

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Jul 27 2023 02:49 PM
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-18-783689-W
Related Case 04C202793
Docket No: 86804

RECORD ON APPEAL

ATTORNEY FOR APPELLANT

BRIAN O'KEEFE #90244,
PROPER PERSON
1200 PRISON RD.
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT

STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-18-783689-W Brian O'Keefe, Plaintiff(s) vs. Nevada State of, Defendant(s)

I N D E X

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Brian O'Keefe, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

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**THIS SEALED
DOCUMENT,
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1 - 3
WILL FOLLOW VIA
U.S. MAIL**

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WILL FOLLOW VIA
U.S. MAIL

**THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
5 - 16
WILL FOLLOW VIA
U.S. MAIL**

FILED

OCT 30 2018

John J. Sullivan
CLERK OF COURT

Name BRIAN O'KEEFE-L.C.C.

Address 1200 PRISON ROAD

City LOVELOCK State NEVADA 89419

Email NIA

Telephone NIA

District Court
Clark County, Nevada

BRIAN KERRY O'KEEFE

Plaintiff,

vs.

THE STATE OF NEVADA

Defendant

Case No.: A-18-783689-W

Department: ~~VII~~ XXX

Notice of Motion ~~Motion~~ PETITION

Please take notice that the hearing on PETITION FOR CIVIL WRIT OF CORAM NOBIS

will be heard on 12/5/2018 at Department XXX Floor 14 Courtroom A
at the hour of 9:00 A AM/PM.

Dated this 28th day of September, 2018

A-18-783689-W
NOTM
Notice of Motion
4792579



Brian K. O'Keefe # 90244
Brian K. O'Keefe

RECEIVED FORM 24.070
OCT 04 2018

CLERK OF THE COURT

1 PPOW
2 BRIAN KERRY O'KEEFE # 90244
3 Lovelock Correctional Center
4 1200 Prison Road
5 Lovelock, Nevada 89419

6 Plaintiff/Petitioner In Pro Se

FILED

OCT 30 2018

[Signature]
CLERK OF COURT

7 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF CLARK

9 BRIAN KERRY O'KEEFE ,)
10 Plaintiff ,)
11 -vs- ,)
12 THE STATE OF NEVADA ,)
13 DEFENDANT .)

Case No.

A-18-783689-W

Dept. No.

VII XXX

A-18-783689-W

IPWHC

Inmate Filed - Petition for Writ of Habeas
4792672



14 PETITION FOR CIVIL WRIT OF CORAM NOBIS
15 PURSUANT NEVADA CONSTITUTION ARTICLE 6
16 SECTION 6 BASED UPON NOW RECOGNIZED
17 TRUJILLO V. STATE, 310 P.3d 594 (NEV. 2013)

• SEE AFFIDAVIT OF BRIAN O'KEEFE ATTACHED

18 COMES NOW, Brian O'Keefe, pro se, to file this action with the
19 Court and department that actually sentenced O'Keefe with express
20 guidance by the federal court.

21 I. JURISDICTION: Nevada Constitution, article 6, § 6(1)
22 and N.R.S. 1-030 authorize the common-law writ of coram nobis for
23 a person who is not in custody on the conviction being challenged.
24 To the extent that Biggers v. State, 289 P.2d 1051 (Nev. 1955),
25 suggested that the common-law writ did not exist in Nevada, has
26 since been overruled by "Trujillo v. State," supra.

Respectfully,

Dated this 27th day, September 2018, pursuant NRS 208.165.

Brian K. O'Keefe
Brian K. O'Keefe

ACCORD HAINES v. KERNER, 404 U.S. 519, 520 (1972)

ACCORD CASRO v. UNITED STATES, 548 U.S. 375, 377 (2003)

RECEIVED

OCT 04 2018

CLERK OF THE COURT

AFFIDAVIT OF Brian O'Keefe #90294
04 C202793

STATE OF NEVADA)
) SS:
COUNTY OF PERMING)

I, Brian Kerry O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe.
2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.
3. Prosecutor reported COURT 6 Burglary conviction to which libel was picked up on N.O.T.I.S. as reached by a guilty plea as a simulated fact;
4. Prior counsel S.P.D. Randall Pike stated he had knowledge but it was fixed;
5. C.D.O.A. S. Kisko reported sub silentio O'Keefe pled guilty as plea;
6. State deprived O'Keefe of his entire "acquittal" as a abuse of process;
7. State court impediment always disavowed as acquiescence with a fundamental miscarriage of justice occurring repeatedly itself and triggering the continuing violation doctrine adversely to plaintiffs otherwise Judge D. Bell committed intentional act of collusion.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 28th day of September, 2018

Brian K. O'Keefe #90294
Brian K. O'Keefe

II. STATEMENT BY FEDERAL COURT ON PROCEDURAL DUE PROCESS

Based on judgment fully expired, the federal court, case no. 3-14-cv. 41-PCS-WAC, expressly opined that where state court's make available said petition for Writ of Coram Nobis, such petition must be brought only in the court that actually "sentenced" the petitioner. (id. at ¶ pg. 3, line 21, doc. #6)
The penalty phase was held in department VII, Judge J. Bell, unaware.

III. PROCEDURAL HISTORY RELEVANT

O'Keefe was found "not guilty" of all felonious intent by acquittal verdict on Counts 1, 2, 3, 4, and 5. However, the jury returned a "legally inconsistent verdict" when finding a guilty verdict on Count 6, felony burglary subsequently acquitting O'Keefe of Counts 1 thru 5 which underpinned Count 6 and was a requisite to sustain the verdict.

• [INCORPORATE HERE BY REFERENCE EXHIBITS 1, 2, 3 ATTACHED. COURT MINUTES / ETC]

Before sentencing, the hearing court Sally Lockner (dept. 23) transferred the case to Judge Bell to conduct penalty phase. The state viz C.D.D.A. KRISTO commits fraud upon the court by implying "sub silentio" that O'Keefe pled guilty covering up the injustice and abuse of process. This simulated fact resulted in a fundamental miscarriage of justice.

IV. POINTS AND AUTHORITIES / LEGAL ARGUMENT

Plaintiff is challenging the deprivation of his acquittals which legally moots Count 6. Prejudice persists by the state repeatedly using the Burglary despite of its voidness. O'Keefe has been impeached with this wrongful judgment. Additionally, parole was denied based on this

1 burglary judgment, used against O'Keefe at parole as an aggravator. (8/20/2018)

2 • [INCORPORATE HERE BY REFERENCE EXHIBIT 4 ATTACHED - Trial Transcript 3/20/09]

3 • [INCORPORATE HERE BY REFERENCE EXHIBIT 5 ATTACHED - INFORMATION 7/6/09]

4 Pursuant the INFORMATION Count 1 charged: "Battery with INTENT to COMMIT
5 A CRIME" - did then and there wilfully, unlawfully, and feloniously use force
6 or violence upon the person of another, to wit: Victoria Whitmarsh,
7 with intent to commit sexual assault, by striking the said Victoria Whitmarsh
8 about the head and/or body with his hands.

9 Count 6 charged: "BURGLARY" -

10 did then and there wilfully, unlawfully, and feloniously enter, with intent
11 to commit battery and/or sexual assault and/or a felony, to-wit:
12 battery and/or sexual assault, that certain building occupied by Victoria
13 Whitmarsh, located at 2219 North Rancho, No. 2083 Las Vegas, Clark County, Nevada.

14 Two big problems act as affirmative defense. • First, O'Keefe lived
15 there in cohabitation.

16 • Second, and moreover, O'Keefe was acquitted in
17 order, of all the preceding (5) five felony counts before the jurors
18 reached Count 6, predicated on the prior felony counts 1 to 5.

19 Reading the INFORMATION becomes "prima facie evidence" when
20 juxtaposed to the Verdict. (EXHIBIT 1 - JURY VERDICT RETURNED)

21 • SEE EXHIBITS 1, 2, 3, 4, 5 -

22 Delisted by Contreras v. State, 118 Nev. 332,
23 46 P.3d 661 (2002) (While a burglary charge may be based upon an intent
24 to commit any felony when entering a structure, the burglary statute
25 specifically includes "assault or battery on any person" as a felony
26 that may underlie a burglary). Emphasis again, O'Keefe lived there.

Once the jury acquitted O'Keefe of felony counts 1, 2, 3, 4, 5 the requisite felonious intent required to underpin Count 6 Burglary was lost. Therefore, the jury verdict returned amounted to a true legally inconsistent verdict as a complete fundamental miscarriage of justice. However, any error still resulted in lack of jurisdiction or authority to sustain the felony burglary returned. ^{Dep.} (XXIII) The trial court had its own independent duty, at that time, to sua sponte correct the verdict instead of remaining silent.

Therefore, "abuse of process" allowed the state to commit fraud upon the UNKNOWING newly assigned sentencing court. Otherwise, two options as fact implied exist. One, Judge S. Bell participated in abuse of [due] process or Judge Bell was surely unaware.

The state presented a simulated fact, reported by C.D.A. Susan Kriolo, that O'Keefe pled guilty sub silentio. Casewriter Ker reported in N.O.T.I.C., "stated I pled guilty" to Count 6 which would explain the unconstitutional miscarriage of justice. SAD.

LEGAL ARGUMENT

2.] CORAM NOBIS is available when (1) facts not known to the court; (2) facts not withheld; (3) facts that would have prevented entry of judgment. Coram nobis is an extraordinary remedy, one necessary to achieve justice. The common law writ of coram nobis is available in Nevada only for prisoners who are no longer in custody on the judgment being challenged to address errors of fact outside the record that were not known to Judge Bell when ready to sentence O'Keefe. "Otherwise," Judge Stewart Bell, who did not hear the actual trial, would have been committing an act of Judicial misconduct by KNOWLEDGE of this simulated fact.

1 B. N.R. Civ. P. Rule 60(b)(4) is available to correct void judgments
2 becoming a fundamental miscarriage of justice based on acts where
3 the court was exceeding its jurisdiction by the legally inconsis-
4 tent verdict holding no authority. When the jury decided the
5 first five counts in order, Count 6 became moot and void.

6
7 C. DEPRIVATION OF ACQUITTAL VERDICTS AS PROTECTED LIBERTY INTERESTS

8 • see DAKE v. SOHRER, 468 U.S. 183, 202 (1984); Nev. Const., article I § 2.

9 THE acquittal verdicts Counts 1-5, do not sustain Count 6,
10 verdict of guilty, "Burglary" under statutory law NRS 205.060.

11
12 Moreover, the acquittal verdicts on Counts 1-5 become a protected
13 liberty interest that can never be waived or forfeited just like
14 the lack of subject-matter jurisdiction. Verdicts in criminal
15 trials become an essential element to jury trials and are heavily
16 guarded by the U.S. and Nevada Constitutions under the 14th Amend.

17
18 The state would rather create any and all simulated facts as
19 semantics with cleverly disguised plays as here in the case at bar.
20 The record however speaks for itself and DUE PROCESS, A LAW
21 afforded by the 14th Amend. and Nev. Const. art. I § 8(5) prohibit the
22 state from the continual deprivation of all felonious intent acquittals.

23
24 An error of law is an abuse of discretion that Judge Bell did without
25 knowledge. Procedural due process cannot be lost or waived.
26 "The writ of error coram nobis must issue to correct the judgment
27 that the court never had power to enter." • see U.S. v. Peter,
28 310 F.3d 709, 715 (11th Cir. 2002); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974) (same)

D. FACTUAL INNOCENCE is demonstrated by the jury acquittals on Counts 1-5 resulting in "actual innocence" which justifies good cause to overcome any bars wrongly attempted by the state.

- See Bousley v. U.S., 523 U.S. 614, 623 (1998). See also Mitchell v. State, 149 P.3d 33, 122 Nev. 1269, 1274 (2006). When a petitioner can prove "UNDISPUTEDLY" and demonstrate that a federal constitutional violation has occurred, where he is deprived of all (5) five felony acquittals which then resulted in a Count 6 conviction of one who is actually innocent, any procedural bar will result in a clear fundamental miscarriage of justice. Fundamental miscarriage of justice also entitles an untimely petition. • See State v. Bennett, 81 P.3d 1 (2003) (19 Nov. 589)

This state caused impediment and interference by state officials is an external force and UNCONSTITUTIONAL. Accord Murray v. Carrier, 477 U.S. 477, 478 (1986).

V. APPOINTMENT OF COUNSEL AND EVIDENTIARY WARRANTS

- THE INTEREST OF JUSTICE DEMAND, WHICH WAS THE PURPOSE OF THE TRIAL:

The certified J.O.C. and court minutes & exhibits attached demonstrate unquestionable "ACTUAL INNOCENCE". The jury had to determine the first five verdicts, Counts 1-5, before they could decide Count 6. Bamboozling the newly assigned penalty phase court, as Judge J. Bell, was not a constitutionally sufficient means to protect my acquittal verdicts on Counts 1 to 5 which Count 6 was dependent on. Simple misdemeanor battery cannot sustain Count 6. Procedural due process warrants a hearing in the minimum to end the deprivation.

VI. CONCLUSION: The verdict of felony larceny, Count 6 is void. Issue writ of CORAM NOBIS to hold evidentiary hearing and appoint Counsel.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR CIVIL WRIT OF CORAM NOBIS... to the below address(es) on this 28TH day of September, 2018, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Brock Slip No. 2277152

1) CIVIL Department Clark County Dist. Atty.
200 Lewis Ave.
Las Vegas, NV. 89155-2212

2) ORIGINAL TO Clerk of the Court (8TH Jud.)
200 Lewis Ave., 3RD FLOOR
Las Vegas, NV. 89155

Brian K. O'Keefe
Brian K. O'Keefe # 902461
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Petition For CIVIL WRIT OF CORAM NOBIS... filed in District Court Case No. AC20183 does not contain the social security number of any person.

Dated this 28TH day of September, 2018.

Brian K. O'Keefe
Brian K. O'Keefe
Plaintiff In Pro Se

EXHIBIT 1

TRIAL JUDGE: SALLY COEHRO

CASE C202793

STATE OF NEVADA

CRIMINAL COURT MINUTES

PAGE 9

JURY TRIAL VERDICT BEING
RETURNED

EXHIBIT 1

PAGE: 009

MINUTES DATE: 10/28/04

CRIMINAL COURT MINUTES

04-C-202793-C STATE OF NEVADA

vs O'Keefe, Brian K

CONTINUED FROM PAGE: 008

10/28/04 08:30 AM 03 TRIAL BY JURY

HEARD BY: Sally Loehrer, Judge, Dept. 15

OFFICERS: Theresa Lee, Court Clerk
Lisa Makowski, Reporter/Recorder

PARTIES: STATE OF NEVADA

008190 Miller, Ross J.

Y

Y

0001 D1 O'Keefe, Brian K.

Y

000754 Buchanan II, James L.

Y

JURY PRESENT. At the hour of 11:58 A.M. the Jury returned with a VERDICT as follows; CT 1 - GUILTY of BATTERY (M), CT 2 - NOT GUILTY of Sexual Assault, CT 3 - NOT GUILTY of Sexual Assault, CT 4 - NOT GUILTY of Sexual Assault, CT 5 - NOT GUILTY of Attempt Sexual Assault, and CT 6 - GUILTY of BURGLARY (F). Upon inquiry by the Court, neither side requested the jury polled. Court thanked and excused the jury. Mr. Buchanan requested permission to argue for bail, SO ORDERED. Court stated its' concerns regarding deft and the victim getting in contact with one another. The Court will only consider releasing deft if the Court can be assured there will not be any telephone contact, letters, and no personal contact. Deft. concurred. Deft will reside with his father. COURT ORDERED, matter referred to the Division of Parole and Probation for a Pre-Sentence Investigation and Report. COURT ORDERED, O.R. RELEASE is GRANTED with a NO CONTACT ORDER WITH THE VICTIM. Court ADMONISHED Deft re no telephone calls, letters, mail, and no personal contact whatsoever. Deft. required to report to P & P the Monday following his release from custody on 11/1/04, and to bring \$25 in the correct denominations of cash next court date for payment of fees.

O.R.

12/27/04 8:30 A.M. SENTENCING

PRINT DATE: 08/25/09

PAGE: 009

CONTINUED ON PAGE: 010
MINUTES DATE: 10/28/04

EXHIBIT 2

SENTENCING JUDGE: STEWART L. BELL

CASE C202793

STATE OF NEVADA

CRIMINAL COURT MINUTES

PAGE 10

SENTENCING

CT 1 - BATTERY (MISDEMEANOR)

CT 6 - BURGLARY (FELONY)

EXHIBIT 2

PAGE: 010

MINUTES DATE: 12/01/04

CRIMINAL COURT MINUTES

04-C-202793-C STATE OF NEVADA

vs O'Keefe, Brian K

CONTINUED FROM PAGE: 009

12/01/04 08:30 AM 01 STATE'S REQUEST REMAND TO CUSTODY FOR SENTENCING

HEARD BY: Sally Loehrer, Judge; Dept. 15

OFFICERS: Theresa Lee, Court Clerk
Lisa Makowski, Reporter/Recorder

PARTIES: STATE OF NEVADA

007480 Pate, Susan

Y

Y

0001 D1 O'Keefe, Brian K

Y

000754 Buchanan II, James L.

Y

Mr. Buchanan stated the Court granted deft an O.R. release after trial, however, he has a Ohio Child Support case that has a hold on him which is coming up in Justice Court the beginning of this month. He spoke to L.J. O'Neale, and he is putting it on calendar to extradite to Ohio, and Ohio will have to come pick him up. Deft has not been out-of-custody since the trial date. COURT ORDERED, Deft is REMANDED into custody and held WITHOUT BAIL, sentencing date STANDS.

CUSTODY (COC/OHIO)

* 12/27/04 08:30 AM 00 SENTENCING

HEARD BY: Stewart L. Bell, Judge; Dept. 7

OFFICERS: Theresa Lee, Court Clerk
Cheryl Gardner, Reporter/Recorder

PARTIES: STATE OF NEVADA

006024 Krisko, Susan R.

Y

Y

0001 D1 O'Keefe, Brian K

Y

000754 Buchanan II, James L.

Y

DEFT. O'KEEFE ADJUDGED GUILTY of CT 1 - BATTERY (M), and CT 6 - BURGLARY (F). Arguments by counsel. Court inquired re the victim speaker. Ms. Krisko stated she chose not to appear. COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee, a \$150 DNA Analysis Fee, and submit to testing to determine genetic markers; Deft. SENTENCED on CT 6 - to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of ONE-HUNDRED AND TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC); SUSPENDED; placed on PROBATION for an indeterminate period not to exceed FIVE (5) YEARS, and on CT 1 - Deft SENTENCED to CREDIT TIME SERVED. CONDITIONS:

1/ No contact with the victim initiated by deft. (Mr. Buchanan argued the love/hate nature of their relationship and how the victim called deft to

PRINT DATE: 08/25/09

PAGE: 010

CONTINUED ON PAGE: 011

MINUTES DATE: 12/27/04

EXHIBIT 3

CERTIFIED JUDGMENT OF CONVICTION
(JURY TRIAL)

CASE C202793

DEPT No. XV

EXHIBIT 3

1 JOCP
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 200 South Third Street
6 Las Vegas, Nevada 89155-2212
7 (702) 455-4711
8 Attorney for Plaintiff

SA case
acq with
SA

DISTRICT CO.
CLARK COUNTY,

9 THE STATE OF NEVADA,
10 Plaintiff,

Case No: C202793

Dept No: XV

11 *vs-*
12 BRIAN KERRY OKEEFE,
13 #1447732

14 Defendant.

15 JUDGMENT OF CONVICTION (JURY TRIAL)

16 The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNT 1 -
17 BATTERY WITH INTENT TO COMMIT A CRIME (Felony); COUNT 2 - SEXUAL
18 ASSAULT (Felony); COUNT 3 - SEXUAL ASSAULT (Felony); COUNT 4 - SEXUAL
19 ASSAULT (Felony); COUNT 5 - ATTEMPT SEXUAL ASSAULT (Felony); and COUNT
20 6 - BURGLARY (Felony), in violation of NRS 200.400; 200.364, 200.366; 193.330,
21 200.364, 200.366; 205.060, and the matter having been tried before a jury, and the

22 Defendant being represented by counsel and having been found guilty of the crime(s) of

23 COUNT I - BATTERY (Misdemeanor); and COUNT VI - BURGLARY (Category B
24 Felony), in violation of NRS 200.481; 205.060; and thereafter on the 27th day of December,

25 2004, the Defendant was present in Court for sentencing with his counsel, ~~XXXXXXXXXX~~

26 ~~XXXXXXXXXX~~, and good cause appearing therefor,

27 THE DEFENDANT HEREBY ADJUDGED guilty of the crime(s) as set forth in the
28 jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee, a \$150.00 DNA

1 Analysis Fee and submit to testing to determine genetic markers, the Defendant is sentenced
2 as follows: on COUNT 6 - to a minimum of twenty-four (24) months and a maximum of one
3 hundred twenty (120) months in the Nevada Department of Corrections; SUSPENDED;
4 placed on probation for an indeterminate period not to exceed five (5) years, and on COUNT
5 1 - Defendant sentenced to CREDIT FOR TIME SERVED. CONDITIONS: 1) No contact
6 with the victim initiated by Defendant. Court advised Defendant any contact that the victim
7 initiates will not be a problem for him; 2) Search clause/burglary tools; 3) Complete
8 Domestic Violence counseling; 4) Secure and maintain full time employment; 5) Mental
9 Health counseling as deemed necessary by Parole and Probation; 6) Resolve the warrant
10 from the State of Ohio within the next one hundred twenty (120) days; 7) Four (4) hours of
11 community service work each week. Case closed.

12 DATED this 30 day of December, 2004.

13
14 STEWART L. BELE *for* SALLY LOEHNER
15 DISTRICT JUDGE
16
17
18
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22

23
24 CERTIFIED COPY
25 DOCUMENT ATTACHED IS A
26 TRUE AND CORRECT COPY OF
27 THE ORIGINAL OR ELECTRONICALLY
28 FILED DOCUMENT ON FILE

2005 JAN -3 P 4:03

da
CLERK

EXHIBIT

4

FRIDAY
MARCH 20, 2009

JURY TRIAL - DAY 5
(2 PAGES)

See Rough Draft Transcript page 95

LINE 17

IMPEACHED WITH BURGLARY

EXHIBIT

4

#001

LCC

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

COPY

THE STATE OF NEVADA,

Plaintiff,

vs.

BRIAN KERRY O'KEEFE,

Defendant.
.....

. CASE NO. C-250630
. DEPT. NO. 17
. TRANSCRIPT OF
. PROCEEDINGS

FILED
JUL 10 2009
[Signature]
CLERK OF COURT

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

FRIDAY, MARCH 20, 2009

ROUGH DRAFT TRANSCRIPT OF
JURY TRIAL - DAY 5

APPEARANCES:

FOR THE PLAINTIFF: PHILLIP SMITH, ESQ.
STEPHANIE GRAHAM, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT: RANDALL H. PIKE, ESQ.
PATRICIA A. PALM, ESQ.
Special Public Defenders

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

1 A That is correct.
 2 Q Both of those marriages ended because you say due to
 3 alcoholism?
 4 A Yes.
 5 Q Okay. You meet Victoria sometime in October, 2001,
 6 right?
 7 A Yes.
 8 Q And that in April '07, that's when you testified that
 9 you were released from prison from the battery constituting
 10 domestic violence charge.
 11 A Yes.
 12 Q And it is, in fact, true that you served about three
 13 years in custody over that charge; isn't that correct?
 14 A No, sir.
 15 Q You didn't serve three years in custody?
 16 A It was a two to five, sir. You're a prosecutor, you
 17 know better than that.
 18 THE COURT: Sir, answer the question yes or no.
 19 THE WITNESS: On that, no, I did not, sir.
 20 BY MR. SMITH::
 21 Q How much of that two to five did you serve?
 22 A Two.
 23 Q So you're saying you served two years in custody?
 24 A On that charge, yes, sir.
 25 Q Okay. And you also admitted that you weren't honest

Page 94

ROUGH DRAFT TRANSCRIPT

1 Q For felony criminal non-support of dependents, and
 2 that's actually two counts, correct?
 3 A Two children, yes, sir.
 4 Q So in total you have four felony convictions,
 5 correct?
 6 MS. PALM: Objection, your Honor. I don't think
 7 that's correct.
 8 MR. SMITH: If it's two counts, it --
 9 THE COURT: It's three separate cases.
 10 MR. SMITH: Three separate cases, but four felony
 11 convictions.
 12 BY MR. SMITH::
 13 Q Is that correct?
 14 A There is the case in Ohio. I guess, if that's the
 15 way it would be classified, a count for each child. I'm --
 16 Q I'm just make sure it's clear. Three separate cases,
 17 but four felony convictions.
 18 A I think they charged me for each child, yeah, it was
 19 one case, Mr. Smith.
 20 Q Okay.
 21 MR. SMITH: Judge, I'm pass the witness.
 22 THE COURT: All right. Any redirect?
 23 MS. PALM: No, your Honor.
 24 THE COURT: All right. Thank you, sir.
 25 THE WITNESS: Thank you.

Page 96

ROUGH DRAFT TRANSCRIPT

1 with Cheryl about your ongoing relationship with Victoria
 2 Witmarsh; is that correct?
 3 A That is correct, sir.
 4 MR. SMITH: Court's indulgence. Judge, I'm pass the
 5 witness. Thanks.
 6 THE COURT: All right. If I --
 7 MR. SMITH: Actually, I'm sorry.
 8 THE COURT: All right.
 9 MR. SMITH: I'm sorry.
 10 BY MR. SMITH::
 11 Q I just want to clarify one other thing. Regarding
 12 your prior experience, you get out of the military, and we
 13 obviously know that you've kind of come into some trouble with
 14 the law by way of these felony convictions since you've gotten
 15 out of the military; is that correct?
 16 A That's correct, Mr. Smith.
 17 Q And we've hear that you're a convicted felon for
 18 burglary, right?
 19 A That's correct, Mr. Smith.
 20 Q And also that you're a convicted felon for battery
 21 constituting domestic violence, right?
 22 A That is correct, Mr. Smith.
 23 Q And I want to make sure I get it right. And you're
 24 also convicted out of Ohio -- is it Ohio? Yes, Ohio.
 25 A Yes, sir.

Page 95

ROUGH DRAFT TRANSCRIPT

1 THE COURT: Go down with your -- any other -- oh, I'm
 2 sorry. I'm sorry. I apologize. We have some questions from
 3 the jurors. If you could hand those to the marshal, please.
 4 Counsel approach, please.
 5 (Off-record bench conference).
 6 THE COURT: Mr. O'Keefe, we have, as you know, we
 7 allow questions from the jurors, and we have some questions for
 8 you, all right.
 9 THE WITNESS: Yes, Judge.
 10 THE COURT: One of the jurors, it says when you got
 11 out of the car, did you know Victoria was angry at you?
 12 THE WITNESS: Does that have to be a yes or no,
 13 Judge.
 14 THE COURT: I think at this point it does, and your
 15 attorney or Mr. Smith can follow up.
 16 THE WITNESS: That would have to be --
 17 THE COURT: It says did you -- I'll read it again to
 18 you, sir. When you got out of the car, did you know Victoria
 19 was angry at you?
 20 THE WITNESS: Yes.
 21 THE COURT: And were you in turn angry at her?
 22 THE WITNESS: No, I was happy.
 23 THE COURT: All right. Next question, where was the
 24 knife when you were wadding up the pillowcase?
 25 THE WITNESS: On the bed somewhere. I don't -- on

Page 97

ROUGH DRAFT TRANSCRIPT

EXHIBIT

5

INFORMATION C202793

COUNT 1 BURGLARY BASED
ON FENONIOUS ENTRY VIA
BATTERY ACQUITTED OF

EXHIBIT

5

#001

LCC:

Shirley Blumgren
CLERK

1 **INFO**

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 SUSAN R. KRISKO
6 Deputy District Attorney
7 Nevada Bar #006024
8 200 South Third Street
9 Las Vegas, Nevada 89155-2212
10 (702) 455-4711
11 Attorney for Plaintiff

12 I.A. 7/13/04
13 9:00 A.M.
14 PD

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

18 BRIAN KERRY OKEEFE,
19 #1447732

20 Defendant.

Case No: C202793
Dept No: V

INFORMATION

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

23 DAVID ROGER, District Attorney within and for the County of Clark, State of
24 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That BRIAN KERRY OKEEFE, the Defendant(s) above named, having committed
26 the crimes of BATTERY WITH INTENT TO COMMIT A CRIME (Felony - NRS
27 200.400); SEXUAL ASSAULT (Felony - NRS 200.364, 200.366); ATTEMPT SEXUAL
28 ASSAULT (Felony - NRS 193.330, 200.364, 200.366) and BURGLARY (Felony - NRS
205.060), on or about the 29th day of May, 2004, within the County of Clark, State of
Nevada, contrary to the form, force and effect of statutes in such cases made and provided,
and against the peace and dignity of the State of Nevada,

///

///

1 COUNT 1 - BATTERY WITH INTENT TO COMMIT A CRIME

2 did then and there wilfully, unlawfully, and feloniously use force or violence upon
3 the person of another, to-wit: VICTORIA WHITMARSH, with intent to commit sexual
4 assault, by striking the said VICTORIA WHITMARSH about the head and/or body with his
5 hands.

