

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JOHN MENTABERRY

Appellant,

VS.

STATE OF NEVADA,

Respondent.

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APPELLANT’S PETITION FOR REVIEW
NRAP 40B

Fourth Judicial District Court
The Honorable Alvin Kacin

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1 TABLE OF CONTENTS

2 NRAP 26.1 Disclosure 4

3
4 STATEMENT OF THE ISSUES 4

5 I. THE COURT OF APPEALS
6 MISAPPREHENDED THAT MENTABERRY
7 HAD BEEN IMPROPERLY DEPRIVED
8 OF HIS RIGHT TO A DIRECT APPEAL
9 OF THE ORIGINAL JUDGMENT OF
10 CONVICTION, AND THEREBY ERRONEOUSLY
11 CONCLUDED THAT HE HAD VOLUNTARILY
12 WAIVED ISSUES.

11 STATEMENT OF PROCEDURAL BACKGROUND 4

12 ARGUMENT 7

13 CONCLUSION 10

TABLE OF AUTHORITIES

<i>Daly v. State</i> , 99 Nev. 564, 568–69, 665 P.2d 798, 802 (1983)	6
<i>Foster v. Dingwall</i> , 126 Nev. 56, 227 P.3d 1042 (2010).	9
<i>Gibbons v. State</i> , 97 Nev. 299, 629 P.2d 1196 (1981)	6
<i>Huneycutt v. Huneycutt</i> , 94 Nev. 79 575 P.2d 585 (1978)	9
<i>Jackson v. State</i> , 133 Nev. 880, 410 P.3d 1004 (Ct. App. 2017).	7, 8
<i>Lozada v. State</i> , 110 Nev. 349, 871 P.2d 944 (1994).	5
<i>Patterson v. State</i> , 111 Nev. 1525, 1532, 907 P.2d 984, 989 (1995) . .	6
NRAP 40.	7, 8
NRAP 12A	9
NRCP 62.1	9

1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons
3 and entities as described in NRAP 26.1(a) and must be disclosed. These
4 representations are made in order that the judges of this court may evaluate
5 possible disqualification or recusal:
6

7 Appellant Kevin Mentaberry is an individual person with no affiliations to
8 any corporations or publicly held company.
9

10 Attorney John Malone is the principal of the law office of John Malone and
11 appears on behalf of appellant.
12

13 **STATEMENT OF THE ISSUES**

- 14 I. THE COURT OF APPEALS MISAPPREHENDED THAT
15 MENTABERRY HAD BEEN IMPROPERLY DEPRIVED OF HIS
16 RIGHT TO A DIRECT APPEAL OF THE ORIGINAL JUDGMENT OF
17 CONVICTION, AND THEREBY ERRONEOUSLY CONCLUDED
18 THAT HE HAD VOLUNTARILY WAIVED ISSUES.

19 **STATEMENT OF PROCEDURAL BACKGROUND**

20 Appellant Kevin Mentaberry was charged by information with one count of
21 sexual assault on a child under the age of 16 years, a category “A” felony, and with
22 two lesser charges of statutory sexual seduction and lewdness with a child 14 or 15
23 years old, both category “B” felonies. *Appellant’s Appendix*, Vol. I, pp.1-4. He
24 pleaded not guilty and went to trial on all charges. The jury convicted him on one
25

1 charge of lewdness with child under 14 or 15 years old. *Appellant's Appendix*,
2 Vol. I, pp.5-10. The district court sentenced him to 28 to 72 months, suspended for
3 60 months, and 5 years of probation with 180 days served. *Appellant's Appendix*,
4 Vol. I, pp.5-10.
5

6 Trial counsel failed to perfect a direct appeal, and Mentaberry retained new
7 counsel and filed a timely postconviction petition for a writ of habeas corpus
8 pursuant to and *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). *Appellant's*
9 *Appendix* Vol. 1, pp. 11-23. The State filed its response, and the petition was fully
10 briefed. Before the court could address the petition, however, the district court
11 determined sua sponte that it had imposed an illegal sentence on Mentaberry by
12 granting him probation. The district court issued an order to show cause to all
13 parties and set a hearing. *See Appellant's Appendix*, pp. 23-39. At the hearing, the
14 court and the parties discussed the validity of the original sentence and the pending
15 postconviction petition. The parties and court concluded that the sentence was
16 indeed illegal, and that appellant's petition had substantive merit, and that a new
17 amended judgment of conviction would solve both the problem of the sentence and
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1 the issue of the direct appeal in one move.¹ The new judgment would impose a
2 legal sentence and would restart the time for Mentaberry to pursue his direct
3 appeal.
4

5 On resentencing, the district court imposed a sentence of 28 to 72 months in
6 prison. *Appellant's Appendix, Vol. I, pp.40-41*. Mentaberry filed a timely notice
7 of appeal.
8

9 The parties fully briefed the merits of the appeal, challenging various aspects
10 of the trial and raising issues of sufficiency of the evidence, juror bias, and
11 improperly admitted hearsay evidence under *Patterson v. State*, 111 Nev. 1525, 1532,
12 907 P.2d 984, 989 (1995); *Daly v. State*, 99 Nev. 564, 568–69, 665 P.2d 798, 802
13 (1983), *modified on other grounds by Richmond v. State*, 118 Nev. 924, 59 P.3d
14 1249 (2002); and *Gibbons v. State*, 97 Nev. 299, 629 P.2d 1196 (1981). *See*
15
16
17 *Appellant's Opening Brief*.

18 The appeal was transferred to the court of appeals. The court of appeals
19
20 concluded that because Mentaberry was appealing from an amended judgment of
21

22
23
24 ¹Because the substance of the hearing did not pertain specifically to the
25 merits of the appeal, counsel declined to include a transcript in the original
appendix. The transcripts are therefore attached hereto as Exhibit A.

1 conviction, rather than from the original judgment of conviction, therefore he could
2 only raise issues related to the amendment pursuant to its decision in *Jackson v. State*,
3 133 Nev. 880, 882, 410 P.3d 1004, 1006 (Ct. App. 2017). The court of appeals
4 therefore affirmed without considering the parties' arguments because Mentaberry
5 had not challenged the new sentence. But, as Mentaberry tried to explain in his
6 petition for rehearing, as he does here, the circumstances leading to entry of the
7 amended judgment are unique, and the court of appeals misapplied *Jackson*.
8
9
10

11 Mentaberry properly and timely followed the directions of this court and the
12 rules of law to correct his trial counsel's failure; the parties concurred that his
13 petition had merit and that he had indeed been deprived of his direct appeal of the
14 judgment of conviction, and he should not now be again deprived of his direct appeal
15 by the courts.
16
17

18 **ARGUMENT**

19 The court of appeals entered its order denying rehearing on December 22,
20 2022. Kevin Mentaberry seeks this court's review pursuant to NRAP 40B. A
21 petition for review must be filed within 18 days of the court of appeals' decision;
22 this petition is therefore timely. NRAP 40B(c). A petition for review will be
23 considered when the decision of the court of appeals conflicts with its own
24
25

precedent or with decisions of the supreme court or United States Supreme Court.
NRAP 40(a)(2). Here, the principles of *Jackson v. State*, 133 Nev. 880, 882, 410
P.3d 1004, 1006 (Ct. App. 2017) – avoiding limitless challenges to convictions that
may undermine the doctrine of finality - do not require the court to limit its review
to the new sentence. This is not a case where Mentaberry managed to use statutory
deadlines to sneak in an untimely appeal or may be able to manipulate the courts in
perpetuity. This court has created a specific procedure by which appellants are
able to recover a constitutional right that was improperly denied them. Mentaberry
followed this procedure. His petition was timely from the original judgment of
conviction, the parties concurred that it had merit and should be granted. The court
of appeals should have resolved the appeal on the merits. Mentaberry is not
getting second bite at the appeal apple; he is trying – pursuant to the procedures
specifically outlined by this court in its caselaw and appellate rules - to secure his
first bite.

This is not a situation in which the amended judgment unfairly provides
Mentaberry an second opportunity to appeal his original judgment, as the court was
concerned with in *Jackson v. State*, 133 Nev. at 882, 410 P.3d at 1006. Here,
Mentaberry was specifically deprived of his right to a direct appeal, and expressly
and timely sought to remedy that deprivation as directed by this court’s decades of

1 jurisprudence and specific rules of procedure. The district court, the State, and
2 appellant all concurred that the entry of the corrected judgment would have the
3 effect of remedying the loss of the direct appeal. If this court declines to review
4 the court of appeals decisions, Mentaberry will have been deprived not only of his
5 right to a direct appeal but also even of his right to have his timely, fully briefed
6 petition resolved.
7

8
9 Accordingly, Mentaberry asks this court to grant review and to consider the
10 merits of his direct appeal arguments. In the alternative, this court should allow
11 the parties to seek a limited remand for the limited purpose of allowing the district
12 court to conduct a hearing on the postconviction petition that would enable
13 Mentaberry to pursue a direct appeal from the original judgment of conviction, as
14 anticipated by this court's rules and jurisprudence.²
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16
17
18
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20

21
22
23 ²Because of the unique procedural posture of this matter, Mentaberry
24 has not yet approached the district court for an order indicating its intent to grant
25 the petition pursuant to NRAP 12A and NCRP 62.1. Mentaberry awaits this
court's instruction on the matter. *See also Huneycutt v. Huneycutt*, 94 Nev.79 575
P.2d 585 (1978), and *Foster v. Dingwall*, 126 Nev. 56, 227 P.3d 1042 (2010).

1 **CONCLUSION**

2 This court should recognize the unique circumstances here and grant review
3
4 to consider the merits of the appeal.

5 DATED this 9th day of January, 2023.

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**CERTIFICATE OF COMPLIANCE
(NRAP 32)**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word's Times New Roman in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40(b)(3) because it does not exceed 10 pages.

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

1 I affirm that this brief does not contain the social security number of any
2 person.

3
4 Dated this 9th day of January, 2023.

5 By: John E. Malone

6 John E. Malone
7 Attorney for Appellant
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CERTIFICATE OF SERVICE

I affirm that I served the foregoing Appellant's Petition for Review on the following parties:

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Dated this: 9th day of January, 2023.

By: Kelly Atkinson
Kelly Atkinson

Exhibit “A”

Exhibit “A”

FILED

1 CASE NO.. DC-CV-21-68 AND CR-FP-18-5030

2 DEPT. 2

2022 OCT 24 AM 11:40

4TH JUDICIAL DISTRICT COURT

CLERK _____ DEPUTY _____

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4
5 IN THE FOURTH JUDICIAL DISTRICT COURT
6 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

7 * * * * *

8 THE STATE OF NEVADA,
9 Plaintiff,
10 vs.
11 KEVIN MENTABERRY,
12 Defendant.

COPY

13
14
15 REPORTER'S TRANSCRIPT
16 OF
17 STATUS HEARING
18 BEFORE THE HONORABLE JUDGE ALVIN R. KACIN
19 DISTRICT COURT JUDGE

20 DATED FRIDAY, SEPTEMBER 10, 2021

21
22
23
24
25 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

1 APPEARANCES:

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25

1 CASE NO. DC-CV-21-68 AND CR-FP-18-5030

2 DEPT. 2

3

4

5 IN THE FOURTH JUDICIAL DISTRICT COURT

6 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

7 *****

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 KEVIN MENTABERRY,

12 Defendant.

13

14

REPORTER'S TRANSCRIPT
OF
STATUS HEARING

15

16

17 BEFORE THE HONORABLE JUDGE ALVIN R. KACIN

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1 ELKO, NEVADA; FRIDAY, SEPTEMBER 10, 2021

2

2:05 P.M.

3

PROCEEDINGS

4

02:05:33

THE COURT: Okay. We're on the record for two

6

cases. We have case CR-FP-18-5030, State of Nevada is

7

plaintiff. Kevin John Mentaberry is the defendant.

8

And case DC-CV-21-68, Kevin John Mentaberry is

9

petitioner. Charles Daniels, Director of Nevada

02:10:50

Department of Corrections is the respondent.

11

And anyway, this is the date and time set for

12

a status hearing in the latter case, which is a

13

petition for writ of habeas corpus post conviction.

14

And then a show cause hearing in the criminal case.

02:15:17

That's under an order entered August 23rd,

16

2021. So we have Elko County Deputy District Attorney

17

Chad Thompson here to represent the state.

18

Mr. Mentaberry is here with his counsel. And that is a

19

John Malone; is that right?

02:20:31

MR. MALONE: Correct, your Honor.

21

THE COURT: All right. And so, of course, the

22

Court's concern in the criminal case is that the

23

defendant was found guilty by a jury of one count of

24

lewdness with a 14- or 15-year-old child, a category B

02:25:46

felony. I think it's laid out in this order pretty

2

02:01:40

well, the order to show cause. The Court did order the

2

defendant to serve 72 months in the prison. Minimum

3

term was 28 months. The sentence was suspended. The

4

defendant was placed on probation for 60 months.

02:05:01

And as I recall at the sentencing hearing,

6

there was no disagreement with the Division of Parole

7

and Probation's recommendation that -- well, there was

8

disagreement from the state that the defendant should

9

be put on probation. However, no one argued the Court,

02:10:40

in fact, lacked the legal authority to do that. And I

11

fear that the Court did lack the legal authority to do

12

that. And that this was -- the Court was required to

13

sentence the defendant to prison.

14

So the Court may correct an illegal sentence

02:15:50

at any time under NRS 176.555. And I want to see if

16

there's any reason why the Court should not do that in

17

this case.

18

I think I'm reading the statutes correctly.

19

And the Court discovered this in actually dealing with

02:20:40

another case where the defendant had actually plead, I

21

think, guilty to one or two counts of lewdness with a

22

14- or 15-year-old child.

23

And so I think I'm reading these statutes

24

correctly that in Chapter 176A where the Court simply

02:25:00

lacked authority to suspend sentence -- execution of

02:01: sentence and put the defendant on probation.
2 So, Mr. Thompson, do you have any argument on
3 that? And then I'll go to Mr. Malone.
4 MR. THOMPSON: Judge, to be frank with you the
02:05: day that this order to show cause came to us I was
6 drafting my own order. I was part of this other case
7 where I discovered the same issue as you did.
8 And I did my research on it. And I started
9 drafting a motion to correct an illegal sentence at
02:10: that time. And then we got this order from the Court.
11 And I said, Well, I don't have to do anything.
12 So I totally agree that probation is not an
13 option here. This is -- I talked to the victims and
14 the victims' family and let them know what happened. I
02:15: said, Look, I missed this. I should have caught it at
16 the PSI at that time.
17 THE COURT: Well, and the Court generally
18 backstops this too. And the -- this is the first time
19 in nearly ten years on the bench I've ever had this
02:20: happen. I think it started with the Division of Parole
21 and Probation recommending, affirmatively recommending
22 probation.
23 MR. THOMPSON: Yeah. There the PSI states
24 that it's not a mandatory. And then they also -- and
02:25: we -- we went through the hoops of getting a

02:01: psychosocial evaluation like you normally would for
2 someone who's got to be found to be not a high risk to
3 reoffend. And we did all that, and I missed it. And I
4 explained that to the family. And our position is that
02:05: the statutes are very clear here.
6 I mean, it's -- it's just -- it's not any
7 subsection of 201.230. It's just all of 201.230 you
8 don't get probation.
9 And so it seems very clear to us in that we
02:10: need to reschedule sentencing and do it again.
11 THE COURT: Okay. And that's what you would
12 like to do is reschedule a sentencing hearing and doing
13 it again?
14 MR. THOMPSON: I think that's what the
02:15: appropriate thing is to do.
16 THE COURT: Okay. Rather than simply just
17 say, well, this is now --
18 MR. THOMPSON: I think it would be more fair
19 to the defendant to do it that way.
02:20: THE COURT: Well, and --
21 MR. THOMPSON: And --
22 THE COURT: I think it would be -- I didn't
23 know that there were going to be any victims here
24 today. But that was going to be my point if there
02:25: weren't any victims here today is that they have a

5
02:11: might under the victim impact laws to have notice.
2 MR. THOMPSON: They're here. And I brought it
3 to their -- so just as soon as I found out, so I called
4 them. Let them know what's going on. I told them that
02:15: I anticipated we would probably have another sentencing
6 hearing because now your aims of sentencing become a
7 little bit different or at least your focus. I could
8 see the defense possibly wanting to present their
9 evidence differently.
02:10:25 I know we originally had recommended that he
11 go to prison and not get probation I believe at
12 sentencing. But so, anyway, that seems like the fair
13 way to go. But if you want to try to go forward today,
14 that's fine. They're here.
02:15:38 THE COURT: Okay. And then who -- who is here
16 today?
17 MR. THOMPSON: Shauna Eklund.
18 THE COURT: Shauna Eklund who I recognize --
19 MR. THOMPSON: Yes.
02:20:45 THE COURT: -- from the litigation. Yeah.
21 MR. THOMPSON: And these would be the
22 grandparents, if I recall --
23 THE COURT: Okay.
24 MR. THOMPSON: -- of the child.
02:25:49 THE COURT: Right. And I --

6
02:11:50 MR. THOMPSON: I don't think the child wanted
2 to be here. She wasn't at sentencing before I don't
3 think.
4 UNIDENTIFIED SPEAKER: She wasn't.
02:15:56 THE COURT: Okay.
6 MR. THOMPSON: She was not. So I would be
7 surprised if she came, but maybe she would.
8 THE COURT: Okay. All right. Mr. Malone.
9 MR. MALONE: Your Honor, I'm in somewhat of an
02:10: unenviable position. And I'm kind of surprised that
11 I'm here at this stage in the proceeding like this. So
12 we are, what? About a year and eight months -- nine
13 months after the original sentence was pronounced or
14 the jury came back.
02:15:26 THE COURT: I can't remember. When was the
16 sentence?
17 MR. THOMPSON: It was in June --
18 THE COURT: The sentencing was in June --
19 MR. THOMPSON: -- 2020.
02:20:30 THE COURT: -- of last year. I know it was
21 over a year. Yeah. And the --
22 MR. THOMPSON: Yeah.
23 THE COURT: -- Court had ordered the defendant
24 to serve some jail time at the front end of the
02:25: sentence.

02:11:39 MR. MALONE: I believe six months.
2 THE COURT: Right.
3 MR. MALONE: So he did serve that. And he's
4 been supervised by Parole and Probation since then.
02:15:43 And, of course, the -- it's my understanding
6 that Mr. Mentaberry was found not to be a high risk to
7 reoffend.
8 So the case presents a lot of novel issues.
9 We have filed a writ of habeas corpus alleging
02:10: ineffective assistance of counsel in the failure to
11 inform Mr. Mentaberry. It was actually informing him
12 that he could not appeal. That's what we expect the
13 evidence would show at a hearing on the writ. That he
14 was told "you can't appeal."
02:15:26 Not that it would be a futile gesture, but
16 just there was no appeal.
17 THE COURT: Um-hum.
18 MR. MALONE: And that hasn't been presented to
19 the Court.
02:20:36 So right now there are two things. I mean,
21 the Court could deny the writ petition when it comes
22 up.
23 I'm sorry, your Honor. I'm getting crowded by
24 my chair there.
02:25:48 THE COURT: This is a small courtroom. If you
02:11:4 need to move around to be comfortable --
2 MR. MALONE: I'll just move over here.
3 THE COURT: Or if you want to sit down, you
4 can do that.
02:15:54 MR. MALONE: I don't like sitting down and
6 speaking, so we'll just --
7 THE COURT: I was never a big fan of that
8 either as a lawyer. And here you actually have to look
9 through the clerk's screens to see the judge, I think,
02:10:00...
11 MR. MALONE: You know, it's new territory for
12 me here. I'm glad to be here. But it is -- you know,
13 one gets comfort in certain courtrooms that one appears
14 in all the time.
02:15:14 THE COURT: Sure.
16 MR. MALONE: So anyway, I would definitely --
17 I would strenuously object to sentence being pronounced
18 today.
19 THE COURT: Okay.
02:20:23 MR. MALONE: That's corrected. We -- I don't
21 want to address -- I must say, I think there is a
22 problem with the original sentence and suspension.
23 Right now the community, I believe, is safe.
24 He's under the supervision of Parole and Probation. He
02:25: was out on bond before trial.

9
02:11:45 Right now my concern is keeping Mr. Mentaberry
2 out of the Nevada State Prison before we know that he
3 should be there. We don't know that right now.
4 As I said earlier, and I'm repeating myself,
02:15: there will be an appeal --
6 THE COURT: Sure.
7 MR. MALONE: -- of some sort. It will either
8 be on the writ, and then if we're successful on that --
9 well, on the writ. And if not, if we're not successful
02:10: with the writ, there would be an appeal. And even if
11 we aren't successful on the writ, there would be an
12 appeal.
13 So the hearing, I read it as a status hearing.
14 So...
02:15:28 THE COURT: On the petition -- yeah, as it
16 pertains to the civil case, the petition for writ of
17 habeas corpus. I think that's accurate.
18 MR. MALONE: Okay.
19 THE COURT: Yeah.
02:20:35 MR. MALONE: Well --
21 THE COURT: And I can tell you why I thought I
22 should do that too. But I'm more than happy to hear
23 you out.
24 MR. MALONE: Oh, I think -- I think every --
02:25: what my goal is today is to keep Mr. Mentaberry in his

10
02:11:5 home right now under strict supervision by Parole and
2 Probation until the details and the mistakes are fixed.
3 The -- that the -- the misapprehensions that lead us
4 here are repaired.
02:15:10 So I don't want to concede that the law -- I
6 believe, the law looks like it is what it is. That
7 probation is not available for this offense.
8 I can understand some of the confusion. For
9 30 years everybody saw lewdness case and knew it was a
02:10: mandatory -- you know, that that you were going to
11 prison.
12 And then the law did change and made a couple
13 of what would you call it? Made it more of a
14 progressive crime regarding the age of the victims.
02:15:48 So right now I think the status -- the status
16 hearing should conclude that the status -- sorry, your
17 Honor. If we can approach for a second. I --
18 THE COURT: Okay. Did you want to have a
19 bench conference?
02:20:10 MR. MALONE: No.
21 THE COURT: Off the record?
22 MR. MALONE: I just I feel like I'm slurring
23 my words.
24 THE COURT: Okay.
02:25:13 MR. MALONE: I have -- so I had tongue cancer

02:11:17 about 25 years ago.

2 THE COURT: Okay.

3 MR. MALONE: Had about a third of my tongue
4 removed. And there are times when my speech isn't as
02:15:20 clear as I would like. Normally people don't comment
6 on -- you know, most of the time I say something and
7 everybody goes, well I didn't know. But I wanted to
8 make you aware of that.

9 THE COURT: Okay. That's fine.

02:10:36 MR. MALONE: And that, you know, it -- it
11 highlights for me, but maybe not for everybody else.

12 THE COURT: Okay. I didn't see it as a
13 problem, thought. So please --

14 MR. MALONE: Oh, I certainly see it as a
02:15:40 problem.

16 THE COURT: Okay. Well please --

17 MR. MALONE: In terms of the prior cancer
18 situation.

19 THE COURT: Sure.

02:20:55 MR. MALONE: So I don't think we should rush
21 into sentencing. That would create a lot of different
22 problems.

23 The -- if the Court grants the writ, we go
24 reset on an appeal and he can -- and he can post an
02:25:00 appellate bond, an appeal bond.

02:11:17 If you don't grant the writ, we'll appeal any
2 way and post an appeal bond.

3 So, really, I think the option -- the Court
4 should address everything pretty carefully, and we

02:15:30 should proceed with this case now in the correct manner
6 and with diligence.

7 But it looks to me that whatever happens and
8 whatever the court rules, there -- there will be an
9 appeal of some sort.

02:10:53 And he would have the right to bond out.

11 THE COURT: Well, let me ask you this. This
12 was my thought in setting this case for status hearing
13 on the habeas action.

14 My thinking was, look, if the Court ends up

02:15:10 sentencing the defendant and correcting what appears to

16 be an illegal sentence in the criminal case, then the
17 defendant -- I think his right to appeal really would
18 be resurrected; would it not? Because then the Court
19 has now said, Look, I'm -- I, as the judge, would be

02:20:30 now saying "I'm amending this judgment of conviction.

21 The defendant has to go to prison." You know. And
22 now -- and I've had other cases like this where the
23 defendant's preserved the right to appeal, say, a
24 denial of a motion to suppress, and the defendant

02:25:00 pleads guilty to some offense or no contest. The Court

02:11:00 accepts the plea. The Court sentences the defendant

2 and orders prison time. No suspension of sentence. No
3 suspension of the execution of sentence. The defendant
4 has got to go to prison. And then the defendant posts

02:15:20 bond on appeal.

6 MR. MALONE: Is the Court questioning whether
7 I think that's a --

8 THE COURT: I'm asking --

9 MR. MALONE: If I think that's a good idea?

02:10:35 THE COURT: I'm asking you if you think that
11 is a way to really dispose of the post conviction
12 petition for writ of habeas corpus as really moot
13 because then he would get to appeal.

14 MR. MALONE: That --

02:15:46 THE COURT: And --

16 MR. MALONE: I would ask -- oh --

17 THE COURT: The Court would then entertain
18 whether to -- whether there should be an appeal bond or
19 not.

02:20:56 MR. MALONE: I think that --

21 THE COURT: Stay out on pending the resolution
22 of the appeal. You see what I mean.

23 MR. MALONE: I do. And I'm embarrassed that I
24 didn't think of that solution.

02:25:07 THE COURT: Oh, well.

02:21:08 MR. MALONE: I think it -- it certainly is
2 the --

3 THE COURT: I'm embarrassed that I didn't
4 pronounce the correct sentence to begin with.

02:25:15 MR. MALONE: As I stated earlier, there's some
6 confusion always when there's some change in the law.
7 But I -- if that is a possibility, we would have no
8 opposition to it.

9 THE COURT: Okay.

02:10:25 MR. MALONE: But I do need to research it. I
11 can't --

12 THE COURT: Okay.

13 MR. MALONE: I can't make a decision now. I'm
14 buying myself another trip out here --

02:15:34 THE COURT: Okay.

16 MR. MALONE: -- through the road work and
17 everything else. But I think I need to do --

18 THE COURT: Well --

19 MR. MALONE: -- that and do my due diligence.

02:20:41 THE COURT: Well, and the other thing is, I
21 mean, I don't know how much notice that the victims got
22 of this hearing. I mean, the DA, in my experience,
23 does a good job of giving a lot of notice. But and
24 then I think if we can have a resentencing hearing

02:25:50 where also Mr. Mentaberry can put on any further

02:21: evidence he thinks is appropriate, that is the way I
2 would like to see it go too.
3 My only purpose today was to see, look, is
4 there any legal argument against having a resentencing?

02:25: Certainly the DA's office sees it as I'm seeing this
6 legal issue now.

7 And Mr. Mentaberry, you know, he's just in a
8 spot here where he's probably surprised, but has
9 counsel, and you've advised him.

02:40:30 So I have no problem resetting this for
11 sentencing hearing. And, you know, I'm not going to,
12 say -- I'm not making any promises about what I would
13 do if I resentenced and followed the law and did not
14 suspend the execution of the sentence.

02:45:52 I'm not making any promises about whether I
16 would allow the defendant to remain out pending an
17 appeal. But it's something that I think the defendant
18 can ask for, and that the Court can consider giving
19 that relief. And then he would, I assume then, be able
02:20: to appeal all these issues including whether it was
21 properly sentenced, I guess. Whatever legal issues his
22 esteemed counsel thinks there are.

23 MR. MALONE: Thank you.

24 The -- I think that that's a good proposal and
02:25: solution. I would ask for leave of two weeks to maybe

02:21: file paperwork and do the research on that issue.

2 THE COURT: Okay.

3 MR. MALONE: And -- but I am certainly
4 intrigued by the Court's analysis.

02:25:45 THE COURT: Okay. Well, I have done it in
6 other cases. I know it's out there. What's your view
7 on that? Is that a -- is that a legal avenue?

8 MR. THOMPSON: The --

9 THE COURT: For the defense as far as you
02:40: know?

11 MR. THOMPSON: Yeah. He would have the
12 opportunity to appeal and dismiss the writ case
13 basically because it would be reinstated.

14 THE COURT: Well, and remain out, remain

02:45: released --

16 MR. THOMPSON: There --

17 THE COURT: -- pending.

18 MR. THOMPSON: -- is an avenue that allows him
19 to do, like I say, an appeal bond, but there are hoops

02:20: to jump through.

21 THE COURT: Um-hum.

22 MR. THOMPSON: I mean, there are
23 considerations.

24 THE COURT: That the Court has to make.

02:25:16 MR. THOMPSON: There are factors that the

02:21: Court has to decide whether or not it's appropriate.

2 Or should the sentence be imposed at that point in
3 time?

4 THE COURT: Right. Right.

02:25:24 MR. THOMPSON: And I have that. I briefed it.

6 And I've done it in another case. It's a fairly high
7 burden for the defendant.

8 THE COURT: It's what? High burden?

9 MR. THOMPSON: It's a fairly high burden for
02:40: the defendant.

11 THE COURT: Well, but it's something that the
12 Court can certainly consider.

13 MR. THOMPSON: They can.

14 THE COURT: I'm not going to do anything with
02:45: this habeas action right now. I mean, I'm not touching
16 it. Because we got to figure out what to do in the
17 criminal case.

