

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jul 27 2023 02:59 PM
Elizabeth A. Brown
Clerk of Supreme Court

BRIAN KERRY O'KEEFE,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: 04C202793

Docket No: 86804

RECORD ON APPEAL VOLUME 6

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

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IX. • EXHIBITS FOR PETITION (LEHRER) CORAM NOBIS

CASE C202793

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

Brian Kerry O'Keefe,

#90244 petitioner,

v.

STATE OF NEVADA,

respondents.

C202793

XXIII

Petition For WRIT OF CORAM
NOBIS APPENDIX OF EXHIBITS
(1, 2, 3)

• EXHIBIT "1"

CRIMINAL COURT MINUTES

1 page 10/28/2004

TRIAL BY JURY - VERDICT RETURNED

• EXHIBIT "2"

CRIMINAL COURT MINUTES

1 page 12/27/2004

NEW JUDGE - SENTENCING

• EXHIBIT "3"

CERTIFIED JUDGMENT OF CONVICTION

CERTIFIED JAN. 3, 2005

STEWART BELL FOR SALLY LOEHNER

DOCUMENT
2 pages

(SENTENCING)

September 14th, 2014

By: Brian K. O'Keefe
Brian K. O'Keefe

EXHIBIT 1

TRIAL JUDGE: SALLY COEHNER
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.

000754 Buchanan II, James L.

Y
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

CONTINUED ON PAGE: 011

PRINT DATE: 08/25/09

PAGE: 010

MINUTES DATE: 12/27/04

EXHIBIT 3

CERTIFIED JUDGMENT OF CONVICTION
(JURY TRIAL)

CASE C202793

DEPT NO. XV

EXHIBIT 3

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

Libby B. Ruggins
da CLERK

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,

11 -vs-

12 BRIAN KERRY OKEEFE,
13 #1447732

14 Defendant.

Case No: C202793

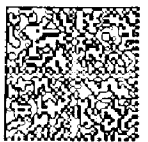
Dept No: XV

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, [REDACTED]
26 [REDACTED], 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

Brian Keith O'Hare #90244
LoveLock Correctional Center
1200 Prison Road
LoveLock, Nevada 89419



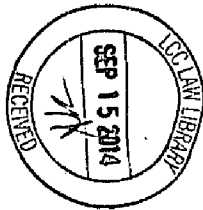
UNITED STATES POSTAGE
FIRST CLASS
02 1M
0008006586
MAILED FROM ZIP CODE 89419
SEP 16 2014
\$01.820

BRASS SLIP No. 2061300

STEVEN GRIELSON, Clerk of the Court
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155-1160

INMATE LEGAL
MAIL CONFIDENTIAL

LEGAL MAIL




CLERK OF THE COURT

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHRISTOPHER S. HAMNER
Deputy District Attorney
Nevada Bar #011390
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 K. O'KEEFE,
#1447732

Defendant.

CASE NO: C202793

DEPT NO: XXIII

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR
APPOINTMENT OF COUNSEL

DATE OF HEARING: OCTOBER 13, 2014
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through CHRISTOPHER S. HAMNER, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Appointment of Counsel.

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.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 6, 2004, the State charged Brian K. O'Keefe (hereinafter – "Defendant") by
4 way of information with: Count 1 – Battery with Intent to Commit a Crime (Felony – NRS
5 200.400); Counts 2-4 – Sexual Assault (Felony – NRS 200.364, 200.366); Count 5 – Attempt
6 Sexual Assault (Felony – NRS 193.330, 200.364, 200.366); and Count 6 – Burglary (NRS
7 205.060).

8 Defendant's jury trial commenced on October 25, 2004. On October 28, 2004, the jury
9 returned a verdict of guilty on Count 1 (for the lesser-included offense of Battery) and Count
10 6. On December 27, 2004, Defendant appeared in district court with counsel, was adjudged
11 guilty, and was sentenced on Count 6 to a minimum of twenty-four (24) months and a
12 maximum of one hundred twenty (120) months in the Nevada Department of Corrections,
13 suspended, Defendant placed on probation for a period not to exceed five (5) years; and on
14 Count 1 to credit for time served. Defendant's conditions of probation were: 1) no contact with
15 the victim initiated by Defendant; 2) search clause / burglary tools; 3) domestic violence
16 counseling; 4) secure and maintain full-time employment; 5) mental health counseling as
17 deemed necessary by P&P; 6) resolve a warrant from the State of Ohio within one hundred
18 twenty (120) days; 7) four hours of community service each week.

19 Judgment of conviction was filed on January 3, 2005. On February 1, 2005, Defendant
20 filed a notice of appeal. On January 23, 2006, the Nevada Supreme Court issued its order
21 affirming Defendant's convictions, with remittitur issuing on February 17, 2006.

22 On February 5, 2007, Defendant filed a pro per petition for writ of habeas corpus (post-
23 conviction); Defendant filed a supplement to his petition on February 15, 2007. The State
24 opposed Defendant's petition on April 6, 2007, and at a hearing on April 11, 2007, the district
25 court denied Defendant's petition on the merits. The district court entered its findings of fact,
26 conclusions of law and order on May 17, 2007, and its notice of entry on May 21, 2007.
27 Defendant filed a notice of appeal from the denial of his petition on April 19, 2007. The
28 Nevada Supreme Court issued its order affirming the denial of Defendant's petition on March

24, 2008, with remittitur issuing on April 18, 2008. An order honorably discharging Defendant from probation in this case was filed on September 10, 2008.

On January 10, 2014, Defendant filed a motion for default judgment. On February 14, 2014, the Court denied the motion. On September 30, 2014, the Defendant filed a Notice of Petition and Petition for Writ of Coram Nobis Based on Acquittal of all Felonies which Underpinned Count 6 Burglary Thereby Court in Want of Jurisdiction with New Sentencing Judge Lacking This Knowledge and Fact. That motion is scheduled to be heard by the Court on October 22, 2014. On September 22, 2014, the Defendant filed the instant motion to which the State opposes as follows:

ARGUMENT

DEFENDANT IS NOT ENTITLED TO AN APPOINTMENT OF COUNSEL

In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly observed that “[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution’s right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution.”

NRS 34.750 provides, in pertinent part:

“[a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:

- (a) The issues are difficult;
 - (b) The Defendant is unable to comprehend the proceedings; or
 - (c) Counsel is necessary to proceed with discovery.”
- (emphasis added).

Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of cases in which appointment of counsel is mandated by statute, one does not have “[a]ny constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at 164.

1 The Nevada Supreme Court has observed that a petitioner "must show that the
2 requested review is not frivolous before he may have an attorney appointed." Peterson v.
3 Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS
4 177.345(2)). Here, Defendant cannot make the necessary showing that post-conviction
5 counsel is needed. A review of the claims found in the petition demonstrates that the issues
6 are not difficult. Nor has Defendant demonstrated that he is unable to comprehend the
7 proceedings. Since Defendant fails to demonstrate with any specificity why such counsel is
8 necessary, the motion should be denied.

9 **CONCLUSION**


10 For all of the foregoing reasons, Defendant's motion should be denied.

11 DATED this 10th day of October, 2014.

12 Respectfully submitted,

13 STEVEN B. WOLFSON
14 Clark County District Attorney
15 Nevada Bar #001565

16 BY

17 
18 _____
19 CHRISTOPHER S. HAMNER
20 Deputy District Attorney
21 Nevada Bar #011390
22
23
24
25
26
27
28

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of October, 2014, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRIAN O'KEEFE #90244
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

BY: _____

C. Cintola
Employee of the District Attorney's Office

CH/cc/L3


CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
GIANCARLO PESCI
Chief Deputy District Attorney
Nevada Bar #007135
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-

CASE NO: 04C202793

BRIAN O'KEEFE,
aka Brian K. O'Keefe, #1447732

DEPT NO: XXIII

Defendant.

STATE'S RESPONSE TO DEFENDANTS PETITION FOR WRIT OF CORAM NOBIS
BASED ON ACQUITTAL OF ALL FELONIES WHICH UNDERPINNED COUNT 6
BURGLARY THEREBY COURT IN WANT OF JURISDICTION WITH NEW
SENTENCING JUDGE LACKING THIS KNOWLEDGE AND FACT

DATE OF HEARING: OCTOBER 22, 2014
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through GIANCARLO PESCI, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Notice of Petition and "Petition for Writ of Coram Nobis Based on Acquittal of All Felonies Which Underpinned Count 6 Burglary Thereby Court in Want of Jurisdiction With New Sentencing Judge Lacking This Knowledge and Fact"

This response 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 An Information was filed on July 6, 2004, charging Brian Kerry O'Keefe, (hereinafter
4 "Defendant") with one (1) count of Battery With Intent To Commit A Crime (Felony – NRS
5 200.400), three (3) counts of Sexual Assault (Felony – NRS 200.364, 200.366), one (1) count
6 of Attempt Sexual Assault (Felony – NRS 193.330, 200.364, 200.366), and one (1) count of
7 Burglary (Felony –NRS 205.060).

8 Defendant pleaded not guilty to the charges alleged against him. Trial commenced on
9 October 25, 2004 and concluded on October 28, 2004. The jury returned a verdict of guilty
10 for count one (1) - Battery (Misdemeanor); and count six (6) - Burglary (Category B Felony).
11 Defendant was sentenced on December 27, 2004, on count six (6) to a minimum of twenty-
12 four (24) months and a maximum of one hundred twenty (120) months in the Nevada
13 Department of Corrections. Defendant's sentence was suspended and he was placed on
14 probation for an indeterminate period not to exceed five (5) years. For count one (1) Defendant
15 was sentenced to credit for time served.

16 The Judgment of Conviction was filed on January 3, 2005. Defendant's Notice of
17 Appeal was filed on February 1, 2005. The Nevada Supreme Court affirmed Defendant's
18 conviction on January 23, 2006. See O'Keefe v. State, Order of Affirmance No. 44644 (Jan.
19 23, 2006). Remittitur issued on February 17, 2006.

20 Defendant filed a Petition for Writ of Mandamus seeking transcripts, his file, etc. on
21 July 24, 2006. The State filed its Opposition on August 7, 2006. The Order denying this
22 Petition was filed August 17, 2006. On October 19, 2006, Defendant filed a Motion for New
23 Trial and a Supplement to that motion on December 13, 2006. The State filed its Opposition
24 on November 14, 2006. The motion was denied on December 18, 2006. Defendant filed a
25 Notice of Appeal on December 26, 2006. The Nevada Supreme Court affirmed the district
26 court's denial of Defendant's Motion for New Trial on March 24, 2008; Remittitur issued
27 April 18, 2008. See O'Keefe v. State, Order of Affirmance Nos. 48673 and 49329 (March 24,
28 2008).

1 Defendant filed a Petition for Writ of Habeas Corpus on February 5, 2007. Defendant
2 filed a Supplement to his Petition on February 15, 2007. The State filed its Opposition on
3 April 6, 2007. The court denied his Petition April 11, 2007. Defendant filed a Notice of
4 Appeal on April 19, 2007. The Findings of Fact, Conclusions of Law, and Order was filed
5 May 17, 2007, with Notice of Entry on May 21, 2007. The Nevada Supreme Court affirmed
6 the district court's denial of Defendant's Petition on March 24, 2008; Remittitur issued April
7 18, 2008. See O'Keefe v. State, Order of 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, Defendant 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, Defendant filed a
13 "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 Defendant filed a "Supplement of Evidence of Suicides and Self Mutilations and Mental
16 Health Along with Ninth COA on, Namely, A Double Jeopardy Violation, Case No. 12-
17 15271." On January 28, 2014, Defendant filed a Reply to the State's Response. On January
18 29, 2014, the Court denied Defendant's original Petition and all supplements pursuant to a
19 hearing. The Order was entered on February 14, 2014.

20 On February 12, 2014, Defendant filed a Notice of Appeal regarding his Petition for
21 Writ of Mandamus or, in the Alternative, Writ of Coram Nobis. On July 23, 2014, the Nevada
22 Supreme Court affirmed the District court's judgment. See O'Keefe v. State, Order of
23 Affirmance Nos. 65040 and 65217 (July 23, 2014). On August 8, 2014, Defendant filed a pro-
24 per "Motion to Stay Mandate Pending Certiorary Review." On August 15, 2014, the Nevada
25 Supreme Court granted the Motion and ordered that Remittitur would be stayed until
26 December 1, 2014 and shall issue on December 8, 2014.

27 On January 10, 2014, Defendant filed a "Motion for Default Judgment for State's
28 Failure to Exercise Simple Reasonable Due Diligence to 'Serve' Petitioner Copy of Opposition

1 in 'Conjunction' with 'Filing' with Emphasis on A.G.O. No 2002-15 (March 21, 2002). On
2 January 30, 2014, the State filed its Opposition. On February 3, 2014, Defendant's Motion
3 was denied pursuant to a hearing. The Order denying Defendant's Motion was entered on
4 February 14, 2014.

5 On September 22, 2014, Defendant filed a Motion to Appoint Counsel. The State filed
6 its Opposition on October 10, 2014. Defendant's motion was denied on October 13, 2014.

7 Defendant filed the instant "Petition for Writ of Coram Nobis Based on Acquittal of
8 All Felonies Which Underpinned Count 6 Burglary Thereby Court in Want of Jurisdiction
9 With New Sentencing Judge Lacking This Knowledge and Fact!" on September 30, 2014. The
10 State's response is as follows.

11 ARGUMENT

12 **I. THE DISTRICT COURT DOES NOT HAVE PLENARY JURISDICTION** 13 **OVER THIS MATTER AS IT IS THE SUBJECT OF A PENDING APPEAL**

14 The District court does not currently have jurisdiction in which to grant Defendant's
15 Motion. Generally "[j]urisdiction in an appeal is vested *solely* in the supreme court until the
16 remittitur issues to the district court." Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643,
17 644 (1994) (emphasis added). In the instant petition, Defendant contends that a jury
18 instruction regarding "felonious intent" was incorrect, and thus his Burglary conviction should
19 be overturned. Defendant makes the same claim in his Petition for Writ of Mandamus or, in
20 the Alternative, Writ of Coram Nobis filed on December 6, 2013 and appealed on February
21 12, 2014.

22 Defendant's appeal in Nevada Supreme Court Docket No. 65040 is still pending at this
23 time. An Order affirming the District court's judgment has been issued, but Remittitur has
24 been stayed. However, while an appeal is pending the district court maintains jurisdiction to
25 deny motions that would alter the judgment that is on appeal, even if it could not grant them.
26 Foster v. Dingwall, 126 Nev. Adv. Op. 5, ___, 228 P.3d 453, 454-56 (2010). As such, this
27 Court maintains limited jurisdiction to deny Defendant's instant motion and should do so as
28 demonstrated below.

II. DEFENDANT'S CLAIM IS BARRED BY LAW OF THE CASE

Defendant's claims are precluded by law of the case. Defendant's claim in this regard has already been raised and rejected by this court and once by the Nevada Supreme Court, and thus is barred by the law of the case. The Nevada Supreme Court found that not only was there sufficiency of the evidence regarding Defendant's Burglary conviction, but also that the claims were not properly raised in a writ of coram nobis. See O'Keefe v. State, Order of Affirmance Nos. 65040 and 65217 (July 23, 2014), p. 2.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975), quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799.

III. DEFENDANT'S CLAIMS ARE NOT COGNIZABLE IN A WRIT OF CORAM NOBIS

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

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

Id. at 595. Critically, however, the Court also held that:

Although we do not attempt to precisely define the realm of factual errors that may give rise to a writ of coram nobis, ***that realm is limited to errors involving facts that were not known to the court, were not withheld by the defendant, and would have prevented entry of the judgment.*** For example, a factual error does not include claims of newly discovered evidence because these types of claims would not have precluded the judgment from being entered in the first place. See Hyung Joon Kim, 90 Cal.Rptr.3d 355, 202 P.3d at 453; Commonwealth v. Morris, 281 Va. 70, 705 S.E.2d 503, 506 (Va.), cert. denied, 565 U.S. —, 132 S.Ct. 115, 181 L.Ed.2d 39 (2011). ***And legal errors fall***

1 *entirely outside the scope of the writ. See, e.g., Hyung Joon Kim*, 90 Cal.Rptr.3d
2 355, 202 P.3d at 446; *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891, 896 (2012).
3 A writ of coram nobis is the forum to correct only the most egregious factual
4 errors that would have precluded entry of the judgment of conviction had the
error been known to the court at the time.

5 A writ of coram nobis is not, however, the forum to relitigate the guilt or
6 innocence of the petitioner. We have long emphasized the importance of the
7 finality of judgments, and we are gravely concerned that recognizing this writ,
8 even in the very limited form that we do today, will result in a proliferation of
9 stale challenges to convictions long since final. *See Jackson v. State*, 115 Nev.
10 21, 23 n. 2, 973 P.2d 241, 242 n. 2 (1999); *Groesbeck v. Warden*, 100 Nev. 259,
11 261, 679 P.2d 1268, 1269 (1984). *Given these concerns, we hold that any 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.*

12 *Trujillo v. State*, 310 P.3d at 601-02 (emphasis added). Defendant's petition takes issue with
13 a jury instruction regarding "felonious intent," as well as an argument for actual innocence.
14 As Defendant's claims are not issues of fact which would have prevented entry of judgment,
15 they are not cognizable in a Petition for Writ of Coram Nobis and he is not entitled to relief.

16 **IV. DEFENDANT IS NOT ENTITLED TO COUNSEL**

17 The District court does not have plenary jurisdiction to grant Defendant's motion,
18 including his request for appointment of counsel. Thus, Defendant's request should be denied.

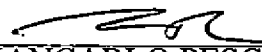
19 **CONCLUSION**

20 Based on the foregoing arguments, Defendant's Motion should be DENIED.

21 DATED this 20th day of October, 2014.

22 Respectfully submitted,

23 STEVEN B. WOLFSON
24 Clark County District Attorney
25 Nevada Bar #


26 BY 
27 GIANCARLO PESCI
28 Chief Deputy District Attorney
Nevada Bar #007135

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 20th day of October, 2014, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRIAN O'KEEFE #90244
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

BY: _____


C. Cintola
Employee of the District Attorney's Office

GC/GP/cc/L3

Case No. 04-C202793
Dept. No. XXIII

Alvin D. Lamm
CLERK OF THE COURT

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'Heere
#90244 Defendant.

Courtroom 12C
Judge Setany Miley

NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant, Brian Kerry O'Heere,
in pro se, hereby appeals to the Nevada Supreme Court the
the denial of Motion To Appoint Counsel 1
filed/entered on or about the 13th day of October, 2014,
in the above-entitled Court.

Dated this 20th day of October, 2014.

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

Defendant In Pro Se

En 1: Koerschner v. Warden, N.S.P.; et al, #90244
508 F. Supp.2d 849 (D. Nev. 2007)

Disables a segregation unit with a law library system deemed
insufficient, inadequate is grounds to appoint counsel with
complex issue, i.e., procedural errors committed by state of constitutional
magnitude, judicial error, 1208 secularist misconduct.

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CLERK OF THE COURT

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 20th day of October, 2014, by placing same in the U.S. Mail via prison law library staff: Box Slip # 2005660

STEVEN CARRISON, Clerk of the Court
200 LEWIS AVE, 3RD FLOOR
Las Vegas, NV. 89155-1160

Bruce K. Okate
Bruce K. Okate # 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 NOTICE OF APPEAL filed in District Court Case No. 04-C202793 does not contain the social security number of any person.