6 COUNT 2 - SEXUAL ASSAULT

7 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
8 VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: fellatio; by
9 placing his penis on or in the mouth of the said VICTORIA WHITMARSH, against her will.

10 COUNT 3 - SEXUAL ASSAULT

11 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
12 VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: sexual
13 intercourse; by placing his penis into the genital opening of the said VICTORIA
14 WHITMARSH, against her will.

15 COUNT 4 - SEXUAL ASSAULT

16 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
17 VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: anal intercourse
18 by placing his penis into the anal opening of the said VICTORIA WHITMARSH , against
19 her will.

20 COUNT 5 - ATTEMPT SEXUAL ASSAULT

21 did then and there wilfully, unlawfully, and feloniously attempt to sexually assault
22 and subject VICTORIA WHITMARSH, a female person, to sexual penetration, to-wit: anal
23 intercourse; by attempting to place his penis into the anal opening of the said VICTORIA
24 WHITMARSH, against her will.

25 ///

26 ///

27 ///

28 ///

COUNT 6 – BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit battery and/or sexual assault and/or a felony, to-wit: battery and/or sexual assault, that certain building occupied by VICTORIA WHITMARSH, located at 2219 North Rancho, No. 2083, Las Vegas, Clark County, Nevada.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY /s/ S. Krisko

SUSAN R. KRISKO
Deputy District Attorney
Nevada Bar #006024

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
HORN, David R.	LVMPD P#1928
STEIBER, Raymond C.	LVMPD P#3542
MONIOT, Timothy Sanford	LVMPD P#4664
MORGENSTERN, Kevin John	LVMPD P#4665
RAMIREZ, Vicente R.	LVMPD P#4916
KELLY, Shanan D.	LVMPD P#6836
MAJORS, William J.	LVMPD P#7089
BARRERA, Roger	LVMPD P#8050
WHITMARSH, Victoria	2992 Orchard Mesa Dr., Henderson, NV 89052
EBBERT, Linda	UMC/SANE, 1800 W. Charleston, LVN 89102
TURON, Besse Tobias	2219 N. Rancho Dr., LVN 89107
CUSTODIAN OF RECORDS	LVMPD – Records
CUSTODIAN OF RECORDS	LVMPD – Dispatch

	<u>NAME</u>	<u>ADDRESS</u>
1		
2	CUSTODIAN OF RECORDS	UMC, 1800 W. Charleston, LVN 89102
3	PENO, Tammy	2219 N. Rancho, LVN
4	LNU, Tracy	Budget Suites
5	LNU, Missy	Budget Suites

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DA#04F09774X/rad
 LVMPD EV#0405292232
 BAT W/INT; S/A; ATT S/A; BURG - F
 (TK4)



21P B9419 \$ 002.26
02 4M
0000340675OCT. 16 201

John D. Brown
1774 St. Louis
(9th. Ward)

1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910	1911	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298</
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THE UNIVERSITY OF CHICAGO

Brian O'Keefe
90244

Lovelock Corr. Ctr.
1200 Prison Rd.

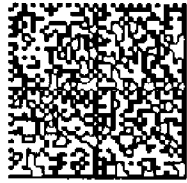
Lovelock, NV 89419

Lovelock Correctional Center

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MAIL CONFIDENTIAL

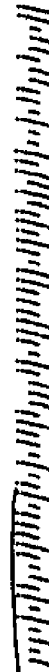
Clark of the Court
200 Lewis Ave., 3rd Fl.
Las Vegas, NV ~~89155~~
89155

42 FOR CIVIL WRIT OF HABEAS CORPUS

2 (CLERK MAIL)

← ATTN: CIVIL CLERK

89101X6300



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1 MOTION
2 BRIAN KERRY O'KEEFE # 90244
3 Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

FILED
NOV 30 2018
Clerk of Court

4 Plaintiff In Pro Se

6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF CLARK

8 * * * * *

9 BRIAN KERRY O'KEEFE,)
10 Plaintiff,)
11 -vs-)
12 THE STATE OF NEVADA,)
13 defendant.)
14

Case No. A-18-783687-W

Dept. No. XXX

15 MOTION FOR JUDGMENT ON THE PLEADINGS WITH
16 NOTICE PROVIDED BY AFFIDAVIT THAT THE STATE
17 FAILED TO FILE ANY TYPE OF RESPONSE DESPITE
18 SERVICE OF SAID PETITION AS A MATTER OF LAW
19 WITH CONSEQUENCES AS ADMISSION UNDER NRCVP 8(d)

20 Pursuant N.R.Civ. P. Rule 12(c)

21 COMES NOW, Brian O'Keefe as plaintiff to humbly serve and file this action.
22 Plaintiff served said petition for Coram Nobis by mail on 9/28/2018
23 with the court clerk actually filing said action on 10/30/2018.

24 As of November 26th 2018, no timely or untimely response, answer or
25 opposition has been filed in accordance with any rule, e.g. - N.R.Civ.P.
26 Rules 7(a), Rule 8(c), Rule 8(d), Rule 9, Rule 12, E.D.C.R. 2.20, etc. .

27 This action is made with all papers on file and the following Points
28 AND AUTHORITIES made by affidavit. Respectfully Submitted,

Dated November 26, 2018 pursuant NRS 208.165, by: Brian L. O'Keefe

Afford HAINES T. KERNER, 464 U.S. 513, 520 (1972) Lovelock Correctional Center
pro per # 90244

RECEIVED
NOV 30 2018
CLERK OF THE COURT
LCC FORM 24.014

AFFIDAVIT OF Brian Kerry O'Keefe

STATE OF NEVADA, Civil ETH CASE NO. A-18-783689-W

SS:

COUNTY OF PERKINS

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. Mailed and served the defendant as Civil Dept. Clark County District Attorney, Petition with a Notice of Petition at 200 Lewis Avenue, Las Vegas Nevada 89155-2212 on 9/28/2018.

4. Said Petition filed on 10/30/2018 with Informa Process approved as No. A-18-783689-W.

5. Petition raised "affirmative defenses" of lack of jurisdiction and fraud which was required to be addressed or otherwise considered admitted by law.

6. As of November 26, 2018 (Monday) plaintiff has received no type of response.

7. Hearing is set to 12/5/2018, Dept. XXX (Wednesday) at 09:00 a.m.

8. Plaintiff files this action thereby invoking N.R. Civil P. Rule 8 (d) where it is evident and implied, by no response, that petition for coram nobis filed 10/30/2018 is meritorious and a consent to granting of the same. See also Eighth District Court Rule ("E.D.C.R.") 2.20 (same).

9. A Motion via N.R. Civ. P. 12(c) is designed to provide this "Court" a means of disposing of cases when facts are not in dispute and a judgment on the merits

[CONTINUED]

can be achieved by focusing on the content of the pleadings and only questions of law remain. (• SEE BERNARD v. Rockhill Dev. Co., 103 Nev. 132, 734 P.2d 1238 (1987)).

10. Language "upon such terms as are just" applies to void judgments. Subsection (b) of N.R.C.M.P. 60(b) invests this "Court" with the discretionary power to relieve a party from a final judgment that is void. (• SEE Deros v. Stern, 87 Nev. 148, 483 P.2d 648 (1971)); see also PHRASE "Jurisdictional Fact," definition.

11. E.D.C.F. 2.20 within (10) days after service of [petition] motion, the opposing party "MUST" serve and file written opposition thereto. Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion is meritorious and a consent to granting of the same.

12. Plaintiff O'Keefe avers the Parole Board utilized this Void Felony Burglary conviction in my P.S.I. as the main and one of the aggravators to deny my Parole on 8/21/2018 triggering again collateral consequences and triggering the Continuing Violation Doctrine which is the basis of the Original Petition of Coram Nobis filed October 30, 2018 in Department XXX assigned case no. A-18-783689-W which was more than timely served now in the State's possession for over 60 days with nobody filing a Notice of Appearance (PROCEEDING) or ANY RESPONSE.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 26th (Monday) day of November, 2018

(8TH Judicial (See N.C.)
A-18-783689-W

By: Brian K. O'Keefe #90244
Brian K. O'Keefe
LoveLock Cell. CTR.
1200 Prison Rd.
LoveLock, Nv. 89419
Pro per / #90244

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION FOR JUDGMENT ON THE PLEADINGS... N.R.C.P. 8(d) to the below address(es) on this 26th day of November (Monday), 2018, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Brass Slip No. 227~~247~~ 227609

1) Civil Dept. Clark County Dist. Atty.
200 Lewis Ave.
Las Vegas, Nevada 89155-2212

2) Original to Clerk of the Court (8TH Judicial Dist. Ct.)
200 Lewis Avenue, 3RD Floor, Las Vegas, Nevada 89155

Brian K. O'Keefe
Brian K. O'Keefe # 90294
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR JUDGMENT ON THE PLEADINGS... N.R.C.P. filed in District Court Case No. A-18-783689-W does not contain the social security number of any person.

Dated this 26th day of November (Monday), 2018.

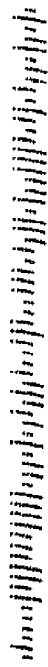
Brian K. O'Keefe
Brian K. O'Keefe
Plaintiff In Pro Se

Brian C. Heese #90244
Lovelock Coll. UTR.
1200 Indian Blvd
Lovelock, Nev. 89419

Base Ship No. 2276007
Legal Mail

Clerk of the Court (8th Fed. Dist. Ct.)
200 Lewis Ave., 3RD FLR.
Las Vegas, Nevada 89155

8910146300 0075



Steven D. Grierson

NOAS

Brian Kerry O'Keefe # 90244

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Plaintiff In Pro Se

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

BRIAN KERRY O'KEEFE

Plaintiff,

-vs-

THE STATE OF NEVADA

Defendant

Case No. A-18-783689-W

Dept. No. XXX

• SEE ATTACHED APPLICATION TO PROCEED IN
FORMA PAUPERIS WITH FINANCIAL CERTIFICATE

CIVIL - NOTICE OF APPEAL ¹

NOTICE IS GIVEN that Plaintiff, Brian Kerry O'Keefe,
in pro se, hereby appeals to the Nevada Supreme Court the
denial of the unopposed noticed served petition despite N.R.Civ.P. 12(c) Motion
as filed/entered on the 5th day of December, 2018,
(complete if applicable) and the _____

_____, as filed/entered on the _____ day of
_____, 20____, in the above-entitled Court.

Dated this 18th day of December, 2018.

Brian K. O'Keefe

Brian K O'Keefe # 90244

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Plaintiff In Pro Se

FN1: Court failed to address that
Count 1 conviction returned by jury
was on the lesser included simple misdemeanor battery and that the State
used one INFORMATION that charged (6) six counts. INVOKED N.R.Civ.P. 8(d).
STATE FILED NO OPPOSITION ALSO INVOKING EDCR 2.20.

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CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 18th day of December, 2018, by placing same in the U.S. Mail via prison law library staff: Base Slip No. 2273779

Steven Garrison, Clerk of Court (8TH Jud.)
200 Lewis Avenue, 3RD Floor
Las Vegas, Nevada 89155

Brian L. O'Keefe
Brian L. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in District Court Case No. A783689-W does not contain the social security number of any person.

Dated this 18th day of December, 2018

Brian L. O'Keefe
Brian L. O'Keefe

Petitioner In Pro Se

27

FILED
DEC 24 2018
CLERK OF COURT

MOTN

Brian Kerry O'Keefe #90244
(Name)
L.C.C. 1200 Prison Road
(Mailing Address)
Lovelock, Nevada 89419
(City, State, Zip)

In Proper Person

In The EIGHTH Judicial District Court of the State of Nevada

In and for THE COUNTY OF CLARK

BRIAN KERRY O'KEEFE)
)
Plaintiff)
vs.)
THE STATE OF NEVADA, et al.)
Defendants)

Case No. A-18-783689-W
Dept. No. xxx

● CASE-OF-FIRST-IMPRESSION

MOTION TO ALTER OR AMEND JUDGMENT OF 12/5/18 DENYING PETITION
WHERE STATE ADMITTED PLAINTIFF'S AVERMENTS BY N.R.CIV.P. 8(d), EDCR 2.20

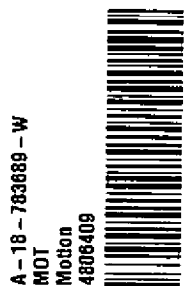
I, Brian Kerry O'Keefe, plaintiff, appearing in Proper Person, request that the Court enter an Order granting me the following: (see page 3)

● POINTS AND AUTHORITIES - (JURISDICTION)

Pursuant N.R.Civ.P. 59(e), this Court has inherent authority to "ALTER" OR "AMEND" its judgment, orally, on 12/5/2018 denying plaintiff's Civil Writ of Coram Nobis based on these Grounds, "where" the court misalleged, and omitted the fact that the jury returned a simple proffered lesser-included-offense of Count 1 "misdemeanor-battery" to the Count 1 BATTERY WITH INTENT TO COMMIT A CRIME, NRS 200.400 (F) and closed out Count 1, with credit time served, which is manifested in the certified Doc attached to the petition as EXHIBIT 3. (see also - EXHIBIT 1 CRIMINAL COURT MINUTES) (same) Also, "where" the court failed to divulge that this case, C202793, was changed by a single INFORMATION filed 7/6/2004, with (6) counts arising from the same set of facts.

Page 1 of 3

INVOKED HOWES V. KERNER, 404 U.S. 59, 520 (1972) (per curiam)
FN1: INFORMATION ENCOMPASSED COUNTS 1, 2, 3, 4, 5, 6 IN A SINGLE CHARGING DOCUMENT, Battery - Lesser included misdemeanor was, viz jury instruction on Count 1 BATTERY (F)



A-18-783689-W
MOT
Motion
4806409

LCC LL 26.045

RECEIVED
DEC 24 2018
CLERK OF THE COURT

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1 This Motion is made and based upon the accompanying Memorandum of Points and

2 Authorities: I. Rule of LAW - N.R.Civ.P. 8(d) and EDCR 2.20 and EDCR 3.20

3 This court's 12/8/18 journal entry denying petition goes completely contrary to the Rule of Law.

4 N.R.Civ.P. 8(d) (Effect of Failure to Deny) Averments in a pleading to which a responsive
5 pleading is required are admitted ~~when~~ not denied in the [required] responsive pleading.

6 Also, EDCR 2.20 and 3.20 prescribe, "opposing party must serve and file written
7 notice of nonopposition or opposition thereto," ... "Failure of the opposing party to

8 serve and file written opposition may be construed as an admission that the petition
9 is meritorious and a consent to granting the same." Moreover, plaintiff filed

10 also a timely N.R.Civ.P. 12(c), filed 11/30/18, which could be construed as a
11 Rule 56 Summary Judgment, based on a true simple question of law, "undisputed."

12 This court is required not to raise defense issues or ignore plaintiff's valid
13 "miscarriage of justice" and Count 6 averment of Burglary conviction being VOID

14 based on lack of felonious intent. IN FACT, this civil petition brought
15 to address the deprivation of civil rights, FEDERAL, to due process and equal

16 protection, mandates this court to apply the correct law. Delineated by
17 Bartman v. U.S. Postal, 231 F.3d 1220, 1223 (9th Cir. 2000) ("Holding courts are indepen-

18 dently obliged to apply the correct law, regardless if none of the parties briefed it,
19 or implicitly briefed it wrong, or failed to brief it at all.")

20 Clearly, the state not
21 only admitted plaintiff's averments, they waived any and all defenses by failing to oppose.

22
23 II. COUNT 1 (F) BATTERY WITH INTENT TO COMMIT CRIME OR COUNT 1 (M) BATTERY as lesser.

24 The Court recognizes plaintiff was convicted of Count 1 BATTERY (Misdemeanor), yet
25 misrepresents contrary to Nev. Const., article 15 § 2 (Oath of Office) that the jury's

26 acquitted of Count 1 (Felony) Battery - NRS 20A.400, fails to supply the requisite
27 felonious intent for Count 6, Burglary based on 4/e intent to commit any felony

28 when entering a structure. The Count 1 (M) Battery conviction cannot sustain the

This Motion is made and based upon the accompanying Memorandum of Points and Authorities:

required felonious intent required by statutory law as N.E.S. 205-060.

III. TRANSFERRED INTENT AND DOCTRINE OF "NO SCITUR A SOCIIS"

● SEE A.G.O. No. 2002-15 (MARCH 21, 2002)

A simple Count 1 misdemeanor battery conviction cannot supply the felonious "transferred intent," required for Count 6 Burglary. Noting Count 6 was predicated on the criminal intent of felonious Count 1 (F) Battery with intent to commit a crime charged as either Count 1, 2, 3, 4, 5 and any combination of the first five felony counts for the alleged event on May 29, 2004 charged via a single indictment (C202193) filed 7/6/2004.

N.E.S. 205.060 (1) provides: "A person who, ..., enters any ... apartment ... with the intent to commit ... battery on any person or any felony is guilty of burglary."

The Attorney General Opinion ("A.G.O.") No. 2002-15 delineates the doctrine of "no scitur a sociis" providing that a word is known by the company it keeps and gathers meaning from the words around it. See Babbitt v. Sweet Homes..., 518 U.S. 687, 72 (1995) citing Orr Ditch Co. v. Dist. Ct., 64 Nev. 138, 146 (1947).

Moreover, C.J. MAUPIN concurring in State of Nevada v. Contreras, 118 Nev. 332 (2002) that while a burglary charge may be based upon an intent to commit any felony, as charged via plaintiff's Count 1 (F) BATTERY WITH INTENT TO COMMIT A CRIME N.E.S. 205.400, when entering a structure, the burglary statute specifically includes "assault or battery on any person" as a felony that may underlie a burglary. Emphatically, without the jury returning a felony conviction on Counts 1, 2, 3, 4 or 5 before coming to Count (6) Felony Burglary, the jury verdict of guilty on Count 6 must be stricken and voided under N.R.Cr.P. 60(b)(4) or by GRANT OF WRIT OF HABEAS CORPUS.

IV. CONCLUSION without a "felony" Count 1 conviction, and with acquittal on Counts 2, 3, 4 and 5, the guilty verdict returned on Count 6 became a defective verdict, now voidable.

Amend indictment and order "hearing."

● GRANT "PPW" of Coram Nobis

This document does not contain the Social Security number of any person.

I declare under penalty of perjury under the law of the State of Nevada that the forgoing is true and correct.

DATED this 19th day of December, 2018

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the undersigned hereby certifies that on this date, I deposited a true and correct copy of the foregoing Motion in the U.S. Mail with postage pre-paid thereon, addressed to:

Clerk of Court (8TH JUD. DIST. CT.)
(Name of other Party)

CLACK COUNTY DISTRICT ATTORNEY Civil Dept.
(Name of other Party)

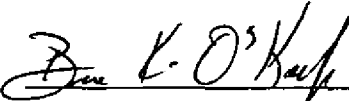
200 Lewis Ave., 3RD FLR.
(Address)

200 Lewis Avenue
(Address)

Las Vegas, Nevada 89155
(City, State, Zip)

Las Vegas, Nevada 89155-2212
(City, State, Zip)

Dated this 18th day of December, 2018


(Signature)

Mr. Brian Kerry O'Keefe
90244
LOVELOCK CORR. CTR.
1200 Prison Road
Lovelock, Nevada 89409

Lovelock Correctional Center



Clerk of the Court, 8th Jud. Dist. Court
200 Lewis Avenue, 3RD Floor
Las Vegas, Nevada 89155

"CIVIL"

By Brass Slip No. 2274140
Legg Mar 20

PRIVATE LEGAL
MAIL CONFIDENTIAL
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JEC 24-2018 FORM 24.070

CLERK OF THE COURT

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Name BRIAN KERRY O'KEEFE
Address LOVELOCK CORRECTION CENTER
City 1200 PRISON ROAD State _____
Email LOVELOCK NEVADA 89419
Telephone # 90244

District Court
Clark County, Nevada

BRIAN KERRY O'KEEFE

Plaintiff,

vs.
THE STATE OF NEVADA, et al.

Defendant(s)

Case No.: A-18-783689-W
Department: XXX

Notice of Motion

Please take notice that the hearing on MOTION TO ALTER OR AMEND JUDGMENT OF
12/5/18 DENYING PETITION WHERE STATE ADMITTED... BY N.R. Civ.P. 8(d), EDCR 2.20
will be heard on January 30, 2019 in Department XXX Floor 14 Courtroom A
at the hour of 9:00 AM/PM.

Dated this 19th day of December, 2018

A-18-783689-W
NOTM
Notice of Motion
4886410



By: Brian K O'Keefe pro per #90244
Brian K O'Keefe

FILED
DEC 24 2018
CLERK OF COURT

THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
57 - 62
WILL FOLLOW VIA
U.S. MAIL



1 ASTA

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 BRIAN KERRY O'KEEFE,

10 Plaintiff(s),

11 vs.

12 STATE OF NEVADA,

13 Defendant(s),

Case No: A-18-783689-W

Dept No: XXX

14
15
16 **CASE APPEAL STATEMENT**

17 1. Appellant(s): Brian K. O'Keefe

18 2. Judge: Jerry A. Wiese

19 3. Appellant(s): Brian K. O'Keefe

20 Counsel:

21 Brian K. O'Keefe 90244
22 1200 Prison Rd.
23 Lovelock, NV 89419

24 4. Respondent (s): State of Nevada

25 Counsel:

26 Steven B. Wolfson, District Attorney
27 200 Lewis Ave.
28 Las Vegas, NV 89101

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: Yes, October 30, 2018

8 **Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: N/A

10 Date Application(s) filed: N/A

11 9. Date Commenced in District Court: October 30, 2018

12 10. Brief Description of the Nature of the Action: Civil Writ

13 Type of Judgment or Order Being Appealed: Dismissal

14 11. Previous Appeal: No

15 Supreme Court Docket Number(s): N/A

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

18 Dated This 29 day of December 2018.

19 Steven D. Grierson, Clerk of the Court

20 /s/ Heather Ungermann

21 Heather Ungermann, Deputy Clerk

22 200 Lewis Ave

23 PO Box 551601

24 Las Vegas, Nevada 89155-1601

25 (702) 671-0512

26 cc: Brian K. O'Keefe

27

FILED
JAN 16 2019
CLERK OF COURT

Name Brian Kerry O'Keefe
Address LOVELL CORR. CTR.
City 1200 Prison Rd. State _____
Email Lovelock Nevada 89409
Telephone _____

District Court
Clark County, Nevada

BRIAN KERRY O'KEEFE

Plaintiff,
vs.
THE STATE OF NEVADA

Defendant

Case No.: A-18-783689-W
Department: XXX

• SEE EXHIBIT "A" CASE SUMMARY
ATTACHED PRINTED 12/12/18
(2 PGS.)

Notice of Motion

Please take notice that the hearing on MOTION COURT TO ADJUDICATE RULE 59 (e)
MOTION AND/OR ENTER ORDER DENYING BY WRITTEN ENTRY
will be heard on February 20, 2019 in Department XXX Floor 14 Courtroom A
at the hour of 9:00 AM/PM

Dated this 9th day of January, 2019

Brian K O'Keefe #90244
pro per

RECEIVED
JAN 16 2019
CLERK OF THE COURT

100 LL FORM 24.070

A-18-783689-W
NOTM
Notice of Motion
4809185



27

FILED
JAN 16 2019
CLERK OF COURT

Brian O'Keefe #90244
(Name)
LOVELOCK CORR. CTR. 1200 Prison Rd.
(Mailing Address)
Lovelock Nevada 89419
(City, State, Zip)

In Proper Person

In The EIGHTH Judicial District Court of the State of Nevada
In and for THE COUNTY OF CLARK

BRIAN KERRY O'KEEFE)
Plaintiff)
vs.)
THE STATE OF NEVADA)
Defendant)

S.C.N. Case No. 77797
NOA has no effect until entry of order.

Case No. A-18-783689-W
Dept. No. XXX

(• SEE EXHIBIT "A" CASE SUMMARY ATTACHED (2 PGS.))
* Case of First Impression

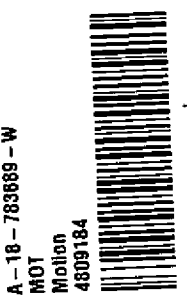
• MOTION COURT TO ADJUDICATE RULE 59(e) MOTION AND/OR ENTER ORDER DENYING BY WRITTEN ENTRY

I Brian Kerry O'Keefe, plaintiff, appearing in Proper Person, request that the Court enter an Order granting me the following:

- 1.) a decision resulting from the MOTION TO ALTER OR AMEND JUDGMENT pursuant Nev. R. Civ. P. 59(e) in plaintiff's favor;
- 2.) OR, enter "formal" judgment denying A.S.A.P.
- 3.) Forwarded copy to plaintiff O'Keefe, at Lovelock Correctional Center, 1200 Prison Road, Lovelock NV. 89419.
- 4.) RECOGNIZE a "FUNDAMENTAL MISCARriage OF JUSTICE" with where moral turpitude has occurred as the fundamental basis of their delay. ACTUAL INNOCENCE APPLIES.

INVOKE HAINES v. KERNER, 404 U.S. 59, 520 (1972) per curiam

FN1: FILED 1/03/2019, S.C.N. No. 77797 IN FORMA PAUPERIS APPEAL GRANTED. WAITING ON THIS COURT TO ADJUDICATE NEV. R. CIV. P. 59(e) MOTION; Final order.



RECEIVED
JAN 16 2019
CLERK OF THE COURT

LCC LL 26.045

This Motion is made and based upon the accompanying Memorandum of Points and Authorities: (SEE EXHIBIT "A" CASE SUMMARY A-18-783689-W printed 12/12/18 attached.)

Pursuant to formal law (procedural law) this honorable court is required to provide an equitable ruling consisting of the written entry of ORDER.

Plaintiff's protected "liberty interests" are generated by here the DUE PROCESS CLAUSES of their own force, Nev. Const., art. 1 § 8(5) and the "DUE PROCESS CLAUSE" with "Liberty CLAUSE" of the U.S. Constitutional XIV Amendment. Moreover, Nevada Const., article 6 § 6(1) and N.R. 8 1.030 authorize the common law writ of coram nobis as delineated and now recognized by the Nevada Supreme Court in TRUJILLO v. STATE, 310 P.3d 594 (Nev. 2013) in which this court is required by the judicial canons (2.26) to remain equitable and perform all tasks to include final adjudication by way of a final order being entered.

This Court cannot dispute a decision ^{ignoring} ~~denying~~ plaintiff's Motion for a Judgment on the Pleadings filed 11/30/2018 occurred when the decision was pronounced on 12/5/2018 in the minute order.

(• SEE OATH OF OFFICE, Nev. Const., Article 18 § 2)
Flummily, plaintiff begs this Court to alter his judgment, granting his Motion pursuant Nev. R. Civ P 59(e) with certification of intent to Amend² where plaintiff can motion the Nevada Supreme Court under case no. 77797 and remand back to this Court. Otherwise file final Order in writing denying.

FN2: spare judicial economy/administration where as a matter-of-law, simple battery count 4 misdemeanor intent cannot supply felonious transferred intent to sustain count 6 based on felonious intent by law. see also "WHITE", 330 P.3d 482, 484 (Nev. 2014)

EXHIBIT A

CASE SUMMARY

8TH CASE NO. A-18-783689-W printed 12/12/18

- See ENTRY 11/30/2018 MOTION FOR JUDGMENT ON PLEADINGS
- see 2180 ENTRY 12/05/2018 (COURT
" ORDERED " PETITION " DENIED ")

EXHIBIT A

CASE SUMMARY

CASE NO. A-18-783689-W

Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

§ Location: Department 30
§ Judicial Officer: Wiese, Jerry A.
§ Filed on: 10/30/2018
§ Cross-Reference Case Number: A783689
§ Defendant's Scope ID #: 1447732

CASE INFORMATION

Case Type: Other Civil Writ

Case Status: 10/30/2018 Open

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-18-783689-W
Court Department 30
Date Assigned 10/30/2018
Judicial Officer Wiese, Jerry A.

