

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

KEVIN JOHN MENTABERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 88476
District Court Case No. CR-FP-18-5030

Electronically Filed
Apr 24 2024 09:54 AM
Elizabeth A. Brown
Clerk of Supreme Court

NOTICE TO TRANSMIT REQUIRED DOCUMENT

TO: Rebecca Plunkett, Elko County Clerk

The copies of the notice of appeal transmitted to the Supreme Court of Nevada were not accompanied by the document(s) indicated below:

- Docket Entries for Case No. DC-CV-21-68
- Minutes for Case No. DC-CV-21-68
- Recent Orders filed in Case No. DC-CV-21-68

Please forward a certified copy of the document to the Supreme Court Clerk's Office within 7 days of the date of this notice. If your office is unable to comply with this request, please provide this office with a written explanation stating why you cannot transmit the document.

DATE: April 15, 2024

Elizabeth A. Brown, Clerk of Court

By: Brittany Cowden
Deputy Clerk

Notification List

Electronic
Elko County District Attorney \ Tyler J. Ingram, District Attorney

Paper
Kevin John Mentaberry

24-13079

CASE SUMMARY
CIVIL
CASE NO. DC-CV-21-68

MENTABERRY, KEVIN J VS. WARDEN GARRETT,
TIM LOVELOCK CORRECTIONAL CENTER **
WRIT OF HABEAS **

§
§
§
§

Location: **Civil**
Judicial Officer: **Kacin, Alvin R.**
Filed on: **06/11/2021**

CASE INFORMATION

Related Cases

ECDC-CRFP-18-5030 (Companion Case)

Case Type: **Civil Writ - Writ of Habeas Corpus**

Case Status: **03/28/2023 Reopened**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	DC-CV-21-68
Court	Civil
Date Assigned	06/11/2021 0:00 AM
Judicial Officer	Kacin, Alvin R.

PARTY INFORMATION

Petitioner

MENTABERRY, KEVIN JOHN

Attorneys

MALONE, JOHN
Retained
775-815-6067(H)

Respondent

DANIELS CHARLES DIRECTOR, NEVADA DEPT OF CORRECTIONS
Removed: 03/28/2023
Converted (Inactive Party Default)

GARRETT, WARDEN, LOVELOCK CORRECTIONAL CENTER, TIM

ET AL

DATE

EVENTS & ORDERS OF THE COURT







EVENTS

06/11/2021	Petition <i>Title: POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR EVIDENTIARY HEARING.pdf</i> <i>Notes: COPY PLACED IN DA'S BOX, COPIES MAILED TO MALONE LAW IN SASE</i>
06/11/2021	Unknown Document <i>Title: AFFIDAVIT OF PETITIONER KEVIN MENTABERRY IN SUPPORT OF PETITION FOR POST CONVICTION WRIT OF BABEAS CORPUS.pdf</i> <i>Notes: COPY PLACED IN DA'S BOX, COPIES MAILED TO MALONE LAW IN SASE</i>
06/11/2021	Unknown Document <i>Title: AFFIDAVIT OF JOHN MENTABERRY IN SUPPORT OF PETITION FOR POST CONVICTION WRIT OF BABEAS CORPUS.pdf</i> <i>Notes: COPY PLACED IN DA'S BOX, COPIES MAILED TO MALONE LAW IN SASE</i>
06/11/2021	Department 2
06/11/2021	New Filing
06/18/2021	Clerk's Office
06/18/2021	Unknown Document <i>Title: ORDER CHANGING CAPTION.pdf</i>
06/18/2021	Unknown Document <i>Title: ORDER DENYING HABEAS RELIEF.pdf</i> <i>Notes: ORDER GRANTING LEAVE TO FILE AMENDED POST-CONVICTION PETITION</i>