Dated this 20th day of October, 2014.

Bruce K. Okate
Bruce K. Okate

Defendant In Pro Se

90244

Brian O'Hare - 9024
LOVELOCK COLLECTION CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

INMATE LEGAL
MAIL CONFIDENTIAL

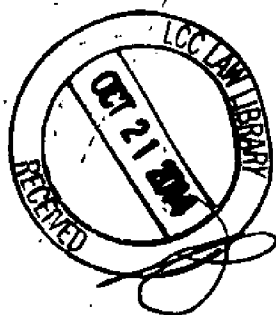
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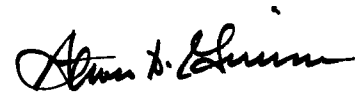
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STEVEN BRACSON, Clerk of the Court
200 LEWIS AVE., 3RD FLOOR
LAS VEGAS, NV 89155-1160



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CLERK OF THE COURT

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

STATE OF NEVADA,

Plaintiff(s),

vs.

BRIAN K. O'KEEFE,

Defendant(s),

Case No: 04C202793

Dept No: XXIII

CASE APPEAL STATEMENT

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

2. Judge: Stefany Miley

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

Counsel:

Brian K. O'Keefe #90244
1200 Prison Rd.
Lovelock, NV 89419

4. Respondent: The State of Nevada

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101
(702) 671-2700

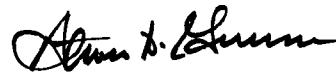
- 1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A
3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A
5 6. Appellant Represented by Appointed Counsel In District Court: Yes
6 7. Appellant Represented by Appointed Counsel On Appeal: N/A
7 8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A
8 9. Date Commenced in District Court: July 6, 2004
9 10. Brief Description of the Nature of the Action: Criminal
10 Type of Judgment or Order Being Appealed: Misc. Order
11 11. Previous Appeal: Yes
12 Supreme Court Docket Number(s): 44372, 44644, 48673, 49329, 65040
13 12. Child Custody or Visitation: N/A

14 Dated This 27 day of October 2014.

15 Steven D. Grierson, Clerk of the Court

16
17 

18 _____
19 Heather Ungermann, Deputy Clerk
20 200 Lewis Ave
21 PO Box 551601
22 Las Vegas, Nevada 89155-1601
23 (702) 671-0512
24
25
26
27
28



CLERK OF THE COURT

1 **ORDR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHARLES THOMAN
6 Deputy District Attorney
7 Nevada Bar #012649
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 BRIAN K. O'KEEFE,
14 #1447732

15 Defendant.

CASE NO: C202793

DEPT NO: XXIII

16 ORDER DENYING DEFENDANT'S MOTION FOR
17 APPOINTMENT OF COUNSEL

18 DATE OF HEARING: OCTOBER 13, 2014
19 TIME OF HEARING: 9:30 A.M.

20 THIS MATTER having come on for hearing before the above entitled Court on the
21 13th day of October, 2014, the Defendant not being present, IN PRO PER PERSON, the
22 Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through
23 CHARLES THOMAN, Deputy District Attorney, and the Court without argument, based on
24 the pleadings and good cause appearing therefor,

25 ///

26 ///

27 ///

28 ///

1 Court noted State's Opposition filed October 10, 2014, pointed out Defendant gave no
2 reason for the need of counsel, stated Defendant had no constitutional right to counsel in post-
3 conviction proceedings and further stated motion lacks merit.

4 Therefore, COURT ORDERED, motion DENIED.


5 DATED this 27 day of October, 2014.

6
7 
8 DISTRICT JUDGE KLS

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

JUDGE STEFANY A. MILEY

11 BY


12 
13 CHARLES THOMAN
Deputy District Attorney
Nevada Bar #012649

14
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25
26
27
28 cc/L3

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 29th day of October, 2014, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

BRIAN O'KEEFE #90244
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419

BY: 
C. Cintola
Employee of the District Attorney's Office

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 65040
District Court Case No. C202793

FILED

DEC 11 2014

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, 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:

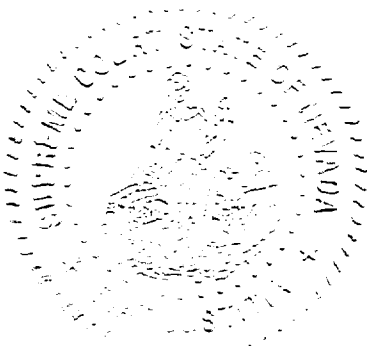
"ORDER the judgments of the district court AFFIRMED."

Judgment, as quoted above, entered this 23rd day of July, 2014.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
December 08, 2014.

Tracie Lindeman, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk



04C202793
CCJA
NV Supreme Court Clerks Certificate/Judgr
4419229



IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 65040 ✓

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

No. 65217

FILED

JUL 23 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying a petition for a writ of mandamus or *coram nobis* and a motion to modify or correct an illegal sentence.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge (Docket No. 65040), Eighth

¹These appeals have been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the records are sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). We elect to consolidate these appeals for disposition. See NRAP 3(b)(2).

Judicial District Court, Clark County; Michael Villani, Judge (Docket No. 65217).

Docket No. 65040

In his December 6, 2013, petition, appellant challenged his criminal conviction by claiming that there was insufficient evidence to support his conviction for burglary, that the district court judge that sentenced him had a conflict of interest, and that he suffered from ineffective assistance of counsel. Appellant asserted he was entitled to mandamus relief or, in the alternative, relief through a writ of *coram nobis*.

First, appellant improperly challenged the validity of a judgment of conviction through a petition for a writ of mandamus. See NRS 34.160; NRS 34.724(2) (stating that a post-conviction petition for a writ of habeas corpus is the proper vehicle with which to challenge a judgment of conviction); *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (discussing the scope of mandamus). In addition, appellant failed to demonstrate that he did not have an adequate remedy with which to challenge his conviction. See NRS 34.170. Therefore, the district court did not err in denying the petition.

Second, appellant failed to demonstrate that he was entitled to relief on his petition for a writ of *coram nobis*. Appellant's claims were not properly raised in a petition for a writ of *coram nobis* because they were claims arising from alleged factual errors that are on the record, the claims could have been raised earlier, or they involved legal and not factual errors. See *Trujillo v. State*, 129 Nev. ___, ___, 310 P.3d 594, 601-

02 (2013). Appellant has previously litigated a post-conviction petition for a writ of habeas corpus, *O'Keefe v. State*, Docket Nos. 48673 and 49329 (Order of Affirmance, March 24, 2008), and appellant failed to demonstrate that he could not have raised his current claims in that petition. *See Trujillo*, 129 Nev. at ___, 310 P.3d at 601-02 (discussing that it is the petitioner's burden to demonstrate that he could not have reasonably raised his claims at an earlier time). Therefore, the district court did not err in denying the petition.

Docket No. 65217

In his January 27, 2014 motion, appellant claimed that the trial court was without jurisdiction because appellant had sought relief in federal court and a decision regarding his federal habeas petition was pending before the Ninth Circuit Court of Appeals during his state court trial. This claim fell outside the narrow scope of claims permissible in a motion to modify sentence. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant also failed to demonstrate that his sentence was facially illegal or that the district court lacked jurisdiction due to the federal court proceedings. *See id.* Appellant did not demonstrate that the federal court proceedings divested Nevada state courts of jurisdiction over this case. Moreover, appellant failed to demonstrate that the federal court had stayed the proceedings in state court while it considered appellant's petition. *See* 28 U.S.C. § 2251(a)(1).

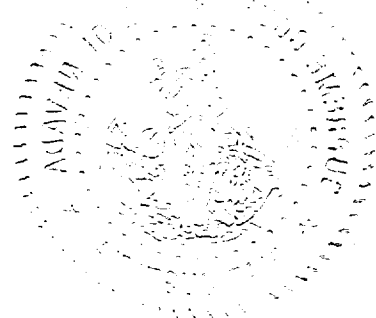
Therefore, we conclude that the district court did not err in denying appellant's motion. Accordingly, we

ORDER the judgments of the district court AFFIRMED.²

Pickering, J.
Pickering
Parraguirre, J.
Parraguirre
Saitta, J.
Saitta

cc: Hon. Stefany Miley, District Judge
Hon. Michael Villani, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.



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

DATE: DECEMBER 8TH 2014
Supreme Court Clerk, State of Nevada

By


Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 65040
District Court Case No. 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: December 08, 2014

Tracie Lindeman, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):

Hon. Stefany Miley, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on DEC 11 2014.

HEATHER UNGERMANN Mk

Deputy District Court Clerk

RECEIVED

DEC 10 2014

CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 66785
District Court Case No. C202793

FILED

JAN 06 2015

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, 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 5th day of December, 2014.

04C202793
CCJD
NV Supreme Court Clerks Certificate/Judgm
4423797



IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
December 30, 2014.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 66785

FILED

DEC 05 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order denying a motion to appoint counsel. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

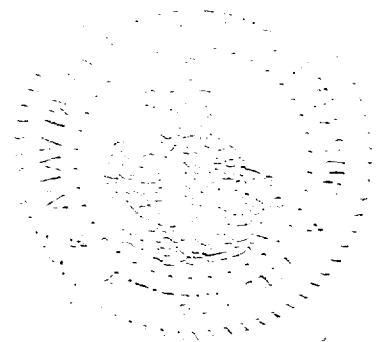
Because no statute or court rule permits an appeal from an order denying a motion to appoint counsel, we lack jurisdiction. *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Accordingly, we
ORDER this appeal DISMISSED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Stefany Miley, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
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: December 30th, 2014

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. 66785
District Court Case No. 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: December 30, 2014

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):
Hon. Stefany Miley, District Judge
Brian Kerry O'Keefe
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on JAN 06 2015.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED

JAN 05 2015

CLERK OF THE COURT

FILED

SEP 16 2019

NOCA

Brian Kerry O'Keefe # 90244

~~Lovelock Correctional Center~~

~~1200 Prison Road~~

~~Lovelock, Nevada 89419~~

High Desert State Prison

P.O. Box 650

Indian Springs, NV. 89070-0070

John L. Blum
CLERK OF COURT

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,)

PETITIONER,)

-vs-

THE STATE OF NEVADA, et al.,)

RESPONDENT,)

• (THREE DISTRICT CASES)

Case No.'s 04C202793 and 05C207835

Dept. No.'s XXX (BTH)

"AND"

Case No. 08C250630

Dept. No. XVII

NOTICE OF CHANGE OF ADDRESS - (FOR THREE CASES ABOVE)

NOTICE IS HEREBY GIVEN THAT the address of Brian Kerry O'Keefe, in pro se, has been changed to the following:

~~Lovelock Correctional Center~~
~~1200 Prison Road~~
~~Lovelock, Nevada 89419~~

High Desert State Prison
P.O. Box 650

INDIAN SPRINGS, NV. 89070-0070

All further correspondence should be addressed to petitioner at his new address above.

Dated this 13th day of September, 2019, pursuant NRS 200.165.

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

~~Lovelock Correctional Center~~ H.D.S.P.
~~1200 Prison Road~~
~~Lovelock, Nevada 89419~~ P.O. Box 650
Indian Springs

Petitioner In Pro Se Nevada 89070

RECEIVED

SEP 16 2019

590.24 WROG TILK OF THE COURT

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF CHANGE OF ADDRESS to the below address(es) on this 13th day of September, 2019, by placing same in the U.S. Mail, First-Class postage, per NRCP 5(b):

to: Steven Goussan, Clerk of Court
200 Lewis Ave., 322 Floor
Las Vegas, NV. 89101

CLERK NOTE:

All Registered Users of the CM/ECF System will be served by the Clerk as follows:

1) Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV. 89155

2) Office of the Attorney General
555 E. WASHINGTON AVE., #3900
Las Vegas, NV. 89101

High Desert State Prison
P.O. BOX 680
Indian Springs, NV. 89070

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

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

I do affirm that the preceding document, NOTICE OF CHANGE OF ADDRESS, does NOT contain the social security number of any person.

Dated this 13th day of September, 2019.

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

BRIAN KERRY C'KEEFE

#90244

HIGH DESERT STATE PRISON

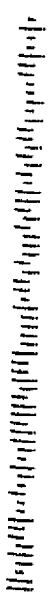
P.O. BOX 650

INDIAN SPRINGS, NV 89070-0070

LEGAL MAIL

STEVEN GREGSON, CLERK OF COURT
200 LEWIS AVE., 3RD FLOOR
Las Vegas, Nevada 89101
CONFIDENTIAL

89101-630000



D/C 2 LINT
SEP 12 2019
SEP 11 DES
VOLUME 11/13/14/15/16/17/18/19

LAS VEGAS NV 890
13 SEP 2019 PM 5 L



Petitioner / Appellant In Pro Se

* * * * *

● (5) FIVE CASES

Case No. C258630 / A-18-786320-W (2)

Dept. No. XVII / XXX and

C267835 (4) C202793 (5) A-19-786923-C

XXX dept. VII dept. VI

1232

WEEK OF THE MIGHT

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF CHANGE OF ADDRESS to the below address(es) on this 13th day of November, 2019, by placing same in the U.S. Mail, First-Class postage, per NRCP 5(b):

Clerk, Eighth Jud. Dist. Ct.
200 Lewis Ave., 3RD FLOOR
Las Vegas, NV 89155

Clerk Please
UTILIZE CM/ECF
NOTIFY following
Registered Parties

- 1) Nevada Attorney General
100 N. CARSON ST
CARSON CITY NV 89701
- 2) Attorney General Office Clark County
558 Washington St
Las Vegas NV 89107

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

Retituted In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

I do affirm that the preceding document, NOTICE OF CHANGE OF ADDRESS, does NOT contain the social security number of any person.

Dated this 12th day of November, 2019.

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

Brian Kerry O'Keefe # 90244
LOVELOCK CORRECTIONAL CENTER
1200 Prison Road
Lovelock, NV 89419

Lovelock Correctional Center NV
RECEIVED 2019 PM

NOV 18 2019

CLERK OF THE COURT

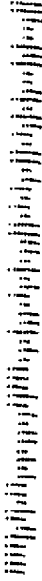
INMATE LEGAL
MAIL CONFIDENTIAL

Steven Brenner, Clerk of Court (874 Juv.)
200 Lewis Ave., 3RD Floor
Las Vegas, NV. 89155

CONFIDENTIAL

LEGAL MAIL

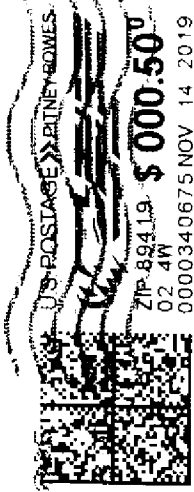
000910158



LCC LAW LIBRARY

NOV 13 2019

RECEIVED



CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing REQUEST FOR SUBMISSION OF MOTION to the below address(es) on this 27th day of February, 2020, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): Prison Slip No. 2334126

Don K O'Leary
Prison L O'Leary # 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 REQUEST FOR SUBMISSION OF MOTION does not contain the social security number of any person.

Dated this 27th day of February, 2020.

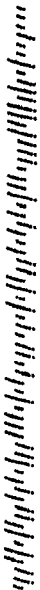
Don K O'Leary
Prison L O'Leary
Petitioner In Pro Se

Brian Henry O'Sheeha (#90244)
Corelock Correctional Center
1200 Prison Road
Corelock, N.Y. 89419

**INMATE LEGAL
MAIL CONFIDENTIAL**

BRASS #12 NO. 2334126
LEGAL MAIL

BS10136300



Clerk of the Court
Eighth Judicial Dist. Court
200 Lewis Ave., 3RD FL.
CRK VERAS, N.Y. 81155
(Confidential)

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28 FEB 2020 PM 5:42:28



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FEB 27 2020

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NOAS

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

FILED

APR -4 2022

Thomas A. Hoffman
CLERK OF COURT

Petitioner In Pro Se

EIGHTH
DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

BRIAN KERRY O'KEEFE

Plaintiff,

-vs-

THE STATE OF NEVADA

Defendant.

* Case of First Impression

Case No. A-18-783689-C202793

Dept. No. XXIV - 24

Judge Erik Ballou

(OMNIBUS - 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 OMNIBUS MOTION NR8 176.555 / NRCVP 60 (b) on the issues on page 2,
as filed/entered on the 17th day of March, 2022,
(complete if applicable) and the

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

Dated this 30th day of March, 2022.

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

Plaintiff In Pro Se

1 see issues on appeal on page 2
hereby attached.

(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 486.73)
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-18-783669 - 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, 2022, by placing same in the U.S. Mail via prison law library staff:

01788 Slip No. 2671624
Clerk All registered participants of cmlccf served by Clerk.
NOTE: INVOICE EDOR 8.05 (a)(f) 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-18-783669
C202793 does not contain the social security number of any person.

Dated this 30th day of March, 2022.

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

Petitioner In Pro Se

Brian O'Heade #90244

LCC
1208 Milton Rd.
Cave Rock, NV. 89419

LOVELOCK CORRECTIONAL CENTER

US POSTAGE
ZIP 89419 \$000.53⁰
02 4W
0000369000 MAR 31 2022

**INMATE LEGAL
MAIL CONFIDENTIAL**

Clerk of the Court (8th Judicial)
Steven Overton

out 3/30/2022

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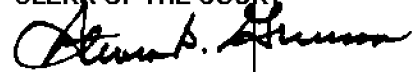
APR - 4 2022

LEGAL MAIL

CLERK OF THE COURT
Clerk of the Court
Steven Overton

200 Lewis Ave., 3RD FL

C78 Vegas NV 89101



1 ASTA

2
3
4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 STATE OF NEVADA,

11 Plaintiff(s),

12 vs.

13 BRIAN KERRY O'KEEFE,

14 Defendant(s),
15

Case No: 04C202793

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 #90244
24 1200 Prison Rd.
Lovelock, NV 89419

25 4. Respondent: The State of Nevada

26 Counsel:

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

(702) 671-2700

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

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

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

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

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: July 6, 2004

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Misc. Order

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 44372, 44644, 48673, 49329, 65040, 66785, 81867

12. Child Custody or Visitation: N/A

Dated This 5 day of April 2022.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Brian K. O'Keefe

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

FILED
JUN 10 2022
[Signature]
CLERK OF COURT

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,)
11 Petitioner,) Case No. 040202793
12 -vs-,) Dept. No. XXIV (24)
13 THE STATE OF NEVADA,)
14 Respondent.)

15 NOTICE OF MOTION
16 _____
17 _____
18 _____

19 Please take notice that the hearing on Motion to
20 Vacate Judgment (NRS 176.555) will be heard on
21 _____ in Department _____
22 at the hour of _____ AM.

23 Dated this 26th day of May 2022,
24 pursuant to NRS 208.165 by:
25 Brian K. O'Keefe
26 Brian K. O'Keefe
27 pro per, # 90244
28

LCC LL FORM 24.014
RECEIVED
JUN 23 2022
CLERK OF THE COURT

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

FILED
JUN 10 2022

John J. Sullivan
CLERK OF COURT

Petitioner In Pro Se

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

* * * * *

July 6, 2022
9:30 AM

BRIAN KERRY O'KEEFE,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF NEVADA,)
)
Respondent.)