PARTY INFORMATION

Plaintiff O'Keefe, Brian Kerry

Pro Se







Defendant Nevada State of

DATE

EVENTS & ORDERS OF THE COURT

INDEX

EVENTS

10/19/2018	 Application to Proceed in Forma Pauperis Filed By: Plaintiff O'Keefe, Brian Kerry
10/30/2018	 Inmate Filed - Petition for Writ of Habeas Corpus Party: Plaintiff O'Keefe, Brian Kerry <i>Petition for Writ of Coram Nobis</i>
10/30/2018	 Order to Proceed In Forma Pauperis Granted for: Plaintiff O'Keefe, Brian Kerry
10/30/2018	 Notice of Motion Filed By: Plaintiff O'Keefe, Brian Kerry <i>Petition for Civil Writ</i>
10/30/2018	 Filed Under Seal Filed By: Plaintiff O'Keefe, Brian Kerry
11/30/2018	 Motion Filed By: Plaintiff O'Keefe, Brian Kerry <i>Motion for Judgment on the Pleadings with Notice Provided by Affidavit that the State failed to File any Type of Response Despite Service of Said Petition as a Matter of Law with Consequences as Admission Under NRCIVP, 8 (d)</i>

CASE SUMMARY
CASE NO. A-18-783689-W

HEARINGS

12/05/2018

 **Petition (9:00 AM)** (Judicial Officer: Wiese, Jerry A.)

Events: 10/30/2018 Notice of Motion

Notice of Petition for Civil Writ of Coram Nobis

Denied:

Journal Entry Details:

No parties present. Court ADVISED. it appeared the State was properly noticed with the Motion, no opposition was filed, however, in reading the petition, Court NOTED. Plaintiff was convicted of counts 1 and 6 and found not guilty on all of the sexual assault charges. Furthermore, the Court, was not convinced the acquittal on counts 2 to 5 required an acquittal on counts 1 and 6, as they were independent charges, consequently, ORDERED. Petition DENIED.:

This document does not contain the Social Security number of any person.

I declare under penalty of perjury under the law of the State of Nevada that the forgoing is true and correct.

DATED this 9th day of January, 2019

CLARK COUNTY DISTRICT ATTORNEY REGISTERED PARTICIPANT
OF CM/ECF FILING SYSTEM.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the undersigned hereby certifies that on this date, I deposited a true and correct copy of the foregoing Motion in the U.S. Mail with postage pre-paid thereon, addressed to:

Clark County

(Name of other Party)

200 Lewis Ave 3RD FLR

(Address)

Las Vegas NV 89105-1160

(City, State, Zip)

Clark County District Attorney

(Name of other Party)

200 Lewis Ave.

(Address)

Las Vegas NV 89155

(City, State, Zip)

Dated this 9th day of January, 2019

[Signature]
(Signature)

Brian O'Leary #90244
Caveblock Court. Ctr.
1200 Prison Rd.
Caveblock, NV. 89419

Lepidoback Correctional Center



U.S. POSTAGE PITNEY BOWES
ZIP 89419 \$000.68
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Boys Slip No. 2285093
LEGAL MAIL

Clerk of the Court (8th Judicial)
200 Lewis Ave., 3rd Fl.
Las Vegas, NV. 89155
INMATE LEGAL
MAIL CONFIDENTIAL

RECEIVED
JAN 9 2019
LIBRARY

FILED
JAN 17 2019
CLERK OF COURT

MOTN
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

BRIAN KERRY O'KEEFE ,)
Plaintiff ,)
-vs- ,)
THE STATE OF NEVADA et al. ,)
Defendant(s) .)

Case No. A-18-783689-W
Dept. No. XXX

Will file NEW NOA or see attached EXH.
(AMENDED N.O.A. WILL BE FILED IF NEEDED)
SUBSEQUENT ENTRY WRITTEN ORDER

EX PARTE MOTION FOR COURT TO TAKE JUDICIAL
NOTICE THAT PREMATURE NOTICE OF APPEAL HAS
NO EFFECT ON JURISDICTION TO WHICH DISTRICT
COURT RETAINS JURISDICTION PURSUANT COMMON LAW
AND PURSUANT N.R.A.P. 4(2)(6) (PREMATURE NOTICE OF APPEAL)
WHERE O'KEEFE ALSO MOTIONED & C.N. BY COPY AS EXHIBIT "A"

Comes Now Brian O'Keefe, pro se, to humbly provide notice, pursuant, e.g.-
express opinion delineated in Southern Nev. Homebuilders Ass'n vs. City of
N. Las Vegas, 112 Nev. 297, 913 P.2d 1276 (1996), specifically listed under
N.R.A.P. 3A (Civil Actions; standing to appeal; appealable determinations),
that O'Keefe's premature N.O.A. has no effect on this Court's authority.
• (Plaintiff mistakenly thought written order had been filed.)

O'Keefe admits, in his previous motion, he listed that this Court could
certify its intent to hear the Petition, which is not required.
Concluding, this Court can hear the action and decide without
the NOA having any legal force based that, and on, its being
premature. Any final decision denying, will simply be re-appealed.

Hopefully, this will not be the case - by: Brian K. O'Keefe 90244
Dated this 11 day of January 2019 pursuant Nev 208-165. Brian K. O'Keefe
INVOKE HAINES v. KERNER, 404 U.S. 519, 520 (1972) (per curiam); Nev. Const. article I § 2.

A-18-783689-W
EXH1
Ex Parte Motion
4811050

LCC LL FORM 24.014
CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing EX PARTE Motion FOR Court... Pursuant Common Law to the below address(es) on this 11th day of January, 2019, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): By Brass Slip No. 2285092

Steven Garrison, Clerk of Court
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155-1160

- All registered users and participants of the CM/ECF system will be served by the clerk of the court.

Brian K. O'Keefe
Brian K. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding EX PARTE Motion... Pursuant Common Law filed in District Court Case No. A-18-783689-W does not contain the social security number of any person.

Dated this 11th day of January, 2019.

Brian K. O'Keefe
Brian K. O'Keefe
Plaintiff In Pro Se

EXHIBIT

A

MOTION MAILED 1/11/2019
TO Nevada Supreme Court

DIXIE OR STAY

APPEAL NO. 77797

8TH Dist. Case NO. A703689

Dept. - XXV

EXHIBIT

A

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,)
)
Appellant,)
)
 -vs-)
)
THE STATE OF NEVADA,)
)
)
)
Respondents,)
)

Case No. 77797

MOTION TO DISMISS EXISTING APPEAL AS
SEN CASE NO. 77797 FOR EIGHTH JUDICIAL
DISTRICT COURT HAS NOT ENTERED A
FINAL JUDGMENT AND HAS SCHEDULED
A HEARING ON O'KEEFE'S N.R.C.P. 59(e)
MOTION SCHEDULED JANUARY 30, 2019 09:00AM

Comes Now, Brian O'Keefe, plaintiff still truly, in pro se, to humbly request this Court either "stay" the current appeal until disposition of the written notice of a "possible" denial of O'Keefe's Motion to ALTER OR AMEND JUDGMENT pursuant Nev. R. Civ. P. 59(e) timely filed or,

• (FOR JUDICIAL ECONOMY / ADMINISTRATION)
 dismiss appeal no. 77797, "without prejudice," for O'Keefe the right to file new Notice of Appeal [even amended N.O.A.] subsequent any denial, where the new notice of appeal will be filed within (30) days after written notice of said denial of 59(e) Motion.

• SEE Able Elec. Inc. v. Kaufman, 104 Nev. 29, 752 P.2d 216 (1988); N.R.A.P. 4
 O'Keefe was notified by the district court, in a minute order, that the Court denied petition on 12/5/2018 where O'Keefe filed a 59(e) Motion and NOA simultaneously filed on 12/24/2018. However, Court never filed final order but instead scheduled hearing for 59(e) motion on 1/30/2019. Brian O'Keefe
 Dated January 11, 2019 pursuant NRS 208.165, by: Brian O'Keefe

FN 1: STAY PROCEEDINGS UNTIL DISPOSITION OF HEARING 1/30/2019 AND NOTICE OF DECISION IF O'Keefe is notified of the denial, appellant then will file Amended NOA.

1 S.C.N. No. 77797 CERTIFICATE OF SERVICE

2 I do certify that I mailed a true and correct copy of the foregoing
3 (check appropriate box)

4 ☐ Opening Brief

5 ☐ Reply Brief

6 ☒ Motion: MOTION TO DISMISS [OR STAY] . . .

7 ☐ Petition: _____

8 ☐ Other: _____

9 to the below address(es) on this 11th day of January, 2019, by

10 placing same in the hands of prison staff for posting in the U.S. Mail, per

11 Nev.R.App.P. 25: Brccr Slip No. 2285092

12 EIGHTH JUDICIAL DISTRICT COURT DEPT. XXX
13 217 CLERK OF THE COURT 8TH JUDICIAL
200 LEWIS AVE., 3RD FLOOR
14 ATTN: JUDGE WIDBE, JERRY A.
Las Vegas, Nevada 89155

15 Attorney For NO PARTIES APPEARED

16 ☒ and ORIGINAL AND ONE COPY to:

17 CLERK of the COURT
18 Nevada Supreme Court
211 S. Carson Street
19 Suite 201
Carson City, Nevada 89701

20
21 Brian K. O'Keefe
22 Brian K. O'Keefe # 90244

23 Lovelock Correctional Center

24 1200 Prison Road

25 Lovelock, Nevada 89419

26 Plaintiff In Pro Per

Loveland Correctional Center



U.S. POSTAGE
ZIP 89419 \$000.470
02 4W
0000340675 JAN 14 2019

Brian O'Keefe #90244
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, Nev. 89419

Clerk of the Court, 874 Suburban Dr. Ct.
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160

INMATE LEGAL
MAIL CONFIDENTIAL
8910136300 CO 75

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Buss Slip No. 2285092
LEGAL MAIL :

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JAN 11 2019
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1 NOTC
2 Brian Kerry O'Keefe # 90244
3 Lovelock Correctional Center
1200 Prison Road
4 Lovelock, Nevada 89419

FILED
JAN 22 2019
CLERK OF COURT

4 Plaintiff In Pro Se

6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF CLARK**

8 * * * * *

9 BRIAN KERRY O'KEEFE)
10 plaintiff) • CASE-OF- FIRST- IMPRESSION
11 -vs-) Case No. A-18-783689-W
12 THE STATE OF NEVADA)
13 defendant) Dept. No. xxx
14 • (SEE ATTACHED EXHIBIT "A")

15 JUDICIAL NOTICE PURSUANT N.R.S. 47.150(2)
16 OF MOTION FOR LEAVE OF COURT TO FILE
17 JUDICIAL NOTICE PURSUANT N.R.S. 47.140
18 THAT THE LAW-OF-THE- NEVADA- SUPREME COURT...
19 THEREFORE APPEALABLE UNDER N.R.A.P. 3A(b)(1)

20 COMES NOW, Brian O'Keefe, plaintiff pro per, to humbly keep this
21 court apprised of the "result" (see EXHIBIT "A") derived by the
22 "CAUSE" of the "ORDER REDESIGNATING APPEAL", Filed on 1/10/2019.
23 • (JUDICIAL NOTICE AS ADVISEMENT TO FUTURE CASES MAKING AN APPEAL)
24 O'Keefe only wished to have the Nevada Supreme Court
25 recognize their own law-of-the- N.S.C. as delineated by their
26 own rules as N.R.A.P. 3A(b)(1) and common law decision of
27 Trujillo v. Nevada, 129 Nev. Adv. Rep. 78 (Oct. 10, 2013) where any denial
28 of a petition for a writ of coram nobis is treated as a civil appeal.
29 Dated this 14th day of January 2019 pursuant NRS-208.165, by: Brian K. O'Keefe
30 INVOKES HAINES v. KERNER, 404 U.S. 519, 520 (1972) (per curiam); Brian K. O'Keefe
31 see also Nev. Const., art. I § 2 pro per # 90244

A-18-783689-W
NOT
Motion
4811648

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JAN 22 2019
CLERK OF COURT

EXHIBIT A

- 8TH CASE NO. A-18-783689-W

SUPREME COURT OF NEVADA CASE NO. 77797

FROM 8TH JUDICIAL DISTRICT COURT

HONORABLE JERRY A. WIESE, District Judge

Dept. XXX

COPY OF JUDICIAL NOTICE

FILED IN S.C.N. BY

MAIL ON 1/15/2019 (Tuesday)

BRASS SLIP NO. 2285003

EXHIBIT A

Court's
copy

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE

Case No. 77797

#90244

Appellant

8th Judicial Case No. A-18-703689-W

-VS-

THE STATE OF NEVADA

* CASE-OF-FIRST-IMPRESSION

Respondent

MOTION FOR LEAVE OF COURT TO FILE

JUDICIAL NOTICE PURSUANT N.R.S. 47.140

THAT THE LAW-OF-THE-NEVADA-SUPREME-

COURT IS SUCH THAT A PETITION FOR A

WRIT OF CORAM NOBIS ON APPEAL IS

TREATED AS A CIVIL APPEAL BY THE "HOLDING"

OF THIS COURT IN TRUJILLO V. STATE, 129 NEV. ADV. REP. 75

FILED OCTOBER 10, 2013 BY GIBBONS, DOUGLAS AND

SAITTA, IS THEREFORE APPEALABLE UNDER N.R.A.P. 3A(b)(1)

- INVOICE Nev. Const., Article I § 8 (3); U.S. XIV Const. Amend and TRUJILLO v. State, supra.

Comes Now, Brian O'Keefe, plaintiff pro per, to humbly advise this Court's, ostensibly, "staff attorney" to the law-of-the-Nevada-Supreme-Court on the issue at hand, concerning the treatment of the denial of a petition for coram-nobis on appeal.

- (SEE ORDER REDESIGNATING APPEAL, NO. 77797 FILED JAN. 10, 2019)

Pursuant the "HOLDINGS" of this Court, by a (3) JUDGE PANEL, unless this Court chooses now, "sub-sponte," to take this matter to an "EN-BANC COURT," as already delineated by Judges GIBBONS, "DOUGLAS" WHO WROTE OPINION, and SAITTA, the issue has already been adjudicated thereby invoking "Judicial Estoppel" and or "Collateral Estoppel" or "issue preclusion." Future cases, such as O'Keefe, may depend on it. Respectfully Submitted, Brian O'Keefe

INVOKE HAINES v. KERNER, 404 U.S. 519, 520 (1972) (per curiam) and Nev. Const., art. I § 2.

Dated this 14th day of January 2019 pursuant NRS 208.165 / 2010C 3 1746.

LCC 11 FORM 28.022

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing
(check appropriate box)

- ☐ Opening Brief
☐ Reply Brief
☐ Motion: _____
☐ Petition: _____
☒ Other: JUDICIAL NOTICE

to the below address(es) on this 15th day of January, 2019, by
placing same in the hands of prison staff for posting in the U.S. Mail, per
Nev.R.App.P. 25: BROOKS SIP No. 2285003

Clerk of the Court
Nevada Supreme Court
201 E. Carson St.
Suite 201
Prison City, Nevada 89701

Attorney For _____

☒ and

EIGHTH JUDICIAL CLERK OF COURT
200 LEWIS AVE.
3RD FLOOR
ATTN: CASE NO. A-18-703689-W
Lt. Vojtko, Nevada 89155

Brian K. O'Leary
Brian K. O'Leary # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

Brian Kerry O'Keefe
#90244
LOVELOCK CORC. ORC.
1200 Prison Rd.
LOVELOCK, NV. 89419

Lovelock Correctional Center

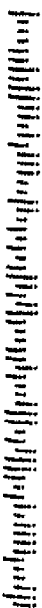


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0000340675 JAN 16 2019

Clerk of the Court (8711 Jud. Dist. Ct.)
200 Lewis Ave., 3rd Flr.
Las Vegas, Nevada 89155

INMATE LEGAL
MAIL CONFIDENTIAL

6510136300 C075



Post Slip No. 2278092
LEGAL MAIL

LCC LAW LIBRARY

JAN 15 2019

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27

FILED

MAR 21 2019

[Signature]
CLERK OF COURT

1 Name Brian Kerry O'Keefe

2 Address L.O.C. 1200 Prison Road

3 City Loveock, Nevada State 89419

4 Email _____

5 Telephone _____

6 District Court
7 Clark County, Nevada
8

9 BRIAN KERRY O'KEEFE

11 Plaintiff,

12 vs.

13 THE STATE OF NEVADA, et al.

15 Defendant

Case No.: A-18-783689-W

Department: XXX

17 Notice of Motion

18 Please take notice that the hearing on MOTION THE COURT TO TAKE JUDICIAL
19 NOTICE C.J. BIBBONS OF THE NEVADA SUPREME COURT ... EXHIBIT 3
20 will be heard on _____, 2019 in Department XXX Floor _____ Courtroom _____
21 at the hour of _____ AM/PM.

22 Dated this 17th day of MARCH, 2019

Brian K. O'Keefe #90264

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MAR 21 2019

CLERK OF THE COURT

A-18-783689-W
NOTM
Notice of Motion
4824799



27

FILED

MAR 21 2019

CLERK OF COURT

SUPP
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Defendant In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,)
Plaintiff,)
-vs-)
BRIAN KERRY O'KEEFE,)
Defendant.)

Case No. 08C250630

Dept. No. XVII



RECEIVED

MAR 21 2019

CLERK OF THE COURT

SUPPLEMENTAL AUTHORITY OF
• DOTSON V. NEVADA, 114 NEV. 582 (1998)
WHERE THE LAW OF THE SUPREME COURT IS
NRS 209.151(1)(d) IS INAPPLICABLE TO
CHAPTER 34 HABEAS CORPUS ACTIONS, PERIOD!

COMES NOW, Brian O'Keefe, pro per, to humbly bring to this Court's attention the authority of the Nevada Supreme Court in Dotson v. THE STATE OF NEVADA, supra which effects the state's entire argument. Naturally, the state cannot have it both ways where the state argues it is an improper civil action O'Keefe files, and a challenge via a post 34 action challenging his judgment of conviction, contrary to "Dotson". Civil actions are appropriate in criminal cases involving abuse of process with moral turpitude and a lack of equitable decisions by the state. Dated this 17th day of March 2019, pursuant NRS 208.165, by Brian K. O'Keefe, DOVILE HAINES v. KERNEL, 404 US 58, 520 (1972); Nev. Const., Art. I & 2. Brian K. O'Keefe

LCC LL FORM 24.014

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Supplemental Authority Dutton v. Nevada, 114 Nev. 582 to the below address(es) on this 18th day of March, 2019, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

Brian O'Keefe
Brian O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Defendant In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Supplemental Authority filed in District Court Case No. C250630 does not contain the social security number of any person.

Dated this 18th day of March, 2019.

Brian O'Keefe
Brian O'Keefe
Defendant In Pro Se

FILED

MAR 21 2019

[Signature]
CLERK OF COURT

MOTN
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

* * * * *

BRIAN KERRY O'KEEFE ,)

Plaintiff ,)

-vs-

THE STATE OF NEVADA, et al. ,)

Defendant(s) .)

Case No. A-18-783689-W

Dept. No. XXX

• SEE AFFIDAVIT ATTACHED

MOTION THE COURT TO TAKE JUDICIAL
NOTICE C.S. GIBBONS OF THE NEVADA
SUPREME COURT HAS NOTICED AND PROVIDED
THIS COURT OPPORTUNITY TO RECONSIDER ITS
DECEMBER 5, 2018 DECISION WHEN FILING ORDER
AS AN EQUITABLE MEANS BASED ON EXHIBIT 3

Comes Now, Brian O'Keefe, pro per plaintiff, to humbly request this court reconsider its oral denial on 12/05/18.

This Court must recognize the attached certified J.O.C., to the original Petition for Civil Writ of Coram Nobis as EXHIBIT 3, manifest a jury verdict on Count 1 as a simple misdemeanor. Moreover, the INFORMATION filed was a single charging instrument, for the County 6 (F) Burglary was based on any of the first five felony counts to sustain the required felonious entry. (see EXHIBIT 5, INFORMATION 0202793)

Dated March 17, 2019 pursuant NRS 208.165, by Brian K. O'Keefe

• INVOKES HAINES v. KERNER, 404 U.S. 515, 520 (1972) (per curiam); N.R. Civ. P. 8.
(Simple pleading, pro se efficiency mandated.)

A-18-783689-W

MOT

Motion

4824797



RECEIVED

MAR 21 2019

CLERK OF THE COURT

LCC LL FORM 24.014

AFFIDAVIT OF Brian Kerry O'Keefe
CASE NO. A-18-783 689- W

STATE OF NEVADA)

COUNTY OF PERSHING) SS:

I, Brian Kerry O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian Kerry O'Keefe,

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. This Court, J. Wiene, has now been issued an ORDER from the C.J. GIBBONS of the Nevada Supreme Court to, ostensibly reconsider his 12/05/18 decision and enter the formal decision. (see SCN case No. 77797, order filed 3/11/19)

4. Remember, the Court Rooms are for the people with real issues that this Court is and has been elected to hear and render equitable decisions.

5. Recognize the "Rule of Law" and your own Oath of Office, given under Nev. Const., Article 15 § 2.

6. Reconsider Plaintiff A. O'Keefe's PRAYER FOR RELIEF in his Petition For CIVIL WRIT of CORAM NOBIS which indicated in Section V, page 6, APPOINTMENT OF COUNSEL AND EVIDENTIARY WARRANTED to conclusion which requested this Court to issue WRIT [ORDER] of Coram Nobis and hold hearing SINCE THIS COURT WAS NOT CONVINCED pursuant your oral decision 12/5/18 (id ☼ 6 of Petition for Coram Nobis filed Oct 30 2018) see Section V and VI., CONCLUSION

7. Recognize this action, of a serious fundamental-misconception of justice, as a case of first-impression, where this Court has a duty to correct this gross past judicial error where the state clearly did not follow the letter of the law and we all "know" why.

8. Realize, petitioner O'Keefe is only seeking the proper remedy by law and is not asking this Court to commit simulated facts but to do the correct thing and issue ultimately the WRIT of HABEAS CORPUS to fix this voidable judgment that is nothing but a defective verdict.

9. Recognize generally speaking, the "exhaustion doctrine" was created for state courts to fix their own errors by having the opportunity to do such and if this Court honestly, and truly does not know that a simple misdemeanor battery, or a proper challenge cannot sustain a felonious intent requirement then this Court needs briefing and evidentiary hearing.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NR9 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Sunday 17th day of March, 2019

Joe O'Keefe

A-18-783689-W

/// Parole Denied August 20, 2018 based on this voidable judgment.
/// Petition for Writ of Habeas Corpus is the last
/// stop possible (remedy) for an expired case, criminal.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION THE COURT TO TAKE JUDICIAL NOTICE ... to the below address(es) on this 18th day of March, 2019, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Brass Slip No. 2285837

Clerk of the Court
Steven Grierson, 8TH Jud. Dist. Ct.
200 Lewis Ave., 3RD FLR.
Las Vegas, Nevada 89158

Clerk to Serve Clark County Dist. Attorney
via CM/ECF electronic filing system where
District Attorney is registered as participant.

Brian K. O'Keefe
Brian K. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Motion the Court to Take Judicial Notice ... filed in District Court Case No. A-18-783689-W does not contain the social security number of any person.

Dated this 18th day of March, 2019.

Brian K. O'Keefe
Brian K. O'Keefe
Plaintiff In Pro Se

Brian O'Keefe # 20244
LOVELOCK CORR CTR.
1200 Prison Rd.
LOVELOCK, NV. 89419

Lovelock Correctional Center



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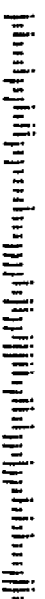
INMATE LEGAL
MAIL CONFIDENTIAL

Steven Brereton, Clerk of Court
Decker's Office

200 Lewis Ave., 3RD FLR
CAR NEVAS, NV. 89415

3455 Slip No. 2285857

891017E300



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MAR 18 2019
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DISTRICT COURT
CLARK COUNTY, NEVADA

BRIAN O'KEEFE,)
)
Plaintiff,) Case No. A-18-783689-W
vs.) Dept. XXX
)
THE STATE OF NEVADA,)
)
Defendant.)
_____)

ORDER

This matter, having come before the court on December 5, 2018, on a Defendant's Writ of Mandamus or, in the Alternative, Writ of Coram Nobis, and the court being fully advised in the premises herein, does hereby find the following:

FINDINGS OF FACT

1. An Information was filed on July 6, 2004, charging Brian Kerry O'Keefe, (hereinafter "Defendant") with one count of Battery With Intent To Commit A Crime (Felony — NRS 200.400), three counts of Sexual Assault (Felony — NRS 200.364, 200.366), one count of Attempt Sexual Assault (Felony — NRS 193.330, 200.364, 200.366), and one count of Burglary (Felony — NRS 205.060).
2. Defendant pled not guilty to the charges alleged against him. Trial commenced on October 25, 2004 and concluded on October 28, 2004. The jury returned a verdict of guilty for count one - Battery (Misdemeanor); and count six - Burglary (Category B Felony). Defendant was sentenced on December 27, 2004, on count six to a minimum

1 of twenty-four months and a maximum of one hundred twenty months in the Nevada
2 Department of Corrections. Defendant's sentence was suspended and he was placed
3 on probation for an indeterminate period not to exceed five (5) years. For count one
4 Defendant was sentenced to credit for time served.
5

- 6 3. The Judgment of Conviction was filed on January 3, 2005. Defendant's Notice of
7 Appeal was filed on February 1, 2005. The Nevada Supreme Court affirmed
8 Defendant's Conviction of January 23, 2006. See O'Keefe v. State, Order of
9 Affirmance No. 44644 (Jan. 23, 2006). Remittitur issued on December 13, 2006.
10
- 11 4. Defendant filed a Petition for Writ of Mandamus seeking transcripts, his file, etc. on
12 July 24, 2006. The State filed its Opposition on August 7, 2006. The Order denying
13 this Petition was filed August 17, 2006. On October 19, 2006, Defendant filed a
14 Motion for New Trial and a Supplement to that motion on November 14, 2006. The
15 motion was denied on December 18, 2006. Defendant filed a Notice of Appeal on
16 December 26, 2006. The Nevada Supreme Court affirmed the district court's denial of
17 Defendant's Motion for New Trial on March 24, 2008; Remittitur issued April 18,
18 2008. See O'Keefe v. State, Order of Affirmance Nos. 48673 and 49329 (March 24,
19 2008).
20
- 21 5. Defendant filed a Petition for Writ of Habeas Corpus on February 5, 2007. Defendant
22 filed a Supplement to his Petition on February 15, 2007. The State filed its Opposition
23 on April 6, 2007. The court denied his Petition April 11, 2007. Defendant filed a
24 Notice of Appeal on April 19, 2007. The Findings of Fact, Conclusions of Law, and
25 Order was filed May 17, 2007, with Notice of Entry on May 21, 2007. The Nevada
26
27
28

1 Supreme Court affirmed the district court's denial of Defendant's Petition on March
2 24, 2008; Remittitur issued April 18, 2008. See O'Keefe v. State, Order of Affirmance
3 Nos. 48673 and 49329 (March 24, 2008).

- 4
5 6. An Order Honorably Discharging Probationer was filed September 10, 2008,
6 discharging Defendant from Probation. An Order for Disposal of Exhibits was filed
7 October 17, 2012.
- 8
9 7. On December 6, 2013, Defendant filed a Petition for Writ of Mandamus or, in the
10 Alternative, Writ of Coram Nobis in C202793. The State filed a response on. On
11 January 29, 2014, the Court heard and denied the Petition for Writ of Mandamus or,
12 in the Alternative, Writ of Coram Nobis .
- 13
14 8. On October 30, 2018, Defendant filed the instant Writ of Mandamus or, in the
15 Alternative, Writ of Coram Nobis in A-18-783689-W, which was heard and denied on
16 December 5, 2018 and which was decided upon its merit.
- 17
18 9. Defendant appealed the denial of his Writ of Mandamus or, in the Alternative, Writ of
19 Coram Nobis in A-18-783689-W to the Supreme Court;
- 20
21 10. On March 11, 2019, the Nevada Supreme Court issued an order in Appeal case
22 77797 instructing the district court to enter a "*written order memorializing the court's*
23 *decision made on December 5, 2018*", within 60 days. This Order is issued to satisfy
24 that instruction.