18 MR. THOMPSON: Sure.

19 THE COURT: And the victims are here. And I
02:20: want them to understand I'm not saying I'm definitely
21 going to do one thing or the other. I'm just trying to
22 figure out how to get this case done.

23 Because the Court made an error, I think, in
24 the way it suspended the execution of the sentence in
02:25: this case. You know, I've been doing this on this

02:21: district court bench for nearly 10 years. And I
2 couldn't believe that that happened in this case.

3 But I think it started -- as I'm sure you've
4 probably already discussed with them. It started when

02:25: the Division of Parole and Probation made a
6 recommendation for an illegal sentence. Now the
7 Division of Parole and Probation can make no
8 recommendations on sentence. Although they do tell us
9 district judges whether they think a conviction -- or a

02:40: defendant can be put on probation or not. They still
11 do that. They tell us whether they think it's
12 mandatory probation. They tell us whether -- I'm
13 assuming the courts where you're practicing is the same
14 thing. Over here they tell us in the presentence

02:45: reports, this is mandatory probation. This is
16 mandatory no probation.

17 If that -- they make those sorts of comments
18 in these presentence reports. This is where this thing
19 went wrong. And then, you know, when neither -- and

02:20: I'm not pointing any fingers. I don't throw anybody
21 under the bus. The buck stops here. Ultimately, it's
22 my sentence. But nobody else pointed out to the Court
23 that that was a recommendation that was in error. And
24 the Court didn't backstop that. So that's how we ended

02:25: up here today. Which is a shame.

02:21:32 MR. MALONE: And, your Honor, I do have
2 another insight I think. Number one, the statute --
3 the statute was changed.

4 I know that Mr. Woodbury, when he was
02:25:48 preparing for sentencing did research involving the
6 Legislative Counsel Bureau. There was really some
7 inconsistent -- and they don't promulgate law, but
8 their information was misleading.

9 And he -- he did do that research and thought
02:30:10 that, Okay, you know, everybody is on this bus and
11 looks like it will be okay.

12 THE COURT: Well, yeah, I'm -- I'm just
13 assuming. I mean, Mr. Thompson is an officer of the
14 Court. He tells me that he just missed it. Okay. I
02:35:15 missed it too.

16 MR. MALONE: Well --

17 THE COURT: And the reason I did was I didn't
18 backstop it. And he probably didn't either because
19 he's getting a recommendation just like I am from the
02:40:20 Division of Parole and Probation.

21 MR. MALONE: Uh-huh.

22 THE COURT: I don't know what Mr. Woodbury did
23 because he's not here to tell me. I just kind of
24 assumed he didn't --

02:45:32 MR. MALONE: Well --

02:51:33 THE COURT: He didn't even see it as a problem
2 either once he saw there was a recommendation for
3 probation. He probably thought, that's good, and I can
4 go argue that.

02:55:40 MR. MALONE: I think the problem from the --
6 from the legislative standpoint is they put very
7 important parts of the statute in a different statute.

8 THE COURT: Oh, yeah.

9 MR. MALONE: Which, my goodness, let's not do
02:10:10 that.

11 THE COURT: Well, everybody went past Go from
12 NRS 176A.100(1)(a) when we shouldn't have gone even
13 past then. That's the problem. Everybody then
14 everybody went to NRS 176A.110. And they looked at
02:15:05 NRS 176.139. And you're right. Those are all in
16 different areas of -- those are all located in
17 different statutes.

18 And I'm glad I have a new law clerk here now.
19 Because I've told him in Nevada you're going to have to
02:20:20 look at all kinds of places to figure out what the law
21 is in the statutes sometimes.

22 MR. MALONE: This isn't going to bite anybody
23 in this courtroom again.

24 Your Honor, I would ask -- so my next -- quite
02:25:30 frankly, I mean, I was -- I was hired to prosecute the

02:21:40 writ, to draft the writ and take care of that.

2 And --

3 THE COURT: I know this has to be a surprise
4 to you.

02:25:47 MR. MALONE: It was -- yeah.

6 THE COURT: As it is to him. As it is to
7 these people back here; right? They're probably
8 wondering what in the world is going on here.

9 MR. MALONE: Well, I mean, Mr. Mentaberry
02:30:10 survived the initial shock and is still with us. And
11 that's good.

12 But I would ask if the Court at this point in
13 time should I advise my client to be in touch with a
14 bondsmen? Would he be able to stay out of custody at
02:35:15 sentencing and have time to post the bond? I don't
16 know what the Court's procedure is.

17 THE COURT: I haven't looked at it. But if
18 you want to --

19 MR. MALONE: I don't even know what bond.

02:40:27 THE COURT: If you want to brief me on it,
21 that's fine. I thought you said you were going to file
22 something.

23 MR. MALONE: Well, no, your Honor. I want to
24 look to see if I'm going to file anything.

02:45:36 THE COURT: Okay.

02:51:36 MR. MALONE: But I -- this is a different
2 issue now.

3 I want to make sure that he doesn't walk out
4 of this courtroom -- and I'm going to do everything I

02:55:40 can to make sure that he has adequate time to post
6 whatever bond -- to make the arrangements to post
7 whatever bond the Court might set if the Court decides
8 that that --

9 THE COURT: To go there.

02:10:00 MR. MALONE: -- is appropriate.

11 THE COURT: Okay.

12 MR. MALONE: Because obviously it might not
13 be.

14 But we -- we -- I feel I need to do that. And
02:15:05 so I'm asking the Court if we would have -- after
16 sentencing, and you make your decision whether or not
17 we would have a stay of the execution. Or if the Court
18 might -- I don't know what the Court can do. I think
19 we have to have a bond.

02:20:25 THE COURT: Yeah. I mean, I'd have to look at
21 the law on that. That is one thing that I didn't do.

22 MR. MALONE: I think I need more than two
23 weeks.

24 THE COURT: At this stage.

02:25:34 Well, what I'm -- what I'm looking at is I

02:21:3 would like this resentencing to be within the next
2 month. I don't want this to linger any longer. I
3 don't think it's fair to these people sitting behind
4 Mr. Thompson. Ms. Eklund and her family. I don't
02:25:4 think it's appropriate for Mr. Mentaberry either.

6 MR. MALONE: Your Honor, my calendar right
7 now, I have a 12-count trafficking and other crimes
8 trial set for, I believe, the 16th of October.

9 THE COURT: Okay.

02:10:10 MR. MALONE: So anyway, I have that. I think
11 it's going -- I think it's set right now for ten days.

12 THE COURT: Okay.

13 MR. MALONE: And it's a case that's requiring
14 quite a bit of work --

02:15:26 THE COURT: Okay.

16 MR. MALONE: -- on my part to prepare.

17 THE COURT: So what you're telling me is it
18 would have to be after that?

19 MR. MALONE: I would -- it would -- yes. I

02:20:3 mean, I really have a duty to my -- to that client
21 to -- that trial starts on the 19th of October, and it
22 goes for six days.

23 THE COURT: Okay. Well, it's not as far out
24 as I wanted to go, but -- but I've already been told by

02:25:5 my judicial assistant that I'm pretty good during the

02:31:5 week of November 1st.

2 MR. MALONE: That will be fine.

3 THE COURT: And I'm going to be gone on Friday
4 the 5th, but I will be here. My regular law and motion

02:35:0 day is Monday. I prefer not to do this on a regular
6 law and motion day.

7 MR. MALONE: Please.

8 THE COURT: So if it could be Tuesday the 2nd,
9 3rd, or 4th. Mr. Thompson can check with Ms. Eklund

02:40:1 and her family. And then we can go from there.

11 MR. THOMPSON: November 2nd, does that work?

12 MS. EKLUND: I don't know. I have to check
13 work.

14 MR. THOMPSON: All right.

02:45:25 THE COURT: Okay. Well, I can take a recess
16 so the parties can check their respective calendars.
17 My judicial assistant is in here anyway. We will check
18 our calendar. Why don't we see if we can get something
19 set.

02:20:35 MR. MALONE: Your Honor.

21 THE COURT: Yeah.

22 MR. MALONE: I apologize for being a problem
23 child, but I am -- right now I have a defense contract
24 in Douglas County that I'm leaving at the beginning of

02:25:0 October. And I don't know my current -- that --

02:31:5 November should allow me to get my new calendar in
2 place.

3 THE COURT: Okay.

4 MR. MALONE: I'm taking over. Another

02:35:0 attorney is assigned cases right now in Carson City.

6 So anyway I want to let the Court know that. Right
7 now, I don't have a calendar for November.

8 THE COURT: Okay.

9 MR. MALONE: If that -- sorry.

02:40:16 THE COURT: Well, if we could set this -- I'd

11 like to set this then -- I'm not going to be in the
12 office during the week of the 8th. I don't want this
13 to get down towards Thanksgiving. I mean, I'd like to
14 get this done, you know. And that should give

02:45:3 Mr. Mentaberry and his counsel plenty of time to make a
16 case, assuming the Court does ultimately find this was
17 a sentence that's illegal, he has to go to prison. It
18 will give counsel an opportunity to make the case to
19 the Court why perhaps he should be able to remain

02:20:5 released pending his appeal.

21 And, again, I think this probably resurrects
22 the appeal. And that probably kills the habeas action.

23 So, and then, of course, Mr. Thompson can
24 argue against that if he feels that's appropriate. We

02:25:5 can have a resentencing hearing. And, you know, get

02:31:1 due process, not just -- proper due process. Not just
2 to Mr. Mentaberry, but certainly to the victim's who
3 deserve it too.

4 MR. MALONE: And, your Honor, what date did

02:35:2 the Court set?

6 THE COURT: Well --

7 MR. MALONE: Oh --

8 THE COURT: I will let Mr. Thompson check
9 with -- maybe Ms. Eklund needs to call her work it

02:40:3 sounds like. They can check and see what a good date
11 is during that week. My judicial assistant can double
12 check our calendar too. All right.

13 So we'll just take a brief recess. Okay.

14 Thank you.

02:45:40

(Recess)

17 THE COURT: All right. Good afternoon, again.
18 Please be seated. And we're back on the record for the
19 two cases DC-CV-21-68, Mentaberry versus Daniels.

02:20:09 CR-PP-18-5030, State versus Mentaberry. And
21 Chad Thompson, the Deputy District Attorney is back to
22 represent the state. And Mr. Malone is back in court
23 with counsel -- with his attorney -- his client rather,
24 Kevin Mentaberry.

02:25:24 So the judicial assistant's informed me that

02:41: the date that is good for the Court and counsel for
2 resentencing would be November 2nd, 2021, at 2:00 p.m.
3 and I assume Mr. Thompson's checked with the victims.
4 And that that's okay?

02:45:42 MR. THOMPSON: Yes.

6 THE COURT: And Mr. Malone's available at this
7 point for that date.

8 And so we'll have you there. We'll have you
9 here for that. You have to be here, okay, for the

02:40: sentencing, resentencing, Mr. Mentaberry.

11 And, yeah, I mean, if there's any further
12 legal arguments that need to be made regarding the
13 resentencing aspect of this, or the legality of all
14 this, then I'll hear it at that time too. Although

02:45: really today was the date and time -- today was the day
16 I was supposed to hear all that type of argument.

17 We'll -- like I say, you know, I'll be happy
18 to entertain any further arguments from the lawyers on
19 what the appropriate sentence should be. And certainly

02:20: hear a statement from Mr. Mentaberry further if he has
21 anything. And then also from the victims. Of course,

22 I assume the state will want to end the proceeding with
23 their statements, so. And take any other documentary
24 or physical evidence or any other types of evidence

02:25: besides testimony that you may have. I'll be eager to

02:41: hear all that.

2 Because as you point out, he has been on -- he
3 has been out a long time since I sentenced him and
4 maybe there will be some things regarding that that

02:55: will be hearing about.

6 So the Court will just simply use the prior
7 presentence report. At this point, I don't think I'd
8 reorder an amendment for any of that. I don't see the
9 need for that. But what I do -- since we've got three

02:40: judges here, we don't have representatives of Parole
11 and Probation come here for these hearings, Mr. Malone.

12 Typically, what I do is I ask the parties to
13 just verify with the Division of Parole and Probation
14 what credit for time served is. And then the Court

02:45: also verifies that. Our judicial assistant Lidia

16 verifies that as well.

17 And then what I ask is the parties to discuss
18 what credit for time served is so that, you know, I
19 make sure I get that right because I know it's going to

02:20: change since Mr. Mentaberry served some jail time once

21 I sentenced him, so -- after I sentenced him, so -- the
22 first time.

23 So, and then we'll just kind of hold on to the
24 petition for writ of habeas corpus file. And then --

02:25: and then we're going -- I'm going to check in on the

02:51: issue of remaining released pending the -- any appeal
2 too. I think that's something I'm just going to
3 revisit in chambers too.

4 MR. THOMPSON: I would just suggest that after

02:53: the sentencing hearing that we would just roll right
6 into that hearing, whatever it is. So if there is

7 anything that needs to be filed beforehand, I think we
8 ought to do that before.

9 THE COURT: Okay.

02:40:47 MR. THOMPSON: So we can just roll from --
11 once the judgment of conviction is entered orally, I
12 think we can roll into that.

13 THE COURT: Okay. Okay?

14 So be prepared for all that. This

02:45: November 2nd should give Mr. Thompson plenty of time to
16 talk to the victims about how this is going to go. And
17 then also Mr. Mentaberry to prepare any arguments he's
18 got and statement he might have. And then Mr. Malone
19 time to research that aspect of the case.

02:20:13 MR. MALONE: Thank you.

21 THE COURT: Thank you very much. Court's in
22 recess.

23 And, again, the Court does -- before we
24 actually go on recess -- apologize to all parties for

02:25: the confusion that's happened here. This -- this

02:51: just -- I hate to see this kind of stuff.

2 Court's in recess.

3 (Proceedings were concluded.)

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REPORTER'S CERTIFICATE

1
2 STATE OF NEVADA)
3 COUNTY OF CLARK)
4 I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
5 HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
6 PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
7 TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
8 STENOGRAPHY NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
9 AND UNDER MY DIRECTION AND SUPERVISION AND THE
10 FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
11 ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
12 PROCEEDINGS HAD.

13 IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
14 MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
15 NEVADA.

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17
18 PEGGY-ISOM, RMR, CCR 541
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MR. MALONE: [65] MR. THOMPSON: [30] 5/4 5/23 6/14 6/18 6/21 7/2 7/17 7/19 7/21 7/24 8/1 8/6 8/17 8/19 8/22 18/8 18/11 18/16 18/18 18/22 18/25 19/5 19/9 19/13 19/18 26/11 26/14 29/5 31/4 31/10 MS. EKLUND: [1] 26/12 THE COURT: [96] UNIDENTIFIED SPEAKER: [1] 8/4	540 [1] 2/10 541 [2] 1/25 33/17 5th [1] 26/4 6 60 [1] 4/4 68 [3] 1/1 3/8 28/19 7 72 [1] 4/2 738-3101 [2] 2/9 2/10 775 [3] 2/9 2/10 2/20 8 89701 [1] 2/19 89801 [1] 2/8 8th [1] 27/12	allows [1] 18/18 already [2] 20/4 25/24 also [5] 5/24 16/25 29/21 30/15 31/17 Although [2] 20/8 29/14 ALVIN [1] 1/17 always [1] 16/6 am [3] 18/3 21/19 26/23 amending [1] 14/20 amendment [1] 30/8 analysis [1] 18/4 another [6] 4/20 7/5 16/14 19/6 21/2 27/4 anticipated [1] 7/5 any [20] 4/15 4/16 5/2 6/6 6/23 6/25 14/1 16/25 17/4 17/12 17/15 20/20 25/2 29/11 29/18 29/23 29/24 30/8 31/1 31/17 anybody [2] 20/20 22/22 anything [5] 5/11 19/14 23/24 29/21 31/7 anyway [6] 3/11 7/12 10/16 25/10 26/17 27/6 apologize [2] 26/22 31/24 appeal [24] 9/12 9/14 9/16 11/5 11/10 11/12 13/24 13/25 14/1 14/2 14/9 14/17 14/23 15/5 15/13 15/18 15/22 17/17 17/20 18/12 18/19 27/20 27/22 31/1 APPEARANCES [1] 2/1 appears [2] 10/13 14/15 appellate [1] 13/25 approach [1] 12/17 appropriate [7] 6/15 17/1 19/1 24/10 25/5 27/24 29/19 are [13] 6/5 8/12 9/20 12/2 12/4 13/4 17/22 18/19 18/22 18/25 19/19 22/15 22/16 areas [1] 22/16 aren't [1] 11/11 argue [2] 22/4 27/24 argued [1] 4/9 argument [3] 5/2 17/4 29/16 arguments [3] 29/12 29/18 31/17 around [1] 10/1 arrangements [1]	24/6 as [26] 4/5 5/7 7/3 7/3 10/8 11/4 11/13 11/15 13/4 13/5 13/12 13/14 14/19 15/12 16/5 17/5 18/9 18/9 20/3 22/1 23/6 23/6 25/23 25/24 30/2 30/16 ask [8] 14/11 15/16 17/18 17/25 22/24 23/12 30/12 30/17 asking [3] 15/8 15/10 24/15 aspect [2] 29/13 31/19 assigned [1] 27/5 assistance [1] 9/10 assistant [4] 25/25 26/17 28/11 30/15 assistant's [1] 28/25 assume [3] 17/19 29/3 29/22 assumed [1] 21/24 assuming [3] 20/13 21/13 27/16 at [27] 4/5 4/15 5/9 5/15 5/16 7/7 7/11 8/2 8/11 8/24 9/13 19/2 22/14 22/20 23/12 23/14 23/17 24/20 24/24 24/25 26/24 29/2 29/6 29/14 30/7 33/6 33/8 attorney [5] 2/4 3/16 27/5 28/21 28/23 August [1] 3/15 authority [3] 4/10 4/11 4/25 available [2] 12/7 29/6 avenue [3] 2/18 18/7 18/18 aware [1] 13/8	10/25 11/2 31/8 31/23 33/6 BEFORE-ENTITLED [1] 33/6 beforehand [1] 31/7 begin [1] 16/4 beginning [1] 26/24 behind [1] 25/3 being [2] 10/17 26/22 believe [6] 7/11 9/1 10/23 12/6 20/2 25/8 bench [3] 5/19 12/19 20/1 besides [1] 29/25 BEST [1] 33/11 big [1] 10/7 bit [2] 7/7 25/14 bite [1] 22/22 bond [13] 10/25 13/25 13/25 14/2 14/10 15/5 15/18 18/19 23/15 23/19 24/6 24/7 24/19 bondsmen [1] 23/14 brief [2] 23/20 28/13 briefed [1] 19/5 brought [1] 7/2 buck [1] 20/21 burden [3] 19/7 19/8 19/9 Bureau [1] 21/6 bus [2] 20/21 21/10 but [32] 6/24 7/12 7/13 8/7 9/15 10/12 11/22 13/7 13/11 14/7 16/7 16/10 16/17 16/23 17/8 17/17 18/3 18/19 19/11 20/3 20/22 21/7 23/12 23/17 24/1 24/14 25/24 25/24 26/4 26/23 28/2 30/9 buying [1] 16/14 C calendar [5] 25/6 26/18 27/1 27/7 28/12 calendars [1] 26/16 call [2] 12/13 28/9 called [1] 7/3 came [3] 5/5 8/7 8/14 can [28] 10/4 11/21 12/8 12/17 13/24 13/24 16/24 16/25 17/18 17/18 19/12 19/13 20/7 20/10 22/3 24/5 24/18 26/9 26/10 26/15 26/16 26/18 27/23 27/25 28/10 28/11 31/10 31/12 can't [4] 8/15 9/14 16/11 16/13 cancer [2] 12/25
--	--	---	--	---

C cancer... [1] 13/17 care [1] 23/1 carefully [1] 14/4 CARSON [2] 2/19 27/5 case [25] 1/1 3/6 3/8 3/12 3/14 3/22 4/17 4/20 5/6 9/8 11/16 12/9 14/5 14/12 14/16 18/12 19/6 19/17 19/22 19/25 20/2 25/13 27/16 27/18 31/19 cases [5] 3/6 14/22 18/6 27/5 28/19 category [1] 3/24 caught [1] 5/15 cause [3] 3/14 4/1 5/5 CCR [2] 1/25 33/17 certain [1] 10/13 certainly [7] 13/14 16/1 17/5 18/3 19/12 28/2 29/19 CERTIFICATE [1] 33/1 CERTIFIED [1] 33/4 CERTIFY [1] 33/5 CHAD [3] 2/5 3/17 28/21 chair [1] 9/24 chambers [1] 31/3 change [3] 12/12 16/6 30/20 changed [1] 21/3 Chapter [1] 4/24 Chapter 176A [1] 4/24 Charles [1] 3/9 check [8] 26/9 26/12 26/16 26/17 28/8 28/10 28/12 30/25 checked [1] 29/3 child [5] 3/24 4/22 7/24 8/1 26/23 CITY [2] 2/19 27/5 civil [1] 11/16 CLARK [2] 33/3 33/14 clear [3] 6/5 6/9 13/5 clerk [1] 22/18 clerk's [1] 10/9 client [3] 23/13 25/20 28/23 come [1] 30/11 comes [1] 9/21 comfort [1] 10/13 comfortable [1] 10/1 comment [1] 13/5 comments [1] 20/17 community [1] 10/23 concede [1] 12/5 concern [2] 3/22 11/1 conclude [1] 12/16	concluded [2] 32/3 conference [1] 12/19 confusion [3] 12/8 16/6 31/25 consider [2] 17/18 19/12 considerations [1] 18/23 CONSTITUTES [1] 33/10 contest [1] 14/25 contract [1] 26/23 conviction [5] 3/13 14/20 15/11 20/9 31/11 corpus [5] 3/13 9/9 11/17 15/12 30/24 correct [5] 3/20 4/14 5/9 14/5 16/4 corrected [1] 10/20 correcting [1] 14/15 Corrections [1] 3/10 correctly [2] 4/18 4/24 could [5] 7/7 9/12 9/21 26/8 27/10 couldn't [1] 20/2 counsel [9] 3/18 9/10 17/9 17/22 21/6 27/15 27/18 28/23 29/1 count [2] 3/23 25/7 counts [1] 4/21 COUNTY [6] 1/6 2/4 3/16 26/24 33/3 33/14 couple [1] 12/12 course [4] 3/21 9/5 27/23 29/21 court [49] Court's [5] 3/22 18/4 23/16 31/21 32/2 courtroom [3] 9/25 22/23 24/4 courtrooms [1] 10/13 courts [1] 20/13 CR [3] 1/1 3/6 28/20 CR-FP-18-5030 [3] 1/1 3/6 28/20 create [1] 13/21 credit [2] 30/14 30/18 crime [1] 12/14 crimes [1] 25/7 criminal [4] 3/14 3/22 14/16 19/17 crowded [1] 9/23 CTHOMPSON [1] 2/11 current [1] 26/25 custody [1] 23/14 CV [3] 1/1 3/8 28/19 D DA [1] 16/22 DA's [1] 17/5	Daniels [2] 3/9 28/19 date [6] 3/11 28/4 28/10 29/1 29/7 29/15 DATED [1] 1/20 day [4] 5/5 26/5 26/6 29/15 days [2] 25/11 25/22 DC [3] 1/1 3/8 28/19 DC-CV-21-68 [3] 1/1 3/8 28/19 dealing [1] 4/19 decide [1] 19/1 decides [1] 24/7 decision [2] 16/13 24/16 defendant [24] 1/12 2/14 3/7 3/23 4/2 4/4 4/8 4/13 4/20 5/1 6/19 8/23 14/15 14/17 14/21 14/24 15/1 15/3 15/4 17/16 17/17 19/7 19/10 20/10 defendant's [1] 14/23 defense [3] 7/8 18/9 26/23 definitely [2] 10/16 19/20 denial [1] 14/24 deny [1] 9/21 Department [1] 3/10 DEPT [1] 1/2 Deputy [2] 3/16 28/21 deserve [1] 28/3 details [1] 12/2 did [14] 4/1 4/11 5/7 5/8 6/3 9/3 12/12 12/18 17/13 21/5 21/9 21/17 21/22 28/4 didn't [11] 6/22 13/7 13/12 15/24 16/3 20/24 21/17 21/18 21/24 22/1 24/21 different [6] 7/7 13/21 22/7 22/16 22/17 24/1 differently [1] 7/9 diligence [2] 14/6 16/19 DIRECTION [1] 33/9 Director [1] 3/9 disagreement [2] 4/6 4/8 discovered [2] 4/19 5/7 discuss [1] 30/17 discussed [1] 20/4 dismiss [1] 18/12 dispose [1] 15/11 district [7] 1/5 1/18 2/4 3/16 20/1 20/9 28/21	Division [6] 4/6 5/20 20/5 20/7 21/20 30/13 do [35] documentary [1] 29/23 does [4] 16/23 26/11 27/16 31/23 doesn't [1] 24/3 doing [2] 6/12 19/25 don't [29] 5/11 6/8 8/1 8/2 10/5 10/20 11/3 12/5 13/5 13/20 14/1 16/21 20/20 21/7 21/22 23/15 23/19 24/18 25/2 25/3 25/4 26/12 26/18 26/25 27/7 27/12 30/7 30/8 30/10 done [4] 18/5 19/6 19/22 27/14 double [1] 28/11 Douglas [1] 26/24 down [4] 10/3 10/5 27/13 33/5 draft [1] 23/1 drafting [2] 5/6 5/9 due [3] 16/19 28/1 28/1 during [3] 25/25 27/12 28/11 duty [1] 25/20 E eager [1] 29/25 earlier [2] 11/4 16/5 eight [1] 8/12 either [5] 10/8 11/7 21/18 22/2 25/5 Eklund [5] 7/17 7/18 25/4 26/9 28/9 ELKO [5] 1/6 2/4 2/8 2/25 3/16 ELKOCOUNTYNV.NET [1] 2/11 else [3] 13/11 16/17 20/22 embarrassed [2] 15/23 16/3 end [2] 8/24 29/22 ended [1] 20/24 ends [1] 14/14 entered [2] 3/15 31/11 entertain [2] 15/17 29/18 ENTITLED [1] 33/6 error [2] 19/23 20/23 ESQ [2] 2/5 2/17 esteemed [1] 17/22 evaluation [1] 6/1 even [4] 11/10 22/1 22/12 23/19	ever [1] 5/19 every [1] 11/24 everybody [7] 12/9 13/7 13/11 21/10 22/11 22/13 22/14 everything [3] 14/4 16/17 24/4 evidence [5] 7/9 9/13 17/1 29/24 29/24 execution [5] 4/25 15/3 17/14 19/24 24/17 expect [1] 9/12 experience [1] 16/22 explained [1] 6/4 F fact [1] 4/10 factors [1] 18/25 failure [1] 9/10 fair [3] 6/18 7/12 25/3 fairly [2] 19/6 19/9 family [4] 5/14 6/4 25/4 26/10 fan [1] 10/7 far [2] 18/9 25/23 Fax [1] 2/10 fear [1] 4/11 feel [2] 12/22 24/14 feels [1] 27/24 felony [1] 3/25 figure [3] 19/16 19/22 22/20 file [4] 18/1 23/21 23/24 30/24 filed [2] 9/9 31/7 find [1] 27/16 fine [4] 7/14 13/9 23/21 26/2 fingers [1] 20/20 first [2] 5/18 30/22 fixed [1] 12/2 FLOOR [1] 2/7 focus [1] 7/7 followed [1] 17/13 FOREGOING [1] 33/10 forward [1] 7/13 found [4] 3/23 6/2 7/3 9/6 FOURTH [1] 1/5 FP [3] 1/1 3/6 28/20 frank [1] 5/4 frankly [1] 22/25 FRIDAY [3] 1/20 3/1 26/3 front [1] 8/24 FULL [1] 33/10 further [4] 16/25 29/11 29/18 29/20 futile [1] 9/15
---	--	---	---	--