Case No. 04C202793

Dept. No. XXIV (24)

HEARING REQUESTED

MOTION TO VACATE JUDGMENT (NRS 176.555)

Comes Now, Brian O'Keefe, proper Plaintiff, who hereby
MOVES this Court for an "ORDER" to vacate judgment,
Count 6 (F)(Burglary) in case 04C202793.

This motion is made upon the myriad of papers on file
embodied with the State's "judicial admissions"¹ and the
following Points and Authorities.

Dated this 26th day of May 2022 (NRS 208.165) by Brian O'Keefe
Brian O'Keefe
1 (State's Response A-20-811284-C FILED 7/23/2020; id ¶ 4, lines 21 to 24)
(STATEMENT OF FACTS - ... at time of crime ... dating ... living together...)
(cohabitation rights) (see EXHIBIT 1 ATTACHED)

1 **I.**

JURISDICTION

2

3 This Honorable Court obtains jurisdiction pursuant NRS 176.555.

4 see Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996) (Beginning

5 with "Peters", this court established a line of cases - Motion To

6 Vacate Judgment...) (State v. E.F.D.C., 100 Nev. 90, 671 P.2d 1044, 1047

7 (1984); see also Harris v. State, 130 Nev. 435, 329 P.3d 69 (en banc 2014)

8 see also Collier v Bayer, 408 F.3d 1271, 1282 n.2 (9th Cir. 2005) (NRS 176.555

9 is a post conviction remedy. This motion is not subject to the time

10 bars and procedural hurdles limiting other types of appeals).

11

12 **II.**

POINTS AND AUTHORITIES

13

14 **A** see NEW PROOF - STATE'S JUDICIAL ADMISSIONS EXHIBITS 1, 2, 3

15

16 (EXHIBIT 1 STATE'S RESPONSE... PETITION TO ESTABLISH FACTUAL INNOCENCE.)

17 Filed 7/23/2020, Case No. A-20-811284-C, 040202793

18 Here, on page 4, is a STATEMENT OF FACTS, ... at the time

19 of the [alleged] crime, ... in a dating relationship with Petitioner...

20 and were living still together... (id. *4 at lines 21-24)

21

22 (EXHIBIT 2 FAST TRACK STATEMENT FILED AUG 19 2009 (Case No. 53859)

23 Here again is STATEMENT OF FACTS... In 2004, O'Keefe was convicted

24 of burglary for entering into the couple's joint dwelling... (id. *2)

25

26 (EXHIBIT 3 STATE'S MOTION IN LIMINE, (250630 FILED 01/06/2011)

27 ... The police were once again called to the couple's residence and Defendant

28 left for a cooling off period... where Defendant... resided (id. *6)

1 **B** EXCEPTION TO THE LAW OF THE CASE DOCTRINE provides
2 that where a prior decision was clearly erroneous and would
3 result in manifest injustice if enforced, a court can overrule.
4 see HSU v. County of Clark, 123 Nev. 625, 173 P.3d 724 (2007);
5 see also Harris v. Nevada, 329 P.3d at 624 (Nev 2014 en banc)

6
7 Here, the State's response to the factual innocence petition
8 manifests that a (3) Judge panel improperly denied O'Keefe
9 NRS 34.724 petition becoming completely contrary to a
10 subsequent Nevada en banc 2014 "WHITE" decision.
11 see State of Nevada v. WHITE, 330 P.3d 482 (en banc 2014)
12 • see EXHIBIT 1 at page 10, lines 26-27

13
14 **C** DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW
15 ("Class of One")

16 O'Keefe is being denied equal protection to a class of one.
17 Unlike Weber v. Nevada, 132 Nev. 1043 (2016) and "WHITE", 2014
18 the non-application of my rehabilitation defense results in a
19 different treatment to persons with the same issue.
20 see Reed v. Reed, 404 U.S. 71, 75-76 (1961); Village of Willow Brook
21 v. O'Lech, 528 U.S. 562, 564 (2000) (recognizing equal protection right to be
22 consistent.)

23
24 **D** CONTINUING COLLATERAL CONSEQUENCES

25
26 Pursuant Spencer v. Kemna, 523 U.S. 7-12 (1998) a court retains
27 jurisdiction where collateral prejudicial consequences are demonstrated.
28 Here, O'Keefe has a myriad of consequences, e.g., impeachment,

1 parole being denied specifically based on the improper alleged
2 violent burglary Count 6 judgment of conviction with a future
3 parole hearing scheduled. Additionally, points are assessed
4 to each felony placing petitioner in a high risk assessment.
5 These are just a few of the many prejudicial consequences.

6 E NEW FEDERAL STATUTORY INTERPRETATION

7
8
9 Under Borden v. United States, 141 S.Ct. 1177 (June 10, 2021)
10 SCOTUS announced a violent felony requires specific intent
11 and a knowing or purposeful mens rea not a reckless
12 state of mind by a simple misdemeanor general intent crime.
13 Nevada also recognizes this in Tucker v. State, 92 Nev.
14 486, 553 P.2d 954 (Nev. 1976) (whether intoxication is so gross as to
15 preclude a capacity to form the specific intent necessary to support
16 a burglary charge...); see also Nevada v. Contreras, 118 Nev. 332, 339
17 (Nev. 2002 en banc) (same).

18 IN O'Keefe's trial (C202743),
19 as drafted the State predicated COUNT 6 (F) Burglary on
20 the previous Counts 1-5. However, O'Keefe was acquitted
21 of all felonies but the State got a misdemeanor simple
22 battery conviction with a reckless mens rea that cannot
23 underpin and legally support Count 6 (F) Burglary.
24 see also Nevada v. WHITE, supra (... intent to commit a felony...)

25
26 Nevada adopted the Principles of Penal Law: substantive law,
27 Model Penal Code in 1962. Nevada employs term "against"
28 in NRS 205.060 to accord with the language of "BORDEN".

1 **F**

ACTUAL / FACTUAL INNOCENCE EXISTS

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Undisputed is the "factual" matter that Petitioner O'Keefe is innocent by the fact he resided in the dwelling and even Budget Suites could not legally run me off for I had established legal rights by living there and paying rent for over 30 days.

The truth is that the police asked me to leave for the night - ONLY - for a cooling off period because Victoria asked only that.

There also was no TPO's in effect at any time.

- see Schlup v. Delo, 513 U.S. 298 (1995); Pelligrini v. State, 117 Nev. 860, 887 (2001)

(SUMMATION)

- (INCLUDE EXHIBITS 1, 2 and 3) (attached)

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

- see Reynolds Law & Landscape Design, Inc. v. Plaster Dev. Co., Inc., 127 Nev. 331 (2011)

III.

CONCLUSION

- 1) Hold telephonic/video hearing;
- 2) Appoint counsel;
- 3) Grant Motion to Vacate Judgment (Count 6 Burglary) and keep the misdemeanor battery to presuppose your [improper] alleged valid conviction despite not being pursuant NRS 33-018.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing MOTION TO VACATE JUDGMENT (NRS 176.555) to the below address(es) on this 27th day of May (FRIDAY), 2022, by placing same in the U.S. Mail via prison law library staff, pursuant to NRC 5(b): ● Invoke EDCR 8.05 (2), (4): NRS 176.555
NOTE TO CLERK: All registered participants of the CM/ECF system (SERVICE LIST) will be served by the clerk of court.

● Registered Participant

Clark County District Attorney

● New - Registered User PAPER COPY RETURNED AFTER FILING

Brian O'Keefe #90244

LCC

1200 Prison Road

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 MOTION TO VACATE JUDGMENT filed in District Court Case No. C202793 does not contain the social security number of any person.

Dated this 27th day of May, 2022.

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

LNUT

LCC

Steven D. Grierson

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\695115\200869515C-RSPN-(O'KEEFE, BRIAN)-001.DOCX

see AGO

*to commit
felony
CR 115*

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 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 Coram 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 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 **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

#001

LCC

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 *D. Malton*
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

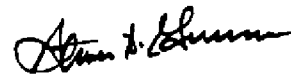
See pg. 6 - lines 23-28

EXHIBIT

3

#001

LCC


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 6, lines 25-28 "COUPLES RESIDENCE"
"Defendant and Victoria RESIDED"

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

12 **Event Number 040403-1089**

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

23 **Event Number 040529-2232**

(Case C202793, Burglary with/ conviction)

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

May 29, 2004
INCIDENT

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

INMATE LEGAL
MAIL CONFIDENTIAL

Clerk of Court Steven Giverson
Office of the Clerk - Eighth Cir.
200 Lewis Ave., 3rd Fl.
Las Vegas, Nevada 89101
ATTN: CONFIDENTIAL

RENO, NV 89503 895
TUE 31 MAY 2022 PM

UT LEGAL MAIL
5/17/2022 (FEB 04)

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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.

04C202793
CCJD
NV Supreme Court Clerks Certificate/Judgn
4996616



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

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. Young
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.

I. Hardesty, J.
Hardesty

Stiglich, J.
Stiglich

Herndon, 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

SUPREME COURT
OF
NEVADA

(O) 1947A

22-13703

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. Yarns
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

J. Hardesty J.
Hardesty

Stiglich J.
Stiglich

Herndon 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



1 **OPP**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 Karen Mishler
6 Chief Deputy District Attorney
7 Nevada Bar #13730
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

9 BRIAN K. O'KEEFE,
10 #90244

11 Petitioner,

CASE NO: 04C202793

12 -vs-

A-20-811284-C

13 THE STATE OF NEVADA,

DEPT NO: XXIV

14 Respondent.

15 **STATE'S OPPOSITION TO MOTION TO VACATE JUDGMENT**

16
17 DATE OF HEARING: July 6, 2022
18 TIME OF HEARING: 9:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Opposition to Petitioner's Motion to Vacate
22 Judgment.

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

26 //

27 //

28 //

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

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

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

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

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

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

22 On October 19, 2006, Petitioner filed a Motion for New Trial and a Supplement to that
23 motion on December 13, 2006. The State filed its Opposition on November 14, 2006. The
24 District Court denied the motion on December 18, 2006. On December 26, 2006, Petitioner
25 filed a Notice of Appeal. The Nevada Supreme Court affirmed the district court's denial of
26 Petitioner's Motion for New Trial on March 24, 2008; Remittitur issued April 18, 2008. See
27 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 a "Petition to Establish Factual Innocence
16 Pursuant to NRS 34.900 to NRS 34.990 Inclusive" and a Motion for Appointment of Counsel.¹
17 On March 10, 2020, Petitioner filed a Supplemental Petition and a Motion for Leave of Court
18 to file the Supplemental Petition. On June 15, 2020, the District Court ordered the State to file
19 a written response. On July 23, 2020, the State filed its Response. On July 27, 2020, Petitioner
20 filed a "Motion for Judgment on the Pleadings as a Matter of Law Based on the Petition NRS
21 34.960 Establishing a Prima Facie Case Where Question of Law Warrants Relief with this
22 Court Vacating (F) Burglary Conviction Affording State's Right to Appeal."

23 On August 24, 2020, the Court denied Petitioner's Petition to Establish Factual
24 Innocence, Supplemental Petition to Establish Factual Innocence, Motion to Appoint Counsel,
25 and "Plaintiff's Motion for Judgment on the Pleadings as a Matter of Law Based on the Petition
26 NRS 34.960 Establishing a Prima Facie Case Where Question of Law Warrants Relief with
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 this Court Vacating (F) Burglary Conviction Affording State's Right to Appeal." On
2 September 25, 2020, the Court filed its Findings of Fact, Conclusions of Law and Order.

3 On November 2, 2020, Petitioner filed a Notice of Appeal.

4 On April 23, 2021, the Nevada Supreme Court Affirmed Petitioner's Judgment of
5 Conviction. Remittitur issued on July 14, 2021.

6 On June 10, 2022, Petitioner filed the instant Motion to Vacate Judgment. The State
7 responds as follows.

8 STATEMENT OF THE FACTS

9 Victoria Whitmarsh ("the victim") testified that at the time of the crime, she was in a
10 dating relationship with Petitioner. Reporter's Transcript on Appeal ("RTA") 10/26/04 at 26-
11 27. She also testified that she and Petitioner were living together at the Budget Suites on
12 Rancho Drive. RTA 10/26/04 at 49. According to Victoria, there was strife in their relationship
13 because of Petitioner's drinking problems and his thoughts that she was unfaithful. RTA
14 10/26/04 at 28-44. The victim testified that she suffered abuse at Petitioner's hands many times
15 over the several preceding years, but she always took him back because of how he promised
16 her that there would be change. RTA 10/26/04 at 28-44, 49.

17 On the evening of May 28, 2004, the two (2) were at Texas Station bowling and
18 drinking. RTA 10/26/04 at 50-52. An argument began between them, because Petitioner was
19 drinking too much, and Victoria wanted him to stop and go home. Id. As a result of the
20 argument, the victim ended up walking home alone. RTA 10/26/04 at 54. When Victoria
21 arrived at the Budget Suites, she contacted security to obtain an escort to her room because
22 she was afraid of Petitioner, and to acquire another key to her room. Id. Security walked her
23 to the room and found Petitioner present. Id. Security then called the Las Vegas Metropolitan
24 Police Department ("LVMPD") due to the domestic issues. RTA 10/26/04 at 55. LVMPD
25 responded and asked Petitioner to leave for the night. Id.

26 Victoria went to sleep for the night and awoke sometime after noon, on May 29, 2004,
27 to Petitioner knocking on the door. RTA 10/26/04 at 23, 56-57. She did not want to let
28 Petitioner back into the apartment and reminded Petitioner that he was not allowed on the

1 property; however, he stated that he just needed to get his belongings. RTA 10/26/04 at 57.
2 Victoria ultimately allowed Petitioner inside. RTA 10/26/04 at 57-58.

3 When Petitioner entered the room, he immediately began behaving aggressively and
4 accusing Victoria of having sex with other individuals. RTA 10/26/04 at 58-60. Petitioner
5 struck her about the head, face, and body repeatedly. Id. He then led her onto the couch and
6 forced her to perform oral sex on him. RTA 10/26/04 at 61. Victoria complied because she
7 feared for her life. RTA 10/26/04 at 61-62 Then, Petitioner forced her to engage in vaginal
8 intercourse for a short time before demanding anal intercourse. RTA 10/26/04 at 63-65.
9 Petitioner then forced her to engage in anal intercourse, and ultimately ejaculated inside of her
10 anus. RTA 10/26/04 at 65.

11 Approximately half an hour later, Petitioner forced her to perform oral sex on him and
12 submit to vaginal intercourse again. RTA 10/26/04 at 68. Additionally, he once again forced
13 her to engage in anal intercourse. Id. Petitioner could not finish, so Victoria went to the
14 restroom and would not come out. RTA 10/26/04 at 69. When Petitioner fell asleep, she
15 proceeded to get dressed and left the room quietly so that she could seek help from Security.
16 Id.

17 Security Officer Besse was first contacted by Victoria who was very upset, and visibly
18 shaking. II RTT 10/26/04 at 108-09. Besse went to the couple's room and found Petitioner
19 passed out in the bed, completely naked. II RTT 10/26/04 at 110. Due to the gravity of the
20 situation, Besse placed Petitioner in custody. II RTT 10/26/04 at 110-12.

21 Officer Shanan Kelly responded to a call from dispatch, around 5:00 p.m., regarding a
22 trespasser in custody, specifically "somebody was in custody by security for trespass, possible
23 battery and sexual assault". RTA 10/26/14 at 07-08, 22. Contact was made with the Petitioner.
24 Id. at 09-22. Crime Scene Analyst Horn responded to the crime scene and discovered that the
25 scene was consistent with Victoria's version of events. II RTT 10/26/04 at 65-75. Specifically,
26 he located a white and black Zebra print dress with fecal matter and blood on it and a pair of
27 blue shorts with fecal matter and blood on it. Id.

1 Officer Ray Steiber observed that Victoria was visibly upset and crying. Reporter's
2 Trial Transcript Volume II ("II RTT") 10/26/04 at 76-77. Victoria advised them that Petitioner
3 beat her and subjected her to sexual contact. RTA 10/26/14 at 72. Patrol contacted Detective
4 Moniot, who responded to the University medical Center ("UMC") where Victoria was
5 transported. RTA 10/26/14 at 72-73. II RTT 10/26/04 at 142-44.

6 When Detective Moniot contacted Victoria, she was very withdrawn, visibly upset,
7 crying vigorously, and holding herself around her mid-section. II RTT- 10/26/04 at 146-47.
8 Detective Moniot also observed that she was walking "gingerly." Id. While speaking with
9 Victoria, Detective Moniot also noticed that there was a significant amount of hair from
10 Victoria's head on her upper body. II RTT 10/26/04 at 150-51. Victoria stated that it was a
11 result of Petitioner pulling out her hair. RTA 10/26/14 at 73.

12 Victoria underwent a SANE exam at UMC which was administered by Linda Ebbert.
13 RTT- 10/27/04 at 17. Nurse Ebbert noted multiple sites of bruising all over Victoria's body
14 and a laceration to her upper lip. RTT- 10/27/04 at 23-31. Additionally, she observed several
15 deep lacerations to Victoria's anus. RTT- 10/27/04 at 31-34, 37-39. The injuries were
16 consistent with Victoria's version of events.

17 ARGUMENT

18 **I. PETITIONER CANNOT DEMONSTRATE THAT HIS SENTENCE IS** 19 **ILLEGAL**

20
21 As an initial matter, it is unclear what type of pleading Petitioner intended for the instant
22 motion to be as there is no statutorily recognized pleading known as a "motion to vacate
23 judgment." Petitioner cites to NRS 176.555 in the title of his motion, which permits the court
24 to correct an illegal sentence. To the extent that Petitioner claims that his sentence is illegal,
25 this claim fails.

26 NRS 176.555 states that "[t]he court may correct an illegal sentence at anytime." See
27 also Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). However, the grounds
28 to correct an illegal sentence are interpreted narrowly under a limited scope. See Edwards v.

1 State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); see also Haney v. State, 124 Nev. 408,
2 411, 185 P.3d 350, 352 (2008). "A motion to correct an illegal sentence is an appropriate
3 vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot
4 be used as a vehicle for challenging the validity of a judgment of conviction or sentence based
5 on alleged errors occurring at trial or sentencing." Edwards, 112 Nev. at 708, 918 P.2d at 324.

6 "Motions to correct illegal sentences address only the facial legality of a sentence." Id.
7 Motions to correct illegal sentences evaluate whether the sentence imposed on the defendant
8 is "at variance with the controlling statute, or illegal in the sense that the court goes beyond
9 its authority by acting without jurisdiction or imposing a sentence in excess of the statutory
10 maximum provided." Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).
11 Other claims attacking the conviction or sentence must be raised by a timely filed direct appeal
12 or a timely filed Petition for a Post-Conviction Writ of Habeas Corpus per NRS 34.720-34.830,
13 or other appropriate motion. See id.

14 Here, Petitioner does not allege that his sentence is at variance with the controlling
15 statutes, nor does he allege that the court was acting beyond its jurisdiction or that his sentence
16 is in excess of the statutory maximum. Accordingly, his Motion is outside of the narrow scope
17 of a motion to correct illegal sentence and must be denied. See id. Further, Petitioner was
18 sentenced to credit for time served as to Count 1, and twenty-four (24) to one hundred twenty
19 (120) months as to Count 6, which is within the sentencing range set out in the controlling
20 statutes. See NRS 200.481, 205.060.