25 CONCLUSIONS OF LAW

- 26 1. Pursuant to State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005),
27 it is mandatory for the Court to address the statutory procedural default rules when
28

1 considering post-conviction habeas petitions;

2 2. The mandatory provisions of NRS 34.726 state:

3 1. Unless there is good cause shown for delay, a petition that challenges the validity
4 of a judgment or sentence must be filed within 1 year after entry of the judgment of
5 conviction or, if an appeal has been taken from the judgment, within 1 year after
6 the supreme court issues its remittitur. For the purpose of this subsection, good
cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

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

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

9
10 3. NRS 34.810(1) (b) (2) requires a court to dismiss a petition if the petitioner's
11 conviction was the result of a trial and the grounds for the petition could have been
12 raised in a direct appeal. A petitioner can avoid dismissal if he meets the burden of
13 pleading and proving specific facts that demonstrate good cause for his failure to
14 present a timely claim and actual prejudice. NRS 34.810(3);

15
16 4. In *Gonzales v. State*, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court
17 rejected a habeas petition that was filed two days late, pursuant to the "clear and
18 unambiguous" mandatory provisions of NRS 34.726(1). *Gonzales* reiterated the
19 importance of filing the petition with the district court within one year mandate,
20 absent a showing of "good cause" for the delay in filing. *Gonzales*, 53 P.3d at 902.

21
22 5. In order to demonstrate good cause, a petitioner must show that an impediment
23 external to the defense prevented him or her from complying with the state procedural
24 default rules." *Hathaway v. State*, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
25 *Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); *Lozada v. State*,
26 110 Nev. 349, 353 871 P.2d 944, 946 (1994); *Passanisi v. Director*, 105 Nev. 63, 769
27
28

1 P.2d 72 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252
2 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988). Such an external
3 impediment could be ‘that the factual or legal basis for a claim was not reasonably
4 available to counsel, or that ‘some interference by officials’ made compliance
5 impracticable.” Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478,
6 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
7 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).
8

9
10 6. To find good cause there must be a “substantial reason: one that affords a legal
11 excuse.” Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773
12 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
13 1981). The lack of assistance of counsel when preparing a petition, and even the
14 failure of trial counsel, not to forward a copy of the file to a petitioner, have been
15 found to be non-substantial, not constitution good cause. See Phelps v. Director
16 Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v.
17 State, 111 Nev. 335, 890 P.2d 797 (1995).
18

19
20 7. NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if “[a]
21 period exceeding five years between the filing of a judgment of conviction, an order
22 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
23 conviction and the filing of a petition challenging the validity of a judgment of
24 conviction....” The statute also requires that the State plead laches in its motion to
25 dismiss the petition. NRS 34.800(2).
26

27 8. A colorable showing of actual innocence may excuse a failure to demonstrate good
28

1 cause under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117
2 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842 921
3 P.2d 920, 922 (1996). “[A]ctual innocence’ means factual innocence, not mere legal
4 insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). “To avoid
5 application of the procedural bar to claims attacking the validity of the conviction, a
6 petitioner claiming actual innocence must show that it is more likely than not that no
7 reasonable juror would have convicted him absent a constitutional violation.”
8 *Pellegrini*, 117 Nev. At 887, 34 P.3d at 537 (citing *Schlup v. Delo*, 513 U.S. 298, 327
9 (1995)).

12 DISCUSSION

13 Upon review of Defendant’s Writ of Mandamus or, in the Alternative, Writ of Coram
14 Nobis, the Court failed to address in its Order denying Defendant’s Writ the following: 1)
15 the procedural default rules which apply to Defendant’s petition, 2) the prejudice to the State
16 in responding to the petition or to conduct a retrial, due to the age of the case, and 3) whether
17 Defendant was actually innocent and a failure to consider his petition would result in a
18 fundamental miscarriage of justice.
19
20

21 Defendant’s petition was thirteen years after the judgment of conviction was entered in
22 this case and also four years after the Nevada Supreme Court issued a Remittitur on
23 Defendant’s first appeal. Defendant’s first Petition for Writ of Habeas, filed on July 14,
24 2003, and was denied due to the one year procedural time bar found in NRS 34.726.
25

26 The Petition for Writ of Habeas at issue in this order was filed on October 30, 2018, and
27 could have been denied, as it was successive pursuant to 34.810, and it was time barred
28

1 pursuant to NRS 34.726(1), since it was filed more than one year after the conviction.

2 Additionally, NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if
3 “[a] period exceeding five years between the filing of a judgment of conviction, an order
4 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
5 conviction and the filing of a petition challenging the validity of a judgment of
6 conviction....” The statute also requires that the State plead laches in its motion to dismiss
7 the petition. NRS 34.800(2).
8

9
10 To overcome procedural barriers to filing successive and time barred petitions, a
11 petitioner must demonstrate good cause for delay. To demonstrate good cause, a petitioner
12 must show that an impediment external to the defense prevented him or her from complying
13 with the state procedural default rules. Such an external impediment could be ‘that the
14 factual or legal basis for a claim was not reasonably available to counsel, or that ‘some
15 interference by officials’ made compliance impracticable.” *Hathaway*, 71 P.3d at 506
16 (citations omitted). There was no such showing in the present case.
17

18
19 To find good cause there must be a “substantial reason: one that affords a legal excuse.”
20 *Hathaway*, 71 P.3d at 506 (citations omitted). No such substantial reason has been provided
21 to this Court.

22
23 A colorable showing of actual innocence may excuse a failure to demonstrate good cause
24 under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860,
25 887, 34 P.3d 519, 537 (2001) (additional citations omitted).

26 Although, Defendant failed to demonstrate good cause in filing his time barred
27 successive petition, his petition was based on a claim of actual innocence, and this court
28

1 wants to be sure that an innocent man is not living with a felony conviction that would be
2 improper, and consequently, this Court undertakes the following analysis.

3 Mr. O'Keefe argues that because he was acquitted on Counts 1-5, the underlying basis
4 for his conviction of Burglary (Count 6) was not present, and consequently, he should have
5 been acquitted of Count 6 also. Mr. O'Keefe is incorrect that he was acquitted of Counts 1-
6 5. In fact, he was found guilty of Count 1 - Battery (M), and found not guilty of Counts 2-5.
7 (See Verdict, dated Oct 28, 2004, attached hereto).
8

9 Burglary is defined as follows:
10

11 Except as otherwise provided in subsection 5, a person who, by day or night, enters any
12 house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or
13 other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane,
14 glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or
battery on any person or any felony, or to obtain money or property by false pretenses, is
guilty of burglary.

15
(NRS 205.060[1]), emphasis added.
16

17 When Mr. O'Keefe's case was tried to a jury, the Jury was instructed that "Battery means
18 any willful and unlawful use of force or violence upon the person of another. Any person
19 who commits a battery upon another with the specific intent to commit a Sexual Assault is
20 guilty of the offense of Battery With Intent to Commit Sexual Assault." (See Instruction 4,
21 attached hereto).
22

23 The Jury was further instructed that "Every person who, by day or night, enters any
24 apartment with the intent to commit battery and/or sexual assault and/or a felony therein is
25 guilty of burglary." (See Instruction 12, attached hereto).
26

27 It is interesting to note that apparently while deliberating, the Jury had a question for the
28

1 Court as follows: "Please clarify the difference between "battery with intent to commit a
2 crime: and battery. Does the "intent to commit a crime" have to include sexual assault?"
3 The Court's response was "Please refer to and re-read Instructions number 3 and 4." (See
4 Juror Question and Response, attached hereto). Thereafter, the Jury returned a verdict of
5 guilty with regard to battery, but not with the "intent to commit a crime."

7 The Jury may have been confused because Instruction 4 discusses the possibility of a
8 conviction for "Battery With Intent to Commit Sexual Assault," but the Jury Verdict Form
9 did not provide that as an option. The Verdict form only provided the options of "Battery
10 With Intent to Commit a Crime" or "Battery." (See Verdict Form)

12 Regardless of whether the Jury was confused by the instructions or the verdict form, the
13 Jury did convict the Defendant of "battery" (which means that they found a willful and
14 unlawful use of force or violence upon the person of another), and "burglary," (which means
15 that they found that the Defendant entered an apartment with the intent to commit battery or
16 a felony therein). The Defendant's argument that the conviction of battery cannot support
17 the conviction of burglary is simply inconsistent with the language of NRS 205.060. That
18 statute specifically indicates that a person who enters an apartment or other structure with
19 the intent to commit a battery, is guilty of burglary. (See NRS 205.060).

22 O'Keefe argues in his Writ of Coram Nobis that he lived and cohabited in the apartment
23 which he was charged with entering. (See pg. 3 of Writ of Coram Nobis). The Nevada
24 Supreme Court has held that "one cannot burglarize his own home so long as he has an
25 absolute right to enter the home." *State v. White*, 130 Nev. 533, 539, 330 P.3d 482 (2014).
26 The Court further indicated that "ownership may be one factor to consider, [but] the
27
28

1 appropriate question is whether the alleged burglar has an absolute, unconditional right to
2 enter the home.” *Id.*¹ Other than Mr. O’Keefe’s allegation or contention that he “lived
3 there,” there is no evidence supporting an “absolute, unconditional right to enter the home.”
4 Without more of a record, and without any supporting evidence being submitted by Mr.
5 O’Keefe, this Court must assume, based upon the conviction, that he did not have such an
6 “absolute, unconditional right to enter the home.”
7


8 Based upon all of the information, evidence, and documentation submitted to this Court,
9 the Court cannot find that Defendant has established his actual innocence. The evidence
10 and argument submitted are simply insufficient to support Mr. O’Keefe’s Petition for Writ of
11 Coram Nobis.
12

13 ORDER

14 Defendant’s Writ of Mandamus or in the Alternative Writ of Coram Nobis is denied
15 as time barred and successive and his claim of actual innocence is unfounded, therefore, his
16 Petition is hereby dismissed.
17

18 IT IS SO ORDERED.

19 DATED and DONE this 22 day of March, 2019.
20

21 
22 _____
23 JERRY A. WIESE II
24 DISTRICT COURT JUDGE, DEPT. XXX
25

26 ¹ In *State v. White*, the evidence indicated that although White had orally agreed to stay elsewhere during the
27 week, he still maintained an absolute right to enter the residence and did not forfeit any possessory right he had in it.
28 Further, he could not be ejected or prevented from entering the residence, especially since he still retained his keys to the house and entered it on a weekly basis to stay with his children on weekends. The Court notes that no similar evidence of Mr. O’Keefe’s possessory interest in the residence was presented in the Writ of Coram Nobis.

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Defendant.

**NOTICE OF ENTRY OF
ORDER: ORDER**



DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system, or, if no e-mail was provided, mailed or placed in the Clerk's Office attorney folder for:

Brian O'Keefe

#90244

Lovelock Correctional Center

1200 Prison Road

Lovelock, NV 89419

Steven Wolfson

Clark County District Court Attorney

200 Lewis Avenue

Las Vegas, NV 89155-2212

The Supreme Court of Nevada

Elizabeth Brown, Clerk of the Court

408 East Clark Avenue

Las Vegas, NV 89101



Tatyana Ristic, JEA



DISTRICT COURT
CLARK COUNTY, NEVADA

BRIAN O'KEEFE,)
)
Plaintiff,) Case No. A-18-783689-W
vs.) Dept. XXX
)
THE STATE OF NEVADA,)
)
Defendant.)
_____)

ORDER

This matter, having come before the court on December 5, 2018, on a Defendant's Writ of Mandamus or, in the Alternative, Writ of Coram Nobis, and the court being fully advised in the premises herein, does hereby find the following:

FINDINGS OF FACT

1. An Information was filed on July 6, 2004, charging Brian Kerry O'Keefe, (hereinafter "Defendant") with one count of Battery With Intent To Commit A Crime (Felony — NRS 200.400), three counts of Sexual Assault (Felony — NRS 200.364, 200.366), one count of Attempt Sexual Assault (Felony — NRS 193.330, 200.364, 200.366), and one count of Burglary (Felony — NRS 205.060).
2. Defendant pled not guilty to the charges alleged against him. Trial commenced on October 25, 2004 and concluded on October 28, 2004. The jury returned a verdict of guilty for count one - Battery (Misdemeanor); and count six - Burglary (Category B Felony). Defendant was sentenced on December 27, 2004, on count six to a minimum

1 of twenty-four months and a maximum of one hundred twenty months in the Nevada
2 Department of Corrections. Defendant's sentence was suspended and he was placed
3 on probation for an indeterminate period not to exceed five (5) years. For count one
4 Defendant was sentenced to credit for time served.
5

- 6 3. The Judgment of Conviction was filed on January 3, 2005. Defendant's Notice of
7 Appeal was filed on February 1, 2005. The Nevada Supreme Court affirmed
8 Defendant's Conviction of January 23, 2006. See O'Keefe v. State, Order of
9 Affirmance No. 44644 (Jan. 23, 2006). Remittitur issued on December 13, 2006.
10
11 4. Defendant filed a Petition for Writ of Mandamus seeking transcripts, his file, etc. on
12 July 24, 2006. The State filed its Opposition on August 7, 2006. The Order denying
13 this Petition was filed August 17, 2006. On October 19, 2006, Defendant filed a
14 Motion for New Trial and a Supplement to that motion on November 14, 2006. The
15 motion was denied on December 18, 2006. Defendant filed a Notice of Appeal on
16 December 26, 2006. The Nevada Supreme Court affirmed the district court's denial of
17 Defendant's Motion for New Trial on March 24, 2008; Remittitur issued April 18,
18 2008. See O'Keefe v. State, Order of Affirmance Nos. 48673 and 49329 (March 24,
19 2008).
20
21 5. Defendant filed a Petition for Writ of Habeas Corpus on February 5, 2007. Defendant
22 filed a Supplement to his Petition on February 15, 2007. The State filed its Opposition
23 on April 6, 2007. The court denied his Petition April 11, 2007. Defendant filed a
24 Notice of Appeal on April 19, 2007. The Findings of Fact, Conclusions of Law, and
25 Order was filed May 17, 2007, with Notice of Entry on May 21, 2007. The Nevada
26
27
28

1 Supreme Court affirmed the district court's denial of Defendant's Petition on March
2 24, 2008; Remittitur issued April 18, 2008. See O'Keefe v. State, Order of Affirmance
3 Nos. 48673 and 49329 (March 24, 2008).

- 4
5 6. An Order Honorably Discharging Probationer was filed September 10, 2008,
6 discharging Defendant from Probation. An Order for Disposal of Exhibits was filed
7 October 17, 2012.
- 8
9 7. On December 6, 2013, Defendant filed a Petition for Writ of Mandamus or, in the
10 Alternative, Writ of Coram Nobis in C202793. The State filed a response on. On
11 January 29, 2014, the Court heard and denied the Petition for Writ of Mandamus or,
12 in the Alternative, Writ of Coram Nobis .
- 13
14 8. On October 30, 2018, Defendant filed the instant Writ of Mandamus or, in the
15 Alternative, Writ of Coram Nobis in A-18-783689-W, which was heard and denied on
16 December 5, 2018 and which was decided upon its merit.
- 17
18 9. Defendant appealed the denial of his Writ of Mandamus or, in the Alternative, Writ of
19 Coram Nobis in A-18-783689-W to the Supreme Court;
- 20
21 10. On March 11, 2019, the Nevada Supreme Court issued an order in Appeal case
22 77797 instructing the district court to enter a "*written order memorializing the court's*
23 *decision made on December 5, 2018*", within 60 days. This Order is issued to satisfy
24 that instruction.

25 CONCLUSIONS OF LAW

- 26 1. Pursuant to State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005),
27 it is mandatory for the Court to address the statutory procedural default rules when
28

1 considering post-conviction habeas petitions;

2 2. The mandatory provisions of NRS 34.726 state:

3 1. Unless there is good cause shown for delay, a petition that challenges the validity
4 of a judgment or sentence must be filed within 1 year after entry of the judgment of
5 conviction or, if an appeal has been taken from the judgment, within 1 year after
6 the supreme court issues its remittitur. For the purpose of this subsection, good
cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

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

8 (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.
9

10 3. NRS 34.810(1) (b) (2) requires a court to dismiss a petition if the petitioner's
11 conviction was the result of a trial and the grounds for the petition could have been
12 raised in a direct appeal. A petitioner can avoid dismissal if he meets the burden of
13 pleading and proving specific facts that demonstrate good cause for his failure to
14 present a timely claim and actual prejudice. NRS 34.810(3);
15

16 4. In *Gonzales v. State*, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court
17 rejected a habeas petition that was filed two days late, pursuant to the "clear and
18 unambiguous" mandatory provisions of NRS 34.726(1). *Gonzales* reiterated the
19 importance of filing the petition with the district court within one year mandate,
20 absent a showing of "good cause" for the delay in filing. *Gonzales*, 53 P.3d at 902.
21

22 5. In order to demonstrate good cause, a petitioner must show that an impediment
23 external to the defense prevented him or her from complying with the state procedural
24 default rules." *Hathaway v. State*, 119 Nev. 30, 71 P.3d 503, 506 (2003); citing
25 *Pellegrini v. State*, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); *Lozada v. State*,
26 110 Nev. 349, 353 871 P.2d 944, 946 (1994); *Passanisi v. Director*, 105 Nev. 63, 769
27
28

- 1 P.2d 72 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252
2 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988). Such an external
3 impediment could be 'that the factual or legal basis for a claim was not reasonably
4 available to counsel, or that 'some interference by officials' made compliance
5 impracticable." Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478,
6 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904;
7 citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).
8
9
10 6. To find good cause there must be a "substantial reason: one that affords a legal
11 excuse." Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773
12 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw.
13 1981). The lack of assistance of counsel when preparing a petition, and even the
14 failure of trial counsel, not to forward a copy of the file to a petitioner, have been
15 found to be non-substantial, not constitution good cause. See Phelps v. Director
16 Nevada Department of Prisons, 104 Nev. 656, 660, 764 P.2d 1303 (1988); Hood v.
17 State, 111 Nev. 335, 890 P.2d 797 (1995).
18
19
20 7. NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if "[a]
21 period exceeding five years between the filing of a judgment of conviction, an order
22 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
23 conviction and the filing of a petition challenging the validity of a judgment of
24 conviction...." The statute also requires that the State plead laches in its motion to
25 dismiss the petition. NRS 34.800(2).
26
27
28 8. A colorable showing of actual innocence may excuse a failure to demonstrate good

1 cause under the fundamental miscarriage of justice standard. Pellegrini v. State, 117
2 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842 921
3 P.2d 920, 922 (1996). “[A]ctual innocence’ means factual innocence, not mere legal
4 insufficiency.” Bousley v. United States, 523 U.S. 614, 623 (1998). “To avoid
5 application of the procedural bar to claims attacking the validity of the conviction, a
6 petitioner claiming actual innocence must show that it is more likely than not that no
7 reasonable juror would have convicted him absent a constitutional violation.”
8 Pellegrini, 117 Nev. At 887, 34 P.3d at 537 (citing Schlup v. Delo, 513 U.S. 298, 327
9 (1995)).
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12 DISCUSSION

13 Upon review of Defendant’s Writ of Mandamus or, in the Alternative, Writ of Coram
14 Nobis, the Court failed to address in its Order denying Defendant’s Writ the following: 1)
15 the procedural default rules which apply to Defendant’s petition, 2) the prejudice to the State
16 in responding to the petition or to conduct a retrial, due to the age of the case, and 3) whether
17 Defendant was actually innocent and a failure to consider his petition would result in a
18 fundamental miscarriage of justice.
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21 Defendant’s petition was thirteen years after the judgment of conviction was entered in
22 this case and also four years after the Nevada Supreme Court issued a Remittitur on
23 Defendant’s first appeal. Defendant’s first Petition for Writ of Habeas, filed on July 14,
24 2003, and was denied due to the one year procedural time bar found in NRS 34.726.
25

26 The Petition for Writ of Habeas at issue in this order was filed on October 30, 2018, and
27 could have been denied, as it was successive pursuant to 34.810, and it was time barred
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1 pursuant to NRS 34.726(1), since it was filed more than one year after the conviction.

2 Additionally, NRS 34.800(1) creates a rebuttable presumption of prejudice to the State if
3 “[a] period exceeding five years between the filing of a judgment of conviction, an order
4 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
5 conviction and the filing of a petition challenging the validity of a judgment of
6 conviction....” The statute also requires that the State plead laches in its motion to dismiss
7 the petition. NRS 34.800(2).
8

9
10 To overcome procedural barriers to filing successive and time barred petitions, a
11 petitioner must demonstrate good cause for delay. To demonstrate good cause, a petitioner
12 must show that an impediment external to the defense prevented him or her from complying
13 with the state procedural default rules. Such an external impediment could be ‘that the
14 factual or legal basis for a claim was not reasonably available to counsel, or that ‘some
15 interference by officials’ made compliance impracticable.” *Hathaway*, 71 P.3d at 506
16 (citations omitted). There was no such showing in the present case.
17

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19 To find good cause there must be a “substantial reason: one that affords a legal excuse.”
20 *Hathaway*, 71 P.3d at 506 (citations omitted). No such substantial reason has been provided
21 to this Court.

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23 A colorable showing of actual innocence may excuse a failure to demonstrate good cause
24 under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860,
25 887, 34 P.3d 519, 537 (2001) (additional citations omitted).

26 Although, Defendant failed to demonstrate good cause in filing his time barred
27 successive petition, his petition was based on a claim of actual innocence, and this court
28

1 wants to be sure that an innocent man is not living with a felony conviction that would be
2 improper, and consequently, this Court undertakes the following analysis.

3 Mr. O'Keefe argues that because he was acquitted on Counts 1-5, the underlying basis
4 for his conviction of Burglary (Count 6) was not present, and consequently, he should have
5 been acquitted of Count 6 also. Mr. O'Keefe is incorrect that he was acquitted of Counts 1-
6 5. In fact, he was found guilty of Count 1 - Battery (M), and found not guilty of Counts 2-5.
7 (See Verdict, dated Oct 28, 2004, attached hereto).
8

9 Burglary is defined as follows:
10

11 Except as otherwise provided in subsection 5, a person who, by day or night, enters any
12 house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or
13 other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane,
14 glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or
15 **battery** on any person or any felony, or to obtain money or property by false pretenses, is
16 guilty of burglary.

17
18 (NRS 205.060[1]), emphasis added.
19

20 When Mr. O'Keefe's case was tried to a jury, the Jury was instructed that "Battery means
21 any willful and unlawful use of force or violence upon the person of another. Any person
22 who commits a battery upon another with the specific intent to commit a Sexual Assault is
23 guilty of the offense of Battery With Intent to Commit Sexual Assault." (See Instruction 4,
24 attached hereto).
25

26 The Jury was further instructed that "Every person who, by day or night, enters any
27 apartment with the intent to commit battery and/or sexual assault and/or a felony therein is
28 guilty of burglary." (See Instruction 12, attached hereto).

It is interesting to note that apparently while deliberating, the Jury had a question for the

1 Court as follows: "Please clarify the difference between "battery with intent to commit a
2 crime: and battery. Does the "intent to commit a crime" have to include sexual assault?"
3 The Court's response was "Please refer to and re-read Instructions number 3 and 4." (See
4 Juror Question and Response, attached hereto). Thereafter, the Jury returned a verdict of
5 guilty with regard to battery, but not with the "intent to commit a crime."
6

7 The Jury may have been confused because Instruction 4 discusses the possibility of a
8 conviction for "Battery With Intent to Commit Sexual Assault," but the Jury Verdict Form
9 did not provide that as an option. The Verdict form only provided the options of "Battery
10 With Intent to Commit a Crime" or "Battery." (See Verdict Form)
11

12 Regardless of whether the Jury was confused by the instructions or the verdict form, the
13 Jury did convict the Defendant of "battery" (which means that they found a willful and
14 unlawful use of force or violence upon the person of another), and "burglary," (which means
15 that they found that the Defendant entered an apartment with the intent to commit battery or
16 a felony therein). The Defendant's argument that the conviction of battery cannot support
17 the conviction of burglary is simply inconsistent with the language of NRS 205.060. That
18 statute specifically indicates that a person who enters an apartment or other structure with
19 the intent to commit a battery, is guilty of burglary. (See NRS 205.060).
20
21

22 O'Keefe argues in his Writ of Coram Nobis that he lived and cohabited in the apartment
23 which he was charged with entering. (See pg. 3 of Writ of Coram Nobis). The Nevada
24 Supreme Court has held that "one cannot burglarize his own home so long as he has an
25 absolute right to enter the home." *State v. White*, 130 Nev. 533, 539, 330 P.3d 482 (2014).
26 The Court further indicated that "ownership may be one factor to consider, [but] the
27
28

1 appropriate question is whether the alleged burglar has an absolute, unconditional right to
2 enter the home." *Id.*¹ Other than Mr. O'Keefe's allegation or contention that he "lived
3 there," there is no evidence supporting an "absolute, unconditional right to enter the home."
4 Without more of a record, and without any supporting evidence being submitted by Mr.
5 O'Keefe, this Court must assume, based upon the conviction, that he did not have such an
6 "absolute, unconditional right to enter the home."
7

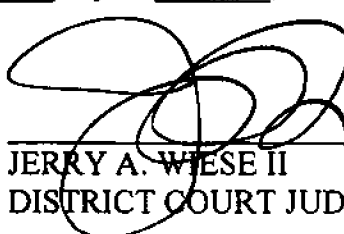
8 Based upon all of the information, evidence, and documentation submitted to this Court,
9 the Court cannot find that Defendant has established his actual innocence. The evidence
10 and argument submitted are simply insufficient to support Mr. O'Keefe's Petition for Writ of
11 Coram Nobis.
12

13 ORDER

14 Defendant's Writ of Mandamus or in the Alternative Writ of Coram Nobis is denied
15 as time barred and successive and his claim of actual innocence is unfounded, therefore, his
16 Petition is hereby dismissed.
17

18 IT IS SO ORDERED.

19 DATED and DONE this 22 day of March, 2019.
20

21 
22 _____
23 JERRY A. WIESE II
24 DISTRICT COURT JUDGE, DEPT. XXX
25

26 ¹ In *State v. White*, the evidence indicated that although White had orally agreed to stay elsewhere during the
27 week, he still maintained an absolute right to enter the residence and did not forfeit any possessory right he had in it.
28 Further, he could not be ejected or prevented from entering the residence, especially since he still retained his keys to the house and entered it on a weekly basis to stay with his children on weekends. The Court notes that no similar evidence of Mr. O'Keefe's possessory interest in the residence was presented in the Writ of Coram Nobis.

27

FILED

APR 22 2019

CLERK OF COURT

NOTC

Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

Brian Kerry O'Keefe ,)
Plaintiff ,)
-vs-)
THE STATE OF NEVADA ,)
et al. Defendant(s).)

Case No. A-18-783689-W
Dept. No. XXX

JUDICIAL NOTICE OF OBJECTION
TO DISTRICT COURT'S ORDER
FILED IN SUPREME COURT
OF NEVADA ON 4/19/2019

Pursuant NRS 47.150(2)

Comes now, Brian O'Keefe, plaintiff pro se, to
humbly provide this Court with a copy, just
received, of the OBJECTION filed on 4/19/2019.

Dated 4/16/2019 pursuant NRS 208.165: Respectfully Submitter,
Brian K. O'Keefe
Brian K. O'Keefe #90244

IN WAKE HAINER v. KERNER, 404 US 512 (1972) pro per

A-18-783689-W
NOTC
Notice
4831108



APR 22 2019
RECEIVED
CLERK OF THE COURT
LCC 11 FORM 24.014

FILED

APR 22 2019

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLERK OF COURT

BRIAN KERRY O'KEEFE

Case No. 77797

Appellant

8TH JUDICIAL DIST. CASE NO. A-18-783689-W

-vs-

CASE-OF-FIRST-IMPRESSION

THE STATE OF NEVADA, et al.

FILED

APR 09 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY DEPUTY CLERK

OBJECTION TO DISTRICT COURT'S ORDER
FILED 3/25/2019 WHICH OMITTS FACTS
AND REMAINS SILENT TO LEGAL FACT
THAT THE STATE COMMITTED FRAUD BY 1
THE SIMULATED FACT THAT O'KEEFE FLED
GUILTY TO COUNTY 6 AND THE COURT LACKED
ANY FELONIOUS CONVICTION AS A JURISDICTIONAL
FACT THAT DID NOT EXIST TO SUSTAIN BURGLARY
AS A MISCARRIAGE OF JUSTICE BY STATE IMPEDIMENT

● SEE AFFIDAVIT OF APPELLANT

* COURT CANNOT RAISE DEFENSES FOR STATE WHO WAIVED.

COMES NOW, Brian O'Keefe, appellant proper, to humbly
file this objection to the district court's order electronically
filed on 3/25/2019 where O'Keefe did not receive until
April 2, 2019 ultimately causing O'Keefe to respond by affidavit.

