

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 Electronically Filed
4 Nov 02 2021 10:00 p.m.
5 Elizabeth A. Brown
6 Clerk of Supreme Court

7 MICHAEL ALLEN MACK,

CASE NO.: 83165

8 Appellant,

9 vs.

10 THE STATE OF NEVADA,

11 Respondent,

12 **ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND**
13 **FOR THE COUNTY OF NYE, THE HONORABLE KIMBERLY WANKER,**

14 **PRESIDING**

15 **APPELLANT'S APPENDIX ON APPEAL**

16 **VOLUME II**

17
18 David H. Neely III, Esq.
19 NV. Bar No. 3891
20 3520 E. Tropicana Ave., Suite D-1
21 Las Vegas, Nevada 89121
22 Attorney for Appellant

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

Chris Arabia, Esq.
Nye County District Attorney
P.O. Box 39
Pahrump, Nevada 89041
Attorneys for Respondent

1 Appellant, **MICHAEL ALLEN MACK**, by and through his attorney of
2 record, David H. Neely III, Esq., hereby files the following as his Appendix on
3 Appeal Volume Two, containing the documents deemed pertinent to the issues on
4 appeal.
5

6 Appellant reserves the right to file supplemental appendixes as required in
7 Opening, Answering or Reply Briefs.
8

9 I hereby certify that I have read this Appendix on Appeal Volume Two and
10 to the best of my knowledge, information, and belief, it is not frivolous or
11 interposed for any improper purpose such as to harass or to cause unnecessary
12 delay or needless increase in the cost of litigation. I further certify that this
13 Appendix complies with all applicable Nevada Rules of Appellate Procedure, in
14 particular NRAP 28(e), which requires every assertion in the Brief regarding
15 matters in the record be supported by a reference to the page and volume number
16 of this appendix where the matter is relied on is to be found. I understand that I
17 may be subject to sanctions in the event that the accompanying Brief is not in
18 conformity with the requirements of the Nevada Rules of Appellate Procedure.
19

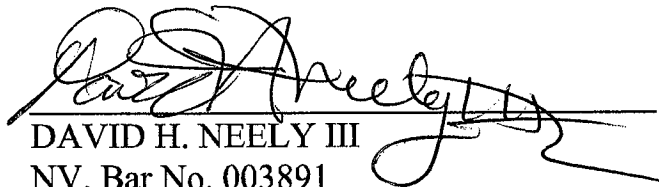
20 **VERIFICATION**

21 1. I hereby certify that this Appellant's Appendix on Appeal Volume
22 Two complies with the formatting requirements of NRAP 32(a)(6) because:
23
24

1 This Appellant's Appendix on Appeal Volume Two has been prepared in a
2 proportionally spaced typeface using Microsoft Word 2016 in Times New Roman
3 14.

4 2. I further certify that the Appendix on Appeal Volume Two complies
5 with the page limitation of NRAP 32(a)(7).
6

7 **SUBMITTED** this 2nd day of November, 2021.

8
9 
10

11 DAVID H. NEELY III
12 NV. Bar No. 003891
13 3520 E. Tropicana Ave., Suite D-1
14 Las Vegas, Nevada 89121
15 Attorney for Appellant
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agent or employee of
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1 CASE NO. 7444A

2 DEPT NO. 1

FILED

2014 MAR 27 4 10 PM

NYE COUNTY CLERK
DEPUTY

3
4 IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT

5 COUNTY OF NYE, STATE OF NEVADA

6
7 THE STATE OF NEVADA,)

8 Plaintiff,)

9 vs.)

10 MICHAEL ALLEN MACK,)

11 Defendant.)

TRANSCRIPT OF PROCEEDINGS

CHANGE OF PLEA

12
13 BEFORE THE HONORABLE KIMBERLY WANKER,

14 DISTRICT COURT JUDGE

15 1520 EAST BASIN AVENUE, PAHRUMP, NEVADA 89060

16 ON WEDNESDAY, DECEMBER 4, 2013

17 AT 9:04 A.M.

18
19 APPEARANCES:

20 For the State: Tim Treffinger, Esq.

21 Nye County Deputy District Attorney

22
23 For the Defendant: Thomas Gibson, Esq.

24
25 Reported By: Tracy A. Manning, CCR No. 785

1 WEDNESDAY, DECEMBER 4, 2013

2 ---oOo---

3 THE COURT: Before that I'm going to call
4 Mr. Gibson's case. Case No. CR 7444A, State of
5 Nevada versus Michael Allen Mack. This is also on
6 for a change of plea, but my understanding is
7 Mr. Mack is in the hospital; is that right?

8 MR. GIBSON: That's my understanding,
9 Judge, that he had an apparent stroke. I think it
10 was yesterday or the day before. And family members
11 called us to inform us of that. We -- my secretary
12 called over to the jail and they also confirmed.

13 THE COURT: Do we know where he's at and
14 what his condition is?

15 MR. GIBSON: No.

16 MR. TREFFINGER: I know he's in the
17 hospital. That's all the jail could give me this
18 morning. They're going to have a sergeant go over
19 and find out what his actual status is around noon
20 today.

21 THE COURT: Is he at Desert View Hospital
22 or was he taken to Las Vegas?

23 MR. TREFFINGER: I don't have that
24 information, Your Honor.

25 THE COURT: Okay, all right. So we'll get

1 an update on that, and then I'm going to leave the
2 trial on. I'm going to leave the Quiroga trial on
3 until this gets resolved. So I'm here the rest of
4 the week during this trial. So if something
5 changes, I'm happy to take a change of plea. But at
6 this point I can't accept a plea of guilty on behalf
7 of Mr. Quiroga.

8 Thank you for coming in, Mr. Gibson.

9 MR. GIBSON: I apologize, Judge. I was
10 thinking it was 9:00 and not 8:15.

11 THE COURT: That's fine. Thank you.

12 (Proceedings concluded at 9:05 a.m.)
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STATE OF NEVADA)
COUNTY OF CLARK)

That I reported the taking of the proceedings,
at the time and place aforesaid;

I further certify that I am not a relative, employee, or independent contractor of counsel of any of the parties involved in said action; nor a person financially interested in the action; nor do I have any other relationship with any of the parties or with counsel of any of the parties involved in the action that may reasonably cause my impartiality to be questioned.

Tracy Mann

Tracy A. Manning, CCR 785

Case No. CR7444A

*The undersigned affirms that
this document does not contain
the social security number of
any person.*

FILED

2013 DEC -5 AM 11:20

[Signature]
BY DEPUTY

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

THE STATE OF NEVADA,

Plaintiff,

vs.

SECOND AMENDED INFORMATION

MICHAEL ALLEN MACK,

Defendant. /

BRIAN T. KUNZI, District Attorney within and for the County of Nye, State of Nevada, informs the Court that MICHAEL ALLEN MACK, before the filing of this Second Amended Information, did then and there, in Nye County, Nevada, commit the following offense, to wit:

ATTEMPTED SEXUAL ASSAULT, in violation of NRS 200.366/193.330, A CATEGORY 'B' FELONY, committed in the following manner, to wit: That ON OR ABOUT OR BETWEEN SEPTEMBER 10, 2012 AND APRIL 9, 2013, in Pahrump Township, Nye County, Nevada, said Defendant MICHAEL ALLEN MACK did willfully and unlawfully attempt to subject another person, to wit: NCSO pseudonym "COURTNEY", to sexual penetration, against the victim's will, or under conditions in which said Defendant knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of her conduct, by attempting to penetrate the victim's vagina;

///

///

///

1 All of which is contrary to the form, force, and effect of the statutes in such
2 cases made and provided, and against the peace and dignity for the State of Nevada.

3 Witnesses and their addresses known to the District Attorney of Nye County,
4 State of Nevada, at the time of the filing of this Amended Information:

5 SERGEANT KELLY JACKSON
6 NYE COUNTY SHERIFF'S OFFICE
7 PAHRUMP, NEVADA

EMILY SMITH
621 S. BLAGG
PAHRUMP, NEVADA

8 DEPUTY ROBIN BECHT
9 NYE COUNTY SHERIFF'S OFFICE
10 PAHRUMP, NEVADA

JANE DOE
c/o NYE COUNTY DISTRICT
ATTORNEY'S OFFICE
PAHRUMP, NEVADA

11 DETECTIVE DAVID BORUCHOWITZ
12 NYE COUNTY SHERIFF'S OFFICE
13 PAHRUMP, NEVADA

SUSAN KALLAHER
3100 W. SAHARA AVENUE, SUITE
204
LAS VEGAS, NEVADA

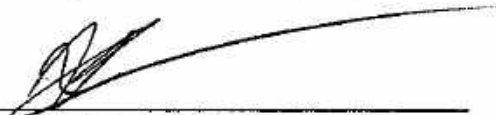
14 DEPUTY JOHN KAKAVULIAS
15 NYE COUNTY SHERIFF'S OFFICE
16 PAHRUMP, NEVADA

17 DETECTIVE MICHAEL EISENLOFFEL
18 NYE COUNTY SHERIFF'S OFFICE
19 PAHRUMP, NEVADA

20 DATED this 5th day of December, 2013.

21 BRIAN T. KUNZI
22 NYE COUNTY DISTRICT ATTORNEY

23 By

24 
TIMOTHY R. TREFFINGER
Deputy District Attorney

1 **CERTIFICATE OF SERVICE**

2 I, Nikki McPherson, Executive Legal Secretary, Office of the Nye County District
3 Attorney, P. O. Box 39, Pahrump, Nevada 89041, do hereby certify that I have served
4 the following:

5 **SECOND AMENDED INFORMATION in**
6 **5TH JDC Case No(s). CR7444A**
7 **STATE v. MICHAEL ALLEN MACK**

8 upon said Defendant herein by delivering a true and correct copy thereof, on
9 December 5, 2013 to the following:

10 Thomas Gibson, Esquire
11 at the Nye County District Attorney's office
12 in Pahrump, Nevada

13 
14 _____
15 Nikki McPherson
16
17
18
19
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21
22
23
24

CASE NO. CR 7444

DEPT NO. 1

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

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL MACK.

Defendant.

TRANSCRIPT OF PROCEEDINGS

CHANGE OF PLEA

BEFORE THE HONORABLE KIMBERLY WANKER, DISTRICT COURT JUDGE

1520 EAST BASIN AVENUE, PAHRUMP, NEVADA 89060

ON FRIDAY, DECEMBER 6, 2013

AT 9:19 A.M.

APPEARANCES:

For the State:

Tim Treffinger, Esq.

Nye County Deputy District Attorney

For the Defendant:

Thomas J. Gibson, Esq.

Nye County Public Defender

Reported by: Deborah Ann Hines, CCR #473, RPR

FRIDAY, DECEMBER 6, 2013

---oOo---

THE COURT: We're just waiting I think on Mr. Mack.

MR. GIBSON: Judge, we have a little housekeeping matter.

THE COURT: Sure.

MR. GIBSON: We have interlineated that the third "I" to make it a tier III from II.

THE COURT: Okay.

MR. GIBSON: So no photocopies. We only have one copy. That is an original so we'll need to make copies.

THE COURT: We'll make copies of that. I'm not sure where Christel is.

Good morning, Mr. Mack. How are you?

THE DEFENDANT: Oh, I'm hanging in there.

THE COURT: Hopefully you're feeling better. I understand you've been under the weather.

THE DEFENDANT: Oh, yes, I have, unfortunately.

THE COURT: Do you have the executed guilty plea agreement?

MR. GIBSON: Right here in front of me.

THE COURT: And Mr. Mack initialed that

1 clause, that change?

2 MR. GIBSON: Your Honor, I suggest that both
3 counsel also initial too --

4 THE COURT: Yes.

5 MR. GIBSON: -- showing we're all in
6 agreement.

7 Need your signature and make copies.

8 MR. TREFFINGER: My signature would be
9 helpful. Today is the 6th.

10 MR. GIBSON: And, your Honor, can we all get
11 copies of this, since we're going to be --

12 THE COURT: Would you instant message
13 Christel or Carla.

14 We'll get copies before we begin.

15 MR. GIBSON: Excuse me, your Honor.

16 THE COURT: Sure.

17 THE DEFENDANT: Can I sit down, your Honor?

18 THE COURT: Absolutely.

19 THE DEFENDANT: Thank you.

20 THE CLERK: Do you want your copies filed?

21 MR. GIBSON: Yes, I'm sorry.

22 THE COURT: Rachel, I handed you the
23 original.

24 Okay. Are we ready?

25 MR. GIBSON: I believe so, Judge, yes.

1 MR. TREFFINGER: Yes.

2 THE COURT: This is the time and place set
3 for a change of plea and arraignment in case number
4 CR 7444A, State of Nevada versus Michael Alan Mack.
5 The record will reflect the presence of Mr. Mack, his
6 attorney Tom Gibson, and we have Tim Treffinger on
7 behalf of the Nye County District Attorney's Office.

8 Are the parties prepared to go forward?

9 MR. GIBSON: Yes, your Honor.

10 MR. TREFFINGER: Yes, your Honor.

11 THE COURT: From my understanding this
12 matter has been negotiated; is that right?

13 MR. GIBSON: Correct.

14 MR. TREFFINGER: (Nods head.)

15 THE COURT: Okay. Mr. Mack, I know you're
16 not well so I'm going to let you stay seated, okay?

17 THE DEFENDANT: All right. Thank you.

18 THE COURT: Mr. Mack, the second amended
19 Information in this case reads State of Nevada versus
20 Michael Alan Mack. Is that your true name?

21 THE DEFENDANT: Yes, it is.

22 THE COURT: And how old are you?

23 THE DEFENDANT: I'm 70, your Honor. 70.

24 THE COURT: Okay. And how far did you go in
25 school?

1 THE DEFENDANT: I think it was eleventh I
2 think.

3 THE COURT: Eleventh grade, okay. Do you
4 have any specialized training or anything?

5 THE DEFENDANT: Yes.

6 THE COURT: Okay. In what areas is that in?

7 THE DEFENDANT: Well, the areas have been
8 in -- I've worked in the past in credit management
9 and company evaluations, in that area.

10 THE COURT: Do you read, write and
11 understand the English language?

12 THE DEFENDANT: Pretty much so. Not as well
13 as I used to.

14 THE COURT: Okay. Have you ever been
15 treated for any sort a mental disorder?

16 THE DEFENDANT: No, ma'am.

17 THE COURT: Okay. And do you have a copy of
18 the second amended Information?

19 THE DEFENDANT: Yes, I do.

20 THE COURT: Have you read it?

21 THE DEFENDANT: Yes. Second amended?

22 THE COURT: Yes.

23 THE DEFENDANT: Yes, I read it. Yes.

24 THE COURT: I can tell you the change
25 between the second amended Information and the

1 amended Information was they had left out the attempt
2 statute 193.330. That's the only change that I noted
3 between those two documents. Ms. Aldana can read
4 the -- stand up and read the second amended
5 Information in its entirety or you can waive it.
6 What would you like to do?

7 THE DEFENDANT: Waive it.

8 THE COURT: You've been provided a copy of
9 the second amended Information wherein you've been
10 charged with attempted sexual assault. It's a
11 violation of Nevada Revised Statute 200.336 and
12 Nevada Revised Statute 193.330. It's a category B
13 felony. Do you understand the nature of the charge
14 set forth in the second amended Information?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: And have you had the opportunity
17 to discuss this charge with your attorney,
18 Mr. Gibson?

19 THE DEFENDANT: Yes.

20 THE COURT: And as to the charge set forth
21 in the second amended Information, how do you plead?

22 THE DEFENDANT: Guilty as offered.

23 MR. GIBSON: Under Alford.

24 THE DEFENDANT: Guilty under Alford.

25 THE COURT: You're make a guilty pursuant to

1 Alford plea?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Okay. Alford versus North
4 Carolina is a U.S. Supreme Court decision from 1970
5 that is essentially -- it's a guilty plea but what
6 you're saying is the State can prove -- you're not
7 necessarily admitting that you're guilty, you're
8 saying that the State has sufficient evidence and can
9 prove the allegations set forth in the Information
10 beyond a reasonable doubt if the case went to trial.
11 So I want to be sure you understand that and that's
12 the plea you want to enter.

13 THE DEFENDANT: Yes.

14 THE COURT: Okay. And if you don't,
15 Mr. Mack, it's fine. We're happy to provide you with
16 a trial. It's really up to you. I don't want anyone
17 ever in my courtroom to feel pressured, that they've
18 been pressured --

19 THE DEFENDANT: No, I understand, your
20 Honor.

21 THE COURT: -- into some type of plea
22 agreement.

23 Before I can accept your Alford plea, I want
24 to be certain that the plea has been knowingly,
25 freely and voluntarily entered into, and in addition

1 the guilty plea agreement that you signed, that you
2 signed it knowing the terms and conditions of that,
3 knowing and understanding the terms and conditions of
4 that agreement and knowing that you knowingly, freely
5 and voluntarily entered into that agreement, so I'm
6 going to ask you some questions.

7 Now do you understand that for purposes of
8 this case, an Alford plea will be treated no
9 differently than a guilty plea? So it's an Alford
10 plea, kind of a nolo contendere plea but it's treated
11 for purposes of court proceedings as a plea of
12 guilty. Do you understand that?

13 THE DEFENDANT: Yes, I do.

14 THE COURT: Okay. Now since this is an
15 Alford plea, Mr. Treffinger, what facts would the
16 State seek to prove if this matter went to trial?

17 MR. TREFFINGER: If this matter went to
18 trial, your Honor, the State would be seeking to
19 prove that on or about or between September 10th,
20 2012, and April 9th, 2013, in Pahrump Township, Nye
21 County, Nevada, that the defendant, Michael Alan
22 Mack, did willfully and unlawfully attempt to subject
23 another person, in this case using the NCSO pseudonym
24 Courtney, to sexual penetration against the victim's
25 will or under conditions in which the defendant knew

1 or should have know that the victim was mentally or
2 psychically incapable of resisting or understanding
3 the nature of her conduct by attempting to penetrate
4 the victim's vagina.

5 THE COURT: Thank you, Mr. Treffinger.

6 Mr. Mack, you understand that the court will
7 rely on the facts just stated by Mr. Treffinger in
8 determining the factual basis for your plea?

9 THE DEFENDANT: Yes, I do.

10 THE COURT: And do you agree that the State
11 has sufficient evidence to prove the charges against
12 you beyond a reasonable doubt to those facts as
13 stated?

14 THE DEFENDANT: Well, I don't know if they
15 have...

16 THE COURT: You know, Mr. Mack, if you don't
17 know, and, like I said, if you don't want to take
18 this plea, that's fine. I've got it set for trial
19 actually, and I can also reset it for trial. So it's
20 really up to you. I don't want you in any way to
21 feel pressured into this plea.

22 THE DEFENDANT: Yeah, I understand that,
23 your Honor. I agree.

24 THE COURT: Okay. I want to be sure that
25 you agree. You're kind of hesitant here. Do you

1 think that the State doesn't have sufficient evidence
2 or you just -- I'm really trying to figure out what
3 you're thinking here.

4 THE DEFENDANT: Well, I don't -- I'll accept
5 what he's saying, but I don't -- how would I know if
6 he had insufficient evidence?

7 THE COURT: Okay.

8 MR. GIBSON: Your Honor, I think what he's
9 trying to say is that it appears the State would be
10 able to prove their case beyond a reasonable doubt.
11 He's not sure until he sees the whites of everyone's
12 eyes, but to avoid that greater situation --

13 THE COURT: Right.

14 MR. GIBSON: -- he's pleading guilty
15 pursuant to Alford.

16 THE COURT: Mr. Mack, have you made a
17 determination that it's in your best interest to
18 accept the plea bargain and enter this type of a
19 guilty plea?

20 THE DEFENDANT: Yes.

21 THE COURT: And is one of the reasons you
22 decided to enter this plea, this Alford plea, is to
23 avoid the possible harsher penalty if you were
24 convicted of the original charges at trial?

25 THE DEFENDANT: Yes.

1 THE COURT: And you understand that
2 originally you were charged with sexual assault on
3 Count I, a category A felony; you were charged on
4 Count II with sexual assault, a category A felony;
5 you were charged with Count III of preventing or
6 dissuading a victim from reporting a crime,
7 commencing prosecution or causing arrest, it's a
8 category D felony; that you were charged with Count
9 IV of unlawful contact with a person with mental
10 illness, a gross misdemeanor; Count V, abuse of a
11 vulnerable person, it's a gross misdemeanor; and that
12 by -- but what you're doing in this case, instead of
13 being -- going to trial on those charges, you have
14 agreed to plead guilty pursuant to Alford to a single
15 count of attempted sexual assault?

16 THE DEFENDANT: I agree.

17 THE COURT: And do you think that it was in
18 your best interest to do that rather than to proceed
19 to trial on the original counts?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. All right. Now,
22 Mr. Mack, are you a United States citizen?

23 THE DEFENDANT: Yes.

24 THE COURT: Are you under the influence of
25 any drugs, alcohol or other medications at this time?

1 THE DEFENDANT: Well, just doctor's
2 medications, yes.

3 THE COURT: Are you under any medications
4 that would affect your ability to understand the
5 proceedings and what's going on today?

6 THE DEFENDANT: No, ma'am.

7 THE COURT: Okay. Now do you understand
8 that when you enter an Alford plea, guilty plea
9 pursuant to Alford, that you give up certain
10 constitutional rights? Do you understand that?

11 THE DEFENDANT: Yes.

12 THE COURT: Have you -- has Mr. Gibson gone
13 over the constitutional rights that you'll be giving
14 up by entering an Alford plea?

15 THE DEFENDANT: No, not in detail, no.

16 THE COURT: Well --

17 MR. GIBSON: We --

18 THE DEFENDANT: Oh, agreement, okay.

19 THE COURT: Well, let me do that. I'm going
20 to go through them with you, okay? And if you have
21 any questions, please feel free to stop me because I
22 want to be certain that you understand what you're
23 giving up by entering an Alford plea, okay?

24 You have a right to a speedy and public
25 trial before a jury of your peers. In fact, we have

1 a trial set, it's still on my calendar, beginning the
2 week of I believe the...

3 THE CLERK: 16th.

4 THE COURT: December 16th, 2013. Now if you
5 enter an Alford plea, you're going to give up your
6 right to a jury trial and to go forward on that
7 trial. Do you understand this?

8 THE DEFENDANT: Yes, I understand, yes.

9 THE COURT: And do you understand that by
10 entering an Alford plea you aren't going to be able
11 to contest the criminal charge on file against you
12 set forth in the second amended Information?

13 THE DEFENDANT: I understand.

14 THE COURT: You have the right to make the
15 State prove the charges against you beyond a
16 reasonable doubt at trial, but by entering an Alford
17 plea you're giving up that right. Do you understand
18 this?

19 THE DEFENDANT: Yes, I do.

20 THE COURT: You have the right to face your
21 accusers, to confront them in court and to have your
22 lawyer, Mr. Gibson, cross-examine them, but by
23 entering an Alford plea you're giving up that right.
24 There's not going to be a trial. There will be no
25 one coming to court that Mr. Gibson can

1 cross-examine. Do you understand this?

2 THE DEFENDANT: Yes.

3 THE COURT: Now do you understand that by
4 entering an Alford plea you're giving up the right to
5 present a defense to the charges against you?

6 THE DEFENDANT: Yes.

7 THE COURT: You have the right to have
8 witnesses subpoenaed and compelled to appear at trial
9 on your behalf, to aid in your defense, but by
10 entering an Alford plea you're giving up that right.
11 Do you understand this?

12 THE DEFENDANT: Yes.

13 THE COURT: Now in our system of justice you
14 do not have to convict yourself. You have the right
15 against self-incrimination. In other words, you have
16 the right to remain silent and not give any testimony
17 against yourself.

18 Should this case proceed to trial, you are
19 not required to take the witness stand. You are not
20 required to call any witnesses on your own behalf.
21 And, in fact, Mr. Gibson doesn't even have to
22 cross-examine the witnesses called by the State. And
23 the reason for that is because in a criminal case as
24 a defendant you have zero burden. The burden rests
25 exclusively with the State to prove the charges

1 against you beyond a reasonable doubt.

2 By entering a guilty plea pursuant to
3 Alford, you're giving up your right against self
4 incrimination and you're, in fact, convicting
5 yourself because you're saying to the court, I am
6 guilty of the crime of attempted sexual assault, a
7 category B felony. Do you understand this?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: And do you want to do this?

10 THE DEFENDANT: Yes.

11 THE COURT: Let's talk about what happens
12 with your appeal rights by entering a guilty plea
13 pursuant to Alford. Do you understand that by
14 entering your Alford plea, you are, in fact, giving
15 up your rights to an appeal, at least with respect to
16 the subject of guilt or innocence?

17 THE DEFENDANT: Yes.

18 THE COURT: After today you can only appeal
19 for four reasons: The court has sentenced you
20 illegally, the State has failed to follow through
21 with the terms of the plea agreement, your Alford
22 plea was not entered voluntarily, or the law is
23 illegal or unconstitutional. Other than these four
24 reasons you cannot appeal your Alford guilty plea.
25 Do you understand this?

1 THE DEFENDANT: Yes.

2 THE COURT: Now I have received a letter
3 from you that was dated November 19th, 2013, that
4 you -- that was addressed to Mr. Gibson that you had
5 sent me indicating you were concerned because -- with
6 the representation because he had not met with you,
7 and Mr. Zane, the investigator, had not met with you.
8 Do you still have concerns regarding Mr. Gibson and
9 Mr. Zane?

10 THE DEFENDANT: No, I do not.

11 THE COURT: And at this point are you
12 satisfied with the representation that's been
13 provided to you by Mr. Gibson?

14 THE DEFENDANT: Yes, your Honor.

15 MR. GIBSON: Your Honor, may I clarify
16 something? Mark Henry is our investigator.

17 THE COURT: I'm sorry, Mark Henry. I
18 apologize. This said Mark and I assumed it was
19 Mr. Zane.

20 MR. GIBSON: No, Henry.

21 THE COURT: So Mr. Henry, okay. And at this
22 point as of today, December 6th, 2013, those concerns
23 that you set forth in your November 19th letter have
24 all been resolved; is that right?

25 THE DEFENDANT: Yes, your Honor.

1 MR. GIBSON: Your Honor, for the record
2 Mr. Henry and I have met with Mr. Mack. I met with
3 him on multiple occasions since that letter, and
4 Mr. Henry did at least one meeting with him and was
5 working on the case up until the time we decided to
6 reach this agreement.

7 THE COURT: Okay. Thank you, Mr. Gibson. I
8 appreciate that.

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

12 THE DEFENDANT: Yes.

13 THE COURT: Okay. Let's talk about
14 sentencing when you enter a plea. Do you understand
15 that regardless of the plea negotiations between your
16 attorney and the prosecution and any representations
17 that they make on your behalf at the time of
18 sentencing, that all decisions regarding sentencing
19 in this case are entirely up to the court?

20 THE DEFENDANT: Yes.

21 THE COURT: Now has anyone promised you
22 anything other than what's set forth in the guilty
23 plea agreement that was filed with the court today,
24 December 6th, 2013, in exchange for your plea of
25 guilty?

1 THE DEFENDANT: No.

2 THE COURT: And has anyone threatened you,
3 your family, or anyone close to you in order to get
4 you to enter your Alford guilty plea?

5 THE DEFENDANT: No.

6 THE COURT: Is your Alford guilty plea the
7 result of your own choice after consulting with your
8 attorney, Mr. Gibson?

9 THE DEFENDANT: Yes.

10 THE COURT: And did you enter this Alford
11 guilty plea freely and voluntarily?

12 THE DEFENDANT: Yes.

13 THE COURT: Are you entering an Alford plea
14 to avoid a possible harsher penalty at trial?

15 THE DEFENDANT: Yes.

16 THE COURT: Okay. Now taking a look at the
17 guilty plea agreement, I note that pursuant to the
18 terms of the agreement that you are going to enter an
19 Alford plea to attempted sexual assault, and that at
20 the time of sentencing both parties would retain the
21 right to argue for any lawful sentence. Is that your
22 understanding of the guilty plea agreement?

23 THE DEFENDANT: Yes.

24 THE COURT: Now I want to cover some things
25 with you about that guilty plea agreement. Do you

1 understand that as a result of your plea, the maximum
2 possible sentence that the court could impose is
3 20 years in the Nevada Department of Corrections?

4 THE DEFENDANT: Yes.

5 THE COURT: And I want to be sure that
6 because this is a sex offense, do you understand that
7 you will be required to undergo a psychosexual
8 evaluation?

9 THE DEFENDANT: I didn't know that, but,
10 yes.

11 THE COURT: But do you understand that that
12 will -- now I'm telling you --

13 THE DEFENDANT: Yes.

14 THE COURT: -- that you will be at some
15 point required to undergo a psychosexual evaluation?

16 THE DEFENDANT: Uh-huh.

17 THE COURT: Because this is a sex offense,
18 do you understand that you're going to have to have
19 certain sex offender registration requirements and
20 supervision requirements, and the supervision
21 requirements will be lifetime, they will be lifetime
22 requirements? Do you understand that?

23 THE DEFENDANT: Yes, now.

24 THE COURT: Okay. And has Mr. Gibson talked
25 to you about the registration and the supervision

1 requirements that you're going to be required to
2 follow pursuant to Nevada Revised Statutes by
3 entering this plea?

4 THE DEFENDANT: He told me that I had to
5 register but I don't know the details of the
6 requirements, the procedure.

7 THE COURT: Would you like -- would you like
8 Mr. Gibson to go through those requirements with you?

9 THE DEFENDANT: Yeah. I don't have the
10 details. I mean, I know I saw it that I have to
11 register.

12 MR. GIBSON: We discussed this yesterday.
13 Remember we talked about the 48-hour requirement and
14 that you're required to whenever you change
15 residences?

16 THE DEFENDANT: Yeah, I knew the residence
17 but, I mean, not all when and --

18 THE COURT: Do you understand that within 48
19 hours of entering this plea you're going to be
20 required to register with the Nye County Sheriff's
21 Office as a sex offender?

22 THE DEFENDANT: 48 hours of this plea, yeah,
23 register?

24 THE COURT: Right.

25 THE DEFENDANT: Yes.

1 THE COURT: Okay.

2 THE DEFENDANT: I am.

3 THE COURT: Do you understand that as a
4 result of entering this plea that you will have --
5 you will be subject to lifetime supervision by parole
6 and probation? Do you understand that?

7 THE DEFENDANT: No, I didn't know that, but
8 that's...

9 THE COURT: Okay. Knowing that --

10 THE DEFENDANT: Okay.

11 THE COURT: -- now, I'm telling you that you
12 will be required to be subject to lifetime
13 supervision by parole and probation, do you still
14 want to enter your Alford plea?

15 THE DEFENDANT: I guess.

16 THE COURT: Okay. And you're also going to
17 have certain registration requirements. Those
18 registration requirements are going to be with the
19 law enforcement agency. You're going to be in a
20 registry, a sex offense registry. Knowing, by me
21 telling you that, and you're also going to be
22 classified as a category tier three sex offender, do
23 you still want to enter your Alford plea?

24 THE DEFENDANT: Yes.

25 THE COURT: Okay. And do you understand

1 that if you fail to register when you're required to
2 do so, that you can be subject to a separate category
3 D felony?

4 THE DEFENDANT: A separate what, ma'am?

5 THE COURT: Category D felony for failing to
6 register.

7 THE DEFENDANT: Yes.

8 THE COURT: Okay. All right. I also want
9 to be sure that you understand that you may be
10 subject to community notification provisions designed
11 to reach members of the public likely to encounter
12 you. And so knowing that do you still want to enter
13 this Alford plea?

14 THE DEFENDANT: Yes.

15 THE COURT: Okay. All right. Now I noticed
16 that on the Alford plea, on page six there's a
17 signature line for Michael E. Mack. Is that your
18 signature?

19 THE DEFENDANT: Yes, it is.

20 THE COURT: And did you sign this agreement
21 on December 5th, 2013?

22 THE DEFENDANT: Yes, I did.

23 THE COURT: Now I want to be sure one thing
24 on the agreement that was charged this morning, and
25 it is on page four, is that the consequences of this

1 sex offense, the agreement originally read that you
2 would be considered a tier two sex offender, but it
3 is actually a tier three sex offender. Do you
4 understand that?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: And did you initial next to that
7 that you understood that?

8 THE DEFENDANT: Yes.

9 THE COURT: Now I notice in the bottom
10 right-hand corner of pages one through seven of the
11 agreement are some initials. Are those your
12 initials, MAM?

13 THE DEFENDANT: Yes, it is.

14 THE COURT: Okay. And now prior to the time
15 that you signed and initialed this agreement, did you
16 read it?

17 THE DEFENDANT: Yes, I did.

18 THE COURT: Did you understand everything
19 that was set forth in the agreement?

20 THE DEFENDANT: Yes, I did.

21 THE COURT: Prior to the time that you
22 signed and initialed the agreement, did you have the
23 opportunity to discuss the agreement with Mr. Mack --
24 I'm sorry, Mr. Gibson?

25 THE DEFENDANT: Yes, I did.

1 THE COURT: And did Mr. Gibson
2 satisfactorily answer any questions you might have
3 about the written guilty plea agreement?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you have any questions for
6 the court about the agreement?

7 THE DEFENDANT: No, I do not.

8 THE COURT: Did you sign and initial this
9 agreement freely and voluntarily?

10 THE DEFENDANT: Yes, I did.

11 THE COURT: Did anyone threaten you, coerce
12 you or otherwise force you in any way to enter into
13 the written guilty plea agreement?

14 THE DEFENDANT: No.

15 THE COURT: Now do you have any questions
16 about the court proceedings so far?

17 THE DEFENDANT: No, I do not.

18 THE COURT: Do you understand that by
19 entering an Alford plea, you waive or give up the
20 constitutional rights that we've previously
21 discussed?

22 THE DEFENDANT: Yes.

23 THE COURT: Here's your opportunity,
24 Mr. Mack, if you'd like to change your mind. And if
25 you truly feel you don't want to enter this plea, I'm

1 fine with that. I'm happy to set it for trial. What
2 I want to be certain is that you want to enter the --
3 you enter the plea that you want to enter, that you
4 don't feel pressured or otherwise forced in any way
5 to enter a plea. While we do have it set on calendar
6 next week, I'm even happy to continue the trial if
7 you would like that, if you decide that you want to
8 go to trial, okay?

9 THE DEFENDANT: Yes.

10 THE COURT: So I'm going to ask you now,
11 here's going to be the moment of truth, it's your
12 kind of last and final chance to enter your plea
13 here. Based upon my questions and our discussion
14 here this morning, what is your plea to the charge in
15 the second amended Information of attempted sexual
16 assault, a category B felony?

17 THE DEFENDANT: What is my plea? Guilty.
18 I'm sorry, your Honor.

19 THE COURT: Okay. And that guilty plea will
20 be entered pursuant to Alford; is that right?

21 THE DEFENDANT: Yes.

22 THE COURT: Okay. Then the court finds that
23 Mr. Mack understands the nature of the offense
24 charged, the consequence of his plea, that he has
25 made a knowing, voluntary and intelligent waiver of

1 his constitutional rights, and at this time,
2 Mr. Mack, I will accept your Alford plea to the
3 charge of attempted sexual assault, a category B
4 felony.

5 The court also finds that Mr. Mack
6 knowingly, freely and voluntarily entered into a
7 written guilty plea agreement, that he understood the
8 terms of that agreement, and that he is aware of the
9 consequences of entering into the written guilty plea
10 agreement and for entering an Alford plea to
11 attempted sexual assault.

12 This matter is going to the Department of
13 Parole and Probation for a presentence report. It's
14 going to be set for the entry of judgment and
15 imposition of sentence I believe on March 21st, 2014
16 at 9:00 a.m.

17 Now I do believe that may be dependent upon
18 getting the psychosexual evaluation, because this
19 isn't an offense that is probationable; however,
20 without that psychosexual evaluation I would -- I
21 believe that this is a probationable offense, and so
22 that as a consequence it being that, that it is
23 necessary to get that psychosexual evaluation prior
24 to the time of sentencing. So that may delay the
25 sentencing. That will be arranged by parole and

1 probation.

2 So is there anything else that we need to
3 address?

4 MR. TREFFINGER: I have nothing further,
5 your Honor.

6 THE COURT: Mr. Gibson?

7 MR. GIBSON: Not that I can think of.

8 THE COURT: Mr. Mack, do you have any
9 concerns that we need to address?

10 THE DEFENDANT: No, ma'am, not in relation
11 to this, no.

12 THE COURT: Okay. All right. Well, then
13 thank you very much. The court will now be in
14 recess.

15 (Thereupon the proceedings
16 were concluded at 9:48 a.m.)

17 * * * * *

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CERTIFICATE OF REPORTER

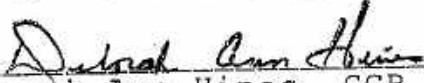
STATE OF NEVADA)

SS:

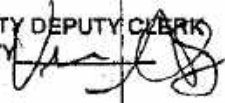
COUNTY OF NYE)

I, Deborah Ann Hines, certified court reporter, do hereby certify that I took down in shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 29th day of December, 2013.


Deborah Ann Hines, CCR #473, RPR

JUN 19 2014

NYE COUNTY DEPUTY CLERK
DEPUTY 

1 CASE NO. CR 7444

2 DEPT NO. 1

3
4 IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT
5 COUNTY OF NYE, STATE OF NEVADA
6

7 THE STATE OF NEVADA,)
8 Plaintiff,) TRANSCRIPT OF PROCEEDINGS
9 vs.) SENTENCING HEARING
10 MICHAEL ALLEN MACK,)
11 Defendant.)
12

13 BEFORE THE HONORABLE KIMBERLY WANKER,
14 DISTRICT COURT JUDGE
15 1520 EAST BASIN AVENUE, PAHRUMP, NEVADA 89060
16 ON FRIDAY, MARCH 21, 2014
17 AT 9:05 A.M.
18

19 APPEARANCES:

20 For the State: Tim Treffinger, Esq.

21 Nye County Deputy District Attorney
22

23 For the Defendant: Thomas Gibson, Esq.
24

25 Reported By: Tracy A. Manning, CCR No. 785

1 FRIDAY, MARCH 21, 2014

2 ---oOo---

3 THE COURT: Our first case this morning is
4 Case No. CR 7444, State of Nevada versus Michael
5 Allen Mack.

6 Good morning, Mr. Mack.

7 THE DEFENDANT: Morning.

8 THE COURT: This is the time and place set
9 for sentencing in Case No. CR 7444, State of Nevada
10 versus Michael Allen Mack. The record will reflect
11 the presence of Mr. Mack, his attorney, Tom Gibson.
12 We have Tim Treffinger on behalf of the Nye County
13 District Attorney's office and we have Lisa Thelaner
14 on behalf of Parole & Probation.

15 Is there any legal reason why we should
16 not go forward with judgment and sentencing now?

17 THE DEFENDANT: No, Your Honor.

18 MR. TREFFINGER: No, Your Honor.

19 THE COURT: Mr. Mack, I did see that you
20 had addressed a letter to my attention indicating
21 that you had not had the opportunity to speak to
22 Mr. Gibson and would have liked to have had about
23 half an hour before the start of sentencing today to
24 speak with him. Have you had that opportunity?

25 THE DEFENDANT: I talked to him briefly

1 yesterday. But he's always got a short schedule
2 so -- but I guess I'm --

3 THE COURT: If you're not ready, I'd be
4 happy to trail your matter and give you the
5 opportunity to speak with Mr. Gibson if you would
6 like.

7 THE DEFENDANT: He indicated yesterday we
8 would have some time to talk again this morning
9 about the -- but, you know, I don't really want to
10 throw your court off.

11 THE COURT: Mr. Mack, I think it's -- if
12 you need the time to speak with your attorney, I
13 have absolutely no problem in calling another case
14 and giving you that opportunity. Would you like
15 that? We can simply trail you. It's not a problem.

16 THE DEFENDANT: Yeah, I'd like to confer
17 with him.

18 MR. GIBSON: Judge, can we set it for,
19 like, the next date, then? Because unless there's
20 victims here that need to speak. The reason being
21 is that I spent a half -- over half an hour with him
22 yesterday going over the PSI with him, answering
23 questions he had and -- I mean, there's only so much
24 time you can go over the same thing. So I don't
25 know.

1 THE COURT: Mr. Treffinger, do you have
2 any victims that want to speak today at sentencing?

3 MR. TREFFINGER: I do not, Your Honor.

4 THE COURT: Okay. So Mr. Gibson, you have
5 two other matters, I think, that will probably --
6 they're both, I think, with guilty plea agreements,
7 or proposed guilty plea agreements.

8 MR. GIBSON: One is and the other one
9 is --

10 THE COURT: So if we handle those matters,
11 those would be next. Perhaps you'd have time to
12 meet with Mr. Mack before you left today?

13 THE DEFENDANT: Your Honor, let's go ahead
14 and proceed. I think I'm basically -- I'll go
15 ahead.

16 THE COURT: Well, Mr. Mack, I want to be
17 sure that you're comfortable with it. I am --

18 THE DEFENDANT: There's a few questions.

19 THE COURT: -- time of arraignment, I will
20 not arraign and accept a guilty plea, nor will I
21 expect someone to move forward if they need
22 additional time with counsel.

23 THE DEFENDANT: No, ma'am. Go ahead.

24 THE COURT: Okay. You're sure that
25 you're --

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: -- comfortable?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: That you've had the
5 opportunity -- you had the opportunity to speak to
6 Mr. Gibson yesterday?

7 THE DEFENDANT: Yes.

8 THE COURT: Okay. Then we'll move
9 forward.

10 This is the time and -- as I mentioned,
11 this is the time and place set for sentencing.

12 Ms. Thelaner, are there any changes or
13 additions to the presentence report?

14 MS. THELANER: No, Your Honor.

15 THE COURT: The Court has a couple of
16 issues with the presentence investigation report.
17 And the first is on page 2, under the social
18 security number. There's four digits for the
19 first -- and that obviously can't be. It should be
20 a three digit number. So I don't know what the
21 correct social security number is, but that needs to
22 be corrected.

23 The other issue I have is on -- also on
24 page 2 of the PSI. It's under marital status. What
25 is written in the PSI conflicts with what is written

1 in the psychosexual evaluation report that was
2 prepared by John Pacault. So I'm not sure whether
3 Mr. Mack's been married three times or four times.

4 MS. THELANER: Your Honor, he listed three
5 times on my questionnaire.

6 THE COURT: Okay. And Dr. -- or I'm
7 sorry, it's not doctor. But John Pacault's
8 psychosexual evaluation, family members. Mr. Mack
9 was divorced four times.

10 MR. GIBSON: It was four.

11 THE COURT: Four. I just want to be sure
12 the PSI is correct. Because obviously that will
13 follow Mr. Mack. So it's important that the
14 information contained therein be correct. So I
15 should amend that to Mr. Mack has been married on
16 four separate occasions?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Okay. Those were the changes
19 I saw. Counsel, does anyone have any changes or
20 additions to the presentence report?

21 MR. TREFFINGER: State has no changes,
22 Your Honor.

23 MR. GIBSON: I think it -- Judge, what
24 Mr. Mack is telling me is that he's not in agreement
25 with a couple of lines that were conclusory in the

1 psychosexual evaluation, but not the PSI itself.