21 **II. PETITIONER CANNOT ESTABLISH FACTUAL INNOCENCE**

22 Next, to the extent that Petitioner intends the instant pleading to be a post-conviction
23 petition for writ of habeas corpus, he is required to file a petition that conforms with the
24 requirements of NRS Chapter 34. As such a petition would be procedurally barred as untimely
25 under NRS 34.726, and as successive under NRS 34.810, Petitioner would need to demonstrate
26 good cause and prejudice before his claims could be considered on their merits.
27

28 //

1 In substance the pleading appears to be most similar to a petition to establish factual
2 innocence, as he claims to be actually innocent of his Burglary conviction. But such a petition
3 is required to meet the standards set forth in NRS 34.900-990. Furthermore, Petitioner has
4 already filed such a petition before this Court, in which he raised the exact same claim; as
5 explained below, this petition was properly denied by this Court.

6 When a defendant files a Petition to Establish Factual Innocence, said claim, made under
7 the relevant statutes, "is separate from any state habeas claim that alleges a fundamental
8 miscarriage of justice to excuse procedural or time limitations pursuant to NRS 34.726 or
9 34.810." NRS 34.950.

10 NRS 34.960 states in relevant part:

11 1. At any time after the expiration of the period during which a
12 motion for a new trial based on newly discovered evidence may
13 be made pursuant to NRS 176.515, a person who has been
14 convicted of a felony may petition the district court in the county
15 in which the person was convicted for a hearing to establish the
16 factual innocence of the person based on newly discovered
17 evidence. A person who files a petition pursuant to this subsection
18 shall serve notice and a copy of the petition upon the district
19 attorney of the county in which the conviction was obtained and
20 the Attorney General.

21 2. A petition filed pursuant to subsection 1 must contain an
22 assertion of factual innocence under oath by the petitioner and
23 must aver, with supporting affidavits or other credible documents,
24 that:

25 (a) Newly discovered evidence exists that is specifically
26 identified and, if credible, establishes a bona fide issue of factual
27 innocence;

28 (b) The newly discovered evidence identified by the
petitioner:

(1) Establishes innocence and is material to the case
and the determination of factual innocence;

(2) Is not merely cumulative of evidence that was
known, is not reliant solely upon recantation of testimony by a
witness against the petitioner and is not merely impeachment
evidence; and

(3) Is distinguishable from any claims made in any
previous petitions;

1 3. In addition to the requirements set forth in subsection 2, a
2 petition filed pursuant to subsection 1 must also assert that:

3 (a) Neither the petitioner nor the petitioner's counsel knew of
4 the newly discovered evidence at the time of trial or sentencing or
5 in time to include the evidence in any previously filed post-trial
6 motion or postconviction petition, and the evidence could not have
7 been discovered by the petitioner or the petitioner's counsel
8 through the exercise of reasonable diligence; or

9 (b) A court has found ineffective assistance of counsel for
10 failing to exercise reasonable diligence in uncovering the newly
11 discovered evidence.

12 4. The court shall review the petition and determine whether
13 the petition satisfies the requirements of subsection 2. If the court
14 determines that the petition:

15 (a) Does not meet the requirements of subsection 2, the court
16 shall dismiss the petition without prejudice, state the basis for the
17 dismissal and send notice of the dismissal to the petitioner, the
18 district attorney and the Attorney General.

19 (b) Meets the requirements of subsection 2, the court shall
20 determine whether the petition satisfies the requirements of
21 subsection 3. If the court determines that the petition does not meet
22 the requirements of subsection 3, the court may:

23 (1) Dismiss the petition without prejudice, state the basis
24 for the dismissal and send notice of the dismissal to the petitioner,
25 the district attorney and the Attorney General; or

26 (2) Waive the requirements of subsection 3 if the court
27 finds the petition should proceed to a hearing and that there is other
28 evidence that could have been discovered through the exercise of
reasonable diligence by the petitioner or the petitioner's counsel at
trial, and the other evidence:

(I) Was not discovered by the petitioner or the
petitioner's counsel;

(II) Is material upon the issue of factual innocence;
and

(III) Has never been presented to a court.

According to NRS 34.920, factual innocence means a defendant did not do the
following:

1. Engage in the conduct for which he or she was convicted;
2. Engage in conduct constituting a lesser included or inchoate offense of the
crime for which he or she was convicted;

//

1 3. Commit any other crime arising out of or reasonably connected to the facts
2 supporting the indictment or information upon which he or she was convicted;
and

3 4. Commit the conduct charged by the State under any theory of criminal liability
4 alleged in the indictment or information.

5 In the instant Petition, Petitioner claims that his attached documents support his claim
6 that he is factually innocent of the Burglary conviction, because he had occupancy rights of
7 the dwelling that he shared with the victim. Petition at 2, 5. Further, Petitioner alleges that
8 since the jury convicted him of a misdemeanor Battery, this Battery conviction cannot now
9 sustain the Burglary conviction as there was a lack of felonious intent. Petition at 4. Based
10 upon the claims and materials submitted by Petitioner, he cannot demonstrate that he was
11 factually innocent of the Burglary charge for the following reasons:

12 **A. Petitioner Failed to Establish that His Exhibits Constitute Newly Discovered**
13 **Evidence.**

14 “‘Newly discovered evidence’ means evidence that was not available to a petitioner at
15 trial or during the resolution by the trial court of any motion to withdraw a guilty plea or motion
16 for new trial and which is material to the determination of the issue of factual innocence.” NRS
17 34.930.

18 Here, Petitioner failed to provide this Court with any newly discovered evidence.
19 Petitioner appears to be claiming that previous filings of the State demonstrate that he is
20 actually innocent of Burglary because he lived at the subject residence. Petition at 2. Pleadings
21 by the State are not proof of factual innocence as defined under NRS 34.920 and NRS 34.930.

22 Further, this Court has already considered and denied Petitioner’s claim that he was not
23 guilty of Burglary because he lived at the residence he was accused of burglarizing. See
24 Findings of Fact, Conclusions of Law and Order, September 25, 2020, at 10–11. Thus, re-
25 litigation of this issue is precluded under the doctrine of res judicata. Exec. Mgmt. v. Ticor
26 Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v.
27 Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)). Additionally, this claim was also
28 raised on appeal and rejected. See Order of Affirmance April 23, 2021, at 1. Thus, this claim

1 is also barred by the law of the case doctrine. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797,
2 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)) (“The law of
3 a first appeal is law of the case on all subsequent appeals in which the facts are substantially
4 the same.”).

5 More importantly the claim was correctly denied. At trial, Petitioner testified that while
6 he and the victim both paid rent towards the apartment, the apartment at the Budget Suites was
7 in the victim’s name only. RTT 10/27/04 at 110. The victim also testified that she lived with
8 Petitioner at the Budget Suites. RTA 10/26/04 at 49. Accordingly, the attached exhibits cannot
9 constitute “newly discovered evidence” since this evidence was made available to Petitioner
10 at trial. As the Nevada Supreme Court explained:

11 O’Keefe first argues the district court erred by denying his petition
12 because he lived at the residence he was accused of burglarizing.
13 O’Keefe fails to explain how the location of his residence at the
14 time of the offense was not available to him at trial. Therefore, we
15 conclude he is not entitled to relief on this claim. *See* NRS
16 34.960(2)(a) (requiring newly discovered evidence to establish
17 factual innocence); *see also* NRS 34.930 (“Newly discovered
evidence’ means evidence that was not available to a petitioner at
trial. ...”).

18 See Order of Affirmance April 23, 2021, at 1. Accordingly, Petitioner has failed to present any
19 evidence that sufficiently meets the statutory standard of “newly discovered evidence” and
20 this claim should be denied.

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

22 Petitioner failed to establish that he was factually innocent of the Burglary conviction
23 and his reliance on State v. White, 130 Nev. 533, 330 P.3d 482 (2014), is unavailing. First,
24 Petitioner previously argued that his “counsel was ineffective for failing to present a defense
25 to burglary based on the fact that O’Keefe was a cohabitant of the apartment.” Order of
26 Affirmance, March 24, 2008, at 10 (emphasis added). According to the Court, “[b]ecause
27 unlawful entry of the apartment was not a necessary element of burglary, cohabitation of the
28 apartment or lawful entry of the apartment was not a viable defense to the charge of burglary.”

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

13 Moreover, this Court has previously held that even if this Court were to determine that
14 State v. White applies now,³ any claim would be belied by the record. Findings of Fact,
15 Conclusions of Law and Order, September 25, 2020, at 13. According to State v. White, "a
16 person with an absolute right to enter a structure cannot commit burglary of that structure."
17 130 Nev. at 538, 330 P.3d at 485-86. "[C]onsent to the entry is not a defense to burglary if the
18 person acquired the entry with felonious intent." Id. at 537-38; 330 P.3d at 485; citing Barrett
19 v. State, 105 Nev. 361, 364, 775 P.2d 1276, 1277 (1989). Further, "while ownership may be
20 one 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 ² Which the State argued above there is no "newly discovered evidence".

³ Which it cannot as this Court cannot overrule the Nevada Supreme Court. See NEV. CONST. Art. VI § 6.

1 10/26/04 at 57-58. Accordingly, Petitioner's reliance on White is misplaced as that case is
2 easily distinguishable from the case at hand.

3 As to Petitioner's other claim regarding the lack of "felonious intent," and that the
4 Battery conviction cannot be used to support the Burglary conviction, said claim is meritless.
5 According to Petitioner, since the jury convicted him of a misdemeanor, the State did not prove
6 the correct mens rea for Burglary. Petition at 4. Petitioner fails to understand the fact that
7 because he was convicted of a misdemeanor Battery does not automatically defeat any finding
8 that he committed the crime of Burglary.

9 Most importantly, this claim was previously raised in a Petition for Writ of Habeas
10 Corpus and was addressed by the Nevada Supreme Court under an ineffective assistance of
11 counsel standard:

12 First O'Keefe claimed that counsel was ineffective for failing to move to dismiss
13 his conviction for burglary after he was acquitted of all felony charges. He
14 asserted that his conviction for misdemeanor battery could not support the
conviction for burglary.

15 O'Keefe failed to demonstrate that counsel was deficient. NRS
16 205.060(1) provides that any person who enters a room with the intent to commit
17 batter on any person is guilty of burglary. **This statute does not differentiate**
18 **between misdemeanor and felony battery.** O'Keefe admitted at trial that he
19 slapped the victim, thereby committing a battery upon the victim. Sufficient
evidence was presented at trial for the jury to find that O'Keefe entered the
apartment with the intent to commit a battery.

20 Order of Affirmance, March 24, 2008, at 5 (internal citations omitted) (emphasis added). The
21 Court reiterated its finding that there was sufficient evidence to support a conviction of
Burglary. Id. at 11. Again, any argument to the contrary is barred under the law of the case
doctrine. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

22 Petitioner again raised this claim in his Petition to Establish Factual Innocence, and the
23 Nevada Supreme Court again denied the claim finding that it was barred under the law of the
24 case doctrine. Order of Affirmance, April 23, 2021, at 2. Therefore, Petitioner's claims are
25 insufficient to satisfy the standard to prove factual innocence; accordingly, his pleadings must
26 be denied.

27 //

28 //

1 Finally, Defendant references the law of the case doctrine, due process, equal
2 protection of the law, collateral consequences, and an irrelevant federal case. Defendant fails
3 to provide any cogent argument or legal support for any claim that these concepts necessitate
4 vacating his conviction. See Hargrove v. State, 100 Nev. at 502, 686 P.2d at 225.

5 **CONCLUSION**

6
7 Based on the foregoing arguments, Petitioner's Motion to Vacate Judgment should be
8 DENIED.

9
10 DATED this 30th day of June, 2022.

11 Respectfully submitted.

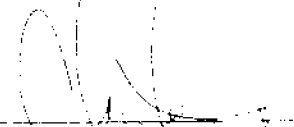
12 STEVEN B. WOLFSON
13 Clark County District Attorney
14 Nevada Bar #001565

15 BY /s/ KAREN MISHLER
16 KAREN MISHLER
17 Chief Deputy District Attorney
18 Nevada Bar #13730

19 **CERTIFICATE OF MAILING**

20 I hereby certify that service of the above and foregoing was made this 1st day of July
21 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

22 Brian O'Keefe #90244
23 Lovelock Correctional Center
24 1200 Prison Road
25 Lovelock, NV 89419

26 BY 
27 Secretary for the District Attorney's Office

28 04F09774X/KM/elh/L3

Almond S. Hemin
CLERK OF THE COURT

ORDR
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ROBERT TURNER
Chief Deputy District Attorney
Nevada Bar #006526
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 K. O'KEEFE,
#90244

Defendant.

CASE NO: 04C202793

DEPT NO: XXIV

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT

DATE OF HEARING: July 6, 2022
TIME OF HEARING: 9:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 6th day of July, 2022, the defendant not being present having filed Pro Per, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ROBERT TURNER, Chief Deputy District Attorney, and without argument, based on the pleadings and good cause appearing therefor,

///

///

///

///

1 IT IS HEREBY ORDERED that the Defendant's Motion to Vacate Judgment, shall be,
2 and it is DENIED.

3 DATED this _____ day of July, 2022.

Dated this 13th day of July, 2022

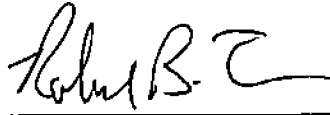
4 

5 DISTRICT JUDGE

6 STEVEN B. WOLFSON
7 Clark County District Attorney
Nevada Bar #001565

CD9 E20 AEBB 4A2A
Erika Ballou
District Court Judge

8
9 BY



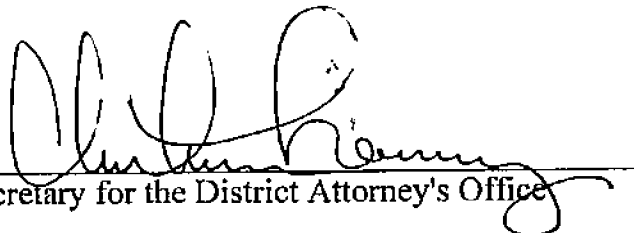
10 ROBERT TURNER
11 Chief Deputy District Attorney
Nevada Bar #006526

12
13 **CERTIFICATE OF MAILING**

14 I hereby certify that service of the above and foregoing was made this 13th
15 day of July 2022, by depositing a copy in the U.S. Mail, postage pre-paid,
16 addressed to:

17 Brian O'Keefe #90244
18 Lovelock Correctional Center
1200 Prison Road
19 Lovelock, NV 89419

20
21
22 BY


Secretary for the District Attorney's Office

23
24
25
26
27
28 04F09774X/clh/L3

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 The State of Nevada vs Brian K
O'Keefe

CASE NO: 04C202793

7 DEPT. NO. Department 24

8
9 **AUTOMATED CERTIFICATE OF SERVICE**

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

13 Service Date: 7/13/2022

14 D A motions@clarkcountyda.com

CLERK OF THE COURT

1 CERTIFICATE OF SERVICE

2 I do certify that I mailed a true and correct copy of the
3 foregoing NOTICE OF APPEAL to the below address(es) on this
4 21 day of July, 2022, by placing same in the
5 U.S. Mail via prison law library staff:
6
7
8
9
10
11
12
13
14
15

16 Brian K. O'Leary
17 Brian K. O'Leary # 90244
18 Lovelock Correctional Center
19 1200 Prison Road
20 Lovelock, Nevada 89419
21
22
23
24
25
26
27
28
Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

23 The undersigned does hereby affirm that the preceding
24 NOTICE OF APPEAL filed in District Court Case No. 040202793
25 does not contain the social security number of any person.

26 Dated this 21 day of July, 2022.

27 Brian K. O'Leary
28 Brian K. O'Leary
Petitioner In Pro Se

RENO 44-3886

Clerk of Court (STEVEN BREWSTER)
200 LEWIS AVE., 3RD FLR.
LAS VEGAS NV 89101
ATTN: CONFIDENTIAL

OUT LOCAL MAIL
7/21/22

1290

**INMATE LEGAL
MAIL CONFIDENTIAL**

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1 ASTA

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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 STATE OF NEVADA,

11 Plaintiff(s),

12 vs.

13 BRIAN KERRY O'KEEFE,

14 Defendant(s),
15

Case No: 04C202793

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 #90244
24 1200 Prison Rd.
Lovelock, NV 89419

25 4. Respondent: The State of Nevada

26 Counsel:

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

(702) 671-2700

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

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

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

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

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: July 6, 2004

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Misc. Order

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 44372, 44644, 48673, 49329, 65040, 66785, 81867,
84511

12. Child Custody or Visitation: N/A

Dated This 28 day of July 2022.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Brian K. O'Keefe

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 85098
District Court Case No. C202793

FILED

FEB - 8 2023

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 the judgment of the district court AFFIRMED.""

Judgment, as quoted above, entered this 13th of January, 2023.

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 07, 2023.

Elizabeth A. Brown, Supreme Court Clerk

By: Melissa Fuller
Administrative Assistant

04C202793
CCJA
NV Supreme Court Clerks Certificate/Judge
5021984



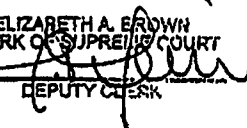
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 85098-COA

FILED

JAN 13 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Brian Kerry O'Keefe appeals from an order of the district court denying a motion to correct an illegal sentence filed on June 10, 2022.¹ Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

In his motion, O'Keefe claimed the State had admitted certain facts regarding the crimes in various filings; the Nevada Supreme Court's decision affirming the district court's denial of his postconviction petition for a writ of habeas corpus was erroneous; he was denied due process and equal protection under the law; he was subject to continuing collateral consequences; his conviction for misdemeanor battery could not legally support his burglary conviction; and he was factually innocent of burglary.

O'Keefe's claims fell outside the narrow scope of claims permissible in a motion to correct an illegal sentence.² *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Therefore, without

¹O'Keefe's motion was titled "motion to vacate judgment (NRS 176.555)."

²To the extent O'Keefe attempts to raise new claims on appeal, we decline to consider them in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

considering the merits of any of the claims raised in the motion, we conclude the district court did not err by denying the motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Gibbons

 J.
Bulla

 J.
Westbrook

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. 85098
District Court Case No. 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: February 07, 2023

Elizabeth A. Brown, Clerk of Court

By: Melissa Fuller
Administrative Assistant

cc (without enclosures):
Hon. Erika D. Ballou, District Judge
Brian Kerry O'Keefe
Clark County 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 - 8 2023.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
APPEALS
FEB - 8 2023

CLERK OF THE COURT

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

FILED
MAR 28 2023

Am. & Blum
CLERK OF COURT

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
Petitioner
-vs-
THE STATE OF NEVADA et al.
Defendant

• MATTER-OF-FIRST-IMPRESSION
Case No. 04C202793
Dept. No. VII¹
HEARING REQUESTED:
DATE OF HEARING April 19, 2023
TIME OF HEARING 9:30 AM

PETITION FOR A WRIT OF CORAM VOBIS PURSUANT
NEVADA CONSTITUTION ARTICLE 6, SECTION 6 AND NRS 1.030
CHALLENGING AN ERROR OF FACT WITHIN SCOPE OF WRIT
AS OCCUPANCY RIGHTS PROVIDING IMMUNITY FROM SUIT
WHERE CONVICTION HAS CONTINUING COLLATERAL CONSEQUENCES

• (see ATTACHED AFFIDAVIT AND EXHIBITS 1 to 7)

COMES NOW, Brian O'Keefe, Petitioner proper, hereby moves this Court for
a writ of coram vobis, as the only appropriate remedy available in accordance
with, The Uniform Post-Conviction Procedure Act, 69 HARK. L. REV. 1289 (1956) which
requires a state corrective judicial process, for expired cases, and petitions for a writ
of coram vobis, is a legally available common-law remedy for persons no longer in
custody on the judgment challenged where all the provisions of Chapter 34 are moot.