This action is made and based on the pleadings on file
to place emphasis on the appellant's omitted Motion For
JUDGMENT ON THE PLEADINGS... N.R.Civ.P 8(d) filed 11/30/2018
and the followings Points and Authorities by the attached affidavit.

RECEIVED
28 APR 11 2019
DATED 2nd day of April, 2019 pursuant NRS 208.165 by, Brian L. O'Keefe

FN1: STATE FILED ON N.O.T.I.S. O'Keefe pled guilty
to Burglary as collusion and moral turpitude.
(SEE MORAL-WRONG DOCTRINE)

Brian O'Keefe
LOVELOCK CORR. CTR.
1200 Prison Rd.
LoveLock, NV. 89449

A-18-783689-W

OBJ
Objection
4831108

LCCLL FORM 28.014

AFFIDAVIT OF Brian Kerry O'Keefe
S.C.N. CASE NO. 77797

STATE OF NEVADA)
) SS:
COUNTY OF PERMING)

I, Brian Kerry O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian Kerry O'Keefe.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. Received ORDER "memorializing" where court admits decided on merits on 4/2/19.

4. Court omits procedural fact that O'Keefe timely filed for a Judgment on the pleadings filed 11/30/2018 and other filings, i.e. - 59(e) Motion.

5. Court omits at hearing held 12/05/2018, 9:00 AM, that the State was properly noticed with petition and no opposition was filed. Moreover, Court fails to mention O'Keefe was acquitted of all grades as felonies.
• SEE Nev. Const., Art. 15 § 3 (Count 1 Simple misdemeanor, 6 month sentence)

6. Court fails to address authorities cited which explain that a Burglary charge may be based upon an intent to commit any felony when entering a structure, where Nevada's burglary statute (NRS 205.060) specifically includes [felonious] "assault or battery on any person" as a FELONY that may underlie a burglary. • SEE AGO NO. 2002-15 (3/21/2002)

7. The Court fails to recognize "limitations" and time bars do not apply to expired cases and Petitions of Coram Nobis. O'Keefe is not in custody on this case. "Coram Nobis" is the last stop possible in a Criminal case with a true Voidable judgment. The Court cannot raise procedural defenses that do not apply especially when the state chose not to answer.

8.) O'Keefe attached EXHIBIT 3, as a Certified FOC, is the CRUX of the entire action. O'Keefe stated clearly in his petition that he was acquitted and found "NOT GUILTY" of all felonious intent counts charged only as Counts 1, 2, 3, 4, and 5. (id page 2)

The Court states in his ORDER memorializing (id page 8) that O'Keefe was in fact found guilty of only the simple misdemeanor which does not supply felonious transferred intent to sustain the defective guilty verdict on Count 6 Burglary.

9.) The Court Omits parole was denied on 8/21/2018 based primarily on this VOIDABLE improper Burglary conviction.

10.) "THE DOCTRINE OF 'NECESSARY A SOCIUS' provides that a word is known by the company it keeps and gathers meaning from the words around it." • see AGO No. 2002-15 (March 21, 2002)

• Attorney General's Office of Nevada (Felonious Assault or Battery)
• SEE NRS 205.060

11.) O'Keefe's FOC is a protected liberty interest under the 14th U.S. Const., Amend. and Nev. Const., Art. I § 8(s) where Count 6 was predicated on all or any felonious guilty verdict on Counts 1 to 5, which was not returned by the jury.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 2nd day of April, 2019

12.) VOIDABLE Judgments can be raised at any time in the proper court that entered it.

///

///

///

Brin Kerry O'Keefe #90244/
LOVELOCK CORR. CTR.

row Prison Rd
LOVELOCK NV 89419

S.C.N. CASE No. 77797

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing
(check appropriate box)

☐ Opening Brief

☐ Reply Brief

☐ Motion: _____

☐ Petition: _____

☒ Other: OBJECTION...

to the below address(es) on this 3rd day of April, 2019, by
placing same in the hands of prison staff for posting in the U.S. Mail, per
Nev.R.App.P. 25: Broker Slip No. 2284601

Nevada Supreme Court

OFFICE OF THE CLERK

201 E. Carson Street

Suite 201

Carson City, Nevada 89701

Attorney For _____

☒ and

WHEN FILED STAMPED COPY RETURNS O'Keefe
will serve copy to:

EIGHTH JUDICIAL DIST. CT.

OFFICE OF THE CLERK

200 Lewis Ave. 3rd FLR

Las Vegas, Nevada 89158

CASE NO. A-18-783689-W

Pursuant NRS 204.165

4/2/2019, by

Bruce K. O'Keefe

Bruce K. O'Keefe # 912849

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Appellant

In Pro Se

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Judicial Notice of Objection to the below address(es) on this 16th day of April, 2019, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Box Slip No. 2284838

Brian K. O'Keefe
Brian K. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419
Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Judicial Notice of Objection filed in District Court Case No. A-18-703689-W does not contain the social security number of any person.

Dated this 16th day of April, 2019.

Brian K. O'Keefe
Brian K. O'Keefe
Plaintiff In Pro Se

Brian O'Keefe #90244
LOVELACK CORR CTR.
1200 Prison Rd.
LOVELACK, NV 89449

Lovelock Correctional Center



Chief of the Court (OTH Judicial)
200 Lewis Ave., 3rd FLR
Las Vegas, NV 89155

Pass Slip No. 2264838

LEGAL MAIL

INMATE LEGAL
MAIL CONFIDENTIAL

8910136300 0075

RECEIVED
APR 16 2019
LOVELACK LIBRARY

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 77797
District Court Case No. A783689

FILED

FEB 25 2020

Alma S. Brown
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 20th day of September, 2019.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Review denied."

Judgment, as quoted above, entered this 24th day of January, 2020.

A-18-783689-W
CCJA
NV Supreme Court Clerks Certificate/Judgm
4898584



IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this February 18, 2020.

Elizabeth A. Brown, Supreme Court Clerk

By: Monique Mercier
Administrative Assistant

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77797-COA

FILED

SEP 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Brian Kerry O'Keefe appeals from a district court order denying a petition for a writ of *coram nobis* that was filed on October 30, 2018. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

O'Keefe claims the district court erred by construing his petition as a postconviction petition for a writ of habeas corpus, finding the petition was procedurally barred, and then addressing his actual innocence claim on its merits.

A postconviction petition for a writ of habeas corpus is not available to those who have completed the sentence imposed by the judgment of conviction and are no longer in custody. *See Nev. Const. art. 6 § 6(1); NRS 34.724(1); Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). However, a writ of *coram nobis* is available to "a person who is not in custody on the conviction being challenged." *Trujillo v. State*, 129 Nev. 706, 716, 310 P.3d 594, 601 (2013). Because O'Keefe had served his sentence for the conviction he was challenging, we conclude the district court erred by construing O'Keefe's petition for a writ of *coram nobis* as a postconviction petition for a writ of habeas corpus. Nevertheless, for the

reasons discussed below, we conclude the district court reached the correct result in denying the petition.

"[T] writ of *coram nobis* may be used to address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered." *Id.* at 717, 310 P.3d at 601. The scope of a petition for a writ of *coram nobis* is "limited to errors involving facts that were not known to the court, were not withheld by the defendant, and would have prevented the entry of the judgment." *Id.* "And legal errors fall entirely outside the scope of the writ." *Id.* "[A]ny error that was reasonably available to be raised while the petitioner was in custody is waived, and it is the petitioner's burden on the face of his petition to demonstrate that he could not have reasonably raised his claims during the time he was in custody." *Id.* at 717-18, 310 P.3d at 601-02.

In his petition, O'Keefe challenged his conviction for burglary. He asserted that because the jury did not find him guilty of any felony for the first five counts against him, the jury's guilty verdict for burglary was inconsistent and improper. This claim was reasonably available to be raised by O'Keefe while he was still in custody and he did not demonstrate he could not have reasonably raised this claim while he was in custody. Therefore, this claim was waived. O'Keefe also asserted that his conviction for burglary was legally improper because he lived at the residence he was accused of burglarizing. This claim fell outside the scope of a writ of *coram nobis*. Accordingly, we affirm the denial of the petition.¹ See *Wyatt v. State*,

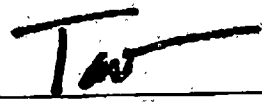
¹Because O'Keefe's claims were either waived or outside the scope of the writ, we need not address his assertion on appeal that the district court erred by not presuming all of his statements were true based on the State's failure to oppose the petition.


86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

O'Keefe also argues the district court abused its discretion by denying his request for counsel. The record demonstrates O'Keefe did not provide any cogent argument in support of his request for counsel. And, as noted above, the claims O'Keefe raised in his petition were either waived or outside the scope of the petition. Accordingly, we conclude the district court did not abuse its discretion by declining to appoint counsel.

Having concluded O'Keefe is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Brian Kerry O'Keefe
Clark County District Attorney
Eighth District Court Clerk

²We have considered all documents O'Keefe has filed in this matter and conclude no relief based upon those documents is warranted.

CERTIFIED COPY

This document is a full, true and correct copy of the original on file and of record in my office.

DATE:

February 15, 2020

Supreme Court Clerk, State of Nevada

By:

[Signature] Deputy

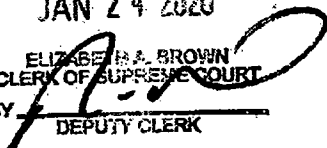
IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77797

FILED

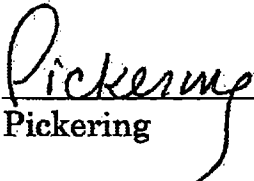
JAN 24 2020

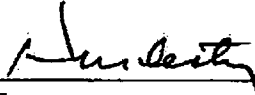
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

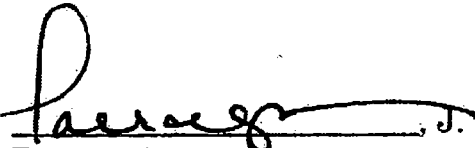
ORDER DENYING PETITION FOR REVIEW

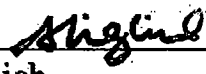
Review denied.¹ NRAP 40B.²


It is so ORDERED.

 C.J.
Pickering

 J.
Hardesty

 J.
Parraguirre

 J.
Stiglich

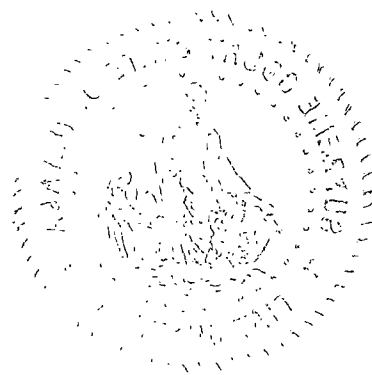
 J.
Cadish

 J
Silver

¹Having considered appellant's "motion for leave to file and motion for supplemental argument for petition for review," filed on January 7, 2020, we conclude that no relief is warranted.

²The Honorable Mark Gibbons, Justice, did not participate in the decision of this matter.

cc: Brian Kerry O'Keefe
Clark County District Attorney
Eighth District Court Clerk





CERTIFIED COPY

This document is a full, true and correct copy of the original on file and of record in my office.

DATE: September 15, 2020

Supreme Court Clerk, State of Nevada

By [Signature] Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 77797
District Court Case No. A783689

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 18, 2020

Elizabeth A. Brown, Clerk of Court

By: Monique Mercier
Administrative Assistant

cc (without enclosures):
Brian Kerry O'Keefe
Clark County District Attorney \ Steven B. Wolfson, District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on FEB 25 2020.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED
APPEALS

FEB 21 2020

CLERK OF THE COURT

Heather A. Hume

CLERK OF THE COURT

OSCC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

BRIAN O'KEEFE, PLAINTIFF(S)
VS.

CASE NO.: A-18-783689-W

NEVADA STATE OF, DEFENDANT(S) DEPARTMENT 30

CIVIL ORDER TO STATISTICALLY CLOSE CASE

Upon review of this matter and good cause appearing,
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to
statistically close this case for the following reason:

DISPOSITIONS:

- ☐ Default Judgment
- ☐ Judgment on Arbitration
- ☐ Stipulated Judgment
- ☐ Summary Judgment
- ☐ Involuntary Dismissal
- ☐ Motion to Dismiss by Defendant(s)
- ☐ Stipulated Dismissal
- ☐ Voluntary Dismissal
- ☐ Transferred (before trial)
- ☐ Non-Jury – Disposed After Trial Starts
- ☐ Non-Jury – Judgment Reached
- ☐ Jury – Disposed After Trial Starts
- ☐ Jury – Verdict Reached
- ☒ Other Manner of Disposition

DATED this 17th day of December, 2020.

Dated this 19th day of December, 2020



JERRY A. WIESE
DISTRICT COURT JUDGE

3F8 D66 FB55 D7CE
Jerry A. Wiese
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Brian O'Keefe, Plaintiff(s)

CASE NO: A-18-783689-W

7 vs.

DEPT. NO. Department 30

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 Electronic service was attempted through the Eighth Judicial District Court's
12 electronic filing system, but there were no registered users on the case.

13
14 If indicated below, a copy of the above mentioned filings were also served by mail
15 via United States Postal Service, postage prepaid, to the parties listed below at their last
known addresses on 12/21/2020

16 Brian O'Keefe

#90244

Brian Kerry O'Keefe

1200 Prison Road

Lovelock, NV, 89419

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Electronically Filed
2/1/2022 10:19 AM
Steven D. Grierson
CLERK OF THE COURT



Brian O'Keefe, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-18-783689-W

Department 30

NOTICE OF HEARING

Please be advised that the Plaintiff's - Motion for Relief from Judgment or Order Pursuant to Rule 60 of the Nevada Rules of Civil Procedure Based on new Change in Law by Scotys and Nevada En Bank Decision of harris or in the Alternative, Motion to Vacate Illegal Sentence in the above-entitled matter is set for hearing as follows:

Date: March 09, 2022

Time: 9:00 AM

Location: RJC Courtroom 14A
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

**THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
133 - 136
WILL FOLLOW VIA
U.S. MAIL**

Heather S. Hemin
CLERK OF THE COURT

Case No. _____

Dept. No. _____

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

* * * * *

Brian Kerry O'Keefe,)

Plaintiff,)

-vs-

THE STATE OF NEVADA,)

Defendant.)

NOTICE OF MOTION

Case No. A-18-183689-W

TO: Clark County District Attorney's Office (CM/ECF)

You and each of you will take notice that the Plaintiff
in the above-entitled action will bring his MOTION FOR RELIEF
FROM JUDGMENT OR ORDER PURSUANT TO RULE 60b ...
before the above-entitled Court and department, for hearing the
same on the _____ day of _____, 20____, at _____m.,
or as soon thereafter as the Court may deem just and proper.

Dated this 24th day of December, 2021.

Brian K O'Keefe
Brian K O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

RECEIVED

26.07.2022 JAN 03 2022

CLERK OF THE COURT

Heather L. Smith
CLERK OF THE COURT

1 MOTN
2 Brian Kerry O'Keefe # 90244
3 Lovelock Correctional Center
4 1200 Prison Road
5 Lovelock, Nevada 89419

6 Petitioner In Pro Se

7 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF CLARK

9 * * * * *

10 BRIAN KERRY O'KEEFE ,)

Case - of - First Impression

11 Plaintiff ,)

Case No. A-18-783689-W

12 -vs-

Dept. No. XXX

13 THE STATE OF NEVADA ,)

(COVID-19) - TELEPHONIC HEARING REQUESTED

14 Defendant .)

Date: _____

TIME: _____

(See ATTACHED EXHIBITS 1, 2 and 3) (Affidavit)

15 MOTION FOR RELIEF FROM JUDGMENT OR ORDER
16 PURSUANT TO RULE 60 OF THE NEVADA RULES OF
17 CIVIL PROCEDURE BASED ON NEW CHANGE IN LAW
18 BY SCOTUS AND NEVADA EN BANC DECISION OF HARRIS *
19 OR, IN THE ALTERNATIVE, MOTION TO VACATE ILLEGAL SENTENCE

20 COMES NOW, Petitioner Brian O'Keefe, pro per, hereby files this Motion For
21 Relief From Judgment Or Order, pursuant NRCVP 60, of its Orders, denying Petition
22 for Writ of Coram Nobis on 3/25/2019 and Closing Case on 12/19/2020, as an
23 equitable remedy based on new federal change in law and en banc decision
24 of Nevada Supreme Court of Harris v. State of Nevada, intra, (2014),
25 where proof of actual innocence warrants this Honorable Court to reopen case of
26 "In the alternative," treat as Motion to Vacate Illegal sentence pursuant to NRS 176.555.
27 Scotus announced any "violent felony" requires a "specific intent," where here a
28 simple misdemeanor battery, by reckless conduct, being a general intent crime,
is not enough to "qualify" as a predicate to support Nevada's violent felony
of Burglary (NRS 205.060(1)), as a crime "against" the property.

Dated this 20th day of December, 2021 pursuant NRS 208.165 by: Brian K. O'Keefe
* (Court may construe Motion as needed in the interest of justice) Brian K. O'Keefe
• INVOKES STATE OF NEVADA, v. WHITE, 330 P.3d 482 at 485 (2014) (interpreted substantive law)

POINTS AND AUTHORITIES

I. ARGUMENT

- a.) NRCIVP 60 - Authority, Jurisdiction, Equitable Rule to reopen;
 - b.) Nev. Const., art. 6 § 6 - All WRITS CLAUSE (CORAM NOBIS);
 - c.) New Constitutional substantive statutory interpretation - SCOTUS;
 - d.) New Proof, Actual Innocence satisfying good cause, "McQuiggin";
 - e.) NRS 176.555 (MOTION TO VACATE ILLEGAL SENTENCE, FILED AT ANYTIME);
 - f.) EXCEPTIONS TO THE LAW-OF-THE-CASE-DOCTRINE, "Hsu v. County of Clark"
- a.) NRCIVP 60 (b) - (RELIEF FROM JUDGMENT OR ORDER)

The evident object of this provision is to relieve a party from the effects of some judgment or order made by the court in its regular proceedings where this Honorable Court had entertained Plaintiff's petition for coram nobis, notably, "dismissing without prejudice," for failure to provide sufficient proof of actual innocence. Rule 60 is remedial and should be liberally construed. ● Heard v. Fisher's & Cobb Sales & Distribs., Inc., 86 Nev. 566, 502 P.2d 104 (1973) ("SCOTUS" announced - "the whole purpose of Rule 60(b) is to make an exception to finality." ● Buck v. Davis, 137 S.Ct. 759, 778 (2017))

The Ninth Circuit recognizes Rule 60(b) as "an equitable remedy to prevent manifest injustice." ● Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008)

● See Vasui v. United States, 772 F.2d 1496, 1498-99 (9th Cir. 1985)

- b.) Nev. Const., art. 6 § 6 - (All Writs clause - Petition for Coram Nobis)

Where custody no longer exists and case is final, the Nevada District Courts always retain original jurisdiction to correct Constitutional errors, to include new substantive statutory interpretation. Before the Court "en banc," the Nevada Supreme Court delineated in Harris v. State of Nevada, 130 Nev. 435, that the new statutory habeas corpus petition (NRS 34.720 - 34.830) did not supersede "Coram nobis," where custody was the integral factor. This was in recognition by the en banc court, the State's obligation, totally,

1 to provide a State corrective judicial process by the Uniform Post
2 Conviction Procedure Act (UPEPA), which includes final cases where
3 "custody" no longer exists. This warrants further and all of
4 Chapter 34 provisions - i.e., NRS 34.720 to 34.830, inclusive - inapplicable.
5 • see "Harris," fn1 (en banc 2014) citing Trujillo v. State, 129 Nev. 706 (2013);
6 citing also Mooney v. Holohan, 294 U.S. 103, 113 (1935); Young v. Raper, 337 U.S. 235, 239 (1949)
7 • c.) NEW CONST., SUBSTANTIVE STATUTORY INTERPRETATION - (Borden v. United States, infra)

8
9 Nevada Appellate Courts recognize Teague v. Lane, 489 U.S. 288 (1989), applying
10 a more liberal version where under the "fundamental-fairness" doctrine
11 the Due Process Clause of the Fourteenth Amendment mandates the new Consti-
12 tutional sudden change in law applies retroactively to state cases when
13 collateral review is applied for within one year of "Borden's" release.
14 • Branham v. Baca, Warden, 134 Nev. 814 (2018) citing Welch v. United States,
15 136 S.Ct. 1257 (2016); Montgomery v. Louisiana, 577 U.S. 190 (2016)

16
17 SCOTUS announced, "violent felony" requires ["specific intent"] knowing
18 use of force, not mere reckless conduct. Onerous criminal statutes
19 like the "violent felony" charged as NRS 205.060(1), cannot be predicated
20 on general intent crimes where the use of force is based on mere
21 reckless conduct. • INVOLVE STATE OF NEVADA V. WHITE, supra

22 The "Borden" court started its opinion by identifying (4)
23 four categories of mental states commonly found in criminal statutes, in
24 descending order of culpability: (1) purposefully, (2) knowingly,
25 (3) recklessly, and (4) negligently. These were further broken down
26 into two groups, with the first two being a deliberate choice to harm
27

28 1: 141 S.Ct. 1817 (June 10, 2021) (retroactive to state cases on collateral review)

someone, and the last two being a disregard for the risk of injury to someone.

In *Voisine v. United States*, 579 U.S. 686 (2016), the Court held that a prior conviction for domestic violence with only a reckless mental state does qualify to prohibit a person from possessing a firearm under § 922 (g)(9). That statute's definition of a qualifying conviction requires "the use of force" like the ACCA's elements clause but without targeting a person. For statute § 922 (g)(9) therefore, the Court concluded that a reckless "mens rea" satisfies the "use" of force to bar a domestic violence offenders from possessing guns.

Notably, the Court expressly left open the question in that case of whether reckless offenses could qualify under more "onerous" criminal statutes, like the ACCA! On June 10, 2021, the "Borden" Court reached the question they reserved in "*Leocal*² and *Voisine*."

A qualifying conviction to predicate a violent felony requires now a [specific intent] - knowing use of force, not mere reckless conduct.

• Accord *Tucker v. State*, 92 Nev. 486, 553 P.2d 951 (Nev. 1976) (Whether intoxication is so gross as to preclude a capacity to form the specific intent necessary to support a burglary charge...); see also *State of Nevada v. Contreras*, 118 Nev. 332, 339 (en banc 2002) (for burglary - § 339 - the predicate crime for which is battery...); (A burglary charge may be based upon the [specific] intent to commit a felonious assault or battery) (id 338).

The "Borden" court addressed the target of the force where the

2. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (a drunk driving offense does not meet the violent felony definition of the elements clause because it is a crime of negligence and not a deliberate act).

1 focus was on the word "against" as used in the elements clause of the
2 ACCA and employed in the Nevada criminal codes (Nev. Rev. Stat., Title
3 15, Chs. 200, 205 (1986) and (2017)).

4 As drafted by the State, Information
5 0202793 was predicated Count 6 (F) Burglary - NRS 205.060(1) (crime
6 "against" the property) then on a specific intent felony Battery
7 with Intent to commit a crime (NRS 200.400) (crime "against a person"),
8 as Count 1.

9 However, the jury acquitted O'Keefe of "ALL" specific intent"
10 and returned a simple battery misdemeanor with a reckless
11 mens rea (crime "against" a person) (CM) NRS 200.481 as a
12 general intent crime which by law cannot support or sustain
13 a (F) Burglary conviction, a violent felony.

14 • Moreover, O'Keefe lived at the residence
15 and cannot commit a crime "against his own property"!

16 • INVOKE State of Nevada v. WHITE, 130 Nev 533 (en banc 2014)

17 This "en banc" ruling would overrule the previous badly reasoned
18 (3) three judge decision which improperly denied - affirming - that
19 [co]habitation was not a viable defense to a charge of burglary.

20 • See EXHIBIT 1 (STATE'S RESPONSE PETITION TO ESTABLISH FACTUAL INNOCENCE)
21 (id. at ¶ 10, lines 22-25) (citing Order of Affirmance, NSC NO. 48673 filed
22 March 24, 2008 at 10. (emphasis added)).

23 Naturally, the State failed
24 to mention that an "En Banc" decision on the issue concerning habitation
25 would trigger the law of the case exception warranting overruling. ("Harris")
26

27 3: Principles of Penal law, substantive law; Model Penal Code adopted in 1962. Nevada
28 does "Employ" the terminology of offenses "against" a person - offenses "against" property.

d.) NEW PROOF, ACTUAL INNOCENCE, SATISFYING GOOD CAUSE, "McQuiggin"

Judicial admissions constitute a formal waiver requiring O'Keefe from having to prove any further and prohibits the State from disputing.

• Reynolds Law & Landscape Design Inc. v. Plaster Development Co., Inc., 127 Nev 331 (2011)

Proof of actual innocence - "here substantial" - provides a true gateway to be heard where under McQuiggin v. Perkins, 569 U.S. 383 (2013), it not only provides good cause to overcome AEDPA bar but also any procedural bar as an equitable means.

The following exhibits demonstrate prima facie case and constitute prima facie evidence supporting my viable affirmative defense of habitation, partnership rights as I couple where no required TPO was pending. (NRCNP8(2))

(EXHIBIT 1 - STATE'S RESPONSE - FILED 7/23/2020 - Case No. A-20-811204-C)

• AS A "STATEMENT OF FACTS" (Victoria Whitmarsh ("the victim") testified that at the time of the crime, she was in a dating relationship with Petitioner. She also testified that she and Petitioner were living together...)

• (id at ¶ 4) (EXHIBIT 1 - STATE'S RESPONSE filed 7/23/2020)

(EXHIBIT 2 - FAST TRACK STATEMENT FILED 8/19/2009, NSC NO. 53858)

• see again "STATEMENT OF FACTS", (id at ¶ 2, line 27) (O'Keefe was convicted of burglary for entering into the couple's joint dwelling...)

(EXHIBIT 3 - NOTICE OF MOTION AND MOTION IN LIMINE TO ADMIT EVIDENCE OF OTHER BAD ACTS... (id at ¶ 6, line 24-26) (The police were called to couple's residence... where Defendant [O'Keefe] and Victoria resided...)

c.) NRS 176.555 - MOTION TO VACATE ILLEGAL SENTENCE (FILED AT ANYTIME)

Finally, an "en banc" decision of "Harris" delineates where "custody" has - with sentence - concluded, any remedy available allows a person to raise a claim that is outside the scope of post conviction NRS 34.724.
• (see fn 1 of Harris)

Where under NRS 176.555⁴, a motion to vacate an illegal sentence can be filed at anytime where the district court is within the scope of this provision and retains the inherent authority to correct and "vacate" an illegal sentence.
• (see "Passanisi", 108 Nev. at 321)

An illegal sentence, in the case at bar, is demonstrated not only on the "jurisdictional fact" of my existing habitation right by attached prima facie evidence as EXHIBITS 1 to 3, but the legal fact that the Court imposing sentence acted without jurisdiction where a miscarriage of justice occurred.

The jury returned simply a misdemeanor battery as a general intent crime based on recklessness. Where "WHITE" (en banc) for the first time interpreted the "substantive law" on NRS 205.060(1), and the law of Nevada holds that - specific intent (feloniously) is necessary to support a burglary charge. • see also Tucker v. State, 92 Nev. 486 (1976) This now becomes clear under Borden v. United States, supra. (see argument ante, ¶ 3-5 on issue)

Under "Harris", C'Kerfe's prior (3) judge decision (NISC 48673 at 10-11, March 24, 2008) affirming is badly reasoned and warrants overruling. Otherwise an aberration in Nevada Law will continue as manifest injustice.

4: Edwards v. The State of Nevada, 112 Nev. 704, 708

F.) EXCEPTIONS TO THE LAW-OF-THE-CASE DOCTRINE, "Hsu v. County of Clark"

Where "LAC" in Nevada, can only be raised on timely NRS 34.724 petition, in aberration in Nevada law occurred by a three judge panel in NRC No. 48673 filed March 24, 2008 affirming claims 9 and 10, as unsound law-of-the-case. • see Hall v. State, 91 Nev 314, 315 (1975)

However, as delineated in en banc - "Harris", 329 P.3d 624 (2014), "when governing decisions prove to be unwarrantable or are badly reasoned, they should be overruled". (citations omitted)

Therefore, the exceptions to the law-of-the-case doctrine should be applied where in Hsu v. County of Clark, 123 Nev 625 (2007), three specific exceptions to the law-of-the-case have been adopted concluding a court may revisit a prior ruling when - (1) subsequent proceeding produce substantially different evidence; (2) there has been an intervening change in controlling law or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced. Plaintiff now meets not only one provision, but all 3! Prima facie evidence as EXHIBITS 1 to 3, the change in law ("Borden") and substantive statutory interpretation, in "White", of NRS 205.060. • (see ante, ¶ 3-5)

"White" and "Borden" with "Tucker" and "Contreras" all manifest that NRS 205.060, as a violent felony (crime against property), must be predicated on a felony, with specific intent, not a simple (m) general intent crime with mere mens rea of recklessness or negligence.

