



**EIGHTH JUDICIAL DISTRICT COURT
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July 17, 2023

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. BRIAN KERRY O'KEEFE
S.C. CASE: 86804
D.C. CASE: 04C202793

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated July 7, 2023, enclosed is a certified copy of the Order Denying Defendant's Petition for a Writ of Coram Nobis filed July 14, 2023 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN KERRY OKEEFE,
#1447732

Defendant.

CASE NO: 04C202793

DEPT NO: XVIII

ORDER DENYING DEFENDANT'S PETITION FOR A WRIT OF CORAM NOBIS

DATE OF HEARING: MAY 31, 2023
TIME OF HEARING: 9:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 31st day of May, 2023, the Defendant not being present, proceeding in propria persona, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, without argument, based on the pleadings, and good cause appearing therefor,

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2 Petitioner claims that the evidence was insufficient to support his conviction
3 for Burglary, and that he should have been charged with Battery Constituting
4 Domestic Violence under NRS 33.018 rather than Battery under NRS 200.481.
5 These claims are not properly raised in a petition for a writ of coram nobis because
6 these are allegations of legal, not factual, error, and they were available to be raised
7 in previous proceedings. Accordingly, this Court denies Petitioner's claim.

8 In Trujillo v. State, 129 Nev. 706, 708, 310 P.3d 594, 595-96 (2013), the
9 Nevada Supreme Court acknowledged that the writ of coram nobis may be used to
10 challenge a judgment of conviction after a defendant's sentence was rendered but
11 when he was no longer in custody. In determining that coram nobis was an available
12 remedy in Nevada, the Court held that:

13 [T]he common-law writ of coram nobis is available under Article
14 6, Section 6(1) of the Nevada Constitution, which grants the
15 district courts the power to issue writs that are proper and
16 necessary to the complete exercise of their jurisdiction, and NRS
1.030, which continues the common law under some
circumstances.

17 Id., 310 P.3d at 595. Critically, however, the Court also held that:

18 Although we do not attempt to precisely define the realm of factual
19 errors that may give rise to a writ of coram nobis, ***that realm is limited***
20 ***to errors involving facts that were not known to the court, were not***
21 ***withheld by the defendant, and would have prevented entry of the***
22 ***judgment.*** For example, a factual error does not include claims of
23 newly discovered evidence because these types of claims would not
24 have precluded the judgment from being entered in the first place. See
25 Hyung Joon Kim, 90 Cal.Rptr.3d 355, 202 P.3d at 453;
26 Commonwealth v. Morris, 281 Va. 70, 705 S.E.2d 503, 506 (Va.),
27 cert. denied, 565 U.S. —, 132 S.Ct. 115, 181 L.Ed.2d 39 (2011).
28 ***And legal errors fall entirely outside the scope of the writ.*** See, e.g.,
Hyung Joon Kim, 90 Cal.Rptr.3d 355, 202 P.3d at 446; State v. Diaz,
283 Neb. 414, 808 N.W.2d 891, 896 (2012). A writ of coram nobis is
the forum to correct only the most egregious factual errors that would

1 have precluded entry of the judgment of conviction had the error been
2 known to the court at the time.

3 A writ of coram nobis is not, however, the forum to relitigate the guilt
4 or innocence of the petitioner. We have long emphasized the
5 importance of the finality of judgments, and we are gravely concerned
6 that recognizing this writ, even in the very limited form that we do
7 today, will result in a proliferation of stale challenges to convictions
8 long since final. See Jackson v. State, 115 Nev. 21, 23 n. 2, 973 P.2d
9 241, 242 n. 2 (1999); Groesbeck v. Warden, 100 Nev. 259, 261, 679
10 P.2d 1268, 1269 (1984). ***Given these concerns, we hold that any
11 error that was reasonably available to be raised while the petitioner
12 was in custody is waived, and it is the petitioner's burden on the face
13 of his petition to demonstrate that he could not have reasonably
14 raised his claims during the time he was in custody.***

15 Id. at 717-18, 310 P.3d at 601-02 (emphasis added).

16 Petitioner's claims are of law and not an issue of fact which would have
17 prevented an entry of judgment. Petitioner challenges the legal sufficiency of the
18 evidence, and the propriety of the State charging him with a violation of NRS
19 200.481. Such claims are not issues of fact which would have prevented an entry of
20 judgment, and thus are not cognizable in a petition for writ of coram nobis, and
21 accordingly Petitioner is not entitled to relief.

22 Furthermore, these claims were available to be raised in prior proceedings
23 while Petitioner was still in custody, and consequently these claims are waived from
24 consideration by this Court. Petitioner's claims relate to the sufficiency of the
25 evidence to sustain his conviction; such claims could have been raised on direct
26 appeal.

27 In fact, Petitioner has previously raised this exact claim concerning his
28 Burglary conviction on multiple occasions. In his first postconviction petition for
writ of habeas corpus, Petitioner claimed his misdemeanor battery could not support
his Burglary conviction. This claim was rejected. On appeal, the Nevada Supreme
Court affirmed the denial, concluding that NRS 205.060(1) does not differentiate
between misdemeanor and felony battery, and simply states that "any person who

1 enters a room with the intent to commit battery on any person is guilty of burglary.”
2 O’Keefe v. State, No. 49329 (Order of Affirmance, Mar. 24, 2008), at 05. As the
3 Nevada Supreme Court has already ruled on this issue, further litigation of this claim
4 is barred by the doctrine of the law of the case. Hall v. State, 91 Nev. 314, 315-16,
5 535 P.2d 797, 798-99 (1975).

6 Petitioner also claimed in his first petition for writ of habeas corpus that he
7 did not commit Burglary due to his claim that he was a cohabitant of the apartment
8 at the time of the offenses. The denial of this claim was also affirmed by the Nevada
9 Supreme Court, which stated “[b]ecause unlawful entry of the apartment was not a
10 necessary element of burglary, cohabitation of the apartment or lawful entry of the
11 apartment was not a viable defense to the charge of burglary.” O’Keefe v. State, No.
12 49329 (Order of Affirmance, Mar. 24, 2008), at 10.

13 Petitioner attempts to relitigate this claim due to the Nevada Supreme Court’s
14 decision in State v. White, 130 Nev. 533, 330 P.3d 482 (2014). In White, “a person
15 with an absolute right to enter a structure cannot commit burglary of that structure.”
16 130 Nev. 533, 538, 330 P.3d 482, 485-86 (2014). “[C]onsent to the entry is not a
17 defense to burglary if the person “acquired the entry with felonious intent.” Id. at
18 537-38; 330 P.3d at 485; citing Barrett v. State, 105 Nev. 361, 364, 775 P.2d 1276,
19 1277 (1989). Further, “while ownership may be one factor to consider, the
20 appropriate question is whether the alleged burglar has an absolute, unconditional
21 right to enter the home.” Id. at 538–39, 330 P.3d at 486. A defense based on White
22 is not available to Petitioner because he did not have an absolute right to enter the
23 apartment. Petitioner in this case was previously instructed to leave the property by
24 LVMPD. Reporter’s Transcript on Appeal (“RTA”), October 26, 2004, filed Apr.
25 22, 2005, at 55. Moreover, the victim testified that she only allowed Petitioner to
26 enter the property under the guise that he was picking up his belongings. RTA at
27 57-58. Accordingly, Petitioner’s reliance on White is misplaced as that case is
28 easily distinguishable from the case at hand. Thus, even if this claim were

1 cognizable in a petition for writ of coram nobis, he would not be entitled to any
2 relief.

3
4 THEREFORE, IT IS HEREBY ORDERED that the Defendant's Petition for a Writ of
5 Coram Nobis, shall be, and it is Denied.

6 DATED this _____ day of July, 2023.

Dated this 14th day of July, 2023

7 
8 _____
DISTRICT JUDGE

9 STEVEN B. WOLFSON
10 Clark County District Attorney
Nevada Bar #001565

979 B6F 1BA8 834A
Mary Kay Holthus
District Court Judge

11
12 BY /s/ Karen Mishler
13 KAREN MISHLER
14 Chief Deputy District Attorney
Nevada Bar #013730

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22 km/appellate

July 17, 2023



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1 **CSERV**

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3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 The State of Nevada vs Brian K
7 O'Keefe

CASE NO: 04C202793

8 DEPT. NO. Department 18

9 **AUTOMATED CERTIFICATE OF SERVICE**

10 This automated certificate of service was generated by the Eighth Judicial District
11 Court. The foregoing Order Denying Motion was served via the court's electronic eFile
12 system to all recipients registered for e-Service on the above entitled case as listed below:

13 Service Date: 7/14/2023

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