This action is made on the following sound Constitutional Points and Authorities.

Dated this 20th day of March 2023 pursuant NRS 208.165 by: Brian K. O'Keefe
Brian K. O'Keefe

FNL see EXHIBIT 1 (NSC DOCKET SHEET, No. 44644, Sentencing Court J. Bell, Dept. 7).

• IN RE Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam holding less stringent standards)

I.

JURISDICTION

This Court obtains jurisdiction under Nevada Constitution, art. 6 § 6, both NRS 1.030 and NRS 191.010 and Common-law decisions Harris v. THE STATE OF NEVADA, 130 Nev. 435 (en banc) (2014) and Trujillo v. THE STATE OF NEVADA, 129 Nev. 706, 310 P.3d 594; 2013 Nev. LEXIS 20.

The district courts retain jurisdiction which always continues as a post-step to correct certain types of errors in criminal cases; see also NRS 47.140 (Matters of Law) and NRS 47.120 (Matters of Fact).

II.

POINTS AND AUTHORITIES (A. to E.)

• A.

("Judicial Admissions")

The State, under Assistant District Attorney Chris Galli (no. 5398), files a Notice of Motion And Motion in Limine to Admit Evidence of Other Bad Acts in a subsequent case 0250630 for an "ORDER" granting the admission of the earlier Count 6 (F) Burglary Conviction in the case at bar here, case no. 040202793, police event no. 040529-2232.

• see EXHIBIT 2 (Caption Page Notice of Motion... FILED 01/06/2011)

Here, as a "judicial-admission," Petitioner C. Koepfer's occupancy rights are established by an extensive review of police reports and trial testimony, etc.;

"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 -

1 Budget Suites management office where Defendant and Victoria resided
2 reporting a domestic incident between the two (2). ... Detective
3 Moniot's taped interview of Victoria, she detailed the circumstances
4 of Defendant's brutal attack. According to Victoria, the two had been
5 having problems.... On the evening of May 28, 2004, the two were at
6 Texas Station bowling and drinking. The two got into an argument....
7 Victoria ended up walking home alone. Victoria contacted security at Budget
8 Suites to obtain an escort to the room because she was afraid of
9 Defendant. Security walked her to their room and found Defendant
10 present. Security called Metro [LYMPD] due to domestic issues. Metro
11 responded and asked Defendant to leave for the night. Victoria went
12 to sleep for the night and awoke some time after noon when Defendant
13 began knocking on the door. ... Victoria ultimately allowed Defendant
14 inside. ... She waited until Defendant fell asleep, got dressed, left
15 the room quietly and got security. ... Defendant was ultimately
16 charged with multiple counts of Sexual Assault, Attempt Sexual Assault,
17 Burglary² and Assault and Battery. Following a jury trial, Defendant
18 was found guilty of Burglary and Battery [misdemeanor].³ (emphasis added)
19 • see again EXHIBIT 2 (Caption Page 1, 6, 7 and 8 - STATE'S MOTION IN LIMINE)

20
21 Prior filing of Fast Track Statement unopposed by Fast Track Response
22 manifests - (STATEMENT OF FACTS) "... In 2004, O'Keefe was convicted of burglary
23 for entering into the couple's joint dwelling ...")

24 • see EXHIBIT 3 (Case No. 53259, Dist case no. 0250630 Filed Aug 17 2009)

25
26 **FNL** Victoria told Police I lived there and at arrest police did not charge burglary.
27 Deputy District Attorney added charge of burglary after preliminary despite objection by defense.

1 • B. PROCEDURAL HISTORY RELEVANT

2
3 Plain error was committed at trial when the trial court heard herself
4 actual testimony from the alleged Victim, Victoria Whitmarsh, that
5 up to the time that police were dispatched, and arrived at the
6 scene, O'Keefe still lived there where no temporary restraining
7 orders were active and Victoria admitted O'Keefe paid the rent.

8 • See EXHIBIT 7 (INFORMATION AS DRAFTED)

9 Police repeatedly admitted that the night before, in the other
10 call where police responded, O'Keefe was only asked to leave
11 for the night and all property including hygiene products were
12 inside the apartment including clothes, tools and bikes.

13
14 On direct appeal, attorney told untruth that O'Keefe no longer
15 wished to appeal. • (see EXHIBIT 1 docket entry dated 06/17/05)

16 • Invoice Martinez v. Ryan, 1328 Cf. 1309 (2012) (IAC)

17 Petitioner O'Keefe filed timely NRS 34.724 habeas petition
18 where the (3) three judge panel issued an inconsistent and
19 decision contrary to State of Nevada vs. WHITE, 330 P.3d 482
20 (2014) (en banc) which declared cohabitation is a defense to a
21 charge of burglary. As an alternative argument, O'Keefe
22 raised that as the information was drafted, to sustain a
23 burglary conviction, the jury was required to return a felony
24 conviction on Counts 1 to 5. • See EXHIBIT 7 (INFORMATION)

25 Petitioner filed a Coram nobis
26 where the appellate court stated I could have raised claims
27 while still in custody and that living at the residence
28

1 prohibited the charge of burglary was a legal error outside the
2 scope of a writ for coram nobis.

- 3 • see EXHIBIT 4 (ORDER OF AFFIRMANCE NO. 77787-0014 FILED SEP 20 2019)

4
5 Petitioner discovered the new factual innocence petition promulgated
6 by the legislature - NRS 34.900 - 34.990 - where the court
7 issued the writ and state's response made more judicial
8 admissions of the state. In particular, the "Statement of Facts"
9 reads:

10 "Victoria Whitmarsh ("the victim") testified that at the time
11 of the crime, she was in a dating relationship with
12 Petitioner. Reporter's Transcript in Appeal ("RTA") 10/26/04
13 at 26-27. She also testified that she and Petitioner
14 were living together at the Budget Suites on Rancho Drive."

- 15 • see EXHIBIT 5 (STATE'S RESPONSE CASE A-20-011204-C FILED 7/23/20);
- 16 • id at 4, lines 20-25.

17
18
19 • C. CONTINUING PREJUDICIAL COLLATERAL CONSEQUENCES

- 20 • see EXHIBIT 6 (FOC, certified copy)

21 Every day Petitioner suffers a wrongful impact where collateral
22 consequences of the unlawful burglary conviction on my own
23 property affects possible employment to multiple parole
24 hearings being denied based on the burglary assessed as a violent
25 felony where a future parole hearing is scheduled for 2029.

- 26 • see e.g. Spencer v. Kemna, 523 U.S. 1, 84-16 (1998) (continuing
27 collateral consequences...)

1 • D. MATTERS OF LAW (NRS 47.140)

2
3 Pursuant to NRS 47.140 (1)(2) the Constitutions and statutes of
4 both the United States and Nevada should be recognized
5 where here Nevada adopted the U.S. CPA in which SCOTUS
6 requires the states to provide state prisoners with a means to
7 raise claims of federal constitutional violations. • see e.g.

8 Harris v. THE STATE OF NEVADA, 130 Nev. 31 442 (en banc) (2014) citing
9 Case v. Nebraska, 381 U.S. 334, 338 (1965); Young v. Raper, 337 U.S. 235, 239 (1949).

10 Footnotes 1 and 2 point directly to common-law decision of
11 Trujillo v. State, 129 Nev. 706 (2013) where the Court announces
12 that the United States Supreme Court has, in 1834, recognized
13 that the writ of *coram vobis* is available in state court to challenge
14 an error of fact relating to a defendant's immunity from suit.

15 • see e.g. Davis v. Paolard, 33 U.S. 512, 324, 8 L. Ed 957 (1834)

16
17 Where under Nev. Const., article I sec. 2 (Paramount Allegiance)
18 the Nevada Supreme Court is bound by all SCOTUS authorities.
19 • see Burgos v. NSP, 87 Nev. 30, 31 (1971) (same).

20
21 Where Nevada brought suit via Information against the
22 Defendant O'Keefe, the affirmative defense of occupancy
23 rights would have been a constitutional immunity from
24 the charge of burglary pursuant NRS 205.060(1) enforceable
25 by Nev. Const., art. I sec. 8(3) and the XIV U.S. Const. Amendment.
26 The burglary conviction is an undisputed aberration of Nevada law,
27 constituting a complete manifest injustice and miscarriage of justice.

1 • E. MATTERS OF FACT (NR 47.130)

2
3 Pursuant NR 47.130 (1) facts subject to judicial notice are
4 facts in issue or facts from which they may be inferred. Here
5 the fact of Petitioner's address was undisputed as the same
6 address where the location of occurrence on the police report
7 identified suspect (O'Keefe) as living there. The police
8 found no TPO's and realized as an equitable thought,
9 that where Victoria only requested O'Keefe to leave for
10 the night, on the prior dispatch, the police arriving
11 the second time and making then the arrest, had prior
12 knowledge of all prior happenings and did not book or
13 charge O'Keefe with a charge of burglary when having
14 conscious knowledge and actual knowledge from the alleged
15 victim's own voluntary statement and complaint that up
16 to the time of the arrest we lived in cohabitation.

17 The law is clear that after 30 days O'Keefe
18 had rights especially when paying the rent.

19
20 • F. NEVADA SUPREME COURT SUBSTANTIVE STATUTORY INTERPRETATION
21 (NR 205.060 (1))

22 • INVOKE THE STATE OF NEVADA vs. WHITE, 330 7.34 482 (en banc) (2014)

23 Subsequent 2 (3) three NSC panel affirming O'Keefe's timely
24 habeas corpus petition (NR 34.724) averring that cohabitation
25 was not a viable defense to the charge of burglary, 2008,
26 the NSC, is a full ENBANC court, in 2014 said the opposite.
27 Petitioner O'Keefe's parole was denied and O'Keefe started post attack.

1 In addressing for the first time whether a person can burglarize his or
2 her own home the ENBANC court concluding a person cannot burglarize
3 their own home when a right to enter exists. In fact, a person
4 by common law could not be convicted of burglary for entering his
5 own home with intent to commit a felony and this rule applied
6 not only to sole owners of homes, but also to joint occupants,
7 thus the important factor was occupancy rather than ownership.

8 Moreover, this has always been the law of Nevada
9 where the ENBANC court cited Vansickle v. Haines, 7 Nev.
10 249, 285 (1872). Common law burglary was a crime against
11 habitation and occupancy.

12 • In Harris v. Nevada, 329 P.3d 624,
13 although the doctrine of stare decisis militates against overruling
14 precedent, Armata-Carpio v. State, 129 Nev. 531, 535 (2013), where
15 governing decisions prove to be unworkable or are badly reasoned,
16 they should be overruled; see e.g. State v. Lloyd, 129 Nev. 739,
17 750 (2013) (quoting Egzi v. Chambers, 129 Nev. 239, 243 (2013) (quoting
18 { 329 P.3d 624 } Payne v. Tennessee, 501 U.S. 808, 827 (1991)))

19
20 Petitioner O'Keefe was wrongly denied his Constitutional Rights
21 without due process when the Nevada Supreme Court affirmed
22 his pro per grounds 9 and/or 10 from his timely filed state
23 habeas petition, NSC No.'s 48673 and 49329 consolidated by the Court
24 filed on March 24 2008. By the public announcement of the
25 White case where the actual appeal was naturally made
26 by an inept deputy district attorney seeking only a
27 conviction also on the charge of burglary by stocking charges.

1 • G. FAILURE TO PROVIDE EQUAL PROTECTION TO A CLASS OF ONE

2
3 Unlike equitable treatment provided to "WHITE" and "WEBER",³ the courts
4 treated O'Karke differently and affirmed a timely proper challenge.
5 • see Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (successful equal
6 protection claim can be brought by a "class of one", where the plaintiff
7 alleges that he has been intentionally treated differently from others
8 similarly situated and that there is no rational basis for the difference
9 in treatment.)

10
11 • H. EXCEPTIONS TO THE LAW OF THE CASE DOCTRINE

12
13 Under Hou v. County of Clark, 122 Nev. 628 (2007) three specific
14 exceptions to the law-of-the-case doctrine have been adopted,
15 concluding that a court may revisit a prior ruling when (1)
16 subsequent proceedings produce substantially new or different evidence;
17 (2) there has been an intervening change in controlling law or,
18 (3) the prior decision was clearly erroneous and would result in
19 manifest injustice if enforced. (Cf. "White", *supra*.)

20
21 • I. NEVADA CREATED NEW LAW NRS 33.018 (domestic violence)

22
23 Despite this new law, the state utilized an "improper" battery-d-
24 charge of NRS 200.481, misdemeanor, which is improper where the
25 facts are undisputed, we were a couple requiring NRS 33.018. The
26 state utilized NRS 200.481 as a lesser to (F) NRS 200.400.

27 FN3 Webster v. State of Nevada, 132 Nev. 1043 (2016) (Granted IAC claim failure to challenge.)

• 5.

LEGAL DISCUSSION FOR CORAM VOBIS, NRS 1.030.

Nevada admits these facts; they are bound by SCOTUS authorities and are required to provide a post corrective judicial process that also includes prisoners who are no longer in custody under the judgment being challenged - suffering continuing collateral consequences.

Where custody status becomes the essential factor therefore requiring an unusual vehicle for a prisoner to obtain a writ for a hearing, the challenged error of fact must also be within the scope of the writ that the petitioner prosecutes.

There again undisputed, pursuant Judge Douglas in "Trujillo", his opinion articulated that Nevada's all writ clause, Nev. Const., art. 6 sec. 6 and NRS 1.030 with NRS 171.010 allows common law of England and it is not repugnant or in conflict with the Constitution and laws of the United States or the Constitution of Nevada where Article 6, Section 6 have the power - authority - to issue here the writ of coram vobis as a proper means in accord also with the UCPA to provide a post vehicle where the exact claim and error of fact within scope of the writ of coram vobis is O'Keeffe's constitutional immunity from suit via the criminal information on Count 6 (F) Burglary pursuant NRS 205.060 (1). • see e.g. Davis v. Packard, supra cited by Trujillo. This Court must remember that the Nevada ENBANK decision of "Harris", 130 Nev. 435 (2014) recognizes coram vobis for a limited type of factual error. However, coram vobis is the legal counterpart for the exact factual error within scope of the writ.

1 As a case of first impression, NRS 1.030 provides that the
2 common law of England, so far as it is not repugnant to or in conflict
3 with the Constitution and laws of the United States, or the Consti-
4 tution and laws of this State [NEVADA], shall be the rule of
5 decision in the courts of this State.

6 Thus, to apply the common
7 law, two requirements must be satisfied under NRS 1.030: (1)
8 that *coram vobis* be a common-law writ, and (2) that *coram vobis*
9 not be repugnant to or in conflict with the Constitution and laws both
10 federal and state.

11 The first part is easy to meet for *coram vobis*
12 certainly is a common law writ that was not abolished in England
13 like *coram nobis* was becoming obsolete.

14 Second, *coram vobis*
15 also is a recognized vehicle, even before its counterpart *coram nobis*.
16 In 1834 the United States Supreme Court recognized and acknowledged
17 *coram vobis* as being available in state court to challenge an error
18 of fact relating to defendant's immunity from suit! • see "Trujillo"
19 citing Davis v. Packard, 33 U.S. (8 Pet.) 312, 324, 8 L. Ed. 957 (1834)
20 (the U.S. Supreme Court recognized that its counterpart, the writ of *coram*
21 *vobis* might be available in state court to challenge an error of
22 fact relating to defendant's immunity from suit).

23 Just like Trujillo's attorney became the first to be heard where his
24 attorney filed in 200 arguing for *coram nobis* as the only remedy post
25 to challenge his 1996 conviction, O'Keefe prosecutes now for the writ
26 of *coram vobis* where the alleged error of fact is within scope!

1 Petitioner O'Kute avers that procedural due process cannot be
2 deprived where NRS 1.030 and NRS 205.060(1) become protected
3 liberty interests enforceable by the XIV U.S. Const. Amend.

4
5 Under McQuinn v. Perkins, 569 U.S. 383 (2013) proof of actual
6 innocence overcomes any procedural bar permitting this Court to
7 proceed to the merits of my *coram vobis* claim and issue
8 the writs for a response and hearing requested under due process.

9
10 However, this Court should keenly recognize a judicial
11 admission bars the State from disputing it in any manner.
12 Once the state admitted my occupancy rights this relieves
13 Petitioner from proving any further. • see Keybank Land & Land-
14 scape Design Inc. v. Plaster Development Co. Inc., 7 Nev. Corp.,
15 127 Nev. 331, 343, 225 P.3d 268 (2011)

16 Actual innocence means
17 actual innocence where O'Kute legally could not commit a crime
18 against his property - Ch 205 - ; see Bousley v. United States,
19 523 U.S. 614, 623 (1998)

20 Procedural bars do not apply, see Pellegrini,
21 17 Nev. at 887, 34 P.3d at 57 (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).
22 Laches, NRS 34-810, do not apply where Chapter 34 - NRS
23 34.724 to 34.830 are inapplicable and only apply to prisoners
24 who are in custody or judgment being challenged.

25
26 **III.**

CONCLUSION

27 Grant Writ of *Coram Vobis* and schedule hearings.
28

AFFIDAVIT OF Brian Kerry O'Keefe #90244

STATE OF NEVADA)

COUNTY OF PERSHING)

SS:

Case No. 4C202793

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 and I'm actually innocent of Burglary!
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, and believe all to be true and correct.
3. Petitioner exercises his FIRST AMENDMENT right to redress and truly believes claim alleged is sound in law and is not designed in any manner to harass any officer of the courts but to seek redress of this aberration of NRS 205.060 (1) and the absolute fundamental miscarriage of justice continuing daily by this fundamental manifest injustice by deprivation of due process.
4. Petitioner suffered again this unconstitutional conviction used by the parole board and faces again a future parole hearing in 2029 where (F) Burglary Count 6 is considered prejudicially Petitioner where Burglary conviction is treated as a violent felony improperly assessed points affecting classification, etc..

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 209.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Monday 20th day of March, 2023

Brian K. O'Keefe

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Petition For A Writ of Corpus Vobis... to the below address(es) on this 20th day of March, 2023, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCF 5(b): • Inmate EDCR 8.05 (2)(f): All registered users of the CM/ECF system will be served by the clerk.

SERVICE LIST :

- (Registered User - Clark County District Attorney);
- (Non-Registered User - Brian O'Keefe
Paper Copy Filed LOVELOCK CORRECTIONAL CENTER
and Returned. 1200 Prison Road
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 Petition For A Writ of Corpus Vobis... filed in District Court Case No. 04CZ02793 does not contain the social security number of any person.

Dated this 20th day of March, 2023.

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

EXHIBIT 1

SCH. DOCKET SHEET CASE NO. 44644

EXHIBIT 1

Nevada Supreme Court Docket Sheet

Docket: 44644

O'KEEFE (BRIAN) VS. STATE

Page 1

BRIAN K. O'KEEFE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 44644

Consolidated with:

Counsel

James L. Buchanan, II, Las Vegas, NV, as counsel for Appellant, Brian Kerry O'Keefe

Attorney General/Carson City, Carson City, NV, as counsel for Respondent, The State of Nevada

Clark County District Attorney, Las Vegas, NV \ James Tufteland, as counsel for Respondent, The State of Nevada

Case Information

Panel: NNP06

Panel Members: Douglas/Becker/Parraguirre

Disqualifications:

Case Status: Remittitur Issued/Case Closed

Category: Criminal Appeal

Type: Fast Track

Subtype: Direct

Submitted:

Date Submitted:

Oral Argument:

Sett. Notice Issued:

Sett. Judge:

Sett. Status:

Related Court Cases:

44372, 48673, 49329, 65040, 66785

District Court Case Information

Case Number: C202793

Case Title: STATE VS. O'KEEFE

Judicial District: Eighth

Division:

County: Clark Co.

Sitting Judge: Stewart L. Bell

Replaced By: Eighth Judicial District Court Dept. 7

Notice of Appeal Filed: 02/01/05 Appeal

Judgment Appealed From Filed: 01/03/05

Docket Entries

Date	Docket Entries	
02/07/05	Filing Fee Waived.	
02/07/05	Filed Certified Copy of Notice of Appeal/Proper Person Fast Track. (Fast track notice mailed to trial counsel.)	05-002412
03/09/05	Filed Motion to Extend Time.	05-004761
03/21/05	Filed Order Granting Motion. filed March 9, 2005. Counsel for appellant shall have 30 days from the date of this order to file and serve the fast track statement and appendix.	05-005424
04/20/05	Filed Motion to Extend Time. Motion for Extension of Time for Filing Fast Track Statement.	05-007637
04/20/05	Filed Rough Draft Transcript of Proceedings. Proceedings: October 26, 2004, October 27, 2004 and October 28, 2004. Court Reporter: Lisa Makowski.	

Monday, November 15, 2021 09:02 AM

Nevada Supreme Court Docket Sheet

Docket: 44644

O'KEEFE (BRIAN) VS. STATE

Page 2

04/25/05	Filed Request for Rough Draft Transcript(s). Transcripts requested: 10/25/04, 10/26/04, 10/27/04, 10/28/04, and 12/27/04. Court Reporter: M. Cook and L. Makowski. Filed in district court on: 03/03/05.	35-008153
05/09/05	Filed Order Granting Motion. filed April 20, 2005. Court reporter or recorder Lisa Makowski shall file the requested transcripts within 10 days of this order. Appellant shall have 20 days from the filing of the transcripts to file and serve the fast track statement and appendix	35-009005
05/13/05	Filed Transcript. Proceedings: 10/25/04 and 10/26/04. Court Reporter: Julie Lever.	
05/17/05	Filed Letter. from Court Reporter Lisa Makowski regarding the transcript for October 25, 2004.	35-009622
05/19/05	Filed Letter. from Court Reporter Lisa Makowski regarding the transcript for October 26, 2004.	35-009874
06/06/05	Filed Motion. James L. Buchanan.	35-011025
06/06/05	Filed Fast Track Statement. THE FAST TRACK STATEMENT STRICKEN BY ORDER 06/17/05	
06/06/05	Filed Appendix to Fast Track Statement. THE FAST TRACK APPENDIX STRICKEN BY ORDER 06/17/05	
06/09/05	Filed Order. a review of the rough draft transcripts request form reveals that it was not served on the correct court reporter or recorder. Counsel for appellant is ordered to file a rough draft transcript request form within 5 days of this order, and file 2 copies of the transcript request form and proof of service on court reporter or recorder Cheryl Gardner in this court within 10 days of this order.	35-011405
06/15/05	Filed Transcript. Proceedings: 12/27/04. Court Reporter: Cheryl Gardner.	
06/17/05	Filed Order. Striking Fast Track Statement and Appendix. On June 6, 2005, counsel for appellant filed a fast track statement and appendix. Because of the deficiencies in the fast track statement and appendix, the clerk of this court shall strike the fast track statement and appendix filed on June 6, 2005. On June 6, 2005, counsel for appellant also filed a motion to withdraw as counsel in this appeal. Counsel may not withdraw until he has fulfilled the obligations placed on trial counsel by NRAP 3C(b). Counsel must first file a fast track statement and appendix that comport with the provisions of NRAP 3C in this court. The motion to withdraw is therefore denied. Counsel for appellant shall have 20 days from the date of this order to file a fast track statement and appendix. Thereafter, this appeal shall proceed in accordance with the provisions of NRAP 3C.	35-011964
06/20/05	Filed Request for Rough Draft Transcript(s). (Notice of Filing Proof of Request for Rough Draft Transcript). Transcripts requested: 12/27/04. Court Reporter: Renee Silvaggio/Joann Orduna. Filed in district court on: 06/15/05.	35-012057
07/07/05	Received Proper Person Motion. Motion to Appoint Alternate Counsel.	35-013442
07/08/05	Received Proper Person Motion. Motion for Extension of Time for filing Fast Track Supplemental Statement.	35-013613
07/08/05	Received Proper Person Letter. Letter dated July 5, 2005.	35-013614
* 07/11/05	Filed Fast Track Statement.	35-013666
* 07/11/05	Filed Appendix to Fast Track Statement.	
07/21/05	Received Proper Person Letter. Proper Person Letter for Recording.	35-014459
07/25/05	Received Proper Person Motion. Motion to Request Order of Execution of Appointment of Alternate Counsel.	35-014681

Monday, November 15, 2021 09:02 AM

Nevada Supreme Court Docket Sheet

Docket: 44644**O'KEEFE (BRIAN) VS. STATE****Page 3**

07/28/05	Filed Fast Track Response.	35-015039
08/01/05	Received Proper Person Motion. Proper Person Request for Motion to Augment the Record.	35-015264
08/04/05	Received Proper Person Letter. Letter dated July 29, 2005 w/attached Proper Person Motion to Augment Record.	35-015503
08/15/05	Received Proper Person Document. Proper Person Supplemental Statement.	35-016101
08/15/05	Received Proper Person Document. Proper Person Appendix in Support of Supplemental Statement.	35-016102
10/07/05	Filed Order. This court has reviewed all documents submitted in proper person, and concludes no relief is warranted. Appellant is represented by counsel and we decline to grant appellant permission to file documents in proper person. Any further proper person documents submitted by appellant shall be returned to appellant, unfiled.	35-019882
01/23/06	Filed Order of Affirmance. "ORDER the judgment of conviction AFFIRMED." NNP06-MD/NB/RP	36-001588
02/17/06	Issued Remittitur.	36-001928
02/17/06	Remittitur Issued/Case Closed.	
03/02/06	Filed Remittitur. Received by County Clerk on February 21, 2006.	36-001928

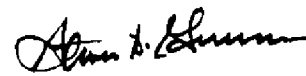
Monday, November 15, 2021 09:02 AM

EXHIBIT 2

CAPTION PAGE : NOTICE OF MOTION AND
MOTION IN LIMINE ... FILED BY STATE ON 1/06/2011

see • (Pages 1, 6, 7 and 8)

EXHIBIT 2


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 6, lines 25-28 "COURT'S RESIDENCE"
"Defendant and Victim's RESIDENCE"

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

12 **Event Number 040403-1089**

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

23 **Event Number 040529-2232** (Case C202793, Burglary wrongful conviction)
24 *POLICE*

25 In the late hours of May 28, 2004/early morning hours of May 29, 2004, Victoria and
26 Defendant got into a verbal argument. The police were once again called to the couple's
27 residence and Defendant left for a cooling off period. Later on May 29, 2004 dispatch
28 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

1 Victoria was very upset and bleeding from the mouth.

2 Victoria spoke with dispatch and relayed that in addition to being beaten by
3 Defendant, he also forced her to have anal intercourse with him. Patrol responded to the
4 Budget Suites and made contact with Victoria and Defendant who had been placed into
5 custody by security prior to Metro's arrival. Patrol also observed that Victoria was visibly
6 upset and crying. Victoria advised them that Defendant beat her and subjected her to sexual
7 contact. Patrol contacted Detective Moniot who responded to UMC where Victoria was
8 transported.

9 When Detective Moniot made contact with Victoria, she was very withdrawn, visibly
10 upset, crying vigorously, and holding herself around her mid-section. Detective Moniot also
11 observed that she was walking "gingerly." Victoria complained of severe rectal pain from
12 being anally penetrated. While speaking with Victoria, Detective Moniot also noticed that
13 there was a significant amount of hair from Victoria's head on her upper body. Victoria
14 stated that it was a result of Defendant pulling out her hair.

15 During the course of Detective Moniot's taped interview of Victoria, she detailed the
16 circumstances of Defendant's brutal attack. According to Victoria, the two had been having
17 problems because of Defendant's drinking problems and his thoughts that she was
18 unfaithful. Victoria advised Detective Moniot that she suffered abuse at Defendant's hands
19 many times over the several preceding years, but that she always took him back because he
20 sweet talked her. On the evening of May 28, 2004, the two were at Texas Station bowling
21 and drinking. The two got into an argument because Defendant was drinking too much and
22 Victoria wanted him to stop and go home. Victoria ended up walking home alone.

23 Victoria contacted security at Budget Suites to obtain an escort to her room because
24 she was afraid of Defendant. Security walked her to their room and found Defendant
25 present. Security called Metro due to the domestic issues. Metro responded and asked
26 Defendant to leave for the night. Victoria went to sleep for the night and awoke some time
27 after noon when Defendant began knocking on the door. She did not want to allow
28 Defendant inside, but he stated that he just needed to get his belongings because he had

* 1 someone coming to pick him up. Victoria ultimately allowed Defendant inside. *

2 When Defendant entered the room, he immediately began behaving aggressively and
3 accusing Victoria of having sex with other individuals. Defendant struck her about the head,
4 face, and body repeatedly. He then pushed her onto the couch and forced her to perform oral
5 sex on him. Victoria complied because she feared for her life. Then, Defendant forced her
6 to engage in vaginal intercourse for a short time before demanding anal intercourse.
7 Defendant forced her to engage in anal intercourse, telling her that rectum felt loose and he
8 believed she was sleeping with other men. Defendant ejaculated inside of her anus.

9 Approximately half an hour later, Defendant forced her to perform oral sex on him
10 and submit to vaginal intercourse again. Additionally, he once again forced her to engage in
11 anal intercourse. Victoria convinced Defendant to stop because she wanted to use the
12 restroom. Victoria went to the restroom and would not come out. She waited until
13 Defendant fell asleep, got dressed, left the room quietly and got security.

14 During the course of the follow-up investigation, Detectives learned that Security
15 Officer Besse was first contacted by Victoria who was very upset and had blood on her face.
16 Besse went to the couple's room and found Defendant passed out in the bed, completely
17 naked. Due to the gravity of the situation, Besse placed Defendant in custody.

18 CSA Horn responded to the scene and discovered that the scene was consistent with
19 Victoria's version of events. Specifically, he located a white and black Zebra print dress
20 with fecal matter and blood on it and a pair of blue shorts with fecal matter and blood on it.
21 Those were the clothing items worn by Victoria after the first and second assaults.

22 Victoria also underwent a SANE exam at UMC which was administered by Linda
23 Ebbert. Nurse Ebbert noted multiple sites of bruising all over Victoria's body and a
24 laceration to her upper lip. Additionally, she observed several deep lacerations to Victoria's
25 anus. The injuries were consistent with Victoria's version of events.

* 26 Defendant was ultimately charged with multiple counts of Sexual Assault, Attempt
27 Sexual Assault, Burglary, and Assault and Battery. Following a jury trial, Defendant was
28 found guilty of Burglary and Battery.

EXHIBIT 3

FAST TRACK STATEMENT Case No. 53859

Dist. Case No. 0250630 FILED AUG 19, 2009

see • (Page 1 Incl 2)

EXHIBIT 3

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

See page 2
lines 26-27

FILED

AUG 19 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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 4

ORDER OF AFFIRMANCE No. TTA7-COA

FILED SEP 20 2019

EXHIBIT 4

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*,

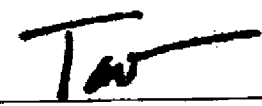
¹Because O'Keefe's claims were either waived or outside the scope of the writ, we need not address his assertion on appeal that the district court erred by not presuming all of his statements were true based on the State's failure to oppose the petition.

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.

EXHIBIT 5

STATE'S RESPONSE FILED 7/23/2020

Case No. A-20-811294-C

040202793

EXHIBIT 5

Steven B. Wolfson

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 //

//

\\CLARKCOUNTY\DA.NET\CRM\CASES\2008\69515\2008\69515C-RSPN-(O'KEEFE, 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.

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EXHIBIT

6

Joe Certified Copy Case No. 0202793

EXHIBIT

6

1 JOC
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 -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, ~~DAVID S. HUGHAN, ESQ.~~
26 ~~DAVID S. HUGHAN, ESQ.~~ 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. BELL *for* SALLY LOEHRER
15 DISTRICT JUDGE
16
17
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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

26 005 JAN -3 P 4: 03

27 *Shirley B. Pringle*
28 da CLERK

EXHIBIT

7

INFORMATION Q202793

FILED 07/06/2004

EXHIBIT

7

Shirley Blanton
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
15 DISTRICT COURT
16 CLARK COUNTY, NEVADA

17 THE STATE OF NEVADA,

18 Plaintiff,

19 -vs-

20 BRIAN KERRY OKEEFE,
21 #1447732

22 Defendant.

Case No: C202793
Dept No: V

INFORMATION

23 STATE OF NEVADA }
24 COUNTY OF CLARK } ss.

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

27 That BRIAN KERRY OKEEFE, the Defendant(s) above named, having committed
28 the crimes of BATTERY WITH INTENT TO COMMIT A CRIME (Felony - NRS
200.400); SEXUAL ASSAULT (Felony - NRS 200.364, 200.366); ATTEMPT SEXUAL
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 ///

1 COUNT 6 – BURGLARY

2 did then and there wilfully, unlawfully, and feloniously enter, with intent to commit
3 battery and/or sexual assault and/or a felony, to-wit: battery and/or sexual assault, that
4 certain building occupied by VICTORIA WHITMARSH, located at 2219 North Rancho, No.
5 2083, Las Vegas, Clark County, Nevada.

6
7 DAVID ROGER
DISTRICT ATTORNEY
8 Nevada Bar #002781

9
10 BY /s/ S. Krisko

11 SUSAN R. KRISKO
Deputy District Attorney
12 Nevada Bar #006024

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

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

Steven B. Wolfson

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
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 OKEEFE,
#1447732

Defendant.

CASE NO: 04C202793
DEPT NO: XVIII

**STATE'S OPPOSITION TO DEFENDANT'S PETITION
FOR A WRIT OF CORAM NOBIS**

DATE OF HEARING: MAY 31, 2023
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, and moves this Honorable Court for an order denying the Defendant's Petition for a Writ of Coram Nobis heretofore filed in the above-entitled matter.

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 filed an Information charging Brian Kerry O'Keefe,
4 ("Petitioner") with the following: Count 1 – Battery With Intent To Commit A Crime
5 (Felony – NRS 200.400); Counts 2-4 – Sexual Assault (Felony – NRS 200.364, 200.366);
6 Count 5 – Attempt Sexual Assault (Felony – NRS 193.330, 200.364, 200.366); Count 6 –
7 Burglary (Felony –NRS 205.060).

8 On October 25, 2004, Petitioner's jury trial commenced, and it concluded on October
9 28, 2004. The jury returned a verdict of guilty for Count 1 - Battery (Misdemeanor); and
10 Count 6 - Burglary (Category B Felony).

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

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

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20 and his file. The State filed its Opposition on August 7, 2006. The Order denying this Petition
21 was filed August 17, 2006.

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

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3 6, 2007. The Court denied his Petition on April 11, 2007. On April 19, 2007, Petitioner filed
4 a Notice of Appeal. The Findings of Fact, Conclusions of Law and Order was filed May 17,
5 2007. The Nevada Supreme Court affirmed the Court's denial of Petitioner's Petition on
6 March 24, 2008; remittitur issued April 18, 2008. See O'Keefe v. State, Order of Affirmance
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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. The Order of denial was
19 entered on February 14, 2014.

20 On February 12, 2014, Petitioner filed a Notice of Appeal regarding his Petition for
21 Writ of Mandamus or, in the Alternative, Writ of Coram Nobis. On July 23, 2014, the Nevada
22 Supreme Court affirmed the Court's judgment. See O'Keefe v. State, Order of Affirmance
23 Nos. 65040 and 65217 (July 23, 2014). On August 8, 2014, Petitioner filed a pro-per "Motion
24 to Stay Mandate Pending Certiorari Review." On August 15, 2014, the Nevada Supreme Court
25 granted the Motion and ordered that remittitur would be stayed until December 1, 2014 and
26 shall issue on December 8, 2014.

27 On January 10, 2014, Petitioner filed a "Motion for Default Judgment for State's Failure
28 to Exercise Simple Reasonable Due Diligence to 'Serve' Petitioner Copy of Opposition in

1 'Conjunction' with 'Filing' with Emphasis on A.G.O. No 2002-15 (March 21, 2002). On
2 January 30, 2014, the State filed its Opposition. On February 3, 2014, Petitioner's Motion was
3 denied pursuant to a hearing. The Order denying Petitioner's Motion was entered on February
4 14, 2014.

5 On September 22, 2014, Petitioner filed a Motion to Appoint Counsel. The State filed
6 its Opposition on October 10, 2014. On October 13, 2014, the Court denied the Motion; the
7 Court then filed the order on October 29, 2014. On October 24, 2014, Petitioner filed a Notice
8 of Appeal. On December 5, 2014, the Nevada Supreme Court dismissed the 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 responded on October 20, 2014. On October 22, 2014, the Court took the matter off calendar
13 as the Court did not have jurisdiction due to Petitioner's pending appeal regarding the Writ of
14 Coram Nobis.

15 On February 7, 2020, Petitioner filed a Petition to Establish Factual Innocence Pursuant
16 to NRS 34.900 to NRS 34.990 Inclusive, and a Motion for Appointment of Counsel. On March
17 10, 2020, Petitioner filed a Supplemental Petition and a Motion for Leave of Court to file the
18 Supplemental Petition. On March 20, 2020, Petitioner filed a Motion to Take Judicial Notice
19 of Case Summary of Case No. C202793, which the Court denied on June 15, 2020. On April
20 6, 2020, Petitioner filed a Motion to Take Judicial Notice of NRS 33.018 as a Matter of Law
21 Pursuant to NRS 47.140(2) Promulgated January 1, 1998 Whereas the State Committed Fraud
22 by Utilizing Old Law Pursuant to NRS 200.481 Not Applicable Resulting in Manifest
23 Injustice. On July 23, 2020, the State filed its Response to the Petition to Establish Factual
24 Innocence, Supplemental Petition, and Motion for Appointment of Counsel. On August 24,
25 2020, the Court denied the Petitions.