Moreover, O'Keefe had undisputed habitation - partnership rights and could not have faced a burglary conviction where someone cannot legally - subsequent "WHITE" - commit a crime against his property.

II. LEGAL DISCUSSION - REASONS TO GRANT MOTION

• (DUE PROCESS OF LAW / EQUAL PROTECTION OF THE LAW (CLASS OF ONE))

Pursuant Nev. Const., art. I sec. 2, the Nsc is bound by all State authorities. • see *Bargas v. NSP, Warden*, 87 Nev. 30, 31 (1971)

Articulated by "Harris", due process becomes violated under the U.S. Constitution's XIV Amendment, if the State fails to proffer a corrective "judicial process" to challenge Constitutional violations that resulted in a conviction of otherwise a factually innocent person. • see "Harris," citing *Mooney v. Holohan*, 294 U.S. 103, 113 (1935); *Young v. Ragen*, 337 U.S. 235, 239 (1949) (citations omitted) *id* 130 Nev. at 442.

This also applies to any case that is final and the person is no longer in custody.

• (EQUAL PROTECTION OF THE LAW - (NRS 205.060) - CLASS OF ONE)

Notably, equal protection of the law to O'Keefe as a class of one is being continually deprived. On appeal of the denial of state habeas and factual innocence petitions,⁵ affirmed on appeal, the appellate courts of Nevada treat O'Keefe differently than *Weber v. Nevada*, 132 Nev. 1043 (2016) and *Nevada v. White*, *supra*. Here, both decisions ultimately vacated burglary convictions or charges.

Therefore the non-application of my cohabitation viable defense resulted in different treatment to persons with the same issue, where the charge of burglary is inconsistently applied randomly.

• see *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Village of Willow Brook v. O'Lech*, 528 U.S. 562, 564 (2000) (recognizing equal protection right to be consistent).

5: Nsc No. 48673, at 10, 11; 81867-COA at 1-2, 4/23/2021, PFR denied 7/13/2021

1 • Continuing Collateral Consequences Doctrine (Spencer v. Kemna, 523 U.S. 18)

2 • Case no. C202793 (NRS 205.060 - (F) Burglary, Violent Offense)

3 This Court already recognized it would be improper for a man to live
4 with a felony conviction, that was wrongfully used to impeach
5 O'Keefe and his character, used to deny parole and daily counts
6 as an aggravator assessed points when totaling crime score for
7 assessment of risk to reoffend, classification and future parole boards. 6

8
9 Additionally, where O'Keefe has raised the claim timely before,
10 would not the provisions of NRCVP 15(c) relate this back?

11
12 "Our law must not become so caught up in procedural niceties that it fails
13 to sort out simple instances of right from wrong and some redress
14 for the latter." • See ABF Freight System v. NLRB, 510 U.S. 317 (1994)

15
16 "In a society devoted to the rule of law, the difference between violating
17 or not violating a criminal statute cannot be shrugged aside as a
18 minor detail." • see Dretke v. Haley, 541 U.S. 399

19
20 Proof of actual-factual innocence under McQuiggins v. Perkins, supra
21 provide a means where a gateway colorable claim - such as here -
22 can provide good cause and authority to address claim on merits.

23 • see also Pellegrini v. State, 117 Nev. 860, 887 (2001) (citing Schlup v. Delo,
24 513 U.S. 298).

25 Also, O'Keefe asserts the defense of laches to prohibit
26 any wrongful procedural bars where custody no longer exists.
27 • (invoke Harris, White, Borden, 14th Amend.)

28 6: O'Keefe scheduled for parole hearing in 2029. First parole denied 3 yrs.!

III.

SUMMATION

Prima facie evidence is attached EXHIBIT 1, (STATE'S Response, FACTUAL INNOCENCE NRS 34-960, Case NO. A-20-811284-C) manifests the procedural history with the factual innocence judicial admission relevant as an undisputed - "STATEMENT OF FACTS" that up to the time the police arrived, O'Keefe lived there!

And the ambiguity of NRS 205.060(1) implies a "felony" assault or battery is required as a qualifying predicate act. • (see "Contreras")
• (see AGO 2002-15, March 21, 2002; doctrine of noscitur a sociis) (A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately around it). (A.B. Opinion) "Contreras", 2d 110 Nev 338, - "... the burglary statute specifically includes 'assault or battery on any person' as a felony that may underlie a burglary. (emphasis added); see also "WHITE", id 330 P.3d 484-85, - "... entering of the dwelling of another with the INTENT [specific] to commit a FELONY." (emphasis added)

NRS 205.060(1) truly does not distinguish whether it mandates felony, by the omission of the word. Therefore, the void for vagueness doctrine could also be argued. However, other / common-law decisions clarify the argument, as O'Keefe avers. Moreover, would not "Borden" and "White" clarify this issue?

O'Keefe pled "not guilty" where all "Constitutional Rights" exists for collateral attack. A "void judgment" has no force or effect, the invalidity of which can be asserted at anytime by any party, directly or collaterally. From its inception, a void judgment continues to be null.

Finally, conclusions with facts relevant in attached affidavit, here O'Keefe will only highlight facts and trial testimony that sadly questions the Court's integrity, then at trial, and the misconduct of prosecutor Susan Kisko and defense attorneys Buchanan and Kelly.

(FACTS) - • (see affidavit attached)

- 1) Judge Lochner, after hearing trial testimony O'Keefe lived there, remained completely silent. Failed her legal duty, duty to speak and duty to act!
- 2) Failed to strike jury verdict returned on Count 6 subsequent the acquittal of specific intent crime (F) Battery with intent to commit a crime - NRS 200.400 when jury returned misdemeanor battery "without" - the [specific] intent to commit a crime!
- 3) Sent case to dept. 7 for sentencing on 12/21/2007 where Judge Stewart Bell was not aware that I lived at residence.
- 4) Alleged Victim - Victoria - testified and admission made after she let me in, she later went alone to buy beer and cigarettes.
- 5) When Victoria returned, O'Keefe was on phone setting up a move.
- 6) Victoria waited for me to fall asleep, devised her plan.
- 7) O'Keefe's intent was only to come home and shower and sleep resulting from previous instructions, night before - 11:00 pm - to only leave for a cooling off period, only - verified by police.
- 8) At booking, police did not charge O'Keefe with burglary. District Attorney, S. Kisko, stacked charges to scare for a deal.

IV.

CONCLUSION

For the foregoing reasons, O'Keefe requests this Court to:

- 1) Grant motion, under any means, and grant hearing - telephonic - conf;
- 2) Ultimately, vacate count(6) felony burglary sentence;
- 3) provide any other equitable relief warranted in the interest of justice;
- 4) In the minimum, appoint counsel to file counseled Motion. Claim colorable!

AFFIDAVIT OF Brian O'Keefe #90244

STATE OF NEVADA)

Case No. A-18-783689-W

) SS:

COUNTY OF PERKINS)

Related Case No. 04-CZ02793

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe and I'm innocent.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. Sitting trial, Judge Loehrer failed sua sponte to strike burglary charge after hearing trial testimony from "alleged victim" that up to and at time of arrest O'Keefe lived at residence and we were an active couple.
 • see exhibits 1, 2, and 3 (same)

4. Nevada's legislature promulgated their new law NRS 33.018 distinguished specifically from NRS 200.481, taking legal effect Jan. 1 1998.
Judge Loehrer improperly instructed jury on a simple misdemeanor pursuant NRS 200.481 to Count 1, NRS 200.481 (F) Battery with intent to commit a crime despite testimony we were a couple. The court was without jurisdiction. Outside scope based on facts.
 • see English v. Nevada, 116 Nev 828 (2000) (NRS 33.018 distinguished from NRS 200.481)

5. Buchanan's Office told untruth and filed deficient FTS on direct appeal - struck by NRC saying I no longer wished to appeal.
 I declare under penalty of perjury that the foregoing is true and correct, and

that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Monday, 27th day of December, 2021

ENI NRC ORDER FILED June 17, 2005, doc. no. 05-11964, 0280 NO. 44644

Brian O'Keefe
 Brian L. O'Keefe

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION FOR RELIEF FROM JUDGMENT... VACATE ILLEGAL SENTENCE to the below address(es) on this 27th day of December (Monday), 2021, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCIP 5(b): (BAISS Slip No. 2327000)

• INVOKE EDCR 8.05(a), (f); NRCIP 5 CM/ECF SYSTEM:

• see SERVICE LIST - REGISTERED PARTICIPANTS

Clark County District Attorney

FILED PAPER COPY
TO BE RETURNED

NON REGISTERED PARTICIPANT

Brian Kerry O'Keefe

1200 Prison Rd.

Lovelock, Nr. 89419

(All participants of the
cm/ecf system will
be served by the clerk.)

Brian K. O'Keefe

Brian K. O'Keefe # 90244

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Petitioner

In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding

MOTION FOR RELIEF FROM JUDGMENT... VACATE ILLEGAL SENTENCE filed in District Court Case No. A-18-783689-W does not contain the social security number of any person.

Dated this 24th day of December, 2021.

Brian K. O'Keefe

Brian K. O'Keefe

Plaintiff

In Pro Se

EXHIBIT

1

STATE'S RESPONSE - FILED 7/23/2020

Case No. A-20-B11284-C

(6 Pages - 1, 2, 3, 4, 10 and 11)

see pg. 4, lines 20 to 26

EXHIBIT

1



1 RSPN
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 TALEEN PANDUKHT
6 Chief Deputy District Attorney
7 Nevada Bar #005734
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 BRIAN K. O'KEEFE,
13 #1447732
14 Defendant.

CASE NO: A-20-811284-C
04C202793
DEPT NO: XXIII

15 STATE'S RESPONSE TO DEFENDANT'S PETITION TO ESTABLISH FACTUAL
16 INNOCENCE, SUPPLEMENTAL PETITION TO ESTABLISH FACTUAL
17 INNOCENCE, AND MOTION FOR APPOINTMENT OF COUNSEL

18 DATE OF HEARING: August 24, 2020
19 TIME OF HEARING: 10:15 AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and
22 hereby submits the attached Points and Authorities in Response to Defendant's Petition To
23 Establish Factual Innocence, Supplemental Petition to Establish Factual Innocence, and
24 Motion for Appointment of Counsel.

25 This response is made and based upon all the papers and pleadings on file herein, the
26 attached points and authorities in support hereof, and oral argument at the time of hearing, if
27 deemed necessary by this Honorable Court.

28 //

//

\\CLARKCOUNTYDA.NET\CRM\CASE2\2008\695\15\200869515C-RSPN-(OKEEFE, BRIAN)-001.DOCX

see AGO

to commit
FELONY
CRIME

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On July 6, 2004, the State filed an Information charging Brian Kerry O'Keefe, (hereinafter "Petitioner") with: Count 1 – Battery With Intent To Commit A Crime (Felony – NRS 200.400); Counts 2-4 – Sexual Assault (Felony – NRS 200.364, 200.366); Count 5 – Attempt Sexual Assault (Felony – NRS 193.330, 200.364, 200.366); and Count 6 – Burglary (Felony – NRS 205.060). Petitioner plead not guilty to the charges alleged against him.

On October 25, 2004, the jury trial commenced and concluded on October 28, 2004. The jury returned a verdict of guilty for Count 1 – Battery (Misdemeanor); and Count 6 – Burglary (Category B Felony).

On December 27, 2004, the District Court sentenced Petitioner to: Count 1 Credit for time served; and Count 6 a minimum of twenty-four (24) months and a maximum of one hundred twenty (120) months in the Nevada Department of Corrections; suspended, placed on probation for an indeterminate period not to exceed five (5) years. The Judgment of Conviction was filed on January 3, 2005.

On February 1, 2005, Petitioner filed a Notice of Appeal. The Nevada Supreme Court affirmed Petitioner's conviction on January 23, 2006. See O'Keefe v. State, Order of Affirmance No. 44644 (Jan. 23, 2006). Remittitur issued on February 17, 2006.

On July 24, 2006, Petitioner filed a Petition for Writ of Mandamus seeking transcripts, his file, etc. The State filed its Opposition on August 7, 2006. The Order denying this Petition was filed August 17, 2006.

On October 19, 2006, Petitioner filed a Motion for New Trial and a Supplement to that motion on December 13, 2006. The State filed its Opposition on November 14, 2006. The District Court denied the motion on December 18, 2006. On December 26, 2006, Petitioner filed a Notice of Appeal. The Nevada Supreme Court affirmed the district court's denial of Petitioner's Motion for New Trial on March 24, 2008; Remittitur issued April 18, 2008. See O'Keefe v. State, Order of Affirmance Nos. 48673 and 49329 (March 24, 2008).

1 On February 5, 2007, Petitioner filed a Petition for Writ of Habeas Corpus; on February
2 15, 2007, Petitioner filed a Supplement to his Petition. The State filed its Opposition on April
3 6, 2007. The District Court denied his Petition on April 11, 2007. On April 19, 2007, Petitioner
4 filed a Notice of Appeal. The Findings of Fact, Conclusions of Law and Order was filed May
5 17, 2007. The Nevada Supreme Court affirmed the district court's denial of Petitioner's
6 Petition on March 24, 2008; Remittitur issued April 18, 2008. See O'Keefe v. State, Order of
7 Affirmance Nos. 48673 and 49329 (March 24, 2008).

8 An Order Honorably Discharging Probationer was filed September 10, 2008. An Order
9 for Disposal of Exhibits was filed October 17, 2012.

10 On December 6, 2013, Petitioner filed a Petition for Writ of Mandamus or, in the
11 Alternative, Writ of Coram Nobis. He also filed a Motion to Appoint Counsel. The State filed
12 its Response to both Motions on December 18, 2013. On December 19, 2013, Petitioner filed
13 a "Motion To Supplement Petition For A Writ Of Mandamus Or, In The Alternative, Writ of
14 Coram Nobis With A Certified Copy of J.O.C To C202793." On December 27, 2013,
15 Petitioner filed a "Supplement of Evidence of Suicides and Self Mutilations and Mental Health
16 Along with Ninth COA on, Namely, A Double Jeopardy Violation, Case No. 12-15271." On
17 January 28, 2014, Petitioner filed a Reply to the State's Response. On January 29, 2014, the
18 Court denied Petitioner's original Petition and all Supplements pursuant to a hearing. The
19 Order was entered on February 14, 2014. On February 12, 2014, Petitioner filed a Notice of
20 Appeal regarding his Petition for Writ of Mandamus or, in the Alternative, Writ of Coram
21 Nobis. On July 23, 2014, the Nevada Supreme Court affirmed the District Court's judgment.
22 See O'Keefe v. State, Order of Affirmance Nos. 65040 and 65217 (July 23, 2014). On August
23 8, 2014, Petitioner filed a pro-per "Motion to Stay Mandate Pending Certiorary Review." On
24 August 15, 2014, the Nevada Supreme Court granted the Motion and ordered that Remittitur
25 would be stayed until December 1, 2014 and shall issue on December 8, 2014.

26 On January 10, 2014, Petitioner filed a "Motion for Default Judgment for State's Failure
27 to Exercise Simple Reasonable Due Diligence to 'Serve' Petitioner Copy of Opposition in
28 'Conjunction' with 'Filing' with Emphasis on A.G.O. No 2002-15 (March 21, 2002). On

1 January 30, 2014, the State filed its Opposition. On February 3, 2014, Petitioner's Motion was
2 denied pursuant to a hearing. The Order denying Petitioner's Motion was entered on February
3 14, 2014.

4 On September 22, 2014, Petitioner filed a Motion to Appoint Counsel. The State filed
5 its Opposition on October 10, 2014. On October 13, 2014, the District Court denied the
6 Motion; the Court then filed the order on October 29, 2014. On October 24, 2014, Petitioner
7 filed a Notice of Appeal. On December 5, 2014, the Nevada Supreme Court dismissed the
8 appeal.

9 On September 30, 2014, Petitioner filed a "Petition for Writ of Coram Nobis Based on
10 Acquittal of All Felonies Which Underpinned Count 6 Burglary Thereby Court in Want of
11 Jurisdiction With New Sentencing Judge Lacking This Knowledge and Fact!" The State
12 respond on October 20, 2014. On October 22, 2014, the Court took the matter off calendar as
13 the Court did not have jurisdiction due to Petitioner's pending appeal regarding the Writ of
14 Coran Nobis.

15 On February 7, 2020, Petitioner filed the instant "Petition to Establish Factual
16 Innocence Pursuant to NRS 34.900 to NRS 34.990 Inclusive" and a Motion for Appointment
17 of Counsel.¹ On March 10, 2020, Petitioner filed a Supplemental Petition and a Motion for
18 Leave of Court to file the Supplemental Petition. On June 15, 2020, the District Court ordered
19 the State to file a written response. The State responds herein.

20 STATEMENT OF THE FACTS

21 Victoria Whitmarsh ("the victim") testified that at the time of the crime, she was in a
22 dating relationship with Petitioner. Reporter's Transcript on Appeal ("RTA") 10/26/04 at 26-
23 27. She also testified that she and Petitioner were living together at the Budget Suites on
24 Rancho Drive. RTA 10/26/04 at 49. According to Victoria, there was strife in their relationship
25 because of Petitioner's drinking problems and his thoughts that she was unfaithful. RTA
26 10/26/04 at 28-44. The victim testified that she suffered abuse at Petitioner's hands many times

27
28 ¹ On March 20, 2020, Defendant filed a "Motion to Take Judicial Notice of Case Summary of Case No. C202793... as Exhibit 'G'". On June 15, 2020, this Court denied the motion. On April 6, 2020, Defendant filed a Motion to Take Judicial Notice of NRS 33.018 ...Order Vacating Judgment".

1 **A. Petitioner Failed to Establish that His Exhibits and Affidavits Constituted**
2 **Newly Discovered Evidence.**

3 Here, Petitioner failed to provide this Court with any newly discovered evidence.
4 “Newly discovered evidence” means evidence that was not available to a petitioner at trial or
5 during the resolution by the trial court of any motion to withdraw a guilty plea or motion for
6 new trial and which is material to the determination of the issue of factual innocence.” NRS
7 34.930.

8 At trial, Petitioner testified that while he and the victim both paid rent towards the
9 apartment, the apartment at the Budget Suites was in the victim’s name only. RTT- 10/27/04
10 at 110. The victim also testified that she lived with Petitioner at the Budget Suites. RTA
11 10/26/04 at 49. Clearly, this is a fact that was always known to the Petitioner and this evidence
12 was heard by the jury. Accordingly, the attached Exhibits and Affidavits cannot constitute
13 “newly discovered evidence” since this evidence was made available to Petitioner at trial.
14 Moreover, the attachment of the opinion in State v. White cannot constitute newly discovered
15 evidence as this was a legal opinion and separate from his case.²

16 Finally, Petitioner’s submission of the Information and Judgment of Conviction cannot
17 signify “newly discovered evidence” because these documents are not pieces of evidence. For
18 these reasons, Petitioner failed to present any evidence that sufficiently meets the statutory
19 standard of “newly discovered evidence”.

20 **B. Petitioner Failed to Establish Factual Innocence.**

21 Petitioner failed to establish that he was factually innocent of the Burglary conviction
22 and his reliance on State v. White cannot constitute factual innocence. First, Petitioner
23 previously argued that his “counsel was ineffective for failing to present a defense to burglary
24 based on the fact that O’Keefe was a cohabitant of the apartment.” Order of Affirmance,
25 NSC No. 48673, filed March 24, 2008 at 10. (emphasis added). According to the Court,
26 “[b]ecause unlawful entry of the apartment was not a necessary element of burglary,
27 cohabitation of the apartment or lawful entry of the apartment was not a viable defense to the
28

² Petitioner’s arguments’ regarding this case, and the relation to his case, will be discussed below.

1 charge of burglary." Id. The applicable statute at the time was in effect from 1995 until 2005.
2 See NRS 205.060. Since the Nevada Supreme Court issued their decision in State v. White,
3 the Burglary statute had been revised. See NRS 205.060. Accordingly, any additional
4 argument, that is contrary to the appellate court's decision, is barred under the law of the case
5 doctrine. "The law of a first appeal is law of the case on all subsequent appeals in which the
6 facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)
7 (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law
8 of the case cannot be avoided by a more detailed and precisely focused argument subsequently
9 made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Clearly, this
10 alleged "newly discovered evidence"³ is not distinguishable from any other claims made in a
11 previous petition. [Therefore, Petitioner's claim that his cohabitation of the apartment with the
12 victim establishes a claim sufficient to meet the statutory standards of factual innocence is
13 meritless.]

14 Moreover, even if this Court were to determine that State v. White applies now,⁴ any
15 claim would be belied by the record. According to State v. White, "a person with an absolute
16 right to enter a structure cannot commit burglary of that structure." 130 Nev. 533, 538, 330
17 P.3d 482, 485-86 (2014). "[C]onsent to the entry is not a defense to burglary if the person
18 "acquired the entry with felonious intent." Id. at 537-38; 330 P.3d at 485; citing Barrett v.
19 State, 105 Nev. 361, 364, 775 P.2d 1276, 1277 (1989). Further, "while ownership may be one
20 factor to consider, the appropriate question is whether the alleged burglar has an absolute,
21 unconditional right to enter the home." Id. at 538-39, 330 P.3d at 486.

22 Unlike White, where the defendant in that case "could not be ejected or prevented from
23 entering the residence, especially since he still retained his keys to the house...", the Petitioner
24 in this case was previously instructed to leave the property by LVMPD. RTA 10/26/04 at 55;
25 See White, at 539, 330 P.3d at 486. Moreover, the victim testified that she only allowed
26 Petitioner to enter the property under the guise that he was picking up his belongings. RTA
27

28 ³ Which the State argued above there is no "newly discovered evidence".

⁴ Which it cannot as this Court cannot overrule the Nevada Supreme Court. See NEV. CONST. Art. VI § 6.

EXHIBIT

2

FAST TRACK STATEMENT

NSC NO. 53859, 8/19/2009 FILED

Pages 1 and 2

See pg. 2, lines 27-28

EXHIBIT

2

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 53859

District Court Case No. C250630

FILED

AUG 19 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malone*
DEPUTY CLERK

FAST TRACK STATEMENT

1. Name of party filing this fast track statement: Appellant Brian O'Keefe
2. Name, law firm, address, and number of attorney submitting this fast track statement: JoNell Thomas, Clark County Special Public Defender's Office, 330 South 3rd Street, Suite 800, Las Vegas, Nevada 89155, (702) 455-6265.
3. Name if different from trial counsel: n/a
4. Judicial district, county, and district court docket number of lower court proceedings: Eighth Judicial District Court, Clark County, Docket No. C250630
5. Name of judge issuing order appealed from: Honorable Michael Villani
6. Length of trial. 5 days.
7. Conviction appealed from: One count of second degree murder with use of a deadly weapon.
8. Sentence for each count: A term of 10 to 25 years for second degree murder and a consecutive term of 96 months to 240 months for the weapons enhancement.
9. Date district court announced decision, sentence, or order appealed from: 5/5/09.
10. Date of entry of written judgment or order appealed from: 5/8/09
11. If this appeal is from an order on a petition for a writ of habeas corpus n/a
12. If the time for filing the notice of appeal was tolled by a post-judgment motion: n/a

RECEIVED
AUG 19 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

09-20141

299

81867

- 1 13. Date notice of appeal filed: 5/21/09
- 2 14. Specify rule governing the time limit for filing the notice of appeal: NRAP 4(b).
- 3 15. Specify statute which grants this court jurisdiction: NRS 177.015.
- 4 16. Specify nature of deposition. Judgment of conviction entered pursuant to a jury verdict.
- 5 17. Pending and prior proceedings in this court. None known to counsel.
- 6 18. Pending and prior proceedings in other courts. None known to counsel.
- 7 19. Proceedings raising same issues. None known to current counsel.
- 8 20. Procedural history. The State charged O'Keefe with murder with use of a deadly
- 9 weapon. 1 App. 1. He entered a plea of not guilty and invoked his right to a speedy trial.
- 10 1 App. 5. The State filed a motion to admit bad act evidence which was addressed by the
- 11 district court. 1 App. 8. It did not include as a bad act the claim that O'Keefe used a racial
- 12 epithet while talking with an officer. 1 App. 8-9. An Amended Information was filed. 1
- 13 App. 12. The State did not charge a theory of felony murder. 1 App. 12. Trial began on
- 14 March 16, 2009. 1 App. 20, 65. During trial, O'Keefe filed a brief on the admissibility of
- 15 evidence of the alleged victim's history of suicide attempts, anger outbursts, anger
- 16 management therapy, self-mutilation (with knives and scissors) and erratic behavior. 2 App.
- 17 313. Proposed jury instructions were submitted by O'Keefe. 2 App. 322. After five days
- 18 of trial, on March 20, 2009, the jury returned a verdict finding O'Keefe guilty of second
- 19 degree murder with use of a deadly weapon. 2 App. 309, 380. O'Keefe filed a motion to
- 20 settle the record, which addressed matters that took place in chambers and during unrecorded
- 21 bench conferences. 2 App. 381. Argument on the motion took place on April 7, 2009. 2
- 22 App. 387. The sentencing hearing was held on May 5, 2009. 2 App. 391. As noted above,
- 23 this timely appeal followed.
- 24 21. Statement of facts. Brian O'Keefe and Victoria Whitmarsh, the alleged victim, met in
- 25 a treatment facility in 2001. 1 App. 95, 2 App. 256. They dated and co-habitated off and on,
- 26 and had what could be described as a very tumultuous relationship. 2 App. 256-57. In 2004,
- 27 O'Keefe was convicted of burglary for entering into the couple's joint dwelling with the
- 28 intent to commit a crime against Whitmarsh. O'Keefe was sentenced with probation, but his

EXHIBIT

3

STATE'S MOTION IN LIMINE TO
ADMIT EVIDENCE OF OTHER BAD ACTS...

Case No. QZ50630 FILED 1/6/2011

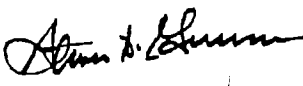
Pages 1 and 6

See pg. 6 - lines 23-28

EXHIBIT

3

A-18-783689-W


CLERK OF THE COURT

0332
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CHRISTOPHER LALLI
Nevada Bar #005398
Chief Deputy District Attorney
LIZ MERCER
Deputy District Attorney
Nevada Bar #0010681
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

BRIAN O'KEEFE,
#1447732

Defendant.

Case No. C250630
Dept No. XVII

**NOTICE OF MOTION AND MOTION *IN LIMINE* TO ADMIT EVIDENCE
OF OTHER BAD ACTS PURSUANT TO NRS 48.045 AND
EVIDENCE OF DOMESTIC VIOLENCE PURSUANT TO 48.061**

DATE OF HEARING: 01/20/2011
TIME OF HEARING: 8:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRISTOPHER LALLI, Chief Deputy District Attorney, and LIZ MERCER, Deputy District Attorney, and files this Notice of Motion and Motion to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS 48.061.

///

///

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* SEE PAGE 60 lines 25-28 "COUPLES RESIDENCE"
"Defendant and Victim's RESIDENCE"

no visible injury, no arrest was made. However, Defendant was escorted from the residence he shared with Victoria by Officer Price with the Las Vegas Metropolitan Police Department and instructed to not return for twenty-four (24) hours. At approximately 11:00 p.m., that same date, Defendant returned to residence, burst through the door open and entered. A verbal argument again ensued. Defendant then began slapping Victoria with open hands on both sides of her face, breaking her glasses in the process. A neighbor who heard the noise telephoned police. Defendant fled the area prior to Officer Price's arrival. When Price responded, he found Victoria crying, in fear, with a visible injury to her face. Defendant was subsequently charged with battery constituting domestic violence, third offense in Case No. C207835. After Jury Trial, Defendant was convicted of the charge and sentenced to twenty-four (24) to sixty (60) months in the Nevada Department of Corrections.

Event Number 040403-1089

On April 3, 2004, Defendant returned to the apartment and began shouting at Victoria for calling the police on him the day prior and continued to accuse her of being unfaithful. Defendant then slapped Victoria across the face and tried to corner her. Victoria was able to escape, fled from the apartment and ran to the apartment office. The manager, Linda Eggleston, heard Victoria screaming, "Help me! Help me!" Eggleston was able to grab Victoria and pull her into her office and lock the door. Then, they called the police. Officer Rumery contacted Defendant at the couple's apartment and he was arrested for two (2) counts battery constituting domestic violence - one for the April 2 incident and one for the April 3 incident. Defendant was charged for both incidents in Las Vegas Municipal Court Case No. C581783A and pled guilty to Battery Constituting Domestic Violence.