G gesture [1] 9/15 get [10] 6/8 7/11 15/13 19/22 26/18 27/1 27/13 27/14 27/25 30/19 gets [1] 10/13 getting [3] 5/25 9/23 21/19 give [3] 27/14 27/18 31/15 giving [2] 16/23 17/18 glad [2] 10/12 22/18 GMAIL.COM [1] 2/21 go [16] 5/3 7/11 7/13 7/13 13/23 14/21 15/4 17/2 22/4 22/11 24/9 25/24 26/10 27/17 31/16 31/24 goal [1] 11/25 goes [2] 13/7 25/22 going [21] 6/23 6/24 7/4 12/10 17/11 19/14 19/21 22/19 22/22 23/8 23/21 23/24 24/4 25/11 26/3 27/11 30/19 30/25 30/25 31/2 31/16 gone [2] 22/12 26/3 good [9] 15/9 16/23 17/24 22/3 23/11 25/25 28/10 28/17 29/1 goodness [1] 22/9 got [7] 5/10 6/2 15/4 16/21 19/16 30/9 31/18 grandparents [1] 7/22 grant [1] 14/1 grants [1] 13/23 guess [1] 17/21 guilty [3] 3/23 4/21 14/25	haven't [1] 23/17 having [1] 17/4 he [33] 7/10 9/3 9/12 9/13 10/24 11/2 13/24 13/24 14/10 15/13 17/1 17/19 18/11 21/4 21/9 21/9 21/14 21/14 21/18 21/24 22/1 22/2 22/3 23/14 24/3 24/5 27/17 27/19 27/24 29/20 30/2 30/2 31/18 he's [7] 9/3 10/24 17/7 17/8 21/19 21/23 31/17 hear [5] 11/22 29/14 29/16 29/20 30/1 hearing [18] 1/15 3/12 3/14 4/5 6/12 7/6 9/13 11/13 11/13 12/16 14/12 16/22 16/24 17/11 27/25 30/5 31/5 31/6 hearings [1] 30/11 her [3] 25/4 26/10 28/9 here [33] 3/17 3/18 5/13 6/5 6/23 6/25 7/2 7/14 7/15 8/2 8/11 10/2 10/8 10/12 10/12 12/4 16/14 17/8 19/19 20/14 20/21 20/25 21/23 22/18 23/7 23/8 26/4 26/17 29/9 29/9 30/10 30/11 31/25 HEREBY [1] 33/5 HEREUNTO [1] 33/13 high [5] 6/2 9/6 19/6 19/8 19/9 highlights [1] 13/11 him [8] 9/11 17/9 18/18 22/19 23/6 30/3 30/21 30/21 hired [1] 22/25 his [9] 3/18 11/25 14/17 17/21 19/15 27/15 27/20 28/23 28/23 hold [1] 30/23 home [1] 12/1 Honor [10] 3/20 8/9 9/23 12/17 21/1 22/24 23/23 25/6 26/20 28/4 HONORABLE [1] 1/17 hoops [2] 5/25 18/19 how [4] 16/21 19/22 20/24 31/16 However [1] 4/9 huh [1] 21/21 hum [2] 9/17 18/21	I I'd [4] 24/20 27/10 27/13 30/7 I'll [6] 5/3 10/2 29/14 29/17 29/25 30/5 I'm [45] I've [6] 5/19 14/22 19/6 19/25 22/19 25/24 idea [1] 15/9 if [36] illegal [5] 4/14 5/9 14/16 20/6 27/17 impact [1] 7/1 important [1] 22/7 imposed [1] 19/2 in [62] including [1] 17/20 inconsistent [1] 21/7 INDICATED [1] 33/7 ineffective [1] 9/10 inform [1] 9/11 information [1] 21/8 informed [1] 28/25 informing [1] 9/11 initial [1] 23/10 insight [1] 21/2 into [4] 13/21 31/6 31/12 33/8 intrigued [1] 18/4 involving [1] 21/5 is [74] isn't [2] 13/4 22/22 ISOM [3] 1/25 33/4 33/17 issue [5] 5/7 17/6 18/1 24/2 31/1 issues [3] 9/8 17/20 17/21 it [66] it's [24] 3/25 5/24 6/6 6/6 6/6 6/7 9/5 10/11 17/17 18/6 19/1 19/6 19/8 19/9 19/11 20/11 20/21 25/3 25/5 25/11 25/11 25/13 25/23 30/19	30/15 jump [1] 18/20 June [2] 8/17 8/18 jury [2] 3/23 8/14 just [25] 6/6 6/7 6/16 7/3 9/16 10/2 10/6 12/22 17/7 19/21 21/12 21/14 21/19 21/23 28/1 28/1 28/13 30/6 30/13 30/23 31/2 31/4 31/5 31/10 32/1 K KACIN [1] 1/17 keep [1] 11/25 keeping [1] 11/1 KEVIN [4] 1/11 3/7 3/8 28/24 kills [1] 27/22 kind [4] 8/10 21/23 30/23 32/1 kinds [1] 22/20 knew [1] 12/9 know [36] L lack [1] 4/11 lacked [2] 4/10 4/25 laid [1] 3/25 last [1] 8/20 latter [1] 3/12 law [12] 2/16 12/5 12/6 12/12 16/6 17/13 21/7 22/18 22/20 24/21 26/4 26/6 laws [1] 7/1 lawyer [1] 10/8 lawyers [1] 29/18 lead [1] 12/3 least [1] 7/7 leave [1] 17/25 leaving [1] 26/24 legal [7] 4/10 4/11 17/4 17/6 17/21 18/7 29/12 legality [1] 29/13 legislative [2] 21/6 22/6 let [5] 5/14 7/4 14/11 27/6 28/8 let's [1] 22/9 lewdness [3] 3/24 4/21 12/9 Lidia [1] 30/15 like [18] 6/1 6/12 7/12 8/11 10/5 12/6 12/22 13/5 14/22 17/2 18/19 21/11 21/19 25/1 27/11 27/13 28/10 29/17 linger [1] 25/2 litigation [1] 7/20	little [1] 7/7 located [1] 22/16 long [1] 30/3 longer [1] 25/2 look [8] 5/15 10/8 14/14 14/19 17/3 22/20 23/24 24/20 looked [2] 22/14 23/17 looking [1] 24/25 looks [3] 12/6 14/7 21/11 lot [3] 9/8 13/21 16/23 M made [5] 12/12 12/13 19/23 20/5 29/12 make [12] 13/8 16/13 18/24 20/7 20/17 24/3 24/5 24/6 24/16 27/15 27/18 30/19 making [2] 17/12 17/15 MALONE [8] 2/16 2/17 3/19 5/3 8/8 28/22 30/11 31/18 Malone's [1] 29/6 mandatory [5] 5/24 12/10 20/12 20/15 20/16 manner [1] 14/5 MATTER [1] 33/6 may [2] 4/14 29/25 maybe [5] 8/7 13/11 17/25 28/9 30/4 me [10] 10/12 13/11 14/7 14/11 21/14 21/23 23/20 25/17 27/1 28/25 mean [14] 6/6 9/20 15/22 16/21 16/22 18/22 19/15 21/13 22/25 23/9 24/20 25/20 27/13 29/11 MENTABERRY [21] 1/11 3/7 3/8 3/18 9/6 9/11 11/1 11/25 16/25 17/7 23/9 25/5 27/15 28/2 28/19 28/20 28/24 29/10 29/20 30/20 31/17 might [4] 24/7 24/12 24/18 31/18 Minimum [1] 4/2 misapprehensions [1] 12/3 misleading [1] 21/8 missed [4] 5/15 6/3 21/14 21/15 mistakes [1] 12/2 Monday [1] 26/5 month [1] 25/2
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M months [6] 4/2 4/3 4/4 8/12 8/13 9/1 moot [1] 15/12 more [4] 6/18 11/22 12/13 24/22 most [1] 13/6 motion [4] 5/9 14/24 26/4 26/6 move [2] 10/1 10/2 Mr. [31] 3/18 5/2 5/3 8/8 9/6 9/11 11/1 11/25 16/25 17/7 21/4 21/13 21/22 23/9 25/4 25/5 26/9 27/15 27/23 28/2 28/8 28/22 29/3 29/6 29/10 29/20 30/11 30/20 31/15 31/17 31/18 Mr. Malone [5] 5/3 8/8 28/22 30/11 31/18 Mr. Malone's [1] 29/6 Mr. Mentaberry [15] 3/18 9/6 9/11 11/1 11/25 16/25 17/7 23/9 25/5 27/15 28/2 29/10 29/20 30/20 31/17 Mr. Thompson [7] 5/2 21/13 25/4 26/9 27/23 28/8 31/15 Mr. Thompson's [1] 29/3 Mr. Woodbury [2] 21/4 21/22 Ms. [3] 25/4 26/9 28/9 Ms. Eklund [3] 25/4 26/9 28/9 much [2] 16/21 31/21 must [1] 10/21 my [32] 5/6 5/8 6/24 9/5 9/24 11/1 11/25 12/23 13/3 13/4 14/12 14/14 16/19 16/22 17/3 20/22 22/9 22/24 23/13 25/6 25/16 25/20 25/25 26/4 26/17 26/25 27/1 28/11 33/9 33/11 33/14 33/14 myself [2] 11/4 16/14	never [1] 10/7 new [3] 10/11 22/18 27/1 next [2] 22/24 25/1 nine [1] 8/12 no [13] 1/1 4/6 4/9 9/16 12/20 14/25 15/2 15/2 16/7 17/10 20/7 20/16 23/23 nobody [1] 20/22 normally [2] 6/1 13/5 not [35] NOTES [1] 33/8 notice [3] 7/1 16/21 16/23 novel [1] 9/8 November [6] 26/1 26/11 27/1 27/7 29/2 31/15 November 2nd [1] 31/15 now [23] 6/17 7/6 9/20 10/23 11/1 11/3 12/1 12/15 14/5 14/19 14/20 14/22 16/13 17/6 19/15 20/6 22/18 24/2 25/7 25/11 26/23 27/5 27/7 NRS [4] 4/15 22/12 22/14 22/15 NRS 176.139 [1] 22/15 NRS 176.555 [1] 4/15 NRS 176A.100 [1] 22/12 NRS 176A.110 [1] 22/14 Number [1] 21/2 NV [3] 1/25 2/8 2/19	only [1] 17/3 opportunity [2] 18/12 27/18 opposition [1] 16/8 option [2] 5/13 14/3 or [19] 3/24 4/21 4/22 7/7 8/13 10/3 14/25 15/18 19/1 19/2 19/21 20/9 20/10 24/16 24/17 26/9 29/13 29/24 29/24 orally [1] 31/11 order [7] 3/15 3/25 4/1 4/1 5/5 5/6 5/10 ordered [1] 8/23 orders [1] 15/2 original [2] 8/13 10/22 originally [1] 7/10 other [8] 5/6 14/22 16/20 18/6 19/21 25/7 29/23 29/24 ought [1] 31/8 our [4] 6/4 26/18 28/12 30/15 out [20] 3/25 7/3 10/25 11/2 11/23 14/10 15/21 16/14 17/16 18/6 18/14 19/16 19/22 20/22 22/20 23/14 24/3 25/23 30/2 30/3 over [4] 8/21 10/2 20/14 27/4 own [1] 5/6	plaintiff [3] 1/9 2/2 3/7 plea [1] 15/1 plead [1] 4/20 pleads [1] 14/25 please [4] 13/13 13/16 26/7 28/18 plenty [2] 27/15 31/15 point [6] 6/24 19/2 23/12 29/7 30/2 30/7 pointed [1] 20/22 pointing [1] 20/20 position [2] 6/4 8/10 possibility [1] 16/7 possibly [1] 7/8 post [7] 3/13 13/24 14/2 15/11 23/15 24/5 24/6 posts [1] 15/4 practicing [1] 20/13 PRATT [1] 2/18 prefer [1] 26/5 prepare [2] 25/16 31/17 prepared [1] 31/14 preparing [1] 21/5 present [1] 7/8 presented [1] 9/18 presentence [3] 20/14 20/18 30/7 presents [1] 9/8 preserved [1] 14/23 pretty [3] 3/25 14/4 25/25 prior [2] 13/17 30/6 prison [9] 4/2 4/13 7/11 11/2 12/11 14/21 15/2 15/4 27/17 probably [8] 7/5 17/8 20/4 21/18 22/3 23/7 27/21 27/22 probation [22] 4/4 4/9 5/1 5/12 5/21 5/22 6/8 7/11 9/4 10/24 12/2 12/7 20/5 20/7 20/10 20/12 20/15 20/16 21/20 22/3 30/11 30/13 Probation's [1] 4/7 problem [8] 10/22 13/13 13/15 17/10 22/1 22/5 22/13 26/22 problems [1] 13/22 procedure [1] 23/16 proceed [1] 14/5 proceeding [2] 8/11 29/22 Proceedings [3] 32/3 33/6 33/12 process [2] 28/1 28/1 progressive [1] 12/14	promises [2] 17/12 17/15 promulgate [1] 21/7 pronounce [1] 16/4 pronounced [2] 8/13 10/17 proper [1] 28/1 properly [1] 17/21 proposal [1] 17/24 prosecute [1] 22/25 PSI [2] 5/16 5/23 psychosexual [1] 6/1 purpose [1] 17/3 put [5] 4/9 5/1 16/25 20/10 22/6
N NAME [1] 33/14 nearly [2] 5/19 20/1 need [8] 6/10 10/1 16/10 16/17 24/14 24/22 29/12 30/9 needs [2] 28/9 31/7 neither [1] 20/19 NEVADA [9] 1/6 1/8 3/1 3/6 3/9 11/2 22/19 33/2 33/15	O object [1] 10/17 obviously [1] 24/12 October [3] 25/8 25/21 26/25 Off [1] 12/21 offense [2] 12/7 14/25 office [4] 2/16 17/5 27/12 33/14 officer [1] 21/13 oh [6] 11/24 13/14 15/16 15/25 22/8 28/7 okay [38] old [2] 3/24 4/22 on [40] once [3] 22/2 30/20 31/11 one [8] 3/23 4/9 4/21 10/13 10/13 19/21 21/2 24/21	P p.m [2] 3/2 29/2 paperwork [1] 18/1 Parole [10] 4/6 5/20 9/4 10/24 12/1 20/5 20/7 21/20 30/10 30/13 part [2] 5/6 25/16 parties [4] 26/16 30/12 30/17 31/24 parts [1] 22/7 past [2] 22/11 22/13 PEGGY [3] 1/25 33/4 33/17 pending [5] 15/21 17/16 18/17 27/20 31/1 people [3] 13/5 23/7 25/3 perhaps [1] 27/19 pertains [1] 11/16 petition [6] 3/13 9/21 11/15 11/16 15/12 30/24 petitioner [1] 3/9 physical [1] 29/24 place [2] 27/2 33/7 placed [1] 4/4 places [1] 22/20	promises [2] 17/12 17/15 promulgate [1] 21/7 pronounce [1] 16/4 pronounced [2] 8/13 10/17 proper [1] 28/1 properly [1] 17/21 proposal [1] 17/24 prosecute [1] 22/25 PSI [2] 5/16 5/23 psychosexual [1] 6/1 purpose [1] 17/3 put [5] 4/9 5/1 16/25 20/10 22/6	Q questioning [1] 15/6 quite [2] 22/24 25/14
				R rather [2] 6/16 28/23 read [1] 11/13 reading [2] 4/18 4/23 really [7] 14/3 14/17 15/11 15/12 21/6 25/20 29/15 reason [2] 4/16 21/17 recall [2] 4/5 7/22 recess [6] 26/15 28/13 28/15 31/22 31/24 32/2 recognize [1] 7/18 recommendation [5] 4/7 20/6 20/23 21/19 22/2 recommendations [1] 20/8 recommended [1] 7/10 recommending [2] 5/21 5/21 record [4] 3/5 12/21 28/18 33/11 regarding [3] 12/14 29/12 30/4 regular [2] 26/4 26/5 reinstated [1] 18/13 released [3] 18/15 27/20 31/1 relief [1] 17/19 remain [4] 17/16 18/14 18/14 27/19 remaining [1] 31/1 remember [1] 8/15 removed [1] 13/4 reoffend [2] 6/3 9/7 reorder [1] 30/8 repaired [1] 12/4 repeating [1] 11/4 report [1] 30/7

R REPORTED [1] 1/25 REPORTER [1] 33/4 REPORTER'S [2] 1/14 32/6 reports [2] 20/15 20/18 represent [2] 3/17 28/22 representatives [1] 30/10 required [1] 4/12 requiring [1] 25/13 reschedule [2] 6/10 6/12 research [6] 5/8 16/10 18/1 21/5 21/9 31/19 resentenced [1] 17/13 resentencing [7] 16/24 17/4 25/1 27/25 29/2 29/10 29/13 reset [1] 13/24 resetting [1] 17/10 resolution [1] 15/21 respective [1] 26/16 respondent [1] 3/10 resurrected [1] 14/18 resurrects [1] 27/21 revisit [1] 31/3 right [30] 3/19 3/21 7/1 7/25 8/8 9/2 9/20 10/23 11/1 11/3 12/1 12/15 14/10 14/17 14/23 19/4 19/4 19/15 22/15 23/7 25/6 25/11 26/14 26/23 27/5 27/6 28/12 28/17 30/19 31/5 risk [2] 6/2 9/6 RMR [2] 1/25 33/17 road [1] 16/16 roll [3] 31/5 31/10 31/12 rules [1] 14/8 rush [1] 13/20	see [14] 4/25 7/8 10/9 13/12 13/14 15/22 17/2 17/3 22/1 23/24 26/18 28/10 30/8 32/1 seeing [1] 17/5 seems [2] 6/9 7/12 sees [1] 17/5 sentence [23] 4/3 4/13 4/14 4/25 5/1 5/9 8/13 8/16 8/25 10/17 10/22 14/16 15/2 15/3 16/4 17/14 19/2 19/24 20/6 20/8 20/22 27/17 29/19 sentenced [4] 17/21 30/3 30/21 30/21 sentences [1] 15/1 sentencing [16] 4/5 6/10 6/12 7/5 7/6 7/12 8/2 8/18 13/21 14/15 17/11 21/5 23/15 24/16 29/10 31/5 SEPTEMBER [2] 1/20 3/1 serve [3] 4/2 8/24 9/3 served [3] 30/14 30/18 30/20 set [8] 3/11 24/7 25/8 25/11 26/19 27/10 27/11 28/5 setting [1] 14/12 shame [1] 20/25 Shauna [2] 7/17 7/18 she [5] 8/2 8/4 8/6 8/7 8/7 shock [1] 23/10 SHORTHAND [1] 33/4 should [17] 4/8 4/16 5/15 11/3 11/22 12/16 13/20 14/4 14/5 15/18 19/2 23/13 27/1 27/14 27/19 29/19 31/15 shouldn't [1] 22/12 show [4] 3/14 4/1 5/5 9/13 simply [3] 4/24 6/16 30/6 since [4] 9/4 30/3 30/9 30/20 sit [1] 10/3 sitting [2] 10/5 25/3 situation [1] 13/18 six [2] 9/1 25/22 slurring [1] 12/22 small [1] 9/25 so [48] solution [2] 15/24 17/25 some [10] 8/24 11/7 12/8 14/9 14/25 16/5 16/6 21/6 30/4 30/20	someone [1] 6/2 something [6] 13/6 17/17 19/11 23/22 26/18 31/2 sometimes [1] 22/21 somewhat [1] 8/9 soon [1] 7/3 sorry [3] 9/23 12/16 27/9 sort [2] 11/7 14/9 sorts [1] 20/17 sounds [1] 28/10 speaking [1] 10/6 speech [1] 13/4 spot [1] 17/8 stage [2] 8/11 24/24 standpoint [1] 22/6 started [4] 5/8 5/20 20/3 20/4 starts [1] 25/21 state [11] 1/6 1/8 3/6 3/17 4/8 11/2 28/20 28/22 29/22 33/2 33/14 stated [1] 16/5 statement [2] 29/20 31/18 statements [1] 29/23 states [1] 5/23 status [7] 1/15 3/12 11/13 12/15 12/15 12/16 14/12 statute [4] 21/2 21/3 22/7 22/7 statutes [5] 4/18 4/23 6/5 22/17 22/21 stay [3] 15/21 23/14 24/17 STENOTYPE [2] 33/5 33/8 still [2] 20/10 23/10 stops [1] 20/21 STREET [1] 2/6 strenuously [1] 10/17 strict [1] 12/1 stuff [1] 32/1 SUBSCRIBED [1] 33/13 subsection [1] 6/7 successful [3] 11/8 11/9 11/11 suggest [1] 31/4 supervised [1] 9/4 supervision [3] 10/24 12/1 33/9 supposed [1] 29/16 suppress [1] 14/24 sure [8] 10/15 11/6 13/19 19/18 20/3 24/3 24/5 30/19 surprise [1] 23/3 surprised [3] 8/7 8/10	17/8 survived [1] 23/10 suspend [2] 4/25 17/14 suspended [2] 4/3 19/24 suspension [3] 10/22 15/2 15/3 T take [4] 23/1 26/15 28/13 29/23 taking [1] 27/4 talk [1] 31/16 talked [1] 5/13 tell [6] 11/21 20/8 20/11 20/12 20/14 21/23 telling [1] 25/17 tells [1] 21/14 ten [2] 5/19 25/11 term [1] 4/3 terms [1] 13/17 territory [1] 10/11 testimony [1] 29/25 than [3] 6/16 11/22 24/22 Thank [4] 17/23 28/14 31/20 31/21 Thanksgiving [1] 27/13 that [143] that's [22] 3/15 6/11 6/14 7/14 9/12 10/20 11/17 13/9 15/7 15/9 17/24 20/24 22/3 22/13 23/11 23/21 25/13 27/17 27/24 29/4 31/2 31/25 their [5] 7/3 7/8 21/8 26/16 29/23 them [6] 5/14 7/4 7/4 7/4 19/20 20/4 then [31] 3/14 5/3 5/10 5/24 7/15 9/4 11/8 12/12 14/16 14/18 15/4 15/13 15/17 16/24 17/19 17/19 20/19 22/13 22/13 26/10 27/11 27/23 29/14 29/21 30/14 30/17 30/23 30/24 30/25 31/17 31/18 there [31] 4/6 4/7 5/23 6/23 6/24 9/16 9/20 9/24 10/21 11/3 11/5 11/10 11/11 13/4 14/8 14/8 15/18 17/4 17/22 18/6 18/16 18/19 18/22 18/25 21/6 22/2 24/9 26/10 29/8 30/4	31/6 there's [4] 4/16 16/5 16/6 29/11 THEREAFTER [1] 33/7 these [7] 4/23 7/21 17/20 20/18 23/7 25/3 30/11 they [15] 5/24 6/25 19/13 20/8 20/9 20/10 20/11 20/11 20/12 20/14 20/17 21/7 22/6 22/14 28/10 They're [3] 7/2 7/14 23/7 thing [6] 6/15 16/20 19/21 20/14 20/18 24/21 things [2] 9/20 30/4 think [46] thinking [1] 14/14 thinks [2] 17/1 17/22 third [1] 13/3 this [62] THOMPSON [10] 2/5 3/17 5/2 21/13 25/4 26/9 27/23 28/8 28/21 31/15 Thompson's [1] 29/3 those [3] 20/17 22/15 22/16 thought [6] 11/21 13/13 14/12 21/9 22/3 23/21 three [1] 30/9 through [4] 5/25 10/9 16/16 18/20 throw [1] 20/20 time [24] 3/11 4/15 5/10 5/16 5/18 8/24 10/14 13/6 15/2 19/3 23/13 23/15 24/5 27/15 29/14 29/15 30/3 30/14 30/18 30/20 30/22 31/15 31/19 33/7 times [1] 13/4 today [10] 6/24 6/25 7/13 7/16 10/18 11/25 17/3 20/25 29/15 29/15 told [4] 7/4 9/14 22/19 25/24 tongue [2] 12/25 13/3 too [9] 5/18 11/22 17/2 21/15 28/3 28/12 29/14 31/2 31/3 TOOK [1] 33/5 totally [1] 5/12 touch [1] 23/13 touching [1] 19/15 towards [1] 27/13 trafficking [1] 25/7 TRANSCRIBED [1]
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T TRANSCRIBED... [1] 33/8 TRANSCRIPT [2] 1/14 33/10 trial [3] 10/25 25/8 25/21 trip [1] 16/14 TRUE [1] 33/10 try [1] 7/13 trying [1] 19/21 Tuesday [1] 26/8 two [6] 3/5 4/21 9/20 17/25 24/22 28/19 type [1] 29/16 types [1] 29/24 TYPEWRITING [1] 33/8 Typically [1] 30/12	W walk [1] 24/3 want [15] 4/15 7/13 10/3 10/21 12/5 12/18 19/20 23/18 23/20 23/23 24/3 25/2 27/6 27/12 29/22 wanted [3] 8/1 13/7 25/24 wanting [1] 7/8 was [43] wasn't [2] 8/2 8/4 way [6] 6/19 7/13 14/2 15/11 17/1 19/24 we [42] we'll [7] 10/6 14/1 28/13 29/8 29/8 29/17 30/23 we're [5] 3/5 11/8 11/9 28/18 30/25 we've [1] 30/9 week [3] 26/1 27/12 28/11 weeks [2] 17/25 24/23 well [29] 4/1 4/7 5/11 5/17 6/17 6/20 11/9 11/20 13/7 13/16 14/11 15/25 16/18 16/20 18/5 18/14 19/11 21/12 21/16 21/25 22/11 23/9 23/23 24/25 25/23 26/15 27/10 28/6 30/16 Well please [1] 13/16 went [4] 5/25 20/19 22/11 22/14 were [5] 6/23 12/10 23/21 32/3 33/8 weren't [1] 6/25 what [30] 5/14 6/11 6/14 8/12 9/12 11/25 12/6 12/13 14/15 15/22 17/12 19/8 19/16 21/22 22/20 23/8 23/16 23/19 24/18 24/25 24/25 25/17 28/4 28/10 29/19 30/9 30/12 30/14 30/17 30/18 what's [2] 7/4 18/6 whatever [6] 14/7 14/8 17/21 24/6 24/7 31/6 when [8] 8/15 9/21 13/4 16/6 20/4 20/19 21/4 22/12 where [8] 4/20 4/24 5/7 14/22 16/25 17/8 20/13 20/18 WHEREOF [1] 33/13 whether [10] 15/6 15/18 15/18 17/15	17/20 19/1 20/9 20/11 20/12 24/16 which [3] 3/12 20/25 22/9 who [4] 7/15 7/15 7/18 28/2 who's [1] 6/2 why [4] 4/16 11/21 26/18 27/19 will [12] 11/5 11/7 14/8 21/11 26/2 26/4 26/17 27/18 28/8 29/22 30/4 30/6 within [1] 25/1 WITNESS [1] 33/13 wondering [1] 23/8 Woodbury [2] 21/4 21/22 words [1] 12/23 work [5] 16/16 25/14 26/11 26/13 28/9 world [1] 23/8 would [44] writ [16] 3/13 9/9 9/13 9/21 11/8 11/9 11/10 11/11 11/16 13/23 14/1 15/12 18/12 23/1 23/1 30/24 wrong [1] 20/19		
U Uh [1] 21/21 Uh-huh [1] 21/21 ultimately [2] 20/21 27/16 Um [2] 9/17 18/21 Um-hum [2] 9/17 18/21 under [7] 3/15 4/15 7/1 10/24 12/1 20/21 33/9 understand [2] 12/8 19/20 understanding [1] 9/5 unenviable [1] 8/10 until [1] 12/2 up [3] 9/22 14/14 20/25 us [8] 5/5 6/9 12/3 20/8 20/11 20/12 20/14 23/10 use [1] 30/6		Y yeah [13] 5/23 7/20 8/21 8/22 11/15 11/19 18/11 21/12 22/8 23/5 24/20 26/21 29/11 year [5] 3/24 4/22 8/12 8/20 8/21 years [4] 5/19 12/9 13/1 20/1 yes [3] 7/19 25/19 29/5 you [54] you're [4] 20/13 22/15 22/19 25/17 you've [2] 17/9 20/3 your [14] 3/20 7/6 7/7 8/9 9/23 12/16 18/6 21/1 22/24 23/23 24/16 25/6 26/20 28/4		
V verifies [2] 30/15 30/16 verify [1] 30/13 versus [2] 28/19 28/20 very [4] 6/5 6/9 22/6 31/21 victim [1] 7/1 victim's [1] 28/2 victims [9] 5/13 6/23 6/25 12/14 16/21 19/19 29/3 29/21 31/16 victims' [1] 5/14 view [1] 18/6				

1 CASE NO. CR-FP-18-5030

2 DEPARTMENT 2

2022 OCT 24 AM 11:41

4TH JUDICIAL DISTRICT COURT

CLERK _____ DEPUTY _____ *VS*

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

7 -oo0oo

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 KEVIN MENTABERRY,

12 Defendant.

COPY

13
14 REPORTER'S TRANSCRIPT
15 OF
16 SENTENCING

17 BEFORE THE HONORABLE JUDGE ALVIN R. KACIN
18

19
20 DATED TUESDAY, NOVEMBER 2, 2021

21 ELKO, NEVADA
22

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24
25 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

Peggy Isom, CCR 541, RMR

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EXHIBITS

1 CASE NO. CR-FP-18-5030
2 DEPARTMENT 2
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5 IN THE FOURTH JUDICIAL DISTRICT COURT
6 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA
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8 THE STATE OF NEVADA,
9 Plaintiff,
10 vs.
11 KEVIN MENTABERRY,
12 Defendant.
13
14 REPORTER'S TRANSCRIPT
15 OF
16 SENTENCING
17 BEFORE THE HONORABLE JUDGE ALVIN R. KACIN
18
19
20 DATED TUESDAY, NOVEMBER 2, 2021
21 ELKO, NEVADA
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25 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

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3 EXHIBIT DESCRIPTION MARKED RECEIVED
4 A Report 9
5 B Quest Counseling Receipt 9
6 C Probation Supervision Fees Receipt 9
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1 INDEX
2
3 WITNESS PAGE
4
5 TINA SNOW
6 Direct Examination By Mr. Malone 21
7
8 HEATHER MENTABERRY
9 Direct Examination By Mr. Malone 24
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ELKO, NEVADA; TUESDAY, NOVEMBER 2, 2021

2:00 P.M.

PROCEEDINGS

THE COURT: Okay. We are on the record for case CR-FP-18-5030. State of Nevada plaintiff versus Kevin John Mentaberry. We have Elko County Deputy District Attorney Chad Thompson here to represent the state. Mr. Mentaberry is here with his new counsel, Mr. Malone, and -- John Malone. So this is the date and time set for essentially a resentencing hearing. And are the parties ready to proceed for this? MR. THOMPSON: The state is. MR. MALONE: Yes, your Honor. THE COURT: Okay. So we can go through this the usual way and have victim impact testimony. And I don't know if you still want to do that. How would you like to proceed? MR. THOMPSON: I talked to them beforehand, and they actually are not inclined to say anything today. I mean, they'd said what they said, the ones who did speak at the last sentencing, and none of them are inclined to speak today. They expect you to do the right thing. THE COURT: Okay. Well, of course, the last

time we were there the sentence that was pronounced was error, but I think we've gotten that figured out.

So I remember the testimony from the last hearing, I believe, and also from the trial. Because we're talking about a conviction, Count Three, lewdness with a 14- or 15-year-old child, a category B felony. That was the conviction. It was Count Three of the information here. And also the Court's re-reviewed the presentence report.

So I think I'll make a record on that. I have re-reviewed that. And then, of course, I sat through the trial. And then also Mr. Mentaberry's statement is attached, a one-line statement.

So there was the evaluation of Sherry Hixon-Brenenstall. I've rereviewed that as well. I thought that was appropriate. And there were also a victim impact statement attached and restitution on the table. So I think I've reviewed everything that was provided to the Court prior to the last hearing.

And the last sentencing hearing was in June of 2020. So it's been a while, but this case stands out for the Court I think mostly because I've gone through the -- I went through the trial. I was the trial judge.

So anyway, the reason I asked is the victims

can go last. Anyone who's a victim under Nevada law can go last and make a statement. For those in court who fit that description, I'll just remind them that they are certainly welcome to do that at the end of this proceeding. So they heard it from the bench.

So do we have any evidence for sentencing other than that possibly?

MR. THOMPSON: I don't. I did have an update on the credit for time served.

THE COURT: Okay.

MR. THOMPSON: Which would be 116 days.

THE COURT: Okay. And the defense's position on that?

MR. MALONE: On anything you've spoken?

THE COURT: Credit for time served.

MR. MALONE: We believe that's correct.

THE COURT: Okay. Thank you.

MR. THOMPSON: And then I think --

THE COURT: Because the division had not provided that to the Court, so thank you.

MR. THOMPSON: I think all the restitution was paid, wasn't it?

UNIDENTIFIED PERSON: (Nods head.)

MR. THOMPSON: They have received all the restitution from the previous order.

THE COURT: Okay.

MR. THOMPSON: So that has been paid.

THE COURT: All right. Well, any -- well, of course, there will have to be an amended judgment of conviction. It will just reflect that that --

MR. THOMPSON: You give credit.

THE COURT: -- has credit for payment.

MR. THOMPSON: Sure.

THE COURT: Which I typically do when we have restitution that's prepaid. Sometimes prior to sentencing we have those cases. So that was \$1,470. And the Court can give credit for that.

All right. So any -- no other evidence on this side.

Any other evidence that you wanted to present today, Mr. Malone?

MR. MALONE: Yes, your Honor.

THE COURT: Okay.

MR. MALONE: I've got three documents. They've been provided to the state. One of them is a payment receipt.

This is also a supervision payment received.

And then I do have a report from Life Quest Counseling where Mr. Mentaberry has been counseling for the past, what? Year and a half.

1 THE COURT: Okay. Any objection to their
2 admission?
3 MR. THOMPSON: No.
4 THE COURT: Are they marked? Did you want
5 them marked as exhibits today?
6 MR. MALONE: Yes, your Honor. Thank you.
7 THE COURT: Okay. They will be so marked.
8 You just want to do separate exhibits? Or one packet?
9 MR. THOMPSON: I'll leave it to the Court,
10 your standard practice whatever is --
11 THE COURT: Okay. Why don't you mark them
12 separately, Darla, and then would that be --
13 How many documents are there?
14 MR. MALONE: There are three. I don't have a
15 page count, your Honor.
16 THE COURT: That's fine, but A, B, C.
17 MR. MALONE: Thank you.
18 THE COURT: Any objection to A, B, and C for
19 identification?
20 MR. THOMPSON: No.
21 THE COURT: All right. Those exhibits are now
22 admitted. They're Exhibits A, B, and C. So I'll go
23 ahead and review those. And then we can go to
24 argument.
25 (Exhibit A, B, and C admitted).

1 already, so...
2 MR. THOMPSON: Yeah.
3 THE COURT: \$1470. Okay. Thank you.
4 All right. Exhibit C with the Court -- I
5 couldn't help but overhear -- that reflects for an
6 account update just less than a month ago. Zeros
7 across the board. Do you have that one?
8 MR. THOMPSON: The one he gave me did not have
9 that.
10 THE COURT: Okay.
11 MR. THOMPSON: Actually that's the same one
12 you gave me three times.
13 That's okay.
14 THE COURT: Do you want to look at Exhibit C?
15 MR. THOMPSON: I saw his version of it.
16 That's fine.
17 THE COURT: And the Court has briefly reviewed
18 Exhibit B which has been admitted. So all right.
19 Payments to Life reflecting -- it's a ledger reflecting
20 payments to Life Quest.
21 All right. Just leave that one right there.
22 THE COURT CLERK: Okay.
23 THE COURT: Argument.
24 MR. THOMPSON: So we made our arguments seems
25 like a long time ago. Because you remember this case,

1 THE COURT: All right. And I have reviewed
2 Exhibit A. That's pretty clearly the assessment of
3 Christina Beier, B-E-I-E-R, of Mr. Mentaberry's
4 progress toward meeting or exceeding therapeutic goals,
5 and I get that.
6 What is Exhibit B, this thicker packet? Can
7 you explain that?
8 MR. MALONE: Your Honor, I believe that was
9 payment -- payments for.
10 Your Honor, these are the payments for Quest
11 Counseling.
12 THE COURT: Okay.
13 MR. MALONE: Just showing that he's up on his
14 payments for his counseling charges.
15 THE COURT: I see. Okay. Thank you.
16 MR. MALONE: You're welcome.
17 THE COURT: And I'll take a look at that. It
18 looks like Exhibit C is just a two-page exhibit which
19 is the -- basically shows the balance of zero for the
20 defendant's probation supervision fees. I think.
21 That's what I'm seeing from this.
22 MR. MALONE: And restitution, your Honor.
23 THE COURT: And restitution, correct.
24 Restitution is on there.
25 And the state agrees he's paid all restitution

1 Judge. This is a young girl who was, I believe, 14 at
2 the time when the incident occurred.
3 There was a single allegation of sexual
4 assault, and then also the lewdness with a child 14 or
5 15. He was convicted of the 14- or 15-year-old count
6 and exonerated on the sexual assault count.
7 If you recall that girl when she testified she
8 was very emphatic that this happened. And was very
9 emotional about it. And it clearly affected her.
10 And when we came to sentencing last time we
11 asked you to send him to prison. We felt that he
12 deserved four to ten, and that's what we asked for.
13 And I know the Court didn't go along with that. You
14 did give him 28 to 72, and then you put him on
15 probation.
16 And so in our view now the 28 to 72, the
17 statute's clear, he's got to go to prison. And we
18 think that that would be the appropriate sentence at
19 this time. Just to impose it and make it prison.
20 THE COURT: All right. And then I will engage
21 the parties because this is -- in this discussion
22 because this is new to me. The Court's never had this
23 issue come up pronouncing an illegal sentence.
24 The illegality here, of course, was the
25 probation under NRS 176A.100(1)(a) I believe it is.

1 And I was looking at the case law, and under
2 Miranda vs. State, 114 Nev. 385, the district court may
3 correct an illegal sentence only to the extent
4 necessary to bring the sentence into compliance with
5 the statute.

6 But there the Court saw fit -- with, I guess,
7 a dissenting Justin Maupin, the rest of the Court saw
8 fit to -- this is when it was a five-member court
9 too -- saw fit to say that to comply with the double
10 jeopardy clause of the Nevada Constitution, though, the
11 district court may correct an illegal sentence by
12 increasing in severity only when necessary to bring the
13 sentence into compliance with the pertinent statute.
14 And a correction that increases the sentence severity
15 is necessary in, quotes "only when there is no other
16 less severe means of correcting the illegality." And
17 so do you think I could give a higher underlying --
18 well, a higher sentencing range anyway?

19 MR. THOMPSON: It's moot. I'm not asking you
20 to do it. I mean.

21 THE COURT: Okay. Well, you're an officer of
22 the Court, so I thought I would ask.

23 MR. THOMPSON: It seems to me that the 28 to
24 72 that you have already enunciated, the correction
25 would be the probation portion of it. And, therefore,

1 that would be what would be pulled off the table,
2 and --

3 THE COURT: Well, that would definitely make
4 this sentence more severe because he would no longer be
5 under community supervision.

6 MR. THOMPSON: Sure. But that sentence,
7 though, I think can still remain. I think you can go
8 less than that for sure. But I would steer away from
9 going higher than that if I was in your shoes. That's
10 me.

11 THE COURT: Okay. Thank you.

12 Yes, Mr. Malone.

13 MR. MALONE: Your Honor, it's our position
14 that you can't increase the sentence, I also have
15 Edwards v State 112 Nev. 385. The same language.

16 THE COURT: I did read that case too.

17 MR. MALONE: We can only increase it to
18 effectuate or repair -- not repair, but to fix the
19 error, to remediate the error.

20 Your Honor, I think I'm only one of the few
21 people in here that's not -- that did not see the
22 trial.

23 I've been able to read the sentencing
24 transcript. No trial transcripts have been -- have
25 been produced or, of course, they weren't -- they just

13

1 haven't been done yet, or they haven't been done at

2 all. So I don't have that, that advantage.

3 I do -- I did read the sentencing transcript.

4 I'm aware of the allegations. I was able to read some

5 police reports. So I think I'm familiar with the facts

6 enough. But I thought that Mr. Woodbury's sentencing

7 argument was quite good. He did the -- he did the

8 trial. He was familiar with all of the facts. One of

9 the things I think that -- that I've heard here today

10 was a misstatement regarding the counts. The original

11 counts were three.

12 So Mr. Mentaberry was acquitted on two of the

13 most serious counts.

14 THE COURT: Yes. In the information Count One

15 was sexual assault on a child under the age of 16

16 years, a category A felony.

17 Alternatively to that, Count Two is statutory

18 sexual seduction, category B felony. And I think the

19 alternative count, Count-Three was also an alternative

20 count to the first two. Lewdness with a 14- or

21 15-year-old child.

22 MR. MALONE: So, your Honor, I think that when

23 the Court constructed its original sentencing paradigm,

24 it did pay attention to the verdict that the jury had

25 brought back. Acquittals on two of the most serious

14

1 counts.

2 Also, the fact that Mr. Mentaberry really at

3 that time had no criminal history or minor criminal

4 history. I think a couple domestic batteries that had

5 been, that he successfully completed suspended

6 sentences on.

7 All of those arguments remain. Your Honor,

8 unfortunately, I also didn't have a copy of the PSI,

9 but I think I can proceed without it.

10 THE COURT: Would you like to take a view of

11 it --

12 MR. MALONE: I think that probably --

13 THE COURT: -- before you finish up?

14 MR. MALONE: I think that probably would be --

15 I can read very fast, your Honor.

16 THE COURT: Well, we can go into recess, and

17 you can go ahead and review it.

18 MR. MALONE: Um.

19 THE COURT: This is the corrected one from the

20 last time. So...

21 MR. MALONE: Please.

22 THE COURT: Yeah. All right. I'll go ahead

23 and have my staff make a copy --

24 MR. MALONE: Thank you.

25 THE COURT: -- since you're his attorney now.

15

16

1 All right. We'll go into recess so that
2 Mr. Malone and Mr. Mentaberry can re-review that.
3 Here are Exhibits A, B, and C.
4 *****
5 (Recess)
6 *****
7 THE COURT: So we're back on the record for
8 CR-FP-18-5030, State vs. Mentaberry. Mr. Mentaberry is
9 back in court with counsel John Malone. And Elko
10 County Deputy District Attorney Chad Thompson for the
11 state.
12 I made sure, Mr. Malone, you got copies of not
13 only the presentence report with the interlineations
14 that were put in there in June when I -- June of 2020
15 when we held the original sentencing hearing. But also
16 the copy of the Division of Parole and Probation's
17 scoring sheets that, as we all know, were required at
18 the time of the sentence here when they were making
19 recommendations for sentence.
20 A copy of the defendant's statement.
21 Copy of Dr. Hixon-Brenenstall's report of her
22 evaluation of Mr. Mentaberry.
23 Copies of the -- copy of the victim impact for
24 parents for child victims statement.
25 Restitution, copy of the restitution table.
And I think that included some supporting documentation

1 for the restitution and copies of those.
2 So have you had a chance to read through all
3 that?
4 MR. MALONE: I have, your Honor. And I did
5 have access to the Hixon-Brenenstall report --
6 THE COURT: Okay.
7 MR. MALONE: -- earlier, so I was able to read
8 that.
9 THE COURT: Okay.
10 MR. MALONE: That was the most lengthy or
11 dense document I think.
12 THE COURT: Okay. Great. So okay. You've
13 been able to read through that. So I'm comfortable
14 finishing up the hearing then.
15 MR. MALONE: So, your Honor, the law is clear
16 that the sentence can't be increased over and above the
17 original sentence. I think the Court already touched
18 on this that even though it wouldn't be considered an
19 increase to mandate a prison sentence for
20 Mr. Mentaberry as required, for all intents and
21 purposes it's a worse sentence than was originally
22 pronounced by this Court.
23 So we don't have a legal argument for that,
24 but we certainly have an equitable argument.
25 Now if Mr. Mentaberry had come in this Court,

17 1 what? A year and a half after your original sentence
2 and not done well, not shown that he had made
3 improvement in his life, improvement in the lives of
4 the community and his children and family, you might
5 have some real reason to question whether or not you
6 should consider a lower sentence. I think that you
7 should though.
8 At this point in time Mr. Mentaberry has been
9 clean and sober for three years and four months.
10 That's his word. I mean, he hasn't been tested every
11 day for the last three years and four months. But he
12 has maintained his sobriety. We have two witnesses
13 here that, one is his ex-wife Heather, Heather
14 Mentaberry. She's in court with the very dark hair.
15 And then a friend Ms. Snow that is sitting in
16 the second row, I believe.
17 MS. SNOW: Um-hum.
18 MR. MALONE: Second row.
19 Both of them can attest to his behavior
20 changes, the improvement in his character, and his
21 dealings with others.
22 His expressions that his life is better
23 without substances such as alcohol.
24 So comes to mind that the Lord works in
25 mysterious ways. And sometimes very bad things happen

18 1 in this world that they turn out better.
2 If the Court would like to hear both from
3 Ms. Snow and Ms. Mentaberry at this time?
4 THE COURT: Certainly. It's your
5 presentation, Mr. Malone.
6 MR. MALONE: Ms. Snow --
7 MS. SNOW: Hi.
8 MR. MALONE: -- identify yourself.
9 THE COURT: All right. Yeah, can we have her
10 come up to the witness stand.
11 MR. MALONE: Yes.
12 THE COURT: I would prefer she be sworn.
13 MS. SNOW: Where do you want me?
14 THE COURT: Come on up here. The door comes
15 out to you. Watch your step.
16 MS. SNOW: Okay.
17 MR. MALONE: Just go behind the lady with the
18 red, pretty red sweater. Okay.
19 THE COURT: The witness stand is there. The
20 door comes out to you. Watch your step. Take your
21 time please.
22 Can you raise your right hand and take the
23 oath.
24 MS. SNOW: Um-hum.
25 ///

1 TINA SNOW,
2 having been first duly sworn to testify to the truth,
3 the whole truth and nothing but the truth, was examined
4 and testified as follows:
5 THE COURT: All right. Please have a seat.
6 And just tell us your name.
7 THE WITNESS: My name is Tina Snow.
8 THE COURT: Okay. Can you spell the names.
9 MS. SNOW: S-N-O-W is last name. T-I-N-A is
10 the first name.
11 THE COURT: Okay. Thank you.
12 THE WITNESS: And --
13 THE COURT: Go ahead, Mr. Malone.
14 MS. SNOW: Go ahead.
15 DIRECT EXAMINATION
16 BY MR. MALONE:
17 Q. Ms. Snow, how do you know Kevin Mentaberry?
18 A. Well, I know him because -- well I've known
19 his family for 35 years.
20 And I own a screen printing embroidery shop on
21 the other side of the block. So he's at the back side
22 of the block where he works with the blacksmith shop.
23 And so I've known him for years over there. And I knew
24 his father. And so we are pretty close right there.
25 He's like my neighbor because I live right on the

1 corner. I watch him drive to work every morning. I
2 know I see him every day almost.
3 Q. Are you aware of the problems that lead him to
4 be in Court here?

5 A. Yes.

6 Q. Okay.

7 A. I am aware.

8 Q. Are you aware of any changes he's made in his
9 life in terms of drinking or imbibing alcohol?

10 A. Well, I can tell you he's been sober. My
11 husband's offered him a drink before, and he's turned
12 it down. And I can tell by the time he comes -- he
13 just looks sober anymore. He -- his whole appearance
14 has been totally different. And he's involved with the
15 kids more.

16 He's just -- it's really helped him out a lot.

17 Q. You said he's involved with the kids more.
18 Have you seen improvement in his parenting skills?

19 A. Yes, I have. I mean, you know, he's just with
20 them all the time. And...

21 Q. How many days a week do you think you see him?

22 A. Oh gosh. We see him drive by. Because he
23 drives by when we're having our coffee. So I'd say --
24 and he even goes in on Saturdays and Sundays, and we
25 see him drive by. So almost every day.

21

1 Q. Okay. And you've noticed just a general
2 improvement in his character?

3 A. Oh, yeah.

4 Q. Okay.

5 A. Yeah.

6 Q. And his parenting?

7 A. It's really good. I mean, he really cares
8 about those children. And that's the -- that's his
9 world is his kids.

10 Q. Okay. Well, thank you for coming down here
11 today.

12 A. Well, thank you.

13 THE COURT: Okay.

14 MR. MALONE: He may have some other questions.

15 THE COURT: Any questions?

16 MR. THOMPSON: No.

17 THE COURT: No.

18 Thank you for coming.

19 THE WITNESS: All right. Thank you.

20 THE COURT: All right. Watch your step there.

21 THE WITNESS: Oh, I will.

22 THE COURT: All right. Next witness please.

23 MR. MALONE: Your Honor, Heather Mentaberry.

24 THE COURT: Alright. Mrs. Mentaberry, come on
25 up to the witness stand please. Watch your step there

22

1 again.

2 And then please take the oath here. Raise
3 your right hand.

4 HEATHER MENTABERRY,

5 having been first duly sworn to testify to the truth,
6 the whole truth and nothing but the truth, was examined
7 and testified as follows:

8 THE COURT: Okay. Please have a seat. So
9 your name is?

10 THE WITNESS: Heather Mentaberry.

11 THE COURT: Okay. I think we've got

12 Mentaberry down. Can you spell Heather for us.

13 THE WITNESS: H-E-A-T-H-E-R.

14 THE COURT: Usual spelling. Okay. Thank you.

15 Mr. Malone.

16 DIRECT EXAMINATION

17 BY MR. MALONE:

18 Q. Ms. Mentaberry, Ms. Mentaberry or
19 Mrs. Mentaberry? I don't know.

20 A. It's Ms.

21 Q. Miss?

22 A. M-S.

23 Q. Ms.?

24 A. Um-hum.

25 Q. Okay. What is your relationship to Kevin

23

24

25

27

1 Mentaberry?
2 A. He's my ex-husband.
3 Q. Okay. I don't know if the court reporter can
4 hear you. You've got a very low voice.
5 A. Is this the microphone or something?
6 THE COURT: It is. Yeah, you could just --
7 THE WITNESS: I'll just try to speak --
8 THE COURT: -- keep your voice up so others
9 can hear you including the prosecutor. That would
10 help.
11 THE WITNESS: Okay.
12 BY MR. MALONE:
13 Q. When did you first -- when did you first meet
14 Kevin Mentaberry?
15 A. In high school when we were seniors.
16 Q. Okay. Where was that?
17 A. Elko High School.
18 Q. Okay. And then describe what happened
19 afterward.
20 A. We dated.
21 Q. Well --
22 A. Got married. In 1998 we were married for 12
23 years. And then we've been divorced for about 12 years
24 now.
25 Q. Okay. Now, your marriage had some ups and

1 A. A good ex-husband, yeah. We co-parent
2 together quite well now.
3 Q. Okay. And you've noticed improvement in his
4 personality or character?
5 A. Yeah, 100 percent.
6 Q. Okay. Over the last four, four-plus years
7 have you been able to make any judgments regarding his
8 sobriety?
9 A. Like I said, I talk to him. And I talk to his
10 kids. And he's been sober as long as he said he has.
11 Q. Okay.
12 A. As far as I'm concerned and have noticed.
13 Q. So he's told you that?
14 A. He's told me that, and I've observed it.
15 Q. Okay.
16 A. I seen him, like I said, a few times a week.
17 So and my kids, we share custody of my son, and he says
18 that, you know, his dad is doing great.
19 Q. How many children do you have?
20 A. Together Kevin and I have three.
21 Q. Okay. And would you tell their names and
22 ages?
23 A. Our oldest is Mazy Mentaberry, and she is 22.
24 And then Ava Mentaberry. She just turned 19.
25 And then we've got Zayden Mentaberry, and he's

26

28

1 13.
2 Q. Thank you.
3 (Reporter clarification)
4 A. Mazy is M-A-Z-Y.
5 And then Ava A-V-A.
6 And then Zayden, Z-A-Y-D-E-N.
7 BY MR. MALONE:
8 Q. Are you aware of the counseling that he's
9 undergone.
10 A. Yeah. I've noticed. Well, I know that he was
11 required to do counseling in probation.
12 Q. Okay. Have you noticed any changes you might
13 attribute to the counseling?
14 A. I just notice that he's back to doing, like,
15 hobbies and stuff like that that he used to do. Him
16 and his son go out and ride dirt bikes, and, you know,
17 go look for geos and just stuff that he used to be
18 interested in he's taken an interest in again. So I
19 think he does -- I don't know. I've seen him just be a
20 great dad.
21 Q. Okay.
22 A. Since this all happened. And like you said
23 before, you know, sometimes bad things happen, but then
24 it turns out for the best because it can change
25 someone's life. So I've really seen a good change in

1 downs, would you say?
2 A. Yeah.
3 (Reporter clarification)
4 A. Yes.
5 Q. Okay. And at the point when you got divorced
6 were you two getting along very well at all?
7 A. No. I think --
8 Q. Okay.
9 A. -- that's the reason we got divorced.
10 Q. Yeah. Generally that can be why.
11 Was alcohol involved with both of you in your
12 marriage?
13 A. Yes. We both drank, yes.
14 Q. Okay. And that caused some problems I
15 imagine?
16 A. It did, yes.
17 Q. Okay. Why don't you describe for the Court
18 what your relationships is with Kevin now?
19 A. I see Kevin. We co-parent our kids together.
20 I see him, I don't know, probably two to three times a
21 week. Probably talk to him more than that. We get
22 along way better than we ever have even when we were
23 married.
24 He's a good dad to his kids.
25 Q. Good ex-husband?

1 him.
2 Q. Perfect. Thank you.
3 A. Um-hum.
4 THE COURT: Okay. Any questions for
5 Ms. Mentaberry?
6 MR. THOMPSON: No, thank you.
7 THE COURT: Thank you for your testimony.
8 We'll have you step down. Please watch your step
9 again.
10 All right. And anything else for witnesses?
11 Anybody else?
12 MR. MALONE: No other witnesses, your Honor.
13 THE COURT: Okay. Any further argument?
14 MR. MALONE: Please.
15 THE COURT: Or evidence? Yes.
16 MR. MALONE: Your Honor, I believe that the
17 Court's intention at the original sentencing date was
18 to -- I'm not -- you know, you certainly did not impose
19 the maximum sentence you could have.
20 You really gave Mr. Mentaberry a rope, and he
21 can either use it as a lifeline or a noose. And I
22 would tell the Court that he made a lifeline out of it.
23 He's engaged in his counseling. Every indication is
24 that he's improved his character through counseling and
25 sobriety and taken advantage in a positive way of the

1 chance you gave him.
2 We're going to ask the Court to consider a
3 downward departure from your original sentence.
4 We realize that -- well Mr. Mentaberry
5 realizes that the likelihood is he's going to do time
6 in prison.
7 He's going -- it's going to be very lucky if
8 he gets a minimum sentence here and gets out with a
9 minimal sentence. We do plan to appeal. I do have a
10 notice of appeal prepared for the Court today.
11 The family's made arrangements for bail
12 pending appeal should the Court decide that that's
13 appropriate.
14 The Court knows that most appeals do not end
15 in success. I've explained that to Mr. Mentaberry. He
16 has taken it with sobriety and grace.
17 But I think given the circumstances that
18 involve the original sentence, you know, I can -- I
19 can't really think of something worse maybe than having
20 to face sentence before a judge twice.
21 You think you've escaped; right? You've
22 outrun the tornado. And then another one is coming the
23 other way and hits you. And that's sort of the
24 situation that Mr. Mentaberry has been in for the last
25 couple of months.

29 1 It hasn't caused him to come off his sobriety.
2 It hasn't caused him to come off his quest for
3 improving his life and that of his family and children.
4 He's shown real grace-under pressure. I think that the
5 Court should take that into account in determining
6 whether or not he's an appropriate candidate for a
7 sentence that would be a compromise which -- a
8 compromise like what the Court originally intended. I
9 think that would be completely appropriate.
10 The scoring sheet from the division, sort of
11 a -- I guess, it's not a dead letter because we're
12 really revisiting the sentencing again. But it
13 recommended a sentence of 12 to 48 months.
14 I think that there's every reason why the
15 Court should consider imposing that sentence given the
16 change in what the circumstances are, that a period of
17 prison is going to be required here. It would be the
18 most important thing. Or the most -- the closest thing
19 that we could have to approximating the Court's
20 original intention.
21 The other thing that you have is a lot more
22 data. You've got more data to show you what kind of
23 person that Kevin Mentaberry is going to be outside of
24 this courtroom and for the rest of his life.
25 Four years and three, what? Three months.

30 1 Three years and four months. Sorry. Three years and
2 four months of sobriety is an achievement, a
3 magnificent achievement for somebody who's had
4 struggles with substance abuse for a long time.
5 There are numerous people that rely on him
6 outside his family. He has about eight employees.
7 They all have families. His original incarceration
8 caused problems that the business is starting to
9 recover from. By he knows that other people depend
10 upon him. They depend upon his good behavior.
11 If the -- as I said I think that the Court's
12 main consideration here should be trying to approximate
13 the sentence that you originally pronounced.
14 And I think that a sentence of 12 to 48 months
15 under the current mandates of what he will have to do
16 time in prison should his appeal be unsuccessful,
17 that's probably the best way to proximate that sentence
18 with the Court's original intent.
19 THE COURT: All right. Thank you. You don't
20 have to make a statement. You can if you want. I know
21 you've been through this before, but anything that you
22 wanted to say, Mr. Mentaberry?
23 THE DEFENDANT: Your Honor, my kids have been
24 number one. And my sobriety. And that's -- that's all
25 I really have going for me in my life right now. And

1 just, I guess, asking for a chance for the sake of my
2 family.

3 THE COURT: Okay. Thank you for your
4 statement.

5 And then I don't know. I see Ms. Eklund is
6 here. Shauna Eklund I recall from this litigation is
7 the child victim's mother. She's here and I think
8 other family members are too. And so they have an
9 opportunity to make a statement still if they would
10 like to today.

11 MR. THOMPSON: I still believe they are
12 relying on the Court here.

13 THE COURT: Relying on the Court's decision?
14 Okay.

15 Well, what I intend to do first is go ahead
16 and make a decision on the sentence. This is a
17 correction is really what it is. And I think the
18 judgment of conviction would have to be entered. And
19 then, you know, you could file your notice of appeal.
20 I'm pretty sure I have to do the corrected judgment of
21 conviction first.

22 We can get one together pretty quickly here
23 today, and get that done.

24 But again, a few comments. You know, this
25 case went through a jury trial. And the jury decided

1 as it did. And I think we made a record of what that
2 was at the beginning of the proceedings. And the
3 offense date I note was New Year's Eve of 2018. Well,
4 it was where 2017 was turning into 2018.

5 And after the jury rendered its verdict, there
6 was a presentence report. And it's prepared April 6th,
7 2020. And, of course, I can still -- I was comfortable
8 utilizing that now because I figured with
9 Mr. Mentaberry on probation I would have been advised
10 by the office of the local Division of Parole and
11 Probation's office if, in fact, he was not performing
12 well. What I'm hearing is that he has done well.

13 What the Court did at sentencing was rely on a
14 presentence report that actually made a recommendation
15 for probation. That actually no longer happens. And I
16 guess more than anything I'm talking to the people who
17 maybe aren't at all familiar with this process.

18 After a conviction following a jury trial,
19 conviction of a felony, the Court orders a presentence
20 report. There's an investigation of the defendant's
21 life and criminal history. The Court reviews all that.
22 Here it was a nine -- excuse me, a 12-page report with
23 the attachments I've discussed earlier.