2 THE COURT: So the PSI itself, you may
3 disagree with the information set forth by John
4 Pacault, the gentleman who prepared the psychosexual
5 evaluation. But as far as the PSI is -- he doesn't
6 have any other changes or additions to that?

7 THE DEFENDANT: No, ma'am.

8 THE COURT: Okay. Okay. Well, then,
9 we're going to move forward. The Court's review of
10 the file reflects the following: On December 5th,
11 2013, the State filed an amended information
12 charging Mr. Mack with attempted sexual assault.
13 It's a Category B felony. Mr. Mack was arraigned on
14 December 6th, 2013. He pled guilty pursuant to
15 Alford. He was canvassed by the court on his Alford
16 plea, and the Court found that Mr. Mack had
17 knowingly, freely and voluntarily entered his Alford
18 plea of guilty.

19 Mr. Mack also entered into a written
20 Alford guilty plea agreement. The Court canvassed
21 Mr. Mack concerning his understanding of the terms
22 of the written Alford guilty plea agreement, found
23 that he understood the terms of the agreement. The
24 Court further canvassed Mr. Mack and found that he
25 had knowingly, freely and voluntarily entered into

1 that written Alford guilty plea agreement which
2 leads to sentencing today.

3 Now pursuant to terms of the written
4 guilty plea agreement, both sides retain the right
5 to argue at the time of sentencing.

6 Therefore, Mr. Mack, at this time the
7 Court hereby adjudges you guilty of attempted sexual
8 assault in violation of Nevada Revised Statute
9 200.3661 and Nevada Revised Statute 193.330. It's a
10 Category B felony.

11 Mr. Gibson, you may proceed.

12 MR. GIBSON: Thank you, Judge.

13 Your Honor, the conclusion in the
14 recommendation by the department is a little harsh,
15 in my opinion, in this case. For a couple of
16 reasons.

17 First of all, if you look at Mr. Mack's
18 criminal history, which is really of paramount
19 importance when we're looking at a person and how
20 we're going to be sentencing them, it -- he's got a
21 flawless criminal record. And so, I mean, that
22 should be taken into consideration by the Court and
23 the department -- I'm sure the department does take
24 that into consideration. We don't see many people
25 sentenced in this court that have complete zeros

1 across the board. Usually, at least one misdemeanor
2 in there or something that will affect their -- and
3 show that they may not be a candidate for a minimum
4 type sentence.

5 Secondly is the fact that Mr. Mack has
6 been very active in the community. He has a lot --
7 had a lot -- had a lot of community support. Your
8 Honor received, I'm sure, a number of letters that
9 were forwarded to you by people who were supporting
10 him. And who wished to let the Court know that they
11 want to see Mr. Mack do well. And obviously they
12 don't want to see him go to prison for an extended
13 period of time.

14 In my discussions with Mr. Mack yesterday,
15 he realizes that the odds are that he's going to
16 prison for some time; however, we feel that the
17 recommendation by the Department of Parole &
18 Probation is a little harsh because of his lack of
19 record, and also because of his involvement in the
20 community through most of his lifetime.

21 And therefore, we'd ask that the Court to
22 sentence him to the minimum of two years -- I don't
23 know what the month category would be for that. But
24 we're asking that he be eligible for parole after
25 serving two years. Which in this case

1 theoretically, and actuality, a first offense. And
2 at his age that's a pretty good thing.

3 So Your Honor, that's what we're asking
4 for, is the minimal sentence in this and let him get
5 on with his life.

6 THE COURT: Thank you, Mr. Gibson.
7 Mr. Treffinger?

8 MR. TREFFINGER: Your Honor, Mr. Gibson
9 calls the recommendation by P & P a little harsh.
10 And I think that's completely ridiculous based on
11 the facts of this case.

12 Mr. Mack committed a completely
13 reprehensible crime. Not only did he take advantage
14 of a mentally challenged woman, but one who he had a
15 guardianship over and he was in a position of power
16 over.

17 When you look at the character letters
18 that were sent in, they're sent in by people who
19 obviously -- in some cases have absolutely no idea
20 what his charges are. One of the letters says, I
21 don't know what he did, I don't want to know what he
22 did, but still recommends that this Court give him
23 probation.

24 And I will note that pursuant to NRS
25 176A.110, he's not even eligible for probation

1 because he came back as a high risk to offend. He
2 came back as a man who said he believes he has no
3 need for counseling or treatment. They found him to
4 be someone who minimizes what he's done, has no
5 remorse, has deviant sexual tendencies. This is a
6 man who poses an extreme risk to society. He's a
7 danger to adults and juveniles, anyone who's
8 vulnerable who's around him.

9 And just because he hadn't gotten caught
10 until the age of 70, he does have other allegations
11 sitting out there in New Jersey. He has a
12 dishonorable discharge from the military that was
13 potentially sexually related. And there were other
14 allegations even here in Pahrump that were sexual
15 related.

16 So I believe that the max, 94 to 240, is
17 completely appropriate in this case, Your Honor.

18 THE COURT: Thank you.

19 Mr. Mack, the laws give you the
20 opportunity to speak to me now, either to give me a
21 legal reason why I should not move forward with
22 judgment and sentencing at this time, or to tell me
23 anything you'd like me to consider before I impose
24 sentence. Is there anything you'd like to say?

25 THE DEFENDANT: Your Honor, I mean -- I

1 have acknowledged -- the fact is that what took
2 place between the -- my sister and I was
3 inappropriate. However, I'm not -- I'm not the only
4 one. I mean, whatever I did, I mean, I'm not trying
5 to minimize the fact is, but she has had a -- she's
6 been married before, she's had sexual -- active
7 sexual life and such. So, you know, trying to say
8 that I preyed on her or did something.

9 I mean, you know, she's the one, also --
10 wanted to actually -- you know, touch me or do
11 things and such, you know, when she was giving me a
12 massage. And like I say, I did tell her not to do
13 that or such. So, I mean -- so the fact is that I
14 preyed on her, you know -- I mean, I know that it
15 was wrong, Your Honor.

16 But there was two other people that you
17 know of that she also brought charges against. I
18 mean, I don't know -- she knew them longer than I've
19 ever been in her actual contact life.

20 The thing of being her guardian. She
21 was -- I was a guardian because of -- on my
22 mother -- when my mother was still living at the
23 home she got sick. And she went -- she asked if I'd
24 be her guardian because of her seizures. It was
25 nothing to do with the fact of -- she would not know

1 right from wrong or things of this nature.

2 Also, my mother had her registered on a --
3 with the State, which you can verify, that -- to
4 be -- to go into a group home. And she -- if need
5 be after my parents passed away, it was her plea to
6 me that she didn't want to go into a group home and
7 would she go -- live with when my parents died. She
8 was afraid that was going to happen when my mother
9 passed away and my dad passed away.

10 I made personal sacrifice to -- to --
11 staying here in Pahrump and provide her a place to
12 live. And I really didn't take -- involved in her
13 day-to-day guardianship as a document was signed
14 years before. My mother made the application and
15 she asked the court to appoint me. And I -- so it
16 wasn't until after my dad passed away that I
17 actually was -- had to make a decision on what to
18 do. And I elected to stay in the house, my parents'
19 house. The mortgage was upside down. There was
20 issues there. And so that's how that came about,
21 you know.

22 You know, I mean -- I know -- I have not
23 done anything to any -- any party here whatsoever in
24 the -- other than the situation I had with my
25 sister. In the community. I mean, that's a fact.

1 Other -- anything else, I mean, I don't know if
2 it's -- you know -- you know -- and anything I might
3 have done going back years ago or something of this
4 nature. I mean, actually has no bearing on this
5 case. You know, I mean, I'm 70 years of age. I've
6 been an adult 50 years. Take a timeline or
7 anything. I mean, it's not that I've snuck around
8 or anything. I've been around all kinds of people
9 and such, and day, night, around and such, and, you
10 know, I've -- I didn't -- anyone can vouch on my
11 character. Very good character.

12 And I had poor judgment on a situation
13 when I was sick and not feeling well and having a
14 lot of pain and things. I mean, you, know, it
15 doesn't mean that I made -- made a threat to -- on
16 the community or anybody else.

17 THE COURT: Thank you, Mr. Mack.

18 Mr. Mack, I thought that the psychosexual
19 evaluation that was done by John Pacault, who has
20 been an expert frequently in my courtroom and has
21 done thousands, I think between 5- and 6,000
22 psychosexual evaluations was very telling in this
23 case. It was not at all favorable for you.

24 And the things that really stuck out to me
25 about this case was when he said, when asked about

1 the need, about needing counseling concerning his
2 actions, Mr. Mack said that he did not believe
3 there's a need for treatment. Remarking this is a
4 first-time situation and he has no prior record.

5 Well, most of the time, in cases of sexual
6 assault or -- we don't -- or molestation, we don't
7 have repeat offenders. There is a first time. But
8 what I thought was also very telling is, Mr. Mack
9 admits that he sexually abused his adult adopted
10 sister who is mentally retarded.

11 He -- and he goes on to say, to date, the
12 most reliable determinant of a sexual behavior
13 problem is the honest acknowledgement by a defendant
14 that he is engaged in sexual misconduct and/or
15 inappropriate sexual behavior.

16 Well, while you admitted it, you seem to
17 minimize it, which is exactly what sex offenders do.
18 You're trying to blame your sister. When you
19 were -- at the time you were arrested, you admitted
20 she had the mentality of a three- to four-year-old.
21 She may have had a chronologic age of 45, but you
22 acknowledged you were her guardian.

23 And what's telling, you are being
24 sentenced on this case. But going along with the
25 fact that people do not always get caught. This was

1 from your own admissions. He admitted he was given
2 a dishonorable discharge from the U.S. Coast Guard
3 for sexual misconduct of some kind, which is exactly
4 how he described his sexual conduct with his foster
5 brother. Mr. Mack used the term grab assing to
6 explain both situations. He could not explain why
7 an adult male, he would be roughhousing or grab
8 assing with a pre-teen boy.

9 That is serious to me. You seem to think
10 that just because you've been out and you've been
11 very active and a leader in this community. But
12 community leadership and what goes on behind the
13 scenes are two different things. And that does not
14 in any way excuse your behavior with your sister,
15 with whom you were the guardian.

16 The evaluator raised a very serious
17 concern. And, in fact, the evaluator made this
18 comment. Mr. Mack made no effort to express any
19 genuine remorse or guilt concerning his actions with
20 his adopted sister, who reportedly has a history of
21 being taken advantage of by men in her life due to
22 her disabilities. The evaluator suspects that
23 Mr. Mack's deviant sexual interest involves males or
24 females, and has -- he has obviously preyed on
25 individuals with disabilities and weaknesses, which

1 may be part of the arousal aspect for him, along
2 with selecting victims who can be easily manipulated
3 and are less likely to report and/or be believed if
4 and when they do report.

5 And it went on to say, Mr. Mack's sister
6 said she was threatened and/or hit with a belt if
7 she did not comply with his demands.

8 The fact that you admitted the things that
9 you did with your sister are atrocious to me. You
10 were her -- you were her guardian. And to engage in
11 any sort of sexual conduct, whether she came on to
12 you or not, you were her guardian. You knew what
13 her mental capacity was. And it's inexcusable in my
14 book.

15 And I found the recommendations from
16 Mr. Pacault very telling. So this is what I'm going
17 to do.

18 In accordance with the laws of the State
19 of Nevada, I'm going to assess a \$25 administrative
20 assessment fee, a \$3 DNA administrative assessment
21 fee, a \$150 DNA analysis fee, an \$1110 psychosexual
22 evaluation fee.

23 It is the order and judgment of the Court
24 that defendant, Michael Allen Mack, is sentenced to
25 the Nevada Department of Corrections for a minimum

1 term of 96 months and a maximum term of 240 months.

2 Pursuant to Nevada Revised Statute
3 179D.460, you shall register as a sex offender
4 within 48 hours of sentencing today. You will also
5 be subject to lifetime supervision as a Tier III sex
6 offender pursuant to the Nevada Revised Statutes
7 176.0931.

8 I'm also going to follow the
9 recommendations of Dr. Pacault. And I'm going to
10 put this in because I think they're very telling.
11 This is the recommendation No. 2 said, Mr. Mack
12 should be required to attend and successfully
13 complete a corrections based sex offense specific
14 treatment program to assist him in understanding the
15 dynamics of his sexually offending behaviors. Such
16 program should include at a minimum concepts
17 consisting of thinking errors, cognitive
18 distortions, boundaries, deviant versus healthy
19 sexual fantasies, sexual assault cycles, maintenance
20 cycles, victim empathy and relapse prevention.

21 In addition, other areas that should be
22 addressed with counseling are problem solving and
23 communication skills, dating and relationship issues
24 and healthy lifestyle concepts.

25 In addition, Mr. Mack should also be

1 required to submit to polygraph testing and/or other
2 sexual interest measures, i.e., the Abel assessment,
3 so as to more accurately assess his sexual history,
4 his sexual arousal pattern, and to assist the Court
5 in his treatment providing and ensuring compliance
6 with Court stipulations and treatment requirements.

7 No. 3. Mr. Mack should not be allowed
8 contact of any kind: Direct, mail or third-party
9 with the victim. It's also recommended you have no
10 contact with minor children. And if you do, that it
11 be -- that it be approved by an officer of the court
12 and it should be under the supervision of an adult
13 who is aware of your sexual history.

14 Finally, you should not be allowed to work
15 as a volunteer for any organization or church due to
16 the potential for him to have unsupervised contact
17 with vulnerable people.

18 Mr. Mack, I have to tell you, while you
19 may have minimized this, I did not. I think this is
20 very, very serious what you did. It's inexcusable.
21 And I wish you the best of luck. You'll receive
22 credit for 345 days time served. Thank you.

23 (Proceedings concluded at 9:27 a.m.)
24
25

STATE OF NEVADA)) ss
COUNTY OF CLARK)

Tracy A. Manning, CCR 785

1 Case No. CR7444A

2 Dept 1P

FILED

amo
2014 MAR 25 P 4:37

NYE COUNTY CLERK
BY DEPUTY

3
4
5
6 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE
8

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -v-

JUDGMENT OF CONVICTION

12
13 MICHAEL ALLEN MACK,

14 Defendant.
15

16 On the 6th day of December 2013, the above named defendant appeared before the
17 Court with his counsel, Thomas Gibson, Esq., and the defendant entered a guilty plea pursuant
18 to Alford, to the crime of *Attempted Sexual Assault*, a violation of NRS 193.330/200.366, a
19 Category "B" Felony.

20 On the 21st day of March 2014, the defendant appeared personally and with his
21 attorney, Thomas Gibson, Esq., for entry of Judgment. No sufficient legal cause was shown by
22 the defendant as to why judgment should not be pronounced against him.
23

24 The Court adjudged the defendant guilty of the crime of *Attempted Sexual Assault*, a
25 violation of NRS 193.330/200.366, a Category "B" Felony.

26 The Court then ordered the defendant to the Nevada Department of Corrections for a
27 minimum term of ninety-six (96) months and a maximum of two hundred forty (240) months.
28





1 Defendant shall receive credit for 345 days presentence incarceration.

2 Defendant having been convicted of a sexual offense, shall receive a special sentence
3 of lifetime supervision as a Tier III sex offender, to commence after any period of probation,
4 or any term of imprisonment, or after any period of release on parole.

5 Defendant shall register as a sex offender with a local law enforcement agency
6 pursuant to NRS 179D.450 within 48 hours of sentencing or release from custody.

7 IT IS FURTHER ORDERED that the Defendant shall be required to attend and
8 successfully complete a corrections-based sex offense specific treatment program to assist him
9 in understanding the dynamics of his sexual offending behaviors. Such a program should
10 include, at a minimum, concepts consisting of thinking errors, boundaries, deviant versus
11 healthy sexual fantasies, sexual assault cycles, maintenance cycles, victim empathy and relapse
12 prevention. In addition, other areas that should be addressed in counseling are problem
13 solving and communication skills, dating and relationship issues, and healthy lifestyle
14 concepts.

15 The Defendant shall submit to polygraph testing and/or other sexual interest measures
16 (i.e. the Abel Assessment) so as to more accurately assess his sexual history, his sexual arousal
17 patterns, and to assist the Court and his treatment provider in ensuring compliance with Court
18 stipulations and treatment requirements.

19 The Defendant shall not be allowed contact of any kind (direct, mail or third party)
20 with the victim. If the Defendant does have regular contact with minor children, it shall be
21 approved by an officer of the Court and it should be under the supervision of an adult who is
22 fully aware of his sexual history, Court stipulations, and who agrees to take the legal/civil
23 responsibilities of being a chaperone.

24 The Defendant shall not be allowed to work as a volunteer for any organization or
25 church due to the potential for him to have unsupervised contact with vulnerable people.
26
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28



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The Defendant shall pay to the clerk of the court an administrative fee of \$25.00.

The Defendant shall pay to the clerk of the court a DNA fee of \$150.00.

The Defendant shall pay to the clerk of the court a DNA Administrative Assessment
Fee of \$3.00.

The Defendant shall pay to the clerk of the court a Psychosexual Evaluation fee of
\$1100.00.

IT IS FURTHER ORDERED that any bond in this matter be exonerated, unless
previously ordered by this court for forfeiture or any other purpose.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not
contain the social security number of any person.

DATED this 25 day of March 2014.


DISTRICT JUDGE



CERTIFICATION OF SERVICE

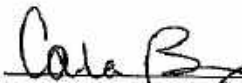
The undersigned hereby certifies that on the 25 day of March 2014, she mailed (or hand delivered) copies of the foregoing **Judgment of Conviction** to the following:

NYE CO. DISTRICT ATTORNEY
PAHRUMP, NV

NEVADA DIVISION OF PAROLE AND PROBATION
PAHRUMP, NV

THOMAS GIBSON, ESQ
LAS VEGAS, NV

NYE CO. SHERIFF
PAHRUMP, NV


CARLA BEGIN, Secretary to
DISTRICT JUDGE

Michael Allen Mack,
petitioner, in pro se

vs.

THE STATE OF NEVADA; NEVADA
DEPARTMENT OF CORRECTIONS;
LOVELOCK CORRECTIONAL CENTER,
WARDEN, ROBERT LEGGINTZ.

RESPONDANTS.

IN THE FIFTH DISTRICT COURT

OF
THE STATE OF NEVADA A 9:37
IN AND FOR
THE COUNTY OF WYOMING CLERK
BY DEPUTY

RE. NOTICE OF APPEAL

I VERY RESPECTFULLY REQUEST THAT ALL PARTIES CONCERNED, PLEASE,
BE ADVISED AND ACKNOWLEDGE THAT I, MICHAEL ALLEN MACK, N.D.O.C.
NUMBER 1117749, DO HEREBY GIVE THE CONCERNED PARTIES
NOTICE OF APPEAL OF CASE NUMBER CR7444A, in pro se.

Very Respectfully Submitted
Michael C Mack
MICHAEL ALLEN MACK, IN PRO SE.

ENTERED THIS 10TH DAY OF FEBRUARY, 2015

DATED THIS 10TH DAY OF FEBRUARY, 2015

Michael Allen Mack* 1117749
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA

89419-5110

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 12TH day of FEBRUARY, 2015, by placing same in the U.S. Mail via prison law library staff:

CLERK OF COURTS BRIAN T. KUNZI
NYE COUNTY DISTRICT COURT NYE COUNTY DISTRICT ATTORNEY
1520 EAST BASIN P.O. BOX 39
PAHRUMP, NEVADA 89060 PAHRUMP, NEVADA 89041

LOVELOCK CORRECTIONAL CENTER WARDEN, ROBERT LE GRAND
(AS PERSONAL) L.C.C.
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

ATTORNEY GENERAL
HEROES MEMORIAL BUILDING
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89710

Michael Allen Mack
MICHAEL ALLEN MACK #1117749
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in District Court Case No. CR7444A does not contain the social security number of any person.

Dated this 10TH day of FEBRUARY, 2015.

Michael Allen Mack
MICHAEL ALLEN MACK #1117749

Petitioner In Pro Se

AFFIDAVIT

RE MICHAEL MACK V. STATE OF NEV.
CASE NUMBER CR7444A
POST CONVICTION PROCEEDINGS

To Whom it may concern

PLEASE BE ADVISED, THAT DUE TO INMATE MICHAEL ALLEN MACK'S INABILITY TO PREPARE AND/OR FORMAT AN ADEQUATE, LEGIBLE, AND/OR OTHERWISE COMPREHENSIVE POST CONVICTION HABEAS PETITION, AND/OR MOTION REQUESTING APPOINTMENT OF COUNSEL, AND REQUEST FOR EVIDENTIARY HEARING; FOR REASONS RANGING FROM COMPLETE IGNORANCE AND ILLITERACY NOT ONLY IN REGARDS TO STRUCTURE AND ARTICULATIONS OF LEGAL DOCUMENTS, BUT ALSO ON HOW TO PRESENT AND/OR OTHERWISE EXPRESS ISSUES, REQUESTS AND/OR CONCERNS TO THE COURT(S) DUE TO HIS COMPLETE IGNORANCE AND ILLITERACY TO AND OF NEVADA STATE RULES AND LAWS, ESPECIALLY AND PARTICULARLY IN REGARDS TO POST CONVICTION PROCEEDINGS. FURTHERMORE, MR. MACK, N.D.O.C. # 1117749, IS A SEVENTY ONE (71) YEAR OLD MAN, WHO, WHILE NOT A COMPREHENSIVE INVALID, DOES HAVE CONSIDERABLE DIMINISHED AND DIMINISHING MENTAL AND COMPREHENSIVE FACILITIES. THUS HE WAS FORCED TO SEEK OUT HELP FROM ANOTHER INMATE, WHO HIS OWN SELF IS IGNORANT AND ILLITERATE TO THE COMPLEXITIES OF NEVADA STATE, AND JUDICIAL, RULES AND LAWS.

IT WAS TOLD TO THIS ATTESTING INMATE, BY ANOTHER INMATE, THAT N.R.S. 722.04.01, PROVIDES THAT INMATE ASSISTANCE IS ALLOWED, BUT REQUIRES THAT THE ASSISTING INMATE IDENTIFY HIMSELF AS AN INMATE, AND DOCUMENT THIS BY WRITING.

"INMATE" FOLLOWED BY THEIR PRISON IDENTIFICATION NUMBER. I, INMATE, N.D.O.C. ID. 1086609 (NEVADA DEPARTMENT OF CORRECTIONS PRISON IDENTIFICATION NUMBER), DO HEREBY ATTEST AND AFFIRM THAT I ASSISTED PETITIONER, MICHAEL ALLEN MACK, NEVADA DEPARTMENT OF CORRECTIONS PRISON IDENTIFICATION NUMBER, 1117749; AND THAT ALL REQUIREMENTS WERE FOLLOWED AND ADHERED TO, TO THE BEST OF MY KNOWLEDGE.

FURTHERMORE, I ACCEPT NO RESPONSIBILITY FOR THE PRESENTED AND/OR OTHERWISE EXPRESSED FACTS, GROUNDS, AND/OR ISSUES OF THE CASE AND/OR PETITION, AS EXPRESSED BY MICHAEL ALLEN MACK, N.D.O.C. # 1117749, IN ANY OF THE ATTACHED LEGAL DOCUMENTS; BUT RATHER ALL RESPONSIBILITY FOR THE TRUTHFULNESS OF AND FOR ALL PRESENTED FACTS RESTS SOLELY UPON THE PETITIONER. FURTHERSTILL, THIS INMATE HELPER, NUMBER 1086609, ATTESTS THAT ABSOLUTELY NO PAYMENT OF ANY KIND WAS ISSUED FOR THE ASSISTANCE PROVIDED.

IN ADDITION, I INFORM THIS HONOURABLE COURT, AND ALL OTHERS TO WHOM IT MAY CONCERN, THAT I AM NOT A TRAINED ATTORNEY, NOR DO I HAVE THE PROPER KNOWLEDGE, QUALIFICATIONS, AND/OR KNOWLEDGE TO ADEQUATELY ASSIST ANY INMATE IN THEIR LEGAL ENDEAVORS. HOWEVER, BECAUSE PETITIONER, MICHAEL ALLEN MACK'S DEFICIENCIES AND DIMINISHMENTS ARE CONSIDERABLE AND OBVIOUS, PETITIONER, MACK, # 1117749 WAS IN NEED OF SOME KIND OF HELP.

PLEASE BE FURTHER ADVISED THAT THIS INMATE "HELP" WILL CEASE TO ASSIST PETITIONER, MICHAEL ALLEN MACK, N.D.O.C. # 1117749, LEAVING THIS MATTER IN ITS ENTIRETY WITH THE COURT(S), AND IN THE HANDS OF GOD; AT THE VERY MOMENT THIS INMATE PLACES HIS SIGNATURE ON THIS AFFIDAVIT.

MAXWELL Houghton # 1086609
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA, 89419-5110

Very Respectfully Submitted.

RECEIVED

FEB 19 2015

Signed this 10TH day of FEBRUARY, 2015

NYE COUNTY CLERK
0311

DEPT. I.P.

Michael Allen Mack,
Petitioner

vs.

THE STATE OF NEVADA;
NEVADA DEPARTMENT OF
CORRECTIONS;

LOVELOCK CORRECTIONAL CENTER,
WARDEN, ROBERT LEGRAND

Respondants

IN THE 5TH DISTRICT COURT
OF THE
STATE OF NEVADA

IN AND TO THE FEB 19 A 11:03
THE County of Nye
Nye County Clerk
BY DEPUTY

RE. Motion For the Appointment
of Counsel;

AND
REQUEST FOR EVIDENTIARY HEARING.

Respectfully comes now the Petitioner, pro se, Michael Allen Mack, within the above entitled cause of action, and respectfully requests this Honorable Court to consider the appointment of Counsel for the prosecution of this action, and grant it, as well as the Petitioner's request for an evidentiary hearing.

This Motion is made and based upon the matters set forth here: NRS 34.750 (1)(2); the affidavit of this Petitioner; the memorandum of points and authorities; as well as all other pleadings and documents on file and/or being filed on and in this case.

- - - STATEMENT OF CASE - - -

This action is commenced for Petitioner, Michael Allen Mack, N.D.O.C. #1117749, in state custody at the Lovelock Correctional Center protective segregation unit, in Lovelock, Nevada; pursuant to Chapter 34; Petition For Writ of Habeas Corpus (post conviction).

- - - STATEMENT OF THE FACTS - - -

- 1) TO SUPPORT THE Petitioner's VITAL NEED FOR THE APPOINTMENT OF COUNSEL IN THIS ACTION, HE STATES THE FOLLOWING:
 - A) THE MERITS OF THE CLAIMS FOR RELIEF IN THIS ACTION ARE OF CONSTITUTIONAL DIMENSION, AND PETITIONER IS LIKELY TO SUCCEED IN THIS CASE.
 - B) PETITIONER IS INCARCERATED IN THE PROTECTIVE SEGREGATION UNIT IN LOVELOCK CORRECTIONAL CENTER IN LOVELOCK, NEVADA; OF WHICH RELEVANCE IS EXPRESSED IN KOERSCHNER V. WARDEN, 508 Supp. 2d 849 (D. NEV. 2007), WHICH STATES: "SEGREGATION UNIT INMATES IN NEVADA STATE PRISON, AT LOVELOCK CORRECTIONAL CENTER, ARE WITHOUT ADEQUATE LAW LIBRARIES OR ADEQUATE ACCESS TO THE COURTS, AND THAT THE INTERESTS OF JUSTICE WARRANT THE APPOINTMENT OF COUNSEL," IN LIGHT OF THE SERIOUS AND POTENTIALLY CONSTITUTIONALLY SUSPECT LIMITATIONS PLACED ON THE PETITIONER'S ACCESS TO THE COURTS, THE PRESENCE OF NON FRIVOLOUS CLAIMS, AND THE OVERALL COMPLEXITY OF THE CASE AND ISSUES PRESENTED. THE COURT ALSO INFORMS RESPONDENTS THAT IT WILL VIEW THE PRESENCE OF SIMILAR LIMITATIONS ON ACCESS TO LEGAL RESOURCES AS A STRONG FACTOR WEIGHING IN FAVOR OF APPOINTMENT OF COUNSEL IN OTHER HABEAS CASES BEFORE THE COURT.
 - C) THE ISSUES PRESENTED IN THE PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) INVOLVE COMPLEXITIES THAT THIS PETITIONER IS UNABLE TO PRESENT AND/OR ARGUE PROPERLY AND/OR EFFECTIVELY, WITH OUT EFFECTIVE ASSISTANCE OF COUNSEL.
 - D) PETITIONER DOES NOT UNDERSTAND THE LAW AND WILL NEED COUNSEL APPOINTED TO HELP HIM FILE A SUPPLEMENTAL PETITION, AND POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION).

0312

- E) Due to Petitioner's incarceration Petitioner is unable to conduct interviews and/or investigations, and will need counsel to undertake this critical necessity.
- F) Petitioner does not have the current legal knowledge and ability/abilities as an attorney would have to properly present this case to this Honorable Court, coupled with the fact that the appointed counsel would be of service to the Court, petitioner, and respondents as well, by sharpening the issues in this case, sharpening the examination of potential witnesses, and ultimately shortening the prosecution of this case.
- G) Petitioner does not have sufficient funds necessary to pay for the costs of a hired attorney. (Please see Declaration of Petitioner's Motion to proceed in Forma Pauperis and supporting documents)
- H) The prison does not provide this Petitioner adequate access to the Law Library, and coupled upon this reality, the facility has very limited legal research materials and/or resources.
- I) This Petitioner does not have access to a prison law clerk, and even if he did, a law clerk is not an attorney, is not bound by attorney/client confidentiality, can not conduct investigations on behalf of this Petitioner, nor would he be allowed to plead before this or any other Court, on this Petitioner's behalf.
- J) This Petitioner has been receiving extensive assistance from an individual who is not qualified to practice law, can not even begin to consider any form of investigation on the very smallest of matters, or take dispositions, expand the record, file a supplemental, or otherwise litigate this action.
- K) The ends of Justice will be served in this case by the Court's appointment of professional and competent effective assistance of counsel to represent this Petitioner.

ARGUMENT

Petitioner is presently incarcerated in the Protective Segregation Unit of the Lovelock Correctional Center, in Lovelock, Nevada, where he is unemployed and without sufficient funds to retain private counsel to represent him. Petitioner is unlearned, unfamiliar, and thus illiterate to and with the complexities of Nevada State Law, particularly and especially state Post Conviction proceedings; furthermore, he has extreme inadequate access to any law library, even if this Petitioner wanted to try to proceed pro se, throughout any following proceedings. Furthermore, Petitioner alleges that the issues in this case are complex and require an evidentiary hearing; and Petitioner is unable to factually develop and adequately present the claims without the assistance of a qualified attorney. Furthermore, counsel is unable to adequately present the claims without an evidentiary hearing.

Motions for the Appointment of Counsel are made pursuant to N.R.S. 34.750, and are addressed to the sound discretion of the Court. Under Chapter 34.750 the Court may request an attorney to represent any such person unable to employ counsel. On a motion for the appointment of counsel, pursuant to N.R.S. 34.750, the District Court should consider whether the appointment of counsel would be of service to the indigent petitioner, the Court, as well as the respondents, by sharpening the issues of the case, sharpening examination of witnesses, and ultimately shortening trial, and assisting the just determination.

In order for the appointment of counsel to be granted, the Court must consider several factors:

- 1) The merits of the claim for relief;
- 2) The Petitioner's ability or inability to investigate crucial factors;
- 3) Whether evidence consists of conflicting testimony effectively treated only by

THREE
OF
FOUR

COUNSEL.

- 4) THE ABILITY TO APPROPRIATELY PRESENT THE CASE;
- 5) THE COMPLEXITY OF THE LEGAL ISSUES RAISED IN THE PETITION.

... CONCLUSION ...

BASED UPON THE FACTS AND LAWS PRESENTED HEREIN, PETITIONER VERY RESPECTFULLY REQUESTS THAT THIS HONOURABLE COURT WEIGH THE FACTORS INVOLVED WITHIN THIS MOTION AND CASE AND GRANT THIS PETITIONER'S REQUESTS FOR THE APPOINTMENT OF COUNSEL TO ASSIST THIS PETITIONER AND THIS COURT IN THE JUST DETERMINATION OF THIS ACTION, AS WELL AS HIS REQUEST FOR AN EVIDENTIARY HEARING.

DATED THIS 10TH DAY OF FEBRUARY, 2015

Very Respectfully Submitted.

Michael C Mack

MICHAEL ALLEN MACK # 1117749

petitioner, in pro se

... VERIFICATION ...

I, MICHAEL ALLEN MACK, DECLARE, AFFIRM, AND ATTEST UNDER THE PENALTY OF PERJURY THAT ALL OF THE ABOVE FACTS, STATEMENTS AND ASSERTIONS ARE TRUE AND CORRECT OF MY OWN KNOWLEDGE. AS TO ANY SUCH MATTERS STATED UPON INFORMATION OR BELIEF, I ATTEST THAT I BELIEVE THEM ALL TO BE TRUE AND CORRECT.

DATED THIS 10TH DAY OF FEBRUARY, 2015

MICHAEL ALLEN MACK # 1117749
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

RESPECTFULLY
Michael C Mack
PETITIONER PRO SE
MICHAEL ALLEN MACK # 1117749
REGARDING:
CASE NO: CR7#44A
DEPT NO: 11 P1
FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

PAGE 4 OF 4

(PAGE FOUR OF FOUR)

CERTIFICATE OF SERVICE BY MAIL

I, MICHAEL ALLEN MACK, hereby certify pursuant to N.R.C.P. 5(b), that on this 12 day of FEBRUARY, 2015, I handed to a prison official for mailing a true and correct copy of the foregoing REQUEST FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING addressed to:

CLERK OF COURTS
NYE COUNTY DISTRICT COURT
1520 EAST BASIN
PAHRUMP, NEVADA 89060

BRIAN T. KUNZI
NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041

LOVELOCK CORRECTIONAL CENTER WARDEN, ROBERT L'E GRAND
(AS PERSONAL) L.C.C.
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

ATTORNEY GENERAL
HERDES MEMORIAL BUILDING
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89710

Case No. CR7444A

Dept. No. 1

FILED

2015 FEB 19 A 9 35

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

MICHAEL ALLEN MACK,

Petitioner,

vs.

THE STATE OF NEVADA; NEVADA
DEPARTMENT OF CORRECTIONS;
LOVELOCK CORRECTIONAL CENTER,
WARDEN, ROBERT LEGRAND

Respondent,

CASE APPEAL STATEMENT

1. Name of the appellant filing the case appeal statement: **Michael Allen Mack.**
2. Identify the judge issuing the decision, judgment, or order appealed from:
Honorable Kimberly A. Wanker.
3. Identify each appellant and the name and address of counsel for each appellant:
Michael Allen Mack, in proper person. The appellant's address is:

**Michael Allen Mack #117749
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419**
4. Identify each respondent and the name and address of appellate counsel, if unknown, for each respondent (if the name of the respondent's appellate counsel is unknown, indicate as much and provide the name and address of the respondent's trial counsel): **The State of Nevada; Nevada Department of Corrections; Lovelock Correctional Center, Warden, Robert LeGrand are listed Respondents. The State of Nevada is represented by the Nye County District Attorney, whose address is:**

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.**
6. Indicate whether appellant was represented by appointed or retained counsel in the district court: **Appellant was represented by Thomas Gibson, Esq., who was appointed.**
7. Indicate whether appellant is represented by appointed or retained counsel on appeal: **Appellant is representing himself, in proper person.**
8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: **The Appellant filed an Application to Proceed in Forma Pauperis February 19th, 2015. The Order is currently pending Judge's signature.**
9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed): **Proceedings in The Fifth Judicial District Court commenced May 14th, 2013 with the filing of the Bindover Order.**
10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court: **This case is a criminal proceeding that was bound over to District Court May 14th, 2013. The Appellant pled guilty (Pursuant to Alford) on December 4th, 2013 to Attempted Sexual Assault and was sentenced March 21st, 2014 to 96/240 months in the Nevada Department of Corrections. The Appellant is not specific what order is being appealed or relief that is being sought.**
11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and

Case No. CR7444A

Dept. No. I.P

FILED

2015 FEB 19 AM 11:03

Tanner Davis
NYE COUNTY CLERK
BY DEPUTY

IN THE 5TH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

* * * * *

MICHAEL ALLEN MACK,

Petitioner,

-VS-
STATE OF NEVADA, NEVADA DEPART-
MENT OF CORRECTIONS, LOVELOCK
CORRECTIONAL CENTER, WARDEN,
ROBERT Le GRAM

Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing

future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center, Pershing County, Nevada.

2. Name and location of court which entered the judgment of conviction under attack: THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF NYE, PARAHUMP, NEVADA

3. Date of judgment of conviction: MARCH 28, 2014

4. Case number: CR 7444A

5. (a) Length of sentence: EIGHT TO TWENTY (8 YEARS TO 20 YEARS)

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ☐ No ☒

If "yes," list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: ATTEMPTED SEXUAL ASSAULT

8. What was your plea? (check one)

- (a) Not guilty ____
(b) Guilty ____
(c) Guilty but mentally ill ____
(d) Nolo contendere X

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

- (a) Jury ____ (b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No ____

12. Did you appeal from the judgment of conviction?

Yes ____ No ____

13. If you did appeal, answer the following:

- (a) Name of court: ____
(b) Case number or citation: ____
(c) Result: ____
(d) Date of result: ____
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not:

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ____ No X

16. If your answer to No. 15 was "yes," give the following information:

- (a) (1) Name of court: ____
(2) Nature of proceeding: ____
(3) Grounds raised: ____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____

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(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No ___

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?
Yes ___ No ___

Citation or date of decision: _____

(2) Second petition, application or motion?
Yes ___ No ___

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ___ No ___

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ___ No X

If yes, state what court and the case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

THOMAS GIBSON, ESQ

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ___ No X

If yes, specify where and when it is to be served, if you know: _____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: PETITIONER'S 5TH, 9TH, AND 14TH STATE AND FEDERAL RIGHTS WERE VIOLATED.

Supporting FACTS (Tell your story briefly without citing cases or law.): PLEASE SEE ATTACHED PAGES FOR SUPPORTING FACTS, AS THIS IS NOT SUFFICIENT SPACE FOR ELABORATION

(b) Ground two: PETITIONER'S 5TH, 6TH, 8TH, 9TH, 10TH, AND 14TH STATE AND FEDERAL RIGHTS WERE VIOLATED, DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (Tell your story briefly without citing cases or law.): PLEASE SEE ATTACHED PAGES FOR SUPPORTING FACTS, AS THIS IS NOT SUFFICIENT SPACE FOR ELABORATION...

(c) Ground three: Petitioner's 5TH, 6TH, 8TH, 9TH, 10TH, and 14TH
STATE AND FEDERAL RIGHTS WERE VIOLATED THROUGH A Bias Judge and abuses
OF JUDICIAL POWERS AND DISCRETIONS.

Supporting FACTS (Tell your story briefly without
citing cases or law.):

PLEASE SEE ATTACHED PAGES FOR SUPPORTING
FACTS, AS THIS IS NOT SUFFICIENT SPACE FOR ELABORATIONS.

(d) Ground four: Petitioner's 5TH, 6TH, 8TH, 9TH, 10TH, and
14TH STATE AND FEDERAL RIGHTS WERE VIOLATED THROUGH CUMULATIVE ERRORS.

Supporting FACTS (Tell your story briefly without
citing cases or law.):

PLEASE SEE ATTACHED PAGES FOR
SUPPORTING FACTS, AS THIS IS NOT SUFF-
ICIENT SPACE FOR ELABORATIONS

WHEREFORE, petitioner prays that the court grant petitioner
relief to which he may be entitled in this proceeding.

EXECUTED at Lovelock Correctional Center on the 10TH day of
the month of FEBRUARY of the year 2015.

Michael C Mack
MICHAEL ALLEN MACK #1117749
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

Ground ONE:

Petitioner's 5TH, 9TH, AND 14TH STATE AND FEDERAL RIGHTS WERE VIOLATED DUE TO HIS NOT BEING MIRANDIZED UPON HIS ARREST.

A). On April 10, 2013, AT APPROXIMATELY 12:30 AM, DETECTIVE DAVID BORUCKOWITZ, OF THE NYE COUNTY SHERIFF'S DEPARTMENT, AND AN UNIFORMED SHERIFF'S DEPUTY, CAME TO PETITIONER'S HOME, EVIDENTLY WITH A WARRANT FOR PETITIONER'S ARREST, WITH EVERY INTENT ON PERFORMING SAID ARREST, AND THUS EXECUTING THE WARRANT.

WHEN THE DETECTIVE AND SHERIFF'S DEPUTY KNOCKED ON PETITIONER'S FRONT DOOR THEY WOKED PETITIONER OUT OF A SOUND PERSCRIBED MEDICATED SLEEP. UPON OPENING HIS FRONT DOOR THE

DETECTIVE STEPPED INTO PETITIONER'S HOME, AS IF IT WERE HIS OWN, AND IMMEDIATELY BEGAN ASKING QUESTIONS, AND MAKING STATEMENTS ABOUT PETITIONER'S ADOPTED SISTER, TO THE EFFECT THAT SHE HAD FILED SOME CHARGES, AND THAT SHE WAS, AT THAT MOMENT, ON HER WAY

TO A LAS VEGAS HOSPITAL.

THIS PETITIONER DOES NOT AND CAN NOT RECOLLECT THE ENTIRE EVENT, AS HE HAD JUST BEEN WOKEN OUT OF A MEDICATED SLEEP, AND SUBSTANTIALLY DISORIENTED. HOWEVER, PETITIONER

CLEARLY RECOLLECTS HIS BEING PLACED UNDER ARREST AND CLEARLY RECOLLECTS NOT BEING NOTIFIED OF THE MIRANDA WARNING. IF THIS SHOULD BE CONTESTED, IT IS THIS PETITIONER'S

UNDERSTANDING THAT DETECTIVE BORUCKOWITZ RECORDED THE EVENT ON AUDIO. APPROXIMATELY FOUR DAYS AFTER PETITIONER'S INITIAL ARREST, ARRAIGNMENT AND APPOINTMENT

OF COUNSEL BY THE JUDGE, DETECTIVE BORUCKOWITZ AND ANOTHER DETECTIVE (UNKNOWN TO THIS PETITIONER) CAME TO THE NYE COUNTY DETENTION CENTER AND ATTEMPTED TO QUESTION PETITIONER,

TWICE IN THE SAME DAY, AGAIN, WITHOUT BEING MIRANDIZED, AND AFTER HAVING BEEN APPOINTED COUNSEL AT ARRAIGNMENT.

AT THIS POINT IN TIME THERE SEEMS TO BE NO OBVIOUS SIGNIFICANCE TO THIS CLAIM; HOWEVER, EVEN THAT WOULD BE IRRELEVANT EVEN IF THERE WAS NO REPRODUCTION, IN LIGHT OF THE FACT

THAT THE POLICE HAVE A RESPONSIBILITY AND DUTY, PER STATE AND FEDERAL LAW, TO NOTIFY AN ARRESTEE WHY HE OR SHE IS BEING ARRESTED, AS WELL AS HIS OR HER IMMEDIATE CONSTITUTIONAL RIGHT

AND QUESTIONING. BUT THERE WAS A REPRODUCTION, OF WHICH WILL BECOME MANIFEST IN OTHER

GROUND AND CLAIMS OF THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION). BUT TO SUFFICE FOR NOW: HAD THE POLICE MIRANDIZED PETITIONER AT TIME OF ARREST, OR AT ANY

OTHER TIME FOR THAT MATTER, IT WOULD HAVE CAUSED HIM TO SEARCH A LITTLE MORE INTO THE CONSTITUTIONAL RIGHTS OF AN AMERICAN CITIZEN; WOULD HAVE CONCLUDED THAT THE

DETECTIVES' CONDUCT WAS NOT JUST SHOTTY BUT GROSSLY INAPPROPRIATE BY THEIR REPEATED ATTEMPTS TO QUESTION PETITIONER, NOT ONLY AFTER NEVER NOTIFYING HIM OF

HIS RIGHTS BUT AFTER HE WAS APPOINTED COUNSEL FOR THE ASSISTANCE OF DEFENSE. FURTHERMORE, PETITIONER WOULD HAVE UNDERSTOOD THAT ANYTHING HE SAID, TO ANY ONE, COULD

HAVE BEEN, AND COULD BE, USED AGAINST HIM IN A COURT OF LAW, OF WHICH ULTIMATELY HAPPENED AS PETITIONER'S SENTENCING JUDGE USED THE RECOMMENDATION, OF WHAT PETITIONER

BELIEVES WAS/A PSYCHOLOGIST, TO SENTENCE PETITIONER TO AN EIGHT TO TWENTY YEAR PRISON SENTENCE, OPPOSED TO THE TWO TO TWENTY YEAR (PROBATIONABLE OFFENCE) PRISON

SENTENCE. PETITIONER AGREED TO AND SIGNED FOR. HAD THIS PETITIONER BEEN MADE AWARE OF HIS RIGHTS, FROM THE ONSET OR AT ANY OTHER POINT,

HE WOULD HAVE BEEN ABLE TO MAKE MORE INFORMED DECISIONS, WOULD HAVE REFUSED TO SPEAK WITH AND/OR TO ANY ONE REGARDING HIS CASE DETAILS, OTHER THAN HIS ATTORNEY; UNTIL

THE TIME AND DAY HE GOT ON THE WITNESS STAND AT TRIAL, OF WHICH TRIAL PETITIONER IS CONFIDENT HE WOULD HAVE BEEN FOUND NOT GUILTY OF THE CHARGES AGAINST HIM, AND WOULD

HAVE BEEN ACQUITTED. THE SHOTTY POLICE WORK OUT LINED IN THIS GROUND RESULTED IN THE VIOLATION OF THIS

PETITIONER'S RIGHT AGAINST SELF INCRIMINATION, AS WELL AS VIOLATIONS OF HIS RIGHTS TO DUE PROCESS OF LAW, EQUAL PROTECTION; AS WELL AS VIOLATIONS OF ESSENTIALLY EVERY

RIGHT UNDER THE 5TH, 6TH, 8TH, 9TH, 10TH, AND 14TH CONSTITUTIONAL RIGHTS. THIS PETITIONER RESPECTFULLY REQUESTS THAT THIS COURT RECOGNIZE THIS GROUND

AS VALID, AND INVALIDATE PETITIONER'S PLEA AGREEMENT AS NULL AND VOID, AND RE-MAND THIS MATTER OF CASE NUMBER, CR 7444A, FOR TRIAL.

Ground Two:

PETITIONER'S 5TH, 6TH, 8TH, 9TH, 10TH, AND 14TH STATE AND FEDERAL RIGHTS WERE ALL VIOLATED, AS HE DID NOT RECEIVE REASONABLE EFFECTIVE ASSISTANCE OF COUNSEL, AND

THROUGH THIS INEFFECTIVE ASSISTANCE, AND AS A RESULT, PETITIONER FELT VICTIMIZED

1 UNINFORMED AND FORTUNATE SELF INCRIMINATION; LOSS OF LIFE AND LIBERTY WITHOUT A
2 DUE PROCESS OF LAW; DID NOT ENJOY HIS RIGHT TO A FAIR AND SPEEDY TRIAL, FACE HIS ACCUSED,
3 PRESENT WITNESSES OF HIS OWN, AND/OR HAVE ALL THE FACTS AND TRUTHS OF THE CASE PUBLICLY
4 PRESENTED BEFORE A FAIR AND IMPARTIAL JUDGE AND JURY; HE DID NOT, THROUGH THE
5 GROSS NEGLIGENCE OF COUNSEL, ENJOY HIS RIGHT FOR THE EQUAL PROTECTION OF HIMSELF AS WELL
6 AS HIS RIGHTS; AND AS A RESULT AND CONSEQUENCE, ULTIMATELY RECEIVED A CRUEL AND
7 UNUSUAL PUNISHMENT, BUT STANDING TO THE CRIME OF CONVICTION.
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9 A. IN THE APPROXIMATE ELEVEN (11) MONTHS OF MR. THOMAS GIBSON, ESQ.'S APPOINTMENT
10 AS THIS PETITIONER'S INEFFECTIVE LEGAL COUNSEL, HE CAME TO VISIT PETITIONER AT THE NYE
11 COUNTY DETENTION CENTER APPROXIMATELY THREE (3) TIMES, IN RELATION TO PETITIONER'S
12 CRIMINAL CASE, NUMBER CR1444, EACH VISIT ONLY BEING APPROXIMATELY FIFTEEN (15) TO
13 TWENTY (20) MINUTES IN DURATION.
14 THE FIRST MEETING WAS A SIMPLE INTRODUCTION, NOTIFICATION OF HIS APPOINTMENT
15 AS COUNSEL, AND A REVIEW OF THE CHARGES AND EVIDENCE AGAINST PETITIONER.
16 THE SECOND MEETING WAS APPROXIMATELY TWO MONTHS LATER (SOME TIME IN LATE JUNE, 2013
17 OR EARLY /MID JULY, 2013), MR. GIBSON SHOWED UP AT THE NYE COUNTY DETENTION
18 CENTER (FROM HEREON "NYE COUNTY DETENTION CENTER" WILL BE REFERRED TO AS
19 "N.C.D.C.") WITH HIS INVESTIGATOR, TO SEE PETITIONER. AT THIS TIME PETITIONER WAS
20 ASKED A FEW SUPERFICIAL QUESTIONS REGARDING THE ALLEGED VICTIM. HOWEVER WHEN ENQUIRIES
21 AND/OR INPUTS, AND/OR INTERJECTIONS WERE MADE BY PETITIONER, SAID ENQUIRIES,
22 INPUTS, AND/OR INTERJECTIONS WERE DISMISSED OUT OF HAND BY BOTH MR. GIBSON AND HIS
23 "INVESTIGATOR".
24 THIS MEETING WAS ABOUT FIFTEEN (15) TO TWENTY (20) MINUTES IN DURATION, AND AGAIN,
25 NONE OF PETITIONER'S QUESTIONS, CONCERNS, AND/OR INPUTS WERE ADDRESSED OR
26 CONSIDERED.
27 THE THIRD (3RD) MEETING WAS APPROXIMATELY FOUR (4) OR FIVE (5) MONTHS LATER; MR.
28 GIBSON AGAIN SHOWING UP WITH HIS "INVESTIGATOR", AT WHICH TIME THEY INFORMED PETITIONER
29 THAT THEY WERE UNABLE TO OBTAIN ANY BACKGROUND INFORMATION ON THE ALLEGED VICTIM,
30 IN SPITE OF THE FACT THAT PETITIONER PROVIDED MR. GIBSON AND HIS "INVESTIGATOR" WITH
31 A LIST OF APPROXIMATELY TEN (10) PEOPLE TO CONTACT, (INCLUDING MEMBERS OF
32 PETITIONER'S AND ALLEGED VICTIM'S FRIENDS AND FAMILY), WHICH INCLUDED NAMES AND
33 PHONE NUMBERS FOR ALL. THIS LIST WAS PROVIDED TO PETITIONER'S INEFFECTIVE AND
34 GROSSLY NEGLIGENT ATTORNEY AND "INVESTIGATOR" BOTH VERBALLY AND IN WRITING.
35 PETITIONER IS FAIRLY CERTAIN THAT HIS INEFFECTIVE ATTORNEY, MR. GIBSON, AND HIS END-
36 ENTLY EQUALLY INEPT INVESTIGATOR, DID NOT CONDUCT ANY INTERVIEWS AND/OR FOLLOW-
37 UP WITH THE PEOPLE ON THE LIST AS FIRST: TWO OF THE PEOPLE ON THAT LIST WERE
38 MEMBERS OF PETITIONER AND ALLEGED VICTIM'S FAMILY, AND PETITIONER KNOWS FOR A
39 FACT THAT THEY WERE NEVER CONTACTED BY PETITIONER'S ATTORNEY'S OFFICE FOR INVESTIGATIVE
40 PURPOSES AND BACKGROUND GATHERING ON THE ALLEGED VICTIM.
41 SECOND: PETITIONER IS FAIRLY CERTAIN THAT HIS ATTORNEY'S OFFICE NEVER EVEN CONTACTED
42 ANY ONE ELSE ON THAT LIST IS DUE TO THE FACT THAT NEITHER HIS ATTORNEY
43 NOR HIS OFFICE WERE ABLE TO OBTAIN ANY BACKGROUND ON THE ALLEGED VICTIM.
44 EVERY SINGLE PERSON ON THAT LIST WAS KNOWN PETITIONER'S ADOPTED SISTER, THE
45 ALLEGED VICTIM, FOR MANY YEARS AND HAD THEY BEEN CONTACTED, PETITIONER IS
46 CONFIDENT THAT EVEN IF PETITIONER'S ATTORNEY AND/OR HIS OFFICE FELT THEIR INFORMATION
47 TO BE SUSPECT (AND PETITIONER WOULD SUGGEST THEY WOULD NOT HAVE), THEY COULD HAVE AT LEAST
48 PROVIDED CROSS REFERENCES, AS WELL AS COLLECTIVE CROSS REFERENCES.
49 AS CONSEQUENCE TO THE NEGLIGENCE OF PETITIONER'S ATTORNEY, AND HIS OFFICE, BY FAIL-
50 ING TO PROPERLY INVESTIGATE THE INFORMATION PROVIDED BY PETITIONER, BY CALLING
51 THE NUMBERS, FOLLOWING UP, AND CONDUCTING INTERVIEWS; THIS PETITIONER WAS DE-
52 PRIVED OF HIS RIGHT TO REASONABLE EFFECTIVE ASSISTANCE OF COUNSEL; HIS RIGHT TO
53 EQUAL PROTECTION AND DUE PROCESS OF LAW; HIS RIGHT TO FACE HIS ACCUSER(S)
54 AND PRESENT WITNESSES IN AND FOR HIS DEFENSE THROUGH A SPEEDY AND PUBLIC
55 TRIAL BY A FAIR AND IMPARTIAL JUDGE AND JURY; AND HIS RIGHT TO HAVE ALL OF THESE
56 RIGHTS EQUALLY UP-HELD AND PROTECTED; WHICH ULTIMATELY RESULTED IN THE LOSS
57 OF THIS PETITIONER'S LIBERTY TO A DEGREE WHICH IS TANTAMOUNT TO NOT ONLY A
58 GROSS MISCARriage OF JUSTICE, BUT A PRISON TERM WHICH IS CRUEL AND UNUSUAL.
59 HAD PETITIONER'S COUNSEL AND/OR HIS OFFICE CONDUCTED A REASONABLE INVESTIGATION
60 BY FOLLOWING UP ON THE INFORMATION PROVIDED BY PETITIONER, AT LEAST, HE WOULD

- 1 HAVE ASCERTAINED THROUGH THE COLLECTED AND COLLECTIVE INFORMATION AND WITNESSES A
B THAT THERE WAS AND SUFFICIENT DEFENSE MATERIAL TO PROCEED TO TRIAL AND OBTAIN
- 2 A VERDICT OF NOT GUILTY OF THE CHARGES INITIALLY AGAINST PETITIONER, AND ESPECI- A
B ally what he was ultimately convicted of.
- 3 PETITIONER CHALLENGES HIS FORMER ATTORNEY AND INVESTIGATOR TO PROVIDE AFFIDAVIT A
B FROM EVERY ONE ON THAT LIST STATING THAT HE AND/OR HIS OFFICE CONTACTED THEM
- 4 DURING THE TIME OF QUESTION; AND IF HE DID CONTACT THEM, WHAT INFORMATION DID A
B THEY PROVIDE, AND WHY WAS IT NOT USED?
- 5 PETITIONER VERY RESPECTFULLY REQUESTS THAT THIS HONORABLE COURT GRANT PETITIONER'S A
B PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AS WELL AS HIS MOTION REQUESTING
- 6 THE APPOINTMENT OF COUNSEL AND EVIDENTIARY HEARING, THAT THIS CASE MAY PRO- A
B CEED TO TRIAL, WHERE PETITIONER IS CONFIDENT A VERDICT OF NOT GUILTY WILL BE OBTAINED.
- 7
- 8 PETITIONER'S COUNSEL WAS INEFFECTIVE IN HIS NEGLIGENCE TO REASONABLY PARTICIPATE, COM- A
B MUNICATE, NOR ASSIST PETITIONER IN THE DEVELOPING AND/OR PREPARATIONS OF A DEFENSE
- 9 AND/OR STRATEGY. A
B
- 10 AS PREVIOUSLY MENTIONED IN "A" OF THIS GROUND, PETITIONER'S INEFFECTIVE LEGAL COUNSELOR A
B CAME TO SEE PETITIONER AT THE N.C.D.C. APPROXIMATELY THREE (3) TIMES TO DISCUSS
- 11 PETITIONER'S LEGAL CASE, IN THE APPROXIMATE ELEVEN (11) MONTHS OF HIS APPOINTMENT A
B OF PETITIONER'S ATTORNEY; AND AGAIN, THESE VISITS ONLY LASTED APPROXIMATELY FIFTEEN
- 12 (15) TO TWENTY (20) MINUTES IN DURATION, IN WHICH TIME (S) NOTHING HAD BEEN ACCOM- A
B PLISHED NOR SATISFIED. (PLEASE NOTE EXHIBITS A-B)
- 13 DESPITE PETITIONER'S REPEATED ATTEMPTS TO CONTACT, COMMUNICATE, AND DIALOGUE WITH HIS A
B ATTORNEY DURING HIS DETAINMENT AT THE N.C.D.C., THROUGH UNRESPONDED TO CORRESPON- A
B DENCES (ONLY TWO OF THESE LETTERS (CARBON COPIES) ARE PRESENTLY AVAILABLE AS EXHIBITS "A"
- 14 AND "B"), REPEATED UNSUCCESSFUL PHONE CALL ATTEMPTS TO PETITIONER'S ATTORNEY'S A
B OFFICE, AND THIRD PARTY DIALOGUE ATTEMPTS WITH PETITIONER'S INEFFECTIVE COUNSEL
- 15 THROUGH PETITIONER'S DAUGHTER, ABSOLUTELY NO REASONABLE, SUFFICIENT, AND/OR SATISFACTORY A
B DEVELOPMENT(S) WERE DEVELOPED, MANUFACTURED, NOR ACCOMPLISHED.
- 16 HAD PETITIONER'S ATTORNEY ENDEAVORED TO PERFORM ANY OF THE DUTIES AND RESPONS- A
B IBILITIES (IN THIS PETITIONER'S CASE) OF WHICH HIS CHOSEN PROFESSION DEMANDS AS WELL
- 17 AS COMMANDS, AND COMMUNICATE, DIALOGUE, AND ASSIST PETITIONER IN THE DEVELOPING A
B OF A DEFENSE; THIS PETITIONER AND HIS LEGAL COUNSELOR WOULD HAVE BEEN ABLE TO
- 18 DEVELOP AND SUBSTANTIATE A SOUND DEFENSE BASED AND ESTABLISHED ON A SOLID FOUND- A
B ATION OF FACTS AND TRUTH; AND HAD THIS BEEN ACCOMPLISHED, THE DEFENSE WOULD
- 19 HAVE BEEN ABLE TO PROCEED TO TRIAL, AND THIS PETITIONER WOULD HAVE BEEN FOUND NOT GUILTY A
B OF THE CHARGES AGAINST HIM.
- 20 PETITIONER VERY RESPECTFULLY REQUESTS THAT THIS HONORABLE COURT RECOGNIZE AND ACK- A
B KNOWLEDGE THIS GROSS NEGLIGENCE OF PETITIONER'S FORMER LEGAL COUNSELOR, MR. THOMAS
- 21 GIBSON, ESQ., AND GRANT THIS PETITIONER'S REQUEST FOR THE APPOINTMENT OF COUNSEL, AND A
B REQUEST FOR EVIDENTIARY HEARING, AS PETITIONER IS CONFIDENT THAT THE ULTIMATE OUT- A
B COME WOULD BE A GRANTING OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST CON-
- 22 VICTION), AND PETITIONER'S CASE WILL PROCEED TO TRIAL, WHERE HE WILL BE FOUND NOT A
B GUILTY OF ALL CHARGES AGAINST HIM.
- 23
- 24 PETITIONER'S FORMER LEGAL COUNSELOR WAS INEFFECTIVE IN THAT HE DELIBERATELY LIED BY THE A
B COMMISSION OF ACCURATE TRUTH; BY INSTEAD PROVIDING PETITIONER WITH MISLEADING INFOR-
- 25 MATION REGARDING 5TH, 6TH, 9TH, 10TH, AND 14TH STATE AND FEDERAL RIGHT VIOLATION, BY THE A
B ARRESTING DETECTIVE, ET AL.
- 26 UPON INITIAL FIRST MEETING WITH PETITIONER'S INEFFECTIVE AND NEGLIGENT LEGAL COUNSELOR; A
B MR. THOMAS GIBSON, ESQ., HE INFORMED PETITIONER THAT ONE OF THE THINGS HE HAD TO
- 27 REVIEW WAS A RECORDING THAT WAS MADE WITHOUT PETITIONER'S KNOWLEDGE, BY DETECTIVE, BOR- A
B UCHOWITZ, AT PETITIONER'S HOME AT THE TIME OF HIS ARREST.
- 28 AFTER BEING NOTIFIED OF THIS RECORDING, PETITIONER INFORMED MR. GIBSON THAT HE (PETITIONER) A
B WAS NEVER NOTIFIED OF HIS MIRANDA WARNING/RIGHTS, NOR THAT HE WAS BEING RECORDED.
- 29 PETITIONER'S GROSSLY INEFFECTIVE LEGAL COUNSELOR'S RESPONSE WAS THAT DUE TO THE NEW A
B FEDERAL TERRORIST LAW THE POLICE ARE NO LONGER REQUIRED TO NOTIFY AN ARRESTEE
- 30 OF HIS OR HER STATE AND FEDERAL RIGHTS THROUGH MIRANDA. A
B
- 31 FIRST OF ALL, PETITIONER'S CASE AND CHARGES, NOR HE HIMSELF HAD AND HAS ABSOLUTELY A
B NOTHING TO DO WITH ANY KIND OF THREAT TO NATIONAL SECURITY.
- 32 SECOND: THE ARRESTING OFFICER(S) CAME TO PETITIONER'S HOME WITH AN ARREST A
B

WARRANT AND A RECORDING DEVICE, WITH EVERY INTENT TO ARREST AND RECORD. AS SOON AS THE ARRESTING OFFICER ASCERTAINED THAT PETITIONER WAS THE INDIVIDUAL NAMED ON THE ARREST WARRANT, HE SHOULD HAVE BEEN PLACED UNDER ARREST, IN HAND CUFFS AND NOTIFIED OF HIS RIGHTS, IF NOT WARNED THAT HE WAS BEING RECORDED.

THIS PARTICULAR BLATANT DISREGARD MR. GIBSON DISPLAYED FOR THIS PETITIONER'S RIGHTS IS APPALLING AND GROSSLY NEGLIGENT; NOT TO MENTION HIS DISREGARD FOR THE LAWS OF THIS COUNTRY. FURTHERMORE, MR. GIBSON DIDN'T EVEN APPLY HIMSELF TO NOTIFY PETITIONER OF HIS RIGHTS, AT ANY TIME OF HIS APPOINTMENT. HAD MR. GIBSON RESPONDED TO THIS ISSUE ACCORDINGLY TO WHAT AND HOW HIS CHOSEN PROFESSION MANDATES, PETITIONER COULD HAVE AT LEAST BEEN MADE FULLY AWARE OF WHAT HIS RIGHTS WERE AND ARE UNDER THOSE CIRCUMSTANCES, AND PETITIONER COULD HAVE DILIGENTLY ENQUIRED FOR MORE COMPREHENSIVE UNDERSTANDING, AND WOULD HAVE ENDED UP ULTIMATELY TAKING HIS CASE TO TRIAL WHERE ALL THE FACTS AND TRUTHS WOULD HAVE BEEN LAYED OUT TO BE WEIGHED, AS PETITIONER WOULD HAVE REFUSED TO PROVIDE DAMNING PARTIAL INFORMATION TO WHAT PETITIONER BELIEVES IS/WAS A PSYCHOLOGIST OF WHOSE "REPORT AND RECOMMENDATION" WAS INSTRUMENTAL IN PETITIONER'S PERSUADING JUDGE'S DECISION TO SENTENCE PETITIONER TO AN EIGHT (8) TO TWENTY (20) YEAR PRISON SENTENCE, INSTEAD OF THE TWO (2) TO TWENTY (20) YEAR PRISON SENTENCE. PLEA AGREEMENT PETITIONER'S GROSSLY INEFFECTIVE LEGAL COUNSELOR MANIPULATED PETITIONER INTO SIGNING THROUGH MISREPRESENTATIONS AND BLATANT DECEPTIONS.

FURTHERMORE, THE PREJUDICE IS EVIDENT IN THAT, ONE, PETITIONER HAS NEVER EVEN BEEN ACCUSED OF ANYTHING OF THE NATURE OF HIS INITIAL CHARGES OR WHAT HE WAS ULTIMATELY CONVICTED OF, IN HIS LIFE, LET ALONE CHARGED OR CONVICTED. TWO, PETITIONER HAS NEVER BEEN CONVICTED OF ANY CRIME, FELONY OR MISDEMEANOR, IN HIS, THEN AT THAT TIME, SEVENTY (70) YEARS OF LIFE; AND THREE, "Attempted SEXUAL ASSAULT" IS A PROBATIONABLE OFFENSE, AND PETITIONER RECEIVES AN EIGHT (8) TO TWENTY (20) YEAR PRISON SENTENCE, FOR THE FIRST CRIMINAL CONVICTION IN HIS LIFE? THERE ARE PEOPLE HERE SERVING LESS TIME FOR MURDER.

PETITIONER'S INEFFECTIVE LEGAL COUNSELOR'S GROSS NEGLIGENCE WAS AND IS LEGAL MALPRACTICE, AND RESULTED IN THE VIOLATIONS OF PETITIONER'S STATE AND FEDERAL RIGHTS.

PETITIONER RESPECTFULLY REQUESTS THAT HIS PLEA AGREEMENT BE REVOKED AND THIS CASE PROCEED TO TRIAL.

D PETITIONER'S LEGAL COUNSELOR WAS INEFFECTIVE IN THAT HE FAILED TO DEFEND THE BEST INTERESTS OF THE PETITIONER, DURING HIS APPOINTMENT AS LEGAL COUNSEL, BY NOT ENDEAVORING TO HAVE PETITIONER'S CASE JUDGE REMOVED FROM CASE NO. CETH444.

ON OR ABOUT MAY 10, 2013, PETITIONER AND HIS THEN APPOINTED LEGAL COUNSELOR STOOD BEFORE HONOURABLE JUDGE, KIMBERLY WANKER, A PUBLIC AND JUDICIAL FIGURE AND OFFICIAL, OF WHOM PETITIONER HAD HAD FORMAL AND INFORMAL PRIVATE AND VERY PUBLIC SOCIAL, POLITICAL AND COMMUNAL TIES AND AFFILIATIONS TO AND WITH, FOR AN APPROXIMATE PERIOD OF EIGHTEEN (18) MONTHS PRIOR TO PETITIONER'S ARREST.

AT THIS TIME, HER HONOUR ACKNOWLEDGED THAT SHE KNEW PETITIONER, AND THAT SHE HAD CONDUCTED SOME RESEARCH INTO SOME RULES (OF SOME SORT) REGARDING A POSSIBLE RECUSAL; DUE TO ANY POTENTIAL AND/OR PERCEIVED CONFLICT OF INTERESTS, PETITIONER ASSUMES. HOWEVER, AT THAT TIME SHE STATED THAT SHE WAS UNABLE TO FIND SUFFICIENT REASONS FOR A RECUSAL; AND THEN ADDRESSED PETITIONER'S THEN LEGAL COUNSEL, MR. GIBSON, SUGGESTING THAT HE CONDUCT HIS OWN RESEARCH INTO THE MATTER; AND THAT IF HE COULD FIND ANY REASON(S) AS TO WHY SHE SHOULD/COULD RECUSE HERSELF, SHE WOULD CONSIDER IT/HIM.

FIRST, TO THIS PETITIONER'S KNOWLEDGE, PETITIONER'S LEGAL COUNSELOR CONDUCTED ABSOLUTELY NO RESEARCH OR INVESTIGATION INTO THIS ISSUE; NOR ANY OTHER FOR THAT MATTER. ANY COMPETENT ATTORNEY, OR ANY ONE WITH SUFFICIENT COMPREHENSIVE ABILITIES, ESPECIALLY IN THE POLITICAL AND JUDICIAL ARENAS, WOULD KNOW THAT IT IS NOT IN THE BEST INTERESTS OF A CRIMINAL DEFENDANT TO GO BEFORE AN ELECTED OFFICIAL IN ELECTION SEASON; ESPECIALLY WHEN SAID CRIMINAL DEFENDANT WAS NOT ONLY BEING CHARGED WITH PARTICULARLY HEINOUS CRIMES, BUT THE CRIMINAL DEFENDANT HAS VERY PUBLIC FORMAL AND INFORMAL, SOCIAL, COMMUNAL, AND EVEN POLITICAL, TIES TO; WHO IS ALSO A PROMINANT AND WIDELY KNOWN FIGURE IN THE COMMUNAL, POLITICAL, AND SOCIAL ARENAS; AS WELL AS IN THE MEDIA.

NEXT, BY COUNSEL'S NEGLIGENCE TO EFFECTIVELY CONSIDER THESE REALITIES AND ACT IN THE BEST INTERESTS OF THIS PETITIONER BY DOING EVERYTHING HE COULD, WITHIN REASON, TO GET A DIFFERENT JUDGE APPOINTED, HE SABOTAGED THIS PETITIONER BY FURTHER PUTTING JUDGE, WANKER

1 in an even tighter situation, as well as the Petitioner, as, in light of the listed facts, alone, if this particular judge gave any impression to the communities and arenas, perceived or otherwise, that she was extending any form of leniency toward Petitioner upon any hypothetical form of conviction; especially with the nature of the criminal charges; it
2 would have been detrimental to her elected judicial position. Her Honour would have no other choice but to make a point of not showing any favor. Furthermore, it would be, and
3 is, only natural under the circumstances, that her Honour would immediately recognize a necessity to publicly sever any publicly perceived friendship and/or affiliation
4 with and from Petitioner, and distance herself and/or Petitioner, as far as possible to preserve her Honour's own reputation within the communities and arenas.
5 The result of Petitioner's counsel's negligence and failure to act in the best interests of his client, of that time, this Petitioner, Petitioner was sentenced to an out-
6 raged prison term of eight (8) to twenty (20) years in prison; which at Petitioner's age is a potential life sentence with out the possibility of parole, for an attempted
7 sexual assault?
8 Not only is this the first time Petitioner was ever been accused of anything of this nature in his then seventy (70) years of life, but this Petitioner, up to being convicted on
9 this case, has absolutely no criminal record whatsoever. Furthermore, for prejudicial
10 revelation, Petitioner apparently had two co-defendants; at least one came before Judge Kimberly Wanker on similar charges. Neither co-defendant received any prison
11 time.
12 Petitioner submits to this Court that had Petitioner's counsel endeavored to come up with a good legal reason to have Judge Wanker replaced with a different Judge, Petitioner would not be in prison right now, and/or in the first place.
13 Petitioner very respectfully requests that this Honourable Court acknowledge the ultimate injustices wrought about by Petitioner's ineffective counsel's negligence, and grant Petitioner's Motion for appointment for counsel, request for evidentiary hearing, and petition for writ of Habeas Corpus (post conviction), rescind Petitioner plea agreement
14 as null and void, and remand this case CR7444A, for trial.
15
16 E Petitioner's legal counselor was ineffective in that he did not act in Petitioner's best interests by Honouring his request to file a motion to have his trial date postponed/rescheduled to a later date, because of medical reasons, which ultimately violated Petitioner's
17 5th, 6th, 8th, 9th, 10th and 14th state and federal rights.
18
19 Petitioner was seventy (70) years of age at the time of his arrest and initial incarceration, at which time he had already been under the treatment of a diversity of medical
20 specialists ranging from his immediate primary physician, a pain management specialist, as well as a physical therapist, and a neuro surgeon, to deal with and treat a diversity of
21 pre-existing health issues Petitioner suffered from. After Petitioner's arrest and incarceration, his physical as well as mental and emotional health began to drastically deteriorate, to such a point that the District Court issued an order for the N.C.D.C.
22 to provide security and transport for the Petitioner to be transported back and forth from the N.C.D.C. to Petitioner's medical treatment providers, on a regular basis.
23 As mentioned, during this period of incarceration, Petitioner's health was on a drastic decline. On November 11, 2017, Petitioner wrote a letter to his then attorney, Mr. Thomas Gibson, respectfully requesting that counsel make a request to the Court to re-
24 schedule Petitioner's trial date to a later date; for reasons ranging from Petitioner's attorney's failure to investigate; counsel's failure to assist Petitioner in the preparation of
25 a defense; to a diversity of then prolonged, unresolved, and progressive medical and/or health reasons. (Please see exhibit "A").
26 However, Petitioner's letters and requests were not right and flagrantly ignored and/or disregarded.
27 Approximately one week and a half after Petitioner's second letter (on this period) to his ineffective counsel requesting an immediate conference to discuss
28 post-mortem Petitioner's trial, as well as to discuss other extremely critical non-frivolous matters pertinent to Petitioner's case; this Petitioner suffered
29 a stroke and was rushed to the hospital, by the Falmouth Emergency Medical Service, where Petitioner was admitted for two (2) days.
30 The following day of Petitioner's release from the hospital and back into N.C.
31

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D.C.'S CUSTODY; NOT OF SOUND MIND AND HEALTH AND IN ABSOLUTELY NO CON-
 DITION TO BE DEALING WITH ANYTHING PERTAINING TO HIS CASE AT THAT TIME;
 PETITIONER'S ATTORNEY, KNOWING FULL WELL THAT PETITIONER HAD JUST SUFFERED A STROKE
 AND JUST GOT RELEASED FROM THE HOSPITAL ON THE BARE MINIMUM STANDARD OF HEALTH,
 FINALLY DECIDED TO SHOW UP AT THE N.C.D.C. WITH A PLEA AGREEMENT FOR A TWO (2)
 TO TWENTY (20) YEAR PRISON SENTENCE, CONDITIONED UPON A GUILTY PLEA.
 AT THAT TIME PETITIONER WAS IN NO SHAPE TO DEAL WITH OR DISCUSS ANYTHING LIKE THIS,
 PHYSICALLY OR MENTALLY, AND EVEN EXPRESSED THIS TO MR. GIBSON. HOWEVER, MR. GIBSON
 CONTINUED TO PRESSURE PETITIONER TO AT LEAST REVIEW AND DISCUSS THIS "DEAL".
 WITH ABSOLUTELY NO ENERGY TO DEBATE, PETITIONER RELUCTANTLY CONCEDED TO RE-
 VIEW THE TERMS OF THIS "DEAL".
 UPON REVIEW, PETITIONER'S LEGAL COUNSELOR EXPLAINED THAT THIS "DEAL" WAS FOR A TWO (2)
 TO TWENTY (20) YEAR PRISON SENTENCE, CONDITIONAL TO A PLEA OF GUILTY. HOWEVER, PETITIONER
 AGAIN MADE HIMSELF ADAMANTLY CLEAR THAT HE WAS/IS NOT GUILTY OF WHAT HE WAS
 BEING CHARGED WITH, AND THAT HE WANTED TO PROCEED TO TRIAL; AT WHICH TIME PET-
 TIONER'S GROSSLY DEFICIENT LEGAL COUNSELOR STATED THAT HE WOULD SEE WHAT HE
 COULD DO.
 THE FOLLOWING MORNING, MR. GIBSON RETURNED TO THE N.C.D.C. WITH A REVISED
 VERSION OF THE PLEA AGREEMENT HE BROUGHT THE PREVIOUS DAY, STATING THAT IT WAS STILL A
 TWO (2) YEARS TO TWENTY (20) YEARS "DEAL" THROUGH A PLEA OF "GUILTY, BUT NOT GUILTY"
 UNDER "ALFORD"; FURTHER STATING THAT HE HAD SPOKEN TO JUDGE, WANKER, ABOUT THE RE-
 VISED OFFER, AND THAT SHE HAD EXPRESSED TO HIM THAT IT WAS A GOOD DEAL IF THE STATE
 WOULD AGREE.
 FIRST: PETITIONER IS NOT GUILTY OF THE CHARGES MADE AGAINST HIM, OR OF WHAT HE
 WAS ULTIMATELY CONVICTED OF. HE WANTED THEM AND STILL WANTS NOW, TO ENJOY THE
 FULL DUE PROCESS OF LAW AND EQUAL PROTECTIONS OF ALL OF PETITIONER'S STATE AND FED-
 ERAL CONSTITUTIONAL RIGHTS; AND PROCEED TO TRIAL THAT PETITIONER MAY FACE HIS ACCUS-
 ERS, CALL HIS OWN WITNESSES, AND PRESENT ALL THE FACTS TO A FAIR AND IMPARTIAL
 JUDGE AND JURY.
 SECOND: PETITIONER'S PLEA AGREEMENT IS NULL AND VOID, DUE TO THE FACT THAT PETITIONER
 WAS NOT OF SOUND PHYSICAL OR MENTAL HEALTH, AND/OR JUDGEMENT; BUT WAS INSTEAD MINO-
 RITED INTO SIGNING IT THROUGH THE MISREPRESENTATION OF HIS GROSSLY DEFICIENT
 LEGAL COUNSELOR; WHILE PETITIONER WAS NOT ONLY STILL IN THE THROUGHS OF A DIVERSITY
 OF SERIOUS PROLONGED MEDICAL AND HEALTH ISSUES, BUT AFTER HAVING JUST BEEN RELEASED
 FROM THE HOSPITAL NOT EVEN FOURTY EIGHT (48) HOURS PRIOR ON THE BARE MINIMUM STANDARD
 OF HEALTH, AFTER HAVING SUFFERED A STROKE.
 MR. GIBSON'S CONDUCT IN THIS INSTANCE IS NOT ONLY GROSS NEGLIGENCE, BUT TANTAMOUNT
 TO LEGAL MALPRACTICE.
 THIRD: MR. GIBSON TOLD PETITIONER THAT JUDGE, KIMBERLY WANKER, PETITIONER'S SITTING JUDGE,
 A PERSON WHOM PETITIONER KNOWS, RESPECTS, TRUSTS, AND EVEN ADMIRES, STATED THAT
 THE REVISED PLEA AGREEMENT WAS A GOOD DEAL, IF THE STATE WOULD GO FOR IT.
 PETITIONER DOES NOT KNOW THE COMPLEXITIES OF THE LAW; HAS NEVER BEEN IN ANY REAL
 TROUBLE IN HIS THEN SEVENTY (70) YEARS OF LIFE; WAS PHYSICALLY, MENTALLY, AND EMOTIONALLY
 DRAINED, EXHAUSTED, AND UNHEALTHY; AND PETITIONER'S GROSSLY DEFECTIVE LEGAL COUN-
 SELOR WAS TAKING ADVANTAGE OF ALL OF THIS TO PUSH THIS PLEA AGREEMENT ON PETITIONER, AND
 THEN STATED THAT THE JUDGE, WHOM PETITIONER HAS ALWAYS HELD IN HIGH REGARD, JUST
 ENDORSED THE PLEA BY SAYING IT WAS A GOOD DEAL.
 THIS BROKE THE PETITIONER, AND HE RELUCTANTLY SIGNED THE PLEA AGREEMENT WITH
 PETITIONER'S JUDGE'S ENDORSEMENT BEING THE PROVERBIAL STRAW.
 THIS PLEA AGREEMENT WAS SIGNED UNDER DURESS, LIES, AND MANIPULATION, THROUGH THE
 MISREPRESENTATION OF PETITIONER'S DEFECTED LEGAL COUNSELOR, MR. THOMAS GIBSON, WHO
 PRESENTED AND PUSHED IT UPON PETITIONER NOT ONLY WITH FALSE PRETEXT, BUT AT
 A TIME WHEN PETITIONER WAS IN NO CONDITION TO MAKE SUCH PROFOUND LIFE CHANGING
 DECISIONS; AND THUS DID NOT ACT IN THE BEST INTEREST OF PETITIONER. FURTHER-
 MORE, PETITIONER DID NOT EVEN GET WHAT HE WAS MANIPULATED INTO SIGNING FOR.
 PETITIONER WAS MANIPULATED INTO SIGNING A TWO (2) TO TWENTY YEAR PLEA AGR-
 EEMENT, BUT WAS SENTENCED TO AN EIGHT (8) TO TWENTY (20) YEAR PRISON SENTENCE.
 THE FACT IS THAT IN THE FIRST PLACE, THIS PLEA AGREEMENT WAS OBTAINED FRAUDU-
 LENTLY, WHICH DISQUALIFIES IT FROM BEING AUTHENTIC AND VALID, UNDER ANY CONTRACT
 LAW; MAKING IT NULL AND VOID. HAD PETITIONER BEEN OF SOUND JUDGEMENT, HE

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would NEVER HAVE SIGNED THE PLEA AGREEMENT, AND PETITIONER'S ATTORNEY COM-
 MINGLED WITH PETITIONER'S EXTREMELY VALID NOVA - FRIVOLOUS REQUEST TO POSTPONE THE
 PETITIONER'S TRIAL DATE, INSTEAD OF DISMISSING THE REQUEST AND INSTEAD SHOWING UP A
 COUPLE DAYS AFTER PETITIONER SUFFERED A STROKE WITH SOME BOGUS PLEA "DEAL",
 PETITIONER WOULD HAVE PROCEEDED TO TRIAL AND WOULD HAVE BEEN FOUND NOT GUILTY
 OF THE CHARGES AGAINST HIM.
 PETITIONER'S ATTORNEY NOT ONLY COMMITTED LEGAL MALPRACTICE BY AND THROUGH
 HIS INSIDIOUS COUNSEL AND DERELICTIONS, BUT HE ALSO COMMITTED WHAT IS tantamount
 TO A CRIMINAL ACT BY SEEMINGLY CONSPIRING WITH THE DISTRICT ATTORNEY'S OFFICE TO
 strip PETITIONER OF HIS LIFE AND LIBERTY WITH OUT DUE PROCESS OF LAW, AS WELL OF
 HIS RIGHTS FOR EQUAL PROTECTION OF ALL OF HIS RIGHTS.
 PETITIONER RESPECTFULLY REQUESTS THAT THE HONORABLE COURT RECOGNIZE AND ACKNO-
 WLEDGE THE GROSSNESS OF PETITIONER'S FORMER LEGAL COUNSEL'S DERELICTIONS OF HIS DUTIES,
 BUT ALSO THAT IT RECOGNIZE AND ACKNOWLEDGE THE INVALIDATION OF PETITIONER'S
 ILLEGAL PLEA AGREEMENT OBTAINED THROUGH THE MALPRACTICE OF PETITIONER'S FORMER
 LEGAL COUNSEL, AND GRANT PETITIONER'S MOTION FOR THE APPOINTMENT OF COUNSEL
 AND REQUEST FOR EVIDENTIARY HEARING, AS WELL AS THIS PETITION FOR WRIT OF HABEAS
 CORPUS (POST CONVICTION), RESCIND PETITIONER'S ILLEGAL PLEA AGREEMENT, AND REMAND
 CASE NUMBER CR7444A, FOR TRIAL.

F

PETITIONER'S FORMER LEGAL COUNSELOR WAS INEFFECTIVE AND GROSSLY NEGLIGENT IN
 HIS REPRESENTATION OF PETITIONER, IN THAT PETITIONER'S COUNSEL FORCED A PLEA, NOT
 IN HIS CLIENT'S BEST INTEREST, UNDER DURESS.
 THROUGHOUT PETITIONER'S DETAINMENT AND INCARCERATION HE HAS MAINTAINED THAT
 HE IS NOT GUILTY OF THE CHARGES AGAINST HIM, AND HAS REPEATEDLY ENDEAVORED TO
 COMMUNICATE WITH HIS DEFENSE COUNSEL AND HIS INVESTIGATOR TO BUILD A DEF-
 ENSE, AND FACE HIS ACCUSERS, AND PRESENT WITNESSES OF HIS OWN, IN DUE COURSE
 OF A SPEEDY TRIAL, ETC. IT IS EVEN ON RECORD THAT PETITIONER DEMANDED A
 SPEEDY TRIAL, THROUGH COUNSEL, AT WHAT PETITIONER BELIEVES WAS HIS PRELIMINARY
 HEARING. HOWEVER THROUGHOUT PETITIONER'S DETAINMENT AT THE N.C.D.C., NOT
 ONLY WAS PETITIONER'S COUNSEL EVIDENTLY DELIBERATELY NOT COMMUNICATING WITH
 THIS PETITIONER REASONABLE FOR ONE THAT IS SUPPOSED TO BE PREPARING FOR AN UP-
 COMING SPEEDY TRIAL OF A HIGH PROFILE PROMINENT PUBLIC FIGURE, AS PETITIONER
 AND HIS CASE WAS AT THAT TIME, BUT IT IS ALSO AS THOUGH PETITIONER'S ATT-
 ORNEY WAS TAKING ADVANTAGE OF PETITIONER'S ILL HEALTH, OF WHICH WAS PROGRESSIVE,
 TO TRY AND WAIT PETITIONER OUT UNTIL HE BROKE.
 IT WAS AND IS CLEAR THAT PETITIONER'S ATTORNEY DID NOT WANT TO ACT IN PETIT-
 IONER'S BEST INTERESTS AND PROCEED TO A SPEEDY TRIAL, OR ANY TRIAL FOR THAT
 MATTER.

THIS STATEMENT OF TRUTH IS NOT ONLY SUPPORTED BY THE FACTS, BUT ONE:
 PETITIONER'S NEGLIGENT LEGAL COUNSELOR DID NOT INVESTIGATE AND/OR FOLLOW-UP IN-
 FORMATION PETITIONER PROVIDED TO HIM AND/OR HIS OFFICE; TWO: BY THE FACT
 THAT NOT ONCE, IN THE ELEVEN (11) MONTHS OF HIS APPOINTMENT AS PETITIONER'S
 LEGAL COUNSEL, EVER CAME TO DISCUSS A DEFENSE AND/OR TRIAL STRATEGY, DESPITE
 THE FACT THAT PETITIONER DEMANDED A SPEEDY TRIAL, AND THE FACT THAT HE WAS/
 IS NOT GUILTY OF ANY OF THE CHARGES AGAINST HIM, BUT ESPECIALLY BY THE
 FACT THAT AFTER REFUSING TO FILE A MOTION TO RESCHEDULE PETITIONER'S TRIAL FOR VALID
 MEDICAL AND HEALTH REASONS, HE SHOWS UP AT THE N.C.D.C. THE MORNING AFTER
 PETITIONER WAS RELEASED FROM A TWO (2) DAY STAY AT THE HOSPITAL, AFTER HAVING
 SUFFERED A STROKE, LIKE A SCAVENGING AMBULANCE CHASER, TRYING TO MAKE A
 BUCK OFF SOMEONE'S MISERY, WITH AN OUTRAGEOUS PLEA AGREEMENT.
 PETITIONER WAS NOT OF REASONABLE AND/OR SOUND MENTAL AND/OR PHYSICAL COND-
 ITION, AND PETITIONER'S NEGLIGENT ATTORNEY KNEW IT, AND TOOK ADVANTAGE OF
 PETITIONER'S WEAKEST AND MOST VULNERABLE MOMENT, AND COERSED HIM INTO
 SIGNING HIS LIFE AWAY, UNDER DURESS.

IF PETITIONER'S ATTORNEY WAS ACTING IN PETITIONER'S BEST INTERESTS, WHY DID
 HE NOT FILE A MOTION TO HAVE THE TRIAL POSTPONED, OF WHICH WAS COMING UP IN
 APPROXIMATELY TWO (2) WEEKS FROM TIME OF SIGNING, APPENDED TO FINALLY COM-
 ING AROUND WITH SOME LUDICROUS PLEA DEAL WHEN PETITIONER WAS PHYSICALLY
 AND MENTALLY COMPROMISED? Surely the judge would have UNDERSTOOD

1 SUCH A REQUEST, ON MEDICAL GROUNDS. A
2 THE FACT IS THAT PETITIONER'S PLEA AGREEMENT WAS PRESENTED WITH NONCHALANT A
3 NEGLIGENCE BOARDING ON MALICIOUSNESS, AND OBTAINED UNDER DURESS; THUS MAKING B
4 IT NULL AND VOID. HAD PETITIONER'S ATTORNEY NOT PREYED ON THE PHYSICAL AND A
5 MENTAL UNWELLBEING OF HIS CLIENT AND FULFILLED HIS DUTIES AS AN ATTORNEY BY AT THE LEAST B
6 DELEGATING PROPER AND THOROUGH INVESTIGATIONS AND FOLLOW-UPS; STRATEGIZING A
7 WITH THE PETITIONER IN THE DEVELOPING AND BUILDING OF A SOLID DEFENSE BASED AND B
8 ESTABLISHED ON FACTS AND TRUTH; FILING A MOTION TO POSTPONE PETITIONER'S A
9 TRIAL DATE, PER PETITIONER'S INSTRUCTIVE REQUEST; AND/OR NOT SHOWING UP RIGHT AFTER B
10 PETITIONER SUFFERED A STROKE, WITH EVERY INTENT ON PREYING ON HIS CLIENT'S A
11 WEAKNESS, IN ORDER TO GET HIM TO SIGN, THIS PETITIONER WOULD NEVER HAVE SIGNED A
12 PLEA AGREEMENT, BUT WOULD HAVE PROCEEDED TO TRIAL, WHERE THE FACTS WOULD HAVE A
13 BEEN PRESENTED; AND THIS PETITIONER WOULD HAVE BEEN FOUND NOT GUILTY OF B
14 THE CHARGES AGAINST HIM. A
15 PETITIONER VERY RESPECTFULLY REQUESTS THAT THIS HONOURABLE COURT RECOGNIZE B
16 AND ACKNOWLEDGE THE GROSS MISCONDUCT OF JUSTICE BY WHO THROUGH THE MIS- A
17 REPRESENTATION AND GROSS NEGLIGENCE OF PETITIONER'S DEFECTED COUNSEL; GRANT THIS B
18 PETITIONER'S RESCINDANCE OF HIS ILLEGAL PLEA AGREEMENT, AND ALL OTHER MOTIONS A
19 REQUESTS, AND PETITIONS THIS PETITIONER IS SUBMITTING TO THIS COURT; AND REMAINS B
20 CASE NUMBER C73444A FOR TRIAL. A
21 G. PETITIONER'S ATTORNEY WAS DEFECTIVE IN HIS ASSISTANCE AS LEGAL COUNSEL, IN THAT HE A
22 BLATANTLY LIED TO PETITIONER, AND CAUSED HIM TO AGREE TO A MORE SERIOUS OFFENSE B
23 ON THE MORNING OF DECEMBER, 5, 2013, NOT EVEN FORTY EIGHT (48) HOURS AFTER A
24 THIS THEN SEVENTY (70) YEAR OLD PETITIONER WAS RELEASED FROM A TWO (2) DAY STAY IN B
25 THE HOSPITAL AS A CONSEQUENCE OF SUFFERING FROM A STROKE; PETITIONER'S DEFECTIVE A
26 LEGAL COUNSEL CAME TO SEE PETITIONER AT THE N.C.D.C., WITH A REVISED VERSION OF THE B
27 PLEA AGREEMENT HE BROUGHT THE PREVIOUS DAY, NOT SEVENTY TWO (72) HOURS AFTER THIS A
28 THIRTY SEVENTY (70) YEAR OLD PETITIONER WHO SUFFERED A STROKE; BADLY PETITIONER TO B
29 REVIEW AND SIGN THE AGREEMENT(S), BOTH DAYS. A
30 ON THE FOREMOST DAY, UPON BROKEN RESIGNATION PETITIONER RELUCTANTLY REVIEWED THE AGREE B
31 MENT. A
32 AS PETITIONER SCANNED THROUGH THE PLEA AGREEMENT HE GOT TO THE SECTION THAT B
33 ADDRESSED "TIER LEVELS", AND ASKED MR GIBSON EXACTLY WHAT IT MEANT. A
34 MR GIBSON RESPONDED BY EXPLAINING TO PETITIONER THAT TIER ONE (I) WAS THE SEVEREST B
35 OF THE TIERS, AND TIER THREE (III) WAS THE LOWEST. A
36 PETITIONER NOTICING THAT THE PLEA AGREEMENT PLACED HIM ON THE MIDDLE TIER, B
37 NUMBER TWO (2), REQUESTED THAT HE PERHAPS AT LEAST BE PLACED ON THE LOWEST A
38 TIER LEVEL, AS FURTHER CONDITION OF SIGNING THE PLEA AGREEMENT; OF WHICH PETITIONER UN- B
39 DERSTOOD TO BE, PER PETITIONER'S DEFECTIVE LEGAL COUNSELOR'S ASSURANCES, TIER LEVEL A
40 THREE (III); (3). PETITIONER'S DEFICIENT LEGAL COUNSELOR THEN ADVISED PETITIONER THAT B
41 ALL HE WOULD HAVE TO DO IS PLACE ANOTHER LINE BY THE ROMAN NUMERAL "I", (1) MAKING A
42 IT A "III" (3), AND PLACE HIS INITIALS BY IT. B
43 THE FOLLOWING MORNING PETITIONER WAS BROUGHT INTO COURT FOR THE PLEA HEARING, A
44 AT WHICH TIME PETITIONER'S GROSSLY DEFECTED LEGAL COUNSELOR INFORMED THE COURT B
45 THAT HIS CLIENT REQUESTED TO CHANGE HIS TIER LEVEL FROM A TWO (2) TO A THREE (3). A
46 JUDGE WANKER THEN SIMPLY ASKED THIS PETITIONER IF THAT IS WHAT HE WANTED TO DO; AND, B
47 BECAUSE OF THE MISINFORMATION PROVIDED BY PETITIONER'S DEFECTED LEGAL COUNSELOR PETI- A
48 TIONER SAID "YES", AT WHICH TIME PETITIONER MADE THE ADJUSTMENTS ON THE PLEA AGREE B
49 MENT, INITIALED, AND GAVE IT TO HIS ATTORNEY. A
50 THIS PETITIONER HAS ALWAYS MAINTAINED A STANCH STANCE ON BEING NOT GUILTY OF B
51 THE CHARGES MADE AGAINST HIM, ONLY SIGNING A NO TO CONTENDRE PLEA AGREEMENT A
52 OUT OF IGNORANCE OF THE LAW, AND RIGHTS OF PETITIONER, AS WELL AS UNDER DURESS; KNOWING B
53 THE OUTRIGHT MISREPRESENTATIONS AND DEFECTIONS OF PETITIONER'S DEFECTED A
54 LEGAL COUNSELOR AND ADVISOR; WHO DECEIVED PETITIONER OUT OF HIS STATE AND FED- B
55 ERAL RIGHTS TO DUE PROCESS OF LAW, EQUAL PROTECTIONS, ETC ETC ETC, SO WHY, IN A
56 THE NAME OF ALMIGHTY GOD, WOULD THIS PETITIONER, OR ANY ONE ELSE FOR THAT MATTER, B
57 REQUEST A CHANGE TO INCREASE ANY PUNISHMENT, FROM A LOWER ONE; ESPECIALLY A
58

1 WHEN THE SAID PERSON MAINTAINED A CLAIM OF BEING NOT GUILTY OF THE CHARGES
2 AGAINST HIM, AND A DESIRE TO PROCEED TO TRIAL?
3 THE ANSWER IS THAT HE WOULDN'T. THIS PETITIONER DID NOT, AND MOST CERTAINLY
4 WOULD NOT HAVE KNOWINGLY MADE SUCH A REQUEST.
5 PETITIONER IS AT A LOSS OF WORDS TO ADJUDICATE THE GROSSNESS OF THIS
6 PER SE PREJUDICIAL DECEPTION AND MISREPRESENTATION, BUT CAN ONLY EQUATE IT WITH
7 NOT A SIMPLE MISCARriage OF JUSTICE, BUT RATHER AN OUT RIGHT SYSTEMATIC OBSTRUCTION
8 OF JUSTICE.
9 PETITIONER'S LEGAL REPRESENTATION WAS SO DEFECTIVE AND SO REPREHENSIBLE AS TO BE
10 SHAMEFUL BEYOND ANYTHING THIS PETITIONER WAS CHARGED OF.
11 HAD PETITIONER'S LEGAL COUNSELOR BEEN TRUTHFUL, HE WOULD NEVER HAVE AGREED TO
12 SUCH A CHANGE. FURTHERMORE, THIS PLEA AGREEMENT WAS BEEN BREACHED AND IS NULL
13 AND VOID, AND REQUESTS THAT THIS COURT SO ORDER IT, AND REMAND CASE NUMBER
14 CR7444 A. FOR TRIAL.

H.

1 PETITIONER'S FORMER ATTORNEY WAS DEFECTIVE AND INEFFECTIVE IN HIS ASSIST-
2 ANCE AS LEGAL COUNSEL BY FAILING TO NOTIFY AND/OR ADVISE PETITIONER THAT HE
3 COULD RESCIND THE PLEA AGREEMENT AT ANY TIME, UP UNTIL SENTENCING.
4 PETITIONER'S LEGAL COUNSELOR EFFECTIVELY FAILED TO INFORM/NOTIFY/ADVISE PETITIONER
5 THAT HE HAD THE RIGHT TO WITHDRAW HIS PLEA AT ANY TIME UP TO SENTENCING, OF
6 WHICH WOULD TAKE PLACE APPROXIMATELY THREE (3) MONTHS AFTER PETITIONER SIGNED.
7 HAD PETITIONER'S LEGAL COUNSELOR ADVISED PETITIONER OF THIS FACT, AFTER PETITIONER
8 HAD REGAINED SOME OF HIS PHYSICAL HEALTH AND MENTAL FACULTIES, HE WOULD HAVE
9 REALIZED HIS ERROR OF SIGNING, WITHDRAWN HIS PLEA, AND PROCEED TO TRIAL,
10 WHERE PETITIONER IS CONFIDENT HE WOULD HAVE BEEN FOUND NOT GUILTY OF THE
11 CHARGES MADE AGAINST HIM.
12 PETITIONER'S LEGAL REPRESENTATION WAS SO DEFICIENT AS TO BE OBSOLETE; AND COUNSEL'S
13 GROSS NEGLIGENCE EFFECTIVELY CAUSED HIS CLIENT TO BE SENTENCED TO EIGHT (8) TO
14 TWENTY (20) YEARS IN PRISON, ON A TWO (2) TO TWENTY (20) PLEA AGREEMENT, PETITIONER
15 WOULD HAVE RESCINDED HAD HE BEEN MADE AWARE THIS WAS AN OPTION, AND WOULD HAVE
16 PROCEEDED TO TRIAL, WHERE HE IS CONFIDENT HE WOULD HAVE BEEN FOUND NOT GUILTY OF
17 THE CHARGES AGAINST HIM.
18 PETITIONER RESPECTFULLY REQUESTS THAT THIS HONOURABLE COURT GRANT PETITIONER'S REQUESTS
19 FOR COUNSEL, EVIDENTIARILY HEARING; THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION),
20 REVERSE PETITIONER'S PLEA AGREEMENT, AND REMAND CASE NUMBER CR7444 A, FOR TRIAL.

I.

1 PETITIONER'S LEGAL REPRESENTATION WAS INEFFECTIVE AND EFFECTIVELY DEFICIENT FOR FAILING
2 TO FILE AN APPEAL ON PETITIONER'S BEHALF, AFTER PETITIONER WAS SENTENCED TO AN
3 EIGHT (8) TO TWENTY (20) YEAR PRISON SENTENCE ON A TWO (2) TO TWENTY (20) YEAR
4 PLEA AGREEMENT.
5 ALTHOUGH PETITIONER'S PLEA AGREEMENT WAIVES HIS RIGHT TO APPEAL THE CONVICTION, "UN-
6 LESS THE APPEAL IS BASED UPON REASONABLE, CONSTITUTIONAL, JURISDICTIONAL, OR OTHER
7 GROUNDS THAT CHALLENGE THE LEGALITY OF THE PROCEEDINGS AND EXCEPT AS OTHER-
8 WISE PROVIDED BY SUBSECTION 3 OF N.I.S. 174.035", (AND THIS PETITIONER SUBMITS
9 TO THIS COURT THAT THERE ARE NUMEROUS CONSTITUTIONAL AND/OR OTHERWISE VIO-
10 LATIONS); PETITIONER'S ATTORNEY SHOULD HAVE FILED AN APPEAL ANYWAY. THE CHANGE
11 PETITIONER WAS COERSED INTO SIGNING A PLEA AGREEMENT FOR WAS NOT ONLY A
12 TWO (2) TO TWENTY (20) YEAR PRISON SENTENCE, OF WHICH PETITIONER INSTEAD RECEI-
13 VED AN EIGHT (8) TO TWENTY (20); BUT IS A PROBATIONABLE OFFENSE. FURTHERMORE,
14 NOT ONLY IS THIS THE FIRST TIME PETITIONER HAS EVER BEEN ACCUSED, LET ALONE CHARGED,
15 OF ANYTHING OF THIS NATURE; BUT THIS PETITIONER HAS ABSOLUTELY NO CRIMINAL RECORD
16 WHATSOEVER; ASIDE FROM PERHAPS A FEW MINOR MOVING AND/OR NON-MOVING TRAFFIC
17 VIOLATIONS; IN PETITIONER'S THEN SEVENTY (70) YEARS OF LIFE.
18 A PRISON SENTENCE OF WHAT, AT PETITIONER'S AGE, AMOUNTS TO A POTENTIAL LIFE SENT-
19 ENCE WITH OUT THE POSSIBILITY OF PAROLE, FOR THE FIRST CRIMINAL CONVICTION IN
20 HIS ENTIRE LIFE, AN ATTEMPTED SEXUAL ASSULT, IS ABSOLUTELY ABSURD.
21 HAD COUNSEL APPEALED THE SENTENCE, HE WOULD HAVE AT LEAST PARTIALLY VINDICATED

himself from being viewed as being a complete defect at his chosen profession; that this Petitioner may have enjoyed an immediate rescindance of his faulty plea agreement, through a direct appeal, and enjoyed a public trial, and be vindicated his own self, through a verdict of not guilty. Petitioner respectfully requests that this Honourable Court acknowledge this claim as valid of its own merit; but especially in the totality of all previous claims and issues raised in this particular ground addressing the ineffective assistance of counsel; reverse Petitioner's illegal plea agreement conviction, and remand case number CRT444 A, for trial.

THREE:

Petitioner's sitting case and sentencing judge did abuse her delegated judicial power, authority, reason, and discretion, by not recusing herself from Petitioner's case, with resolve. As a result Petitioner was deprived his life and liberty without due process of law; did not enjoy his rights to a speedy public trial before a fair and unbiased judge and jury; nor to confront his accusers and present witnesses of his own in his own defense. Thus, neither he nor his rights enjoyed the equal protection to have said rights upheld and equally protected, afforded by the Constitution of the United States of America, but were instead stripped from him by and through the assistance of an authority overstepping her delegated powers and authority; ultimately being instrumental in forcing Petitioner beyond a plea agreement he was coerced into signing of which he did not want; that convicted him of a crime that he did not commit; and received a cruel and unusual punishment from a bias judge as a result, which he did not deserve.

Petitioner stood before Judge Kimberly Wanker on or about May 10, 2013, regarding case number CRT444 A, with his appointed legal counsel, Mr. Thomas Gibson, Esq. At that time Judge Wanker acknowledged that she knew Petitioner, by simply stating that the petitioner sponsored her membership into the "Kiwanis Club" of Pahrump, Nevada. She then proceeded by stating that she had reviewed two case laws or rules, (Petitioner is unaware of exactly what they were), and stated that she could not find sufficient cause for her to recuse herself; but stated to Petitioner's defective legal counselor that if he could find any grounds then she would review and consider them.

First: Judge Wanker's statement in regards to our knowing one another was/is only partially true and factual; but is plain negligence in its omissions, as there are other relevant truths omitted, with seeming deliberateness.

Petitioner is not naive and understands completely the dimensions and dynamics of his prior relationship/friendship to and with Judge Wanker. She, not only being an appointed judicial official, reliant upon electoral votes from the people of the community to maintain this judicial position; but also reliant upon the financial support of those who do, would, and/or may support and/or finance her re-election fundraisers and/or campaigns. Furthermore she was/is highly involved and respected within the surrounding communities; and a prominent figure in a diversity of circles, ranging from communal, judicial, as well as political. This Petitioner was also a prominent figure in a diversity of the same community organizations, groups, as well as social circles, Judge Wanker was routinely actively involved with and in.

Petitioner while not an old and/or close intimate friend of Judge Kimberly Wanker, was of close friendly association with her in extension of the above named circles, as well as, and magnified by, the media; and was even introduced by her to others, on several occasions, as being her friend.

The fact is that Judge Kimberly Wanker and Petitioner were in the throgs of developing a genuine friendship over a period of a year and a half of mutual affiliated endeavors and associations. However, the actual dynamics and dimensions of Petitioner's friendship with

Judge Wanker would be irrelevant in the light of the public's perception;

1 especially by what the media would do with it, and here; and Judge, WANKER is
2 PERCEPTIVE, HER OWN SELF, TO KNOW THIS, IMMEDIATELY, IS NOT A SIMPLE FACT, BUT A
3 SOLID AND GROUNDED REALITY.
4 FIRST, PETITIONER'S DEALINGS WITH JUDGE WANKER WERE SO PUBLICLY KNOWN, THROUGH
5 SOCIALIZATIONS AS WELL AS THE MEDIA, THAT PETITIONER'S BEING CHARGED WITH THE CRIMES
6 HE WAS CHARGED WITH WOULD HAVE A VERY REAL POTENTIAL TO TAIN/ TARNISH HER OWN,
7 (JUDGE, WANKER'S) UPSTANDING REPUTATION AND RESPECTABILITY, IN ALL AREAS, BY SIMPLE
8 "GUILT BY ASSOCIATION", JUST BY PETITIONER'S BEING "CHARGED"; LET ALONE HAD HE ACTUALLY
9 BE CONVICTED, OR RECEIVE ANYTHING BUT THE WORST PUNISHMENT UPON ANY FORM
10 OF CONVICTION.
11 THIS REALITY IS EXPOSED BY THE FACT THAT PETITIONER SIGNED A NO 10 COMPENDRE PLED
12 AGREEMENT (UNDER DURESS, COERCION, AND BY JUDGE WANKER'S APPARENT ENDORSEMENT)
13 FOR A TWO (2) TO TWENTY (20) YEAR PRISON SENTENCE; BUT WAS INSTEAD WOUND DOWN
14 IN EIGHT (8) TO TWENTY (20) YEAR PRISON SENTENCE, OF WHICH CHARGE CONVICTED OF
15 WAS NOT ONLY A PROBATIONABLE OFFENSE, BUT THIS IS THE PETITIONER'S FIRST CRIMINAL
16 CONVICTION IN HIS SEVENTY ONE (71) YEARS OF LIFE.
17 FURTHERMORE, PETITIONER KNOWS JUDGE, KIMBERLY WANKER PERSONALLY ENOUGH TO
18 KNOW THAT ASIDE FROM HAVING A NEED TO DISTANCE HERSELF FROM ANY POTENTIAL
19 SEEMING BIAS IN FAVOR OF PETITIONER, ESPECIALLY IF THERE WAS ANY FORM OF CONVICTION,
20 HER HONOUR WOULD STRUGGLE WITH FEELINGS OF DISGUST AND PERSONAL BETRAYAL OF
21 HER EXTENDED FRIENDSHIP; ESPECIALLY UPON ANY FORM OF CONVICTION.
22 IN SUPPORT OF PETITIONER'S CLAIMS AND CONCLUSIONS HE SUBMITS TO THE COURT THAT
23 PETITIONER HAD HAD MANY DEALINGS WITH JUDGE, WANKER, OVER A PERIOD OF A YEAR AND
24 A HALF, PUBLIC AND PRIVATE, NOT PRECISELY LIMITED TO THE FOLLOWING:
25 PETITIONER WAS JUDGE, KIMBERLY WANKER'S SPONSOR FOR MEMBERSHIP IN THE "KIWANIS
26 CLUB", OF Pahrump, NEVADA,
27 PETITIONER AND HIS SISTER, CASE AND SENTENCING JUDGE, KIMBERLY WANKER, BOTH REGULARLY
28 AND/OR REGULARLY ATTENDED MANY OF THE SAME PUBLIC AND/OR PRIVATE FUNCTIONS AND/OR
29 EVENTS, SUCH AS FOR EXAMPLE AND NOT REMOTELY LIMITED TO, AWARDS BANQUETS AT
30 THE MOUNTAIN FALLS COUNTRY CLUB, IN Pahrump, NEVADA; VARIOUS COMMUNITY EVENTS THAT
31 TOOK PLACE AT THE Pahrump NUGGET CASINO, IN Pahrump, NEVADA; AND VARIOUS COMMUNITY
32 EVENTS WHICH TOOK PLACE AT THE Pahrump COMMUNITY PARK, REGULARLY, ALWAYS GRANTING
33 TOWARD ONE ANOTHER IN MUTUAL FRIENDLINES.
34 PETITIONER PUBLICLY AND PRIVATELY, AND PERSONALLY, ENDORSED JUDGE, WANKER'S FIRST
35 ELECTION, AFTER HER APPOINTMENT AS A Nye County District Court Judge, BY
36 MUTUAL CONSENT, BY PLACING AN ELECTORIAL CAMPAIGN SUPPORT AD. FOR HER IN A COMMUNITY
37 EVENT ADVERTISEMENT BROCHURE, BY PLACING ELECTION SUPPORT BANNERS WITH HER
38 NAME ON THEM, AT A LOCAL EVENT, AS WELL AS VERBAL ENDORSEMENTS, IN HER FAVOR,
39 OVER THE ELECTORIAL CAMPAIGN PERIOD; BY ATTENDING HER FUND RAISER EVENTS, AND
40 EVEN WORKING LATE WITH JUDGE, WANKER, AFTER HOURS, IN HER JUDGE'S CLOMBERS, PREP-
41 ARING MATERIALS FOR A NOT FOR PROFIT RODEO EVENT THAT WAS HELD IN "2012",
42 IN Pahrump, NEVADA; AGAIN, AS PETITIONER PREVIOUSLY MENTIONED, AN ELECTION CAMPAIGN
43 AD WAS PLACED IN A COMMUNITY ADVERTISEMENT BROCHURE OF WHICH PETITIONER PER-
44 SONALLY ASSISTED IN THE FORM AND PLACEMENT, AS WELL AS AN ELECTION BOOTH AT THE
45 RODEO EVENT FOR JUDGE, KIMBERLY WANKER, OF WHICH PLACEMENT WAS PERSONALLY
46 FACILITATED BY PETITIONER, AS PETITIONER WAS NOT ONLY AN ASSISTING COORDINATOR
47 FOR THIS PARTICULAR "NOT FOR PROFIT" FUND RAISER EVENT, BUT WAS ALSO A BOARD
48 MEMBER FOR THE NEVADA WESTERN HERITAGE FOUNDATION, OF WHICH ORGANIZATION WAS PUT-
49 TING ON THE EVENT.
50 FURTHERMORE, ALSO BEING THE COMMUNITY OPERATIONS COORDINATOR OF THE "PATH OF HOPE"
51 COMMUNITY FOOD BANK, THROUGH THE "NEW HOPE FELLOWSHIP CHURCH", IN Pahrump, NEVADA;
52 PETITIONER WAS A FUNCTIONING COLLEAGUE AND ADVOCATE, OF SORTS, WITH JUDGE, WANKER, IN RE-
53 LATION TO HER "DRUG COURT" PROGRAM; AS JUDGE, WANKER WOULD REGULARLY SUPPLY PETI-
54 TIONER WITH SERVICE "VOLUNTEERS" FOR THE FOOD BANK, FROM DRUG COURT.
55 TO ASSIST JUDGE, WANKER IN THE COORDINATION OF THESE ENDEAVORS PETITIONER WOULD BE
56 IN REGULAR AND CONSTANT CONTACT AND COMMUNICATION WITH JUDGE, WANKER, AS WELL AS
57 HER OFFICE FOR IMMEDIATE AND RELATED MATTERS.
58 ESSENTIALLY, EVERY OTHER MONTH, UNDER PETITIONER'S SUPERVISION, JUDGE, WANKER
59 WOULD VOLUNTEER HER TIME AND ENERGIES TO THE "PATH OF HOPE" FOOD BANK.

1 Petitioner and Judge Wanker would work together on Holidays for the distribution of holiday meals for less fortunate, through the "Holiday Task Force" program, in Pahrump, Nevada, of which Petitioner was, at that time, a Holiday Task Force committee member, and a coordinator.
 2
 3 Further still, Judge Wanker attended various other public and/or private events of which Petitioner was also in attendance; again always gravitating toward one another in mutual recognition and friendliness.
 4 The fact and truth is that Petitioner and his sitting and sentencing judge were more than superficial acquaintances; a fact that was regularly publicized by the activities in and/or for our mutual endeavors within the community, and in the eyes of the community;
 5 a "more than casual acquaintance" / friendship that would have to be publicly severed upon the no lo contendere plea agreement conviction, or any other form of hypothetical conviction, with prejudice.
 6 Petitioner claims that Judge Kimberly Wanker, by not diligently or at least reasonably endeavoring to recuse her self from Petitioner's case, (and Petitioner submits that a superficial viewing of a couple of ambiguous rules does not qualify as diligent and/or reasonable endeavor; especially under the circumstances) she displayed poor judgment by suppressing sound discretion, and ultimately overstepped her delegated powers, and abused her authority and position as a judge by implementing personal/bias feelings into her decisions and judgments; of which claims are evident, but not limited to, the following:
 7 1) Not only did Judge Wanker not diligently and/or reasonably endeavor to recuse her self from Petitioner's case, but when she acknowledged that she knew Petitioner, when he first stood before Judge Wanker at what he recalls as his preliminary hearing, she deliberately and blatantly drastically minimized her numerous involvements and mutual endeavors with Petitioner, of which took place over a period of a year and a half; by her outstanding omissions of significant facts; that had they been immediately revealed and/or elaborated on, would have provided more than a reasonable perception of potential bias, of which bias is evident by the fact that the facts were deliberately omitted, but the facts provide sufficient foundation for a more than reasonable ground and decision for recusal.
 8 2) Petitioner has never been involved in any kind of criminal activity in his seventy one (71) years of life; has no criminal record of felony or misdemeanor conviction, prior to the instant alleged offenses, and has never been accused, let alone charged, of anything resembling the nature of Petitioner's case number CR20044, prior to.
 9 Petitioner affirms and deems that he was manipulated and forced into signing a plea agreement, under duress, for two (2) to twenty (20) year prison sentence through a plea of "guilty, but not guilty"; of which plea agreement was communicated to Petitioner by his defective legal counselor as having been endorsed and approved by Judge Wanker, (whom Petitioner knew and trusted), despite the facts mentioned as well as the facts that not only is the charge on the plea agreement a probationable offense, but that there were two other individuals who were arrested in relation to Petitioner's case, and on similar charges, and received probation with no prison time.
 10 However, when Petitioner stood before Judge Wanker for sentencing, she dismissed the plea agreement for two (2) to twenty (20) years in prison, an already outrageous absurdity; and instead sentenced Petitioner to an eight (8) to twenty (20) year prison sentence, of which is a very real potential life sentence without the possibility of parole, at Petitioner's age, for a probationable first offense, of which Petitioner is not even guilty of in the first place.
 11 3) When Petitioner's grossly defective legal counselor informed Judge Wanker at Petitioner's plea hearing (which took place three (3) days after Petitioner's being released from the hospital from having suffered a stroke), that Petitioner requested that his tier level be switched from the moderate level two (2), to the severest level, three (3); Judge Wanker simply asked Petitioner: "Is this what you want to do?" Judge Wanker expressed no surprise at what is a very unusual request; to put it mildly. She never enquired as to if Petitioner knew and/or understood exactly what he was requesting and/or the consequences of such a change; and/or even ask Petitioner "Why?"
 12 Judge Kimberly Wanker may not have been a seasoned judge at that time, but was and is a seasoned and more than qualified attorney, of which reason the Governor appointed her to her judicial position in the first place; and in light of this fact and truth, Petitioner must ask why his presumed unbiased judge committed such a gross and pre-judicial error, seemingly so nonchalant, by not enquiring with reasonable

1 DILIGENCE AS TO IF PETITIONER WAS OF SOUND PHYSICAL AND MENTAL HEALTH AND COMPETENT
TO MAKE SOUND COMPREHENSIVE JUDGEMENTS, BEFORE ACCEPTING ANY IDEA FROM PETITIONER; A
B

2 ESPECIALLY A PLEA AGREEMENT; AND ESPECIALLY WHEN THE JUDGE KNEW PETITIONER HAD
JUST RECENTLY SUFFERED A STROKE AND WAS OF POOR GENERAL HEALTH; AND ESPECIALLY AND B

3 PARTICULARLY AS TO WHY HE WOULD BE REQUESTING SUCH AN UNREASONABLE AND UN-
REASONABLE LAST MINUTE REQUEST FOR A SEVERER PUNISHMENT (IN REGARDS TO THE TIER LEVEL A
B

4 CHANGE)?! THE FACT IS, IN PETITIONER'S CASE AND SITUATION, IS THAT JUDGE, KIMBERLY WANKER DID FAIL
A
B

5 TO EXERCISE HER SOUND DISCRETION AND DISREGARDED GOOD JUDGEMENT; BY FIRST OF ALL, NOT
BEING COMPLETELY FORTHCOMING TO THE RECORD REGARDING THE FULLNESS OF HER ASSOCIATIONS AND A
B

6 INVOLVEMENTS TO AND WITH PETITIONER; AS WELL AS TO AND WITH HERSELF, IN REGARDS
TO HER PERSONAL BIAS OF WHICH COULD AND ULTIMATELY DID CLOUD AND TINT HER JUDGEMENT, A
B

7 DECISIONS, AND/OR RULINGS REGARDING PETITIONER'S CASE AND LIFE.
SECOND: BY NOT RECUSING HERSELF, AT THE VERY LEAST, ON THESE GROUNDS ALONE. A
B

8 HAD JUDGE WANKER ENDEAVORED TO RECUSE HERSELF, BEYOND THE REVIEWING OF A COUPLE
OF AMBIGUOUS RULES; AND/OR PASSING THE RESPONSIBILITY TO FIND SUFFICIENT GROUNDS OVER TO A
B

9 PETITIONER'S IGNOTOMINIOUSLY DEFECTED DETECTIVE ATTORNEY, PETITIONER COULD HAVE (1). ENJOYED
HIS RIGHTS FOR DUE PROCESS OF LAW AND PROCEED TO A PUBLIC AND SPEEDY TRIAL TO FACE HIS A
B

10 ACCUSERS AND PRESENT WITNESSES OF HIS OWN, AND PRESENT ALL THE FACTS BEFORE A FAIR
AND UNBIAS JUDGE AND JURY, AND WOULD HAVE BEEN FOUND NOT GUILTY OF THE CHARGES MADE AS A
B

11 INST HIM. (2) PETITIONER WOULD NOT HAVE BEEN HOODWINKED INTO SIGNING A GUILTY
PLEA AGREEMENT BY HIS DEFECTED LEGAL COUNSELOR, WHO CAME TO PETITIONER WITH JUDGE, A
B

12 WANKER'S ENDORSEMENT, AND APPROVAL. (3) PETITIONER WOULD NOT HAVE BEEN HOODWINKED
INTO MAKING AN UNWITTING REQUEST FOR A SEVERER PUNISHMENT. (4) PETITIONER WOULD A
B

13 NOT HAVE BEEN STRIPPED OF HIS RIGHTS FOR EQUAL PROTECTION. (5) PETITIONER WOULD
NOT HAVE BEEN CONVICTED OF A FELONY. (6) PETITIONER WOULD NOT NOW BE A CONVICTED A
B

14 "SEX OFFENDER." (7) PETITIONER WOULD NOT BE IN PRISON RIGHT NOW, NOR AT ANY OTHER
TIME. A
B

15 PETITIONER VERY RESPECTFULLY REQUESTS THAT THIS COURT RECOGNIZE AND ACKNOWLEDGE THIS
ISSUE AS PER SE PREJUDICIAL, BY ITS OWN MERITS, OR AT LEAST IN THE TOTALITY OF EVERY OTHER A
B

16 GROUND AND CLAIM/ISSUE MADE IN THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
AND GRANT PETITIONER'S MOTION REQUESTING APPOINTMENT OF COUNSEL, AND REQUEST FOR AN A
B

17 EVIDENTIARY HEARING, AS WELL AS THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION), NULL
AND VOID PETITIONER'S ILLEGALLY OBTAINED PLEA AGREEMENT, AND RETURN PETITIONER'S CASE, A
B

18 NUMBER CR34444, FOR TRIAL. A
B

19 PETITIONER'S SITTING AND SENTENCING JUDGE DID VIOLATE PETITIONER'S 5TH, 6TH, 8TH, 9TH,
10TH, AND 14TH STATE AND FEDERAL RIGHTS BY USING AN ILLEGALLY OBTAINED RECOMMENDATION, DEVELOPED A
B

20 AND OBTAINED BY AND FROM ILLEGALLY OBTAINED INFORMATION. A
B

21 FIRST: AS POINTED OUT AND ADDRESSED IN GROUNDS ONE (1) AND TWO (2) OF THIS PETITION
FOR WRIT OF HABEAS CORPUS (POST CONVICTION), PETITIONER WAS NEVER READ, NOTIFIED, AND/OR OTHER A
B

22 WISE ADMONISHED OF HIS "MIRANDA WARNING" OR RIGHTS IN THEIR ENTIRETY, IN REGARDS TO THE
CIRCUMSTANCES; AND WHEN PETITIONER ENQUIRED OF HIS DEFECTIVE LEGAL COUNSELOR REGARDING A
B

23 THE INITIAL COMMISSION BY THE POLICE, PETITIONER'S DEFECTED ATTORNEY TOOK THE SIDE OF THE
POLICE AND DISMISSED PETITIONER OUT OF HAND WITH SOME DISPARAGINGLY OBSCENE EXCUSE PER- A
B

24 TAINING TO NATIONAL SECURITY, NEITHER BEING NOTIFIED, ADMONISHED, AND/OR OTHERWISE
MADE TO UNDERSTAND PRECISELY WHAT HIS RIGHTS WERE/WERE, AND/OR ANY WARNING IN THEIR RE- A
B

25 SPECT, THEN OR AT ANY OTHER TIME; NOT BY THE POLICE; NOT BY PETITIONER'S DEFECTED ATT- A
B

26 ON DECEMBER 5, 2013 PETITIONER WAS COERCED INTO SIGNING AN UNWITTING PLEA AGREEMENT,
OF WHICH IS CURRENTLY AND PRESENTLY BEING CONTESTED, BY HIS DEFECTIVE LEGAL COUNSELOR, AND A
B

27 SEEMINGLY EVIDENTLY, BY PETITIONER'S SITTING AND SENTENCING JUDGE AND FORMER FRIEND, AND
COLLEAGUE OF SORTS, JUDGE, KIMBERLY WANKER. A PLEA AGREEMENT PETITIONER UNDERSTOOD WOULD A
B

28 BE IMPLEMENTED AS INITIALLY FORMULATED AND PRESENTED WHEN RELUCTANTLY AGREED UPON AND
SIGNED, BEING A TWO (2) TO TWENTY (20) YEAR PRISON SENTENCE. A
B

29 APPROXIMATELY 30 DAYS PRIOR TO PETITIONER'S SENTENCING, A STATE RETAINED PSYCHOLOGIST
CAME TO SEE PETITIONER AT THE N.C.D.C., TO CONDUCT AN INTERVIEW OF PETITIONER. A
B

30 ON MARCH 21, 2014, PETITIONER CAME BEFORE JUDGE WANKER FOR SENTENCING. 0337
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B

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ORDOINANCE TO AND WITH THE PLEA AGREEMENT PETITIONER WAS COERSED INTO SIGNING. IN ONE
 COURSE OF THESE PROCEEDINGS, JUDGE WANKER ADDRESSED PETITIONER AND HIS DEFECTIVE ATT-
 ORNEY, AND STATED THAT SHE HAD OBTAINED A PSYCHOANALYSIS RECOMMENDATION REPORT FROM THE
 DOCTOR/PSYCHOLOGIST THAT HAD INTERVIEWED PETITIONER, APPROXIMATELY THIRTY (30) DAYS PRIOR,
 AND THAT HIS RECOMMENDATION WAS FOR AN EIGHT (8) TO TWENTY (20) YEARS PRISON SENTENCE,
 IN OPPOSITION TO THE PLEA AGREEMENT FOR A TWO (2) TO TWENTY (20) YEAR PRISON SENTENCE
 AND THAT SHE WAS REJECTING THE TWO (2) TO TWENTY (20) AND GOING INSTEAD WITH THE
 RECOMMENDATION OF EIGHT (8) TO TWENTY (20).
 FIRST OF ALL, PETITIONER HAD NO INCLINATION THAT WHAT EVER HE SAID TO THE PSYCHOLOGIST WOULD
 BE HELD AGAINST HIM, AND/OR ESPECIALLY THAT IT COULD IN ANY WAY ALTER THE PLEA AGREEMENT
 FOR A TWO (2) TO TWENTY (20) YEAR PRISON SENTENCE HE WAS FORCED INTO SIGNING IN THE FIRST
 PLACE. HAD PETITIONER KNOWN AND/OR UNDERSTOOD WHAT THE CONSEQUENCES COULD BE FROM
 SPEAKING WITH THAT "DOCTOR", HE WOULD HAVE NEVER AGREED TO SPEAK WITH, OR EVEN TO, HIM.
 HAD PETITIONER BEEN MADE TO UNDERSTAND A MIRANDA WARNING BY THOSE RESPONSIBLE TO MAKE
 SURE PETITIONER WAS AWARE AND UNDERSTOOD; PETITIONER WOULD HAVE REFUSED TO SPEAK TO
 AND/OR WITH THE PSYCHOLOGIST. SUCH A REFUSAL WOULD HAVE GONE BEFORE THE COURT, WHERE
 IT WOULD/COULD HAVE BEEN PROPERLY ADDRESSED; AND WHEN IT WAS MADE CLEAR THAT WHAT
 EVER PETITIONER MAY SAY COULD CAUSE ANY DETRAIMENT TO HIS ALREADY DISDAINFULLY AGREED
 UPON PLEA AGREEMENT FOR A TWO (2) TO TWENTY (20) YEAR PRISON SENTENCE, PETITIONER WOULD
 HAVE MAINTAINED HIS REFUSAL TO SPEAK TO/WITH THE PSYCHOLOGIST. THE PLEA AGREEMENT COULD VERY
 WELL LIKELY BEEN RESCINDED, AND PETITIONER WOULD HAVE PROCEEDED TO TRIAL, WHERE HE
 WOULD HAVE BEEN FOUND NOT GUILTY OF THE CHARGES AGAINST HIM.
 BUT THE FACT THAT PETITIONER WAS NEVER AT ANY POINT OF HIS DETAINMENT AT THE N.C.D.C.
 INFORMED AND/OR OTHERWISE WARNED AND/OR ADMONISHED OF "MIRANDA" AND APPLICABLE
 RIGHTS TO THE CIRCUMSTANCES, IN THE FIRST PLACE; WOULD AND DOES MAKE THE PSYCHOANALYSIS INTER-
 VIEW, AS WELL AS ANY INFORMATION OBTAINED, INCLUDING ANY RECOMMENDATION(S) GIVEN AND/
 OR TAKEN INTO CONSIDERATION, AND/OR APPLIED, ILLEGAL. THUS MAKING PETITIONER'S PRISON
 SENTENCE ILLEGAL, WHICH DEMANDS THAT THIS PETITIONER'S SENTENCE BE VACATED AND HIS CASE
 RETURNED TO THE DOCKET AND SET FOR TRIAL.
 FURTHERMORE, THE INFORMATION FOR THE RECOMMENDATION WAS OBTAINED FROM INFORMATION
 OBTAINED IN THE DUE COURSE OF PRE-SENTENCING INTERVIEWS; AND PRE-SENTENCING
 PROCESS OF WHICH ISSUED FROM AN ILLEGALLY OBTAINED PLEA AGREEMENT THAT PETITIONER
 WAS COERSED INTO SIGNING UNDER DURESS AND BLATANT DECEPTION AND LEGAL MALPRACTICE OF
 PETITIONER'S GROSSLY NEGLIGENCE LEGAL COUNSELOR, WHICH MAKES THE PLEA AGREEMENT ILLEGAL
 AND VOID; THUS THE INFORMATION OBTAINED FOR THE RECOMMENDATION, AS WELL AS THE RECOM-
 ENDATION ITSELF, ILLEGAL. THUS MAKING THE PRISON SENTENCE ILLEGAL.
 PETITIONER WAS GROSSLY AND INJURIOUSLY PREJUDICED AND HARMED BY THESE GROSS NEGLIGENCES AND PER-
 SE PREJUDICIAL ERRORS. HIS PRESENT CIRCUMSTANCES ATTEST TO THAT.
 HAD PETITIONER'S SITTING CASE AND SENTENCING JUDGE EXERCISED A LITTLE JURISPRUDENCE AND SOUND
 DISCRETION AT PETITIONER'S PLEA AGREEMENT HEARING BY ASKING PETITIONER FUNDAMENTAL ROUTINE
 QUESTIONS, SUCH AS: "DO YOU FULLY UNDERSTAND THE PLEA AGREEMENT YOU ARE AGREEING TO AND SIGNING?
 DO YOU FULLY UNDERSTAND THE CONSEQUENCES OF TAKING THIS PLEA AGREEMENT? DID YOUR
 ATTORNEY FULLY EXPLAIN TO YOU THE TERMS OF THE PLEA AGREEMENT? DO YOU UNDERSTAND EX-
 ACTLY WHAT YOU ARE CONSENTING TO AND AGREEING TO IN THIS PLEA AGREEMENT? WERE
 YOU FORCED OR COERSED IN ANY WAY INTO SIGNING THIS PLEA AGREEMENT? DO YOU UNDERSTAND
 THAT BY TAKING THIS PLEA AGREEMENT YOU WILL NOT RECEIVE THE TERMS AGREED UPON BE-
 TWEEN YOU AND THE STATE, BUT THAT YOUR PRISON TERM WILL BE AT THE FULL DISCRETION OF
 THE COURT? ARE YOU SURE THAT YOU WANT TO REQUEST A TIER LEVEL CHANGE FROM A
 TWO (2) TO A THREE (3)? DO YOU UNDERSTAND WHAT THAT MEANS; WHAT YOU ARE DOING;
 AND THE CONSEQUENCES OF SUCH A CHANGE?
 THESE ARE FUNDAMENTAL AND VERY REASONABLE DUTIFUL QUESTIONS. SO FUNDAMENTAL AND REA-
 SONABLE, IN FACT, THAT TO OMIT THEM IN ANY CIRCUMSTANCE, BUT ESPECIALLY IN VIEWS
 OF PETITIONER'S THEN AND KNOWN POOR PHYSICAL AND (EVIDENT) POOR MENTAL HEALTH; WOULD (OR
 AT LEAST VERY WELL SHOULD) BE CONSIDERED DELIBERATE INDIFFERENCE AND GROSS NEGLIGENCE.
 HAD JUDGE WANKER ASKED THESE VERY REASONABLE DUTIFUL QUESTIONS, OR ONES SIMILAR TO
 THEM, AND MORE DIRECTIONALLY PROBBING THAN A SUPERFICIAL AMBIGUOUSLY GENERIC, "DO
 YOU HAVE ANY QUESTIONS;" AS PETITIONER HAD MANY QUESTIONS, BUT NO IDEA HOW TO FORM
 THEM; IT WOULD HAVE BECOME CLEAR TO THE COURT AND THE RECORD THAT (1) PETITIONER'S
 DEFECTIVE LEGAL COUNSELOR NEGLECTED TO FULLY EXPLAIN THE DETAILS OF THE PLEA AGREEMENT
 IN A WAY PETITIONER COULD FULLY COMPREHEND AND UNDERSTAND; IN GREAT PART BECAUSE

1 PETITIONER WAS IN NO PHYSICAL OR MENTAL SHAPE TO FULLY AND/OR REASONABLY COMPREHEND
2 AND/OR UNDERSTAND, WHEN IT WAS PRESENTED TO HIM, (2.) THAT PETITIONER WAS FORCED
3 INTO SIGNING THE PLEA AGREEMENT THROUGH THE COERSIVE AND DELIBERATE MISREPRESENTATION OF
4 HIS GROSSLY DEFECTIVE LEGAL COUNSELOR, WHO TOOK DELIBERATE ADVANTAGE OF THE FACT
5 THAT PETITIONER WAS NOT OF SOUND AND/OR REASONABLE PHYSICAL AND/OR MENTAL HEALTH. (3).
6 THAT PETITIONER DID NOT UNDERSTAND THAT HE COULD ACTUALLY BE SENTENCED TO A LONGER
7 PRISON TERM THAN WHAT THE PLEA AGREEMENT WAS FOR. (4) THAT PETITIONER DID NOT KNOW
8 FULLY AND/OR OTHERWISE WITTINGLY REQUEST NOR WANT A VOLUNTARY CHANGE OF TIER
9 LEVELS FROM THE MODERATE TWO (2) TO THE SEVEREST, THREE (3). (5) THAT HE DID NOT
10 UNDERSTAND WHAT HE WAS DOING, AND/OR THE CONSEQUENCES OF SUCH A CHANGE. (6)
11 THAT PETITIONER'S DEFECTIVE LEGAL COUNSELOR WAS COMMITTING LEGAL MALPRACTICE BY ERRONEOUSLY
12 SLY PROVIDING PETITIONER WITH GROSS FAULTY LEGAL COUNSEL, THAT ULTIMATELY STRIPPED PETITIONER
13 OF ALL OF HIS STATE AND FEDERAL RIGHTS.
14 IN SUCH DUE PROCESS, PETITIONER WOULD HAVE REFUSED THE TIER CHANGE, AS WELL AS THE PLEA
15 AGREEMENT IN ITS ENTIRETY; THE DUE COARSE PRE-SENTENCING PROCEDURES WOULD NOT HAVE
16 ENSUED, THE ILLEGAL INFORMATION WOULD NOT HAVE BEEN OBTAINED AND TWISTED, THE ILLEGAL
17 RECOMMENDATION WOULD NOT HAVE BEEN DEVELOPED AND/OR PROVIDED, AND/OR CONSIDERED, AND
18 OR IMPLEMENTED; AND PETITIONER WOULD HAVE PROCEEDED TO A PUBLIC TRIAL, ALL THE FACTS
19 WOULD HAVE BEEN PRESENTED TO AN IMPARTIAL AND UNBIAS JURY, AND PETITIONER WOULD
20 HAVE BEEN FOUND NOT GUILTY OF THE CHARGES THAT WERE MADE AGAINST HIM.
21 PETITIONER VERY RESPECTFULLY REQUESTS THAT THIS HONOURABLE COURT RECOGNIZE AND ACKNOWLEDGE
22 THIS PER SE PREJUDICIAL ERROR BY ITS MERITS; OR AT LEAST IN THE TOTALITY OF EVERY
23 OTHER GROUND AND CLAIM/ISSUE SET FORTH IN THIS PETITION FOR WRIT OF HABEAS CORPUS (POST
24 CONVICTION), AND GRANT PETITIONER'S MOTION REQUESTING THE APPOINTMENT OF COUNSEL AND
25 REQUEST FOR AN EVIDENTIARY HEARING; AS WELL AS PETITIONER'S PETITION FOR WRIT OF HABEAS
26 CORPUS (POST CONVICTION), ORDER PETITIONER'S ILLEGAL PLEA AGREEMENT "Null and Void", AND RE-
27 INSTATE PETITIONER'S CASE; NUMBER CRT444A, FOR TRIAL.
28
29 PETITIONER'S SITTING AND SENTENCING JUDGE ERRED IN THAT SHE DISPLAYED AND EXHIBITED
30 A GROSS LACK OF DISCRETIONARY JUDGEMENT BY ACCEPTING PETITIONER'S PLEA AGREEMENT
31 WITH OUT REASONABLE DUE PROCESS ENQUIRIES, AND/OR ADMONISHMENTS.
32 ON OR ABOUT DECEMBER 1, 2013, PETITIONER SUFFERED A STROKE WHILE DETAINED AT THE
33 N.C.D.C., AFTER NUMEROUS PROLONGED BOUTS WITH OTHER DOCUMENTED MEDICAL/HEALTH ISSUES,
34 OF WHICH THE DISTRICT COURT OF NINE COUNTY IS FULLY AWARE OF.
35 TWO DAYS (2 DAYS) AFTER PETITIONER'S STROKE HE WAS RELEASED FROM THE HOSPITAL ON THE
36 LOWEST MINIMUM STANDARD OF HEALTH, AND WAS RETURNED TO THE N.C.D.C.
37 THE FOLLOWING MORNING AFTER PETITIONER'S RELEASE FROM THE HOSPITAL, HIS DEFECTED
38 LEGAL COUNSELOR CAME TO SEE PETITIONER AT THE N.C.D.C. WITH SOME BOGUS PLEA AGREEMENT
39 FOR A TWO (2) TO TWENTY (20) YEARS PRISON SENTENCE, UNDER THE CONDITION THAT
40 PETITIONER PLEA GUILTY TO ANOTHER CRIME HE DID NOT COMMIT, DESPITE THE FACT THAT
41 PETITIONER REPEATEDLY EXPRESSED TO HIS DEFECTED LEGAL COUNSELOR, DURING THE WHOLE COURSE
42 OF HIS APPOINTMENT, THAT HE (PETITIONER) WANTED TO PROCEED TO A SPEEDY TRIAL.
43 PETITIONER, THEN AS WELL, MAINTAINED THAT HE WAS NOT GUILTY OF THE CHARGES MADE AGAINST
44 HIM, NOR OF THE CHARGE IN THE PLEA AGREEMENT, AND WOULD NOT PLEAD GUILTY,
45 AND WANTED TO PROCEED TO TRIAL.
46 THE FOLLOWING MORNING, PETITIONER'S DEFICIENT LEGAL COUNSELOR RETURNED TO THE
47 N.C.D.C. WITH A REVISED VERSION OF THE PLEA AGREEMENT UNDER SOMETHING CALLED
48 "A FORD", AND WITH JUDGE WALKER'S ALLEGED ENDORSEMENT AND APPROVAL, AT WHICH
49 POINT PETITIONER BROKE AND SIGNED THE PLEA AGREEMENT, UNDER DURESS.
50 THE FOLLOWING MORNING, NOT EVEN A FULL FIVE (5) DAYS AFTER PETITIONER HAD
51 SUFFERED A STROKE, AND CONFINED IN AN ENVIRONMENT THAT DOES NOT PROMOTE
52 PHYSICAL AND/OR MENTAL REHABILITATION AND/OR RECOUPARATION, AND AT THAT TIME
53 STILL VERY MUCH FEELING THE AFTER EFFECTS OF THAT RECENT STROKE, AS WELL AS EVERY
54 OTHER MENTAL AND PHYSICAL ISSUE PETITIONER HAD BEEN SUFFERING FROM PRIOR TO AND
55 THROUGHOUT HIS DETAINMENT; PETITIONER WAS BROUGHT BEFORE JUDGE WALKER FOR THE
56 PLEA HEARING.
57 WHILE MAKING A SUPERFICIAL OUT OF HAND ACKNOWLEDGEMENT THAT PETITIONER HAD BEEN
58 "UNDER THE WHETHER", JUDGE WALKER MADE NO DUTIFUL AND/OR OTHERWISE REASONABLE
59 ENQUIRY INTO THE SOUNDNESS OF PETITIONER'S PHYSICAL HEALTH, MENTAL HEALTH, AND/OR HIS
60 JUDGEMENT, AND/OR OTHERWISE COMPREHENSIVE FACILITIES; BY ENDEAVORING
61

1 AS TO IF PETITIONER UNDERSTOOD THE PLEA AGREEMENT, FULLY, AND OR IF HE WAS SIGNING
2 IT OF HIS OWN VOLITION. FURTHERMORE, WHEN PETITIONER'S ASTOUNDINGLY DERELICTIVE LEGAL
3 COUNSELOR INFORMED THE COURT THAT PETITIONER HAD REQUESTED TO CHANGE HIS TIER LEVEL FROM
4 THE MODERATE LEVEL TWO (2) TO THE SEVEREST LEVEL THREE (3), THERE WAS NO SHADOW AS
5 TO IF PETITIONER UNDERSTOOD WHAT HE WAS DOING, IF HE WAS SURE HE WANTED TO MAKE SUCH A
6 CHANGE, AND/OR IF HE UNDERSTOOD THE CONSEQUENCES OF SUCH A DRASTIC AND CLEARLY UN-
7 REASONABLE REQUEST; ESPECIALLY IN LIGHT OF THE FACT THAT PETITIONER HAD NOT ONLY BEEN
8 STRUGGLING WITH DIVERSE PROLONGED MEDICAL/HEALTH ISSUES PRIOR TO AND THROUGHOUT
9 HIS DETAINMENT, BUT HE JUST SUFFERED A VERY SERIOUS AND VERY DANGEROUS MEDICAL
10 EMERGENCY, TO WIT, A STROKE, JUST DAYS BEFORE.
11 SUCH A DRASTIC AND UNREASONABLE REQUEST SHOULD RAISE THE CONCERN OF ANY REASON-
12 ABLE AND/OR ENQUIRATIVE PERSON, ESPECIALLY A MORE THAN QUALIFIED PROFESSIONAL LEGAL
13 ATTORNEY WHO WAS APPOINTED AND ELECTED TO BE A JUDGE.
14 THE FACT IS THAT THIS THEN SEVENTY (70) YEAR OLD PETITIONER WAS AT THAT POINT NOT
15 ONLY SUFFERING FROM A DIVERSITY OF PROLONGED PHYSICAL HEALTH, AS WELL AS MENTAL HEALTH ISSUES,
16 AT THAT TIME, BUT HAD JUST SUFFERED A STROKE, JUST DAYS BEFORE, AND WAS NOT
17 OF SOUND PHYSICAL HEALTH, NOR OF SOUND MENTAL HEALTH, AND/OR JUDGEMENT, AND WAS
18 NOT ONLY COERSED INTO SIGNING THE PLEA AGREEMENT IN THE FIRST PLACE, UNDER DURESS,
19 BUT HE ALSO DID NOT FULLY COMPREHEND THE EXACT NATURE OF THE DETAILS OF THE PLEA AGREE-
20 MENT, NOR WAS HE IN ANY PHYSICAL OR MENTAL SHAPE TO DO SO, EVEN IF HE HAD A COMPE-
21 TANT ATTORNEY. ALTHOUGH IF HE HAD A COMPETANT ATTORNEY, A PLEA AGREEMENT WOULD
22 NOT HAVE BEEN PRESSURED UPON PETITIONER, ESPECIALLY DAYS AFTER HAVING SUFFERED A SERIOUS
23 HEALTHY COMPLICATION. FURTHERMORE, PETITIONER ESPECIALLY DID NOT KNOW WHAT HE WAS DOING
24 BY HAVING HIS TIER LEVEL CHANGED FROM A TWO (2) TO A THREE (3), THROUGH HIS DEFECTIVE
25 LEGAL COUNSEL'S ASSURANCE.
26 JUDGE, WANKER'S FAILURE TO ENQUIRE INTO THE SOUNDNESS OF PETITIONER'S FACULTIES, WITH
27 REASONABLE AND DUTIFUL INQUIRY; AS WELL AS IF HE UNDERSTOOD COMPLETELY ALL OF THE LIFE CHANG-
28 ING DECISIONS HE WAS MAKING AND/OR AGREEING TO, WITH THE SAME REASONABLE AND DUTIFUL
29 INQUIRY, WAS AT THE VERY MINIMUM A LACK OF SOUND JUDGEMENT AND GROSSLY IRRESPONSIBLE, AND
30 AT WORSE, PER SE PREJUDICIAL VIOLANT JUDICIAL MISCONDUCT.
31 IN EITHER CASE THIS CLAIM/ISSUE MANDATES A REVOCATION OF PETITIONER'S PLEA AGREEMENT,
32 NOT PETITIONER CASE BE RETURNED TO THE DOCKET FOR TRIAL, FOR, BUT NOT LIMITED TO, THE
33 FOLLOWING REASONS:
34 1) HAD THIS JUDGE EXERCISED REASONABLE DUTIFUL INQUIRY INTO THE SOUNDNESS OF PETITIONER'S FACULTIES
35 AND COMPREHENSIVE FACULTIES, PETITIONER IS CONFIDENT THAT JUDGE WANKER WOULD AT THE VERY
36 LEAST FOUND IT NECESSARY TO POSTPONE THE HEARING FOR ANOTHER DATE THAT PETITIONER MAY
37 BE REASONABLY FIT AND HEALTHY, AND PROPERLY AND COMPREHENSIVELY ADMONISHED BY HIS ATT-
38 ORNEY.
39 2) WOULD HAVE CONCLUDED THAT PETITIONER DID NOT AND WAS NOT, AT THAT TIME, ABLE TO FULLY
40 UNDERSTAND WHAT HE WAS AGREEING TO, AND WOULD HAVE, AT THE VERY LEAST, POSTPONED
41 THE HEARING FOR ANOTHER DATE.
42 3) IT ALL WOULD HAVE BEEN EXPLAINED SO AS TO GIVE PETITIONER HALL AND EXPRESS TO THE
43 COURT THAT HE DID NOT UNDERSTAND AND WAS REALLY IN NO CONDITION TO EVEN TRY, THAT HE
44 DID NOT AGREE TO THE PLEA AGREEMENT AND/OR ITS TERMS, AND ESPECIALLY DID NOT
45 KNOWINGLY REQUEST TO BE TAKEN FROM THE MODERATE TIER LEVEL TO THE SEVEREST.
46 4) PETITIONER'S ATTORNEY WOULD HAVE BEEN CAUGHT AND EXPOSED BEFORE THE COURT AND THE
47 RECORD IN THE THROUGHS OF AT MINIMUM, GROSS NEGLIGENCE, AT WORSE, DELIBERATE AND
48 WILLFUL LEGAL MALPRACTICE.
49 IN ANY CASE, HAD PETITIONER'S SITTING CASE JUDGE ACTED IN ACCORDANCE WITH THE MANDATED
50 DUTIES OF HER POSITION, PETITIONER WOULD NOT HAVE HAD AGREED TO THE PLEA AGREEMENT,
51 OR UNWILLINGLY REQUESTED A SEVERER TIER LEVEL DUE TO DEFECTIVE LEGAL COUNSEL; COULD HAVE
52 BEEN APPOINTED AN ATTORNEY THAT WOULD PROPERLY REPRESENT PETITIONER, AND
53 HAVE PETITIONER'S BEST INTERESTS ENACTED UPON; PETITIONER WOULD HAVE PROCEEDED TO
54 A PUBLIC TRIAL (NO LONGER SPEEDY AT THAT POINT), WHERE HE WOULD HAVE PRESENTED THE
55 FACTS TO AN UNBIAS AND IMPARTIAL JURY, FACED HIS ACCUSERS; PRESENTED WITNESSES OF
56 HIS OWN, AND WOULD HAVE BEEN FOUND NOT GUILTY OF THE CHARGES MADE AGAINST HIM.
57 PETITIONER DOES VERY RESPECTFULLY REQUEST THAT THIS HONOURABLE COURT RECOGNIZE AND
58 ACKNOWLEDGE THIS ISSUE AS VALID PER SE PREJUDICIAL ON AND BY ITS OWN MERITS. 0340T LEAST
59
60

IN THE TOTALITY OF ANY OTHER GROUND AND CLAIM/ISSUE SET FORTH HEREIN THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION), AND GRANT PETITIONER'S MOTION REQUESTING APPOINTMENT OF COUNSEL, AND REQUEST FOR EVIDENTIARY HEARING; AS WELL AS THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION), ORDER PETITIONER'S PLEA AGREEMENT "NULL AND VOID" AND REMAND PETITIONER'S CASE, NUMBER, CR 7444A, FOR TRIAL.

FOUR:

A REVOCATION OF NOT JUST/ONLY PETITIONER'S PLEA AGREEMENT, BUT HIS PRISON SENTENCE AS WELL, IS NOT ONLY REQUESTED, BUT MANDATED BY LAW; NOT ONLY BECAUSE OF THE ILLEGAL AND UNCONSTITUTIONAL FASHION IN WHICH IT WAS OBTAINED AND APPLIED, BUT ALSO BECAUSE OF THE NUMEROUS GROSSLY PREJUDICIAL ERRORS, AS WELL AS PER SE PREJUDICIAL ERRORS.

MULTIPLE GROUNDS AND FACTUAL CLAIM/ISSUES WITHIN THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) BY THEMSELVES ARE GROSSLY PREJUDICIAL, AND IN SOME CASES PER SE PREJUDICIAL; AND NOT ONLY REQUIRE BUT MANDATE THAT PETITIONER'S PLEA AGREEMENT BE RESCINDED AS BREACH AND VOID, AS WELL AS A REVERSAL OF PETITIONER'S JUDGMENT OF CONVICTION; AS GIVEN THE FACT THAT EVERY ONE OF PETITIONER'S GROUNDS AND CLAIMS/ISSUES ARE FACTUAL AND TRUE, HEREIN IN THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) (AS WELL AS THOSE NOT LISTED IN THIS PETITION, AS THEY ARE TOO COMPLICATED FOR PETITIONER TO PROPERLY AND ADEQUATELY LAY OUT); ALMOST ANY ONE OF THEM ON THEIR INDIVIDUAL MERIT DISQUALIFIES THE ASSUMED VALIDITY OF THE PLEA AGREEMENT PETITIONER WAS COERSED INTO SIGNING, MAKING IT NULL AND VOID, THROUGH A VARIETY OF BREACHES OF WHAT IS SUPPOSED TO REPRESENT A LEGAL CONTRACT.

THE FACT, BASED NOT ONLY ON FACTS BUT TRUTH, IS THAT PETITIONER'S LEGAL REPRESENTATION WAS SO GROSSLY DEFICIENT AND INADVERTENT AS TO CLASSIFY IT AS LEGAL MALPRACTICE AND PROFESSIONAL NEGLIGENCE; AND JUDGE WANKER'S FAILURE TO NOT ONLY BE COMPLETELY FORTHCOMING BY NEGLECTING TO ENUMERATE, OR AT LEAST GIVE A BRIEFER ELABORATION FOR THE RECORD, AS TO HER MANY AND NUMEROUS ASSOCIATIONS, MUTUAL/PARTNERED ENDEAVORS, AND A BIT MORE THAN SOCIAL FRIENDSHIP WITH PETITIONER, OR ENDEAVOR TO SEPERATE HERSELF FROM PETITIONER'S CASE, AS WELL AS HER SEEMING DELIBERATE AND NON CHALANT INDIFFERENCE BY FAILING TO SCREEN PETITIONER'S FACILITIES, WITH PROPER, REASONABLE, AND DUTIFUL ADMONISHMENTS AND INQUIRIES, TO MAKE ABSOLUTE SURE THAT PETITIONER FULLY KNEW AND COMPLETELY UNDERSTOOD THE PLEA AGREEMENT HE WAS AGREEING TO, THAT WOULD UTTERLY AND COMPLETELY FLIP HIS WORLD UP-SIDE-DOWN AND CHANGE THE REST OF HIS LIFE OF WHICH FAILURE, ON THE JUDGE'S PART, IS ESPECIALLY LEWD IN LIGHT OF THE FACT THAT NOT ONLY WAS THE COURT ET AL FULLY AWARE OF THE THEN SEVENTY (70) YEAR OLD MAN'S NUMEROUS PROLONGED MEDICAL/HEALTH ISSUES AND COMPLICATIONS, AT THAT TIME; BUT ESPECIALLY IN THAT KNOWING, COMPAILED WITH THE NUMEROUS PROLONGED HEALTH COMPLICATIONS, OF THE THEN SEVENTY (70) YEAR OLD MAN, HE HAD JUST SUFFERED A STROKE JUST A FEW DAYS PRIOR TO SIGNING THE PLEA AGREEMENT, AND THEN COMING INTO COURT, MAKING A CLEARLY DRASTIC AND UNREASONABLE LAST SECOND REQUEST FOR A SEVERER PUNISHMENT, ALBEIT UNWILLINGLY.

JUDGE, WANKER'S FAILURE AND NEGLIGENCE WAS AN OMISSION OF RESPONSIBILITY, DUTY, AND REASONABLE SOUND GOOD JUDGEMENT, TO PUT IT POLITELY; ALL OF WHICH, ESPECIALLY COMPILED WITH PETITIONER'S DEFECTIVE AND GROSSLY NEGLIGENT LEGAL COUNSEL, GROSSLY AND INJURIOUSLY PREJUDICED AND HARMED PETITIONER.

WHETHER OR NOT ANY INDIVIDUAL ERROR ADDRESSED HEREIN THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) REQUIRES AND/OR OTHERWISE WARRANTS THE VACATION AND RESCINDANCE OF PETITIONER'S PLEA AGREEMENT, CONVICTION, AND PRISON SENTENCE, THE CUMULATIVE TOTALITY OF MULTIPLE GROSS ERRORS, OMISSIONS, AS WELL AS PER SE PREJUDICIAL ERRORS RESULTED IN THE ENTIRE PROCEEDINGS, TO DATE, AS BEING STRUCTURALLY COMPROMISED AND DEFAULT.

FURTHERMORE, THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERRORS ARE SO NUMEROUS, AND BLATANT, AS TO NOT BE ABLE TO REASONABLY OR LEGALLY PROVE OTHERWISE. HOWEVER TO THE CONTRARY.

PETITIONER RESPECTFULLY, AND HUMBLLY, SUBMITS TO THIS HONORABLE COURT THAT PETITIONER'S INTENTIONS ARE NOT TO USE THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) TO hurl abusive words AT THE COURT; BUT RATHER AT THE FACT THAT PROFESSIONAL AS WELL AS LEGAL OATHS, RULES, PROCEDURES, AND/OR LAWS WERE FLAGRANTLY BEIT, BROKEN, COMMITTED, NEGLECTED, AND/OR OTHERWISE CAST ASIDE; SIMPLY TO DISPOSE OF A HEINOUS HIGH PROFILE CASE; BUT AND ESPECIALLY THE PROMINANT AND WELL KNOWN COMMUNITY FIGURE THE GROSS CLAIMS WERE MADE AGAINST, AS EFFECTIVELY AND QUIETLY AS POSSIBLE; SO

1. ANY OTHER PROMINENT FIGURE AND/OR INDIVIDUAL(S) IN A POSITION OF AFFILIATION, BY WAY
2. OF A SPEEDY AND/OR PUBLIC TRIAL; EVEN IF THAT MEANS CASTING THE LAW ASIDE, TO ACCOM-
3. PETITIONER IS ASTONISHED AT HOW THE ENTIRE PROCEEDINGS (THEN PROCEEDINGS) GIVE STRAY
4. RESEMBLANCE TO WHAT IS TERMED "KANGAROO COURT", INSTEAD OF WHAT THEY WERE / ARE SUPPO-
5. SED TO BE ESTABLISHED UPON: STATE AND FEDERAL LAWS, ORDER, SOUND DISCRETION, GOOD JUDG-
6. EMENT AND JUSTICE; BASED UPON FACTS ESTABLISHED BY TRUTH.
7. PETITIONER VERY RESPECTFULLY REQUESTS THAT THIS HONOURABLE COURT RECOGNIZE AND ACKNOW-
8. LEDGE EVERY ERROR AND VIOLATION OF CONSTITUTIONAL LAW, SET FORTH HEREIN THIS PETITION FOR
9. WRIT OF HABEAS CORPUS (POST CONVICTION), RESPECTIVELY; BUT ESPECIALLY IN TOTALITY, AND VACATE
10. PETITIONER'S JUDGMENT OF CONVICTION AND ILLEGAL PLEA AGREEMENT, APPOINT PETITIONER AN
11. ATTORNEY, AN EVIDENTIARY HEARING IF NECESSARY TO VACATE PETITIONER'S CONVICTION,
12. GRANT THIS PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) UPON ITS OWN MERITS,
13. AND REMAND PETITIONER'S CASE, NUMBER CR74444, FOR TRIAL.
14. FURTHERMORE, PETITIONER RESPECTFULLY SUBMITS THAT HIS PLEA AGREEMENT CONTRACT
15. HAS BEEN BREACHED, AND IS ENTITLED TO PROCEED TO TRIAL ON CASE NUMBER
16. CR74444, BASED ON ALL THE GROUNDS AND ISSUES/MATTERS, SET FORTH HEREIN THIS
17. PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION).

Very Respectfully Submitted

Michael C Mack

MICHAEL ALLEN MACK #1117749

PETITIONER, IN PRO SE.

THIS PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION) WAS SIGNED THIS:

10 TH OF FEBRUARY, 2015

VERIFICATION

21. I, MICHAEL ALLEN MACK, DO ATTEST, DECLARE AND AFFIRM
22. UNDER THE PENALTY OF PERJURY AND CHARACTER DEFAMATION, THAT ALL OF THE
23. FACTS, STATEMENTS, AND ASCERTAINMENTS, SET FORTH HEREIN THIS PETITION FOR WRIT
24. OF HABEAS CORPUS (POST CONVICTION) ARE TRUE AND CORRECT OF MY OWN KNOWLEDGE.
25. AS TO ANY SUCH MATTERS STATED UPON INFORMATION OR BELIEF, I ATTEST
26. AND AFFIRM THAT I BELIEVE THEM ALL TO BE TRUE AND CORRECT.

MICHAEL ALLEN MACK #1117749

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89419-5110

Michael C Mack

MICHAEL ALLEN MACK #1117749

PETITIONER, IN PRO SE.

DATED THIS 10 TH DAY OF FEBRUARY, 2015 0342

NOVEMBER 11, 2013

THOMAS GIBSON
1601 EAST BASIN AVE
PAHRUMP NV 89060

RE MICHAEL MACK - CASE # 13NY0734

DEAR MR GIBSON,

I'M VERY CONCERNED ABOUT YOU HAVING ENOUGH
INFORMATION TO PROPERLY DEFEND ME. I HAVE NOT
HEARD FROM MARK OR YOU, SINCE OUR LAST MEETING.
I TALKED TO MY DAD, MICHAEL, LAST FRIDAY. I
ADVISED HER OF OUR MEETING, AND ALSO TOLD HER THAT
MARK, WOULD BE CALLING HER, ABOUT HER CONVERSATION
WITH MY BROTHER (BILL) WILLIAM MACK, AND WHAT HE
TOLD HER, ABOUT MY STEP SISTER - TAMYRA ALEXANDER.
SHE HAD MENTIONED THAT NO ONE AS CALLED HER.

*IVE LIST
ATTORNEY
BY NEVER
INVESTIGATED
LOVE* I HAVE THE LIST OF NAMES THAT MARK ASK ME
FOR, HOWEVER, I NEED TO GIVE HIM SOME BACKGROUND
INFORMATION ON EACH OF THEM, WHEN I SEE HIM.

I ALSO HAVE SOME OTHER INFORMATION FOR YOU.

NOVEMBER 11, 2013

PAGE TWO

THOMAS GIBSON

NEVER RECEIVED

I WOULD LIKE TO HAVE COPIES OF ALL TRANSCRIPTS AND KNOW WHAT YOUR DEFENCE, AND OPENING STATEMENT WILL BE? SINCE YOU HAD TOLD ME IN AUGUST, THAT YOU WOULD START WORKING ON MY DEFENCE IN SEPTEMBER, WITH A PRIVATE INVESTATOR, AND THIS ONLY TOOK PLACE, THE END OF LAST MONTH, SINCE HE WILL HAVE SEVERAL MORE INDIVIDUALS TO TALK TO, IN MY DEFENCE. I WOULD LIKE FOR YOU TO ASK FOR A "CONTINUANCE" OF MY CASE. HAVING TO WAIT LONGER TO GO TO TRIAL, IS BETTER THEN BEING THROUGH IN, UNDER THE BUS, AT A TRIAL THAT IS ILL-PREPARED FOR!

ALSO, ON MY MEDICAL ISSUES, I HAVE NOT HAD MY TEST RESULTS, "DR'S APPOINTMENT" YET, SINCE THE PERSON IN CHARGE AT THE COUNTY DETENTION CENTER, WAITED ONE (1) MONTH AFTER I HAD THE TEST DONE, (WHICH WAS REQUESTED BY MY DOCTOR TWO (2) MONTHS AGO) TO MAKE MY RESULTS AND TREATMENT APPOINTMENT - IT WAS SCHEDULED FOR LAST WED. OCTOBER 30TH. I WAS JUST TOLD THIS PAST SUNDAY NOV. 10TH, THAT THEY HAD TO RESCHEDULE IT. I STILL NEED TO SEE MY BACK DOCTOR IN LAS VEGAS TO GO OVER THE "CAT-SCAN" RESULTS, THAT I HAD DONE LAST MONTH. HOWEVER, I NEED TO SEE MY MEDICAL DOCTOR ABOUT MY LEG-TEST RESULTS FIRST!

NOVEMBER 11, 2013

PAGE THREE

THOMAS GIBSON.

I ALSO HAVE ANOTHER MEDICAL PROBLEM, MY EYE
GLASS FRAMES BROKE, AND I TURNED IN A MEDICAL REQUEST
LAST WEEK, TO MAKE ME AN APPOINTMENT WITH DR LEEKS
MY VISION IS POOR, WITH OUT THEM!

PLEASE REQUEST A NEW TRIAL DATE AND COME AND
SEE ME ASAP.

THANK YOU + GOD BLESS

Michelle Mack

CC: MICHELLE MACK, PASQUA
5116 NEPTUNE BAY CIRCLE #6
ST CLOUD, FL 34769

NOVEMBER 19, 2013

THOMAS GIBSON
ATTORNEY AT LAW
1601 - EAST BASIN
PAHRUMP, NV 89060

RE: TRIAL DATE OF DECEMBER 16, 2013

Dear Mr Gibson

I need to see you, right away,
about my case! - WHAT'S GOING ON?

I also sent you a letter last week!

I can not understand, why you, have
not been back to see me. It's going on
a month since you & Mark were here!

How can you, or myself, say that I have
Legal Representation, when you do not give
me any information about my case?

Also, Mark, has not been to see me,
as he said he would, also do!

SINCERELY

Michael Mack

cc: Judge, Kim Wanker

0346

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Michael C Mack

MICHAEL ALLEN MACK #1117749
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

CERTIFICATE OF SERVICE BY MAIL

I, MICHAEL ALLEN MACK, hereby certify, pursuant to N.R.C.P. 5(b), that on this 12TH day of the month of FEBRUARY of the year 2015, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden, ROBERT LE GRAND
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada

ATTORNEY GENERAL
HEROES MEMORIAL BUILDING
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89710

BRIAN T. KUNZI
NYE County District Attorney
P.O. BOX 39

PAHRUMP, Nevada 89041

(District Attorney of County of Conviction)

CLERK OF COURTS
NYE COUNTY DISTRICT COURTS
1520 EAST BASIN
PAHRUMP, NEVADA 89060

Michael C Mack
MICHAEL ALLEN MACK #1117749
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se



Case No. PC 7444
Dept. 1

FILED
2015 FEB 23 P 2:02
Stephanie May
CLERK

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

MICHAEL ALLEN MACK,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER APPOINTING
DAVID NEELY, ESQ.

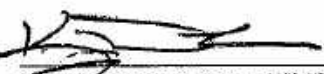
Good cause appearing therefor,

IT IS HEREBY ORDERED that DAVID NEELY, ESQ., is appointed to represent

MICHAEL ALLEN MACK.

IT IS FURTHER ORDERED that supplemental points and authorities shall be filed
within 45 days if needed.

DATED this 23 day of February, 2015.


KIMBERLY WANKER
DISTRICT COURT JUDGE



CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 28th day of February, 2015, she delivered by US mail (or hand delivery) a copy of the foregoing ORDER to the following:

David Neely, Esq.
3520 E. Tropicana, D-1
Las Vegas, NV 89048
(Hand Delivered)

Nye County District Attorney's Office
1520 E. Basin Ave.
Pahrump, NV 89060
(Hand Delivered)

Michael Allen Mack #1117749
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

Christel Raimondo

CHRISTEL RAIMONDO, Clerk to
DISTRICT JUDGE

AFFIRMATION

The undersigned hereby affirms that this Court Order does not contain the social security number of any person.

Christel Raimondo

CHRISTEL RAIMONDO, Clerk to
DISTRICT JUDGE

CASE NO. CR 7444A
DEPT. NO. 1.P

MICHAEL ALLEN MACK
PETITIONER, IN PRO SE
V.S.
THE STATE OF NEVADA; NEVADA
DEPARTMENT OF CORRECTIONS,
LOVELOCK CORRECTIONAL CENTER,
WARDEN, ROBERT L E GRAND,
RESPONDANTS.

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

RE: MOTION TO AMEND
NOTICE OF APPEAL, ONLY,
CASE # CR 7444A,
FILED ON 2015 FEB, 19TH,

IN NYE COUNTY, NEVADA;
PER SANDRA L. MERLINO, NYE COUNTY CLERK, FEBRUARY 19,
2015, NOTICE OF DEFICIENCY.

I, MICHAEL ALLEN MACK, NDOC # 1117749, IN PRO SE, PETITIONER
IN THE ABOVE CASE, RESPECTFULLY REQUESTING PERMISSION TO
AMEND NOTICE OF APPEAL, FILED IN NYE COUNTY, NEVADA,
ON 2015 FEB, 19TH, ONLY, FOR THE FOLLOWING REASONS:
1) PETITIONER RECEIVED A COPY OF A "NOTICE OF DEFICIENCY" FOR
FAILING TO SPECIFY EXACTLY WHAT HE IS APPEALING AND/OR WHAT
RELIEF HE IS SEEKING,
2) PETITIONER EVIDENTLY MUST SPECIFY EXACTLY WHAT HE IS APPEAL-
ING IN ORDER TO PROCEED, IN WHICH HE FAILED TO DO IN THE INITIAL
NOTICE OF APPEAL, FILED ON 2015 FEB, 19TH, IN NYE COUNTY, NEVADA.

FOR THE ABOVE REASONS PETITIONER RESPECTFULLY REQUEST PERMISSION
TO AMEND HIS NOTICE OF APPEAL.
MICHAEL ALLEN MACK # 1117749
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419-5110

RESPECTFULLY SUBMITTED
Michael Allen Mack

MICHAEL ALLEN MACK # 1117749

PETITIONER, IN PRO SE.

25TH
DATED THIS 28TH DAY OF FEBRUARY, 2015

0350

CASE NO. CR 7444A
DEPT. NO. 1.P

MICHAEL ALLEN MARK
PETITIONER, IN PR. SE.

VS.

THE STATE OF NEVADA; NEVADA
DEPARTMENT OF CORRECTIONS,
LOVELOCK CORRECTIONAL CENTER,
WARDEN, ROBERT L. BRAND,

RESPONDENTS.

IN THE FIFTH DISTRICT COURT
OF
THE STATE OF NEVADA
IN AND FOR
THE COUNTY OF Nye

RE: NOTICE OF APPEAL
(AMENDED)

I VERY RESPECTFULLY REQUEST THAT ALL PARTIES CONCERNED,
PLEASE BE ADVISED AND ACKNOWLEDGE THAT I, MICHAEL ALLEN
MARK, NDOC NUMBER 117749, PETITIONER, IN PR. SE, DO
HEREBY FILE THE FOLLOWING NOTICE OF APPEAL OF CASE
NUMBER CR7444A, TO WIT, PETITIONER'S PLEA AGREEMENT
AND SENTENCE STRUCTURE, AND CONVICTION

VERY RESPECTFULLY SUBMITTED

Michael C. Mark

MICHAEL ALLEN MARK, IN PR. SE.

25th
ENTERED THIS 23rd DAY OF FEBRUARY, 2015

25th
DATED THIS 23rd DAY OF FEBRUARY, 2015

MICHAEL ALLEN MARK #117749

LOVELOCK CORRECTIONAL CENTER

1200 PRISON ROAD

LOVELOCK, NEVADA 89415-5000

Certificate of Service

I do certify that I mailed a true and correct copy of the foregoing Motion to amend Notice of Appeal case number CR7444A, and Ammended Notice of Appeal, to the below addresses on this ^{25TH} ~~2ND~~ day of February, 2015, by placing same in the U.S. Mail via Prison law library staff:

Clerk of Courts
Nye County District Court
1520 East Basin
Pahrump, Nevada, 89060

Brian T. Kunz
Nye County District Attorney
P.O. Box # 39
Pahrump, Nevada, 89041

Lovelock Correctional Center,
Warden, Robert Le Grand,
L.C.C. @ 1200 Prison Road
Lovelock, Nevada, 89419-5110

Attorney General
Heroes Memorial Building
100 North Carson Street
Carson City, Nevada, 89710

Michael C Mack

MICHAEL ALLEN MACK #1117749

LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419-5110

PETITIONER, IN PRO SE.

Affirmation Per. N.R.S. 239B.030

The undersigned does hereby affirm the preceeding motion to Amend Notice of Appeal, and Ammended Notice of Appeal, filed in District Court Case number, CR7444A, does NOT contain the social security number of any person.

Dated this ^{25TH} ~~2ND~~ day of February, 2015

Michael C Mack
MICHAEL ALLEN MACK #111774
PETITIONER, IN PRO SE.

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALLEN MACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67441

FILED

FEB 27 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a pro se appeal "of case number CR7444A." Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

The notice of appeal fails to designate the specific order or judgment being challenged on appeal. See NRAP 3(c)(1)(B). To the extent that appellant appeals from the judgment of conviction entered on March 25, 2014, the appeal is untimely filed. See NRAP 4(b)(1)(A) (prescribing a 30-day appeal period from the entry of the judgment of conviction). Further, it does not appear from the documents submitted with this appeal that the district court has entered any other appealable order. We therefore lack jurisdiction to consider this appeal, see *Lozada v. State*, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994) ("[A]n untimely notice of appeal fails to vest jurisdiction in this court."), and we

ORDER this appeal DISMISSED.

[Signature], J.
Parraguirre

[Signature], J.
Douglas

[Signature], J.
Cherry

cc: Hon. Kimberly A. Wanker, District Judge
Michael Allen Mack
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk

1 CASE NO. PC-7444
2 DEPT. NO. 1

3 DAVID H. NEELY III, ESQ.
4 Nevada State Bar No. 03891
5 3520 East Tropicana Ave., Ste. D-1
6 Las Vegas, NV 89048
7 (702) 565-0716
8 Attorney for Petitioner

FILED

2015 APR -7 A 8:21

NYE COUNTY CLERK
BY DEPUTY

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

11 MICHAEL A. MACK,
12)
13)
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28)
Petitioner,
vs.
STATE OF NEVADA,
Respondent.

STIPULATION AND ORDER
FOR EXTENSION OF TIME
TO FILE SUPPLEMENT

IT IS HEREBY STIPULATED AND AGREED by and between DAVID H.
NEELY, III, Esq., attorney for Petitioner, MICHAEL A. MACK, and
Nye County Chief Deputy District Attorney KIRK VITTO, Esq., for
the STATE OF NEVADA, that the Petitioner has until the 1st day of
July, 2015 to file his Supplement.

This stipulation is at the request of DAVID H. NEELY III,
Esq., and is because more time is needed to prepare the
Supplement.

DATED this 3rd day of April, 2015.

ANGELA BELLO, ESQ.
NYE COUNTY DISTRICT ATTORNEY

DAVID H. NEELY, III, Esq.
3520 East Tropicana Ave., D-1
Las Vegas, Nevada 89121
Attorney for Petitioner

KIRK VITTO, Esq.
Chief Deputy District Attorney
P. O. Box 39
Pahrump, NV 89041
Attorney for Respondent

ORDER

Upon Stipulation for the parties hereto, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petitioner in this case has until the 7th day of July, 2015, to file his Supplement.

DATED this 6th day of April, 2015.


DISTRICT JUDGE

Case No. PC7444

Department II

*The undersigned affirms that
this document does not contain
the social security number of
any person*

2015 NOV 12 A 9:07
TANNER DAVIS
NYE

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

MICHAEL A, MACK,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

ANSWER AND MOTION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS (POST-
CONVICTION)

COMES NOW, Respondent, State of Nevada, by and through its attorney,
ANGELA A. BELLO, NYE COUNTY DISTRICT ATTORNEY, through counsel, Chief
Deputy District Attorney, Kirk D. Vitto, and requests that the Petition for Writ of Habeas
Corpus (Post-Conviction) filed by the Petitioner be dismissed. This Petition is subject
to paragraph one of NRS 34.810, and relief should clearly be summarily denied.

POINTS AND AUTHORITIES

Pursuant to NRS 34.810,

The court *shall* dismiss a petition if the court determines that:

///

///

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

1 a) The petitioner's conviction was upon a plea of guilty and the petition
2 is not based upon an allegation that the plea was involuntary or
3 unknowingly entered or that the plea was entered without effective
4 assistance of counsel.

5 The defendant acknowledges that his conviction was the result of his having
6 pled guilty, (pursuant to the Alford decision) and, as a basis for relief makes the
7 following six claims that he asserts represent his plea being received by the court
8 without effective assistance of counsel.

- 9 A. Trial counsel did not effectively investigate the case before plea entering;
- 10 B. Trial counsel was ineffective for allowing the defendant to plead guilty while
11 suffering under the sequela of a medical episode;
- 12 C. Trial counsel failed to inform the defendant of Tier III sex offender
13 consequences;
- 14 D. Trial counsel failed to adequately review the facts of the case and discuss
15 potential defenses;
- 16 E. Trial counsel failed to adequately inform the defendant of the potential
17 sentence as a result of pleading guilty to attempt sexual assault;
- 18 F. Trial counsel labored under an undisclosed conflict of interest.

19 By far the most common claim raised within a request for relief in a post-
20 conviction petition is that the petitioner received ineffective assistance of counsel. The
21 controlling authority stems from the threshold and landmark case when considering
22 such a claim, Strickland v. Washington, 466 U.S. 668, 685-86 (1984). That case set
23 forth a two-prong test. The petitioner must show that his counsel's performance was
24 deficient, and that the deficient performance prejudiced the defense. Warden v.
Lyons, 100 Nev. 430, 432 (1984). An analysis does not require that both prongs be

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

1 addressed if either is an insufficient showing. In order to meet the first prong, the
2 petitioner would have to show that his attorney's performance fell below an objective
3 standard of reasonableness. Means v. State, 120 Nev. 1001, 1011 (2004). A court's
4 scrutiny here is highly deferential. Hindsight is discouraged. In order to show
5 prejudice, the petitioner must show "a reasonable probability that, but for counsel's
6 unprofessional errors, the result of the proceeding would have been different."
7 Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to
8 undermine confidence in the outcome." Id. It is the petitioner's burden to establish
9 this claim, both prongs.

10 In United States v. Arvanitis, 902 F.2d 489, 494-495 (7th Cir. Ill. 1990), the
11 Supreme Court stated:

12 To establish prejudice in the guilty plea context, a defendant must show
13 that 'counsel's constitutionally defective performance affected the
14 outcome of *the plea process*. In other words, the defendant must show
15 that there is a reasonable probability that, but for counsel's errors, [the
16 defendant] would not have pleaded guilty *and would have insisted on
going to trial.*' Hill, 474 U.S. at 59. *A mere allegation by the defendant
that he would have insisted on going to trial is insufficient to establish
prejudice.* (emphasis added)

17 In Hill v. Lockhart, 474 U.S. 52, 56-57 (U.S. 1985), the US Supreme Court said:

18 The government is not responsible for, and hence not able to prevent,
19 attorney errors that will result in reversal of a conviction or sentence.
20 Attorney errors come in an infinite variety and are as likely to be utterly
21 harmless in a particular case as they are to be prejudicial. They cannot
22 be classified according to likelihood of causing prejudice. Nor can they
23 be defined with sufficient precision to inform defense attorneys correctly
24 just what conduct to avoid. *Representation is an art, and an act or
omission that is unprofessional in one case may be sound or even
brilliant in another.* Even if a defendant shows that particular errors of
counsel were unreasonable, therefore, the defendant must show that
they actually had an adverse effect on the defense.

24 ///

1 In addition, we believe that requiring a showing of "prejudice" from
2 defendants who seek to challenge the validity of their guilty pleas on the
3 ground of ineffective assistance of counsel will serve the *fundamental*
interest in the finality of guilty pleas we identified in United States v.
Timmreck, 441 U.S. 780 (1979)" (emphasis added).

4 In Hodges v. State, 119 Nev. 479, 482 (2003) the Court stated:

5 NRS 34.810(1)(a) provides that a court shall dismiss a post-conviction
6 habeas petition challenging a conviction based on a guilty plea unless
7 the petition alleges 'that the plea was involuntarily or unknowingly
8 entered or that the plea was entered without effective assistance of
9 counsel.' A petitioner is entitled to an evidentiary hearing only if he
10 supports his claims with specific factual allegations that if true would
11 entitle him to relief. The petitioner is not entitled to an evidentiary
12 hearing if the factual allegations are belied or repelled by the record.

13 All six claims are quickly eliminated as having any weight for consideration as
14 they run afoul of NRS 34.810.

15 In Evans v. State, 117 Nev. 609, at 621 (2001) the court said:

16 A defendant seeking post-conviction relief cannot rely on conclusory
17 claims for relief but must support any claims **with specific factual**
18 **allegations** that if true would entitle him or her to relief. The defendant
19 is not entitled to an evidentiary hearing if the allegations are belied or
20 repelled by the record (emphasis added).

21 The court in Evans also said,

22 Judicial review of a lawyer's representation is **highly deferential**, and a
23 defendant must overcome the presumption that a challenged action
24 might be considered **sound strategy**. The reviewing court must try to
avoid the distorting effects of hindsight and evaluate the conduct
under the circumstances and from counsel's perspective at the time. Id.
at 622, (emphasis added).

Bare claims, such as the ones presented in the original petition and both
supplements, are insufficient to demonstrate a basis for relief. See Hargrove supra.

///

///

1 The claims before the court are legally without merit and subject to summary
2 dismissal because he has not adequately expressed to this court why what he claims
3 as ineffectiveness would have made an outcome determinative difference and it is his
4 burden. His claims of ineffectiveness are belied by the record. The defendant has not
5 set forth, expressed or explained the value of a more comprehensive investigation if
6 he could show that one was not conducted. The defendant has claimed he would not
7 have pled guilty but for the effect of a medical episode yet the arraignment transcript
8 clearly reflects the court being aware of the situation and addressing it. Transcript of
9 Proceedings Change of Plea, (T) December 6, 2013, page 2, 4. The court specifically
10 asked the defendant, "Are you under any medications that would affect your ability to
11 understand the proceedings and what's going on today? THE DEFENDANT: No,
12 ma'am." T12.

13 The transcript and Guilty Plea Agreement (GPA) clearly set forth the notice
14 required as it pertains to sex-offender status and failing to inform the defendant of Tier
15 III sex offender consequences is nowhere specifically required by law to an extent
16 greater than the notice provided. The tier's were specifically addressed in the
17 defendant's presence. T2, 21-23. The matter was specifically addressed to the
18 defendant, the court making inquiry whether the defendant initialed the change being
19 discussed in his presence, and trial counsel acknowledging "we're all in agreement."
20 T3. The defendant seeks to impose an obligation nowhere required by law. The
21 defendant has failed to meet his burden to establish that trial counsel failed to
22 adequately review the facts, or what discussing the potential defenses would have
23 benefitted. The defendant claims that trial counsel failed to explain the potential
24 sentence he faced, yet the arraignment transcript and GPA are undeniably clear on

1 the matter. T19, 20, 21. Lastly, the defendant would have this court believe that trial
2 counsel labored under an undisclosed conflict of interest that prejudiced him, although
3 he makes no showing in that regard, and it is his burden. The defendant expressly
4 represented to the court that he had no concerns about either trial counsel or the
5 defense investigator and that he was satisfied with the representation he had received.
6 T16.

7 The defendant has to show, with particularity, why what he alleges would have
8 made a difference. He has not done that. What the defendant has alleged instantly is
9 exactly like what the court in Evans clearly said was just not going to be sufficient. As
10 examples, the court in Evans said,

11 Evans asserts that his trial counsel did not conduct adequate pretrial
12 investigation and were thus unprepared to cross-examine some
13 witnesses or call others. [Very similar to the defendant's claim instantly]
14 His claims remain vague, failing to include specific factual
allegations that, if true, establish prejudice. Id. at 644, (emphasis
added).

15 Later, the court continued, remarking that Evans,

16 had gone so far as to claim that the district court 'refused to allow
17 portions of the trial to be recorded.' He fails to substantiate this
18 irresponsible claim in any way ... he has done nothing to support his
vague accusations of wrongdoing and prejudice with any
discussion of the record or a single affidavit, id. at 645 (emphasis
19 added).

20 The court went on:

21 Evans claims that his counsel failed to challenge the prosecutor's
22 endorsement of witnesses and to prepare adequately for the examination
23 of witnesses. The gist of this claim seems to be that the prosecutor's
24 endorsement of witnesses was excessive and untimely. Evans does
not specify how his counsel could have better cross-examined the
State's witnesses and thus fails to show prejudice, id., (emphasis
added).

1 Evans claimed his attorney should have called an expert, but failed "to allege
2 specifically what these experts could have done to make a different result
3 reasonable", id., (emphasis added). Evans claimed his trial counsel did not
4 adequately prepare for the penalty phase, but did not identify "any fact they should
5 have discovered or any specific deficiency in the way they handled the penalty
6 phase", id. at 646, (emphasis added).

7 The defendant has to demonstrate prejudice. He cannot simply say, as an
8 example, "Failed to interview and investigate state witnesses", as we see from the
9 numerous examples quoted from Evans supra. He has to state, with particularity,
10 what that would have accomplished, why it was objectionably reasonable to do, *if it*
11 *was not done*, and, something the defendant has not done at all, on any claim, how
12 and why the outcome would have been different. Doing so is the only way a
13 reviewing court can differentiate the claim with merit from the claim without, and in that
14 regard the defendant has done *nothing*, and it is his burden.

15 The record before the court, the canvass and GPA unequivocally manifests a
16 willing, voluntary, knowing Alford plea to Attempted Sexual Assault, he did not even
17 have to admit what the evidence proved he had done. "It is appellant's responsibility
18 to present relevant authority and cogent argument; issues not so presented need not
19 be addressed by this court." Maresca v. State, 103 Nev. 669, 673 (1987). "A
20 petitioner is entitled to an evidentiary hearing if he (1) alleges facts, which, if proven,
21 would entitle him to relief; and (2) show that he did not receive a full and fair hearing in
22 state court . . . at trial[.]" Alberni v. McDaniel, 458 F.3d 860, 873 (9th Cir. 2006). "A
23 claim is 'belied' when it is contradicted or proven to be false by the record as it existed
24 at the time the claim was made." Mann v. State, 118 Nev. 351, 354 (2002).

- 1 • IF NOT DISMISSED SUMMARILY, THE DEFENDANT HAS NOT
2 SET FORTH ANY BASIS FOR A HEARING

3 According to the law in Nevada, the defendant is obligated to attach whatever is
4 necessary, affidavits, records, other documents, some evidence to support what it is
5 he claims. There must be substantiation. NRS 34.370(4). He can not merely make
6 the claim that his trial counsel failed to pursue (whatever the claim may be) this, that or
7 the other thing without a basis for the claim which otherwise is nothing other than
8 speculation. He must tender evidence tending to establish that there in fact is
9 adequate reason to believe what he is saying as a threshold starting point. He has not
10 done that.

- 11 • THE PETITION IS UNSUPPORTED BY "SPECIFIC FACTUAL
12 ALLEGATIONS THAT IF TRUE WOULD ENTITLE [THE
13 DEFENDANT] TO RELIEF"

14 The claims for relief as alleged, viewed in light of the record extant, dramatically
15 impact this court's decision regarding whether an evidentiary hearing is necessary
16 according to NRS 34.770 which says "The judge or justice, upon review of the return,
17 answer and all supporting documents which are filed, shall determine whether an
18 evidentiary hearing is required." At paragraph 2 the statute says, "If the judge or
19 justice determines that the petitioner is not entitled to relief and an evidentiary hearing
20 is not required, he shall dismiss the petition without a hearing."

- 21 • HIS NAKED CLAIMS FOR RELIEF ARE BELIED BY THE
22 RECORD

23 In Hargrove v. State, 100 Nev. 498, at 502, 503, 686 P.2d 222 (1984), the court
24 said that "bare" or "naked" claims for relief "did not entitle [the defendant] to an
 evidentiary hearing." The court further stated,

1 To the extent that the motion and supplemental authorities raised
2 allegations supported by factual claims, particularly the allegation of
3 ineffective counsel, we note that the factual claims were belied by the
4 record, especially the transcript of the change of plea canvass. A
5 defendant seeking post-conviction relief is not entitled to an evidentiary
6 hearing on factual allegations belied or repelled by the record.

7 Each of the defendant's claims, set forth *supra*, must be reviewed in conjunction
8 with the record to see whether the claims are belied as the prosecution asserts to the
9 extent they are even at all cognizable. To the extent any claims survive the mandatory
10 dismissal aspect of this response; the claims brought in the original petition are wild
11 ramblings that amount to nothing other than bare claims insufficient to demonstrate
12 that he is entitled to relief. Hargrove v. State, 100 Nev. 498, 502-03 (1984).
13 Furthermore, the defendant has utterly failed to demonstrate how any of the above
14 actions alleged to have been ineffectiveness would have affected the outcome at trial.
15 Therefore, the district court should deny the claims as unsupported, unsubstantiated,
16 and bereft of merit.

17 CONCLUSION

18 Because the controlling authority, the law in the State of Nevada, NRS 34.810,
19 says:

20 The court **shall** dismiss a petition if the court determines that:

21 a) The petitioner's conviction was upon a plea of guilty and the petition
22 is not based upon an allegation that the plea was involuntary or
23 unknowingly entered or that the plea was entered without effective
24 assistance of counsel,"

25 The defendant's petition should be dismissed based upon the record. He has,
26 as the moving party with the burden, failed to establish a cognizable claim.

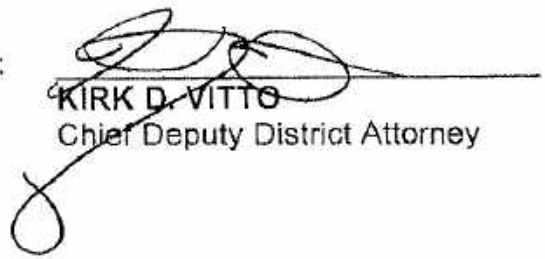
27 ///

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

1 Belied by the record as it is, this court should consider that not only is the
2 defendant's claim without merit, but his claims do not warrant an evidentiary hearing.
3 The record extant demonstrates that with a strong factual basis for denying a hearing,
4 and setting forth the strength of the record in regard to the defendant's instant claim,
5 the court should consider dismissing this action based upon the pleadings and the
6 record with full confidence that the ruling will survive judicial scrutiny upon review. The
7 defendant simply has utterly failed to establish what difference it would have made if
8 anything he asserts were factually accurate, which he has not done, and it is his
9 burden.

10 DATED this 10 day of May, 2015.

11 ANGELA A. BELLO
12 NYE COUNTY DISTRICT ATTORNEY

13 By: 
14 KIRK D. VITTO
15 Chief Deputy District Attorney
16
17
18
19
20
21
22
23
24

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

CERTIFICATE OF SERVICE

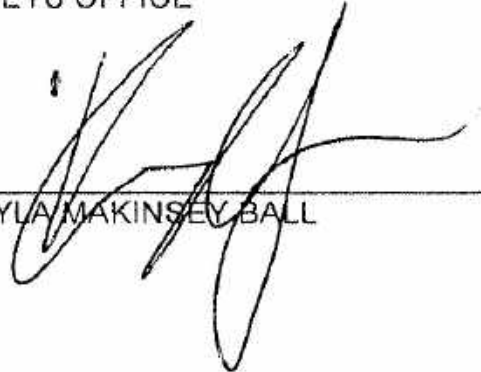
I, Kayla MaKinsey Ball, Executive Legal Secretary, Office of the Nye County District Attorney, P. O. Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

ANSWER AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)
In 5TH JDC Case No. PC7444
STATE v. MICHAEL ALLEN MACK

upon said Defendant herein by hand delivering a true and correct copy thereof on

8/11/15 to the following:

DAVID NEELY
AT THE NYE COUNTY DISTRICT ATTORNEYS OFFICE
IN PAHRUMP, NEVADA


KAYLA MAKINSEY BALL

CASE NO. PC7444
Dept 1

FILED

2015 AUG 25 P 3:43

Stephanie May

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

MICHAEL A. MACK,

Petitioner,

ORDER

v.

THE STATE OF NEVADA,

Respondent.

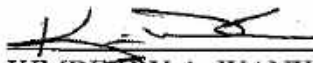
On July 1, 2015, David H. Neely III, Esq. filed *Petitioner's Supplemental Points and Authorities in Support of Post-Conviction Writ*. In said pleading, Petitioner asks the Court to consider the original Petition for Writ of Habeas Corpus that was filed on February 19, 2015.

The Court, upon review of the Petition for Writ of Habeas Corpus filed on February 19, 2015, finds that pages 8 through 25 of said document are written in a manner that is illegible to the Court.

Therefore good cause appearing,

IT IS HEREBY ORDERED that the Petitioner file an Amended Petition for Writ of Habeas Corpus in a 12 point font. The Petitioner shall have 30 days from the filing of this court order, to file the amended petition.

DATED this 25th day of August 2015.

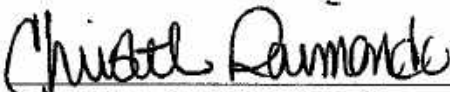

KIMBERLY A. WANKER
DISTRICT JUDGE

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 25th day of August 2015, she mailed
(or hand delivered) copies of the foregoing ORDER to the following:

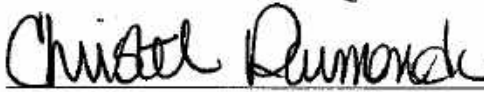
NYE CO. DISTRICT ATTORNEY
PAHRUMP, NV 89060
(HAND DELIVERED)

DAVID NEELY, III, ESQ.
3520 E. TROPICANA, D-1
LAS VEGAS, NV 89121
(HAND DELIVERED)


CHRISTEL RAIMONDO, Clerk to
DISTRICT JUDGE

AFFIRMATION

The undersigned hereby affirms that this Court Order does not contain the social security
number of any person.


CHRISTEL RAIMONDO, Clerk to
DISTRICT JUDGE



Case No. PC-7444
Dept. No. 1

COPY

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

2015 SEP 22 A 9:54
Stephanie May
NYE COUNTY CLERK
BY DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE
AMENDED
MICHAEL A. MACK,) PETITION FOR WRIT OF
Petitioner,) HABEAS CORPUS
vs.) (POST-CONVICTION)
THE STATE OF NEVADA,)
Respondent.)

Petitioner, MICHAEL A. MACK, by and through his Attorney,
DAVID H. NEELY III, Esq., hereby files the following Amended
Petition for Writ of Habeas Corpus (Post-Conviction), pursuant to
NRS 34.750, and in support of his request for an Evidentiary
Hearing pursuant to NRS 34.770 in the above captioned matter.

1. FACTS

On May 14, 2013, an Information was filed charging
Petitioner with COUNT I: SEXUAL ASSAULT, in violation of NRS
200.336, a Category A Felony, Count II: SEXUAL ASSAULT, in
violation of NRS 200.366, a Category A Felony, Count III:
PREVENTING OR DISSUADING VICTIM FROM REPORTING CRIME, COMMENCING
PROSECUTION OR CAUSING ARREST, in violation of NRS 199.305, a
Category D Felony, Count IV: UNLAWFUL CONTACT WITH PERSON WITH
MENTAL ILLNESS, in violation of NRS 207.260, a Gross Misdemeanor,
Count V: ABUSE OF VULNERABLE PERSON, in violation of NRS

1 200.5099, a Gross Misdemeanor, Count VI: SEXUAL ASSAULT, in
2 violation of NRS 200.366, a Category A Felony, Count VII:
3 UNLAWFUL CONTACT WITH PERSON WITH MENTAL ILLNESS, in violation of
4 207.260, a Gross Misdemeanor, Count VIII: ABUSE OF VULNERABLE
5 PERSON, in violation of NRS 200.5099, a Gross Misdemeanor. On May
6 17, 2013, an Arraignment is held where the Petitioner pleads Not
7 Guilty to all charges contained in the Information. On September
8 20, 2013, Motion for OR Release is heard and denied by the Trial
9 Court. On October 23, 2013, a Motion to Sever is heard by the
10 Trial Court and is granted. On November 26, 2013, an Amended
11 Information is filed charging Petitioner with Count I: ATTEMPTED
12 SEXUAL ASSAULT, in violation of NRS 200.366, a Category B Felony.
13 On December 4, 2013, an Arraignment/Change of Plea is held but
14 continued due to unavailability of the Petitioner who is in the
15 hospital due to a stroke. On December 5, 2013, a Seconded Amended
16 Information is filed charging Petitioner with Count I: ATTEMPTED
17 SEXUAL ASSAULT, in violation of NRS 200.366/193.330, a Category B
18 Felony. On December 6, 2013, another Arraignment/Change of Plea
19 is held where the Petitioner pleads Guilty pursuant to ALFORD to
20 Count I: ATTEMPTED SEXUAL ASSAULT, in violation of NRS
21 200.366/193.330, a Category B Felony. On March 21, 2014, a
22 Sentencing Hearing is held where the Petitioner is sentenced to
23 96/240 months in prison, register as a Sex Offender with Lifetime
24 Supervision, Ordered to complete a Corrections based Sex Offense
25 Treatment Program, 345 days Credit Time Served. On February 19,
26 2015, the Petitioner filed a Petition for Writ of Habeas Corpus
27 (Post-Conviction) in the above entitled matter. On February 19,
28 2015, a Motion for Appointment of Counsel and Request for

1 Evidentiary Hearing was filed in the above-entitled matter. An
2 Order Appointing David Neely, Esq. Was filed on February 23,
3 2015.

4 Petitioner is currently incarcerated at the Lovelock
5 Correctional Center in Pershing County, State of Nevada.

6 2. STANDARD UPON REVIEW OF PETITION

7 NRS 34.770 sets forth the Standard for this Court's review
8 of the instant Petition and supporting documentation. NRS 34.770
9 states:

10 1. The judge or justice, upon review of the return,
11 answer and all supporting documents which are filed,
12 shall determine whether an evidentiary hearing is
13 required. A petitioner must not be discharged or
14 committed to the custody of a person other than the
15 respondent unless an evidentiary hearing is held.

16 2. If the judge or justice determines that the
17 petitioner is not entitled to relief and an evidentiary
18 hearing is not required, he shall dismiss the petition
19 without a hearing.

20 3. If the judge or justice determines that an
21 evidentiary hearing is required, he shall grant the
22 writ and shall set a date for the hearing.

23 Where as here, the Petition sets forth specific allegations
24 in the Petition or accompanying brief which if true, would
25 entitle the petitioner to an evidentiary hearing unless those
26 claims are repelled by the record. Hargrove v. State, 100 Nev.
27 498, 686 P.2d 222, (1984); Marshall v. State, 110 Nev 1328, 885
28 P.2d 603 (1994). As stated in Drake v. State, 108 Nev. 523, 836
P.2d 52 (1992):

29 The question in this case is not whether appellant proved
30 his counsel was ineffective, but whether appellant made
31 allegations which entitled him to an evidentiary hearing. See
32 Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); Grondin v.
33 State, 97 Nev. 454, 634 P.2d 456 (1981). [emphasis added]

34 3. INEFFECTIVENESS OF COUNSEL UNDER STRICKLAND

1 To state a claim of ineffective assistance of counsel that
2 is sufficient to invalidate a judgment of conviction, a defendant
3 must demonstrate that counsel's performance fell below an
4 objective standard of reasonableness, and that counsel's errors
5 were so severe that they rendered the jury's verdict unreliable.
6 Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons,
7 100 Nev 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004
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10 2052, 2067, 8L.Ed.2d 674 (1984) the United States Supreme Court
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12 of counsel altogether is legally presumed to result in
13 prejudice". The Supreme Court further reaffirmed this ruling in
14 Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300,
15 (1988).

16 Counsel must adequately prepare the case at all levels,
17 including preliminary matters in Justice Court. Sanborn v.
18 State, 107 Nev. 856, 822 P.2d 11 (1991).

19 Here, as in Marshall v. State, 110 Nev. 1328, 885 P.2d 603
20 (1994), the Petitioner alleged acts which, if true, entitle him
21 to relief as ineffective assistance of counsel.

22 **4. COUNSEL'S CONSTITUTIONALLY DEFECTIVE PERFORMANCE AFFECTED**
23 **THE OUTCOME OF THE PLEA PROCESS.**

24 In United States V. Arvantis, 902 F.2d 489, 494-495 (7th
25 Cir. III. 1990), the Supreme Court stated:

26 To establish prejudice in the guilty plea context, a
27 defendant must show that 'counsel's constitutionally defective
28 performance affected the outcome of the plea process. In other

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2 probability that, but for counsel's errors, the defendant would
3 not have pleaded guilty and would have insisted on going to
4 trial'. Hill v. Lockhart, 474 U.S. 59, 106 S. Ct. 366, 88 L.Ed.
5 2d 203 (1985).

6 The United States Supreme Court in Hill, 474 U.S. 58,
7 stated that, "the two part Strickland v. Washington test applies
8 to challenges to guilty pleas on ineffective assistance of
9 counsel. In the context of guilty pleas, the first half of the
10 Strickland v. Washington test is nothing more than a restatement
11 of the standard of attorney competence already set forth... The
12 second, or prejudice requirement, on the other hand, focuses on
13 whether counsel's constitutionally ineffective performance
14 affected the outcome of the plea process. In other words, in
15 order to satisfy the prejudice requirement, the defendant must
16 show that there is a reasonable probability that, but for
17 counsel's errors, he would have insisted on going to trial.

18 In many guilty plea cases, the "prejudice" inquiry will
19 closely resemble the inquiry engaged in by courts reviewing
20 ineffective-assistance challenges to convictions obtained through
21 a trial. For example, where the alleged error of counsel is a
22 failure to investigate or discover potentially exculpatory
23 evidence, the determination whether the error "prejudiced" the
24 defendant by causing him to plead guilty rather than go to trial
25 will depend on the likelihood that discovery of the evidence
26 would have led counsel to change his recommendation as to the
27 plea. This assessment, in turn, will depend in large part on a
28 prediction whether the evidence likely would have changed the

1 outcome of the trial. Hill, 474 U.S. 59.

2 When a petitioner alleges ineffective assistance of
3 counsel, he must establish the factual allegations which form the
4 basis for his claim of ineffective assistance by a preponderance
5 of the evidence. Next, as stated in STRICKLAND, the petitioner
6 must establish that those facts show counsel's performance fell
7 below a standard of objective reasonableness, and finally the
8 petitioner must establish prejudice by showing a reasonable that,
9 but for counsel's deficient performance, the outcome would have
10 been different. Means v. State of Nevada, 120 Nev. 1001, 103 P.3d
11 25 (2004).

12 In Hodges v. State, 119 Nev. 479, 482 (Nev.2003), the
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14 NRS 34.810(1)(a) provides that a court shall dismiss a
15 post-conviction habeas petition challenging a conviction based on
16 a guilty plea unless the petition alleges 'that the plea was
17 involuntary or unknowingly entered without effective assistance
18 of counsel.' A petitioner is entitled to an evidentiary hearing
19 only if he supports his claims with specific allegations that if
20 true would entitle him to relief. The petitioner is not entitled
21 to an evidentiary hearing if his claims are belied or repelled by
22 the record.

23 5. INSTANCES OF INEFFECTIVE ASSISTANCE OR COUNSEL

24 Petitioner alleges that his attorney has fallen below that
25 standard in the following eight (8) instances which if, taken on
26 their own may not be enough to render the Petitioner's guilty
27 plea unreliable but when taken together, Petitioner believes, and
28 I hope this Court agrees, that taken together, the Petitioner's

1 guilty plea is unreliable. The eight (8) instances are as
2 follows:

3 A. TRIAL COUNSEL FAILED TO USE RELEVANT INFORMATION IN HIS
4 INVESTIGATION PROVIDED BY PETITIONER.

5 Petitioner provided Trial Counsel with at least 10
6 witnesses which included friends and members of the alleged
7 victim's family with their phone numbers to interview prior to
8 trial. Trial Counsel and his investigator failed to contact any
9 of the witnesses. As a result no background information on the
10 alleged victim was ever obtained in preparation for trial. These
11 witnesses possessed information on the alleged victim's life that
12 could have proven useful at trial. In addition, these witnesses
13 could have been useful as cross-references to other witnesses.

14 B. TRIAL COUNSEL FAILED TO MOTION TO HAVE HIS STATEMENTS
15 SUPPRESSED THAT WERE MADE TO THE STATE AT TIME OF ARREST.

16 Petitioner feels that Trial Counsel had a duty to suppress
17 his statements that were made to Detective David Boruchowitz at
18 the time of his arrest. Petitioner maintains that his Miranda
19 Rights were violated during this interview and a Motion to
20 Suppress these statements was a necessity in his defense. "The
21 arresting officers came to Petitioner's home with an arrest
22 warrant and a recording device, with every intent to arrest and
23 record as soon as the arresting officer ascertained that
24 petitioner was the individual named on the arrest warrant, he
25 should have been placed under arrest in handcuffs and notified of
26 his rights, if not warned that he was being recorded".

27 C. TRIAL COUNSEL DELIBERATELY LIED ABOUT THE TIER STATUS
28 THAT PETITIONER FACED AS A RESULT OF HIS PLEA OF GUILTY .

1 Trial Counsel failed to advise the Petitioner what it
2 meant to be a Tier III Sex Offender prior to entry of his plea.
3 Petitioner was originally told that he would be a Tier II Sex
4 Offender prior to discovering at the Arraignment that he was
5 going to be a Tier III Sex Offender. Petitioner would not have
6 entered a plea of Guilty to an offense that required Tier III Sex
7 Offender status if he had understood the consequences.

8 D. TRIAL COUNSEL FAILED TO INFORM PETITIONER THAT THE
9 INFORMATION OBTAINED DURING THE PSYCHO-SEXUAL EXAM COULD BE USED
10 AGAINST HIM AT SENTENCING.

11 Trial Counsel had a duty to inform Petitioner that the
12 information provided in the Psycho-Sexual Exam would be included
13 in a report to the Trial Court and used against him at his
14 Sentencing. "Petitioner would have refused to provide damning
15 partial information to a psychologist whose report and
16 recommendations was instrumental in the Trial Court's decision to
17 sentence Petitioner to an 8 to 20 prison sentence rather than 2
18 to 20 that was in the plea agreement".

19 E. TRIAL COUNSEL FAILED TO MOTION TO HAVE THE TRIAL JUDGE
20 RECUSE HERSELF FROM PETITIONER'S CASE FOR BIAS.

21 "Petitioner had formal and informal private and very
22 public social, political and communal ties and affiliations to
23 and with the Trial Court, for approximately 18 months before
24 Petitioner's arrest. At this time, Her Honor acknowledged that
25 she knew Petitioner, and that she had conducted some research
26 into some rules regarding a possible recusal and then asked Trial
27 Counsel to conduct his own research into the matter; and that if
28 he could find any reason as to why she should recuse herself, she

1 would consider it then. Trial counsel failed to research the
2 issue as instructed by the Trial Court. Petitioner feels that any
3 competent attorney would know that it is not in the best
4 interests of a criminal defendant to go before any elected
5 official in election season; especially when said criminal
6 defendant was not only being charged with particularly heinous
7 crimes but the criminal defendant has very public formal and
8 informal, social, communal, and even political ties to the Trial
9 Court; who is also a prominent and widely known figure in the
10 communal, political and social arenas; as well as in the media".
11 "Trial Counsel failed to consider these realities and try
12 everything he could, within reason, to get a different judge
13 appointed, he sabotaged this Petitioner by further putting Judge
14 Wanker in an even tighter situation as well as the Petitioner's ;
15 as, in light of the listed facts alone, if this particular judge
16 gave any impression to the community that she was extending any
17 form of leniency toward Petitioner especially with the nature of
18 the criminal charges; it would have been detrimental to her
19 elected judicial position. Her Honor would have no other choice
20 but to make a point of not showing any favor. Her Honor would
21 have immediately recognized the necessity of severing any
22 publicly perceived friendship or affiliation with Petitioner and
23 distance herself from Petitioner to preserve her own reputation".

24 Petitioner was the Trial Court's sponsor for membership
25 in the Kiwanis Club, attended the same public meetings and
26 functions as Petitioner in Pahrump, Nevada, publicly endorsed the
27 Trial Court's first election, after her appointment as the
28 District Judge, by placing an electoral campaign support ad for

1 her in a community event ad brochure, by placing election support
2 banners at a local event as well as verbal endorsements of her
3 during her campaign, attended fund raising events and working on
4 her campaign after hours in her chambers, preparing materials for
5 a not for profit rodeo event and manned an election booth at that
6 event in 2012 in support of the Trial Court's election, was
7 helpful in supporting the Drug Court program by supplying service
8 volunteers for the Drug Court, participated with the Trial Court
9 in the Path of Hope Food Bank, Petitioner being Coordinator of
10 Community Operations at the New Hope Fellowship Church Community
11 Food Bank.

12 Trial Counsel had a duty to Motion the Trial Court to
13 Recuse Herself for Bias based on the relationship between the
14 Petitioner and the Trial Court.

15 F. TRIAL COUNSEL FAILED TO REVIEW THE FACTS OF THE CASE AND
16 DISCUSS ANY DEFENSES WITH PETITIONER.

17 Trial Counsel failed to review the facts of the case with
18 Petitioner and never discussed any defenses that Petitioner may
19 have had based on the facts of his case. The Petitioner spent the
20 entire time he was being prosecuted in the above-entitled matter
21 in the Nye County Jail in Pahrump. Trial Counsel rarely visited
22 the Petitioner and when he did visit he failed to discuss the
23 facts of the case or any defenses. Petitioner was given an
24 ultimatum of take it or leave it in the jail prior to his entry
25 of plea and opted to take it because he had no knowledge of the
26 facts of his case or if any defenses existed.

27 G. TRIAL COUNSEL FAILED TO INFORM PETITIONER OF THE
28 CONSEQUENCES OF PLEADING GUILTY TO ATTEMPTED SEXUAL ASSAULT.

1 Prior to the entry of a plea of GUILTY pursuant to ALFORD,
2 Trial Counsel failed to inform Petitioner that he could be
3 sentenced to a maximum sentence of 20 years with a minimum
4 sentence of 8 years. Petitioner understood that he would only
5 have to serve a minimum 2 years before he was allowed parole and
6 Trial Counsel never informed him of the 40% Rule that governs
7 Sentencing in Nevada. Trial Counsel had a duty to inform his
8 client that he could serve 8 years before being eligible for
9 parole and a maximum of 20 years.

10 H. TRIAL COUNSEL FAILED TO REQUEST A CONTINUANCE OF
11 PETITIONER'S TRIAL DATE AFTER HE WAS TOLD TO DO SO BY PETITIONER,
12 CAUSING PETITIONER TO ENTER A PLEA WHILE NOT OF SOUND MIND.

13 Petitioner wrote letters to Trial Counsel requesting that
14 his trial date be continued due to Petitioner's declining health.
15 Petitioner's request was ignored. Petitioner ended up in the
16 hospital after having a stroke and was admitted for 2 days. After
17 being released the Petitioner was not of sound mind and in no
18 condition to be dealing with anything pertaining to his case at
19 that time. Trial Counsel showed up at the Detention Center with a
20 plea agreement for a 2 to 20 year prison sentence after a plea of
21 guilty. At that time Petitioner was in no shape physically or
22 mentally, to deal with or discuss anything like that; and even
23 told Trial Counsel that, but Trial Counsel continued to pressure
24 Petitioner to review and discuss the deal. With absolutely no
25 energy to debate, Petitioner reluctantly agreed to the terms of
26 the deal. Petitioner objected to pleading Guilty and Trial
27 Counsel amended the Plea Agreement to reflect an Alford Plea the
28 next day. Petitioner was not of sound mind when he signed the

1 plea agreement and entered his Alford Plea while under the
2 effects of the stroke he suffered while in custody prior to entry
3 of his plea. Trial Counsel had a duty to continue Petitioner's
4 trial and his plea hearing to allow Petitioner to recover from a
5 stroke he had suffered and regain his mental capacity.

6 **6. CONCLUSION**

7 As stated above, all of the above, and some standing alone,
8 add up to ineffective assistance of counsel which makes the
9 Petitioner's guilty plea unreliable in violation of STRICKLAND.
10 Counsel's performance fell below an objective standard of
11 reasonableness, and their errors were so severe that it caused
12 their client to plead guilty in violation of STRICKLAND since
13 there was a reasonable probability that he would have chosen to
14 go trial.

15 I ask this Court to set an evidentiary hearing in this
16 matter, and I believe that after said hearing, this Court will
17 order a new trial.

18 SUBMITTED this 22nd day of September, 2015.

19 
20 DAVID H. NEELY III
21 Nev. Bar No. 003891
22 3520 E. Tropicana Ave, #D-1
23 Las Vegas, NV 89121
24 Attorney for Petitioner

25 **CERTIFICATE OF SERVICE BY MAIL**

26 I HEREBY CERTIFY that I am an agent or employee of the above
27 attorney, and that on the 22 day of September, 2015, I served
28 the above and foregoing AMENDED PETITION FOR WRIT OF HABEAS

1 (POST-CONVICTION) by depositing a copy in the United States
2 mails, postage prepaid, addressed to the following persons or
3 parties at their last known addresses as indicated below:

4 KIRK VITTO, Esq.
5 Chief Deputy District Attorney
6 P.O. Box 39
7 Pahrump, NV 89041


EMPLOYEE OR AGENT

COPY

Case No. PC-7444
Dept. No. 1

FILED

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

2016 MAY -4 P 1:25
TANNER DAVIS
NYE COUNTY CLERK
BY DEPUTY

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

MICHAEL A. MACK,	) PETITIONER'S OPPOSITION
	) AND REPLY TO STATE'S ANSWER AND
Petitioner,	) MOTION TO DISMISS PETITION FOR
	) WRIT OF HABEAS CORPUS
vs.	) (POST-CONVICTION)
	)
THE STATE OF NEVADA,	)
	)
Respondent.	)

Petitioner, MICHAEL A. MACK, by and through his Attorney, DAVID H. NEELY III, Esq., hereby files the following Petitioner's Opposition and Reply to State's Answer and Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction).

1. FACTS

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27 The question in this case is not whether appellant proved
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15 of counsel.' A petitioner is entitled to an evidentiary hearing
16 only if he supports his claims with specific allegations that if
17 true would entitle him to relief. The petitioner is not entitled
18 to an evidentiary hearing if his claims are belied or repelled by
19 the record.

20 Petitioner and his counsel are well aware of the provisions
21 of the above-mentioned NRS 34.810(2) and deny that the following
22 six (6) instances of Ineffective Assistance of Counsel fail to
23 demonstrate a basis of relief.

24 5. INSTANCES OF INEFFECTIVE ASSISTANCE OR COUNSEL

25 Petitioner alleges that his attorney has fallen below that
26 standard in the following six (6) instances which if, taken on
27 their own may not be enough to render the Petitioner's guilty
28 plea unreliable but when taken together, this attorney believes,

1 and I hope this Court agrees, that taken together, the
2 Petitioner's guilty plea is unreliable. The six (6) instances
3 are as follows:

4 INVESTIGATION

5 A. TRIAL COUNSEL'S INVESTIGATOR TO FAILED TO CONDUCT AN
6 EFFECTIVE INVESTIGATION OF THE CASE PRIOR TO THE ENTRY OF
7 PETITIONER'S PLEA OF GUILTY.

8 Trial Counsel retained an investigator but his investigator
9 failed to conduct an effective investigation of the Petitioner's
10 case. The investigator never interviewed the alleged victim's
11 husbands from her 4 previous marriages as to the mental capacity
12 of the alleged victim. The investigator never interviewed any of
13 the friends or acquaintances of the alleged victim as to the
14 mental capacity of the alleged victim. The investigator never
15 interviewed the Petitioner's daughter as to her thoughts as to
16 the mental capacity of her aunt. The mental capacity of the
17 alleged victim was never properly investigated to show that the
18 alleged victim was not a "person with mental illness" as alleged
19 in Count IV and Count VII nor was she a "vulnerable person" as
20 alleged in Count V and Count VIII in the Information. The
21 investigator never attempted to track down any of the alleged
22 victim's history of mental illness. The likelihood of the
23 Petitioner having a defense that would work at trial is highly
24 unlikely with respect to Count's IV and Count VII and Count V and
25 Count VIII.

26 In the Supreme Court Case of Sanborn v. State, 107 Nev. 399,
27 812 P.2d 1279. 1283. the Court held:

28 Focusing on counsel's performance as a whole, and with due

1 regard for the strong presumption of effective assistance
2 accorded counsel by this court and > Strickland, we hold
3 that Sanborn's representation indeed fell below an objective
4 standard of reasonableness. Trial counsel did not
5 adequately perform pretrial investigation, failed to pursue
6 evidence supportive of a claim of self-defense, and failed
7 to explore allegations of the victim's propensity towards
8 violence. Thus, he "was not functioning as the 'counsel'
9 guaranteed the defendant by the Sixth Amendment." >
10 Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

11 This was an example of the poor pre-trial investigation, or
12 the lack thereof, done by the defense prior to trial that led
13 their client to plead guilty. Counsel must prepare the case at
14 all levels, including preliminary matters in Justice Court.
15 Sanborn v. State, 107 Nev. 856, 822 P.2d. 11 (1991). Counsel's
16 performance fell below an objective standard of reasonableness,
17 and their errors were so severe that it caused their client to
18 plead guilty in violation of STRICKLAND since there was a
19 reasonable probability that he would have chosen to go to trial.

20 PLEA HEARING

21 B. TRIAL COUNSEL CAUSED HIS CLIENT TO ENTER A GUILTY PLEA
22 WHILE THE PETITIONER WAS SUFFERING THE EFFECTS OF A STROKE.

23 Trial Counsel knew that the Petitioner had just been
24 released from the hospital as the result of a stroke he suffered
25 while in the jail but still went forward with the Arraignment and
26 subsequent Guilty Plea pursuant to ALFORD when he was aware that
27 his client had just been released from the hospital as the result
28 of a stroke and was still in recovery. Petitioner was not of
sound mind at the time of entry of his plea and Trial Counsel
should not have allowed his client to plead Guilty until
Petitioner had regained his sound mind to enter a plea of Guilty
pursuant to ALFORD. Petitioner requested a continuance but was

1 told by Trial Counsel to take the deal. Trial Counsel had a duty
2 to request an Mental Competency Evaluation after the Petitioner
3 suffered a stroke to ensure that at the time of entry of plea he
4 was of sound mind.

5 Counsel's performance fell below an objective standard of
6 reasonableness, and their errors were so severe that it caused
7 their client to plead guilty in violation of STRICKLAND since
8 there was a reasonable probability that he would have chosen to
9 go to trial.

10 **SEX OFFENDER STATUS**

11 C. TRIAL COUNSEL FAILED TO INFORM PETITIONER THE
12 CONSEQUENCES OF BEING A TIER III SEX OFFENDER PRIOR TO ENTRY OF
13 PLEA.

14 Trial Counsel failed to advise the Petitioner what it meant
15 to be a Tier III Sex Offender prior to entry of his plea.
16 Petitioner was originally told that he would be a Tier II Sex
17 Offender prior to discovering at the Arraignment that he was
18 going to be a Tier III Sex Offender. Petitioner would not have
19 entered a plea of Guilty to an offense that required Tier III Sex
20 Offender status if he had understood the consequences.

21 Counsel's performance fell below an objective standard of
22 reasonableness, and their error's were so severe that it caused
23 their client to plead guilty in violation of STRICKLAND since
24 there was a reasonable probability that he would have chosen to
25 go to trial.

26 **PRETRIAL PREPARATION**

27 D. TRIAL COUNSEL FAILED TO REVIEW THE FACTS OF THE CASE AND
28 DISCUSS ANY DEFENSES WITH PETITIONER.

1 Trial Counsel failed to review the facts of the case with
2 Petitioner and never discussed any defenses that Petitioner may
3 have had based on the facts of his case. The Petitioner spent the
4 entire time he was being prosecuted in the above-entitled matter
5 in the Nye County Jail in Pahrump. Trial Counsel rarely visited
6 the Petitioner and when he did visit he failed to discuss the
7 facts of the case or any defenses. Petitioner was given an
8 ultimatum of take it or leave it in the jail prior to his entry
9 of plea and opted to take it because he had no knowledge of the
10 facts of his case or if any defenses existed.

11 Counsel's performance fell below an objective standard of
12 reasonableness, and their errors were so severe that it caused
13 their client to plead guilty in violation of STRICKLAND since
14 there was a reasonable probability that he would have chosen to
15 go to trial.

16 E. TRIAL COUNSEL FAILED TO INFORM PETITIONER OF THE
17 CONSEQUENCES OF PLEADING GUILTY TO ATTEMPTED SEXUAL ASSAULT.

18 Prior to the entry of a plea of GUILTY pursuant to ALFORD,
19 Trial Counsel failed to inform Petitioner that he could be
20 sentenced to a maximum sentence of 20 years with a minimum
21 sentence of 8 years. Petitioner understood that he would only
22 have to serve a minimum 2 years before he was allowed parole and
23 Trial Counsel never informed him of the 40% Rule that governs
24 Sentencing in Nevada. Trial Counsel had a duty to inform his
25 client that he could serve 8 years before being eligible for
26 parole and a maximum of 20 years.

27 Counsel's performance fell below an objective standard of
28 reasonableness, and their errors were so severe it caused their

1 client to plead Guilty in violation of STRICKLAND since there was
2 a reasonable probability he would have chosen to go to trial.

3 CONFLICT OF INTEREST

4 F. TRIAL COUNSEL HAD A CONFLICT OF INTEREST DURING HIS
5 REPRESENTATION OF THE PETITIONER WHICH HE NEVER DISCLOSED TO
6 PETITIONER.

7 Representation of a criminal defendant entails certain basic
8 duties. Counsel's function is to assist the defendant, and hence
9 counsel owes the client a duty of loyalty, a duty to avoid
10 conflicts of interest. See Cuyler v. Sullivan, supra 446 U.S., at
11 346, 90 S.Ct., at 1717. From the counsel's function as assistant
12 to the defendant derive the overarching duty to advocate the
13 defendant's cause and the more particular duties to consult with
14 the defendant on important decisions and to keep the defendant
15 informed of important developments in the course of the
16 prosecution. Counsel also has a duty to bring to bear such skill
17 and knowledge as will render the trial a reliable adversarial
18 testing process. See Powell v. Alabama, 287 U.S., at 68-69, 53
19 S.Ct., at 63-64. Strickland v. Washington, 466 U.S. 668, 104
20 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

21 One type of actual ineffectiveness claim warrants a similar,
22 though more limited, presumption of prejudice. In Cuyler v.
23 Sullivan, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the
24 Court held that prejudice is presumed when counsel is burdened by
25 an actual conflict of interest. In those circumstances, counsel
26 breaches the duty of loyalty, perhaps the most basic of counsel's
27 duties. Moreover, it is difficult to measure the precise effect
28 on the defense of representation corrupted by conflicting

1 interests. Given the obligation of counsel to avoid conflicts of
2 interest and the ability of trial courts to make early inquiry in
3 certain situations likely to give rise to conflicts, see, e.g.
4 Fed. Rule Crim. Proc. 44©, it is reasonable for the criminal
5 justice system to maintain a fairly rigid rule of presumed
6 prejudice for conflicts of interest. Even so, the rule is not
7 quite the per se rule of prejudice that exists for the Sixth
8 Amendment claims mentioned above. Prejudice is presumed only if
9 the defendant demonstrates that counsel "actively represented
10 conflicting interests" and that "an conflict of interest
11 adversely affected his lawyer's performance." Cuyler v. Sullivan,
12 *supra*, 446 U.S., at 350, 348, 100 S. Ct. at 1719, 1718.
13 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.
14 Ed. 2d 674 (1984).

15 Trial Counsel had negotiated the terms of his contract to
16 perform public defender services in Nye County with the Nye
17 County District Attorney. In fact, Trial Counsel negotiated the
18 termination of his previous contract that his firm, Gibson and
19 Kuehn, had in effect as the Nye County Public Defender with the
20 Nye County District Attorney. The Nye County District Attorney
21 represented Trial Counsel at two separate hearings before the Nye
22 County Board of County Commissioners as an advocate and as
23 counsel to Trial Counsel in his bid to be awarded a contract as
24 Public Defender after the termination of his firm's contract as
25 the Nye County Public Defender. After being awarded a contract to
26 perform public defender services, the Nye County District
27 Attorney assumed control of the public defender contracts and was
28 Trial Counsel's supervisor.

1 Trial Counsel never disclosed this relationship to
2 Petitioner during his representation. Petitioner had a right to
3 counsel that was independent of the District Attorney who was
4 prosecuting him. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100
5 S. Ct., at 1716-1719, the Court held that prejudice is presumed
6 when counsel is burdened by an actual conflict of interest which
7 is present in this case. In those circumstances, counsel breaches
8 the duty of loyalty, perhaps the most basic of counsel's duties.
9 Trial Counsel has breached his duty of loyalty by negotiating his
10 contract to perform public defender services with the Nye County
11 District Attorney and by working under the supervision of the Nye
12 County District Attorney after that contract was obtained.

13 Prejudice is presumed only if the Petitioner demonstrates
14 that counsel "actively represented conflicting interests" which
15 is present since Trial Counsel owed his continued employment to
16 serving the interests of the Nye County District Attorney. This
17 actual conflict of interest adversely affected his lawyer's
18 performance since the Petitioner received representation from
19 Trial Counsel that the Nye County District Attorney felt he was
20 entitled to, not what he deserved.

21 The Sixth Amendment recognizes the right to the assistance
22 of counsel because it envisions counsel's playing a role that is
23 critical to the ability of the adversarial system to produce just
24 results. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
25 80 L. Ed.2d 674, (1984). There was not an adversarial system
26 present in Nye County at this time and as a result there were no
27 just results.

28 7. CONCLUSION

1 As stated above, all of the above, and some standing alone,
2 add up to ineffective assistance of counsel which makes the
3 Petitioner's guilty plea unreliable in violation of STRICKLAND.
4 Counsel's performance fell below an objective standard of
5 reasonableness, and their errors were so severe that it caused
6 their client to plead guilty in violation of STRICKLAND since
7 there was a reasonable probability that he would have chosen to
8 go trial.

9 This case involves a serious miscarriage of justice as the
10 result of the actions of Trial Counsel and the Nye County
11 District Attorney.

12 I ask this Court to deny State's Motion to Dismiss Petition
13 for Writ of Habeas Corpus (Post-Conviction) and set an
14 Evidentiary Hearing in this matter.

15 SUBMITTED this 4th day of May, 2016.

16
17 
18 DAVID H. NEELY III
19 Nev. Bar No. 003891
20 3520 E. Tropicana Ave, #D-1
21 Las Vegas, NV 89121
22 Attorney for Petitioner

23 **CERTIFICATE OF SERVICE BY MAIL**

24 I HEREBY CERTIFY that I am an agent or employee of the above
25 attorney, and that on the 4th day of May, 2016, I served the
26 above and foregoing PETITIONER'S OPPOSITION AND REPLY TO STATE'S
27 ANSWER AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS
28 POST-CONVICTION by depositing a copy in the United States mails,
postage prepaid, addressed to the following persons or parties at

1 their last known addresses as indicated below:

2 KIRK VITTO, Esq.
3 Chief Deputy District Attorney
4 P.O. Box 39
5 Pahrump, NV 89041



EMPLOYEE OR AGENT



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Case No. PC7444A

FILED

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AMY DOWERS

CLERK
DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

MICHAEL ALLEN MACK,

Petitioner,

-v-

ORDER FOR HEARING ON WRIT
OF HABEAS CORPUS

THE STATE OF NEVADA,

Respondent.

The hearing on the Post Conviction Petition for Writ of Habeas Corpus is set for February 21, 2018 at 9:00 a.m. in the Pahrump District Court in Pahrump, Nevada. Counsel for the Defendant shall make the necessary arrangements to have the Defendant present.

DATED this 15th day of November 2017.


DISTRICT JUDGE

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 27 day of November, 2017 she
mailed (or hand delivered) copies of the foregoing ORDER to the following:

David Neely Esq.
3520 E. Tropicana Ave # D1
Las Vegas, Nv. 89121

Nye County District Attorney's Office
Tonopah, Nv. 89049



GERIE CLIFFORD, Secretary to
DISTRICT JUDGE



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

3 DAVID H. NEELY III, ESQ.
4 Nevada State Bar No. 003891
5 3520 East Tropicana Ave., Ste. D-1
6 Las Vegas, NV 89121
7 (702) 565-0716
8 Attorney for Petitioner

FILED
FIFTH JUDICIAL DISTRICT COURT

JAN 26 2018

NYE COUNTY DEPUTY CLERK
DEPUTY

DEBRA BENNETT

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

11 MICHAEL A. MACK,

12 Petitioner,

13 vs.

14 STATE OF NEVADA,

15 Respondent.

ORDER TO TRANSPORT PRISONER
TO COURT FOR HEARING

16 Upon ex parte application of the Defendant, Michael A. Mack,
17 by and through his attorney, David H. Neely III, Esq., and the
18 Court having reviewed the pleadings and papers on file herein,
19 being fully advised in the premises, pursuant to NRS 209.274, and
20 good cause appearing therefor,

21 THIS COURT FINDS that Michael A. Mack, Prisoner No. 1117749,
22 Lovelock Correctional Center, Lovelock, Nevada, is a necessary
23 and material witness in the Evidentiary Hearing, to be held in
24 Pahrump, Nye County on February 21, 2018 at 9:00 A.M.

25 IT IS HEREBY ORDERED that Michael A. Mack, Prisoner No.
26 1117749, be transported, together with all personal effects,
27 documents and papers pertinent to the above case, from the
28 Lovelock Correctional Center in Lovelock, Nevada, to the Nye
County Courthouse, 1520 East Basin Ave., Pahrump, Nevada, in

1 order to allow said Prisoner to appear and give testimony at the
2 Evidentiary Hearing in the above captioned matter set for
3 February 21, 2018 at 9:00 A.M.

4 DATED this 19th day of January, 2018.

5 
6 DISTRICT JUDGE

7
8
9 RESPECTFULLY SUBMITTED:

10 
11 DAVID H. NEELY III, ESQ.
12 Nev. Bar No. 003891
13 141 S. Frontage Road, Ste. D-1
14 Las Vegas, NV 89121
15 Attorney for Petitioner
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FILED
FIFTH JUDICIAL DISTRICT

JUL 23 2018

Nye County Clerk
Debra L. Melott Deputy

Case No. PC7444A

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

MICHAEL ALLEN MACK,

Petitioner,

-v-

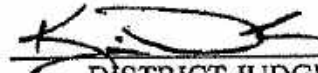
ORDER FOR HEARING ON WRIT
OF HABEAS CORPUS

THE STATE OF NEVADA,

Respondent.

The hearing on the Post Conviction Petition for Writ of Habeas Corpus is set for August 29, 2018 at 1:30 p.m. in the Pahrump District Court in Pahrump, Nevada. Counsel for the Defendant shall make the necessary arrangements to have the Defendant present.

DATED this 9th day of July 2018.


DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES

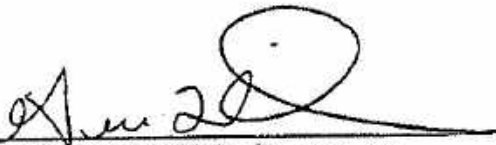


CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 23 day of July, 2018 she mailed (or hand delivered) copies of the foregoing ORDER to the following:

David Neely Esq.
3520 E. Tropicana Ave # D1
Las Vegas, Nv. 89121

Nye County District Attorney's Office
Pahrump, Nv. 89060


GERIE CLIFFORD, Secretary to
DISTRICT JUDGE



COPY

CASE NO. PC-7444A
DEPT. NO. 1

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

FILED
FIFTH JUDICIAL DISTRICT COURT

AUG - 2 2018

NYE COUNTY DEPUTY CLERK

DEBRA BENNETT

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

MICHAEL ALLEN MACK,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

EX PARTE APPLICATION FOR
ORDER TO TRANSPORT PRISONER
TO COURT FOR EVIDENTIARY
HEARING

Petitioner, MICHAEL ALLEN MACK, by and through his attorney, DAVID H. NEELY III, hereby the following ex parte application to this Court for an Order that the Petitioner, MICHAEL ALLEN MACK, Prisoner #1117749, be transported from the Lovelock Correctional Center, in Lovelock, Nevada, to the Nye County Courthouse, 1520 E. Basin Ave., Pahrump, Nevada, in order to allow said Petitioner to appear at the evidentiary hearing in the above captioned matter set for August 29, 2018 at 1:30 p.m.

Good cause exists for an ex parte nature of this application, since the prisoner is currently in the custody of the Nevada Department of Corrections. Petitioner and his attorney cannot reasonably proceed to prepare for the evidentiary hearing without an immediate order.

SUBMITTED this 31st day of July, 2018.

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

DECLARATION OF DAVID H. NEELY III

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, DAVID H. NEELY, III, Esq., do solemnly swear under penalty of perjury, pursuant to NRS 53.045, that the assertions of the following Declaration hereinbelow are true:

1. I am the attorney for the Petitioner and licensed to practice law in the State of Nevada. I can testify as to all matters herein on personal knowledge, except for those matters, I believe them true after reasonable investigation.

2. I am competent to testify to all matters herein on personal knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true after diligent investigation.

3. The above Application should be considered and granted by this Court ex parte, and outside the normal course for motions because the normal subpoena process is not applicable to prisoners given that they are incarcerated.

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

EXECUTED on this 31st day of July, 2018.


DECLARANT

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I am an agent or employee of the above attorney, and that on the 1st day of August, 2018, I served the above and foregoing EX PARTE APPLICATION FOR ORDER TRANSPORTING PRISONER by depositing a copy in the United States mails, postage prepaid, addressed to the following persons or parties at their last known addresses as indicated below:

ANGELA BELLO, Esq.
Nye County District Attorney
P.O. Box 593
Tonopah, Nevada 89049


EMPLOYEE OR AGENT

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

3 DAVID H. NEELY III, ESQ.
4 Nevada State Bar No. 003891
5 3520 East Tropicana Ave., Ste. D-1
6 Las Vegas, NV 89121
7 (702) 565-0716
8 Attorney for Petitioner

FILED
FIFTH JUDICIAL DISTRICT

AUG - 6 2018

[Signature] Nye County Clerk
Deputy

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

11 MICHAEL ALLEN MACK,
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ORDER TO TRANSPORT PRISONER
TO COURT FOR HEARING

vs.

THE STATE OF NEVADA,
Respondent.

Upon ex parte application of the Petitioner, MICHAEL ALLEN MACK, by and through his attorney, DAVID H. NEELY III, Esq., and the Court having reviewed the pleadings and papers on file herein, being fully advised in the premises, pursuant to NRS 209.274, and good cause appearing therefor,

THIS COURT FINDS that MICHAEL ALLEN MACK, Prisoner No. 1117749, Lovelock Correctional Center, Lovelock, Nevada, is a necessary and material party in the evidentiary hearing, to be held in Pahrump, Nye County, Nevada on August 29, 2018 at 1:30 p.m.

IT IS HEREBY ORDERED that MICHAEL ALLEN MACK, Prisoner No. 1117749, be transported, together with all personal effects, documents and papers pertinent to the above case, from the Lovelock Correctional Center in Lovelock, Nevada, to the Nye County Courthouse, 1520 East Basin Ave, #105, Pahrump, Nevada, in

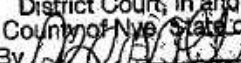
1 order to allow said Prisoner to appear and give testimony at the
2 evidentiary hearing in the above captioned matter set for 29th
3 day of August, 2018 at 1:30 p.m.

4 DATED this 6th day of August, 2018.

5
6 
DISTRICT JUDGE

7
8
9 RESPECTFULLY SUBMITTED:

10 
11 DAVID H. NEELY III
12 Nev. Bar No. 003891
13 3520 East Tropicana Ave., Ste. D-1
14 Las Vegas, NV 89121
Attorney for Petitioner

15
16 The document to which this certificate is attached
17 is a full, true and correct copy of the original
on file and of record in my office.
18 Date: 8-6-18
Sandra L. Menino, clerk of the Fifth Judicial
District Court, in and for the
County of Nye, State of Nevada
19 By  Deputy
20 Per NRS 208.030 the SSN may be redacted.
21 But in no way affects the legality of the document
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1 CASE NO. PC 7444A

2 DEPT NO. 1

3
4 IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT
5 COUNTY OF NYE, STATE OF NEVADA
6

7 MICHAEL ALLEN MACK,)

8 Petitioner,)

9 vs.)

10 THE STATE OF NEVADA,)

11 Respondent.)
12

TRANSCRIPT OF PROCEEDINGS

WRIT OF HABEAS CORPUS

13 BEFORE THE HONORABLE KIMBERLY WANKER,

14 DISTRICT COURT JUDGE

15 1520 EAST BASIN AVENUE, PAHRUMP, NEVADA 89060

16 ON WEDNESDAY, AUGUST 29, 2018

17 AT 1:32 P.M.

COPY

18
19 APPEARANCES:

20 For the Respondent: Kirk Vitto, Esq.

21 Chief Nye County Deputy District
22 Attorney

23 For the Petitioner: David H. Neely III, Esq.
24

25 Reported By: Tracy A. Manning, CCR No. 785

I N D E XWITNESSES FOR THE PETITIONERPAGE

THOMAS GIBSON

Direct Examination by Mr. Neely

6

Cross-Examination by Mr. Vitto

22

Redirect Examination by Mr. Neely

32

E X H I B I T SPETITIONER'S EXHIBITSMARKEDADMITTED

(No exhibits were marked or admitted by the
petitioner or the State.)

1 WEDNESDAY, AUGUST 29, 2018

2 ---oOo---

3 THE COURT: Good afternoon, Mr. Mack. How
4 are you today?

5 THE DEFENDANT: Good afternoon. I'm doing
6 pretty good, thank you.

7 THE COURT: Good. This is the time and
8 place set for a hearing on the writ of habeas
9 corpus. I set it for hearing.

10 Basically, Mr. Mack filed a writ of habeas
11 corpus and a supplemental writ of habeas corpus,
12 alleging ineffective assistance of counsel. And
13 basically, there were 11 bases for that.

14 The first was that the trial court's
15 investigator -- I'm sorry, trial counsel's
16 investigator failed to conduct an effective
17 investigation of the case prior to the entry of
18 Mr. Mack's plea of guilty.

19 Second, trial counsel caused his client to
20 enter a plea of guilty while the -- while Mr. Mack
21 was suffering from the effects of a stroke.

22 Third, trial counsel failed to inform
23 Mr. Mack of the consequences of being a Tier III sex
24 offender prior to entry of plea.

25 Four, trial counsel failed to review the

1 facts of the case and discuss any defenses with
2 Mr. Mack.

3 Five, trial counsel failed to inform
4 Mr. Mack of the consequences of pleading guilty to
5 attempted sexual assault. And I will note he did
6 not plead guilty but guilty pursuant to Alford.

7 Six, trial counsel had a conflict of
8 interest during his representation of Mr. Mack which
9 he never disclosed to petitioner, which is Mr. Mack.

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

14 Eight, trial counsel failed to inform
15 Mr. Mack that the information obtained during the
16 psychosexual examination could be used against him
17 at sentencing.

18 Nine, trial counsel failed to use relevant
19 information in his investigation provided by
20 Mr. Mack.

21 Ten, trial counsel failed to make -- to
22 motion to have Mr. Mack's statements suppressed that
23 were made to the State at the time of arrest.

24 And eleven, trial counsel failed to move
25 to have the trial court judge recuse herself from

1 Mr. Mack's case for bias.

2 So Mr. Neely, have I covered all of the
3 bases for --

4 MR. NEELY: Well, yeah, those were -- many
5 of those were his and some were mine.

6 THE COURT: All right, all right. But
7 that would be the sum and substance --

8 MR. NEELY: Yes, ma'am, that would be
9 complete for sure.

10 THE COURT: All right, okay. This is your
11 writ of habeas corpus, so let me hear -- and I
12 thoroughly examined the file and the trial file
13 before coming in today, so I think I'm up to speed.

14 MR. NEELY: Okay. We would call
15 Mr. Gibson, Your Honor.

16 THE COURT: All right.

17
18 THOMAS GIBSON,

19 having been duly sworn

20 was examined and testified as follows:

21

22 THE COURT: Mr. Gibson, please be seated.
23 Would you please state and spell your first and last
24 name for the court reporter?

25 THE WITNESS: Thomas Gibson, G-i-b-s-o-n.

1 THE COURT: Thank you, Mr. Gibson.

2 Mr. Neely, you may proceed.

3 MR. NEELY: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MR. NEELY:

6 Q. Mr. Gibson, were you appointed to
7 represent Mr. Mack?

8 A. Yes, I was.

9 Q. And my notes indicate the date you were
10 appointed was approximately 4-16-2013; is that your
11 recollection, too?

12 A. That sounds correct.

13 Q. Okay. And at that time, were you a
14 contract attorney with Nye County to provide
15 indigent defense?

16 A. I was.

17 Q. Okay. And you were appointed in the
18 Pahrump Justice Court?

19 A. My recollection, yes.

20 Q. Okay. And when you got the case, Mr. Mack
21 was facing numerous Category A felonies?

22 A. Yes.

23 Q. And, in fact, they were sexual assault
24 Category A felonies, weren't they?

25 A. Correct.

1 Q. And wasn't it your usual practice to
2 retain an investigator in such a serious case?

3 A. Not always. It depends. If it looks like
4 the case is going to trial, of course. We, from the
5 very beginning, were trying to find a -- trying to
6 negotiate the matter because of the strength of the
7 case against the defendant.

8 Q. And did you hire an investigator in the
9 matter?

10 A. I did not.

11 Q. And wasn't the alleged victim's mental
12 capacity an issue in the case?

13 A. Yes.

14 Q. And at the preliminary hearing, I think
15 you raised that issue with -- with the alleged
16 victim.

17 A. I did.

18 Q. And I think you also raised that issue
19 with Susan Kallaher from the State of Nevada's
20 rehabilitation services?

21 A. That, I don't -- I don't recall.

22 Q. So at that time you didn't have your
23 investigator interview any of the alleged victim's
24 four ex-husbands as to her mental capacity?

25 A. I did not.

1 Q. And -- so you didn't have an investigator,
2 so I take it you didn't interview any of the alleged
3 victim's friends or acquaintances as to her mental
4 capacity?

5 A. No.

6 Q. And both you and -- like we spoke earlier,
7 both you and Mr. Gensler, who was representing the
8 co-defendant, cross examined Susan Kallaher for the
9 State?

10 A. I don't recall that. But it -- it's been
11 a while.

12 Q. And during the preliminary hearing,
13 when -- I don't know if you recall, Mr. Gensler had
14 Ms. Kallaher admit that the alleged victim had a
15 long history of creating lies, fabrications and
16 stories?

17 A. Yes, I remember that.

18 Q. And you didn't follow up with an
19 investigator yourself on any -- upon any of those
20 allegations?

21 A. No.

22 Q. Okay. On -- looks like on December the
23 4th an arraignment was held, but it was canceled due
24 to an illness Mr. Mack had suffered?

25 A. I can't -- I couldn't hear you.

1 Q. There was an arraignment held on 12-4 in
2 the District Court here, but it was canceled.

3 A. I have no independent recollection of
4 that.

5 Q. Okay. So if I were -- if I told you that
6 it was canceled because Mr. Mack had been taken to
7 the hospital due to a stroke, would you remember
8 that?

9 A. I do remember him having some medical
10 issues.

11 Q. Okay. And then two days later on 12-6, if
12 you remember another arraignment was held where
13 Mr. Mack pled guilty to the Count I of attempted
14 sexual assault?

15 A. Yes.

16 Q. Were you aware that Mr. Mack had just been
17 released from the hospital, a result of a stroke,
18 and was in recovery?

19 A. I recall he was released from the hospital
20 and had medical issues. To the extent what it was,
21 I don't remember.

22 Q. And did Mr. Mack ask you to continue the
23 arraignment?

24 A. I don't remember that.

25 Q. Mr. Mack alleges that you told him to take

1 the deal.

2 A. I'm sorry?

3 Q. Mr. Mack alleges that you told him to take
4 the deal.

5 A. I don't remember the specific language
6 between us two, but I do recall that after
7 reading -- after the preliminary hearing and reading
8 the discovery on file. And then there was another
9 witness, I believe, and I can't recall -- another
10 alleged victim was going to materialize or -- I got
11 information on that. And based on the totality, I
12 told him the best option -- and this is my -- I'm
13 paraphrasing, but the best option he had was to try
14 to minimize his exposure rather than run the risk of
15 getting, you know, a greater sentence.

16 Q. Thank you. And after -- after you heard
17 he had been ill, had a stroke, you didn't ask for a
18 competency evaluation as a result of his stroke?

19 A. He was communicating with me, so I saw no
20 reason for it. And based on my history with the --
21 with Lake's Crossing and they would find even people
22 that are absolutely raving blathering lunatics to be
23 competent, it doesn't -- I only play that card when
24 it's absolutely necessary.

25 Q. I understand. And it appears that

1 Mr. Mack's arraignment, that the -- actually, the
2 District Court said that she understood he had been
3 under the weather during the arraignment; do you
4 remember the Court --

5 A. I don't remember that.

6 Q. And I think, if you remember, the Court
7 asked -- he asked the Court if he could sit down and
8 she agreed?

9 A. I don't recall that.

10 Q. And do you recall she allowed him to sit
11 during the proceedings?

12 A. Same answer.

13 Q. Okay. And may I ask you, when you
14 discussed the plea memorandum with Mr. Mack, you
15 told him at that point he was going to be a Tier II
16 sex offender?

17 A. We were given information at the time
18 that -- whatever I told him it was, I, II, or III.
19 And then later on they changed the law, or the law
20 was changed, and it was retroactive. And there's --
21 but that's true.

22 Q. You were wrong about his tier level,
23 weren't you?

24 A. Yes.

25 Q. And, in fact, he was subject to Tier III

1 registration, wasn't he?

2 A. I found that out after the fact, yes. I
3 mean, after we had already entered our plea.

4 Q. And you had to amend the plea memorandum
5 to reflect Tier III, didn't you?

6 A. That did -- again, up to that point,
7 though, we were thought -- we were -- I was -- we
8 were going under the assumption it was going to be a
9 II.

10 Q. When you talked to him in the jail, you
11 told him he was going to be Tier II after he took
12 the plea.

13 A. That was my understanding.

14 Q. And was -- and Mr. Mack was surprised to
15 find out he was going to be a Tier III, wasn't he?

16 A. He was disappointed. I don't know how
17 surprised he was.

18 Q. Did you review the facts of the case with
19 Mr. Mack?

20 A. Oh, yeah.

21 Q. And did you discuss any defenses that were
22 available to him?

23 A. Yes.

24 Q. And approximately how many times did you
25 visit him in the jail?

1 A. I don't know. I don't remember. More
2 than one, I know that. And more than a few.

3 Q. Did you give Mr. Mack an ultimatum of take
4 it or leave it in the jail after discussing his plea
5 bargain?

6 A. That's not my style. I don't recall doing
7 that. I don't think I did that.

8 Q. And did you discuss the range of
9 punishments that was possible pursuant to his guilty
10 plea with Mr. Mack?

11 A. Yes.

12 Q. And did you discuss the 40 percent rule
13 with Mr. Mack?

14 A. I don't recall if I discussed the
15 40 percent rule.

16 Q. Did -- did you tell Mr. Mack he'd be
17 facing a maximum sentence of 20 years and a minimum
18 sentence of eight years prior to entering his plea?

19 A. If that were the parameters. Again, I
20 don't have everything in front of me. But if that
21 was what was in the plea agreement, then I would
22 have gone over that with him in detail.

23 Q. Did you inform Mr. Mack that he would only
24 be facing a minimum two-year sentence?

25 A. No.

1 Q. And a couple more questions here.

2 So prior to your contract as an individual
3 contractor, your prior firm Gibson & Kuehn had the
4 public defender contract, didn't it?

5 A. Yes.

6 Q. And your prior firm, Gibson & Kuehn began
7 to kind of break apart due to Mr. Kuehn's legal and
8 ethical issues?

9 A. Yes.

10 Q. And it was a result of the Fellini (ph)
11 case, which is a case everybody heard about, the cow
12 getting hit and he got in a lot of trouble with the
13 State bar.

14 A. Yeah. I think he was disbarred, actually.

15 Q. He actually became disbarred. And had it
16 become apparent that your -- Mr. Kuehn could lose
17 his license at one point?

18 A. Repeat?

19 Q. Did it become apparent to you when you
20 were still his partner that he could lose his
21 license?

22 A. It -- that was an issue. I felt that
23 based on the circumstances, that he -- he could lose
24 his license, at the very minimum being suspended.
25 And Mr. Earnest disagreed with me. He said Harry

1 would just get a slap on the wrist based on his
2 research. And Harry ran with that.

3 Q. And did you consider dissolving your law
4 firm?

5 A. Did I what?

6 Q. Consider dissolving Gibson & Kuehn?

7 A. It's no longer in existence.

8 Q. So it actually did dissolve.

9 A. No, we actually haven't closed it up yet,
10 because there's still -- I haven't -- there's tax
11 issues and other things that were -- it's in the
12 process. But --

13 Q. That's not relevant. We're not going to
14 get into that.

15 A. It's a slow -- it's a slow death.

16 Q. I understand. Now, did you approach the
17 then DA, Brian Kunzi, about taking over the public
18 defender contract you had?

19 A. I think, if I recall, Mr. Earnest and
20 Mr. Kuehn explained to me that they had been in
21 conversations with Mr. Kunzi about this -- the new
22 Humboldt plan that they wanted to get into. And we
23 were told -- well, yes.

24 Q. Okay. And what was your understanding of
25 the offer Mr. Kunzi made to you? I know you just

1 referred it as a Humbolt --

2 A. Take it or leave it. If we -- if we
3 agreed to go along with -- and opt out of our
4 contract early and take -- and submit to the
5 Humboldt plan, that we would be given a contract by
6 the county that he -- wasn't guaranteed, but he
7 would be urging the county commission to approve the
8 plan. And that we would be the first three
9 contracts that would be approved. If we -- if I --
10 any one of us did not agree with it, then there
11 would be no promises.

12 Q. Was it a take it or leave it kind of a
13 deal?

14 A. Absolutely. That's how I took it.

15 Q. And was your understanding that if you
16 fought him you wouldn't get a contract?

17 A. My understanding if I fought him, that is
18 a possibility I wouldn't have gotten the contract.
19 Because I was led to believe that he had great
20 influence over the commissioners.

21 Q. And who drafted the contracts?

22 A. Kunzi.

23 Q. And who sent the contracts out?

24 A. Who sent it out?

25 Q. Yeah. Did you receive the contracts from

1 Mr. Kunzi?

2 A. I got -- I got a copy of it, yes.

3 Q. Okay. And did Mr. Kunzi represent you at
4 the commissioners' meeting when they heard the pitch
5 for the contracts?

6 A. That's my recollection.

7 Q. And --

8 THE COURT: I've got a question on that.
9 You said represent. Did Mr. -- was Mr. Kunzi
10 retained as your counsel? That's the allegation --

11 THE WITNESS: Never.

12 THE COURT: -- that's the question.

13 Maybe you need to clarify that, Mr. Neely.
14 Because you're saying that he -- that Mr. Kunzi
15 represented. And in the legal context, legal
16 representation is he would have acted as counsel for
17 Mr. Kuehn and Mr. Gibson. Is that what you're
18 asking?

19 MR. NEELY: Let me put it -- let me
20 rephrase it.

21 Q. So when you went to the commissioners'
22 meeting, Mr. Kunzi was there, he put forward the
23 idea of the Humboldt plan?

24 A. He -- yes, he was the one who was there
25 representing the county commission -- or the -- he

1 was the DA who represents the commission, and he was
2 the one that was speaking to the commissioners.
3 Now, I don't remember if he got up and spoke in
4 front of them in detail, but I believe most of the
5 bargaining was done behind closed doors.

6 Q. Okay. And was it -- was it Mr. Kunzi who
7 was really the driving force behind the Humboldt
8 plan?

9 A. Yes.

10 Q. And was it your understanding that it
11 would be Pam Webster who was going to be the
12 supervisor of the public defenders?

13 A. No.

14 Q. Did you -- was it your understanding that
15 the plan that he put forward would probably save the
16 county half a million dollars?

17 A. Something like that, yeah.

18 Q. That would be because they would not be
19 using any of the other conflict lawyers?

20 A. That's my understanding.

21 Q. Yeah. And would you -- was it your
22 understanding the desire was to eliminate the
23 expense of paying separate lawyers?

24 A. Yes.

25 Q. And did you ultimately lose your job as a

1 contract public defender?

2 A. Yes. Well, it wasn't renewed. I didn't
3 lose it, it -- yeah, they didn't renew it.

4 Q. Was it over insurance?

5 A. No.

6 Q. I think --

7 A. No. But if you want to ask a follow-up
8 question.

9 Q. Yeah. What was it over?

10 A. I was accused of not having insurance.
11 And I -- and I showed my proof of insurance. And
12 they said, oh, this is just a -- I believe a rider
13 or a proof that I had -- had insurance. But they
14 wanted -- then Pam asked for the policy, which I
15 didn't have handy and I had to order it and get it.
16 And then I went over to her office, dropped it on
17 her desk and said, "There it is, knock yourself
18 out." Politely.

19 Q. Did you feel set up in the way your
20 contract --

21 A. Oh, yes. Yes.

22 Q. -- ended?

23 And who do you think was setting you up?

24 A. Well, my understanding -- my belief is --
25 set -- when you say "set up," please be more

1 specific. What do you mean by that?

2 Q. Do you feel like, you know, the fix was in
3 that you would lose your contract after one year?

4 A. There were -- there was another issue that
5 came up before the -- I mean right after the
6 insurance. And that was the retention of files.
7 Which belonged to the former firm of Gensler,
8 Earnest. And Harry Kuehn chartered -- whatever
9 Harry was going under at that time. Those are all
10 old files, that they were not public defender files
11 that we were maintaining. Those were old other
12 independent files.

13 And I got a frantic call from Pam Webster
14 demanding I go pick them up in -- in Tonopah. And I
15 got a call from the State bar and Brian Kunzi. And
16 I had to -- said the same thing to all three of
17 those entities. "Not my files, not my problem.
18 Talk to Earnest or Kuehn or Gensler."

19 And so that was all -- that was another
20 rift that we had. Because they, for some reason,
21 presumed it was going to be my problem. And then --
22 but then Earnest actually went and picked all those
23 files up in Tonopah later. They were being stored
24 up there by Bob Bruschetta in one of his buildings.

25 Q. Mr. Gibson, who do you think was the --

1 was the ultimate boss on the contract attorneys at
2 that -- when you were working there? Who had hiring
3 and firing -- did Mr. Kunzi have the ability to get
4 you fired if he wanted?

5 A. Do I know or do I suspect?

6 Q. Do you suspect.

7 A. I suspect that Mr. Kunzi had control over
8 the situation, and that Pam Webster pretty much did
9 whatever he wanted her to do. And I -- and I -- and
10 Kunzi had a history of when he decided that someone
11 needed to leave, he slowly built up a file in order
12 to get rid of them, as evidenced by some of the
13 people who used to work in his office, some of the
14 attorneys. But what he did with -- with -- with me
15 was, he started that deal with the no insurance and
16 then with the -- with the maintaining files.
17 Neither one of those had anything to do with me, but
18 I know that they were using that as their --

19 MR. VITTO: Your Honor, I'm going to
20 object at this point. I mean, I've allowed a lot of
21 leeway here. I think we're getting really far
22 afield --

23 MR. NEELY: This is going to be my last
24 question.

25 MR. VITTO: -- any of this is relevant.

1 THE COURT: I'm going to sustain it. This
2 is way off the field. Whether or not he has a
3 contract. There's been nothing established on time
4 frame. I think it's totally irrelevant.

5 The issue here are addressing the number
6 of complaints that were raised by Mr. Mack for the
7 basis he accepted a guilty plea, there is a standard
8 by which counsel must establish ineffective
9 assistance of counsel, and bias and prejudice of the
10 judge, which are the bases for all of this.

11 And this is speculation and I suspect this
12 and I suspect that. Has nothing to do -- there's
13 been no nexus.

14 The objection is sustained. Let's stick
15 to the issues of the writ of habeas corpus.

16 MR. NEELY: I've got no further questions,
17 Your Honor.

18 THE COURT: Mr. Vitto? Do you have any
19 questions of the witness?

20 MR. VITTO: Just a couple, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. VITTO:

23 Q. Mr. Gibson, how strong was the State's
24 case against your client?

25 A. Extremely strong.

1 Q. Extremely strong. In fact, he had made
2 admissions that could be considered confessions?

3 A. Under attorney-client privilege, I'm
4 not -- defer to the Court whether I should answer
5 that.

6 Q. Attorney-client privilege is gone. As
7 soon as he brings a claim against you.

8 A. No, I understand.

9 Q. But I have no problem with you asking the
10 Court for permission to answer.

11 THE COURT: I think you should answer.
12 He's alleged attorney malpractice -- or ineffective
13 assistance of counsel.

14 THE WITNESS: Okay. So -- and repeat the
15 question, Mr. Vitto.

16 BY MR. VITTO:

17 Q. Did, in fact, your client make admissions
18 during interviews that could be considered
19 confessions to the crimes that were alleged?

20 A. Early on in the case he was in denial.
21 Later on, when he saw most of the evidence and we
22 saw the thing coming together, and he -- in fact,
23 that he was going to have to plead -- that the offer
24 was to plead guilty --

25 Q. Hold on a second, Counsel. I'm sorry.

1 I'm not asking you what your client told you. I'm
2 asking what is reflected in the police reports, in
3 his interviews with police.

4 A. Yes, is my recollection.

5 Q. Okay. Now, looking at what he was
6 originally charged with, multiple counts of sexual
7 assault, each of which carried a life sentence that
8 could have been run consecutively, looking at that,
9 in conjunction with what he ultimately pled guilty
10 to and was sentenced upon, looking at just the
11 record itself, it appears to me, and I'm asking your
12 opinion, it appears to me that through your
13 representation of him, you were able to remarkably
14 and dramatically reduce his exposure to the criminal
15 justice system.

16 A. Correct. And that's why I -- we didn't
17 have -- the investigator didn't go to trial mode.
18 Obviously, most cases you should start off being
19 ready to go to trial mode. And other times you
20 don't because why would you kick a person in the
21 shins that you're asking for a favor or a reduction?

22 Q. And, you know, maybe it's important for
23 the Court to understand. Counsel, how long have you
24 been practicing law?

25 A. Too long. Since -- since I graduated law

1 school in '87, started practicing regular practice
2 in January '88.

3 Q. So you've worked as a prosecutor?

4 A. Yes.

5 Q. Federal public defender?

6 A. No.

7 Q. Did you work --

8 A. I'm sorry, I'm sorry. I -- my -- the
9 first job I had was a -- was a state prosecutor out
10 of Buffalo County, Carney, Nebraska. I have been a
11 federal public defender for four and a half years
12 out of the Western District of Tennessee.

13 Q. Okay. And then, of course, you worked as
14 a Nye County public defender, you've worked --
15 you've represented clients, defendants privately,
16 you worked as a prosecutor here in Nye County; all
17 of that is true, correct?

18 A. Yes.

19 Q. How many defendants do you think you've
20 represented in your legal career?

21 A. Thousands, tens of thousands.

22 Q. Okay. Counsel, at some point during these
23 proceedings, did there come a time when there was no
24 need to further investigate this matter?

25 A. That's -- that was my professional

1 opinion.

2 Q. And at what point was that?

3 A. Early on, when we decided that we wanted
4 to seek a reasonable resolution to the -- to the
5 charges. And as you said, based on my reading of
6 what he was looking at versus what Mr. Mack would
7 have received had we -- probably would have received
8 had we gone to trial, the only sane thing to do was
9 to minimize his exposure, which I believe we did.

10 Q. Now, there's been some talk about medical
11 issues. Were you aware or was it obvious that there
12 were some kind of medical issue that should preclude
13 the process going forward at any time?

14 A. When I spoke with him, even after he was
15 in the hospital, he was able to answer questions
16 clearly and concisely. He had no apparent issues
17 with recollection or being able to assist counsel.
18 Those are the things that a medical provider would
19 look at for -- for competency or insanity.

20 Q. And you were there when the Court
21 canvassed the defendant. You were right next to the
22 defendant when the Court canvassed him in regard to
23 there being any reason why we shouldn't go forward
24 today.

25 A. Correct.

1 Q. And Her Honor usually asked something to
2 the effect, "How are you feeling today?" Do you
3 remember something like that?

4 A. I don't remember those words, but she --
5 yes, in the normal course.

6 Q. Now, Counsel, we know, we read the case
7 law, we know that a defendant needs to know whether
8 an offense is probationable or not before they plead
9 guilty or when they plead guilty, right?

10 A. Correct.

11 Q. And we know that advising them of duties
12 to register as a sex offender, lifetime supervision,
13 those are all good things to canvas a person
14 regarding, right?

15 A. Correct.

16 Q. How about specifically referencing tier
17 levels? Are you -- let me ask you the question.

18 In regard to tier levels, are you aware of
19 any legal requirement that requires anybody to
20 canvas anyone on that particular subject?

21 A. Not to my recollection, no. If the
22 question is asked, I'll go do some research for it.
23 And as a matter of fact -- I -- looking back on it,
24 I think that this was the first time that a tier --
25 tier issue ever even came up in my experience.

1 Where -- where the thing -- we thought it was one
2 and it was another. Or that they had -- because I
3 remember, I think they had changed -- they had
4 changed the tiers, and that's what would cause this
5 issue to come up. So this was the first time it
6 ever was an issue.

7 Q. So just let me ask you directly, Counsel.
8 As pointed out by the Court, the defendant is
9 alleging that you were ineffective for failing to
10 investigate the case before plea entering. But --
11 well, is that true?

12 A. I didn't fail. I told him that I was
13 going -- that -- I didn't tell him I wasn't going to
14 get an investigator. I told him we were in -- in
15 negotiation mode, not trial mode.

16 Q. And that was the decision that the two of
17 you reached --

18 A. Oh, yeah.

19 Q. -- in negotiating your posture.

20 A. I don't -- I never tell anyone they have
21 to take a deal.

22 Q. Do you feel that you had an adequate
23 understanding of the facts of the case?

24 A. Yes.

25 Q. One of the issues, which apparently is why

1 some of the questions were asked during direct
2 examination, has to do with you having some kind of
3 undisclosed conflict of interest.

4 Do you have any idea what the defendant is
5 referencing?

6 A. No.

7 Q. So there are questions about your
8 contract, Pam Webster, Mr. Kunzi. Did any of that
9 or anything that you were testifying about have
10 anything to do with your representation of the
11 defendant?

12 A. Not at all.

13 Q. Did it interfere with your representation
14 of the defendant?

15 A. No. That would have been just personal to
16 me and them.

17 Q. The defendant is making reference to
18 something about failing to continue the trial date
19 when you were told to by him. Do you know what he's
20 talking about?

21 A. No.

22 Q. He's referencing something about a failure
23 to inform that psychosexual interview information
24 could be reviewed and used by the Court or counsel.
25 Do you know what he's talking about?

1 A. No. I mean -- I don't -- I don't know.

2 Q. Did he -- was there any discussion about
3 suppressing statements he made to law enforcement?

4 A. If those -- if that was an issue, and I
5 don't recall that specific issue, but I mean, in my
6 normal course, if there are things that could or
7 should be suppressed then I will discuss that with
8 the client. And then again, it's -- everything is
9 always tempered with if, we're trying -- if our goal
10 is to negotiate the best deal possible for fear of
11 what the worst case scenario being convicted of all
12 charges, then, yeah, we'll go over all those things
13 in great detail.

14 But -- and they were mentioned, they're
15 discussed. But beyond that, we didn't -- I didn't
16 get into all the psychosexual issue. I mean,
17 that's -- I do explain it to the client that if they
18 take the plea, a plea, anything that is in the
19 record can be used against them. And the judge has
20 access to those materials if they're provided to the
21 judge.

22 Q. You know, in our line of work, it seems to
23 me that issue spotting is probably one of the most
24 important things that we can do to speed the process
25 along. What is a case? What isn't a case? In line

1 with that, as it pertains to suppressing statements
2 made to law enforcement, is that something that you
3 could possibly miss?

4 A. No.

5 Q. And lastly here, the defendant has
6 referenced something about the Court and bias. Do
7 you have any idea what he's talking about?

8 A. No.

9 Q. Did he ever say something to you?

10 A. Actually, my recollection is that -- that
11 Mr. Mack was very happy that Judge Wanker was the
12 judge because he had worked with her at the Food
13 Bank. I believe it was the Food Bank. Something
14 through New Hope. And that his experience with her
15 was always very positive, and so he was very
16 comfortable with -- with her being the judge.

17 Q. Okay. So he was hoping that perhaps his
18 familiarity with the Court would put him in good
19 graces.

20 A. I believe he was counting on it.

21 Q. Okay.

22 A. Although I did explain to him that -- that
23 regardless of how friendly a judge is with you, the
24 judge is going to follow the law. I did temper it
25 with that. But he was very positive about having

1 Judge Wanker the sitting judge in this matter.

2 MR. VITTO: I have no more questions, Your
3 Honor.

4 MR. NEELY: I just have one, Your Honor.

5 THE COURT: Okay.

6 REDIRECT EXAMINATION

7 BY MR. NEELY:

8 Q. Did Mr. Mack send you a letter asking you
9 to postpone his trial due to illness?

10 A. I do not recall.

11 MR. NEELY: No further questions, Your
12 Honor.

13 THE COURT: Okay, all right. Thank you,
14 Mr. Gibson. Appreciate your time today.

15 Mr. Neely, who's your next witness?

16 MR. NEELY: That was the only witness
17 we're going to call, Your Honor.

18 THE COURT: Okay, all right.

19 Mr. Vitto, do you have any witnesses?

20 MR. VITTO: I have no witnesses, Judge.

21 THE COURT: Okay. Do you have argument?

22 MR. VITTO: You know, this is so brief.
23 I'll be glad to go first.

24 MR. NEELY: Sure.

25 MR. VITTO: This is just a petition that

1 is legally, woefully deficient. The defendant is
2 the moving party. He has the burden of presenting
3 to this Court something that is outcome
4 determinative and something that reflects on the
5 plea process. He has to show that his counsel,
6 Mr. Gibson, having represented defendants as long as
7 he has, in as many different places as he has, in
8 many different capacities, tens of thousands of
9 clients, with the canvas that we have that's a part
10 of the record, the defendant bears the burden of
11 demonstrating to this Court that counsel was
12 ineffective during the plea process.

13 And would not only have to show that
14 counsel was ineffective, but then have to show that
15 what it is that counsel was ineffective at was
16 actually outcome determinative. That it actually
17 would have made a difference. He's fallen woefully
18 short. He hasn't come anywhere near the burden that
19 he would have to manifest to this Court. This
20 petition should be dismissed.

21 THE COURT: Thank you.

22 Mr. Neely?

23 MR. NEELY: Thank you, Your Honor.

24 So, of course, we feel differently. Just
25 quickly go through our issues here. Our position is

1 that at trial, that counsel's failure to hire an
2 investigator to do an effective investigation of the
3 case prior to petitioner's plea of guilty.

4 And Mr. Mack has always alleged that trial
5 counsel caused his client to enter a guilty plea
6 while petitioner was suffering from the effects of a
7 stroke.

8 And this is something else Mr. Mack's
9 always alleged, Your Honor. The trial counsel
10 failed to inform the petitioner of the consequence
11 of being a Tier III sex offender prior to entry of
12 the plea.

13 In addition, trial counsel failed to
14 review the facts of the case or discussing the
15 defense with petitioner.

16 And trial counsel failed -- failed to
17 inform the petitioner the consequence of pleading
18 guilty to attempted sexual assault and the
19 punishments therefore.

20 And as far as the conflict of interest,
21 our position is that given the relationship that
22 Mr. Gibson had with the DA's office in procuring and
23 having a contract at that time when he was the
24 generating force behind the Humboldt system, that
25 there was a conflict of interest between Mr. Gibson

1 and any criminal defendant under that contract.

2 Thank you, very much.

3 THE COURT: Thank you. All right.

4 Anything else from anyone?

5 MR. NEELY: No, Your Honor.

6 THE COURT: Okay.

7 So the Court's looked very carefully, went
8 back through the entire trial file and read
9 everything, including the preliminary hearing
10 transcript, the transcripts of all the hearings that
11 were held in this case by this Court.

12 And I want to address a couple of things.
13 One, it's a difficult -- it's a difficult burden to
14 set aside a guilty plea when there's been a written
15 guilty plea agreement. The defendant was
16 thoroughly, thoroughly canvassed by the Court at the
17 time that he entered his plea. So I want to go
18 through the bases that he set forth in his writ.

19 Trial counsel's investigator failed to
20 conduct an effective investigation on the case prior
21 to the entry of petitioner's plea of guilty. Now,
22 actually, Mr. Gibson did have an investigator. His
23 name was Mark?

24 MR. NEELY: Henry.

25 THE COURT: Henry. And, in fact, the

1 issue came up at the time of the arraignment.
2 Because previously, the Court had received a letter
3 in November of -- November, must have been 2000- --
4 the arraignment was on December 6th, 2013. Must
5 have been November 19th, 2013. And the Court
6 inquired about it at the time of arraignment.

7 The Court said, at that time, brought it
8 to Mr. -- now, this is what I said to Mr. Mack on
9 page 16 of the arraignment transcript dated
10 December 6th, 2013.

11 Now, this is me talking. "Now, I've
12 received a letter from you that was dated
13 November 19th, 2013 that -- that you -- that was
14 addressed to Mr. Gibson that you had sent me
15 indicating you were concerned because -- with the
16 representation, because he had not met with you and
17 Mr. Zane, the investigator, had not met with you.
18 You still have concerns regarding Mr. Gibson and
19 Mr. Zane." And Mr. Mack said, "No, I do not." The
20 Court said, "At this point, are you satisfied with
21 the representation that has been provided to you by
22 Mr. Gibson?" And Mr. Mack said, "Yes, Your Honor."

23 Mr. Gibson said, "Your Honor, may I
24 clarify something? Mark Henry is our investigator."
25 And I said, "I'm sorry, Mr. Mark Henry. I

1 apologize. This said Mark and I assumed it was
2 Mr. Zane." And Mr. Gibson said, "No, Mr. Henry."
3 And the Court said, "So, Mr. Henry, okay. At this
4 point as of today, December 6th, 2013, those
5 concerns that you set forth in your November 19th
6 letter have all been resolved; is that right?" And
7 Mr. Mack said, "Yes, Your Honor."

8 And then Mr. Gibson said, "Your Honor, for
9 the record, Mr. Henry and I have met with Mr. Mack.
10 I met with him on multiple occasions since that
11 letter, and Mr. Henry did at least one meeting with
12 him and was working on the case up until the time we
13 decided to reach this agreement." And I said,
14 "Okay. Thank you, Mr. Gibson. I appreciate that."

15 And I said, "Now, do you think you've had
16 enough time to discuss all the various aspects of
17 this case with Mr. Gibson?" I asked that of
18 Mr. Mack. And Mr. Mack said, "Yes."

19 And so then we went on further to talk
20 about some of the -- some of the issues.

21 So trying to say that trial counsel -- the
22 hindsight is always 50-50 when you're sitting -- or
23 maybe when you're sitting at the Nevada Department
24 of Corrections for a lengthy period of time.
25 Somehow, the memory gets dashed of your opinion.

1 But at that -- I made it very clear, I wanted to be
2 sure that if there were any issues with counsel, and
3 with the investigator that they were resolved at the
4 time of the arraignment. And Mr. Mack indicated to
5 me that they were.

6 Now, so the Court doesn't find, really,
7 any merit to the argument that trial counsel's
8 investigator failed to conduct an effective
9 investigation of the case prior to the entry of
10 petitioner's plea of guilty.

11 I want to bring up two other things in
12 that regard. No. 1 is, I reviewed the preliminary
13 hearing transcript. The victim in this case
14 testified. She testified very graphically about
15 what happened to her.

16 But Detective Boruchowitz also testified.
17 He testified about the admissions that were made by
18 Mr. Mack when he went out to the house to interview
19 and subsequently arrested Mr. Mack.

20 Subsequent to that time, Mr. Mack had a
21 couple of other statements. One was that he told --
22 he admitted certain allegations to John Pacault, who
23 performed the psychosexual evaluation. And I'll get
24 into that a little bit later as I go down through
25 these claims.

1 And then finally, on his presentence
2 investigation report, he admitted the conduct. In
3 fact, I can -- I will read you the statement that
4 was attached to the PSI report, about what Mr. Mack
5 had to say.

6 Mr. Mack said, "I'm sorry for what
7 happened with my adopted sister and I take full
8 responsibility. Even though what took place was
9 consensual, my adopted sister was living with me at
10 that time -- at the time of this offense." So he
11 said yes, I did it. And he admitted it on his
12 presentence investigation statement that was
13 submitted to the Court.

14 Whether it was -- now that raises a whole
15 other issue of questions. It's not -- it's not
16 disputed that the victim in this case was described
17 basically of having an IQ of less than 70, which
18 would have made her mentally vulnerable. I think
19 the old vernacular might have been, and this is no
20 disrespect intended, mentally retarded. But
21 nonetheless -- so the defendant admitted it there,
22 he admitted to Detective Boruchowitz and he admitted
23 it when he was interviewed by John Pacault.

24 So taking a look at the standard for
25 ineffective assistance of counsel, that somehow he

1 had an ineffective investigation, the Court finds no
2 merit to that argument.

3 The second basis for the writ is trial
4 counsel caused the client to enter a plea of guilty
5 while Mr. Mack was suffering the effects of the
6 stroke. And I want to talk about that as well.

7 If we go back to the arraignment, the
8 Court asked Mr. Mack if he would like a continuance
9 of the trial, and if he would like to -- if he was
10 capable of moving forward on the day -- date of
11 December 6th, 2013. To which Mr. Mack replied he
12 didn't need a continuance -- if I can find it here.
13 I said, right from the get-go, I announced the case.
14 This is on page 4 of the transcript. I said, "Are
15 the parties prepared to go forward?" Everybody said
16 yes. I went on to say, "It's my understanding this
17 matter has been negotiated." Everybody said yes.

18 Now, this is where we get to talk about
19 the plea. And the Court says, and you -- the Court,
20 this is on page 6. "You've been provided a copy of
21 the second amended information wherein you've been
22 charged with attempted sexual assault. It's a
23 violation of Nevada Revised Statute 200.336 and
24 Nevada Revised Statute 193.330. It's a Category B
25 felony. Do you understand the nature of the charge

1 set forth in the second amended information?"
2 Mr. Mack replied, "Yes, ma'am." And the Court then
3 went on and asked, "Have you had the opportunity to
4 discuss this charge with your attorney, Mr. Gibson?"
5 The defendant, "Yes." "And as to the charge set
6 forth in the second amended information, how do you
7 plead?" Mr. Mack said, "Guilty as offered."
8 Mr. Gibson says, "Under Alford." The defendant,
9 "Guilty under Alford." The Court, "You are making a
10 guilty plea pursuant to the Alford plea?" The
11 defendant says, "Yes, ma'am." The Court, "Okay.
12 Alford versus North Carolina is a U.S. Supreme Court
13 decision from 1970. That is essentially -- it's a
14 guilty plea, but what you're saying is the State can
15 prove -- you're not necessarily admitting that
16 you're guilty, you're saying that the State has
17 sufficient evidence and can prove the allegations
18 set forth in the information beyond a reasonable
19 doubt if the case went to trial. So I want to be
20 sure you understand that and that's the plea you
21 want to enter." And Mr. Mack said, "Yes." And the
22 Court says, "Okay. And if you don't, Mr. Mack, it's
23 fine. We're happy to provide you with a trial.
24 It's really up to you. I don't want anyone ever in
25 my courtroom to feel pressured, that they've been

1 pressured --" And Mr. Mack interrupts me and says,
2 "No, I understand, Your Honor." And the Court says,
3 "...into some type of plea agreement.

4 Before I can accept your Alford plea, I
5 want to be certain that the plea has been knowingly,
6 freely and voluntarily entered into. And in
7 addition, the guilty plea agreement that you signed,
8 that you signed it knowing the terms and conditions
9 of that, knowing and understanding the terms and
10 conditions of that agreement, and knowing that you
11 knowingly, freely and voluntarily entered into that
12 agreement. So I'm going to ask you some questions."

13 And then I proceeded over -- that was on
14 page 8. I proceeded for -- from page 8 of a written
15 transcript to page 27 to canvas him concerning his
16 understanding of the Alford plea, the penalties he
17 was facing. I thoroughly canvassed him with regard
18 to that, went through the charge. And so at no time
19 did he appear to the Court, did he indicate that he
20 couldn't move forward, that he was suffering under
21 the effects of a stroke. So I find that -- that
22 basis for the ineffective assistance of counsel to
23 be without merit.

24 The third ineffective assistance of
25 counsel claim is that trial counsel failed to inform

1 petitioner of the consequences of being a Tier III
2 sex offender prior to entry of plea.

3 Now, I think there's two things that we
4 need to look at there. One is, what did the guilty
5 plea agreement tell him, that he signed and
6 initialed and that I reviewed with him at the time
7 of arraignment? And then what did the Court tell
8 him about that? And I think you will see in both --
9 in the -- from the transcript of the proceedings
10 that Mr. Mack was well aware of being a Tier III
11 offender and what that was going to entail.

12 In fact, I'll find the pages of the
13 transcript where we went over that. We went over it
14 first right in the beginning. And that was
15 because -- this is on the first page -- well,
16 there's a cover page and then the next page of the
17 transcript I say, "We're just waiting, I think, on
18 Mr. Mack." Because he was in custody. And
19 Mr. Gibson says, "Judge we have a little
20 housekeeping matter." And I said, "Sure." And
21 Mr. Gibson says, "We have interlineated that -- the
22 third I to make it a Tier III from II." I said,
23 "Okay." Mr. Gibson says, "So there's no
24 photocopies, we only have one copy. That is an
25 original so we'll need to make copies." And I said,

1 "We'll make copies of that. I'm not sure where
2 Christel is."

3 Then Mr. Mack came out and I said to
4 Mr. Gibson, "Do you have the executed guilty plea
5 agreement?" Mr. Gibson says, "Right here in front
6 of me." And I said, "And Mr. Mack initialed that
7 clause, that change from the second to the third
8 level of tier offense?" And Mr. Gibson says, "Your
9 Honor, I suggest that both counsel also initial,
10 too." And I said, "Yes. Showing that we're all in
11 agreement." "Need your signature and make copies."
12 I think he was talking to -- he was talking to
13 Mr. Treffinger.

14 And then Mr. Gibson says, "And Your Honor,
15 can we all get copies of this?" And so I got my
16 staff out here. And my staff is the one that made
17 copies of everyone (sic) before we proceeded with
18 the arraignment.

19 Then I went through the second amended
20 information. I offered to read the second amended
21 information, have the clerk read it. He waived that
22 reading. I asked, "And you've had the opportunity
23 to discuss this charge with your attorney,
24 Mr. Gibson?" Mr. Mack said, "Yes." I asked him how
25 he plead -- how he wanted to plead. He pled guilty

1 pursuant to Alford. Then I went through and
2 explained what the Alford plea was.

3 And at one point I asked him, "Mr. Mack,
4 you understand that the Court will rely on the facts
5 just stated by Mr. Treffinger," who was the deputy
6 DA in the courtroom that day, "...in determining the
7 factual basis for your plea since it was an Alford
8 plea?" The defendant said, "Yes, I do." "And do
9 you agree that the State has sufficient evidence to
10 prove the charges against you beyond a reasonable
11 doubt to those facts as stated?" And the defendant
12 says, "Well, I don't know if they have --" And I
13 interrupted him and I said, "You know, Mr. Mack, if
14 you -- if you don't know -- and like I said, if you
15 don't want to take this plea, that's fine. I've got
16 it set for trial. Actually, I can also reset it for
17 trial." So I gave you two opportunities. One to
18 move forward with the trial that was a week away,
19 and second, I was happy to give you -- to give you
20 an extension of the time for trial. "It's really up
21 to you," is what I said. "I don't want you in any
22 way to feel pressured into this plea." And you
23 said, "Yeah, I understand, Your Honor. I agree."

24 And I said, "Okay. I want to be sure that
25 you agree. You're kind of hesitant here. Do you

1 think that the State -- do you think that the State
2 doesn't have sufficient evidence or you just -- I'm
3 trying to figure out what you're thinking here."
4 And Mr. Mack says, "Well, I don't -- I accept what
5 he's saying," meaning Mr. Treffinger, "...but I
6 don't -- how would I know if he had insufficient
7 evidence?" I said, "Okay."

8 And Mr. Gibson says, "Your Honor, I think
9 what he's trying to say is that it appears the State
10 would be able to prove their case beyond a
11 reasonable doubt. He's not sure until he sees the
12 whites of everyone's eyes. But to avoid that
13 greater situation," and I said, "Right." Mr. Gibson
14 says, "He's pleading guilty pursuant to Alford."
15 And I said, "Mr. Mack, have you made a determination
16 that it's in your best interest to accept the plea
17 bargain and enter into this type of guilty plea?"
18 And Mr. Mack said, "Yes." And I said, "And is one
19 of the reasons you've decided to enter this plea,
20 this Alford plea, is to avoid the possible harsher
21 penalty if you were convicted of the original
22 charges at trial?" And he said, "Yes."

23 And I said, "And you understand that
24 originally you were charged with sexual assault on
25 Count I, a Category A felony? You were charged on

1 Count II with sexual assault, Category A felony.
2 You were charged with Count III of preventing or
3 dissuading a victim from reporting a crime,
4 commencing prosecution, or causing arrest. It's a
5 Category D felony. That you were charged with
6 Count IV of unlawful contact with a person with
7 mental illness, a gross misdemeanor. Count V, abuse
8 of a vulnerable person. It's a gross misdemeanor.
9 And that by what you're doing in this case, instead
10 of being -- going to trial on those charges, you
11 have agreed to plead guilty pursuant to Alford to a
12 single count of attempted sexual assault." And
13 Mr. Mack said, "I agree." And I said, "And do you
14 think it's in your best interest to do that rather
15 than to proceed to trial on the original counts?"
16 And Mr. Mack said, "Yes."

17 So -- and I asked him about his -- his
18 ability to go forward. I said, "And are you under
19 the influence of any drugs, alcohol, or other
20 medications at this time?" And Mr. Mack said,
21 "Well, just doctor's medications, yes." And I said,
22 "And -- and you -- under any medications that would
23 affect your ability to understand the proceedings
24 and what's going on today?" And the defendant said,
25 "No, ma'am."

1 So for him to claim that somehow he was
2 suffering the effects of a stroke, he could have
3 told me at any time during that arraignment. I
4 would have been happy to continue the arraignment.
5 I'd have been happy to continue the trial. But he
6 told me he was able to go forward.

7 And I said, "Do you understand that when
8 you enter an Alford plea; Alford plea, guilty plea
9 pursuant to Alford, that you're giving up certain
10 constitutional rights; do you understand that?" He
11 said, "Yes." Then we went through each and every
12 right, constitutional right that he was giving up at
13 that time.

14 And actually, as we go on, and I even told
15 him, "By entering a guilty plea pursuant to Alford,
16 you're giving up your right against
17 self-incrimination and you're, in fact, convicting
18 yourself. Because you are saying to this Court, I
19 am guilty of the crime of attempted sexual assault,
20 a Category B felony; do you understand this?" And
21 he said, "Yes, I do."

22 And I said, "And do you want to do this?"
23 And he said, "Yes." And then we talked about what
24 happened to -- what would happen to your appellate
25 rights by entering a plea of guilty pursuant to

1 Alford. And I said -- again, then I -- we went
2 through -- I covered the concerns of his
3 November 19th, 2013 letter about his counsel. He
4 told me there weren't any problems.

5 So, now we're going to talk about the
6 Tier III offender. And the sentence. I said, "I
7 want to cover some things with you about that guilty
8 plea agreement. Do you understand that as a result
9 of your plea, the maximum possible sentence that the
10 Court could impose is 20 years in the Nevada
11 Department of Corrections?" Mr. Mack said, "Yes."
12 "And I want to be sure that because this is a sex
13 offense, do you understand that you will be required
14 to undergo a psychosexual evaluation?" Mr. Mack
15 said, "I didn't know that, but, yes." "Do you
16 understand that -- now I'm telling you, yes, that
17 you will be at some point required to undergo a
18 psychosexual evaluation." Mr. Mack says, "Uh-huh."
19 "Because this is a sex offense, do you understand
20 that you're going to have certain sex offender
21 registration requirements and supervision
22 requirements, and the supervision requirement will
23 be lifetime. They will be lifetime requirements; do
24 you understand that?" Mr. Mack says, "Yes, now."
25 "Okay. And has Mr. Gibson talked to you about the

1 registration and the supervision requirements that
2 you're going to have to be required to follow
3 pursuant to the Nevada Revised Statutes by entering
4 this plea?" And the defendant, Mr. Mack, says, "He
5 told me that I had to register, but I don't know the
6 details of the requirements, the procedures." And
7 the Court said, "Would you like -- would you like
8 Mr. Gibson to go through those requirements with
9 you?" And the defendant says, "Yeah, I don't have
10 the details. I mean, I know -- I saw it that I have
11 to register." And Mr. Gibson said, "We discussed
12 this yesterday, remember? We talked about the
13 48-hour requirement, having to register within 48
14 hours of being convicted. And that you're required
15 to, whenever you change residence." "Yeah, I knew
16 the residence. But not all when --" and the Court
17 said, "Do you understand that within 48 hours of
18 entering this plea, you're going to be required to
19 register with the Nye County Sheriff's Office as a
20 sex offender?" And the defendant says, "48 hours of
21 this plea? Yeah. Register." The Court says,
22 "Right." The defendant says, "Yes. Okay."

23 And I said, "Do you understand that as a
24 result of entering this plea, that you will have --
25 you will be subject to lifetime supervision by

1 Parole & Probation; do you understand that?" And
2 then -- and Mr. Mack says, "No, I didn't know that,
3 but that's --" and I said, "Okay. Knowing that --"
4 and then Mr. Mack says, "Okay." "Now, I'm telling
5 that -- telling you --" this is the Court, "...that
6 you will be required to be subject to lifetime
7 supervision by Parole & Probation. Do you still
8 want to enter your Alford plea?" The defendant
9 says, "I guess."

10 And the Court says, "Okay. And you're
11 also going to have certain registration
12 requirements. Those registration requirements are
13 going to be with the law enforcement agency. You're
14 going to be in a registry, a sex offense registry.
15 Knowing -- by me telling you, and you're also going
16 to be classified as a Category Tier III sex
17 offender, do you still want to enter your Alford
18 plea?" And Mr. Mack said, "Yes."

19 And I said, "Okay. And do you understand
20 that if you fail to register when you're not
21 required to do -- register when you're required to
22 do so, you can be subject to a separate Category D
23 felony?" And Mr. Mack says, "Separate what, ma'am?"
24 And I said, "Category D felony for failing to
25 register." And Mr. Mack said "Yes."

1 And then I also said, "Okay, all right. I
2 also want to be sure that you understand that you
3 may be subject to community notification provisions
4 designed to reach members of the public likely to
5 encounter you. And so knowing that, do you still
6 want to enter your Alford plea?" And Mr. Mack said,
7 "Yes."

8 And I said, "Okay, all right. Now, I
9 notice that on the Alford plea on page 6 there's a
10 signature line for Michael E. Mack. Is that your
11 signature?" And Mr. Mack says, "Yes, it is." "And
12 did you sign this agreement on December 5th, 2013?"
13 And Mr. Mack said, "Yes, I did." And the Court
14 said, "Now, I want to be sure one thing of the
15 agreement that was changed this morning. And it is
16 on page 4, is that the consequences of this sex
17 offense, the agreement originally read that you
18 would be considered a Tier II sex offender, but is
19 actually a Tier III sex offender; do you understand
20 that?" And Mr. Mack said, "Yes, I do." "And did
21 you initial next to that, that you understood that?"
22 And he said, "Yes."

23 I said, "Now, I notice in the bottom
24 right-hand corner of page 1 through 7 of the
25 agreement are some initials. Are those your

1 initials?" "Yes, it is." "Okay." And I said,
2 "Now, prior to the time that you signed and
3 initialed this agreement did you read it?" "Yes, I
4 did." "Did you understand everything that was set
5 forth in the agreement?" "Yes, I did." "Prior to
6 the time that you signed and initialed the
7 agreement, did you have the opportunity to discuss
8 this agreement with Mr. Mack?" I said, "I'm sorry,
9 Mr. Gibson." "Yes, I did." "And did Mr. Gibson
10 satisfactorily answer any questions you might have
11 about the written guilty plea agreement?" "Yes."
12 "Do you have any questions for the Court about the
13 agreement?" "No, I do not." "Did you sign and
14 initial the agreement freely and voluntarily?"
15 "Yes, I did." "Did anyone threaten you, coerce you,
16 or otherwise force you in any way to enter into the
17 written guilty plea agreement?" The defendant says,
18 "No." So, then, going on, I say, "Now, here's your
19 opportunity, Mr. Mack, if you'd like to change your
20 mind. After we've gone through it's a Tier III
21 offender, the consequences could be 20 years in
22 prison." I say, "Here's your opportunity, Mr. Mack,
23 if you'd like to change your mind. And if you truly
24 feel you don't want to enter this plea, I'm fine
25 with that. I'm happy to set it for trial. What I

1 want to be certain is that you want to enter -- you
2 enter the plea that you want to enter. That you
3 don't feel pressured or otherwise forced in any way
4 to enter a plea. While we do have it set on
5 calendar next week, I'm even happy to continue the
6 trial if you would like that. If you decide that
7 you want to go to trial, okay." And Mr. Mack says,
8 "Yes." So I'm -- and I said, "So I'm going to ask
9 you now, here's going to be the moment of truth.
10 It's your kind of last and final chance to enter
11 your plea here.

12 Based upon my questions and our discussion
13 here this morning, what is your plea to the charge
14 in the second amended information of attempted
15 sexual assault, a Category B felony?" And Mr. Mack
16 says, "What is my plea? Guilty. I'm sorry, Your
17 Honor." And the Court said, "Okay. And that guilty
18 plea will be entered pursuant to Alford; is that
19 right?" And Mr. Mack said, "Yes."

20 And then and only then did the Court
21 accept his plea of guilty pursuant to Alford and
22 make the findings that it did.

23 So the claim that -- that trial counsel
24 caused him to enter a plea of guilty while the
25 petitioner was suffering the effects of a stroke I

1 find absolutely no basis for that. The transcript
2 speaks for itself. It was lengthy. It was -- the
3 Court carefully questioned Mr. Mack. And even after
4 he entered the plea of guilty pursuant to Alford,
5 after the Court went through the penalties, after
6 the Court went through everything, the Court gave
7 Mr. Mack a final opportunity to change that plea to
8 not guilty, offered to continue the trial. So I
9 find that his argument has no merit.

10 Now, the third item was trial counsel
11 failed to inform petitioner of the consequences of
12 being a Tier III sex offender pursuant to -- prior
13 to the entry of plea.

14 I do want to say this. I'm not sure
15 that -- that it is a requirement that you give the
16 defendant every little nitty-gritty detail of -- of
17 this is a Tier III versus a Tier II versus a Tier I.
18 But it is set forth about the registration
19 requirements in the guilty plea agreement. And
20 clearly, clearly, clearly the Court went through it
21 carefully with Mr. Mack and gave him an opportunity
22 to change his plea to not guilty. And so I find
23 that's without merit.

24 In our fourth, trial counsel failed to
25 review the facts of the case and discuss any

1 defenses with the petitioner. Well, Mr. Gibson
2 testified today that he -- that he did speak with
3 Mr. Mack, and Mr. Mack told me at the time of
4 arraignment that any concerns that he had with
5 Mr. Gibson had been resolved.

6 The other thing is that again, the
7 testimony of Mr. Gibson and the Court's review of
8 the file, pretty strong case against Mr. Mack. And
9 so I find -- and even if he had done that, there's
10 no proof that somehow that would have changed the
11 outcome of this case. There was a confession, and
12 Mr. Mack himself, like I said, on two other
13 instances has admitted that he's guilty of the
14 offense.

15 The trial court failed to inform the
16 petitioner of the consequences of pleading guilty to
17 attempted sexual assault. Again, I think that's
18 belied by the guilty plea agreement. But even if
19 that's true, the Court told him what the
20 consequences of -- were of pleading guilty to the
21 attempted sexual assault. The Court also told
22 Mr. Mack, and I can go point to the -- the portion
23 of the transcript. That the person that --
24 sentencing is solely in the discretion of the
25 District Court judge. And as long as the District

1 Court judge sentences within the parameters of the
2 law, the Court is not bound by -- by the guilty plea
3 agreement. And, in fact, this Court sentenced
4 Mr. Mack pursuant to the recommendations of Parole &
5 Probation of the presentence investigation report.
6 The Court -- that's the recommendations that the
7 Court followed, were the ones done by Parole &
8 Probation. So I don't find that cause has any
9 merit.

10 Sixth, trial counsel had a conflict of
11 interest during his representation of petitioner
12 which he never disclosed to petitioner.

13 Apparently, Mr. Mack claims that because
14 Mr. Gibson had a contract, and -- with -- as a
15 public defender, and somehow that contract was
16 changing, that that somehow prejudiced his -- his
17 defense. Or prejudiced him in this case. And that
18 had he known that, that that would have affected the
19 outcome of this case. And I just don't think that
20 has any -- I don't find any basis for that.

21 Seventh -- so again, that -- that basis in
22 the writ of habeas corpus is without merit -- trial
23 court counsel's failure to request a continuance of
24 petitioner's trial date after he was told to do so
25 by petitioner, causing petitioner to enter a plea

1 while not of sound mind.

2 Well, trial counsel may not have done
3 that, that may be a subject of debate, but the Court
4 clearly, before accepting his plea on December 6th,
5 told him on two occasions during that plea canvas,
6 that she would be happy to continue the trial date.
7 So again, that -- there's no indication that trial
8 counsel -- first of all, that he failed to request
9 to make the continuance request. But even if he
10 did -- did not make that request, when the Court
11 asked the defendant if he wanted a trial continuance
12 he said no.

13 Trial counsel failed to inform petitioner
14 that the information obtained during the
15 psychosexual exam could be used against him at
16 sentencing.

17 Well, clearly, John Pacault, the
18 evaluator, told him that at the start of the
19 evaluation. And I'll read to you from the written
20 report of the psychosexual evaluation. The
21 psychosexual evaluation says, "This evaluator met
22 with Mr. Mack on January 7th, 2014 at the Nye County
23 jail. For purposes of this evaluation, this
24 evaluator utilized documents that were provided by
25 the Division of Parole & Probation. They consisted

1 of Mr. Mack's District Court petitions, guilty plea
2 agreement and information, multiple Nye County
3 Sheriff's Department incidence reports and a
4 declaration of arrest report, a Nye County Child
5 Advocacy Center report concerning the victim, along
6 with assessments of the primary victim and her
7 intellectual and behavioral functioning and the
8 legal guardianship paperwork concerning Mr. Mack's
9 sister."

10 Informed consent is the topic. "Mr. Mack
11 was given a full description of the evaluation
12 process, the risks and benefits involved and the
13 rationale for the evaluation. He was informed of
14 the use of confrontation detailed questioning and
15 explicit language during the interview. He was also
16 advised of the importance of cooperation and honesty
17 in order for the evaluation to be effective. The
18 parameters of confidentiality were carefully
19 explained, and in particular, when it had to be
20 broken in accordance with the law.

21 While acknowledging the Court's directive
22 that he be evaluated, the voluntary nature of the
23 evaluation was emphasized. Comprehension of these
24 issues was confirmed, and any questions Mr. Mack had
25 were answered. Written and voluntary consent to

1 proceed was obtained prior to starting the
2 evaluation."

3 So it appears to me that Mr. Mack was well
4 aware, actually from the evaluator himself, at the
5 very start of the evaluation about what the use was
6 of that information, and Mr. Mack verbally and in
7 writing agreed to that. So I find that argument to
8 be without merit.

9 The next claim for ineffective assistance
10 of counsel was trial counsel failed to use relevant
11 information in his investigation provided by
12 petitioner.

13 Again, Mr. Gibson testified and the record
14 is very clear that the evidence against Mr. Mack was
15 strong. Including evidence that had come up of
16 possible additional victims after it was -- it was
17 mentioned in the psychosexual evaluation that
18 another victim had come forward after Mr. Mack's
19 arrest. Claiming he, too, was a person of
20 diminished capacity. He, too, had been sexually
21 assaulted by Mr. Mack.

22 And then according to the psychosexual
23 evaluation, there was allegations involving a
24 stepbrother or foster brother, and then allegations
25 of sexual misconduct and a dishonorable discharge

1 from the Coast Guard.

2 So I again find that cause of -- on the
3 basis for the petition for the writ of habeas corpus
4 to be without merit.

5 Trial counsel failed to motion to have his
6 statements suppressed that were made to the State at
7 the time of arrest.

8 That's just a bald statement, and Mr. Mack
9 has provided nothing that -- it's his burden here --
10 that would suggest that there was a basis to
11 suppress those motions. So the mere statement that
12 counsel did not make the motion, somehow that's a
13 basis for the Court to grant the writ, is just
14 simply without merit. In fact, trial counsel,
15 unless there is a good faith basis for making that
16 motion, cannot, as an attorney in good standing, he
17 could be brought up for violation of the Code of
18 Professional Conduct.

19 So again, without more, other than just a
20 bald statement, the Court finds that without merit.

21 Final claim was that trial counsel failed
22 to motion to have the trial court judge recuse
23 herself from petitioner's case for bias.

24 I would like to go back to the first time
25 this case came before the Court. And the Court, on

1 her own initiative, raised the sections of the code
2 of judicial conduct with the parties, explained that
3 this Court is very active in the community,
4 especially as the Drug Court judge.

5 That I had worked with Mr. Mack as part of
6 the New Hope Path of Hope Food Bank. That I was in
7 Kiwanis with Mr. Mack. That I had done a number of
8 community activities with Mr. Mack. But I also
9 disclosed that I was in the community, but that I
10 had never gone out and had dinner with him or any
11 sort of social relationship. I went through the
12 case authority. And, in fact, if I can find the --
13 I went through a very, very extensive disclosure,
14 including the case authority and the sections of the
15 code of judicial conduct. And I gave both sides an
16 opportunity and time to file a motion for recusal.
17 Neither side moved to recuse me. And, in fact, as I
18 explained to them, I, too, have looked at the code
19 and at the case authority, and explained that a
20 judge has a duty not to recuse themselves if there
21 is not a basis to do so.

22 With that, I would clearly be open-minded
23 and entertain anything that anyone wanted to bring
24 forward. And -- and defense indicated they had no
25 problem with me proceeding as the judge. They had

1 no problem with me proceeding as the judge until it
2 came to sentencing and I sentenced Mr. Mack in
3 accordance with the recommendations of Parole &
4 Probation. Which was the maximum underlying
5 sentence. So it was after the fact, then, that that
6 issue was raised.

7 So trying to look at that in the totality,
8 looking at it, at the disclosures that were made at
9 the time and trying to sit as an appellate court
10 would, and saying did the judge -- did the judge
11 follow the proper protocols? Yes, the judge did.
12 Was the judge biased or prejudiced? No, the judge
13 was not. Did the judge come to some outlandish
14 conclusion? No, the judge followed the
15 recommendations of Parole & Probation who prepared
16 the presentence investigation report. It wasn't
17 outside the parameters of that. It was clearly
18 within the confines and authority of the District
19 Court.

20 So I've gone through all 11 bases that
21 Mr. Mack had for the writ of habeas corpus.
22 Especially as it applies to a guilty plea agreement.
23 The Court finds that they are without merit and the
24 writ of habeas corpus is denied.

25 Thank you.

1 MR. VITTO: Thank you, Your Honor.

2 MR. NEELY: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. NEELY: Thanks for the opportunity.

5 (Proceedings concluded at 2:51 p.m.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, Tracy A. Manning, a duly commissioned
Certified Court Reporter, Clark County, State of
Nevada, do hereby certify:

That I reported the taking of the proceedings,
at the time and place aforesaid;

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said proceeding is a complete, true and accurate record of statements provided by the parties at said time to the best of my ability.

I further certify that I am not a relative, employee, or independent contractor of counsel of any of the parties involved in said action; nor a person financially interested in the action; nor do I have any other relationship with any of the parties or with counsel of any of the parties involved in the action that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have hereunto set my hand
in the County of Clark, State of Nevada, this 6th
day of September 2018.

Tracy A. Manning, CCR 785

FILED
FIFTH JUDICIAL DISTRICT

JUN 24 2021

Nye County Clerk
Deputy

Case No. PC7444A

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

MICHAEL ALLEN MACK,

Petitioner,

ORDER DENYING WRIT OF
HABEAS CORPUS

-v-

STATE OF NEVADA,

Respondent.

History of Case

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



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

23 **THE DEFENDANT:**

24 No, I do not.

25 **THE COURT:**

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

///



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

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

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

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

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.
28



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 I agree to plead guilty to a sex offense, and will be considered
18 a Tier III offender. As a result I understand that I AM subject
19 to sex-offender registration requirements as provided for in
20 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



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
26 ///



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 Aiford 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.

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. 1-12. 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
16 allow that.

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

18 **MR. GIBSON:**

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

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

26 The bottom line is this: the Court thoroughly read and reviewed the file, and lawfully
27 sentenced Mack after he pled guilty pursuant to Alford. Mack was not happy with the
28

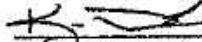


1 sentence he received. This is not, however, a basis for the Court to grant a Petition For
2 Writ of Habeas Corpus. Looking at the totality of the circumstances, and the transcripts of
3 all the proceedings in this case, there simply is no basis for the Court to grant Mack's
4 request for relief. Accordingly,

5
6 **IT IS HEREBY ORDERED** that the Petitioner Michael A. Mack's Petition for Writ of
7 Habeas Corpus is **DENIED**.

8 Nunc Pro Tunc to August 29, 2018

9 DATED this 24th day of June 2021.

10 
11 KIMBERLY A. WANKER
12 DISTRICT JUDGE
13
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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

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

**COPY
FILED**
FIFTH JUDICIAL DISTRICT

JUL - 22 2021

Nye County Clerk
Brittani Smith 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 27th day of July, 2021.

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

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

Electronically Filed
Jul 07 2021 10:43 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
B. Brown Deputy

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

MICHAEL ALLEN MACK,	)	
	)	NOTICE OF APPEAL
Petitioner,	)	
	)	
vs.	)	
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	

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

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 NOTICE OF APPEAL by depositing a copy in the United States mails, postage prepaid, addressed to counsel for respondent at his last known address, as indicated below:

Kirk Vitto, Esq.
Chief Deputy
Nye County District Attorney
P. O. Box 39
Pahrump, NV 89041

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

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


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

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF ~~CLARK~~ **Nye County Clerk**
Judy Ayotte Deputy

MICHAEL ALLEN MACK,
PETITIONER,

vs.
STATE OF NEVADA,
RESPONDENT.

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

REQUEST FOR TRANSCRIPT OF PROCEEDINGS

TO: TRACY A. MANNING, Court Reporter

Fifth Judicial District Court, Dept. 1

Appellant requests preparation of a transcript of the
proceedings before the district court as follows:

Judge or officer hearing the proceeding: KIMBERLY WANKER,
Fifth Judicial District Court, Dept. 1.

Specific individual dates of proceedings for which
transcripts are being requested (a range of dates is not
acceptable): August 29, 2018.

Specific portions of the transcript being requested (e.g.,
suppression hearing, trial, closing argument, etc.): Evidentiary
Hearing.

Number of Copies Required: 3

I hereby certify that on the 12 day of July, 2021, I ordered
the transcript(s) listed above from the court reporter named

1 above, and the required deposit on the 12 day of July, 2020.

2
3
4 DATED this 12 day of July, 2021.

5
6
7 
8 DAVID H. NEELY III, Esq.
9 Nevada Bar No.: 03891
10 DAVID H. NEELY III Attorney At
11 Law
12 3520 E. Tropicana Ave., #D-1
13 Las Vegas, NV 89121
14 (702) 565-0716
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