Event Number 040529-2232

(Case C202793, Burglary wrongful conviction)

In the late hours of May 28, 2004/early morning hours of May 29, 2004, Victoria and Defendant got into a verbal argument. The police were once again called to the couple's residence and Defendant left for a cooling off period. Later on May 29, 2004 dispatch received a call from the Budget Suites management office where Defendant and Victoria resided reporting a domestic incident between the two (2). Security advised dispatch that

*MAY 29, 2004
INCIDENT*

CIVIL COVER SHEET

Clark

County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone):

Brian Kerry O'Keefe (Loc)
1200 Prison Road
Dove Lake NV. 89419

Attorney (name/address/phone):

Pro per - see above

Defendant(s) (name/address/phone):

Clark County District Attorney
200 Lewis Ave.
Las Vegas NV 89155-2212

Attorney (name/address/phone):

Attorney for Defendant

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ Arbitration Requested

Civil Cases

Real Property

- ☐ Landlord/Tenant
- ☐ Unlawful Detainer
- ☐ Title to Property
 - ☐ Foreclosure
 - ☐ Liens
 - ☐ Quiet Title
 - ☐ Specific Performance
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property
 - ☐ Partition
 - ☐ Planning/Zoning

Negligence

- ☐ Negligence -- Auto
- ☐ Negligence -- Medical/Dental
- ☐ Negligence -- Premises Liability (Slip/Fall)
- ☐ Negligence -- Other

Torts

- ☐ Product Liability
 - ☐ Product Liability/Motor Vehicle
 - ☐ Other Torts/Product Liability
- ☐ Intentional Misconduct
 - ☐ Torts/Defamation (Libel/Slander)
 - ☐ Interfere with Contract Rights
- ☐ Employment Torts (wrongful termination)
- ☐ Other Torts
 - ☐ Anti-trust
 - ☐ Fraud/Misrepresentation
 - ☐ Insurance
 - ☐ Legal Tort
 - ☐ Unfair competition

Probate

- ☐ Summary Administration
- ☐ General Administration
- ☐ Special Administration
- ☐ Set Aside Estates
- ☐ Probate Trust/Conservatorships
- ☐ Other Probate

Other Civil Filing Types

- ☐ Construction Defect
- ☐ Breach of Contract
 - ☐ Building & Construction
 - ☐ Insurance Carrier
 - ☐ Commercial Instrument
 - ☐ Other Contracts/Acct/Judgment
 - ☐ Collection of Actions
 - ☐ Employment Contract
 - ☐ Guarantee
 - ☐ Sale Contract
 - ☐ Uniform Commercial Code
- ☐ Civil Petition for Judicial Review
 - ☐ Other Administrative Law
 - ☐ Department of Motor Vehicles
 - ☐ Employer's Insurance of Nevada
- ☐ Appeal from Lower Court (also check applicable civil case box)
 - ☐ Transfer from Justice Court
 - ☐ Justice Court Civil appeal
 - ☒ Civil Writ CORAM NOBIS - A-18-783689-W
 - ☒ Other Special Proceeding Rule 60
 - ☐ Other Civil Filing
 - ☐ Compromise of Minor's Claim
 - ☐ Conversion of Property
 - ☐ Damage to Property
 - ☐ Employment Security
 - ☐ Enforcement of Judgment
 - ☐ Foreign Judgment - Civil
 - ☐ Other Personal Property
 - ☐ Recover of Property
 - ☐ Stockholder Suit
 - ☒ Other Civil Matters Rule 60

III. Business Court Requested (Please check applicable category; for Clark and Washoe Counties only.)

- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 90)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104B)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademarks (NRS 600A)
- ☐ Enhanced Case Mgmt/Business
- ☐ Other Business Court Matters

Date

12/24/2021 FRIDAY

Signature of initiating party or representative

Brian O'Keefe

See other side for family-related case filings.

LCC LI FORM 26.026

Brian Kerry O'Keefe #90244
Lovelock Corr. Ctr.
1200 Prison Road
Lovelock, NV 89419

LOVELOCK CORRECTIONAL CENTER



U.S. POSTAGE PITNEY BOWES
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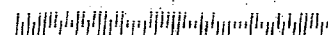
Steven Grierson
Clerk of the Court (Bth Judicial)

200 Lewis Ave., 3rd Fl.
Las Vegas, NV 89101

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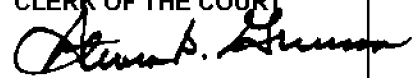
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OPPS
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Clark County District Attorney
Nevada Bar #001565
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN KERRY O'KEEFE,
#1447732

Defendant.

CASE NO: 04C202793

A-18-783689-W

DEPT NO: XXX

**STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF FROM
JUDGMENT OR ORDER PURSUANT TO RULE 60 OF THE NEVADA RULES OF
CIVIL PROCEDURE BASED ON NEW CHANGE IN LAW BY SCOTUS AND
NEVADA EN BANK DECISION OF HARRIS OR IN THE ALTERNATIVE,
MOTION TO VACATE ILLEGAL SENTENCE**

DATE OF HEARING: March 9, 2022
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN AFSHAR, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion. This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 6, 2004, the State charged Brian Kerry O'Keefe ("O'Keefe") by Information
4 with Battery With Intent to Commit a Crime (Felony – NRS 200.400); three counts of Sexual
5 Assault (Felony – NRS 200.364, 200.366); Attempt Sexual Assault (Felony – NRS 193.330,
6 200.364, 200.366) and Burglary (Felony – NRS 205.060). The victim was Victoria Whitmarsh.

7 Jury Trial began on October 25, 2004. On October 28, 2004, the jury found O'Keefe
8 guilty of Battery, a lesser-included charge of Battery With Intent to Commit a Crime, and
9 Burglary. He was found not guilty of the sexual assault and attempt sexual assault charges.
10 The Judgment of Conviction was filed January 3, 2005.

11 O'Keefe filed a Notice of Appeal on December 3, 2004. This was dismissed on as he
12 had not yet been sentenced. Remittitur issued February 4, 2005.

13 On December 27, 2004, O'Keefe was sentenced to credit for time served on Count One,
14 the battery. For Count Six, the burglary, he was sentenced to twenty-four to one hundred
15 twenty months in the Nevada Department of Corrections. The burglary sentence was
16 suspended and O'Keefe placed on probation for up to five years.

17 O'Keefe filed a second Notice of Appeal on February 1, 2005. The Nevada Supreme
18 Court affirmed his conviction on January 23, 2006. Remittitur issued February 17, 2006.

19 An Order Honorably Discharging Probationer was filed September 10, 2008.

20 O'Keefe has attacked his conviction in extensive litigation from 2006 to the present.
21 The district court found O'Keefe to be a vexatious litigant on March 12, 2019, in his murder
22 case, 08C250630. In that case, O'Keefe murdered Victoria Whitmarsh, the victim of the crimes
23 here, on November 5, 2008. He is currently serving a term of imprisonment of one hundred
24 twenty (120) months to a maximum of three hundred (300) months, plus a consecutive term
25 of eight (8) to twenty (20) years for use of a deadly weapon for murder. The Judgment of
26 Conviction for the murder was filed on September 5, 2012, and O'Keefe received 1,394 days
27 credit for time served.
28

1 Though his probation in this case ended years ago and he is now serving a murder
2 sentence on another case, he filed a “Petition for Civil Writ of Coram Nobis Pursuant to
3 Nevada Constitution Article 6 Section 6 Based Upon Now Recognized Trusillo vs. State, 310
4 P.3d 594 (Nev. 2013)” on October 30, 2018. The district court denied the petition on December
5 5, 2018. O’Keefe filed a Notice of Appeal on December 24, 2018.

6 On October 30, 2018, he filed a “Motion to Alter or Amend Judgment of 12/5/18
7 Denying Petition Where State Admitted Plaintiff’s Averments By N.R.Civ.P. 8(d), EDCR
8 2.20.” On January 17, 2019, O’Keefe filed an “Ex Parte Motion for Court to Take Judicial
9 Notice That Premature Notice of Appeal Has No Effect on Jurisdiction to Which District Court
10 Retains Jurisdiction Pursuant Common Law and Pursuant to N.R.A.P. 4(a)(6) (Premature
11 Notice of Appeal) Where O’Keefe also Motioned S.C.N. by Copy as Exhibit A:” On January
12 22, 2019, he filed a “Judicial Notice Pursuant to N.R.S. 47.150(2) of Motion for Leave of Court
13 to File Judicial Notice Pursuant to N.R.S. 47.140 that the Law-of-the-Nevada-Supreme-
14 Court... Therefore Appealable Under N.R.A.P. 3A(b)(1).” On January 30, 2019, Judge Wiese
15 took the matters off calendar as he could not make sense of O’Keefe’s pleadings.

16 On March 21, 2019, O’Keefe filed a “Motion the Court to Take Judicial Notice C.J.
17 Gibbons of the Nevada Supreme Court has Noticed and Provided This Court Opportunity to
18 Reconsider its December 5, 2018 Decision When Filing Order as an Equitable Means Based
19 on Exhibit 3,” as well as a “Supplemental Authority of Dotson v. Nevada, 114 Nev. 582 (1998)
20 Where the Law-of-the-Supreme-Court is NRS 209.451(1)(d) is inapplicable to Chapter 34
21 Habeas Corpus Actions, Period!”

22 On March 25, 2019, the district court filed its Findings of Facts, Conclusions of Law,
23 and Order for the denial of the coram nobis petition.

24 On April 22, 2019, O’Keefe filed a “Judicial Notice of Objection to District Courts’
25 Order Filed in Supreme Court of Nevada on 4/9/2019” and an “Objection to District Court’s
26 Order Filed 3/25/2019 Which Omits Facts and Remains Silent to Legal Fact that the State
27 Committed Fraud by 1 the Simulated Fact that O’Keefe Pled Guilty to Court 6 and the Court
28

1 Lacked Any Felonies Conviction as a Jurisdictional Fact That did not Exist to Sustain Burglary
2 as a Miscarriage of Justice by State Impediment.”

3 The Nevada Court of Appeals affirmed the denial of his petition for coram nobis on
4 September 20, 2019. Remittitur issued February 18, 2020. O’Keefe filed a Petition for Review,
5 which the Nevada Supreme Court denied on January 24, 2020.

6 On February 1, 2022, O’Keefe filed the instant “Motion for Relief from Judgment or
7 Order Pursuant to Rule 60 of the Nevada Rules of Civil Procedure Based on new Change in
8 Law by SCOTUS and Nevada En Bank Decision of Harris or in the Alternative, Motion to
9 Vacate Illegal Sentence.”

10 **STATEMENT OF FACTS**

11 The following is taken from the PSI prepared on December 9, 2004:

12 On May 29, 2004, officers of the Las Vegas Metropolitan Police
13 Department responded to a report of a domestic disturbance, at the Budget
14 Suites, located at 2219 North Rancho Drive. The call was made by Budget
15 Suites Security. Security advised that the victim was very upset and bleeding
16 from the mouth. They also advised that they had the suspect in custody.
17 Dispatch was able to speak to the victim on the telephone. The victim
18 indicated that in addition to being battered, she was also sexual assaulted, by
19 her boyfriend, Brian O’Keefe.

20 When the officers arrived they made contact with the victim, who was
21 visibly upset and crying. The victim stated that she had been beaten by
22 O’Keefe and then forced to engage in anal intercourse. The victim was then
23 transported to the University Medical Center for treatment. Sexual Assault
24 Detectives responded both to the hospital and to the scene.

25 When detectives interviewed the victim at the hospital, she stated that
26 her boyfriend of two and a half years, Brian O’Keefe, had been living
27 together, but have no children in common. The victim stated that she had
28 been the victim of domestic abuse on multiple occasions, at the hands of
O’Keefe. The victim told the detectives that on the night of May 28, 2004,
she and O’Keefe had gone to the Texas Station and consumed alcohol. She
said that she and O’Keefe got into a verbal altercation over his drinking. She
wanted him to stop and go home with her but he refused. She stated that she
left and walked back to the Budget Suites, alone. When she arrived she
contacted security and asked that they escort her to her room, in case O’Keefe
was there. When they arrived at the room, O’Keefe was present. Security
called the police who responded to the scene. Due to the potential for
domestic violence, O’Keefe was asked to leave, for the night.

1 The victim stated that she went to sleep and woke at approximately
2 noon on May 29, 2004, when O'Keefe began knocking on the door. O'Keefe
3 stated that he just wanted to come in and collect his belongings. The victim
4 let him in to the room. The victim stated that as soon as O'Keefe entered the
5 room he became violent. She stated that O'Keefe struck her numerous time
6 in the head, face and body. The victim stated that O'Keefe then pushed her
7 down on the couch and demanded that she preform oral sex on him. She said
8 that she complied out of fear for her life. O'Keefe then forced the victim to
9 engage in vaginal and anal intercourse, eventually ejaculating inside her
10 anus. The victim stated that during the attack, O'Keefe was verbally abusive
11 and accused her of having sex with other men. Approximately thirty minutes
12 later, O'Keefe attempted to force the victim to engage in oral and vaginal
13 intercourse. He did force anal intercourse on the victim, once again. The
14 victim stated that she convinced O'Keefe to stop so she could use the
15 bathroom. The victim stated that she went into the bathroom and did not
16 come out until she saw that O'Keefe was passed out on the bed. The victim
17 then left the room and contacted security.

18 O'Keefe was transported to the Las Vegas Metropolitan Police
19 Department, Sexual Assault Office, for a formal interview. O'Keefe began
20 by denying any type of physical altercation. He later recanted and admitted
21 that he did have a physical altercation with the victim when he returned to
22 the room. O'Keefe stated that the sexual contact between he and the victim
23 was consensual and that he did not force the victim to engage in any sexual
24 contact.

25 The defendant was arrested and booked at the Clark County Detention
26 Center.

27 PSI at 4-5.

28 ARGUMENT

29 O'Keefe claims actual innocence based on a creative mashup of a wide-ranging
30 collection of statutes, federal cases interpreting federal law, and civil procedural rules. He
31 would like his 2018 Petition for Writ of Coram Nobis to be granted, even though this Court's
32 denial of the petition has been affirmed by the Nevada Supreme Court. Alternatively, he would
33 like his sentence vacated, even though his probation ended in 2008. O'Keefe makes no
34 coherent showing of an entitlement to relief.

35 **I. The Denial of O'Keefe's Petition for Writ of Coram Nobis Has Been Affirmed.**

36 In his 2018 petition, O'Keefe argued that his acquittal on sexual assault charges should
37 negate his burglary conviction. Further, O'Keefe asserted he lived in the hotel room and
38

1 therefore could not be convicted of burglarizing his own residence. O’Keefe would now like
2 this Court to overturn the Nevada Court of Appeal’s affirmance of the denial of his petition
3 for writ of coram nobis, because that ruling was “badly reasoned.” Motion at 5.

4 The district court, desiring to ensure “an innocent man is not living with a felony
5 conviction that would be improper,” considered the petition on its merits. Order, filed March
6 25, 2019 (“Order”) at 8. The court noted that NRS 205.060, the burglary statute, included
7 entering a building with the intent to commit a battery, and O’Keefe was convicted of battery.
8 Order at 8. Therefore, the court found O’Keefe’s claim belied by the burglary statute. Order at
9 9. Regarding his claim that he could not burglarize his own home, the district court said
10 O’Keefe made only a bare, naked assertion that he had an absolute right to enter, and this did
11 not suffice to overturn the jury’s consideration of the evidence. Order at 10.

12 The Nevada Court of Appeals upheld the district court’s denial of the petition. The
13 appellate court concluded the lower court had erred by treating the petition as a writ of habeas
14 corpus, but that the court came to the correct conclusion after considering its merits. O’Keefe
15 v. State, Docket No. 77797-COA, Affirmance, filed September 20, 2019 (“Affirmance”), at 1-
16 2. The Court of Appeals clarified the writ of coram nobis could be used to “address errors of
17 fact outside the record that affect the validity and regularity of the decision itself and would
18 have precluded the judgment from being rendered.” Affirmance at 2. All legal errors were
19 outside the scope, and any error that could have been raised while O’Keefe was still in custody
20 was waived. Affirmance at 2.

21 The Nevada Court of Appeals said O’Keefe’s claim that the not guilty verdict on some
22 claims precluded his guilty conviction for burglary was “reasonably available to be raised by
23 O’Keefe while he was still in custody and he did not demonstrate he could not have reasonably
24 raised this claim while he was in custody.” Affirmance at 2. By not raising the claim in a timely
25 manner, the Court of Appeals held the claim was waived, regardless of its merit. Affirmance
26 at 2. Regarding his claim that he could not burgle his own residence, the Court of Appeals said
27 this was a legal claim, not a factual one, and was therefore out of the scope of a writ of coram
28

1 nobis. Affirmance at 2. The Court held all of O’Keefe’s claims were waived or outside the
2 scope, so it affirmed the district court’s denial of the petition. Affirmance at 3.

3 This petition has been heard, decided on its merits, appealed, affirmed, and denied
4 rehearing.

5 **II. IF THIS IS A MOTION TO CORRECT A SENTENCE, IT IS INCORRECTLY**
6 **FILED**

7 If this Court will not overturn the affirmance of the denial of his petition for writ of
8 coram nobis, O’Keefe would like it to “vacate illegal sentence.” Motion at 7.

9 O’Keefe actually wants to overturn his burglary conviction entirely, as it can be used
10 to “impeach O’Keefe and his character.” Motion at 10. This is not a case where his reputation
11 in the community could be harmed by his burglary conviction; first, he is in Lovelock prison,
12 not the community, and second, his murder conviction is likely more damaging to his
13 reputation.

14 A motion to vacate an illegal sentence cannot be used to ward off “continuing collateral
15 consequences” of a conviction. The motion, if successful, does not affect the conviction at all;
16 it merely returns a defendant to the sentencing court for resentencing. If the district court has
17 to resentence O’Keefe for burglary, it will likely sentence him to time served, since his
18 probation has expired. The conviction, however, will remain unchanged.

19 The Nevada Supreme Court has emphasized that a “motion to modify a sentence is
20 limited in scope to sentences based on mistaken assumptions about a defendant’s criminal
21 record which work to the extreme detriment of the defendant.” Edwards v. State, 112 Nev.
22 704, 708, 918 P.2d 321, 325 (1996). “[S]uch a motion cannot be used as a vehicle for
23 challenging the validity of a judgment of conviction or sentence based on alleged errors
24 occurring at trial or sentencing.” Id. at 708, 918 P.2d at 324. A motion to modify or correct an
25 illegal sentence “presupposes a valid conviction and may not, therefore, be used to challenge
26 alleged errors in proceedings that occur prior to the imposition of sentence.” Id.

27 O’Keefe does not allege his sentence was based on a mistaken assumption about his
28 criminal record. Rather, he wishes to attack the conviction itself, asserting that because he

1 resided in the hotel room he burgled, this robs the court of jurisdiction. Regardless of the facts
2 of the case, the trial court had jurisdiction over O'Keefe's burglary conviction, just as it did
3 over his sexual assault acquittals. NRS 171.010. Since a motion to correct a sentence
4 presupposes a valid conviction, O'Keefe's conviction cannot be attacked in this manner.

5 Regardless, if O'Keefe wishes to file a motion to correct his sentence, he must do so
6 under case number 04C202793, as A-18-783689-W refers strictly to his petition for writ of
7 coram nobis.

8 CONCLUSION

9 Based on the foregoing, the State respectfully requests that this Court deny O'Keefe's
10 motion.

11 DATED this 18th day of February, 2022.

12 Respectfully submitted,
13 STEVEN B. WOLFSON
Clark County District Attorney
14 Nevada Bar #001565

15 BY /s/JOHN AFSHAR
16 JOHN AFSHAR
Deputy District Attorney
Nevada Bar #14408

17 CERTIFICATE OF MAILING

18 I hereby certify that service of the above and foregoing was made this 18th day of
19 February, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

20 BRIAN O'KEEFE #90244
21 LOVELOCK CORRECTIONAL CENTER
22 1200 Prison Road
23 Lovelock, NV 89419

24
25 BY /s/D. Daniels
26 Secretary for the District Attorney's Office
27
28

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77797-COA

FILED

SEP 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Brian Kerry O'Keefe appeals from a district court order denying a petition for a writ of *coram nobis* that was filed on October 30, 2018. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

O'Keefe claims the district court erred by construing his petition as a postconviction petition for a writ of habeas corpus, finding the petition was procedurally barred, and then addressing his actual innocence claim on its merits.

A postconviction petition for a writ of habeas corpus is not available to those who have completed the sentence imposed by the judgment of conviction and are no longer in custody. *See Nev. Const. art. 6 § 6(1); NRS 34.724(1); Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). However, a writ of *coram nobis* is available to "a person who is not in custody on the conviction being challenged." *Trujillo v. State*, 129 Nev. 706, 716, 310 P.3d 594, 601 (2013). Because O'Keefe had served his sentence for the conviction he was challenging, we conclude the district court erred by construing O'Keefe's petition for a writ of *coram nobis* as a postconviction petition for a writ of habeas corpus. Nevertheless, for the

reasons discussed below, we conclude the district court reached the correct result in denying the petition.

“[T] writ of *coram nobis* may be used to address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered.” *Id.* at 717, 310 P.3d at 601. The scope of a petition for a writ of *coram nobis* is “limited to errors involving facts that were not known to the court, were not withheld by the defendant, and would have prevented the entry of the judgment.” *Id.* “And legal errors fall entirely outside the scope of the writ.” *Id.* “[A]ny error that was reasonably available to be raised while the petitioner was in custody is waived, and it is the petitioner’s burden on the face of his petition to demonstrate that he could not have reasonably raised his claims during the time he was in custody.” *Id.* at 717-18, 310 P.3d at 601-02.

In his petition, O’Keefe challenged his conviction for burglary. He asserted that because the jury did not find him guilty of any felony for the first five counts against him, the jury’s guilty verdict for burglary was inconsistent and improper. This claim was reasonably available to be raised by O’Keefe while he was still in custody and he did not demonstrate he could not have reasonably raised this claim while he was in custody. Therefore, this claim was waived. O’Keefe also asserted that his conviction for burglary was legally improper because he lived at the residence he was accused of burglarizing. This claim fell outside the scope of a writ of *coram nobis*. Accordingly, we affirm the denial of the petition.¹ See *Wyatt v. State*,


¹Because O’Keefe’s claims were either waived or outside the scope of the writ, we need not address his assertion on appeal that the district court erred by not presuming all of his statements were true based on the State’s failure to oppose the petition.

86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

O'Keefe also argues the district court abused its discretion by denying his request for counsel. The record demonstrates O'Keefe did not provide any cogent argument in support of his request for counsel. And, as noted above, the claims O'Keefe raised in his petition were either waived or outside the scope of the petition. Accordingly, we conclude the district court did not abuse its discretion by declining to appoint counsel.

Having concluded O'Keefe is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Brian Kerry O'Keefe
Clark County District Attorney
Eighth District Court Clerk

²We have considered all documents O'Keefe has filed in this matter and conclude no relief based upon those documents is warranted.



1 NOCH

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 ****

6 Brian O'Keefe, Plaintiff(s)

Case No.: A-18-783689-W

7 vs.

Department 30

8 Nevada State of, Defendant(s)

9
10 **NOTICE OF CHANGE OF HEARING**

11 The hearing on the Motion, presently set for March 09, 2022, at 8:30 AM, has been moved
12 to the 10th day of March, 2022, at 8:30 AM and will be heard by Judge Jerry A. Wiese.

13
14 STEVEN D. GRIERSON, CEO/Clerk of the Court

15 By: /s/ Michelle McCarthy

16 Michelle McCarthy

17 Deputy Clerk of the Court

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that this 1st day of March, 2022

20
21 ☒ The foregoing Notice of Change of Hearing was electronically served to all registered
22 parties for case number A-18-783689-W., and email to:

23 District Attorney : motions@clackountyda.com

24 Attorney General : wiznetfilings@ag.nv.gov

25 /s/ Michelle McCarthy

26 Michelle McCarthy

27 Deputy Clerk of the Court



**DISTRICT COURT
CLARK COUNTY, NEVADA**

Brian O'Keefe, Plaintiff(s)

vs.

Nevada State of, Defendant(s)

Case No.: A-18-783689-W

04C202793

Department 24

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been reassigned to Judge Erika Ballou.

☒ This reassignment is due to: per minute order dated 3/9/22.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion for Relief, on 03/21/2022, at 8:30 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Heather Kordenbrock

Heather Kordenbrock, Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 10th day of March, 2022

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-18-783689-W.

☒ I mailed, via first-class, postage fully prepaid, the foregoing Clerk of the Court, Notice of Department Reassignment to:

Brian Kerry O'Keefe #90244

1200 Prison Road

Lovelock NV 89419

/s/ Heather Kordenbrock

Heather Kordenbrock, Deputy Clerk of the Court

Heather L. Hume
CLERK OF THE COURT

MOTION
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

* * * * *

BRIAN KERRY O'KEEFE,)
)
Plaintiff,)
)
-vs-)
)
THE STATE OF NEVADA,)
)
Defendant.)

Case No. A-18-783689

Dept. No. XXX

MOTION FOR JUDGMENT ON THE PLEADINGS
WHERE PLAINTIFF INVOKES RULE 8 (b) (6)
AND EDCR 2.20 FOR JUDICIAL ADMISSIONS
O'KEEFE HAD HABITATION AND OCCUPANCY 1
RIGHTS WARRANTING ORDER TO VACATE COUNT 6

HEARING DATE: 3/9/2022
TIME : 09:00AM

COMES NOW, Brian O'Keefe, Plaintiff proper, who hereby moves
this honorable court for an "order" vacating Count-6, Information.
This motion is made on affidavit with supporting points
and authorities - , Respectfully Submitted,

Brian K. O'Keefe
Brian K. O'Keefe

Dated this 14th day of February 2022 pursuant NRS 208.165.

1 Case C202793, COUNT 6 (NRS 205.060) (BURGLARY) - see Doc certified
attached, 2 pages.

RECEIVED

LCC LT FORM 24.014
FEB 22 2022
CLERK OF THE COURT

I.

POINTS AND AUTHORITIES

Argument: Plaintiff invokes procedural due process, 14th Amend.
Pursuant NRCVP 12(c), Plaintiff moves this Honorable Court for a judgment on the pleadings, electronically filed 2/1/2022, where the State and Officers of the court manifested undisputable "judicial admissions" certifying Plaintiff O'Keefe's viable affirmative defense of "habitation and occupancy" rights. As a matter of law, the prima facie evidence as EXHIBITS 1, 2 and 3, attached to the action filed 2/1/2022, constitute a formal waiver of proof which now relieves Plaintiff O'Keefe from having to prove his habitation and true occupancy rights and further "prohibits" the defendants from disputing said fact.

Additionally, the defendants failed to respond to action filed 2/1/2022 where this Court has scheduled a hearing on 3/9/2022 where the Clerk of the Court swears that "NOTICE" was provided to the Clark County District Attorney with attached action pursuant NEFCR 9 and EDCR 8.05(a) and (f).

Plaintiff thereby invokes NRCVP 8 (b)(6), 12(c) and EDCR 2.20 for appropriate "ORDER" from this Court.
(see affidavit attached) O'Keefe invokes affirmative defenses of NRCVP 8(c)(6) (estoppel); (R) (sol) and (s) (Waiver).

II.

CONCLUSION

ISSUE "ORDER" vacating Court 6 judgment of conviction.

AFFIDAVIT OF Brian O'Keefe #90244

STATE OF NEVADA)

Case no. A-18-783689-W (related case C202793)

) SS:

Dept. no. XXX

COUNTY OF PERKINS)

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe,

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. The law prohibits the court from raising defenses for the defendant.

4. The defendant failed to respond waiving defenses of habitation and any "Teague" argument relating to Borden v. U.S., supra.