CASE SUMMARY
CIVIL
CASE No. DC-CV-21-68

	<i>FOR WRIT OF HABEAS CORPUS</i>
06/21/2021	Unknown Document <i>Title: NOTICE OF ENTRY OF ORDER.pdf</i> <i>Notes: ORDER DENYING HABEAS RELIEF</i>
07/07/2021	Unknown Document <i>Title: FIRST AMENDED PETITION FOR WRIT OF HC (POST CONVICTION) AND REQUEST FOR EVIDENTIARY HEARING.pdf</i> <i>Notes: FILE STMAPED COPY MAILED BACK IN SASE TO JOHN MALONE LAW OFFICE 1662 US HWY 395 STE 202, MINDEN, NV 89423 AND 1 FILE STAMPED COPY HANDED TO ECDA RUNNER @ 10:45</i>
07/07/2021	Department 2 <i>Notes: FOR DC2 TO REVIEW THE 1ST AMENDED PETITION FILED 7/7/2021</i>
07/20/2021	Clerk's Office <i>Notes: FILE RETURNED AT WINDOW</i>
07/20/2021	Unknown Document <i>Title: ORDER.pdf</i>
07/22/2021	Unknown Document <i>Title: RETURN TO PETITION FOR WRIT OF HABEAS CORPUS.pdf</i>
08/19/2021	Department 2 <i>Notes: PER STICKY NOTE ON LIST</i>
08/23/2021	Clerk's Office <i>Notes: FILE RETURNED AT WINDOW</i>
08/23/2021	Unknown Document <i>Title: ORDER SETTING STATUS HEARING 9.10.21.pdf</i> <i>Notes: AT 2:00PM.</i>
09/01/2021	Department 2
09/10/2021	Status Hearing <i>Location: District Court Department 2</i> <i>Start: 09/10/2021 2:00PM</i>
09/10/2021	DC Civil Hearing Minutes <i>Title: 09.10.21 HRG - STATUS.rtf</i>
09/13/2021	Clerk's Office
11/02/2021	Department 2
11/03/2021	Clerk's Office
11/03/2021	Final Order <i>Title: ORDER OF DISMISSAL.pdf</i> <i>Notes: ORDER CLOSING CASE</i>
11/04/2021	DC Habeas Corpus Notice <i>Title: DC Habeas Corpus Notice (2).rtf</i>
11/04/2021	Unknown Document <i>Title: NOTICE OF ENTRY OF DECISION OR ORDER (2).pdf</i>
11/22/2021	Unknown Document <i>Title: NOTICE OF APPEAL.pdf</i>
11/22/2021	Unknown Document <i>Title: CASE APPEAL STATEMENT.pdf</i>
12/01/2021	Unknown Document <i>Title: CLERK'S CERTIFICATION.pdf</i> <i>Notes: SIGNED, SEALED, AND FILED WITH THE SUPREME COURT.</i>
10/24/2022	Unknown Document <i>Title: TRANSCRIPT OF STATUS HEARING - FRIDAY, SEPTEMBER 10, 2021.pdf</i>
03/23/2023	Department 2 <i>Notes: PER COOPER</i>
03/28/2023	Clerk's Office <i>Notes: CHECKED IN AT WINDOW</i>