24 And the Court notes that it did receive a
25 recommendation of 48 months in the prison with the

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1 minimum term 12 months, and probation was recommended
2 60 months. And the reason probation was recommended
3 was the division erred and thought that probation could
4 be ordered by the Court as long as the defendant was
5 certified as not a high risk to reoffend by an
6 evaluator qualified to make that decision.

7 As it turns out, under Nevada Revised Statute
8 176A.100 that was error to make the recommendation.
9 And the Court relied on that in making a -- fashioning
10 a sentence in this case.

11 And that was error to then enter a judgment of
12 conviction in which the defendant said -- or the Court
13 said, you know, I'm going to reject that recommendation
14 for the underlying sentence. I'm going to make it 72
15 months in the prison which is six years rather than 48
16 months which is four years. And then at the bottom
17 end, I made it 24 months, which is two years, rather
18 than 12 months, which, of course, is one year.

19 So I think that's -- the sentence was fine
20 under the law. It was -- it was not error under the
21 law. The minimum end of the range is not more than
22 40 percent of the maximum which is also Nevada law.

23 The problem is under NRS 176A.100(1)(a), the
24 Court was precluded from ever going to another statute,
25 which is NRS 176A.110, and ordering a psychosexual

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1 evaluation, then reviewing the report and using that to
2 decide whether the defendant was not a high risk to
3 reoffend, and then grant probation based on that. That
4 granting of probation was error.

5 It's not happened since I've been on the bench
6 which is nearly six years, but it happened -- I'm
7 sorry, 10-years in district court, but it's happened in
8 this case. So that, I think for all concerned,
9 certainly the victim, certainly Mr. Mentaberry, was
10 very unfortunate.

11 So anyway, that's -- the Court's got to
12 pronounce sentence under Nevada Revised Statute 176A --
13 I'm sorry NRS 176 I think it's 176.555. The Court can
14 correct an illegal sentence at any time.

15 And so I think, again, what happened in this
16 case was this matter of sentencing was being discussed
17 in another case where another defendant was found
18 guilty of a lewdness with a child charge under
19 NRS 201.230. And it occurred to me in discussing that
20 with lawyers in chambers that Mr. Mentaberry had been
21 convicted of that same thing, yet, he got probation and
22 we knew in the other cases that the Court could not
23 suspend the execution of the sentence and grant
24 probation. And that's when I had everybody come back
25 to court on this case and say, "Wait a minute. We got

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1 a problem here."

2 So anyway, I think that's why we got here
3 today. And again, I find that to be extremely
4 unfortunate. And what this has prompted me to do as a
5 district judge is question everything more than I ever
6 have in terms of what is being presented in a
7 presentence report. Because the Division of Parole and
8 Probation still will tell me whether they think
9 probation is mandatory or not. And there are a whole
10 bunch of changes that have occurred in chambers as a
11 result of this, including scrutinizing the memorandum
12 of plea agreement that comes in more and more about
13 whether it's being represented correctly to everybody
14 what the maximum and minimum sentences are.

15 So as I said at the beginning of the hearing,
16 there's a constitutional overlay here. We do have a
17 double jeopardy clause in not only the United States
18 Constitution but also our constitution here in Nevada.

19 And Miranda vs. State, the case I talked about
20 earlier, again to comply with the double jeopardy
21 clause, the district court may correct an illegal
22 sentence by increasing its severity only when it is
23 necessary to bring the sentence into compliance with
24 the pertinent statute, and a correction that increases
25 sentence severity is necessary only when there is no

1 other less severe means of correcting the illegality.

2 So I think clearly here it's going to be a
3 more severe sentence for the defendant because he is no
4 longer legally -- never was -- eligible for probation
5 because of the charge he was convicted of.

6 And so I just -- those are just some opening
7 comments.

8 I think that the underlying sentence for the
9 reasons I gave at the sentencing hearing was always
10 appropriate. And one -- I can tell you as a sentencer,
11 what I try to do -- you know, I listen to these
12 arguments all the time where maybe a prosecutor says,
13 Judge, give him the maximum sentence so that he -- this
14 defendant you're sentencing, you know, really knows
15 that the sword of Damocles is hanging over his head and
16 that if he messes up on probation, he's going to have
17 to go to prison for a longer time.

18 And I think I used to give that a little more
19 credence early on in my career, but -- on the district
20 court bench, but later on, you know, it always -- it --
21 it became very clear to me very quickly that really a
22 judge does better -- at least in my mind, and
23 reasonable minds can differ on this, I understand --
24 but a judge can do better if he or she just makes an
25 underlying sentence that he or she would be willing to

1 impose later in time if that came to it.

2 Because, unfortunately, I have a lot of people
3 who are given the privilege of probation, and they
4 don't do well. And there are nontechnical violation
5 reports that come to the Court. They admit the
6 violations. The Court ends up saying these people
7 cannot be supervised on probation. They have to go to
8 prison. And I want it to be a sentence that I would
9 feel comfortable imposing at the beginning of the case.

10 And so that's where I'm at up here on this
11 bench. And that's where I'm at with this case. And
12 I'm not going to reduce the sentence is what I'm
13 saying. The sentence was the sentence. And it's 72
14 months in the prison and the minimum term is 28 months.

15 That's what the Court said. That's what the
16 Court meant. That's what the Court felt justice
17 dictated in this case. And I hope I've made myself
18 clear. Really, discussing probation had its reasons up
19 here.

20 And so this is not a revocation of probation.
21 It's the correction of an illegality. But I think the
22 two situations are very comparable for Mr. Malone for
23 the Court. So that's to address your argument to the
24 Court. Although, I do very much appreciate hearing
25 from you today on that.

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1 So the underlying sentence is going to remain.
2 And all I have to do now, I think, is a corrected
3 judgment of conviction. You know, for the record it's
4 the genetic testing fee \$150, the genetic
5 administrative assessment is \$3 dollars, the
6 administrative assessment is \$25.

7 The underlying -- or the sentence, excuse me,
8 is 72 months in the prison, minimum term of 28 months.
9 Restitution \$1,470. Credit for restitution paid.

10 The defendant has credit for 116 days time
11 served.

12 And so there is a lifetime supervision
13 sentence as well. And the Court did include that in
14 its judgment of conviction. I still think that that's
15 appropriate and required actually under the law. And
16 so that's the Court's sentence.

17 Now, I did suggest when we had our previous
18 hearing where I asked the parties to show cause whether
19 there was any reason not to revisit the sentence, you
20 know, I did suggest that, a couple of things.

21 One thing is the defendant's got an -- oh my
22 goodness. I have this up here. He's got a -- yeah,
23 he's got a post conviction petition for writ of habeas
24 corpus in DC-CV-21-0068.

25 I don't know what you want me to do with this

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1 right now because he, I think, he can appeal this
2 sentence now because this is now the judgment of the
3 Court. It's corrected. I fixed the error.
4 So, and, again, I can get that judgment of
5 conviction entered today. If not today very early
6 tomorrow.
7 So I don't know what you want to do with that
8 case. If you just want to hold it in abeyance right
9 now, or what you'd like to do.
10 The other part of it is, you know, there is a
11 legal analysis I think for this motion for bail. The
12 Court can order bail on appeal. I've read this very
13 carefully, under NRS 177.105, .135, and then
14 NRS 178.488(1) bail may be allowed pending appeal for
15 certiorari unless it appears that the appeal is
16 frivolous or taken for delay.
17 And then the most recent case I think on this
18 is Bergna vs. State from 120 Nevada 869.
19 And there the Supreme Court wrote that
20 district judges should provide a reasoned and thorough
21 explanation of findings. This is the page 877.
22 Reasoned and thorough explanation of findings
23 supporting the denial of a motion for bail pending
24 appeal. So if I deny it, then I would have to say, you
25 know, the reasons why.

1 community. The nature and quality of the evidence
2 adduced at trial and circumstances of the offense are
3 highly relevant considerations in evaluating these
4 factors. Well, that makes make.
5 And the evaluation encompasses a wide range of
6 information including the applicant's prior criminal
7 record, attempt to escape from confinement, community
8 associations and employment status. I mean, there are
9 a lot of things that are in his favor here for some of
10 that. Some of that. Given the nature of the
11 conviction, not so much.
12 But I think the Court has to decide in the
13 first place whether the appeal would be frivolous or
14 taken for delay. So I don't know what his appeal
15 issues are because I never reviewed -- I don't think it
16 was argued yet in the post conviction petition for writ
17 of habeas corpus what you felt the appeal issues should
18 have been that weren't raised by prior counsel. So
19 maybe if you can enlighten me on some of this that
20 would help.
21 MR. MALONE: Your Honor, obviously, I'm not
22 the trial -- well, I'm not trial counsel.
23 THE COURT: Right.
24 MR. MALONE: The -- we have not prepared a
25 transcript of the trial. I think that that's necessary

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1 to do to determine whether or not there are appeal
2 issues.
3 I do think that when a criminal defendant is
4 acquitted of two out of three charges, that does setoff
5 a warning that perhaps there are problems underlying
6 the other charge. That that's the one thing I would
7 say looking at from the outside.
8 The -- I don't want to mislead -- the Court
9 has much more information than I have about the conduct
10 of the trial and whether appellate issues might be
11 raised. And some of them can be very technical, not
12 apparent to trial counsel when the case is being tried.
13 And that's what we, I think Mr. Mentaberry has a right
14 to explore. If not explore to pursue an appeal.
15 In fact, the Supreme Court I think has made it
16 clear that the concept of a no-issue appeal is no
17 longer accepted by them. Appellate counsel can't just
18 say there are no issues here. They've got to come up
19 with something.
20 And in most cases there are things that are
21 ready -- that can be, in all cases there are things
22 that can be raised on appeal.
23 But I don't want to mislead the Court by
24 saying -- by looking into the murk and coming up with
25 something off the top of my head.

1 We encourage district courts to set forth such
2 findings either in a written order or on the record.
3 The judge who presided over the trial and has heard the
4 evidence presented at trial is in a unique position to
5 evaluate the factors relevant to a request for bail
6 pending appeal.
7 And this Court will give great respect to the
8 trial judge's assessment of those factors based upon
9 his or her knowledge of the evidence, the legal issues,
10 and the applicant. And, I guess, this case dealt with
11 a motion on appeal for to set bail.
12 So I know the Court went on to write that when
13 that court, the Supreme Court -- of course there was no
14 Court of Appeals back in 2004. But the Court, the
15 appellate court would be guided by factors enumerated
16 in another case talking about whether the appeal was
17 frivolous or taken for delay, and whether the release
18 may pose a risk of flight or danger to the community.
19 And they emphasize that an applicant who had
20 been convicted of a violent serious offense, I think
21 this may have been a murder case, and who faces a
22 substantial term of imprisonment shoulders a heavy
23 burden to demonstrate not only that the appeal is not
24 frivolous nor taken for delay, but also that his or her
25 release will not pose a risk of flight or danger to the

1 I do --
2 THE COURT: Okay. Well, I didn't know the
3 status of that. I didn't know if you talked to trial
4 counsel on not. So ...
5 MR. MALONE: Your Honor, the first step -- no.
6 THE COURT: Okay.
7 MR. MALONE: No. I -- I have not.
8 THE COURT: Okay.
9 MR. MALONE: Other than to say hello.
10 THE COURT: Sure. Well, that's okay.
11 Well, I think you understand the nature of my
12 question given what the law says. So basically what
13 I'm hearing -- correct me if I'm wrong, but what I'm
14 hearing is we've still got to review the trial
15 transcript and the file in the criminal case and see
16 what the appeal issues are. I mean, that's what you're
17 telling me.
18 MR. MALONE: That's correct, your Honor. I
19 mean, the first thing that I did when I got a call from
20 Mr. Mentaberry was to file the writ so we could try to
21 get an appeal back.
22 And we didn't -- we, obviously, the case
23 changed its nature pretty quickly on me.
24 THE COURT: Yeah.
25 MR. MALONE: And at this point, this is what

1 we've been dealing with, this resentencing, a
2 correction of sentence instead of exploring the appeal.
3 The preparation of the transcript is going to
4 be quite costly for Mr. Mentaberry. He knows that. I
5 think I got a quote for the transcript already some
6 months ago.
7 THE COURT: Okay. From our court reporter?
8 MR. MALONE: I believe so.
9 THE COURT: Former court reporter. Yeah.
10 MR. MALONE: And Mr. Mentaberry felt strongly
11 enough that, number one, he is paying counsel. And
12 number two, he understands what it's going to cost to
13 get a transcript prepared, which is not inconsiderable.
14 THE COURT: Okay. Well, what about the -- I
15 suggested last time, though, that he would not then --
16 and this was, I think, discussed by the prosecutor last
17 time we are in court then. He would not be under
18 supervision by the Division of Parole and Probation
19 anymore in this case. So what about that aspect of it?
20 MR. MALONE: Your Honor, I think he would
21 certainly if he can be -- I'm not sure the law comes up
22 with a real good solution for that.
23 I know that he would -- I know that he would
24 submit to whatever conditions the Court requires. He's
25 done that so far. He's been an exemplary probationer.

45 1 THE COURT: Well, I think I was the one who
2 suggested if the Court were going to allow that and he
3 wasn't going to be on probation anymore that he could
4 be monitored, and there could be an alcohol monitor.
5 MR. MALONE: That would be --
6 THE COURT: An ankle monitor for alcohol.
7 MR. MALONE: That would -- that would be fine.
8 He would -- he would submit to that and I think do
9 well.
10 THE COURT: What kind of bail is he seeking
11 now? Because the Court exonerated bail from before.
12 MR. MALONE: Your Honor, we would -- well, I
13 think we would start with \$10,000.
14 THE COURT: Okay. All right.
15 MR. MALONE: Um.
16 THE COURT: Thank you.
17 MR. MALONE: We have -- we have somebody who
18 has quite strong ties to the community.
19 THE COURT: Sure.
20 MR. MALONE: He's already submitted to
21 supervision by the state and done well.
22 He has an active business here that -- as I --
23 THE COURT: This is still the family business?
24 MR. MALONE: Still the family business. He
25 and his father own the business or his father owns the

46 1 business, and he runs it. I think they're --
2 everything is coming out of the same pot. And strong
3 ties to northern Nevada for all his life. Although, he
4 did -- I think he was born in Idaho; right? And lived
5 in Idaho for a time. But the family has been here for
6 a long, long time.
7 THE COURT: Um.
8 MR. MALONE: And as you know his children are
9 here.
10 THE COURT: Right. What did you want to do
11 with then the post conviction case?
12 MR. MALONE: Your Honor, I think if -- I
13 would --
14 THE COURT: I mean, we could --
15 MR. MALONE: -- hold it in abeyance.
16 THE COURT: Or we could dismiss it without
17 prejudice.
18 MR. MALONE: That would be -- that would be
19 fine.
20 And then I do have a notice of appeal prepared
21 in a case appeal statement.
22 THE COURT: Okay.
23 MR. MALONE: That have not been filed, but I
24 signed them today while we were in court.
25 THE COURT: Okay. Well, maybe to make things

1 easier for you I'll get the -- we'll get the judgment
2 of conviction -- corrected judgment of conviction.
3 I'll just note in the caption just to correct an
4 illegal sentence entered today so then you can file
5 those.

6 MR. MALONE: Thank you.

7 THE COURT: That work?

8 MR. MALONE: That will work.

9 THE COURT: Argument.

10 MR. THOMPSON: So under 178.488 that you've
11 read, it says that it "may". So it's discretionary on
12 your part. "Bail may be allowed pending appeal" --
13 this is under one -- "unless it appears that the appeal
14 is frivolous or taken for delay." There's nowhere in
15 there that says while they figure out what the issues
16 might be. Or while they're waiting for a transcript to
17 be created.

18 And then you have subsection (5). It says:
19 "The Court or judge by whom bail may be ordered shall
20 require" -- shall, that's one of those buzz words --
21 "such notice of the application thereof as the Court or
22 judge may deem reasonable to be given to the district
23 attorney."

24 So basically you got to file a motion and you
25 got to set forth these reasons upon which you can rely

1 and decide whether it's frivolous or taken for delay.
2 Right now they have nothing. He's articulated nothing.

3 And the reality in this case, Judge, we didn't
4 have -- I don't remember any pretrial motion work.

5 It is the appeal, in my humble opinion doing
6 this for the number of years that I have, is going to
7 be a "sufficiency of the evidence" appeal. And that's
8 it. That's what they're left with.

9 And the reason why we ended up with the
10 conviction, again in my opinion, that we did is that
11 when I asked the victim whether or not the defendant's
12 finger penetrated her vagina, she said she didn't
13 remember or didn't know.

14 That was the big problem for the state's case
15 regarding Counts One and Two. She was insistent of
16 where his hands went otherwise. And that's what
17 they're left with for an appeal. Is whether a
18 reasonable jury could find, based on the facts that she
19 testified to, the defendant guilty. That's a pretty,
20 pretty high burden for them to carry.

21 And I suggest to you that this appeal is going
22 nowhere. And all you're doing is delaying the
23 inevitable if you grant this opportunity for bail.

24 When you look at the Bergna case, so, yeah,
25 you look at the strength and quality of the evidence

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1 and other indicia of guilt as well as the nature and
2 circumstances of the offense in resolving it. That's
3 all we had. It's just a trial with witnesses. I don't
4 remember any pretrial motions. Nothing that was
5 contested about evidence that was admitted.

6 Then you have that old case in 1917, State vs.
7 McFarland which says, these are some of the things that
8 weigh in favor of granting the bail pending appeal.
9 Flagrant or manifest misconduct in trial. Palpable
10 errors from which or by reason of which conviction
11 resulted.

12 THE COURT: Which case is this?

13 MR. THOMPSON: This is a Nevada case. It's
14 State vs. McFarland. It's 41 Nev. 105, and I'm citing
15 page 112. It's a 1917 case. I believe it's cited in
16 the Bergna case.

17 But these are -- these are things that they
18 said would do it. Palpable errors from which or by
19 reasons of which conviction resulted or where newly
20 discovered admissible evidence is available.

21 That sort of thing weighs in favor of granting
22 the bail. But we don't have that here. All we're
23 doing is delaying the inevitable.

24 I get that he was sentenced and given
25 probation. And he's been out, and he's been doing well

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1 now. But he shouldn't have had that in the first
2 place.

3 And were we back there at the first sentencing
4 and he were sentenced to prison like he should have
5 been, I can't even fathom an argument that Mr. Woodbury
6 would have been able to make. And, in fact,
7 Mr. Woodbury kind of makes the argument for me, he
8 didn't file a direct appeal.

9 And Mr. Woodbury has been doing this a long
10 time. There wasn't some palpable error that he saw
11 that he was Johnny On The Spot ready to go to the
12 Supreme Court with. He knows what kind of stuff is out
13 there, and there just isn't in this case. There just
14 isn't.

15 And so I don't know how the Court can get to
16 the point where they can decide this if we're just
17 saying, Well, there might be something in those
18 transcripts. I'm going to grant you bail based on
19 that. It's not in the statute. That's not one of the
20 reasons. It's not in a hopes for finding something
21 later.

22 And I think that's why (5) exists the way it
23 does is you have to file a motion and be able to
24 articulate these specific facts so the Court can make
25 findings.

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1 And if that's the case that he gets sent off
2 to prison for a while and then they file their motion
3 and you want to grant bail at that juncture because
4 they're able to carry the burden, then that's the way
5 it works. At least that's the way it worked for me in
6 the past the last time somebody tried to do this. Is
7 that the sentence was executed. The attorney filed the
8 motion to stay the sentence. And then we had a hearing
9 on it, and in that particular case the Court denied it.
10 THE COURT: Well, in essence, that's what the
11 Court would have to do first. In Chapter 177 there's
12 talk about staying the sentence; right?
13 MR. THOMPSON: That's after you've decided to
14 grant bail from my understanding.
15 THE COURT: A sentence of imprisonment shall
16 be stayed if an appeal is taken and the defendant is
17 admitted to bail. Right. So you got to make the bail
18 decision first and then --
19 MR. THOMPSON: Right.
20 THE COURT: -- stay the execution or stay the
21 sentence.
22 MR. MALONE: Your Honor.
23 THE COURT: Yes.
24 MR. MALONE: If I can be heard for a second.
25 Mr. Thompson makes the argument that there's nothing to

1 frivolous. We don't know. They have no idea. And
2 they haven't filed their motion.
3 So it's our view that the execution of this
4 sentence has to be imposed today, and they can file
5 their motion to have it -- to have the bail issued
6 under 178.488 and the execution stayed. And then they
7 would let him out.
8 MR. MALONE: Your Honor, Mr. Thompson --
9 THE COURT: You're talking about they would
10 have to do that up in the Supreme Court; right?
11 MR. THOMPSON: Well, the statute says that any
12 court can do it. So either you can do it, the appeal
13 court can do it, or the Supreme Court. That's
14 subsection (3). So any of the three can do that.
15 MR. MALONE: There's no -- there's no
16 requirement to have a -- for a motion to be filed, your
17 Honor.
18 MR. THOMPSON: Then what is subsection (5)?
19 THE COURT: Anything else?
20 MR. THOMPSON: No.
21 MR. MALONE: No.
22 THE COURT: No.
23 All right. Give me a moment then.
24 Okay.
25 (brief pause in proceedings.)

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1 appeal. The -- that the only reason he -- that
2 Mr. Mentaberry was acquitted was because his witness
3 recanted on the stand. That's significant.
4 What I have been able to review are police
5 reports where she repeatedly said that her vagina was
6 caressed and penetrated. The jury -- obviously that
7 changed. That is not the only rationale for the jury
8 making their finding.
9 The -- it's not uncommon. I don't know that
10 we have a system where a defendant is required to
11 explore every appeal issue or course of appeal before
12 filing the appeal.
13 Obviously there would be no need for an appeal
14 if you can convince the trial judge that there should
15 be a judgment notwithstanding the verdict. That hasn't
16 happened here. And one of the things is that
17 Mr. Mentaberry has a right to appeal.
18 The fact that one wasn't filed, I don't think
19 is determinative by this Court.
20 THE COURT: Okay. Anything else?
21 MR. THOMPSON: But the issue is they have the
22 burden to carry here. They have to show something, and
23 you have nothing to rely on --
24 MR. MALONE: Other than --
25 MR. THOMPSON: -- other than this is delay or

1 THE COURT: All right. So under NRS 177.105 a
2 sentence of imprisonment shall be stayed if an appeal
3 is taken and the defendant is admitted to bail.
4 So this has to be stayed if an appeal is taken
5 and the defendant is admitted to bail. There's going
6 to be an appeal taken. The question is whether the
7 defendant will be admitted to bail.
8 Under NRS 177.135 admission to bail upon
9 appeal shall be as provided in the title. So that's
10 Title 14 which deals with procedure in criminal cases.
11 Obviously Chapter 178 is one of those chapters we look
12 to to decide whether bail is appropriate. And that, as
13 I said earlier, lead me to NRS 178.488.
14 Bail may be allowed pending appeal or
15 certiorari unless it appears that the appeal is
16 frivolous or taken for delay.
17 Here's what I've got. I've got a defense
18 lawyer who's new to the case who says he hasn't
19 reviewed the transcript, I'm taking it perhaps even the
20 file in this case, to see what the appeal issues really
21 are in this case.
22 So I don't think I can find that the appeal
23 that is to be taken here, and it's already been
24 announced it's happening, is frivolous or taken for
25 delay. I'm not surprised there's going to be an appeal

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1 because that's what the petition for writ of habeas
2 corpus was about.
3 And so the question still remains, you know,
4 should I allow appeal -- bail pending appeal in this
5 case. The district court certainly I think has
6 authority to do that still.
7 As far as providing notice of the application
8 for that, this is something that was discussed when we
9 last convened. There was no written application.
10 Applications, I suppose, could be oral. I'm not at all
11 surprised that this is being done here today.
12 I suppose I'm a bit surprised that we -- since
13 I did bring it up at the last hearing and that was a
14 concern that the defendant be on a monitor, have
15 that -- my idea was to have it set up or reasonably
16 available to be ready to go right away if he was going
17 to go on bail on appeal. Not only to monitor alcohol
18 use by also movements.
19 So I think at bottom what I have to do is look
20 at the -- so I'm not finding these things impediments
21 to the granting of this motion, I guess, is what I'm
22 telling the prosecutor here given the unique
23 circumstances of this case. But what I will say is as
24 well, is I've got to consider some other things in this
25 case.

1 original sentencing hearing in this case.
2 So at bottom, what I have to do is evaluate
3 what was the evidence in this case. Mr. Thompson hit
4 it right on the head as far as what the evidence was in
5 this case.

6 The evidence was that the testimony from the
7 victim was that she couldn't say with certainty that
8 the defendant penetrated her which is the whole reason,
9 in the Court's view, the jury found the defendant not
10 guilty of Counts One and Two. Because Counts One and
11 Two, as we all know, sexual assault you got to have a
12 penetration, sexual penetration. Same thing for
13 Count Two, statutory sexual seduction.

14 However, the lewdness, for the jury to find
15 the defendant guilty of a lewdness charge in this case
16 did not surprise me at all. In fact, I recall
17 commenting to my law clerk after the trial about that
18 very thing that I was not surprised that that was the
19 verdict.

20 Given all the evidence that was presented in
21 this case including from percipient witnesses who were
22 in the basement of this home when the defendant came
23 down the stairs from upstairs and drinking with a
24 friend, and then sitting down on the couch next to the
25 victim.

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1 So I, frankly, have thought about, well, what
2 are the appeal issues in this case. And substantial
3 sufficiency of the evidence certainly is one that comes
4 up to mind right away for me.

5 I combed the file before the hearing to see
6 whether there were any other issues that might be
7 argued on appeal in this case. The only other one that
8 I could find -- let me backup.

9 I don't recall any arguments over the jury
10 instructions. I don't recall any objections to the
11 jury instructions. I don't recall any instructions
12 that were offered and not given by the Court.

13 And my review of the file supports that
14 conclusion too. Because I, at least as far as not
15 giving instructions that were offered by the defense,
16 because what happens is when I get those, I'll make a
17 record of it and actually mark them refused, which is
18 what our law requires, and file them in the file. I
19 don't see anything on that in this case. So no legal
20 arguments on the instructions, against the
21 instructions. No legal arguments on instructions that
22 the Court did not give. And, I agree with
23 Mr. Thompson, very little pretrial litigation in this
24 case. And as I recall, very little in the way of
25 objections on and rulings on evidentiary issues that

1 We've already established that the law
2 requires a prison sentence without probation in this
3 case.
4 The defendant had a prior record, a criminal
5 record, that certainly is not the worse I've ever seen.
6 But certainly is some cause for concern over time.
7 Although, some of it was quite dated. I would note
8 that between 2010 and the time that he was arrested in
9 this case, which I think was in 2018, there was a big
10 blank spot between 2010 and his arrest in this case.
11 Which that's a plus for him as I consider this motion.
12 But in 2006 he was convicted of battery in
13 Idaho. 2006 petty theft. 2008 possession of drug
14 paraphernalia. 2010, domestic assault. 2010 violation
15 of a no-contact order.
16 Certainly if the Court were going to order
17 bail it would be a no-contact order in this case. That
18 is no contact with the victim or members of her nuclear
19 family, certainly.
20 So anyway, that's his prior criminal record.
21 Not the worse I've ever seen. Certainly not without
22 blemishes, let's say. And serious blemishes.
23 The defendant clearly is employed. He's
24 worked a long time for his family business. I do
25 recall that from the sentencing hearing that -- the

1 actually came up during the trial.
2 The main error in this case was one that
3 benefited the defendant, certainly, up to now, which is
4 where he got to be out on probation when he shouldn't
5 have ever been on probation.

6 The only other thing I can see in here where
7 there might be some fodder for an appeal is the Court's
8 order vacating the order granting a motion for
9 discovery entered in February or April of 2019.

10 This involved the defendant stipulating with
11 the state to allow the Court to review in camera the
12 victim's records, records provided by a psychiatrist,
13 Dr. Khurana, KU -- I'm sorry, K-H-U-R-A-N-A and an LCSW
14 with whom she was counseling, Leslie Rangel.

15 The Court entered an order, a written order
16 because I thought the better of it once the records
17 actually got up here, and I remember appointing counsel
18 for Ms. Eklund. I thought the better of it and said I
19 don't care if the state stipulated to this, I shouldn't
20 be reviewing these records. They're privileged. And
21 the Court entered that order.

22 And so maybe there's something there that can
23 be argued. I don't know. But I'm pretty confident in
24 what that order was. I did the research, and I entered
25 the order.

1 So my assessment of this case is that the
2 evidence was strong on the -- on the dealing when it
3 came to the count with which the defendant was
4 convicted. The defendant testified and, frankly, I
5 don't think he very much helped himself in the
6 testimony. That's all I'm going to say about that.

7 And defense counsel is going to have to look
8 at the record and decide what the appeal issues are in
9 this case. But the nature and the quality of the
10 evidence adduced at trial, the circumstances of the
11 offense, the age of the victim, the defendant obviously
12 was in the throws of his alcohol problem at that time.
13 He drank too much and he was lewd with a child is what
14 the evidence disclosed to me.

15 And so for all those reasons, and placing the
16 greater weight, because I get to weigh these factors on
17 the nature and quality of the evidence adduced at trial
18 and circumstances of the offense, to me those are the
19 most weighty factors that the Court considers here.

20 And for those reasons the Court is denying the
21 motion.

22 Anything else?

23 MR. THOMPSON: And the writ case was
24 dismissed.

25 THE COURT: The writ case would be dismissed

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1 without prejudice.

2 And then the Court's going to enter its
3 judgment of conviction. I still have about an hour and
4 a half or so to do that. I'm going to get that
5 entered. And if we have an email address for the state
6 and we have an email address for Mr. Malone, we can
7 email you a filed copy as soon as it's entered.

8 Court's in recess. Thank you.

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10 (Proceedings were concluded.)

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REPORTER'S CERTIFICATE

2 STATE OF NEVADA)

3 COUNTY OF CLARK) :SS

4 I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
5 HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
6 PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
7 TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
8 STENOGRAPHY NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
9 AND UNDER MY DIRECTION AND SUPERVISION AND THE
10 FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
11 ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
12 PROCEEDINGS HAD.

13 IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
14 MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
15 NEVADA.

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PEGGY ISOM, RMR, CCR 541

<p>BY MR. MALONE: [4] 21/16 24/17 25/12 28/7</p> <p>MR. MALONE: [64] 5/14 7/14 7/16 8/17 8/19 9/6 9/14 9/17 10/8 10/13 10/16 10/22 14/13 14/17 15/22 16/12 16/14 16/18 16/21 16/24 18/4 18/7 18/10 18/15 19/18 20/6 20/8 20/11 20/17 23/14 23/23 29/12 29/14 29/16 43/21 43/24 45/5 45/7 45/9 45/18 45/25 46/8 46/10 46/20 47/5 47/7 47/12 47/15 47/17 47/20 47/24 48/8 48/12 48/15 48/18 48/23 49/6 49/8 53/22 53/24 54/24 55/8 55/15 55/21</p> <p>MR. THOMPSON: [34] 5/13 5/19 7/8 7/11 7/18 7/21 7/24 8/2 8/6 8/8 9/3 9/9 9/20 11/2 11/8 11/11 11/15 11/24 13/19 13/23 14/6 23/16 29/6 33/11 49/10 51/13 53/13 53/19 54/21 54/25 55/11 55/18 55/20 62/23</p> <p>MS. SNOW: [7] 19/17 20/7 20/13 20/16 20/24 21/9 21/14</p> <p>THE COURT CLERK: [1] 11/22</p> <p>THE COURT: [108]</p> <p>THE DEFENDANT: [1] 32/23</p> <p>THE WITNESS: [8] 21/7 21/12 23/19 23/21 24/10 24/13 25/7 25/11</p> <p>UNIDENTIFIED PERSON: [1] 7/23</p> <p>\$</p> <p>\$1,470 [2] 8/11 40/9</p> <p>\$10,000 [1] 47/13</p> <p>\$1470 [1] 11/3</p> <p>\$150 [1] 40/4</p> <p>\$25 [1] 40/6</p> <p>\$3 [1] 40/5</p> <p>.135 [1] 41/13</p> <p>0</p> <p>0068 [1] 40/24</p>	<p>1</p> <p>10-years [1] 36/7</p> <p>100 percent [1] 27/5</p> <p>105 [1] 51/14</p> <p>112 [2] 14/15 51/15</p> <p>114 [1] 13/2</p> <p>116 [2] 7/11 40/10</p> <p>12 [6] 25/22 25/23 31/13 32/14 35/1 35/18</p> <p>12-page [1] 34/22</p> <p>120 [1] 41/18</p> <p>13 [1] 28/1</p> <p>14 [6] 6/6 12/1 12/4 12/5 15/20 56/10</p> <p>15 [1] 12/5</p> <p>15-year-old [3] 6/6 12/5 15/21</p> <p>16 [1] 15/15</p> <p>1662 [1] 2/19</p> <p>176 [1] 36/13</p> <p>176.555 [1] 36/13</p> <p>176A [1] 36/12</p> <p>176A.100 [3] 12/25 35/8 35/23</p> <p>176A.110 [1] 35/25</p> <p>177 [1] 53/11</p> <p>177.105 [2] 41/13 56/1</p> <p>177.135 [1] 56/8</p> <p>178 [1] 56/11</p> <p>178.488 [4] 41/14 49/10 55/6 56/13</p> <p>19 [1] 27/24</p> <p>1917 [2] 51/6 51/15</p> <p>1998 [1] 25/22</p> <p>2</p> <p>2004 [1] 42/14</p> <p>2006 [2] 58/12 58/13</p> <p>2008 [1] 58/13</p> <p>201.230 [1] 36/19</p> <p>2010 [4] 58/8 58/10 58/14 58/14</p> <p>2017 [1] 34/4</p> <p>2018 [3] 34/3 34/4 58/9</p> <p>2019 [1] 61/9</p> <p>202 [1] 2/20</p> <p>2020 [3] 6/21 17/13 34/7</p> <p>2021 [2] 1/20 5/1</p> <p>22 [1] 27/23</p> <p>24 [1] 35/17</p> <p>28 [5] 12/14 12/16 13/23 39/14 40/8</p> <p>2:00 [1] 5/2</p> <p>2ND [1] 2/8</p> <p>3</p> <p>3101 [2] 2/10 2/11</p> <p>3342 [1] 2/22</p>	<p>35 [1] 21/19</p> <p>385 [2] 13/2 14/15</p> <p>392-3342 [1] 2/22</p> <p>395 [1] 2/19</p> <p>4</p> <p>40 percent [1] 35/22</p> <p>41 [1] 51/14</p> <p>48 [4] 31/13 32/14 34/25 35/15</p> <p>5</p> <p>5030 [3] 1/1 5/6 17/7</p> <p>540 [1] 2/7</p> <p>541 [2] 1/25 64/17</p> <p>6</p> <p>60 [1] 35/2</p> <p>6th [1] 34/6</p> <p>7</p> <p>72 [6] 12/14 12/16 13/24 35/14 39/13 40/8</p> <p>738-3101 [2] 2/10 2/11</p> <p>775 [3] 2/10 2/11 2/22</p> <p>8</p> <p>869 [1] 41/18</p> <p>877 [1] 41/21</p> <p>89423 [1] 2/21</p> <p>89801 [1] 2/9</p> <p>:</p> <p>:SS [1] 64/2</p> <p>A</p> <p>abeyance [2] 41/8 48/15</p> <p>ABILITY [1] 64/11</p> <p>able [9] 14/23 15/4 18/7 18/13 27/7 52/6 52/23 53/4 54/4</p> <p>about [19] 6/5 12/9 23/8 25/23 32/6 37/12 37/19 42/16 44/9 46/14 46/19 51/5 53/12 55/9 57/2 59/17 60/1 62/6 63/3</p> <p>above [1] 18/16</p> <p>abuse [1] 32/4</p> <p>accepted [1] 44/17</p> <p>access [1] 18/5</p> <p>account [2] 11/6 31/5</p> <p>ACCURATE [1] 64/11</p> <p>achievement [2] 32/2 32/3</p> <p>Acquittals [1] 15/25</p> <p>acquitted [3] 15/12 44/4 54/2</p> <p>across [1] 11/7</p>	<p>active [1] 47/22</p> <p>actually [8] 5/20 11/11 34/14 34/15 40/15 60/17 61/1 61/17</p> <p>address [3] 39/23 63/5 63/6</p> <p>adduced [3] 43/2 62/10 62/17</p> <p>administrative [2] 40/5 40/6</p> <p>admissible [1] 51/20</p> <p>admission [2] 9/2 56/8</p> <p>admit [1] 39/5</p> <p>admitted [8] 9/22 9/25 11/18 51/5 53/17 56/3 56/5 56/7</p> <p>advantage [2] 15/2 29/25</p> <p>advised [1] 34/9</p> <p>affected [1] 12/9</p> <p>after [5] 19/1 34/5 34/18 53/13 59/17</p> <p>afterward [1] 25/19</p> <p>again [10] 24/1 28/18 29/9 31/12 33/24 36/15 37/3 37/20 41/4 50/10</p> <p>against [1] 60/20</p> <p>age [2] 15/15 62/11</p> <p>ages [1] 27/22</p> <p>ago [3] 11/6 11/25 46/6</p> <p>agree [1] 60/22</p> <p>agreement [1] 37/12</p> <p>agrees [1] 10/25</p> <p>ahead [6] 9/23 16/17 16/22 21/13 21/14 33/15</p> <p>alcohol [7] 19/23 22/9 26/11 47/4 47/6 57/17 62/12</p> <p>all [51] 7/21 7/24 8/3 8/13 9/21 10/1 10/25 11/4 11/18 11/21 12/20 15/2 15/8 16/7 16/22 17/1 17/16 18/2 18/20 20/9 21/5 22/20 23/19 23/20 23/22 26/6 28/22 29/10 32/7 32/19 32/24 34/17 34/21 36/8 38/12 40/2 44/21 47/14 48/3 50/22 51/3 51/22 55/23 56/1 57/10 59/11 59/16 59/20 62/6 62/15 64/5</p> <p>allegation [1] 12/3</p> <p>allegations [1] 15/4</p> <p>allow [3] 47/2 57/4 61/11</p> <p>allowed [3] 41/14 49/12 56/14</p> <p>almost [2] 22/2 22/25</p>	<p>along [3] 12/13 26/6 26/22</p> <p>already [7] 11/1 13/24 18/17 46/5 47/20 56/23 58/1</p> <p>Alright [1] 23/24</p> <p>also [15] 6/4 6/8 6/12 6/16 8/22 12/4 14/14 15/19 16/2 16/8 17/14 35/22 37/18 42/24 57/18</p> <p>alternative [2] 15/19 15/19</p> <p>Alternatively [1] 15/17</p> <p>Although [3] 39/24 48/3 58/7</p> <p>ALVIN [1] 1/17</p> <p>always [2] 38/9 38/20</p> <p>am [1] 22/7</p> <p>amended [1] 8/4</p> <p>analysis [1] 41/11</p> <p>ankle [1] 47/6</p> <p>announced [1] 56/24</p> <p>another [5] 30/22 35/24 36/17 36/17 42/16</p> <p>any [22] 7/6 8/3 8/13 8/15 9/1 9/18 22/8 23/15 27/7 28/12 29/4 29/13 36/14 40/19 50/4 51/4 55/11 55/14 60/6 60/9 60/10 60/11</p> <p>Anybody [1] 29/11</p> <p>anymore [3] 22/13 46/19 47/3</p> <p>Anyone [1] 7/1</p> <p>anything [9] 5/20 7/14 29/10 32/21 34/16 54/20 55/19 60/19 62/22</p> <p>anyway [5] 6/25 13/18 36/11 37/2 58/20</p> <p>apparent [1] 44/12</p> <p>appeal [58] 30/9 30/10 30/12 32/16 33/19 41/1 41/12 41/14 41/15 41/24 42/6 42/11 42/16 42/23 43/13 43/14 43/17 44/1 44/14 44/16 44/22 45/16 45/21 46/2 48/20 48/21 49/12 49/13 50/5 50/7 50/17 50/21 51/8 52/8 53/16 54/1 54/11 54/11 54/12 54/13 54/17 55/12 56/2 56/4 56/6 56/9 56/14 56/15 56/20 56/22 56/25 57/4 57/4 57/17 60/2 60/7 61/7 62/8</p>
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A appeals [2] 30/14 42/14 appearance [1] 22/13 APPEARANCES [1] 2/1 appears [3] 41/15 49/13 56/15 appellate [3] 42/15 44/10 44/17 applicant [2] 42/10 42/19 applicant's [1] 43/6 application [3] 49/21 57/7 57/9 Applications [1] 57/10 appointing [1] 61/17 appreciate [1] 39/24 appropriate [8] 6/16 12/18 30/13 31/6 31/9 38/10 40/15 56/12 approximate [1] 32/12 approximating [1] 31/19 April [2] 34/6 61/9 are [46] 5/5 5/12 5/20 5/23 7/4 9/4 9/13 9/14 9/21 10/10 17/3 21/24 22/3 22/8 28/8 31/16 32/5 33/8 33/11 37/9 37/14 38/6 39/3 39/4 39/22 43/2 43/8 43/9 43/15 44/1 44/5 44/18 44/20 44/20 44/21 45/16 46/17 48/8 51/7 51/17 51/17 54/4 56/21 60/2 62/8 62/18 aren't [1] 34/17 argued [3] 43/16 60/7 61/23 argument [11] 9/24 11/23 15/7 18/23 18/24 29/13 39/23 49/9 52/5 52/7 53/25 arguments [6] 11/24 16/7 38/12 60/9 60/20 60/21 arrangements [1] 30/11 arrest [1] 58/10 arrested [1] 58/8 articulate [1] 52/24 articulated [1] 50/2 as [42] 6/15 9/5 17/16 18/20 19/23 21/4 24/7 27/10 27/10 27/12 27/12 29/21 32/11 34/1 35/4 35/4 35/5 35/7 37/4 37/10 37/15 38/10	40/13 47/22 48/8 49/21 51/1 51/1 56/9 56/12 57/7 57/7 57/23 58/11 59/4 59/4 59/11 60/14 60/14 60/24 63/7 63/7 ask [2] 13/22 30/2 asked [5] 6/25 12/11 12/12 40/18 50/11 asking [2] 13/19 33/1 aspect [1] 46/19 assault [5] 12/4 12/6 15/15 58/14 59/11 assessment [5] 10/2 40/5 40/6 42/8 62/1 associations [1] 43/8 at [49] 5/22 7/4 10/17 11/14 12/1 12/18 13/1 15/1 16/2 17/16 19/8 20/3 21/21 26/5 26/6 29/17 34/2 34/13 34/17 35/16 36/14 37/15 38/9 38/22 39/9 39/10 39/11 42/4 43/2 44/7 45/25 50/24 50/25 52/3 53/3 53/5 57/10 57/13 57/19 57/20 59/2 59/16 60/14 62/8 62/10 62/12 62/17 64/6 64/8 attached [2] 6/13 6/17 attachments [1] 34/23 attempt [1] 43/7 attention [1] 15/24 attest [1] 19/19 attorney [6] 2/5 5/8 16/25 17/9 49/23 53/7 attribute [1] 28/13 authority [1] 57/6 Ava [2] 27/24 28/5 available [2] 51/20 57/16 aware [5] 15/4 22/3 22/7 22/8 28/8 away [3] 14/8 57/16 60/4 B B-E-I-E-R [1] 10/3 back [9] 15/25 17/6 17/8 21/21 28/14 36/24 42/14 45/21 52/3 backup [1] 60/8 bad [2] 19/25 28/23 bail [29] 30/11 41/11 41/12 41/14 41/23 42/5 42/11 47/10 47/11 49/12 49/19 50/23 51/8 51/22 52/18 53/3 53/14 53/17 53/17 55/5 56/3 56/5 56/7 56/8 56/12	56/14 57/4 57/17 58/17 balance [1] 10/19 based [4] 36/3 42/8 50/18 52/18 basement [1] 59/22 basically [3] 10/19 45/12 49/24 batteries [1] 16/4 battery [1] 58/12 be [81] became [1] 38/21 because [29] 6/4 6/22 7/19 11/25 12/21 12/22 14/4 21/18 21/25 22/22 28/24 31/11 34/8 37/7 38/3 38/5 39/2 41/1 41/2 43/15 47/11 53/3 54/2 57/1 59/10 60/14 60/16 61/16 62/16 been [42] 6/21 8/2 8/20 8/24 11/18 14/23 14/24 14/25 15/1 15/1 16/5 18/13 19/8 19/10 21/2 22/10 22/14 24/5 25/23 27/7 27/10 30/24 32/21 32/23 34/9 36/5 36/20 42/20 42/21 43/18 46/1 46/25 48/5 48/23 51/25 51/25 52/5 52/6 52/9 54/4 56/23 61/5 before [10] 1/17 16/13 22/11 28/23 30/20 32/21 47/11 54/11 60/5 64/6 BEFORE-ENTITLED [1] 64/6 beforehand [1] 5/19 beginning [3] 34/2 37/15 39/9 behavior [2] 19/19 32/10 behind [1] 20/17 Beier [1] 10/3 being [5] 36/16 37/6 37/13 44/12 57/11 believe [10] 6/4 7/16 10/8 12/1 12/25 19/16 29/16 33/11 46/8 51/15 bench [4] 7/5 36/5 38/20 39/11 benefited [1] 61/3 Bergna [3] 41/18 50/24 51/16 best [3] 28/24 32/17 64/11 better [7] 19/22 20/1 26/22 38/22 38/24 61/16 61/18 between [2] 58/8 58/10	big [2] 50/14 58/9 bikes [1] 28/16 bit [1] 57/12 blacksmith [1] 21/22 blank [1] 58/10 blemishes [2] 58/22 58/22 block [2] 21/21 21/22 board [1] 11/7 born [1] 48/4 both [4] 19/19 20/2 26/11 26/13 bottom [3] 35/16 57/19 59/2 Brenenstall [2] 6/15 18/5 Brenenstall's [1] 17/20 brief [1] 55/25 briefly [1] 11/17 bring [4] 13/4 13/12 37/23 57/13 brought [1] 15/25 bunch [1] 37/10 burden [4] 42/23 50/20 53/4 54/22 business [7] 32/8 47/22 47/23 47/24 47/25 48/1 58/24 but [43] 6/2 6/21 9/16 11/5 13/6 14/6 14/8 14/18 15/6 16/9 17/14 18/24 19/11 21/3 24/6 28/23 30/17 31/12 32/21 33/24 36/6 36/7 37/18 38/19 38/20 38/24 39/21 42/14 42/24 43/12 44/23 45/13 48/5 48/23 51/17 51/22 52/1 54/21 57/23 58/6 58/12 61/23 62/9 buzz [1] 49/20 C call [1] 45/19 came [5] 12/10 39/1 59/22 61/1 62/3 camera [1] 61/11 can [58] 5/15 7/1 7/2 8/12 9/23 10/6 14/7 14/7 14/17 16/9 16/15 16/16 16/17 17/2 19/19 20/9 20/22 21/8 22/10 22/12 24/12 25/3 25/9 26/10 28/24 29/21 30/18 32/20 33/22 34/7 36/13 38/10 38/23 38/24 41/1 41/4 41/12 43/19 44/11 44/21 44/22 46/21 49/4 49/25 52/15 52/16 52/24	53/24 54/14 55/4 55/12 55/12 55/13 55/14 56/22 61/6 61/22 63/6 can't [5] 14/14 18/16 30/19 44/17 52/5 candidate [1] 31/6 cannot [1] 39/7 caption [1] 49/3 care [1] 61/19 career [1] 38/19 carefully [1] 41/13 cares [1] 23/7 caressed [1] 54/6 carry [3] 50/20 53/4 54/22 case [62] 1/1 5/6 6/21 11/25 13/1 14/16 33/25 35/10 36/8 36/16 36/17 36/25 37/19 39/9 39/11 39/17 41/8 41/17 42/10 42/16 42/21 44/12 45/15 45/22 46/19 48/11 48/21 50/3 50/14 50/24 51/6 51/12 51/13 51/15 51/16 52/13 53/1 53/9 56/18 56/20 56/21 57/5 57/23 57/25 58/3 58/9 58/10 58/17 59/1 59/3 59/5 59/15 59/21 60/2 60/7 60/19 60/24 61/2 62/1 62/9 62/23 62/25 cases [5] 8/11 36/22 44/20 44/21 56/10 category [3] 6/6 15/16 15/18 cause [2] 40/18 58/6 caused [4] 26/14 31/1 31/2 32/8 CCR [2] 1/25 64/17 certainly [15] 7/4 18/24 20/4 29/18 36/9 36/9 46/21 57/5 58/5 58/6 58/16 58/19 58/21 60/3 61/3 certainty [1] 59/7 CERTIFICATE [1] 64/1 certified [2] 35/5 64/4 CERTIFY [1] 64/5 certiorari [2] 41/15 56/15 CHAD [3] 2/6 5/8 17/9 chambers [2] 36/20 37/10 chance [3] 18/2 30/1 33/1 change [3] 28/24 28/25 31/16 changed [2] 45/23 54/7
--	--	--	---	--

C	comparable [1] 39/22	correcting [2] 13/16	custody [1] 27/17	deny [1] 41/24
changes [4] 19/20	completed [1] 16/5	38/1	CV [1] 40/24	denying [1] 62/20
22/8 28/12 37/10	completely [1] 31/9	correction [6] 13/14	D	DEPARTMENT [1] 1/2
Chapter [2] 53/11	compliance [3] 13/4	13/24 33/17 37/24	dad [3] 26/24 27/18	departure [1] 30/3
56/11	13/13 37/23	39/21 46/2	-28/20	depend [2] 32/9 32/10
Chapter 178 [1]	comply [2] 13/9 37/20	correctly [1] 37/13	Damocles [1] 38/15	Deputy [2] 5/7 17/9
56/11	compromise [2] 31/7	cost [1] 46/12	danger [2] 42/18	describe [2] 25/18
chapters [1] 56/11	31/8	costly [1] 46/4	42/25	26/17
character [4] 19/20	concept [1] 44/16	couch [1] 59/24	dark [1] 19/14	description [2] 3/2
23/2 27/4 29/24	concern [2] 57/14	could [15] 13/17 25/6	Darla [1] 9/12	7/3
charge [4] 36/18 38/5	58/6	29/19 31/19 33/19 35/3	data [2] 31/22 31/22	deserved [1] 12/12
44/6 59/15	concerned [2] 27/12	36/22 45/20 47/3 47/4	date [3] 5/10 29/17	determinative [1]
charges [2] 10/14	36/8	48/14 48/16 50/18	34/3	54/19
44/4	concluded [1] 63/10	57/10 60/8	dated [3] 1/20 25/20	determine [1] 44/1
child [8] 6/6 12/4	conclusion [1] 60/14	couldn't [2] 11/5 59/7	58/7	determining [1] 31/5
15/15 15/21 17/23 33/7	conditions [1] 46/24	counsel [10] 5/9 17/8	day [3] 19/11 22/2	dictated [1] 39/17
36/18 62/13	conduct [1] 44/9	43/18 43/22 44/12	22/25	did [30] 5/22 7/8 9/4
children [5] 19/4 23/8	confident [1] 61/23	44/17 45/4 46/11 61/17	days [3] 7/11 22/21	11/8 12/14 14/16 14/21
27/19 31/3 48/8	confinement [1] 43/7	62/7	40/10	15/3 15/7 15/7 15/24
Christina [1] 10/3	consider [5] 19/6 30/2	counseling [11] 3/4	DC [1] 40/24	18/4 25/13 25/13 26/16
circumstances [7]	31/15 57/24 58/11	8/24 8/24 10/11 10/14	DC-CV-21-0068 [1]	29/18 34/1 34/13 34/24
30/17 31/16 43/2 51/2	consideration [1]	28/8 28/11 28/13 29/23	40/24	40/13 40/17 40/20
57/23 62/10 62/18	32/12	29/24 61/14	dead [1] 31/11	45/19 48/4 48/10 50/10
cited [1] 51/15	considerations [1]	count [12] 6/5 6/7	dealing [2] 46/1 62/2	57/13 59/16 60/22
citing [1] 51/14	43/3	9/15 12/5 12/6 15/14	dealings [1] 19/21	61/24
clarification [2] 26/3	considered [1] 18/18	15/17 15/19 15/19	deals [1] 56/10	didn't [9] 12/13 16/8
28/3	considers [1] 62/19	15/20 59/13 62/3	dealt [1] 42/10	45/2 45/3 45/22 50/3
CLARK [2] 64/3 64/14	CONSTITUTES [1]	Count One [1] 15/14	decide [7] 30/12 36/2	50/12 50/13 52/8
clause [3] 13/10	64/10	Count Three [3] 6/5	43/12 50/1 52/16 56/12	differ [1] 38/23
37/17 37/21	constitution [3] 13/10	6/7 15/19	62/8	different [1] 22/14
clean [1] 19/9	37/18 37/18	Count Two [1] 59/13	decided [2] 33/25	direct [3] 21/15 24/16
clear [5] 12/17 18/15	constitutional [1]	counts [7] 15/10	53/13	52/8
38/21 39/18 44/16	37/16	15/11 15/13 16/1 50/15	decision [4] 33/13	DIRECTION [1] 64/9
clearly [4] 10/2 12/9	constructed [1] 15/23	59/10 59/10	33/16 35/6 53/18	dirt [1] 28/16
38/2 58/23	contact [3] 58/15	COUNTY [6] 1/6 2/5	deem [1] 49/22	disclosed [1] 62/14
clerk [1] 59/17	58/17 58/18	5/7 17/9 64/3 64/14	defendant [28] 1/12	discovered [1] 51/20
close [1] 21/24	contested [1] 51/5	couple [3] 16/4 30/25	2/15 35/4 35/12 36/2	discovery [1] 61/9
closest [1] 31/18	convened [1] 57/9	40/20	36/17 38/3 38/14 40/10	discretionary [1]
co [2] 26/19 27/1	convicted [6] 12/5	course [9] 5/25 6/11	44/3 50/19 53/16 54/10	49/11
co-parent [2] 26/19	36/21 38/5 42/20 58/12	8/4 12/24 14/25 34/7	56/3 56/5 56/7 57/14	discussed [4] 34/23
27/1	62/4	35/18 42/13 54/11	58/4 58/23 59/8 59/9	36/16 46/16 57/8
coffee [1] 22/23	conviction [21] 6/5	court [100]	59/15 59/22 61/3 61/10	discussing [2] 36/19
combed [1] 60/5	6/7 8/5 33/18 33/21	Court's [13] 6/8 12/22	62/3 62/4 62/11	39/18
come [10] 12/23	34/18 34/19 35/12 40/3	29/17 31/19 32/11	defendant's [5] 10/20	discussion [1] 12/21
18/25 20/10 20/14	40/14 40/23 41/5 43/11	32/18 33/13 36/11	17/19 34/20 40/21	dismiss [1] 48/16
23/24 31/1 31/2 36/24	43/16 48/11 49/2 49/2	40/16 59/9 61/7 63/2	50/11	dismissed [2] 62/24
39/5 44/18	50/10 51/10 51/19 63/3	63/8	defense [3] 56/17	62/25
comes [7] 19/24	convince [1] 54/14	courtroom [1] 31/24	60/15 62/7	dissenting [1] 13/7
20/14 20/20 22/12	copies [3] 17/11	courts [1] 42/1	defense's [1] 7/12	district [14] 1/5 2/5
37/12 46/21 60/3	17/22 18/1	CR [3] 1/1 5/6 17/7	definitely [1] 14/3	5/8 13/2 13/11 17/9
comfortable [3]	copy [8] 16/8 16/23	CR-FP-18-5030 [3]	delay [9] 41/16 42/17	36/7 37/5 37/21 38/19
18/13 34/7 39/9	17/15 17/19 17/20	1/1 5/6 17/7	42/24 43/14 49/14 50/1	41/20 42/1 49/22 57/5
coming [5] 23/10	17/22 17/24 63/7	created [1] 49/17	54/25 56/16 56/25	division [7] 7/19
23/18 30/22 44/24 48/2	corner [1] 22/1	credence [1] 38/19	delaying [2] 50/22	17/15 31/10 34/10 35/3
commenting [1]	corpus [3] 40/24	credit [7] 7/9 7/15 8/6	51/23	37/7 46/18
59/17	43/17 57/2	8/7 8/12 40/9 40/10	demonstrate [1]	divorced [3] 25/23
comments [2] 33/24	correct [9] 7/16 10/23	criminal [9] 16/3 16/3	42/23	26/5 26/9
38/7	13/3 13/11 36/14 37/21	34/21 43/6 44/3 45/15	denial [1] 41/23	do [55] 5/17 5/23 7/4
community [6] 14/5	45/13 45/18 49/3	56/10 58/4 58/20	denied [1] 53/9	7/6 8/9 8/23 9/8 11/7
19/4 42/18 43/1 43/7	corrected [5] 16/19	CTHOMPSON [1] 2/12	dense [1] 18/11	11/14 13/17 13/20 15/3
47/18	33/20 40/2 41/3 49/2	current [1] 32/15		20/13 21/17 22/21

D	E		
do... [40] 27/19 28/11 28/15 30/5 30/9 30/9 30/14 32/15 33/15 33/20 37/4 37/16 38/11 38/24 39/4 39/24 40/2 40/25 41/7 41/9 44/1 44/3 45/1 47/8 48/10 48/20 51/18 53/6 53/11 55/10 55/12 55/12 55/13 55/14 57/6 57/19 58/24 59/2 63/4 64/4 document [1] 18/11 documentation [1] 17/25 documents [2] 8/19 9/13 does [4] 28/19 38/22 44/4 52/23 doing [7] 27/18 28/14 50/5 50/22 51/23 51/25 52/9 dollars [1] 40/5 domestic [2] 16/4 58/14 don't [35] 5/17 7/8 9/11 9/14 15/2 18/23 24/19 25/3 26/17 26/20 28/19 32/19 33/5 39/4 40/25 41/7 43/14 43/15 44/8 44/23 50/4 51/3 51/22 52/15 54/9 54/18 55/1 56/22 60/9 60/10 60/11 60/19 61/19 61/23 62/5 done [8] 15/1 15/1 19/2 33/23 34/12 46/25 47/21 57/11 door [2] 20/14 20/20 double [3] 13/9 37/17 37/20 down [7] 22/12 23/10 24/12 29/8 59/23 59/24 64/5 downs [1] 26/1 downward [1] 30/3 Dr. [2] 17/20 61/13 Dr. Hixon-Brenenstall's [1] 17/20 Dr. Khurana [1] 61/13 drank [2] 26/13 62/13 drink [1] 22/11 drinking [2] 22/9 59/23 drive [3] 22/1 22/22 22/25 drives [1] 22/23 drug [1] 58/13 duly [2] 21/2 24/5 during [1] 61/1	earlier [4] 18/7 34/23 37/20 56/13 early [2] 38/19 41/5 easier [1] 49/1 Edwards [1] 14/15 effectuate [1] 14/18 eight [1] 32/6 either [3] 29/21 42/2 55/12 Eklund [3] 33/5 33/6 61/18 eligible [1] 38/4 ELKO [8] 1/6 1/21 2/5 2/9 4/9 5/7 17/8 25/17 ELKOCOUNTY NV.NET [1] 2/12 else [5] 29/10 29/11 54/20 55/19 62/22 email [3] 63/5 63/6 63/7 embroidery [1] 21/20 emotional [1] 12/9 emphasize [1] 42/19 emphatic [1] 12/8 employed [1] 58/23 employees [1] 32/6 employment [1] 43/8 encompasses [1] 43/5 encourage [1] 42/1 end [4] 7/4 30/14 35/17 35/21 ended [1] 50/9 ends [1] 39/6 engage [1] 12/20 engaged [1] 29/23 enlighten [1] 43/19 enough [2] 15/6 46/11 enter [2] 35/11 63/2 entered [9] 33/18 41/5 49/4 61/9 61/15 61/21 61/24 63/5 63/7 ENTITLED [1] 64/6 enumerated [1] 42/15 enunciated [1] 13/24 equitable [1] 18/24 erred [1] 35/3 error [10] 6/2 14/19 14/19 35/8 35/11 35/20 36/4 41/3 52/10 61/2 errors [2] 51/10 51/18 escape [1] 43/7 escaped [1] 30/21 ESQ [2] 2/6 2/18 essence [1] 53/10 essentially [1] 5/11 established [1] 58/1 evaluate [2] 42/5	59/2 evaluating [1] 43/3 evaluation [4] 6/14 17/21 36/1 43/5 evaluator [1] 35/6 Eve [1] 34/3 even [5] 18/18 22/24 26/22 52/5 56/19 ever [6] 26/22 35/24 37/5 58/5 58/21 61/5 every [7] 19/10 22/1 22/2 22/25 29/23 31/14 54/11 everybody [2] 36/24 37/13 everything [3] 6/18 37/5 48/2 evidence [20] 7/6 8/13 8/15 29/15 42/4 42/9 43/1 50/7 50/25 51/5 51/20 59/3 59/4 59/6 59/20 60/3 62/2 62/10 62/14 62/17 evidentiary [1] 60/25 ex [4] 19/13 25/2 26/25 27/1 ex-husband [3] 25/2 26/25 27/1 ex-wife [1] 19/13 EXAMINATION [2] 21/15 24/16 examined [2] 21/3 24/6 exceeding [1] 10/4 excuse [2] 34/22 40/7 executed [1] 53/7 execution [4] 36/23 53/20 55/3 55/6 exemplary [1] 46/25 exhibit [9] 3/2 9/25 10/2 10/6 10/18 10/18 11/4 11/14 11/18 Exhibit A [1] 10/2 Exhibit B [2] 10/6 11/18 Exhibit C [3] 10/18 11/4 11/14 exhibits [6] 3/1 9/5 9/8 9/21 9/22 17/3 exists [1] 52/22 exonerated [2] 12/6 47/11 expect [1] 5/23 explain [1] 10/7 explained [1] 30/15 explanation [2] 41/21 41/22 explore [3] 44/14 44/14 54/11 exploring [1] 46/2 expressions [1] 19/22	extent [1] 13/3 extremely [1] 37/3 F face [1] 30/20 faces [1] 42/21 fact [6] 16/2 34/11 44/15 52/6 54/18 59/16 factors [6] 42/5 42/8 42/15 43/4 62/16 62/19 facts [4] 15/5 15/8 50/18 52/24 familiar [3] 15/5 15/8 34/17 families [1] 32/7 family [11] 19/4 21/19 31/3 32/6 33/2 33/8 47/23 47/24 48/5 58/19 58/24 family's [1] 30/11 far [5] 27/12 46/25 57/7 59/4 60/14 fashioning [1] 35/9 fast [1] 16/15 father [3] 21/24 47/25 47/25 fathom [1] 52/5 favor [3] 43/9 51/8 51/21 Fax [2] 2/11 2/22 February [1] 61/9 fee [1] 40/4 feel [1] 39/9 fees [2] 3/6 10/20 felony [4] 6/6 15/16 15/18 34/19 felt [4] 12/11 39/16 43/17 46/10 few [3] 14/20 27/16 33/24 figure [1] 49/15 figured [2] 6/2 34/8 file [14] 33/19 45/15 45/20 49/4 49/24 52/8 52/23 53/2 55/4 56/20 60/5 60/13 60/18 60/18 filed [6] 48/23 53/7 54/18 55/2 55/16 63/7 filing [1] 54/12 find [5] 37/3 50/18 56/22 59/14 60/8 finding [3] 52/20 54/8 57/20 findings [4] 41/21 41/22 42/2 52/25 fine [5] 9/16 11/16 35/19 47/7 48/19 finger [1] 50/12 finish [1] 16/13 finishing [1] 18/14 first [15] 15/20 21/2 21/10 24/5 25/13 25/13 33/15 33/21 43/13 45/5 45/19 52/1 52/3 53/11 53/18 fit [4] 7/3 13/6 13/8 13/9 five [1] 13/8 five-member [1] 13/8 fix [1] 14/18 fixed [1] 41/3 Flagrant [1] 51/9 flight [2] 42/18 42/25 FLOOR [1] 2/8 fodder [1] 61/7 following [1] 34/18 follows [2] 21/4 24/7 FOREGOING [1] 64/10 Former [1] 46/9 forth [2] 42/1 49/25 found [2] 36/17 59/9 four [9] 12/12 19/9 19/11 27/6 27/6 31/25 32/1 32/2 35/16 four-plus [1] 27/6 FOURTH [1] 1/5 FP [3] 1/1 5/6 17/7 frankly [2] 60/1 62/4 friend [2] 19/15 59/24 frivolous [1] 41/16 42/17 42/24 43/13 49/14 50/1 55/1 56/16 56/24 FULL [1] 64/10 further [1] 29/13 G gave [5] 11/8 11/12 29/20 30/1 38/9 general [1] 23/1 Generally [1] 26/10 genetic [2] 40/4 40/4 geos [1] 28/17 get [14] 10/5 26/21 33/22 33/23 41/4 45/21 46/13 49/1 49/1 51/24 52/15 60/16 62/16 63/4 gets [3] 30/8 30/8 53/1 getting [1] 26/6 girl [2] 12/1 12/7 give [9] 8/6 8/12 12/14 13/17 38/13 38/18 42/7 55/23 60/22 given [10] 30/17 31/15 39/3 43/10 45/12 49/22 51/24 57/22 59/20 60/12 giving [1] 60/15 GMAIL.COM [1] 2/23 go [23] 5/15 7/1 7/2

G go... [20] 9/22 9/23 12/13 12/17 14/7 16/16 16/17 16/22 17/1 20/17 21/13 21/14 28/16 28/17 33/15 38/17 39/7 52/11 57/16 57/17 goals [1] 10/4 goes [1] 22/24 going [30] 14/9 30/2 30/5 30/7 30/7 31/17 31/23 32/25 35/13 35/14 35/24 38/2 38/16 39/12 40/1 46/3 46/12 47/2 47/3 50/6 50/21 52/18 56/5 56/25 57/16 58/16 62/6 62/7 63/2 63/4 gone [1] 6/22 good [8] 15/7 23/7 26/24 26/25 27/1 28/25 32/10 46/22 goodness [1] 40/22 gosh [1] 22/22 got [30] 8/19 12/17 17/11 24/11 25/4 25/22 26/5 26/9 27/25 31/22 36/11 36/21 36/25 37/2 40/21 40/22 40/23 44/18 45/14 45/19 46/5 49/24 49/25 53/17 56/17 56/17 57/24 59/11 61/4 61/17 gotten [1] 6/2 grace [2] 30/16 31/4 grant [6] 36/3 36/23 50/23 52/18 53/3 53/14 granting [5] 36/4 51/8 51/21 57/21 61/8 great [4] 18/12 27/18 28/20 42/7 greater [1] 62/16 guess [6] 13/6 31/11 33/1 34/16 42/10 57/21 guided [1] 42/15 guilt [1] 51/1 guilty [4] 36/18 50/19 59/10 59/15	half [3] 8/25 19/1 63/4 hand [2] 20/22 24/3 hands [1] 50/16 hanging [1] 38/15 happen [2] 19/25 28/23 happened [8] 12/8 25/18 28/22 36/5 36/6 36/7 36/15 54/16 happening [1] 56/24 happens [2] 34/15 60/16 has [28] 8/2 8/7 8/24 11/17 11/18 19/8 19/12 22/14 27/10 30/16 30/24 32/6 34/12 37/4 40/10 42/3 43/12 44/9 44/13 44/15 47/18 47/22 48/5 52/9 54/17 55/4 56/4 57/5 hasn't [5] 19/10 31/1 31/2 54/15 56/18 have [105] haven't [3] 15/1 15/1 55/2 having [4] 21/2 22/23 24/5 30/19 he [82] he's [37] 10/13 10/25 12/17 21/21 21/25 22/8 22/10 22/11 22/14 22/16 22/17 22/19 25/2 26/24 27/10 27/13 27/14 27/25 28/8 28/14 28/18 29/23 29/24 30/5 30/7 31/4 31/6 38/16 40/22 40/23 46/24 46/25 47/20 50/2 51/25 51/25 58/23 head [4] 7/23 38/15 44/25 59/4 hear [3] 20/2 25/4 25/9 heard [4] 7/5 15/9 42/3 53/24 hearing [18] 5/11 6/4 6/19 6/20 17/14 18/14 34/12 37/15 38/9 39/24 40/18 45/13 45/14 53/8 57/13 58/25 59/1 60/5 Heather [6] 19/13 19/13 23/23 24/4 24/10 24/12 heavy [1] 42/22 held [1] 17/14 hello [1] 45/9 help [3] 11/5 25/10 43/20 helped [2] 22/16 62/5 her [9] 12/9 17/20	20/9 42/9 42/24 50/12 54/5 58/18 59/8 here [43] 5/8 5/9 6/8 12/24 14/21 15/9 17/3 17/17 19/13 20/14 22/4 23/10 24/2 30/8 31/17 32/12 33/6 33/7 33/12 33/22 34/22 37/1 37/2 37/16 37/18 38/2 39/10 39/19 40/22 43/9 44/18 47/22 48/5 48/9 51/22 54/16 54/22 56/23 57/11 57/22 61/6 61/17 62/19 Here's [1] 56/17 HEREBY [1] 64/5 HEREUNTO [1] 64/13 Hi [1] 20/7 high [5] 25/15 25/17 35/5 36/2 50/20 higher [3] 13/17 13/18 14/9 highly [1] 43/3 HIGHWAY [1] 2/19 him [28] 12/11 12/14 12/14 21/18 21/23 22/1 22/2 22/3 22/11 22/16 22/21 22/22 22/25 26/20 26/21 27/9 27/16 28/15 28/19 29/1 30/1 31/1 31/2 32/5 32/10 38/13 55/7 58/11 himself [1] 62/5 his [56] 5/9 10/13 10/14 11/15 16/25 19/3 19/4 19/10 19/12 19/13 19/19 19/20 19/20 19/22 19/22 21/19 21/24 22/8 22/13 22/18 23/2 23/6 23/8 23/9 26/24 27/3 27/7 27/9 27/18 28/16 29/23 29/24 31/1 31/2 31/3 31/3 31/24 32/6 32/7 32/10 32/16 38/15 42/9 42/24 43/9 43/14 47/25 47/25 48/3 48/8 50/16 54/2 58/10 58/20 58/24 62/12 history [3] 16/3 16/4 34/21 hit [1] 59/3 hits [1] 30/23 Hixon [3] 6/15 17/20 18/5 Hixon-Brenenstall [2] 6/15 18/5 hobbies [1] 28/15 hold [2] 41/8 48/15 home [1] 59/22 Honor [27] 5/14 8/17	9/6 9/15 10/8 10/10 10/22 14/13 14/20 15/22 16/7 16/15 18/4 18/15 23/23 29/12 29/16 32/23 43/21 45/5 45/18 46/20 47/12 48/12 53/22 55/8 55/17 HONORABLE [1] 1/17 hope [1] 39/17 hopes [1] 52/20 hour [1] 63/3 how [6] 5/17 9/13 21/17 22/21 27/19 52/15 However [1] 59/14 hum [4] 19/17 20/24 24/24 29/3 humble [1] 50/5 husband [3] 25/2 26/25 27/1 husband's [1] 22/11 I I'd [1] 22/23 I'll [10] 6/10 7/3 9/9 9/22 10/17 16/22 25/7 49/1 49/3 60/16 I'm [37] 10/21 13/19 14/20 15/4 15/5 18/13 27/12 29/18 33/20 34/12 34/16 35/13 35/14 36/6 36/13 39/10 39/11 39/12 39/12 43/21 43/22 45/13 45/13 45/13 46/21 51/14 52/18 56/19 56/25 57/10 57/12 57/20 57/21 61/13 61/23 62/6 63/4 I've [22] 6/15 6/18 6/22 8/19 14/23 15/9 21/18 21/23 27/14 28/10 28/19 28/25 30/15 34/23 36/5 39/17 41/12 56/17 56/17 57/24 58/5 58/21 Idaho [3] 48/4 48/5 58/13 idea [2] 55/1 57/15 identification [1] 9/19 identify [1] 20/8 if [36] 5/17 12/7 14/9 18/25 20/2 25/3 30/7 32/11 32/20 33/9 34/11 38/16 38/24 39/1 41/5 41/8 41/24 43/19 44/14 45/3 45/13 46/21 47/2 48/12 50/23 52/16 53/1 53/16 53/24 54/14 56/2 56/4 57/16 58/16 61/19	63/5 illegal [6] 12/23 13/3 13/11 36/14 37/21 49/4 illegality [4] 12/24 13/16 38/1 39/21 imagine [1] 26/15 imbibing [1] 22/9 impact [3] 5/16 6/17 17/22 impediments [1] 57/20 important [1] 31/18 impose [3] 12/19 29/18 39/1 imposed [1] 55/4 imposing [2] 31/15 39/9 imprisonment [3] 42/22 53/15 56/2 improved [1] 29/24 improvement [6] 19/3 19/3 19/20 22/18 23/2 27/3 improving [1] 31/3 in [157] incarceration [1] 32/7 incident [1] 12/2 inclined [2] 5/20 5/23 include [1] 40/13 included [1] 17/25 including [4] 25/9 37/11 43/6 59/21 inconsiderable [1] 46/13 increase [3] 14/14 14/17 18/19 increased [1] 18/16 increases [2] 13/14 37/24 increasing [2] 13/12 37/22 INDEX [1] 3/7 INDICATED [1] 64/7 indication [1] 29/23 indicia [1] 51/1 inevitable [2] 50/23 51/23 information [4] 6/8 15/14 43/6 44/9 insistent [1] 50/15 instead [1] 46/2 instructions [7] 60/10 60/11 60/11 60/15 60/20 60/21 60/21 intend [1] 33/15 intended [1] 31/8 intent [1] 32/18 intention [2] 29/17 31/20 intents [1] 18/20
---	--	--	--	---

I interest [1] 28/18 interested [1] 28/18 interlineations [1] 17/12 into [9] 13/4 13/13 16/16 17/1 31/5 34/4 37/23 44/24 64/8 investigation [1] 34/20 involve [1] 30/18 involved [4] 22/14 22/17 26/11 61/10 is [156] isn't [2] 52/13 52/14 ISOM [3] 1/25 64/4 64/17 issue [4] 12/23 44/16 54/11 54/21 issued [1] 55/5 issues [13] 42/9 43/15 43/17 44/2 44/10 44/18 45/16 49/15 56/20 60/2 60/6 60/25 62/8 it [91] it's [36] 6/21 11/19 13/19 14/13 18/21 20/4 22/16 23/7 24/20 30/7 31/11 34/6 36/5 36/7 36/13 37/13 38/2 39/13 39/21 40/3 41/3 46/12 49/11 50/1 51/3 51/13 51/14 51/15 51/15 52/19 52/20 54/9 55/3 56/23 56/24 63/7 its [7] 15/23 34/5 37/22 39/18 40/14 45/23 63/2	June [3] 6/20 17/13 17/13 jury [12] 15/24 33/25 33/25 34/5 34/18 50/18 54/6 54/7 59/9 59/14 60/9 60/11 just [33] 7/3 8/5 9/8 10/13 10/18 11/6 11/21 12/19 14/25 20/17 21/6 22/13 22/16 22/19 23/1 25/6 25/7 27/24 28/14 28/17 28/19 33/1 38/6 38/6 38/24 41/8 44/17 49/3 49/3 51/3 52/13 52/13 52/16 justice [1] 39/16 Justin [1] 13/7 K K-H-U-R-A-N-A [1] 61/13 KACIN [1] 1/17 keep [1] 25/8 KEVIN [9] 1/11 5/7 21/17 24/25 25/14 26/18 26/19 27/20 31/23 Khurana [1] 61/13 kids [8] 22/15 22/17 23/9 26/19 26/24 27/10 27/17 32/23 kind [4] 31/22 47/10 52/7 52/12 knew [2] 21/23 36/22 know [45] 5/17 12/13 17/16 21/17 21/18 22/2 22/19 24/19 25/3 26/20 27/18 28/10 28/16 28/19 28/23 29/18 30/18 32/20 33/5 33/19 33/24 35/13 38/11 38/14 38/20 40/3 40/20 40/25 41/7 41/10 41/25 42/12 43/14 45/2 45/3 46/23 46/23 48/8 50/13 52/15 54/9 55/1 57/3 59/11 61/23 knowledge [1] 42/9 known [2] 21/18 21/23 knows [5] 30/14 32/9 38/14 46/4 52/12 KU [1] 61/13 L lady [1] 20/17 language [1] 14/15 last [18] 5/22 5/25 6/3 6/19 6/20 7/1 7/2 12/10 16/20 19/11 21/9 27/6 30/24 46/15 46/16	53/6 57/9 57/13 later [3] 38/20 39/1 52/21 law [13] 2/17 7/1 13/1 18/15 35/20 35/21 35/22 40/15 45/12 46/21 58/1 59/17 60/18 lawyer [1] 56/18 lawyers [1] 36/20 LCSW [1] 61/13 lead [2] 22/3 56/13 least [3] 38/22 53/5 60/14 leave [2] 9/9 11/21 ledger [1] 11/19 left [2] 50/8 50/17 legal [5] 18/23 41/11 42/9 60/19 60/21 legally [1] 38/4 lengthy [1] 18/10 Leslie [1] 61/14 less [4] 11/6 13/16 14/8 38/1 let [2] 55/7 60/8 let's [1] 58/22 letter [1] 31/11 lewd [1] 62/13 lewdness [6] 6/5 12/4 15/20 36/18 59/14 59/15 life [12] 8/23 11/19 11/20 19/3 19/22 22/9 28/25 31/3 31/24 32/25 34/21 48/3 lifeline [2] 29/21 29/22 lifetime [1] 40/12 like [15] 5/18 10/18 11/25 16/10 20/2 21/25 27/9 27/16 28/14 28/15 28/22 31/8 33/10 41/9 52/4 likelihood [1] 30/5 line [1] 6/13 listen [1] 38/11 litigation [2] 33/6 60/23 little [3] 38/18 60/23 60/24 live [1] 21/25 lived [1] 48/4 lives [1] 19/3 local [1] 34/10 long [8] 11/25 27/10 32/4 35/4 48/6 48/6 52/9 58/24 longer [5] 14/4 34/15 38/4 38/17 44/17 look [8] 10/17 11/14 28/17 50/24 50/25 56/11 57/19 62/7	looking [3] 13/1 44/7 44/24 looks [2] 10/18 22/13 Lord [1] 19/24 lot [4] 22/16 31/21 39/2 43/9 low [1] 25/4 lower [1] 19/6 lucky [1] 30/7 M M-A-Z-Y [1] 28/4 M-S [1] 24/22 made [11] 11/24 17/11 19/2 22/8 29/22 30/11 34/1 34/14 35/17 39/17 44/15 magnificent [1] 32/3 main [2] 32/12 61/2 maintained [1] 19/12 make [18] 6/10 7/2 12/19 14/3 16/23 27/7 32/20 33/9 33/16 35/6 35/8 35/14 43/4 48/25 52/6 52/24 53/17 60/16 makes [4] 38/24 43/4 52/7 53/25 making [3] 17/17 35/9 54/8 MALONE [14] 2/17 2/18 5/10 5/10 8/16 14/12 17/2 17/8 17/11 20/5 21/13 24/15 39/22 63/6 mandate [1] 18/19 mandates [1] 32/15 mandatory [1] 37/9 manifest [1] 51/9 many [3] 9/13 22/21 27/19 mark [2] 9/11 60/17 marked [4] 3/2 9/4 9/5 9/7 marriage [2] 25/25 26/12 married [3] 25/22 25/22 26/23 matter [2] 36/16 64/6 Maupin [1] 13/7 maximum [4] 29/19 35/22 37/14 38/13 may [12] 13/2 13/11 23/14 37/21 41/14 42/18 42/21 49/11 49/12 49/19 49/22 56/14 maybe [6] 30/19 34/17 38/12 43/19 48/25 61/22 Mazy [2] 27/23 28/4 McFarland [2] 51/7	51/14 me [28] 11/8 11/12 12/22 13/23 14/10 20/13 27/14 32/25 34/22 36/19 37/4 37/8 38/21 40/7 40/25 43/19 45/13 45/17 45/23 52/7 53/5 55/23 56/13 59/16 60/4 60/8 62/14 62/18 mean [9] 5/21 13/20 19/10 22/19 23/7 43/8 45/16 45/19 48/14 means [2] 13/16 38/1 meant [1] 39/16 meet [1] 25/13 meeting [1] 10/4 member [1] 13/8 members [2] 33/8 58/18 memorandum [1] 37/11 MENTABERRY [45] 1/11 5/7 5/9 8/24 15/12 16/2 17/2 17/7 17/7 17/21 18/20 18/25 19/8 19/14 20/3 21/17 23/23 23/24 24/4 24/10 24/12 24/18 24/18 24/19 25/1 25/14 27/23 27/24 27/25 29/5 29/20 30/4 30/15 30/24 31/23 32/22 34/9 36/9 36/20 44/13 45/20 46/4 46/10 54/2 54/17 Mentaberry's [2] 6/12 10/3 messes [1] 38/16 microphone [1] 25/5 might [7] 19/4 28/12 44/10 49/16 52/17 60/6 61/7 mind [3] 19/24 38/22 60/4 MINDEN [1] 2/21 minds [1] 38/23 minimal [1] 30/9 minimum [6] 30/8 35/1 35/21 37/14 39/14 40/8 minor [1] 16/3 minute [1] 36/25 Miranda [2] 13/2 37/19 misconduct [1] 51/9 mislead [2] 44/8 44/23 Miss [1] 24/21 misstatement [1] 15/10 moment [1] 55/23 monitor [4] 47/4 47/6
---	--	--	---	--

<p>M</p> <p>monitor... [2] 57/14 57/17</p> <p>monitored [1] 47/4</p> <p>month [1] 11/6</p> <p>months [20] 19/9 19/11 30/25 31/13 31/25 32/1 32/2 32/14 34/25 35/1 35/2 35/15 35/16 35/17 35/18 39/14 39/14 40/8 40/8 46/6</p> <p>moot [1] 13/19</p> <p>more [14] 14/4 22/15 22/17 26/21 31/21 31/22 34/16 35/21 37/5 37/12 37/12 38/3 38/18 44/9</p> <p>morning [1] 22/1</p> <p>most [9] 15/13 15/25 18/10 30/14 31/18 31/18 41/17 44/20 62/19</p> <p>mostly [1] 6/22</p> <p>mother [1] 33/7</p> <p>motion [15] 41/11 41/23 42/11 49/24 50/4 52/23 53/2 53/8 55/2 55/5 55/16 57/21 58/11 61/8 62/21</p> <p>motions [1] 51/4</p> <p>movements [1] 57/18</p> <p>Mr [1] 10/3</p> <p>Mr. [43] 5/9 5/10 6/12 8/16 8/24 14/12 15/6 15/12 16/2 17/2 17/2 17/7 17/11 17/21 18/20 18/25 19/8 20/5 21/13 24/15 29/20 30/4 30/15 30/24 32/22 34/9 36/9 36/20 39/22 44/13 45/20 46/4 46/10 52/5 52/7 52/9 53/25 54/2 54/17 55/8 59/3 60/23 63/6</p> <p>Mr. Malone [10] 5/10 8/16 14/12 17/2 17/11 20/5 21/13 24/15 39/22 63/6</p> <p>Mr. Mentaberry [24] 5/9 8/24 15/12 16/2 17/2 17/7 17/21 18/20 18/25 19/8 29/20 30/4 30/15 30/24 32/22 34/9 36/9 36/20 44/13 45/20 46/4 46/10 54/2 54/17</p> <p>Mr. Mentaberry's [1] 6/12</p> <p>Mr. Thompson [4] 53/25 55/8 59/3 60/23</p> <p>Mr. Woodbury [3]</p>	<p>52/5 52/7 52/9</p> <p>Mr. Woodbury's [1] 15/6</p> <p>Mrs. [2] 23/24 24/19</p> <p>Mrs. Mentaberry [2] 23/24 24/19</p> <p>Ms [3] 24/20 24/23 33/5</p> <p>Ms. [9] 19/15 20/3 20/3 20/6 21/17 24/18 24/18 29/5 61/18</p> <p>Ms. Eklund [1] 61/18</p> <p>Ms. Mentaberry [4] 20/3 24/18 24/18 29/5</p> <p>Ms. Snow [4] 19/15 20/3 20/6 21/17</p> <p>much [5] 39/24 43/11 44/9 62/5 62/13</p> <p>murder [1] 42/21</p> <p>murk [1] 44/24</p> <p>my [27] 16/23 21/7 21/25 22/10 25/2 27/17 27/17 32/23 32/24 32/25 33/1 38/19 38/22 40/21 44/25 45/11 50/5 50/10 53/14 57/15 59/17 60/13 62/1 64/9 64/11 64/14 64/14</p> <p>myself [1] 39/17</p> <p>mysterious [1] 19/25</p> <p>N</p> <p>name [6] 21/6 21/7 21/9 21/10 24/9 64/14</p> <p>names [2] 21/8 27/21</p> <p>nature [7] 43/1 43/10 45/11 45/23 51/1 62/9 62/17</p> <p>nearly [1] 36/6</p> <p>necessary [6] 13/4 13/12 13/15 37/23 37/25 43/25</p> <p>need [1] 54/13</p> <p>neighbor [1] 21/25</p> <p>Nev [3] 13/2 14/15 51/14</p> <p>NEVADA [16] 1/6 1/8 1/21 5/1 5/6 7/1 13/10 35/7 35/22 36/12 37/18 41/18 48/3 51/13 64/2 64/15</p> <p>never [3] 12/22 38/4 43/15</p> <p>new [4] 5/9 12/22 34/3 56/18</p> <p>newly [1] 51/19</p> <p>next [2] 23/22 59/24</p> <p>nine [1] 34/22</p> <p>no [35] 1/1 8/13 9/3 9/20 13/15 14/4 14/24 16/3 23/16 23/17 26/7</p>	<p>29/6 29/12 34/15 37/25 38/3 42/13 44/16 44/16 44/18 45/5 45/7 54/13 55/1 55/15 55/15 55/20 55/21 55/22 57/9 58/15 58/17 58/18 60/19 60/21</p> <p>no-contact [2] 58/15 58/17</p> <p>no-issue [1] 44/16</p> <p>Nods [1] 7/23</p> <p>none [1] 5/22</p> <p>nontechnical [1] 39/4</p> <p>noose [1] 29/21</p> <p>nor [1] 42/24</p> <p>northern [1] 48/3</p> <p>not [65]</p> <p>note [3] 34/3 49/3 58/7</p> <p>notes [2] 34/24 64/8</p> <p>nothing [7] 21/3 24/6 50/2 50/2 51/4 53/25 54/23</p> <p>notice [6] 28/14 30/10 33/19 48/20 49/21 57/7</p> <p>noticed [5] 23/1 27/3 27/12 28/10 28/12</p> <p>notwithstanding [1] 54/15</p> <p>NOVEMBER [2] 1/20 5/1</p> <p>now [20] 9/21 12/16 16/25 18/25 25/24 25/25 26/18 27/2 32/25 34/8 40/2 40/17 41/1 41/2 41/2 41/9 47/11 50/2 52/1 61/3</p> <p>nowhere [2] 49/14 50/22</p> <p>NRS [10] 12/25 35/23 35/25 36/13 36/19 41/13 41/14 56/1 56/8 56/13</p> <p>NRS 176 [1] 36/13</p> <p>NRS 176A.100 [2] 12/25 35/23</p> <p>NRS 176A.110 [1] 35/25</p> <p>NRS 177.105 [2] 41/13 56/1</p> <p>NRS 177.135 [1] 56/8</p> <p>NRS 178.488 [2] 41/14 56/13</p> <p>NRS 201.230 [1] 36/19</p> <p>nuclear [1] 58/18</p> <p>number [4] 32/24 46/11 46/12 50/6</p> <p>numerous [1] 32/5</p> <p>NV [3] 1/25 2/9 2/21</p>	<p>O</p> <p>oath [2] 20/23 24/2</p> <p>objection [2] 9/1 9/18</p> <p>objections [2] 60/10 60/25</p> <p>observed [1] 27/14</p> <p>obviously [6] 43/21 45/22 54/6 54/13 56/11 62/11</p> <p>occurred [3] 12/2 36/19 37/10</p> <p>off [5] 14/1 31/1 31/2 44/25 53/1</p> <p>offense [6] 34/3 42/20 43/2 51/2 62/11 62/18</p> <p>offered [3] 22/11 60/12 60/15</p> <p>office [4] 2/17 34/10 34/11 64/14</p> <p>officer [1] 13/21</p> <p>oh [4] 22/22 23/3 23/21 40/21</p> <p>okay [67]</p> <p>old [4] 6/6 12/5 15/21 51/6</p> <p>oldest [1] 27/23</p> <p>on [73]</p> <p>once [1] 61/16</p> <p>one [33] 6/13 8/20 9/8 11/7 11/8 11/11 11/21 14/20 15/8 15/14 16/19 19/13 30/22 32/24 33/22 35/18 38/10 40/21 44/6 46/11 47/1 49/13 49/20 50/15 52/19 54/16 54/18 56/11 59/10 59/10 60/3 60/7 61/2</p> <p>one-line [1] 6/13</p> <p>ones [1] 5/21</p> <p>only [15] 13/3 13/12 13/15 14/17 14/20 17/12 37/17 37/22 37/25 42/23 54/1 54/7 57/17 60/7 61/6</p> <p>ooOoo [1] 1/7</p> <p>opening [1] 38/6</p> <p>opinion [2] 50/5 50/10</p> <p>opportunity [2] 33/9 50/23</p> <p>or [59] 6/6 9/8 10/4 12/4 12/5 14/18 14/25 15/1 15/20 16/3 18/10 19/5 22/9 24/18 25/5 27/4 29/15 29/21 31/6 31/18 35/12 37/9 38/24 38/25 40/7 41/9 41/16 42/2 42/9 42/17 42/18 42/24 42/25 43/13 44/1</p>	<p>47/25 48/16 49/14 49/16 49/19 49/21 50/1 50/11 50/13 51/9 51/10 51/18 51/19 53/20 54/11 54/25 55/13 56/14 56/16 56/24 57/15 58/18 61/9 63/4</p> <p>oral [1] 57/10</p> <p>order [13] 7/25 41/12 42/2 58/15 58/16 58/17 61/8 61/8 61/15 61/15 61/21 61/24 61/25</p> <p>ordered [2] 35/4 49/19</p> <p>ordering [1] 35/25</p> <p>orders [1] 34/19</p> <p>original [12] 15/10 15/23 17/14 18/17 19/1 29/17 30/3 30/18 31/20 32/7 32/18 59/1</p> <p>originally [3] 18/21 31/8 32/13</p> <p>other [23] 7/7 8/13 8/15 13/15 21/21 23/14 29/12 30/23 31/21 32/9 33/8 36/22 38/1 41/10 44/6 45/9 51/1 54/24 54/25 57/24 60/6 60/7 61/6</p> <p>others [2] 19/21 25/8</p> <p>otherwise [1] 50/16</p> <p>our [11] 11/24 12/16 14/13 22/23 26/19 27/23 37/18 40/17 46/7 55/3 60/18</p> <p>out [18] 6/2 6/21 20/1 20/15 20/20 22/16 28/16 28/24 29/22 30/8 35/7 44/4 48/2 49/15 51/25 52/12 55/7 61/4</p> <p>outrun [1] 30/22</p> <p>outside [3] 31/23 32/6 44/7</p> <p>over [7] 18/16 21/23 27/6 38/15 42/3 58/6 60/9</p> <p>overhear [1] 11/5</p> <p>overlay [1] 37/16</p> <p>own [2] 21/20 47/25</p> <p>owns [1] 47/25</p> <p>P</p> <p>P.M [1] 5/2</p> <p>packet [2] 9/8 10/6</p> <p>page [6] 4/2 9/15 10/18 34/22 41/21 51/15</p> <p>page 112 [1] 51/15</p> <p>page 877 [1] 41/21</p> <p>paid [4] 7/22 8/2 10/25 40/9</p>
--	---	---	---	---

<p>P</p> <p>palpable [3] 51/9 51/18 52/10</p> <p>paradigm [1] 15/23</p> <p>paraphernalia [1] 58/14</p> <p>parent [2] 26/19 27/1</p> <p>parenting [2] 22/18 23/6</p> <p>parents [1] 17/23</p> <p>Parole [4] 17/15 34/10 37/7 46/18</p> <p>part [3] 41/10 49/12</p> <p>particular [1] 53/9</p> <p>parties [3] 5/12 12/21 40/18</p> <p>past [2] 8/25 53/6</p> <p>pause [1] 55/25</p> <p>pay [1] 15/24</p> <p>paying [1] 46/11</p> <p>payment [4] 8/7 8/21 8/22 10/9</p> <p>payments [5] 10/9- 10/10 10/14 11/19 11/20</p> <p>PEGGY [3] 1/25 64/4 64/17</p> <p>pending [8] 30/12 41/14 41/23 42/6 49/12 51/8 56/14 57/4</p> <p>penetrated [3] 50/12 54/6 59/8</p> <p>penetration [2] 59/12 59/12</p> <p>people [6] 14/21 32/5 32/9 34/16 39/2 39/6</p> <p>percent [2] 27/5 35/22</p> <p>percipient [1] 59/21</p> <p>Perfect [1] 29/2</p> <p>performing [1] 34/11</p> <p>perhaps [2] 44/5 56/19</p> <p>period [1] 31/16</p> <p>person [1] 31/23</p> <p>personality [1] 27/4</p> <p>pertinent [2] 13/13 37/24</p> <p>petition [3] 40/23 43/16 57/1</p> <p>petty [1] 58/13</p> <p>place [3] 43/13 52/2 64/7</p> <p>placing [1] 62/15</p> <p>plaintiff [3] 1/9 2/2 5/6</p> <p>plan [1] 30/9</p> <p>plea [1] 37/12</p> <p>please [9] 16/21 20/21 21/5 23/22 23/25 24/2 24/8 29/8 29/14</p>	<p>plus [2] 27/6 58/11</p> <p>point [4] 19/8 26/5 45/25 52/16</p> <p>police [2] 15/5 54/4</p> <p>portion [1] 13/25</p> <p>pose [2] 42/18 42/25</p> <p>position [3] 7/12 14/13 42/4</p> <p>positive [1] 29/25</p> <p>possession [1] 58/13</p> <p>possibly [1] 7/7</p> <p>post [3] 40/23 43/16 48/11</p> <p>pot [1] 48/2</p> <p>practice [1] 9/10</p> <p>precluded [1] 35/24</p> <p>prefer [1] 20/12</p> <p>prejudice [2] 48/17 63/1</p> <p>prepaid [1] 8/10</p> <p>preparation [1] 46/3</p> <p>prepared [5] 30/10 34/6 43/24 46/13 48/20</p> <p>present [1] 8/15</p> <p>presentation [1] 20/5</p> <p>presented [3] 37/6 42/4 59/20</p> <p>presentence [6] 6/9 17/12 34/6 34/14 34/19 37/7</p> <p>presided [1] 42/3</p> <p>pressure [1] 31/4</p> <p>pretrial [3] 50/4 51/4 60/23</p> <p>pretty [9] 10/2 20/18 21/24 33/20 33/22 45/23 50/19 50/20 61/23</p> <p>previous [2] 7/25 40/17</p> <p>printing [1] 21/20</p> <p>prior [6] 6/19 8/10 43/6 43/18 58/4 58/20</p> <p>prison [16] 12/11 12/17 12/19 18/19 30/6 31/17 32/16 34/25 35/15 38/17 39/8 39/14 40/8 52/4 53/2 58/2</p> <p>privilege [1] 39/3</p> <p>privileged [1] 61/20</p> <p>probably [5] 16/12 16/14 26/20 26/21 32/17</p> <p>probation [29] 3/6 10/20 12/15 12/25 13/25 28/11 34/9 34/15 35/1 35/2 35/3 36/3 36/4 36/21 36/24 37/8 37/9 38/4 38/16 39/3 39/7 39/18 39/20 46/18 47/3 51/25 58/2 61/4</p>	<p>61/5</p> <p>Probation's [2] 17/15 34/11</p> <p>probationer [1] 46/25</p> <p>problem [4] 35/23 37/1 50/14 62/12</p> <p>problems [4] 22/3 26/14 32/8 44/5</p> <p>procedure [1] 56/10</p> <p>proceed [3] 5/12 5/18 16/9</p> <p>proceeding [1] 7/5</p> <p>proceedings [5] 34/2 55/25 63/10 64/6 64/12</p> <p>process [1] 34/17</p> <p>produced [1] 14/25</p> <p>progress [1] 10/4</p> <p>prompted [1] 37/4</p> <p>pronounce [1] 36/12</p> <p>pronounced [3] 6/1 18/22 32/13</p> <p>pronouncing [1] 12/23</p> <p>prosecutor [4] 25/9 38/12 46/16 57/22</p> <p>provide [1] 41/20</p> <p>provided [5] 6/19 7/20 8/20 56/9 61/12</p> <p>providing [1] 57/7</p> <p>proximate [1] 32/17</p> <p>PSI [1] 16/8</p> <p>psychiatrist [1] 61/12</p> <p>psychosexual [1] 35/25</p> <p>pulled [1] 14/1</p> <p>purposes [1] 18/21</p> <p>pursue [1] 44/14</p> <p>put [2] 12/14 17/13</p> <p>Q</p> <p>qualified [1] 35/6</p> <p>quality [4] 43/1 50/25 62/9 62/17</p> <p>quest [5] 3/4 8/23 10/10 11/20 31/2</p> <p>question [5] 19/5 37/5 45/12 56/6 57/3</p> <p>questions [3] 23/14 23/15 29/4</p> <p>quickly [3] 33/22 38/21 45/23</p> <p>quite [5] 15/7 27/2 46/4 47/18 58/7</p> <p>quote [1] 46/5</p> <p>quotes [1] 13/15</p> <p>R</p> <p>raise [2] 20/22 24/2</p> <p>raised [3] 43/18 44/11 44/22</p> <p>range [3] 13/18 35/21</p>	<p>43/5</p> <p>Rangel [1] 61/14</p> <p>rather [2] 35/15 35/17</p> <p>rationale [1] 54/7</p> <p>re [3] 6/8 6/11 17/2</p> <p>re-review [1] 17/2</p> <p>re-reviewed [2] 6/8 6/11</p> <p>read [10] 14/16 14/23 15/3 15/4 16/15 18/2 18/7 18/13 41/12 49/11</p> <p>ready [4] 5/12 44/21 52/11 57/16</p> <p>real [3] 19/5 31/4 46/22</p> <p>reality [1] 50/3</p> <p>realize [1] 30/4</p> <p>realizes [1] 30/5</p> <p>really [14] 16/2 22/16 23/7 23/7 28/25 29/20 30/19 31/12 32/25 33/17 38/14 38/21 39/18 56/20</p> <p>reason [10] 6/25 19/5 26/9 31/14 35/2 40/19 50/9 51/10 54/1 59/8</p> <p>reasonable [3] 38/23 49/22 50/18</p> <p>reasonably [1] 57/15</p> <p>reasoned [2] 41/20 41/22</p> <p>reasons [8] 38/9 39/18 41/25 49/25 51/19 52/20 62/15 62/20</p> <p>recall [8] 12/7 33/6 58/25 59/16 60/9 60/10 60/11 60/24</p> <p>recanted [1] 54/3</p> <p>receipt [3] 3/5 3/6 8/21</p> <p>receive [1] 34/24</p> <p>received [3] 3/2 7/24 8/22</p> <p>recent [1] 41/17</p> <p>recess [4] 16/16 17/1 17/4 63/8</p> <p>recommendation [4] 34/14 34/25 35/8 35/13</p> <p>recommendations [1] 17/18</p> <p>recommended [3] 31/13 35/1 35/2</p> <p>record [13] 5/5 6/10 17/6 34/1 40/3 42/2 43/7 58/4 58/5 58/20 60/17 62/8 64/11</p> <p>records [4] 61/12 61/12 61/16 61/20</p> <p>recover [1] 32/9</p> <p>red [2] 20/18 20/18</p>	<p>reduce [1] 39/12</p> <p>reflect [1] 8/5</p> <p>reflecting [2] 11/19 11/19</p> <p>reflects [1] 11/5</p> <p>refused [1] 60/17</p> <p>regarding [3] 15/10 27/7 50/15</p> <p>reject [1] 35/13</p> <p>relationship [1] 24/25</p> <p>relationships [1] 26/18</p> <p>release [2] 42/17 42/25</p> <p>relevant [2] 42/5 43/3</p> <p>relied [1] 35/9</p> <p>rely [4] 32/5 34/13 49/25 54/23</p> <p>relying [2] 33/12 33/13</p> <p>remain [3] 14/7 16/7 40/1</p> <p>remains [1] 57/3</p> <p>remediate [1] 14/19</p> <p>remember [6] 6/3 11/25 50/4 50/13 51/4 61/17</p> <p>remind [1] 7/3</p> <p>rendered [1] 34/5</p> <p>reoffend [2] 35/5 36/3</p> <p>repair [2] 14/18 14/18</p> <p>repeatedly [1] 54/5</p> <p>report [12] 3/3 6/9 8/23 17/12 17/20 18/5 34/6 34/14 34/20 34/22 36/1 37/7</p> <p>REPORTED [1] 1/25</p> <p>reporter [6] 25/3 26/3 28/3 46/7 46/9 64/4</p> <p>REPORTER'S [2] 1/14 63/13</p> <p>reports [3] 15/5 39/5 54/5</p> <p>represent [1] 5/8</p> <p>represented [1] 37/13</p> <p>request [1] 42/5</p> <p>require [1] 49/20</p> <p>required [6] 17/16 18/20 28/11 31/17 40/15 54/10</p> <p>requirement [1] 55/16</p> <p>requires [3] 46/24 58/2 60/18</p> <p>rereviewed [1] 6/15</p> <p>research [1] 61/24</p> <p>resentencing [2] 5/11 46/1</p> <p>resolving [1] 51/2</p> <p>respect [1] 42/7</p>
--	--	--	--	---

T	them [14] 5/19 5/22 7/3 8/20 9/5 9/11 19/19 22/20 44/11 44/17 48/24 50/20 60/17 60/18 then [45] 6/11 6/12 7/18 8/23 9/12 9/23 12/4 12/14 12/20 18/14 19/15 24/2 25/18 25/23 27/24 27/25 28/5 28/6 28/23 30/22 33/5 33/19 35/11 35/16 36/1 36/3 41/13 41/17 41/24 46/15 46/17 48/11 48/20 49/4 49/18 51/6 53/2 53/4 53/8 53/18 55/6 55/18 55/23 59/24 63/2 therapeutic [1] 10/4 there [48] 6/1 6/14 6/16 8/4 9/13 9/14 10/24 11/21 12/3 13/6 13/15 17/13 20/19 21/23 21/24 23/20 23/25 32/5 34/5 37/9 37/25 39/4 40/12 40/19 41/10 41/19 42/13 43/8 44/1 44/5 44/18 44/20 44/21 47/4 49/15 52/3 52/10 52/13 52/13 52/13 52/17 54/13 54/14 57/9 58/9 60/6 61/7 61/22 there's [11] 31/14 34/20 37/16 49/14 53/11 53/25 55/15 55/15 56/5 56/25 61/22 THEREAFTER [1] 64/7 therefore [1] 13/25 thereof [1] 49/21 these [12] 10/10 38/11 39/6 43/3 49/25 51/7 51/17 51/17 52/24 57/20 61/20 62/16 they [35] 5/20 5/21 5/23 7/4 7/5 7/24 9/4 9/7 14/25 14/25 15/1 17/17 20/1 32/7 32/10 33/8 33/9 33/11 37/8 39/3 39/5 39/7 42/19 49/15 50/2 51/17 52/16 53/2 54/21 54/22 55/1 55/2 55/4 55/6 55/9 they'd [1] 5/21 they're [7] 9/22 48/1 49/16 50/8 50/17 53/4 61/20 They've [2] 8/20 44/18 thicker [1] 10/6 thing [12] 5/24 31/18	31/18 31/21 36/21 40/21 44/6 45/19 51/21 59/12 59/18 61/6 things [13] 15/9 19/25 28/23 40/20 43/9 44/20 44/21 48/25 51/7 51/17 54/16 57/20 57/24 think [78] this [108] THOMPSON [7] 2/6 5/8 17/9 53/25 55/8 59/3 60/23 thorough [2] 41/20 41/22 those [17] 7/2 8/11 9/21 9/23 16/7 18/1 23/8 38/6 42/8 49/5 49/20 52/17 56/11 60/16 62/15 62/18 62/20 though [5] 13/10 14/7 18/18 19/7 46/15 thought [7] 6/16 13/22 15/6 35/3 60/1 61/16 61/18 three [17] 6/5 6/7 8/19 9/14 11/12 15/11 15/19 19/9 19/11 26/20 27/20 31/25 31/25 32/1 32/1 44/4 55/14 through [9] 5/15 6/11 6/22 6/23 18/2 18/13 29/24 32/21 33/25 throws [1] 62/12 ties [2] 47/18 48/3 time [35] 5/11 6/1 7/9 7/15 11/25 12/2 12/10 12/19 16/3 16/20 17/17 19/8 20/3 20/21 22/12 22/20 30/5 32/4 32/16 36/14 38/12 38/17 39/1 40/10 46/15 46/17 48/5 48/6 52/10 53/6 58/6 58/8 58/24 62/12 64/7 times [3] 11/12 26/20 27/16 TINA [2] 20/25 21/7 title [2] 56/9 56/10 today [17] 5/21 5/23 8/16 9/5 15/9 23/11 30/10 33/10 33/23 37/3 39/25 41/5 41/5 48/24 49/4 55/4 57/11 together [4] 26/19 27/2 27/20 33/22 told [2] 27/13 27/14 tomorrow [1] 41/6 too [5] 13/9 14/16 33/8 60/14 62/13 TOOK [1] 64/5	top [1] 44/25 tornado [1] 30/22 totally [1] 22/14 touched [1] 18/17 toward [1] 10/4 TRANSCRIBED [1] 64/8 transcript [11] 1/14 14/24 15/3 43/25 45/15 46/3 46/5 46/13 49/16 56/19 64/10 transcripts [2] 14/24 52/18 trial [27] 6/4 6/12 6/23 6/23 14/22 14/24 15/8 33/25 34/18 42/3 42/4 42/8 43/2 43/22 43/22 43/25 44/10 44/12 45/3 45/14 51/3 51/9 54/14 59/17 61/1 62/10 62/17 tried [2] 44/12 53/6 TRUE [1] 64/10 truth [6] 21/2 21/3 21/3 24/5 24/6 24/6 try [3] 25/7 38/11 45/20 trying [1] 32/12 TUESDAY [2] 1/20 5/1 turn [1] 20/1 turned [2] 22/11 27/24 turning [1] 34/4 turns [2] 28/24 35/7 twice [1] 30/20 two [16] 10/18 15/12 15/17 15/20 15/25 19/12 26/6 26/20 35/17 39/22 44/4 46/12 50/15 59/10 59/11 59/13 two-page [1] 10/18 TYPEWRITING [1] 64/8 typically [1] 8/9	35/14 38/8 38/25 40/1 40/7 44/5 understand [2] 38/23 45/11 understanding [1] 53/14 understands [1] 46/12 unfortunate [2] 36/10 37/4 unfortunately [2] 16/8 39/2 unique [2] 42/4 57/22 United [1] 37/17 unless [3] 41/15 49/13 56/15 unsuccessful [1] 32/16 up [24] 10/13 12/23 16/13 18/14 20/10 20/14 23/25 25/8 38/16 39/6 39/10 39/18 40/22 44/18 44/24 46/21 50/9 55/10 57/13 57/15 60/4 61/1 61/3 61/17 update [2] 7/8 11/6 upon [5] 32/10 32/10 42/8 49/25 56/8 ups [1] 25/25 upstairs [1] 59/23 us [3] 2/19 21/6 24/12 use [2] 29/21 57/18 used [3] 28/15 28/17 38/18 using [1] 36/1 usual [2] 5/16 24/14 utilizing [1] 34/8	V vacating [1] 61/8 vagina [2] 50/12 54/5 verdict [4] 15/24 34/5 54/15 59/19 version [1] 11/15 versus [1] 5/6 very [20] 12/8 12/8 16/15 19/14 19/25 25/4 26/6 30/7 36/10 38/21 38/21 39/22 39/24 41/5 41/12 44/11 59/18 60/23 60/24 62/5 victim [10] 5/16 6/17 7/1 17/22 36/9 50/11 58/18 59/7 59/25 62/11 victim's [2] 33/7 61/12 victims [2] 6/25 17/23 view [4] 12/16 16/10 55/3 59/9 violation [2] 39/4 58/14
----------	---	--	---	---	---

<p>V</p> <p>violations [1] 39/6</p> <p>violent [1] 42/20</p> <p>voice [2] 25/4 25/8</p> <p>W</p> <p>Wait [1] 36/25</p> <p>waiting [1] 49/16</p> <p>want [14] 5/17 9/4 9/8 11/14 20/13 32/20 39/8 40/25 41/7 41/8 44/8 44/23 48/10 53/3</p> <p>wanted [2] 8/15 32/22</p> <p>warning [1] 44/5</p> <p>was [110]</p> <p>wasn't [4] 7/22 47/3 52/10 54/18</p> <p>watch [6] 20/15 20/20 22/1 23/20 23/25 29/8</p> <p>way [9] 5/16 26/22 29/25 30/23 32/17 52/22 53/4 53/5 60/24</p> <p>ways [1] 19/25</p> <p>we [77]</p> <p>we'll [3] 17/1 29/8 49/1</p> <p>we're [7] 6/5 17/6 22/23 30/2 31/11 51/22 52/16</p> <p>we've [7] 6/2 24/11 25/23 27/25 45/14 46/1 58/1</p> <p>week [3] 22/21 26/21 27/16</p> <p>weigh [2] 51/8 62/16</p> <p>weighs [1] 51/21</p> <p>weight [1] 62/16</p> <p>weighty [1] 62/19</p> <p>welcome [2] 7/4 10/16</p> <p>well [43] 5/25 6/15 8/3 8/3 13/18 13/21 14/3 16/16 19/2 21/18 21/18 22/10 23/10 23/12 25/21 26/6 27/2 28/10 30/4 33/15 34/3 34/12 34/12 39/4 40/13 43/4 43/22 45/2 45/10 45/11 46/14 47/1 47/9 47/12 47/21 48/25 51/1 51/25 52/17 53/10 55/11 57/24 60/1</p> <p>went [4] 6/23 33/25 42/12 50/16</p> <p>were [21] 6/1 6/16 15/11 17/13 17/16 17/17 25/15 25/22 26/6 26/22 47/2 48/24 52/3 52/4 58/16 59/21 60/6 60/12 60/15 63/10 64/8</p>	<p>weren't [2] 14/25 43/18</p> <p>what [68]</p> <p>whatever [2] 9/10 46/24</p> <p>when [32] 8/9 12/2 12/7 12/10 13/8 13/12 13/15 15/22 17/13 17/14 17/17 22/23 25/13 25/13 25/15 26/5 26/22 36/24 37/22 37/25 40/17 42/12 44/3 44/12 45/19 50/11 50/24 57/8 59/22 60/16 61/4 62/2</p> <p>where [17] 8/24 20/13 21/22 25/16 34/4 36/17 38/12 39/10 39/11 40/18 50/16 51/19 52/16 54/5 54/10 61/4 61/6</p> <p>WHEREOF [1] 64/13</p> <p>whether [17] 19/5 31/6 36/2 37/8 37/13 40/18 42/16 42/17 43/13 44/1 44/10 50/1 50/11 50/17 56/6 56/12 60/6</p> <p>which [28] 7/11 8/9 10/18 11/18 31/7 35/12 35/15 35/16 35/17 35/18 35/22 35/25 36/6 46/13 49/25 51/7 51/10 51/10 51/12 51/18 51/19 56/10 58/9 58/11 59/8 60/17 61/3 62/3</p> <p>while [5] 6/21 48/24 49/15 49/16 53/2</p> <p>who [12] 5/22 7/3 12/1 34/16 39/3 42/3 42/19 42/21 47/1 47/17 56/18 59/21</p> <p>who's [3] 7/1 32/3 56/18</p> <p>whole [5] 21/3 22/13 24/6 37/9 59/8</p> <p>whom [2] 49/19 61/14</p> <p>why [8] 9/11 26/10 26/17 31/14 37/2 41/25 50/9 52/22</p> <p>wide [1] 43/5</p> <p>wife [1] 19/13</p> <p>will [12] 8/4 8/5 9/7 12/20 23/21 32/15 37/8 42/7 42/25 49/8 56/7 57/23</p> <p>willing [1] 38/25</p> <p>without [6] 16/9 19/23 48/16 58/2 58/21 63/1</p> <p>witness [7] 4/2 20/10</p>	<p>20/19 23/22 23/25 54/2 64/13</p> <p>witnesses [5] 19/12 29/10 29/12 51/3 59/21</p> <p>Woodbury [3] 52/5 52/7 52/9</p> <p>Woodbury's [1] 15/6</p> <p>word [1] 19/10</p> <p>words [1] 49/20</p> <p>work [4] 22/1 49/7 49/8 50/4</p> <p>worked [2] 53/5 58/24</p> <p>works [3] 19/24 21/22 53/5</p> <p>world [2] 20/1 23/9</p> <p>worse [4] 18/21 30/19 58/5 58/21</p> <p>would [56] 5/17 7/11 9/12 12/18 13/22 13/25 14/1 14/1 14/3 14/4 14/8 16/10 16/14 20/2 20/12 25/9 26/1 27/21 29/22 31/7 31/9 31/17 33/9 33/18 34/9 38/25 39/8 41/24 42/15 43/13 43/20 44/6 46/15 46/17 46/20 46/23 46/23 47/5 47/7 47/7 47/8 47/8 47/12 47/13 48/13 48/18 48/18 51/18 52/6 53/11 54/13 55/7 55/9 58/7 58/17 62/25</p> <p>wouldn't [1] 18/18</p> <p>writ [6] 40/23 43/16 45/20 57/1 62/23 62/25</p> <p>write [1] 42/12</p> <p>written [3] 42/2 57/9 61/15</p> <p>wrong [1] 45/13</p> <p>wrote [1] 41/19</p> <p>Y</p> <p>yeah [15] 11/2 16/22 20/9 23/3 23/5 25/6 26/2 26/10 27/1 27/5 28/10 40/22 45/24 46/9 50/24</p> <p>year [6] 6/6 8/25 12/5 15/21 19/1 35/18</p> <p>Year's [1] 34/3</p> <p>years [17] 15/16 19/9 19/11 21/19 21/23 25/23 25/23 27/6 31/25 32/1 32/1 35/15 35/16 35/17 36/6 36/7 50/6</p> <p>yes [14] 5/14 8/17 9/6 14/12 15/14 20/11 22/5 22/19 26/4 26/13 26/13 26/16 29/15 53/23</p> <p>yet [3] 15/1 36/21</p>	<p>43/16</p> <p>you [148]</p> <p>you'd [1] 41/9</p> <p>you're [7] 10/16 13/21 16/25 38/14 45/16 50/22 55/9</p> <p>you've [11] 7/14 18/12 23/1 25/4 27/3 30/21 30/21 31/22 32/21 49/10 53/13</p> <p>young [1] 12/1</p> <p>your [52] 5/14 8/17 9/6 9/10 9/15 10/8 10/10 10/22 14/9 14/13 14/20 15/22 16/7 16/15 18/4 18/15 19/1 20/4 20/15 20/20 20/20 20/22 21/6 23/20 23/23 23/25 24/3 24/9 24/25 25/8 25/25 26/11 26/18 29/7 29/8 29/12 29/16 30/3 32/23 33/3 33/19 39/23 43/21 45/5 45/18 46/20 47/12 48/12 49/12 53/22 55/8 55/16</p> <p>yourself [1] 20/8</p> <p>Z</p> <p>Z-A-Y-D-E-N [1] 28/6</p> <p>Zayden [2] 27/25 28/6</p> <p>zero [1] 10/19</p> <p>Zeros [1] 11/6</p>	
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