5. Defendants already - in fact - by "judicial admissions" waived any right to dispute habitation and occupancy rights established as prima facie evidence as exhibits 1, 2, 3. They are estopped from disputing - see NRCVP 8(c)(6) (estoppel)

6. Plaintiff invokes NRCVP 8(b)(6) and 12(c) with EDCR 2.20.

7. Plaintiff demands and is entitled to an "ORDER" from this Court (NRCVP 12(c)) vacating Court's Burglary JOC. (see attached)

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Monday 14th day of February, 2022

1 EXHIBITS attached to pleading
Filed 2/1/2022, case no.
A-18-783689-W.

Brian L. O'Keefe
Brian L. O'Keefe
pro per #90244

*SA case
acquitted
SA*

1 **JOC P**
2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **200 South Third Street**
6 **Las Vegas, Nevada 89155-2212**
7 **(702) 455-4711**
8 **Attorney for Plaintiff**

DISTRICT CO.
CLARK COUNTY,

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

Case No: C202793

Dept No: XV

11 **BRIAN KERRY OKEEFE,**
12 **#1447732**

13 **Defendant.**

14
15 **JUDGMENT OF CONVICTION (JURY TRIAL)**

16 The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNT 1 -
17 BATTERY WITH INTENT TO COMMIT A CRIME (Felony); COUNT 2 - SEXUAL
18 ASSAULT (Felony); COUNT 3 - SEXUAL ASSAULT (Felony); COUNT 4 - SEXUAL
19 ASSAULT (Felony); COUNT 5 - ATTEMPT SEXUAL ASSAULT (Felony); and COUNT
20 6 - BURGLARY (Felony), in violation of NRS 200.400; 200.364, 200.366; 193.330,
21 200.364, 200.366; 205.060, and the matter having been tried before a jury, and the

22 Defendant being represented by counsel and having been found guilty of the crime(s) of

23 **COUNT I - BATTERY (Misdemeanor); and COUNT VI - BURGLARY (Category B**
24 **Felony), in violation of NRS 200.481; 205.060; and thereafter on the 27th day of December,**

25 **2004, the Defendant was present in Court for sentencing with his counsel,**

26 **and good cause appearing therefor,**

27 **THE DEFENDANT HEREBY ADJUDGED guilty of the crime(s) as set forth in the**
28 **jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee, a \$150.00 DNA**

1 Analysis Fee and submit to testing to determine genetic markers, the Defendant is sentenced
2 as follows: on COUNT 6 - to a minimum of twenty-four (24) months and a maximum of one
3 hundred twenty (120) months in the Nevada Department of Corrections; SUSPENDED;
4 placed on probation for an indeterminate period not to exceed five (5) years, and on COUNT
5 1 - Defendant sentenced to CREDIT FOR TIME SERVED. CONDITIONS: 1) No contact
6 with the victim initiated by Defendant. Court advised Defendant any contact that the victim
7 initiates will not be a problem for him; 2) Search clause/burglary tools; 3) Complete
8 Domestic Violence counseling; 4) Secure and maintain full time employment; 5) Mental
9 Health counseling as deemed necessary by Parole and Probation; 6) Resolve the warrant
10 from the State of Ohio within the next one hundred twenty (120) days; 7) Four (4) hours of
11 community service work each week. Case closed.

12 DATED this 30 day of December, 2004.

13
14 ~~STEWART L. BELE~~ *for* SALLY LOEHNER
15 DISTRICT JUDGE
16
17
18
19
20
21
22

23
24 CERTIFIED COPY
25 DOCUMENT ATTACHED IS A
26 TRUE AND CORRECT COPY OF
27 THE ORIGINAL OR ELECTRONICALLY
28 FILED DOCUMENT ON FILE

2005 JAN -3 P 4 03

Sally B. Loehner
da
CLERK

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF MOTION to the below address(es) on this 14th day of February, 2022, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): by Brass Slip No. 2320193.

• INVOKE EDCR 8.05.(2), (7); NRCP 5 CM / ECF SYSTEM:

• see Service List :

All participants of the CM / ECF system will be served by the clerk.

Registered user

Clark County District Attorney

Non - Registered user

Brian K. O'Keefe

1200 prison Rd.

Lovelock, NV. 89419

Brian K. O'Keefe

Brian K. O'Keefe # 90244

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION does not contain the social security number of any person.

Dated this 14th day of February, 2022.

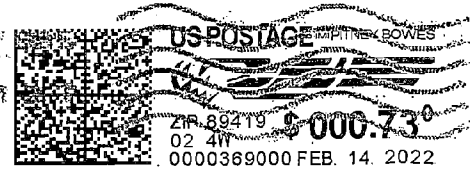
Brian K. O'Keefe

Brian K. O'Keefe

Plaintiff In Pro Se

Brian O'Keefe #90244
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV. 89419

RENO, NV
LOVELOCK CORRECTIONAL CENTER



INMATE LEGAL
MAIL CONFIDENTIAL

BIRTH Slip no. 2320193
OUT 2/14/2022
LEGAL MAIL

Clerk of the Court
Steven Garrison (8th Jud.)
200 Lewis Ave., 3rd FLR
Las Vegas, NV. 89158
ATTN: Confidential

8910136200

RECEIVED
FEB 11 2022
LCC E-FILE

Heather L. Lamin
CLERK OF THE COURT

1 RPLY
2 Brian Kerry O'Keefe # 90244
3 Lovelock Correctional Center
1200 Prison Road
4 Lovelock, Nevada 89419

5 Petitioner In Pro Se

6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF CLARK

8 * * * * *

9 BRIAN KERRY O'KEEFE,)
10 Plaintiff,) Case No. A-18-783689-W
11 -vs-,) Dept. No. XXX
12 THE STATE OF NEVADA,)
13 Defendant.)

14 MOTION TO STRIKE STATE'S UNTIMELY OPPOSITION
15 TO MOTION FOR RELIEF FROM JUDGMENT OR
16 ORDER PURSUANT TO NEVADA RULES OF CIVIL
17 PROCEDURE 12 (F) INVOKING EDCR 2.20, 3.20

18
19 COMES NOW, Brian O'Keefe, pro per, who hereby files this
20 action for an Order "striking" State's untimely opposition
21 filed on 2/18/2022 despite EDCR 2.20 and 3.20.

22
23 This motion is filed on the following Points and Authorities too
24 including the Plaintiff's Rule 60 (b) motion filed 2/01/2022
25 with the Motion For A Judgment on The Pleadings mailed 2/1/2022.

26
27 Dated this 23rd day of February 2022 pursuant NRS 208.165 by Brian O'Keefe

28 RECEIVED

FEB 28 2022

CLERK OF THE COURT

Brian O'Keefe
pro per #90244

LCC LL FORM 24.014

I.

POINTS AND AUTHORITIES

Plaintiff mailed 12/24/2021 Rule 60(b) motion or, in the alternative, Motion to Vacate Illegal Sentence where court clerk filed on 2/01/2022, despite stamping action received on 1/03/2022.

Pursuant EDCR 2.20 and 3.20 the State had 10 days to file a response and moreover, where the action pertained to a true criminal matter, the rule 3.20 allows only seven days to file a response and notice movant. Therefore, the State waives any "Tegure" argument on retroactivity. Procedural due process and the rule of law applies where now Plaintiff O'Keefe is permitted to file this motion to strike under NRCIVP 12(f), once Plaintiff learned from an outside source that the State finally chose to file an undisputed - "late" opposition on 2/18/2022.

The State's choice to file an opposition demonstrates a complete lack of integrity and waste of tax dollars when the Clark County District Attorney representatives made MULTIPLE "judicial admissions" that Plaintiff O'Keefe lived at the residence establishing habitation and occupancy rights which is a viable defense to a charge or conviction on Burglary in Nevada, as the basis to the claim.

II.

CONCLUSION

Grant Motion To Strike State's untimely Opposition by an ORDER.

FN1 Clerk electronically served defendant being a registered participant of the CM/ECF system. (EDCR 8.05)

FN2 Court to "issue" ORDER.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF MOTION to the below address(es) on this 23rd day of February, 2022, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCIP 5(b):

- INVOKE EDCR 8.05 (2) (4); NRCIP 5 (CM/ECF SYSTEM) (NEFCR)
- see Service List - Registered Participant

Clark County District Attorney

CLERK NOTE:

All registered participants of the CM/ECF system will be served by the clerk.

Non-Registered Participant - Paper Copy
Brian O'Keefe #90244
1200 Prison Road
Lovelock, NV. 89419

Brian K. O'Keefe

Brian K. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff

In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding ~~NOTICE OF MOTION~~ MOTION TO STRIKE does not contain the social security number of any person.

Dated this 23rd day of February, 2022.

Brian K. O'Keefe

Brian K. O'Keefe

Plaintiff

In Pro Se

Brian Kerry O'Keefe #90244
LOVELOCK CORR. CTR.
1200 Prison Rd.
LoveLock, NV. 89419

LOVELOCK CORRECTIONAL CENTER

CLERK OF THE COURT

FEB 28 2022

RECEIVED

Clerk of the Court
Steven Emerson
200 Lewis Ave., 3rd FLR.
Las Vegas, NV. 89

INMATE LEGAL
MAIL CONFIDENTIAL

out 2/22/2022
LEGAL MAIL

99101\$6300 C075

0000369000 FEB. 23. 2022



US POSTAGE PAID PITNEY BOWES
ZIP 89419 \$ 000.53⁰
02 4W
0000369000 FEB. 23. 2022

LCC LAW LIBRARY
FEB 22 2022
RECEIVED

Heather S. Hume

CLERK OF THE COURT

ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
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 O'KEEFE,
Petitioner #1447732

Defendant.

CASE NO: A-18-783689-W
(C-04-202793)

DEPT NO: XXIV

ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

DATE OF HEARING: March 17, 2022
TIME OF HEARING: 2:30 A.M.

THIS MATTER was to have come on for hearing on March 17, 2022, however, the hearing date was vacated and there was no appearance by the State or the Petitioner. This Honorable Court took the matter under advisement and has issued the following ruling based on the pleadings and good cause appearing therefor,

///

///

///

///

///

///

///

1 IT IS HEREBY ORDERED that the Plaintiff's Motion for Relief from Judgment, shall
2 be, and it is DENIED.

3 In his Motion, Petitioner seeks relief from a court order denying his Petition for Writ
4 of Coram Nobis. Petitioner filed his Petition for Civil Writ of Coram Nobis Pursuant to
5 Nevada Constitution Article 6, Section 6 based upon now recognized Trusillo vs. State, 310
6 P.3d 594 (Nev. 2013) on October 30, 2018. The district court denied the petition on
7 December 5, 2018.

8 O'Keefe filed a Notice of Appeal on December 24, 2018. The Nevada Court of
9 Appeals affirmed the denial of his petition for coram nobis on September 20, 2019. Remittitur
10 issued February 18, 2020. O'Keefe filed a Petition for Review, which the Nevada Supreme
11 Court denied on January 24, 2020. The Court of Appeals held all of O'Keefe's claims were
12 waived due to not being raised in a timely matter or outside the scope as they were legal
13 claims and not factual ones and affirmed the district court's denial of the petition. Petitioner's
14 petition has been heard, decided on its merits, appealed, affirmed, and denied rehearing and
15 this Court cannot, nor would it, overturn the affirmance.

16 Additionally, Petitioner seeks that this court vacate his illegal sentence if this Court
17 does not overturn the affirmance. However, Petitioner does not intend to get resentenced,
18 which is what would occur if this Motion was granted.

19 Instead, Petitioner wants this Court to overturn his burglary conviction. A motion to
20 correct a sentence presupposes a valid conviction, therefore, O'Keefe's conviction cannot be
21 discredited or vacated in this manner. If O'Keefe wishes to file a motion to correct his
22 sentence, he must do so under case number 04C202793, as A-18-783689-W refers to his
23 petition for writ of coram nobis. However, even if O'Keefe were to file this motion to vacate

24 ///

25 ///

26 ///

27 ///

28 ///

1 an illegal sentence in the original case, it would still be the improper vehicle for the relief he
2 seeks, which is overturning his sentence.

3 Dated this 23rd day of March, 2022

4 
5

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

888 8D8 D81D 8780
Erika Ballou
District Court Judge

9 BY /s/ PAMELA WECKERLY
10 PAMELA WECKERLY
11 Chief Deputy District Attorney
12 Nevada Bar #006163

13 CERTIFICATE OF SERVICE

14 I certify that on the 22nd day of March, 2022, I mailed a copy of the foregoing Order
15 to:

16 BRIAN O'KEEFE, BAC #90244
17 LOVELOCK STATE PRISON
18 1200 PRISON ROAD
19 LOVELOCK, NEVADA 89419

20 BY /s/ J. HAYES
21 Secretary for the District Attorney's Office
22
23
24
25
26
27

28 04F09774X/jh/MVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Brian O'Keefe, Plaintiff(s)

CASE NO: A-18-783689-W

7 vs.

DEPT. NO. Department 24

8 Nevada State of, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 3/23/2022

15 Department Law Clerk

dept30lc@clarkcountycourts.us

03/23/2022

Annex Shinn
CLERK OF THE COURT

MDTN
Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

* * * * *

BRIAN KERRY O'KEEFE,)
)
Plaintiff,)
)
-vs-)
)
THE STATE OF NEVADA,)
)
Defendant.)

Case No. A-18-783689-W - (C202793)

Dept. No. XXX

• SEE AFFIDAVIT ATTACHED

EX PARTE MOTION FOR THIS HONORABLE COURT
TO ISSUE ORDER DIRECTING CLERK OF THE
COURT - STEVEN GRIERSON - TO PROVIDE COPY
OF PSI (C202793) NEVER SEEN BY INMATE

COMES NOW, Brian O'Keefe, Plaintiff pro per, who moves this Honorable Court, pursuant "fundamental-fairness," for an ORDER directing the Clerk of the Court to provide the P.S.I. in case no. 04-C202793 to inmate by mailing.

This action is made by "affidavit" with the following Acts and Points and Authorities.

Dated March 3, 2022 pursuant NRS 208.165 by:

Respectfully Submitted,
Brian K. O'Keefe
Brian K. O'Keefe
pro per - #90244

MAR 14 2022

RECEIVED

POINTS AND AUTHORITIES

AFFIDAVIT OF Brian Kerry O'Keefe

STATE OF NEVADA)

) SS:

COUNTY OF PERSHING)

Case No. : A-18-783684-W

Related case No. : 04-C202793

I, Brian O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

1. My name is Brian O'Keefe.

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. Pursuant Nev. Const., article I sec. 1, article I sec. 8(s) my inalienable rights of due process mandate the production of a P.S.I. that was "NEVER" seen or provided in the past.
• Request ORDER instructing court's clerk to mail copy to inmate.

4. Plaintiff's only plea of "not guilty", case C202793, provides all Constitutional Rights for every and any collateral attack.

5. The Clark County Dist. Attorney's Office filed an untimely opposition to Plaintiff's Rule 60(b) motion filed 2/1/2022, which expressed multiple "simulated facts" which quoted the P.S.I as basis.

6. Plaintiff swears there was never a said "recantation" by O'Keefe when interviewed as expressed in OPPOSITION.

I declare under penalty of perjury that the foregoing is true and correct, and that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this 3rd - Thursday day of March, 2022

Brian K. O'Keefe
Brian K. O'Keefe

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing EX PARTE MOTION... TO ISSUE ORDER FOR P&T to the below address(es) on this 3rd day of March, 2022, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Box Slip No. 232 7095

INVOICE EDCR 8.05 (X) - Master List

NOTE: All registered Otero County D.A. - Registered User
Participants of the cmtcf system will be served by Brian O'Keefe - Non Registered User
the clerk. 1200 Prison Rd.
Lovelock, NV. 89419

Paper Copy - mailing

Brian O'Keefe
Brian O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Plaintiff In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding EX PARTE MOTION... filed in District Court Case No. A-18-783 689-W does not contain the social security number of any person.

Dated this 3rd day of March, 2022.

Brian O'Keefe
Brian O'Keefe
Plaintiff In Pro Se

Brian O'Keefe # 90244
Lovelock Corr. Ctr.
1200 Prison Rd.
Lovelock, NV. 89419

LOVELOCK CORRECTIONAL CENTER



US POSTAGE PAID PITNEY BOWLES
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0000369000 MAR 07 2022

CLERK OF THE COURT

MAR 14 2022

RECEIVED

INMATE LEGAL
MAIL CONFIDENTIAL

Clerk of the Court (8th Jud.)
Steven Brierson
200 Lewis Ave., 3rd FL.
Las Vegas, NV. 89101

LEGAL MAIL

Order Slip No. 2327095

ATTN: ~~CONFIDENTIAL~~

LCC LAW LIBRARY

MAR 04 2022

RECEIVED

1 NOAS

2 Brian Kerry O'Keefe # 90244

3 Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

FILED

APR -4 2022

Thomas A. Williams
CLERK OF COURT

4 Petitioner In Pro Se

5 EIGHTH
6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 * * * * *

9 BRIAN KERRY O'KEEFE)

10 Plaintiff,)

11 -vs-)

12 THE STATE OF NEVADA)

14 Defendant)

* Case of First IMPRESSION

Case No. A-18-783689-C202793

Dept. No. XXIV - 24

Judge Erik Ballou

16 (OMNIBUS - NOTICE OF APPEAL)

17 NOTICE IS GIVEN that Plaintiff, Brian Kerry O'Keefe,

18 in pro se, hereby appeals to the Nevada Supreme Court the denial
19 of OMNIBUS MOTION NR8 176.555 / NRCIVP 60(D) on the issues on page 2,

20 as filed/entered on the 17th day of March, 2022,

21 (complete if applicable) and the

22 _____, as filed/entered on the _____ day of

23 _____, 20____, in the above-entitled Court.

24 Dated this 30th day of March, 2022.

25 Brian K. O'Keefe
26 Brian K. O'Keefe # 90244
27 Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

28 1 See issues on appeal on page 2
hereby attached.

Plaintiff In Pro Se

(ISSUES ON APPEAL) Case no.'s : A-18-783689
04 CZ02793

1. Omnibus motions ultimately denied by district court and appealability.
Case No. CZ02793 related A-18-783689-W.
2. The Nevada Legislature's intent of Nevada Revised Statute 176.555.
Protected liberty interests.
3. Courts to apply exception to the law of the case doctrine raised.
Badly reasoned decisions on claims timely brought. (see NRS 406.73)
4. "Judicial admissions" and application to claims. Confession of error.
5. Continuing collateral consequences, adverse daily to O'Keefe.
6. "En banc" decisions and statutory interpretations.
7. New constitutional rules - retroactive. Waiver of "Teague" defense, etc.
8. Fundamental Miscarriage of Justice standard of review, overcoming bars.
9. Inappropriate statute, misdemeanor, charged and conviction under
NRS 200.481 versus appropriate NRS 33.018 (Dating Relationship).
10. "Due Process" mandates state's to provide corrective judicial
process to correct fundamental manifest injustice and issues
of fundamental miscarriage of justice.
11. District courts cannot raise defenses for State. (e.g. laches)
Moreover, custody status is key affecting scope of statutes.

Case No. - A-18-783689 - 04C202793

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 30th day of March, 20 22, by placing same in the U.S. Mail via prison law library staff:

Dr 788 Slip No. 2671624
Clerk All registered participants of CMECF served by Clerk.
NOTE: INVOKE EDOR 8.05 (a)(4) Registered Participants
SERVICE LIST : Clark County District Attorney

• Paper copy to Non-Registered Participants
Brian Kerry O'Keefe
1200 Prison Rd.
Lovelock, NV 89419

Brian K. O'Keefe
Brian K. O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in District Court Case No. A-18-783689
C202793 does not contain the social security number of any person.

Dated this 30th day of March, 20 22.

Brian K. O'Keefe
Brian K. O'Keefe

Petitioner In Pro Se

Box 0740244

LCC
1200 Milton Rd.
Cave Rock, NV 89419

LOVELOCK CORRECTIONAL CENTER



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INMATE LEGAL
MAIL CONFIDENTIAL

Clerk of the Court (8th Judicial)
Steven Overton

200 Lewis Ave., 3rd Fl

C70 Vegas NV 89101

out 3/30/2022

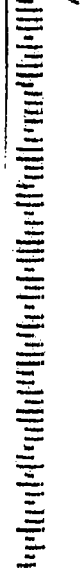
RECEIVED

APR - 4 2022

CECOK MAIL

CLERK OF THE COURT

~~CONFIDENTIAL~~





1 ASTA

2
3
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5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 BRIAN KERRY O'KEEFE,

11 Plaintiff(s),

12 vs.

13 STATE OF NEVADA,

14 Defendant(s),
15

Case No: A-18-783689-W

Dept No: XXIV

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Brian K. O'Keefe

20 2. Judge: Erika Ballou

21 3. Appellant(s): Brian K. O'Keefe

22 Counsel:

23 Brian K. O'Keefe 390244
24 1200 Prison Rd.
Lovelock, NV 89419

25 4. Respondent (s): State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: Yes, February 11, 2022
8 ***Expires 1 year from date filed*
9 Appellant Filed Application to Proceed in Forma Pauperis: N/A
Date Application(s) filed: N/A

10 9. Date Commenced in District Court: October 30, 2018

11 10. Brief Description of the Nature of the Action: Civil Writ

12 Type of Judgment or Order Being Appealed: Misc. Order

13 11. Previous Appeal: Yes

14 Supreme Court Docket Number(s): 77797

15 12. Child Custody or Visitation: N/A

16 13. Possibility of Settlement: Unknown

17 Dated This 5 day of April 2022.

18 Steven D. Grierson, Clerk of the Court

19
20
21 /s/ Heather Ungermann

22 Heather Ungermann, Deputy Clerk
23 200 Lewis Ave
24 PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

25 cc: Brian K. O'Keefe
26
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 84511
District Court Case No. A783689;C202793

FILED

JUN 21 2022

Elizabeth A. Brown
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER this appeal DISMISSED."

Judgment, as quoted above, entered this 29th day of April, 2022.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Rehearing Denied."

Judgment, as quoted above, entered this 24th day of May, 2022.

A - 18 - 783689 - W
CCJD
NV Supreme Court Clerks Certificate/Judgm
4996617



IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
June 20, 2022.

Elizabeth A. Brown, Supreme Court Clerk

By: Andrew Lococo
Deputy Clerk

4

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84511

FILED

APR 29 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. J. [Signature]
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a pro se appeal from an order denying a motion for relief from judgment. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

Because no statute or court rule permits an appeal from an order denying a motion for relief from judgment in a criminal matter, we lack jurisdiction. *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Accordingly, we

ORDER this appeal DISMISSED.

[Signature], J.
Hardesty

[Signature], J.
Stiglich

[Signature], J.
Herndon

cc: Hon. Erika D. Ballou, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84511

FILED

MAY 24 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. J. [Signature]
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

[Signature] J.
Hardesty

[Signature] J.
Stiglich

[Signature] J.
Herndon

cc: Hon. Erika D. Ballou, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 84511
District Court Case No. A783689;C202793

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: June 20, 2022

Elizabeth A. Brown, Clerk of Court

By: Andrew Lococo
Deputy Clerk

cc (without enclosures):

Brian Kerry O'Keefe
Clark County District Attorney \ Alexander G. Chen
Steven D. Grierson, Eighth District Court Clerk
Hon. Erika D. Ballou, District Judge

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on JUN 21 2022.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED
APPEALS

JUN 21 2022

CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

December 05, 2018

A-18-783689-W Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

December 05, 2018 9:00 AM Petition

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Vanessa Medina

RECORDER:

REPORTER: Kimberly Farkas

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- No parties present. Court ADVISED, it appeared the State was properly noticed with the Motion, no opposition was filed, however, in reading the petition, Court NOTED, Plaintiff was convicted of counts 1 and 6 and found not guilty on all of the sexual assault charges. Furthermore, the Court, was not convinced the acquittal on counts 2 to 5 required an acquittal on counts 1 and 6, as they were independent charges, consequently, ORDERED, Petition DENIED.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

January 30, 2019

A-18-783689-W	Brian O'Keefe, Plaintiff(s)
	vs.
	Nevada State of, Defendant(s)

January 30, 2019 9:00 AM Motion

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Vanessa Medina

RECORDER:

REPORTER: Kimberly Farkas

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- No parties present. COURT NOTED it could not make sense of the pleadings, and ORDERED, matter OFF CALENDAR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

February 20, 2019

A-18-783689-W Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

February 20, 2019 9:00 AM Motion

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Phyllis Irby

RECORDER:

REPORTER: Kimberly Farkas

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- The Court noted it has already ruled on this matter. COURT ORDERED, OFF CALENDAR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

February 10, 2022

A-18-783689-W	Brian O'Keefe, Plaintiff(s)
	vs.
	Nevada State of, Defendant(s)

February 10, 2022 3:00 AM Minute Order

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Lauren Kidd

RECORDER: Vanessa Medina

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Pursuant to the Court's request, COURT ORDERS, case 04C202793 which is the underlying criminal case related to the instant matter, be attached to case A-18-783689-W and listed under 'related cases' as a Writ Related Case.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

March 09, 2022

A-18-783689-W	Brian O'Keefe, Plaintiff(s) vs. Nevada State of, Defendant(s)
---------------	---

March 09, 2022	11:30 AM	Minute Order
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HEARD BY: Jones, Tierra	COURTROOM: Chambers
-------------------------	---------------------

COURT CLERK: Teri Berkshire

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- As this case is in relation to writ related criminal case 04C202793, which is assigned to Department 24, this case should also be assigned to Department 24. Pursuant to EDCR 1.31(b)(4) this case is being reassigned to Department 24.

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Writ

COURT MINUTES

March 10, 2022

A-18-783689-W Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

March 10, 2022 8:30 AM Motion for Relief

HEARD BY: Wiese, Jerry A. **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Lauren Kidd

RECORDER: Vanessa Medina

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- State present via BlueJeans video conferencing.

Court advised the Court reviewed the file and noted that an order was issued; however, Court advised this case should have tracked up to Department 24 along with its corresponding criminal case. Court advised the matter was discussed with Criminal Presiding Judge Jones and it was this Court's understanding that Judge Jones ordered the case reassigned to Department 24. Therefore, COURT ORDERED, matter taken OFF CALENDAR.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Writ

COURT MINUTES

March 17, 2022

A-18-783689-W Brian O'Keefe, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

March 17, 2022 2:30 PM Minute Order

HEARD BY: Ballou, Erika COURTROOM: Chambers

COURT CLERK:
Ro'Shell Hurtado

RECORDER:

REPORTER:

PARTIES
PRESENT:

JOURNAL ENTRIES

- The Court having considered all papers and pleadings and determining that no hearing is necessary hereby VACATES the hearing scheduled for March 21, 2022. Petitioner s Motion for Relief from Judgment or Order is hereby DENIED.

In his Motion, Petitioner seeks relief from a court order denying his Petition for Writ of Coram Nobis. Petitioner filed his Petition for Civil Writ of Coram Nobis Pursuant to Nevada Constitution Article 6 Section 6 Based Upon Now Recognized Trusillo vs. State, 310 P.3d 594 (Nev. 2013) on October 30, 2018. The district court denied the petition on December 5, 2018. O Keefe filed a Notice of Appeal on December 24, 2018. The Nevada Court of Appeals affirmed the denial of his petition for coram nobis on September 20, 2019. Remittitur issued February 18, 2020. O Keefe filed a Petition for Review, which the Nevada Supreme Court denied on January 24, 2020. The Court of Appeals held all of O Keefe s claims were waived due to not being raised in a timely matter or outside the scope as they were legal claims and not factual ones, and affirmed the district court's denial of the petition. Petitioner s petition has been heard, decided on its merits, appealed, affirmed, and denied rehearing and this Court cannot, nor would it, overturn the affirmance.

PRINT DATE: 07/27/2023

Page 7 of 8

Minutes Date: December 05, 2018

Additionally, Petitioner seeks that this court vacates his illegal sentence if this Court does not overturn the affirmance. However, Petitioner does not intend to get resentenced, which is what would occur if this Motion was granted. Instead, Petitioner wants this Court to overturn his burglary conviction. A motion to correct a sentence presupposes a valid conviction, therefore, O Keefe s conviction cannot be discredited or vacated in this manner. If O Keefe wishes to file a motion to correct his sentence, he must do so under case number 04C202793, as A-18-783689-W refers to his petition for writ of coram nobis. However, even if O Keefe were to file this motion to vacate an illegal sentence in the original case, it would still be the improper vehicle for the relief he seeks, which is overturning his sentence.

Due to the aforementioned reason, Petitioner s Motion is hereby DENIED. The State is to promptly prepare the order.

CLERK'S NOTE: This Minute Order was electronically filed by Courtroom Clerk, Ro'Shell Hurtado, to all registered parties for Odyssey File & Serve: Mailed to: Brian O'Keefe #90244, 1200 Prison Road, Lovelock, NV, 89419.//rh03.17.22

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated July 26, 20213, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volumes with pages numbered 1 through 219.

BRIAN KERRY O'KEEFE,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-18-783689-W
Related Case 04C202793
Dept. No: XVIII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 27 day of July 2023.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk