Petitioner has not shown that trial counsel was deficient in that regard. As
6 to the MRI and physician consultation, Petitioner has not shown what the results of the MRI and
7 consultation were, and how production of those results would have led to a reasonable probability
8 of a different outcome at sentencing.

9 2. Petitioner's Medications

10 Petitioner next alleges that trial counsel was deficient for not instructing her to tell the Court
11 that she was not taking medications because both Mr. Ing and Petitioner's husband opposed her
12 doing so. Again, Petitioner has not shown how her making this statement at sentencing would have
13 had a reasonable probability of changing the results of the sentencing hearing, which is especially
14 true as neither trial counsel, nor the prosecution, nor any of the witnesses, nor the Court itself made
15 any references to medication during the hearing. The statement as to medication not being made did
16 not, as Petitioner alleges, cause it to appear that Petitioner had done and would continue to do
17 nothing to address her mental health problems. As indicated above, trial counsel mentioned several
18 times that Petitioner had been consistently attending mental health counseling and intended to
19 continue doing so. There is no indication that whether Petitioner was or was not taking medication
20 had any kind of effect on the Court's sentencing decision.

21 3. The Pre-Sentence Investigation Report and Petitioner's Need for Treatment

22 Petitioner next alleges that trial counsel was deficient for not continuing to object to the
23 inclusion of Mr. Ing's statement, copied into the PSI, that Petitioner's need for treatment was as high
24 as it was overdue. Petitioner argues that this statement made it appear to the Court that she was not
25 seeking medical help for her behavior. This is belied by the fact that trial counsel mentioned several
26 times that Petitioner was attending counseling and had been for some time, as well as by the fact that

1 the Court stated that it was aware that the PSI statement had come directly from the psychosexual
2 evaluation. That evaluation clearly indicated that Petitioner had been attending treatment and was
3 interested in continuing to attend treatment. Thus, in context, Mr. Ing's statement is understood as
4 describing the reasons why it is important that Petitioner continue counseling, now that she has
5 finally started attending. Trial counsel allowing this statement to remain in the PSI did not fall below
6 an objective standard of reasonableness, and Petitioner has not shown that the results of the
7 sentencing hearing would have been any different without it.

8 4. Letters or Statements about Petitioner's Depression or Depressed Behavior

9 Petitioner next alleges that trial counsel was deficient for not objecting to the State's
10 statement that Mr. Ing did not know what he was talking about. The Court reviewed both the
11 transcript and the video of the sentencing hearing. Petitioner misstates the record. The State indicated
12 that, contrary to what was indicated in the psychosexual evaluation, none of the letters provided to
13 the Court on behalf of Petitioner mentioned any awareness or belief that Petitioner had been
14 depressed.

15 Petitioner goes on to argue that trial counsel was deficient because he could have gotten
16 letters and/or testimony from friends of Petitioner who could have told the Court that they had
17 known or believed Petitioner to be depressed at or before the time she committed her crimes.
18 Petitioner neither identifies these people, nor what testimony they would have provided, nor how
19 having that testimony would have provided a reasonable probability of a different sentencing
20 outcome.

21 Petitioner then states that trial counsel was deficient for not informing the Court about
22 Petitioner's marital difficulties, her confused and pointless life, or the fact that one of her victims had
23 noted a change in her personality from professional to childlike. Again, Petitioner's mental health
24 struggles, drinking, feelings of worthlessness, and marital issues were mentioned in the psychosexual
25 evaluation and in Petitioner's pastor's testimony. The Court was aware of all of these issues at the
26 time of sentencing; Petitioner has not met her burden of showing that more testimony on this subject

1 would have created a reasonable probability of a different sentencing outcome.

2 5. Petitioner's First Victim's Suicide

3 Petitioner next asserts that trial counsel was deficient because he did not focus more on
4 Petitioner's first victim and the first victim's suicide. Trial counsel mentioned that the suicide was
5 separated in time and space from the victim's relationship with Petitioner, and that the victims, not
6 Petitioner, initiated the sexual behaviors between them.

7 Petitioner argues that trial counsel should have brought up her first victim's mental health
8 history, or the fact that he was broken up with by his girlfriend shortly before killing himself.
9 Petitioner provides no specific facts as to what the victim's mental health history entails, who she
10 would have had testify about it and the victim's break-up, and how any of this testimony would have
11 created a reasonable probability of a lesser sentence.

12 If it is true that Petitioner's first victim was mentally ill and therefore an even more
13 vulnerable and pliable victim even than the other children with whom she engaged in sexual
14 relations, trial counsel may have thought it prudent not to raise this fact to the Court at sentencing.
15 There is no reason to believe that trial counsel's strategic decisions fell below an objective standard
16 of reasonableness.

17 6. Victim Impact Testimony

18 Petitioner next argues that trial counsel should have objected to Ms. Hooper's victim impact
19 testimony when she stated that all four of the victims had been student aides of Petitioner, that
20 Petitioner had been grooming students for years, that she had ruined proms, stalked students, taunted
21 girlfriends, and threatened to engage in more relationships with more teenage boys, and that the
22 community of Wells was completely devastated by Petitioner's acts. Again, trial counsel previously
23 clarified that only two out of four students were Petitioner's student aides.

24 There is no reason to believe that the Court relied on the statements as to Petitioner's past
25 bad acts or the statement as to the devastation of Wells in making its ruling. The Court stated that
26 the four teenage boys with whom Petitioner engaged in sexual relations and their families were the

1 victims in this case. The Court did not reference the grooming or other bad acts Ms. Hooper
2 described, nor the impact of this case on the people of Wells. Trial counsel not delving into a series
3 of bad acts of which he appeared to be unaware may have been a prudent strategic decision.
4 Petitioner has failed to show how trial counsel not questioning the witness as to these allegations,
5 or the allegation that all of Wells was suffering, fell below an objective standard of reasonableness.
6 As the Court never mentioned these statements in its ruling, Petitioner has also failed to show how,
7 but for those statements being allowed to be made, Petitioner's sentence would have been lesser.

8 7. Classification of Victims and Harm

9 Petitioner also alleges that it was improper for the Court to determine that the family and
10 victims who did not testify were injured by Petitioner's actions. All four teenage boys with whom
11 Petitioner engaged in sexual relations are legally her victims under NRS 201.540 and NRS
12 176.015(5)(d)—they are the individuals against whom these crimes were committed.

13 The Court did not need to rely on anything other than Petitioner's no contest plea to these
14 crimes to know that these teenage boys and their families were her victims and were thus, *by*
15 *definition*, injured by her. Petitioner has not shown how trial counsel not objecting to the Court's
16 identification of these teenage boys as victims fell below an objective standard of reasonableness or
17 unreasonably prejudiced him.

18 8. Petitioner's Plans Post-Sentencing

19 Petitioner next contends that trial counsel was deficient by not making Petitioner's specific
20 ongoing treatment and residency plans clear to the Court. Petitioner does not make those plans clear
21 now, nor how these specific treatment plans would have caused a reasonable probability of a
22 different sentencing result for Petitioner. Trial counsel and the psychosexual evaluation and
23 Petitioner's pastor all already indicated that Petitioner was in treatment, had been for an extended
24 period of time, and that she intended to continue that treatment post-sentencing.

25 Trial counsel also indicated that Petitioner would like to move out of the Wells area if she
26 were granted probation. There is no guarantee that Petitioner would have been allowed to move

1 within or without Elko County even if granted probation, however. The Nevada Division of Parole
2 and Probation would have to take into account numerous factors once Petitioner were granted
3 probation to decide whether to grant her request to move, and, if so, to where. There is no reason to
4 believe that trial counsel was deficient for not more strenuously stating Petitioner's desire to leave
5 Wells. There is further nothing to suggest that, had trial counsel done so, there would have been a
6 reasonable probability of a more lenient sentence.

7 9. Change of Plea

8 Petitioner finally contends that trial counsel should have advised her to plead no contest but
9 mentally ill. Nevada does not recognize such a plea. The closest equivalent would be where a plea
10 of guilty but mentally ill. See NRS 175.553(1) and NRS 174.035. If a defendant is found to be guilty
11 but mentally ill, and still mentally ill at the time of sentencing, the sentencing court is required to
12 include an order for the defendant to receive mental health treatment while incarcerated or on
13 probation. NRS 176.057(1)(b)(2). To accept Petitioner's plea of guilty but mentally ill, the Court
14 must have been able to find her guilty beyond a reasonable doubt, that she established by a
15 preponderance of the evidence that due to a mental disease or defect, she was mentally ill at the time
16 she committed her offenses, and that she had not established by a preponderance of the evidence that
17 she was not guilty by reason of insanity. NRS 175.533(1). Petitioner has not shown that she would
18 have met the qualifications to so plead; neither has she shown that she was still mentally ill at the
19 time of her sentencing such that the Court would have been required to order her to receive ongoing
20 mental health treatment as part of her sentence. Thus, Petitioner has neither shown that trial counsel
21 was deficient for not having her plead this way, nor that there is a reasonable probability of her
22 sentence changing if she were able to plead guilty but mentally ill.

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1 THEREFORE, as Petitioner has not met her burden of proof for a habeas corpus evidentiary
2 hearing as to any of the grounds she raised, her petition for writ of habeas corpus is hereby DENIED.

3 SO ORDERED this 27th day of April, 2021.

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5 
6 KRISTON N. HILL
DISTRICT JUDGE - DEPARTMENT 1
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1 **CERTIFICATE OF HAND DELIVERY**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court,
3 Department 1, and that on this 21th day of April, 2021, I personally hand delivered a file stamped
4 copy of the foregoing addressed to:

5 Tyler J. Ingram, Esq.
6 Elko County District Attorney
7 540 Court Street, 2nd Floor
8 Elko, NV 89801
9 [Box in Clerk's Office]

Gary Woodbury, Esq.
1053 Idaho Street
Elko, NV 89801
[Box in Clerk's Office]

11 *Norman*
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Case No. DC-CV-20-69

Dept. No. 1

FILED

2021 JUN 10 PM 1:39

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

CLERK _____ DEPUTY *am*

TENNILLE WHITAKER,
Appellant,

vs.

CLERK'S CERTIFICATION

JERRY HOWELL, WARDEN
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER,
Respondent,

_____/

I, KRISTINE JAKEMAN, the duly elected, acting and qualified County Clerk and Ex-Officio Clerk of the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko, do hereby certify that the annexed are true, full and correct copies of certain documents in Case No. DC-CV-20-69, Dept. 1, Tennille Whitaker, Appellant, vs. Jerry Howell, Warden Florence McClure Women's correctional Center, Respondent, as appears on file and of record in my office.

WITNESS My Hand and Seal of said Court on June 10, 2021.

KRISTINE JAKEMAN, ELKO COUNTY CLERK

By *Annette Marshall*

Annette Marshall, DEPUTY CLERK

CERTIFICATE OF SERVICE

I hereby certify that I caused to be sent electronically and/or mailed a certified copy of the annexed documents in Case No. DC-CV-20-69, Dept. 1, Tennille Whitaker, Appellant, vs. Jerry Howell, Warden Florence McClure Women's correctional Center,, Respondent, as appears on file and of record in this Court, to the following:

Gary D. Woodbury
1053 Idaho St.
Elko, Nevada 89801

Elko County District Attorney
640 Court Street, 2nd Floor
Elko, Nevada 89801

DATED this 10th, day of June, 2021.



Annette Marshall, Deputy Clerk