26 On July 27, 2020, Petitioner filed a Motion for Judgment on the Pleadings as a Matter
27 of Law Based on the Petition NRS 34.960 Establishing a Prima Facie Case. On September 2,
28 2020, the Court denied the Motion. On September 25, 2020, the Court filed Findings of Fact,

1 Conclusions of Law and Order, which denied the Petition to Establish Factual Innocence,
2 Supplemental Petition, Motion to Appoint Counsel, and Motion for Judgment on the Pleadings
3 as a Matter of Law.

4 On November 2, 2020, Petitioner filed a Notice of Appeal. The Nevada Court of
5 Appeals affirmed the Court's denial of Petitioner's Petition to Establish Factual Innocence and
6 Motion for Judgment on the Pleadings. O'Keefe v. State, No. 81867-COA (Order of
7 Affirmance, Apr. 23, 2021).

8 On March 28, 2023, Petitioner filed the instant Petition for a Writ of Coram Nobis
9 Pursuant Nevada Constitution Article 6, Section 6 and NRS 1.030 Challenging an Error of
10 Fact Within Scope of Writ as Occupancy Rights Providing Immunity From Suit. The State
11 responds as follows.

12 STATEMENT OF FACTS

13 Victoria Whitmarsh ("the victim") testified that at the time of the crime, she was in a
14 dating relationship with Petitioner. Reporter's Transcript on Appeal ("RTA") 10/26/04 at 26-
15 27. She also testified that she and Petitioner were living together at the Budget Suites on
16 Rancho Drive. RTA 10/26/04 at 49. According to Victoria, there was strife in their relationship
17 because of Petitioner's drinking problems and his thoughts that she was unfaithful. RTA
18 10/26/04 at 28-44. The victim testified that she suffered abuse at Petitioner's hands many times
19 over the several preceding years, but she always took him back because of how he promised
20 her that there would be change. RTA 10/26/04 at 28-44, 49.

21 On the evening of May 28, 2004, the two (2) were at Texas Station bowling and
22 drinking. RTA 10/26/04 at 50-52. An argument began between them, because Petitioner was
23 drinking too much, and Victoria wanted him to stop and go home. Id. As a result of the
24 argument, the victim ended up walking home alone. RTA 10/26/04 at 54. When Victoria
25 arrived at the Budget Suites, she contacted security to obtain an escort to her room because
26 she was afraid of Petitioner, and to acquire another key to her room. Id. Security walked her
27 to the room and found Petitioner present. Id. Security then called the Las Vegas Metropolitan
28

1 Police Department ("LVMPD") due to the domestic issues. RTA 10/26/04 at 55. LVMPD
2 responded and asked Petitioner to leave for the night. Id.

3 Victoria went to sleep for the night and awoke sometime after noon, on May 29, 2004,
4 to Petitioner knocking on the door. RTA 10/26/04 at 23, 56-57. She did not want to let
5 Petitioner back into the apartment and reminded Petitioner that he was not allowed on the
6 property; however, he stated that he just needed to get his belongings. RTA 10/26/04 at 57.
7 Victoria ultimately allowed Petitioner inside. RTA 10/26/04 at 57-58.

8 When Petitioner entered the room, he immediately began behaving aggressively and
9 accusing Victoria of having sex with other individuals. RTA 10/26/04 at 58-60. Petitioner
10 struck her about the head, face, and body repeatedly. Id. He then led her onto the couch and
11 forced her to perform oral sex on him. RTA 10/26/04 at 61. Victoria complied because she
12 feared for her life. RTA 10/26/04 at 61-62 Then, Petitioner forced her to engage in vaginal
13 intercourse for a short time before demanding anal intercourse. RTA 10/26/04 at 63-65.
14 Petitioner then forced her to engage in anal intercourse, and ultimately ejaculated inside of her
15 anus. RTA 10/26/04 at 65.

16 Approximately half an hour later, Petitioner forced her to perform oral sex on him and
17 submit to vaginal intercourse again. RTA 10/26/04 at 68. Additionally, he once again forced
18 her to engage in anal intercourse. Id. Petitioner could not finish, so Victoria went to the
19 restroom and would not come out. RTA 10/26/04 at 69. When Petitioner fell asleep, she
20 proceeded to get dressed and left the room quietly so that she could seek help from Security.
21 Id.

22 Security Officer Besse was first contacted by Victoria who was very upset, and visibly
23 shaking. II RTT 10/26/04 at 108-09. Besse went to the couple's room and found Petitioner
24 passed out in the bed, completely naked. II RTT 10/26/04 at 110. Due to the gravity of the
25 situation, Besse placed Petitioner in custody. II RTT 10/26/04 at 110-12.

26 Officer Shanan Kelly responded to a call from dispatch, around 5:00 p.m., regarding a
27 trespasser in custody, specifically "somebody was in custody by security for trespass, possible
28 battery and sexual assault". RTA 10/26/14 at 07-08, 22. Contact was made with the Petitioner.

1 Id. at 09-22. Crime Scene Analyst Horn responded to the crime scene and discovered that the
2 scene was consistent with Victoria's version of events. II RTT 10/26/04 at 65-75. Specifically,
3 he located a white and black Zebra print dress with fecal matter and blood on it and a pair of
4 blue shorts with fecal matter and blood on it. Id.

5 Officer Ray Steiber observed that Victoria was visibly upset and crying. Reporter's
6 Trial Transcript Volume II ("II RTT") 10/26/04 at 76-77. Victoria advised them that Petitioner
7 beat her and subjected her to sexual contact. RTA 10/26/14 at 72. Patrol contacted Detective
8 Moniot, who responded to the University medical Center ("UMC") where Victoria was
9 transported. RTA 10/26/14 at 72-73. II RTT 10/26/04 at 142-44.

10 When Detective Moniot contacted Victoria, she was very withdrawn, visibly upset,
11 crying vigorously, and holding herself around her mid-section. II RTT- 10/26/04 at 146-47.
12 Detective Moniot also observed that she was walking "gingerly." Id. While speaking with
13 Victoria, Detective Moniot also noticed that there was a significant amount of hair from
14 Victoria's head on her upper body. II RTT 10/26/04 at 150-51. Victoria stated that it was a
15 result of Petitioner pulling out her hair. RTA 10/26/14 at 73.

16 Victoria underwent a SANE exam at UMC which was administered by Linda Ebbert.
17 RTT- 10/27/04 at 17. Nurse Ebbert noted multiple sites of bruising all over Victoria's body
18 and a laceration to her upper lip. RTT- 10/27/04 at 23-31. Additionally, she observed several
19 deep lacerations to Victoria's anus. RTT- 10/27/04 at 31-34, 37-39.

20 ARGUMENT

21 **PETITIONER'S CLAIMS ARE NOT COGNIZABLE IN A PETITION FOR WRIT** 22 **OF CORAM NOBIS**

23 Petitioner claims that the evidence was insufficient to support his conviction for
24 Burglary, and that he should have been charged with Battery Constituting Domestic Violence
25 under NRS 33.018 rather than Battery under NRS 200.481. These claims are not properly
26 raised in a petition for a writ of coram nobis because these are allegations of legal, not factual,
27 error, and they were available to be raised in previous proceedings.
28

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

6 [T]he common-law writ of coram nobis is available under Article 6, Section
7 6(1) of the Nevada Constitution, which grants the district courts the power
8 to issue writs that are proper and necessary to the complete exercise of their
jurisdiction, and NRS 1.030, which continues the common law under some
circumstances.

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

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

20 A writ of coram nobis is not, however, the forum to relitigate the guilt or
21 innocence of the petitioner. We have long emphasized the importance of the
22 finality of judgments, and we are gravely concerned that recognizing this writ,
even in the very limited form that we do today, will result in a proliferation of
stale challenges to convictions long since final. See Jackson v. State, 115 Nev.
23 21, 23 n. 2, 973 P.2d 241, 242 n. 2 (1999); Groesbeck v. Warden, 100 Nev. 259,
24 261, 679 P.2d 1268, 1269 (1984). *Given these concerns, we hold that any error*
25 *that was reasonably available to be raised while the petitioner was in custody*
26 *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.

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

28 //

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

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

10 In fact, Petitioner has previously raised this exact claim concerning his Burglary
11 conviction on multiple occasions. In his first postconviction petition for writ of habeas corpus,
12 Petitioner claimed his misdemeanor battery could not support his Burglary conviction. This
13 claim was rejected. On appeal, the Nevada Supreme Court affirmed the denial, concluding that
14 NRS 205.060(1) does not differentiate between misdemeanor and felony battery, and simply
15 states that "any person who enters a room with the intent to commit battery on any person is
16 guilty of burglary." O'Keefe v. State, No. 49329 (Order of Affirmance, Mar. 24, 2008), at 05.
17 As the Nevada Supreme Court has already ruled on this issue, further litigation of this claim
18 is barred by the doctrine of the law of the case. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d
19 797, 798-99 (1975).

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

26 Petitioner attempts to relitigate this claim due to the Nevada Supreme Court's decision
27 in State v. White, 130 Nev. 533, 330 P.3d 482 (2014). In White, "a person with an absolute
28 right to enter a structure cannot commit burglary of that structure." 130 Nev. 533, 538, 330

1 P.3d 482, 485-86 (2014). “[C]onsent to the entry is not a defense to burglary if the person
2 “acquired the entry with felonious intent.” Id. at 537-38; 330 P.3d at 485; citing Barrett v.
3 State, 105 Nev. 361, 364, 775 P.2d 1276, 1277 (1989). Further, “while ownership may be one
4 factor to consider, the appropriate question is whether the alleged burglar has an absolute,
5 unconditional right to enter the home.” Id. at 538-39, 330 P.3d at 486. A defense based on
6 White is not available to Petitioner because he did not have an absolute right to enter the
7 apartment. Petitioner in this case was previously instructed to leave the property by LVMPD.
8 RTA 10/26/04 at 55; See White, at 539, 330 P.3d at 486. Moreover, the victim testified that
9 she only allowed Petitioner to enter the property under the guise that he was picking up his
10 belongings. RTA 10/26/04 at 57-58. Accordingly, Petitioner’s reliance on White is misplaced
11 as that case is easily distinguishable from the case at hand. Thus, even if this claim were
12 cognizable in a petition for writ of coram nobis, he would not be entitled to any relief.

13 CONCLUSION

14 Based on the foregoing, the State respectfully requests that Defendant’s Petition for a
15 Writ of Coram Nobis be DENIED. DATED this 2nd day of May, 2023.

16 Respectfully submitted,

17 STEVEN B. WOLFSON
18 Clark County District Attorney
Nevada Bar #001565

19 BY *Karen M. Shiller* 10:51 AM
20 KAREN M. SHILLER
21 Chief Deputy District Attorney
Nevada Bar #013730

22 CERTIFICATE OF MAILING

23 I hereby certify that service of the above and foregoing was made this 2nd of May, 2023,
24 by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

25 BRIAN KERRY O’KEEFE #90244
26 Lovelock Correctional Center
1200 Prison Road
27 Lovelock, Nevada 89419

28 BY *Wright*
Secretary for the District Attorney’s Office

/KM/vw/L3

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

FILED
MAY 17 2023

John J. Blum
CLERK OF COURT

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,)
11 Petitioner,)
12 -vs-)
13 THE STATE OF NEVADA et al.,)
14 Respondent.)

Case No. 04C202793

Dept. No. XVIII

Date of Hearing: May 31, 2023

Time of Hearing: 9:30 AM

15 PETITIONER'S REPLY AND COUNTERMOTION TO STRIKE AND DISMISS,
16 STATE'S OPPOSITION BASED ON IMPROPER RECHARACTERIZATION
17 WITHOUT NOTICE AS INSUFFICIENCY OF PROCESS AND THE
18 LIBEL AS DEFAMATORY STATEMENT OF FACTS DESPITE ADMISSION IN FACT

19 COMES NOW, Brian O'Keefe, in proper person, who now moves this Honorable
20 Court for an "order" striking and dismissing the State's Opposition for good cause.

21 This action is made and based upon the "rule of law" where the petition submitted
22 was premised under Haines v. Kerner, 404 U.S. 519, 520 (1972) invoking the "Castro-
23 Rule" where O'Keefe was the master of his suit, filed as a protected liberty
24 interest, protected under procedural due process as an inalienable right.
25 Therefore, this action is made on the sound Constitutional points and authorities.

26 dated this 9th day of May 2023 pursuant NRS 208.165 by: Brian K. O'Keefe
27 Brian K. O'Keefe

28 1 Castro v. United States, 540 U.S. 375, 377 (2003); Nev. Const., article I sec 2.

24.014 MAY 15 2023
CLERK OF THE COURT

RECEIVED

POINTS AND AUTHORITIES

1. STATEMENT OF THE CASE

Petitioner timely filed a matter-of-first-impression where pro per filings are both held to less stringent standards than pleadings drafted by attorneys and a pro per pleading cannot be recharacterized without procedural due process notice where petitioner becomes master of his suit. • see Haines v. Kerner *supra*; see also Castro v. United States, *supra*; Nev. Const., Article I sec. 2 (Paramount Allegiance to the United States). Where no deficiencies existed and petition conformed under EDCR 8.03, the clerk set for hearing on April 19, 2022 where subsequent colloquy, Court ORDERED State to file a Response by May 17, 2023 where State filed said Response on 5/2/2023 where response was received on 5/9/23, by the Petitioner. However, said response now results in following procedural due process violations providing "good cause" for this action!

LEGAL DISCUSSION (ARGUMENT)

A. JURISDICTIONAL ERROR / PROCEDURAL DUE PROCESS VIOLATION (1st)

- (IMPROPER RECHARACTERIZATION)

This Court's minute order strategically notes a hearing was set by clerk for "Def't's Petition" (emphasis added) not committing conclusively whether said action was available as a matter-of-first-impression under coram vobis! This failure of Nev. Const. art. 1 § 2 (Oath of Office) which mandates an equitable duty to speak, duty to act and legal duty therefore resulted with the State's improper response which recharacterized Clerk's action, prosecuted as a collateral attack under "coram vobis" as a redress of grievances under the FIRST AMENDMENT OF THE U.S. Constitution. • see also Nev. Const., art. 1 § 10 (Right to Petition)

2 Petition For a Writ of Coram Vobis case number 040202793 FILED MAY 28 2023.
• see Robben v. Nevada, 457 P.3d 273 FILED 2/13/22 (Order denying petition for a writ of coram vobis).

1 Nevada Rules of Civil Procedure 12(b)(3) and 12(f) become applicable here
2 where the State's Opposition filed 5/2/23 (040202793, dept. xviii) improperly
3 recharacterized title as a Petition For A Writ of Coram Nobis
4 and presents defamatory "Statement of Facts" as libel³ where
5 pages 5 to 7 are designed for this Court to become biased to petitioner.

6
7 First, procedural due process under the 14th Constitutional Amendment
8 of the United States prohibit the State from depriving protected
9 liberty interests without due process of law. Under the
10 All Writs Act (Nev. Const., art. 6 § 6) and NRS 1-030, NRS 171.010
11 and Harris v. THE STATE OF NEVADA, 130 Nev. 435 (en banc) (2014), Petitioner
12 O'Keefe prosecuted a Petition For A Writ of Coram Vobis. Under
13 the decision of;

14 • Todd RUBEN vs. THE STATE OF NEVADA DEPARTMENT OF TAXATION,
15 2020 Nev. App. Unpub. LEXIS 119; 457 P.3d 273 FILED 2/13/2020, Case No.
16 79906-COT, an opinion resulted in an "ORDER DENYING PETITION FOR A
17 WRIT OF CORAM [V]OBIS" where under "Trujillo", the extraordinary
18 "remedy" of a writ of coram vobis, like its counterpart, the writ
19 of coram nobis, is available in rare circumstances. id 129 Nev. at
20 719, 310 P.3d at 603.

21 Therefore, under the rule of law, O'Keefe
22 demands that the State's Opposition be struck, under NRCP 12(f).

23
24 This Court cannot apply the incorrect standard where the question
25 now becomes a legal question in the first instance. • see
26 Bergmann v. Boyce, 109 Nev. 670, 856 P.2d 500 (1993).

27 3 O'Keefe was acquitted in Act of felony Counts 1, 2, 3, 4 and 5 by a jury trial!

1 Additionally, the State's Opposition constitutes, under NRC 12(D)(3),
2 therefore an insufficiency of process where the State utilizes the
3 common-law decision of "Trujillo" which was filed and argued
4 as a true petition for *causa nobis* as late of the case.

5
6 Moreover, all the scandalous matter presented in the State's Opposition
7 on pages 5 to 7 ("Statement of Facts") warrants an "ORDER" to
8 strike where O'Keefe was determined innocent by a jury of
9 said felony Counts 1, 2, 3, 4 and 5. The State now opens the
10 door for a lawsuit to be filed within two (2) years!

11 The State's Opposition constitutes nothing more than a means of
12 attempting to avoid the truth of O'Keefe's actual-innocence
13 where a bogus procedural response is filed despite timely!

14
15 Under Castro v. United States, *supra* citing Flamer v. Kerner, *supra*
16 it becomes legally established the State violated due process which
17 becomes an inalienable right under both Federal and State Consti-
18 tutions. • see Nev. Const., art. 1 sec 1; see U.S. Const., 5th and 14th Amend's.
19 • see also Nev. Const., art 1 sec. 8(5) (due process).

20
21 O'Keefe's claim is proper for a writ of *causa nobis*, in a criminal
22 case, which relates specifically to "defendant immune from suit."
23 The State fails to address the "judicial admissions" presented in
24 O'Keefe's action which is O'Keefe lived there up to the arrest,
25 which then would establish occupancy rights, barring suit via
26 the criminal information in the first instance. This explains
27 why the State violated Federal due process by the recharacterization.

B.

REASONS WHY MOTION SHOULD BE GRANTED (ACHIEVE JUSTICE)

- CASE-OF-FIRST-IMPRESSION - For a writ of Coram Vobis -

1) Under EDCR 2.20 (g) and NRCIVP 12(b) and 12(f) motion is warranted;

2) Harris v. NEVADA, supra manifests Nevada adopted UPCPA which requires state corrective judicial process for petitioners no longer in custody;

3) Petition for a writ of Coram Vobis is a protected liberty interest relating to a defendant immune from suit in a criminal case;

4) State violated procedural due process committing "Castro Rule" violation;

5) State committed "libel per se" by raising scandalous matter implying O'Keefe is guilty despite acquittal in fact of felony Counts 1 to 5 by a jury verdict of not guilty as law of the case;

6) Actual innocence exists which overcomes any procedural bar where State's prior "judicial admissions" can not be disputed;

7) Manifest injustice would result should this Court not strike State's scandalous OPPOSITION and recognize new petition-CORAM VOBIS.

II.

CONCLUSION (Treat as case of first impression)

Based on the foregoing "Castro Violation" warranting insufficiency of process and libel presented in and as "Statement of Facts", Petitioner prays / an order to strike State's OPPOSITION will be issued and order new response.

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing Petitioner's Reply and (Counter) Motion to Strike and Dismiss to the below address(es) on this 10th day of May, 2023, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b): ● INVEST EDCR 8.02 CONVERSION WEFOR

All parties registered to the CM/ECF will be served by the clerk.

SERVICE LIST

Registered User - Clark County District Attorney

Non-Registered User - Brian Kerry O'Keefe
 Mail Paper Copy Returned see address below.
 After Filing

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 Petitioner's Reply and (Counter) Motion to Strike and Dismiss filed in District Court Case No. 04 CZ02793 does not contain the social security number of any person.

Dated this 10th day of May, 2023.

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

Brian Kerry O'Keefe #90244
LOVELOCK CORR. CTR.
1200 Prison Road
LoveLock, N.Y. 89419

**INMATE LEGAL
MAIL CONFIDENTIAL**

Clerk of Court
Steven Grierson (874 Judicial)
200 LEWIS AVE., 3RD FL.
LAS VEGAS, Nevada 89155

CUT LEGAL MAIL
7/14/2023

1357

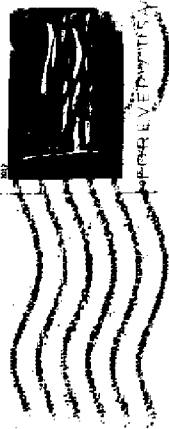
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Brian Kerry O'Keefe # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

BRIAN KERRY O'KEEFE,)

Plaintiff,)

Case No. 04C202793

-vs-

Dept. No. XVIII

THE STATE OF NEVADA, et al.

Defendant.

NOTICE OF APPEAL

NOTICE IS GIVEN that Plaintiff, Brian O'Keefe,

in pro se, hereby appeals to the Nevada Supreme Court the
Castro Violation and recharacterization² by "ORDER" denying without argument,
as filed/entered on the 31st day of May, 2023,
(complete if applicable) and the

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

Dated this 14th day of June, 2023.

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

FN 1 Castro v. United States, 540 U.S. 375 (2003)
FN 2 see TODD RUBEN vs. THE STATE OF NEVADA DEPT. OF TAXATION, 451 P.2d 273
(FUED 2113/2020, CASE NO. 79906-USA)
(ORDER DENYING PETITION FOR A WRIT OF CORAM VOBIS)

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 14th day of June, 2023, by placing same in the U.S. Mail via prison law library staff:

INVOICE NEFOR 9(e)

Service List -
Clark County District Attorney

Brian O'Leake - PAPER COPY
LOVELOCK, NV.

Brian K. O'Leake

Brian K. O'Leake # 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. 040202793 does not contain the social security number of any person.

Dated this 14th day of June, 2023.

Brian K. O'Leake
Brian K. O'Leake

Petitioner In Pro Se

O'Keefe, Brian K. #90244
LOVELACK CORR. CTR.
1200 Prison Road
LOVELACK, Nv. 89419

**INMATE LEGAL
MAIL CONFIDENTIAL**

OUT LEGAL MAIL

RENO NV 895
15 JUN 2023 PM 2 L



Clerk of Court (8th Judicial Dist. Court)

Steven Grieren

200 Lewis Ave., 3rd Fl.

Las Vegas, Nevada 89155

ATTN: CONFIDENTIAL

891013E300





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

10 STATE OF NEVADA,

11 Plaintiff(s),

12 vs.

13 BRIAN KERRY O'KEEFE,

14 Defendant(s),
15

Case No: 04C202793

Dept No: XVIII

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Brian O'Keefe

20 2. Judge: Mary Kay Holthus

21 3. Appellant(s): Brian O'Keefe

22 Counsel:

23 Brian Kerry O'Keefe #90244
24 1200 Prison Rd.
Lovelock, NV 89419

25 4. Respondent: The State of Nevada

26 Counsel:

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

(702) 671-2700

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

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

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: No

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: July 6, 2004

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Misc. Order

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 44372, 44644, 48673, 49329, 65040, 66785, 84511,
85098

12. Child Custody or Visitation: N/A

Dated This 22 day of June 2023.

Steven D. Grierson, Clerk of the Court

/s/ Cierra Borum

Cierra Borum, Deputy Clerk

200 Lewis Ave

PO Box 551601

Las Vegas, Nevada 89155-1601

(702) 671-0512

cc: Brian O'Keefe

Heather S. Hume

CLERK OF THE COURT

ORDR

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN KERRY OKEEFE,
#1447732

Defendant.

CASE NO: 04C202793

DEPT NO: XVIII

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

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

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

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I:\APPELLATE\WPDOCS\ATTORNEY FILES\KAREN'S DOCUMENTS\PWHC\O'KEEFE, BRIAN\STATE'S PROPOSED ORDER O'KEEFE

C202793 DENIAL CORAM NOBIS.DOCX

1
2 Petitioner claims that the evidence was insufficient to support his conviction
3 for Burglary, and that he should have been charged with Battery Constituting
4 Domestic Violence under NRS 33.018 rather than Battery under NRS 200.481.
5 These claims are not properly raised in a petition for a writ of coram nobis because
6 these are allegations of legal, not factual, error, and they were available to be raised
7 in previous proceedings. Accordingly, this Court denies Petitioner's claim.

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

13 [T]he common-law writ of coram nobis is available under Article
14 6, Section 6(1) of the Nevada Constitution, which grants the
15 district courts the power to issue writs that are proper and
16 necessary to the complete exercise of their jurisdiction, and NRS
1,030, which continues the common law under some
circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

6 DATED this _____ day of July, 2023.

Dated this 14th day of July, 2023

7 
8 _____
DISTRICT JUDGE

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

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

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

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 The State of Nevada vs Brian K
O'Keefe

CASE NO: 04C202793

7 DEPT. NO. Department 18

8
9 **AUTOMATED CERTIFICATE OF SERVICE**

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

13 Service Date: 7/14/2023

14 D A motions@clarkcountyda.com

DOCUMENTARY EXHIBITS

LAS VEGAS METROPOLITAN POLICE
FORENSIC LABORATORY REPORT

DEPARTMENT
IDENTIFICATION

NAME: O'KEEFE, Brian (suspect)
WHITMARSH, Victoria (victim)

CASE: 04 0529-2232
AGENCY: LVMPD
DATE: August 23, 2004

INCIDENT: SEXUAL ASSAULT

BOOKED BY: Ebbert
REQUESTED BY: SA / Moniot

SEP 9 2004

I, DAVID P. WELCH, do hereby declare:

That I am a Criminalist employed by the Las Vegas Metropolitan Police Department;

That on November 23, 1977, I first qualified in the Eighth Judicial District Court of Clark County, Nevada, as an expert witness;

That I received evidence in the above case and completed an examination on the following items:

DW 1 - Sealed sexual assault evidence kit containing the following from Victoria Whitmarsh:

- Item A - consent form
- Item B - assault information
- Item C - anatomical drawings
- Item D - blood samples
- Item E - buccal swab standards
- Item F - vaginal swabs
- Item G - rectal swabs
- Item H - oral swabs
- Item J - debris/bitemarks/secretions

DW 2 - One sealed buccal swab kit taken from Brian O'Keefe

DW 3 - One sealed bag booked by Horn (1928-3) containing:
Item 3 - one (1) black and white dress with fecal stains

DW 4 - One sealed bag booked by Horn (1928-6) containing:
Item 6 - white toilet paper with fecal stains

DW 5 - One sealed bag booked by Horn (1928-4) containing:
Item 4 - black shorts with fecal stains
opened but not examined

CONCLUSION:

Semen was detected on a black and white dress and on some toilet paper. Brian O'Keefe cannot be excluded as a source of the semen. The estimate of this DNA profile in the population is rarer than 1 in 600 billion (identity assumed). See DNA Summary Chart.

Semen was detected on the vaginal swabs of the victim, Victoria Whitmarsh. A DNA mixture was indicated, however, Brian O'Keefe cannot be excluded as the minor source of the DNA.

Semen was not detected on the oral or rectal swabs of the victim.

STATE'S EXHIBIT	IBITS
36	
C202793	

STAT # Case

04 0529-2232
By: DW pg 1 of 4

The above items were subjected to PCR amplification at the following STR genetic loci: D3S1358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317, D7S820, D16S539, TH01, TPOX, and CSF1PO. The sex determining amelogenin locus was also examined.

I returned the evidence to the vault.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

8/23/04

David P. Welch, #1418

DAVID P. WELCH, #1418
Criminalist II

Brent Henry D 6161

Reviewer

04 0529-2232

By: DW pg 2 of 4

DNA SUMMARY CHART - LVMPD FORENSIC LABORATORY

Suspect		O'KEEFE, Brian		Victim		WHITMARSH, Victoria		Criminalist	D. Welch, 1418		Event #	04 0529-2232							
Evidence Analyzed				DNA STR Results								Sufficient Sample		Yes		No			
LAB#	DW 1	Evidence Description		buccal swabs Victoria Whitmarsh		VWA		FGA		D8S1179		D21S11		D18S51		X			
Booked By	Ebbert					17, 17		17, 18		24, 25		X, X		13, 15		29, 32.2		17, 17	
Pkg #	Item #					D5S818		D13S317		D7S820		TH01		TPOX		CSF1PO			
SAK	E					7, 13		8, 11		11, 11		9, 11		8, 8		11, 12			
Freq. US Cauc. Pop.				Freq. US Afr. Am. Pop.				Freq. US Hisp. Pop.											
Evidence Analyzed				DNA STR Results								Sufficient Sample		Yes		No			
LAB#	DW 1	Evidence Description		vaginal swabs Victoria Whitmarsh (epithelial fraction - E1)		VWA		FGA		D8S1179		D21S11		D18S51		X			
Booked By	Ebbert					17, 17		17, 18		24, 25		X, X		13, 15		29, 32.2		17, 17	
Pkg #	Item #					D5S818		D13S317		D7S820		TH01		TPOX		CSF1PO			
SAK	F					7, 13		8, 11		11, 11		9, 11		8, 8		11, 12			
Freq. US Cauc. Pop.				Freq. US Afr. Am. Pop.				Freq. US Hisp. Pop.											
Evidence Analyzed				DNA STR Results								Sufficient Sample		Yes		No			
LAB#	DW 1	Evidence Description		vaginal swabs Victoria Whitmarsh (sperm fraction - E2)		VWA		FGA		D8S1179		D21S11		D18S51		X			
Booked By	Ebbert					17, 16		17, 18 15*, 16*		24, 25 20*		X, Y*		13, 15 14*		29, 32.2 28*, 30*		17	
Pkg #	Item #					D5S818		D13S317		D7S820		TH01		TPOX		CSF1PO			
SAK	F					7, 13 10*		8, 11 10*		11		9*, 11		9 6*, 9.3*		8		11, 12	
Freq. US Cauc. Pop.				Freq. US Afr. Am. Pop.				Freq. US Hisp. Pop.											
Evidence Analyzed				DNA STR Results								Sufficient Sample		Yes		No			
LAB#	DW 3	Evidence Description		human semen on black and white dress		VWA		FGA		D8S1179		D21S11		D18S51		X			
Booked By	Horn					16, 16		15, 16		20, 25		X, Y		13, 14		28, 30		15, 16	
Pkg #	Item #					D5S818		D13S317		D7S820		TH01		TPOX		CSF1PO			
1928-3	3					10, 13		10, 11		11, 12		11, 11		6, 9.3		8, 8		11, 12	
Freq. US Cauc. Pop.				Freq. US Afr. Am. Pop.				Freq. US Hisp. Pop.											
< 1 in 600 billion				< 1 in 600 billion				< 1 in 600 billion											

* Denotes Lesser peak height relative to other peaks; NR - No Typing Results Obtained; Inc - Inconclusive Result; NT - Sample Not Typed; EX - Extract Only
Ev # 040529-2232

DNA SUMMARY CHART - LVMPD FORENSIC LABORATORY

Suspect		O'KEEFE, Brian		Victim		WHITMARSH, Victoria		Criminalist		D. Welch, 1418		Event #		04 0529 2232					
Evidence Analyzed				DNA STR Results				DNA STR Results				Sufficient Sample		Yes		No			
LAB#	DW 4	Evidence Description		VWA	FGA	D8S1179	D21S11	D18S51	Remaining for Retest?		Conclusion		Included sperm donor: Brian O'Keefe						
Booked By				human semen on toilet paper															
Horn																			
Pkg #	Item #																		
1928-6	6																		
Freq. US Cau. Pop.				< 1 in 600 billion				Freq. US Afr. Am. Pop.				< 1 in 600 billion				Freq. US Hisp. Pop.			
Evidence Analyzed				DNA STR Results				DNA STR Results				Sufficient Sample		Yes		No			
LAB#	DW 2	Evidence Description		VWA	FGA	D8S1179	D21S11	D18S51	Remaining for Retest?		Conclusion		Reference standard						
Booked By				buccal swabs Brian O'Keefe															
Morgenstern																			
Pkg #	Item #																		
4665-1	A																		
Freq. US Cau. Pop.				Freq. US Afr. Am. Pop.				Freq. US Hisp. Pop.											
Evidence Analyzed				DNA STR Results				DNA STR Results				Sufficient Sample		Yes		No			
LAB#		Evidence Description		VWA	FGA	D8S1179	D21S11	D18S51	Remaining for Retest?		Conclusion								
Booked By																			
Pkg #																			
Item #																			
Freq. US Cau. Pop.				Freq. US Afr. Am. Pop.				Freq. US Hisp. Pop.											
Evidence Analyzed				DNA STR Results				DNA STR Results				Sufficient Sample		Yes		No			
LAB#		Evidence Description		VWA	FGA	D8S1179	D21S11	D18S51	Remaining for Retest?		Conclusion								
Booked By																			
Pkg #																			
Item #																			
Freq. US Cau. Pop.				Freq. US Afr. Am. Pop.				Freq. US Hisp. Pop.											

* Denotes Lesser peak height relative to other peaks; NR - No Typing Results Obtained; Inc - Inconclusive Result; NT - Sample Not Typed; EX - Extract Only
Ev # 040529-2232

Dear Brian,

I had been trying to reach out to you for so long; an explanation of your violent behaviors towards me; at this point you still have not once say you're sorry, nor admit of your problems and ~~having~~ the self denial of facing^{the} responsibility of your behaviors.

I gave 300% from the very beginning of our relationship, but all I got were broken promises and lies! I need an explanation why do you keep ~~on~~ hurting me when you supposed to love me more than life. Are you taking me for a fool!

Brian, please don't take advantage of my kindness. I need to focus on myself this time. What makes you think, I believe you now! I had endured all the ~~many~~ craziness & accepted certain things & behaviors that I cannot even fathom the idea of doing.

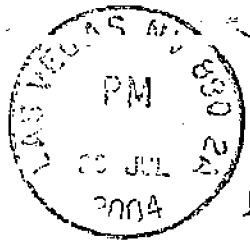
Right now I ~~cannot~~ don't see any future w/us. Time will only tell I can understand your desperation right now, because you know your future will depend on my testimony, for your information, I am not backing out. I will tell exactly the truth & what happened on that day to the best of my knowledge. I am not going to cover-up for you anymore. Face your responsibility, I did not put you there, you put yourself there!

Stop saying you love me, (I know you're just pacifying me, by saying this wonderful words) that's not going to fly w/me at this point. You hurt me bad, I had given you many chances, but all you did was taken ~~any~~ everything for granted, what makes you think it will work out again between you & me.

Do you even realized what you put me thru? between the intimidation, physical & emotional abuse, the mind games consisting of apparent accusations of me having sex w/ other men, what kind of a human being are you? You're not capable of love, but a control, obsessive person

What I did on that miserable ^{/Horror} day of May 29 was merely protecting myself from getting beaten or even killed (not intentionally but accidentally) you were so out of your mind; I can see you capable of the inevitable. I don't want to fear you. As a human being all I need is to be loved & be respected & I give it in return. Please stop telling me I need help; you're the one who needs all the help. I get plenty of support from my family, friends & professional therapist, especially from my family because they love me & concern that I do not get hurt anymore.

*IF you need to write me, please send to the same address I will get it forwarded to new address.



CHIEF
Pay F



Brian O'Keefe #1447732
330 S. Casino Blvd.
Lv. NV. 89101

7628V
1516

23101+2102



2718

MARKET DEPT	DEFENDANT'S EXHIBIT B C202793	10-2-04 10-2-04
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Dear Brian

I received the message on my cell phone regarding how to set-up an account for you to be able to call my cell. Well it is going to cost \$50.00. I don't have that kind of money.

I am not spending anymore for you. You wrecked my car; I am saving every penny I have to buy a new car or get my old car fixed w/c will cost me a lot of money.

If you want to contact me thru my cell you gonna have to find a way to pay for that. Calling me on the landline will jeopardize my living condition w/ my roommates. Once they found out you're calling me (w/c might show up in their phone bill) they will tell my sister and all hell breaks loose. She will find a way to stop the contact between you & me.

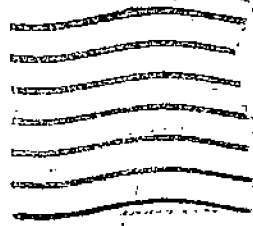
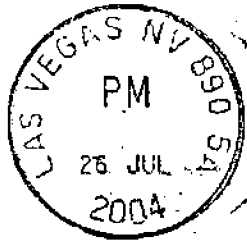
If you want to write me, please do not put return address nor name. My sister instructed my roommates to watch out for me make sure to report any contacts w/you.

Please I don't need anymore trouble or problems, I am trying to get my life in order. I'm not getting any younger, I need a normal life, please Brian don't ruin me anymore. I am already taking a lot of chances by even writing to you & taking your calls. I am fighting a lot of obstacles inside me. One side of me is saying ~~no~~ no contacts

With you *whatsoever, the other side has a lot of questions why you had treated ^{+hurt} me so badly & I cannot settle in my mind unless I have the answers. People are saying just forget about it & go on w/ ^{my} your life. I wish I can just do that; but I invested 2 1/2 years of my life w/ you. I cannot admit that I had been used & played at. I am having a hard time accepting that.

I need to realize that I had put myself in that situation and make sure it will not happen again. I am taking life one day at a time. I told my therapist - that I am hurting deep down inside - she says ^{your wound} it will heal eventually; next thing you know it will be gone, and I will take ^{total} charge of my life and whatever happened in the past was a learning experience.

If it is meant to be let Destiny & fate take charge. Leave it that way!



Brian O'Keefe #1447732
330 S. Casino Blvd
LV, NV., 89101

11 B28V
1516
7718





October 27, 2004

District Court
Judge Sally Loehrer
200 S. 3rd Street
Dept 15
Las Vegas, NV

I, Bonita Kosub, RHIT, CCS, state as follows:

That I am the duly authorized custodian of the medical records of Montevista Hospital, and have authority to certify said records, and

That the copy of the medical records on Victoria T. Whitmarsh attached to this affidavit is a true copy of all the records described in the Subpoena and/or Authorization, and

That the records were prepared by the personnel of the hospital, staff physician, or person acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition, or event.

Bonita Kosub

Bonita Kosub
Manager, Health Information Management

STATE OF NEVADA

COUNTY OF CLARK

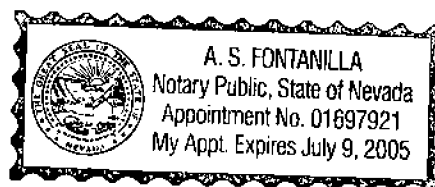
Subscribed and sworn before me, a notary public, in and for said county this

27th day of OCTOBER 2004

[Signature]
Notary Public

MARKED FOR IDENTIFICATION
DEFTS' PROPOSED EXHIBIT

F
C202793



**THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
1381 - 0
WILL FOLLOW VIA
U.S. MAIL**

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CONTINUES
IN NEXT
VOLUME**