CASE SUMMARY
CIVIL
CASE No. DC-CV-21-68

03/28/2023	Unknown Document <i>Title: ORDER VACATING ORDER ENTERED NOVEMEBER 3, 2021 ORDER SETTING STATUS HEARING.pdf</i> <i>Notes: ORDER CHANGING CAPTION</i> <i>HEARING SET FOR MAY 2 2023 @ 2:30 PM</i>
04/26/2023	Department 2 <i>Notes: ELIDIA'S CHECKOUT LIST</i>
05/02/2023	Status Hearing <i>Location: District Court Department 2</i> <i>Start: 05/02/2023 2:30PM</i>
05/02/2023	DC Civil Hearing Minutes <i>Title: 05.02.23 DC2 Civil Hearing Minutes STATUS.rtf</i>
05/03/2023	Clerk's Office <i>Notes: FILE RETURNED AT WINDOW</i>
05/03/2023	Unknown Document <i>Title: ORDER VACATING ORDER ENTERED JULY 20, 2021; ORDER FOR RESPONDENT TO RESPOND.pdf</i>
05/19/2023	Department 2 <i>Notes: FILE PLACED IN DC2 P/U BOX</i>
05/19/2023	Unknown Document <i>Title: ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS.pdf</i>
05/31/2023	Clerk's Office <i>Notes: CHECKED IN AT WINDOW</i>
05/31/2023	Unknown Document <i>Title: ORDER SETTING EVIDENTIARY HEARING 8.30.23.pdf</i> <i>Notes: @ 9:00 AM</i>
06/13/2023	Unknown Document <i>Title: RETURNED MAIL - ORDER SETTING EVIDENTIARY HEARING 8.30.23.pdf</i>
08/23/2023	 Submission of Order <i>SUBMISSION OF STIPULATION & ORDER TO CONTINUE EVIDENTIARY HEARING</i> <i>3 COPIES PROVIDED BY THE DA'S OFFICE</i> <i>FILE CHECKED OUT PROPOSED STIP & ORDER PLACED IN DC2 P/U BOX</i>
08/25/2023	 Stipulation and Order for Continuance <i>STIPULATION AND ORDER TO CONTINUE EVIDENTIARY HEARING</i> <i>3 COPIES TO DA'S BOX FOR PICKUP</i>
08/30/2023	Motion Hearing <i>Location: District Court Department 2</i> <i>Start: 08/30/2023 9:00AM</i>
09/12/2023	 Order <i>RESETTING EVIDENTIARY HEARING</i>
10/30/2023	 Motion to <i>MOTION TO CONTINUE HEARING ON PETITION FOR WRIT OF HABEAS CORPUS</i> <i>(POST CONVICTION)</i> <i>1 COPY MAILED BACK IN SASE: JOHN MALONE LAW 209 N PRATT AVE CARSON CITY</i> <i>NV 89701</i>
11/07/2023	 Stipulation <i>STIPULATION TO CONTINUE HEARING ON PETITION FOR WRIT OF HABEAS CORPUS</i> <i>(POST-CONVICTION)</i> <i>1 COPY PROVIDED BY JMALONELAW@GMAIL.COM</i>
11/07/2023	 Submission of Order <i>[PROPOSED] ORDER RE: CONTINUANCE OF HEARING ON PETITION FOR WRIT OF</i> <i>HABEAS CORPUS (POST-CONVICTION)</i> <i>1 COPY PROVIDED BY JMALONELAW.COM WITH SASE</i> <i>DOCUMENTS PLACED IN DC2 P/U BOX</i>


CASE SUMMARY
CIVIL
CASE NO. DC-CV-21-68


11/07/2023  Order Granting
*ORDER RE: CONTINUANCE OF HEARING ON PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
1 COPY CONFORMED AND PLACED IN MALONE SASE
ORIGINAL PLACED IN DC2 P/U BOX*

12/13/2023  Order
ORDER RESETTING EVIDENTIARY HEARING

03/13/2024  DC Criminal Hearing Minutes
03/13/24 DC 2 MINUTES - EVIDENTIARY HEARING

03/25/2024  Transcript
REPORTER'S TRANSCRIPTS- EVIDENTIARY HEARING - MARCH 13, 2024

03/28/2024  Order Granting
ORDER GRANTING HABEAS RELIEF

03/29/2024  Notice of Entry
NOTICE OF ENTRY OF ORDER

HEARINGS

08/30/2023 *CANCELED DC Appeal Hearing (9:00 AM) (Judicial Officer: Kacin, Alvin R. ;Location: Department 2)
Continued*

11/09/2023 *CANCELED DC Writ of Habeas Corpus Hearing (2:00 PM) (Judicial Officer: Kacin, Alvin R. ;Location: Department 2)
Continued*

03/06/2024 *CANCELED DC Writ of Habeas Corpus Hearing (1:00 PM) (Judicial Officer: Kacin, Alvin R. ;Location: Department 2)
Continued*

03/13/2024 **DC Writ of Habeas Corpus Hearing (1:00 PM) (Judicial Officer: Kacin, Alvin R.)**

FINANCIAL INFORMATION

No Financial Information Exists

FILED

2023 MAR 27 PM 2:45

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

4th JUDICIAL DISTRICT COURT

CLERK _____ DEPUTY Am

KEVIN JOHN MENTABERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83878-COA

FILED

SEP 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK


ORDER OF AFFIRMANCE


Kevin John Mentaberry appeals from a corrected judgment of conviction. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

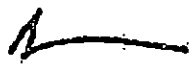
Mentaberry argues that the trial court committed plain error by failing to strike two jurors that knew members of the victim's family, the trial court committed plain error by permitting the admission of hearsay, and the jury's verdict was not supported by sufficient evidence. "[I]n an appeal taken from an amended judgment of conviction, the appellant may only raise challenges that arise from the amendments made to the original judgment of conviction." *Jackson v. State*, 133 Nev. 880, 882, 410 P.3d 1004, 1006 (Ct. App. 2017). Mentaberry does not raise a challenge to the changes made to the corrected judgment of conviction. Rather, Mentaberry's claims challenge the original judgment of conviction and could have been raised in an appeal from the original judgment of conviction. Accordingly,

Mentaberry waived these claims by not raising them in an appeal from his original judgment of conviction, and we

ORDER the corrected judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc; Hon. Alvin R. Kacin, District Judge
John E. Malone
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk



FILED

Case No. DC-CV-21-68

Dept. No. 2

2023 MAR 28 PM 2:15

4th JUDICIAL DISTRICT COURT

CLERK _____ DEPUTY SC

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

KEVIN MENTABERRY,

Petitioner,

vs.

TIM GARRETT,
Warden, Lovelock Correctional Center

Respondent.

**ORDER VACATING ORDER ENTERED
NOVEMBER 3, 2021**

**ORDER SETTING STATUS HEARING
ORDER CHANGING CAPTION**

On July 7, 2021, Petitioner Kevin Mentaberry filed an amended petition for a writ of habeas corpus. Petitioner is challenging a judgment of conviction entered in Case No. CR-FP-18-5030. In that case, the court entered a judgment of conviction on June 19, 2020, finding Petitioner guilty of one count lewdness with a 14 or 15 year old child, a category B felony.

Because the judgment of conviction set forth an illegal sentence, the court held a resentencing hearing in that case. At the hearing, the parties stipulated in open court to dismiss this action. The court entered an order dismissing the action on November 3, 2021.

The court entered a second corrected judgment of conviction on January 4, 2022 and ordered Petitioner to serve a maximum term of 72 months and a minimum term of 28 months in the Nevada Department of Corrections. The Court of Appeals affirmed the conviction on September 22, 2022. Petitioner then petitioned the Supreme Court of Nevada for review.


On March 22, 2023, the Supreme Court entered an "Order Denying Petition for Review and Remanding." In that order, the Supreme Court instructed the court to address the post-conviction petition for a writ of habeas corpus that was dismissed.

1 Accordingly, the court is vacating its order entered November 3, 2021. The court is also setting a
2 status hearing to determine how the parties wish to proceed.

3 **Therefore, the court enters the following orders:**

- 4 1. The order entered November 3, 2021 is vacated.
- 5 2. A status hearing is set for May 2, 2023, at 2:30 p.m.
6 PST in the courtroom of Department 2; Fourth Judicial District Court. 30 minutes shall be set
7 aside for the hearing.
- 8 3. Counsel may appear for the hearing via two-way audio-visual equipment.
- 9 4. The caption of this action is changed as reflected above.

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11 DATED this 24 day of March, 2023.

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15 The Honorable Alvin R. Kacin
16 District Judge/Department 2
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CERTIFICATE OF SERVICE

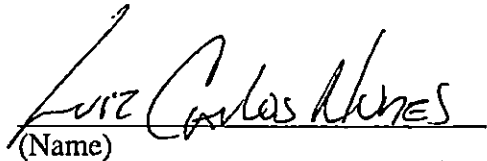
Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 28 day of March, 2023, served by the following method of service:

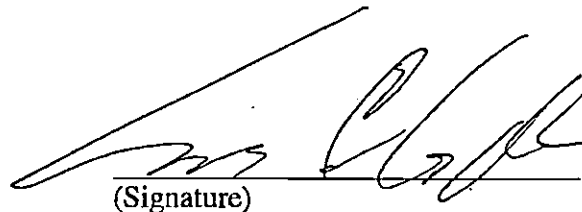
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<input type="checkbox"/> Certified US Mail	<input type="checkbox"/> Overnight Federal Express
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<input type="checkbox"/> Overnight US Mail	<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Personal Service	<input checked="" type="checkbox"/> Box in Clerk's Office

a true copy of the foregoing document addressed to:

Elko County District Attorney's Office
[Box in Clerk's Office]

John Malone, Esq.
1662 US Highway 395, Suite 202
Minden, NV 89423
[Regular US Mail]


(Name)


(Signature)

FILED

Case No. DC-CV-21-68

Dept. No. 2

2023 MAY -3 PM 2:04

4th JUDICIAL DISTRICT COURT
CLERK _____ DEPUTY JP

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

KEVIN MENTABERRY,

Petitioner,

vs.

TIM GARRETT,
Warden, Lovelock Correctional Center

Respondent.

**ORDER VACATING ORDER ENTERED
JULY 20, 2021**

ORDER FOR RESPONDENT TO RESPOND

On July 7, 2021, Petitioner Kevin Mentaberry filed an amended petition for a writ of habeas corpus. Petitioner is challenging a judgment of conviction entered in Case No. CR-FP-18-5030. In that case, the court entered a judgment of conviction on June 19, 2020, finding Petitioner guilty of one count lewdness with a 14 or 15 year old child, a category B felony. The court ordered Respondent to respond to the petition on July 20, 2021.

Because the judgment of conviction set forth an illegal sentence, the court held a resentencing hearing in that case. At the hearing, the parties stipulated in open court to dismiss this action. The court entered an order dismissing the action on November 3, 2021.

The court entered a second corrected judgment of conviction on January 4, 2022 and ordered Petitioner to serve a maximum term of 72 months and a minimum term of 28 months in the Nevada Department of Corrections. The Court of Appeals affirmed the conviction on September 22, 2022. Petitioner then petitioned the Supreme Court of Nevada for review.

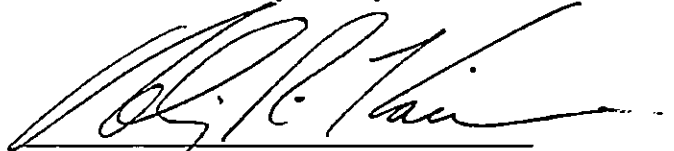
1 On March 22, 2023, the Supreme Court entered an "Order Denying Petition for Review and
2 Remanding." In that order, the Supreme Court instructed the court to address the post-conviction petition
3 for a writ of habeas corpus that was dismissed.

4 On May 2, 2023, the court held a hearing to determine how the parties wished to proceed. At the
5 conclusion of the hearing, the court stated it would vacate its July 20, 2021 order and give Respondent
6 45 days to respond to the amended petition.

7 **Therefore, the court enters the following orders:**

- 8 1. The order entered July 20, 2021 is vacated.
9 2. Respondent shall respond to the amended petition by June 16, 2023 at 4:00 p.m. PST.

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11 DATED this 2 day of May, 2023.

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15 The Honorable Alvin R. Kacin
16 District Judge/Department 2
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 3 day of May, 2023, served by the following method of service:

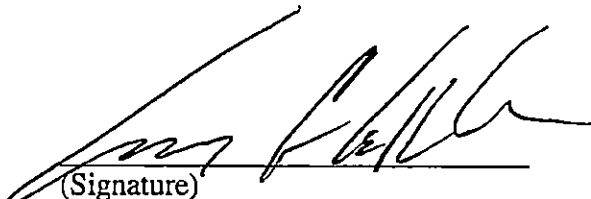
<input checked="" type="checkbox"/> Regular US Mail	<input type="checkbox"/> Overnight UPS
<input type="checkbox"/> Certified US Mail	<input type="checkbox"/> Overnight Federal Express
<input type="checkbox"/> Registered US Mail	<input type="checkbox"/> Fax to # _____
<input type="checkbox"/> Overnight US Mail	<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Personal Service	<input checked="" type="checkbox"/> Box in Clerk's Office

a true copy of the foregoing document addressed to:

Elko County District Attorney's Office
[Box in Clerk's Office]

John Malone, Esq.
1662 US Highway 395, Suite 202
Minden, NV 89423
[Regular US Mail]


(Name)


(Signature)

FILED

2023 MAY 31 PM 1:45

4th JUDICIAL DISTRICT COURT
CLERK _____ DEPUTY *CS*

1 Case No. DC-CV-21-68

2 Dept. No. 2

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

8
9 KEVIN MENTABERRY,

10 Petitioner,

**ORDER SETTING EVIDENTIARY
HEARING**

11 vs.

12 TIM GARRETT,
Warden, Lovelock Correctional Center

13 Respondent.
14 _____/

15 On July 7, 2021, Petitioner Kevin Mentaberry filed an amended petition for a writ of habeas
16 corpus. Petitioner is challenging a judgment of conviction entered in Case No. CR-FP-18-5030. In that
17 case, the court entered a judgment of conviction on June 19, 2020, finding Petitioner guilty of one count
18 lewdness with a 14 or 15 year old child, a category B felony. The court ordered Respondent to respond
19 to the petition on July 20, 2021.

20 Because the judgment of conviction set forth an illegal sentence, the court held a resentencing
21 hearing in that case. At the hearing, the parties stipulated in open court to dismiss this action. The court
22 entered an order dismissing the action on November 3, 2021.

23 The court entered a second corrected judgment of conviction on January 4, 2022 and ordered
24 Petitioner to serve a maximum term of 72 months and a minimum term of 28 months in the Nevada
25 Department of Corrections. The Court of Appeals affirmed the conviction on September 22, 2022.
26 Petitioner then petitioned the Supreme Court of Nevada for review.
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1 On March 22, 2023, the Supreme Court entered an "Order Denying Petition for Review and
2 Remanding." In that order, the Supreme Court instructed the court to address the post-conviction petition
3 for a writ of habeas corpus that was dismissed.

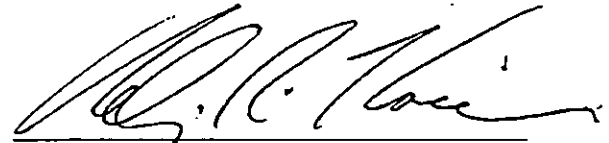
4 On May 2, 2023, the court held a hearing to determine how the parties wished to proceed. At the
5 conclusion of the hearing, the court stated it would vacate its July 20, 2021 order and give Respondent
6 45 days to respond to the amended petition. Respondent filed an "Answer to Petition for Writ of Habeas
7 Corpus" on May 19, 2023.

8 Having reviewed the pleadings and papers on file, the court is setting an evidentiary hearing.

9 **Therefore, the court enters the following order:**

- 10 1. An evidentiary hearing is set for August 30, 2023, at 9:00 a.m.
11 PST in the courtroom of Department 2, Fourth Judicial District Court. 2 hours shall be set aside
12 for the hearing.

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14 DATED this 23 day of May, 2023.

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18 The Honorable Alvin R. Kacin
19 District Judge/Department 2
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 31st day of May, 2023, served by the following method of service:

<input checked="" type="checkbox"/> Regular US Mail	<input type="checkbox"/> Overnight UPS
<input type="checkbox"/> Certified US Mail	<input type="checkbox"/> Overnight Federal Express
<input type="checkbox"/> Registered US Mail	<input type="checkbox"/> Fax to # _____
<input type="checkbox"/> Overnight US Mail	<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Personal Service	<input checked="" type="checkbox"/> Box in Clerk's Office

a true copy of the foregoing document addressed to:

Elko County District Attorney's Office
[Box in Clerk's Office]

John Malone, Esq.
1662 US Highway 395, Suite 202
Minden, NV 89423
[Regular US Mail]

John Malone, Esq.
1601 Fairview Drive, Suite H
Carson City, NV 89701
[Regular US Mail]

Elodie Ramirez
(Name)


(Signature)

Case No. DC-CV-21-68

Dept. No. 2

FILED

2023 SEP 12 PM 1:41

4TH JUDICIAL DISTRICT COURT

CLERK DEPUTY U

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

KEVIN MENTABERRY,

Petitioner,

**ORDER RESETTING EVIDENTIARY
HEARING**

vs.

TIM GARRETT,
Warden, Lovelock Correctional Center

Respondent.

On July 7, 2021, Petitioner Kevin Mentaberry filed an amended petition for a writ of habeas corpus. Petitioner is challenging a judgment of conviction entered in Case No. CR-FP-18-5030. In that case, the court entered a judgment of conviction on June 19, 2020, finding Petitioner guilty of one count of lewdness with a 14 or 15 year old child, a category B felony. The court ordered Respondent to respond to the petition on July 20, 2021.

Because the judgment of conviction set forth an illegal sentence, the court held a resentencing hearing in that case. At the hearing, the parties stipulated in open court to dismiss this action. The court entered an order dismissing the action on November 3, 2021.

The court entered a second corrected judgment of conviction on January 4, 2022 and ordered Petitioner to serve a maximum term of 72 months and a minimum term of 28 months in the Nevada Department of Corrections. The Court of Appeals affirmed the conviction on September 22, 2022. Petitioner then petitioned the Supreme Court of Nevada for review.

1 On March 22, 2023, the Supreme Court entered an "Order Denying Petition for Review and
2 Remanding." In that order, the Supreme Court instructed the court to address the post-conviction petition
3 for a writ of habeas corpus that was dismissed.

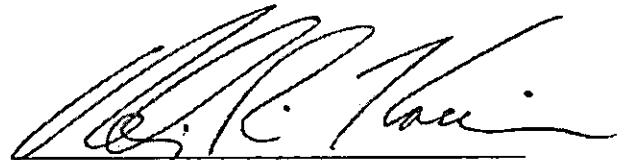
4 On May 2, 2023, the court held a hearing to determine how the parties wished to proceed. At the
5 conclusion of the hearing, the court stated it would vacate its July 20, 2021 order and give Respondent
6 45 days to respond to the amended petition. Respondent filed an "Answer to Petition for Writ of Habeas
7 Corpus" on May 19, 2023.

8 The court set an evidentiary hearing for August 30, 2023. However, the parties stipulated to
9 continue the hearing. Accordingly, the court is resetting the evidentiary hearing.

10 **Therefore, the court enters the following order:**

- 11 1. An evidentiary hearing is set for November 9, 2023, at 2:00 p.m. PST in the courtroom of
12 Department 2, Fourth Judicial District Court. 2 hours shall be set aside for the hearing.

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14 DATED this 12 day of September, 2023.

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18 The Honorable Alvin R. Kacin
19 District Judge/Department 2
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 12 day of September, 2023, served by the following method of service:


<input checked="" type="checkbox"/> Regular US Mail	<input type="checkbox"/> Overnight UPS
<input type="checkbox"/> Certified US Mail	<input type="checkbox"/> Overnight Federal Express
<input type="checkbox"/> Registered US Mail	<input type="checkbox"/> Fax to # _____
<input type="checkbox"/> Overnight US Mail	<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Personal Service	<input checked="" type="checkbox"/> Box in Clerk's Office

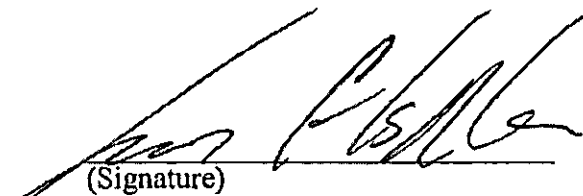
a true copy of the foregoing document addressed to:

Elko County District Attorney's Office
[Box in Clerk's Office]

John Malone, Esq.
1662 US Highway 395, Suite 202
Minden, NV 89423
[Regular US Mail]

John Malone, Esq.
1601 Fairview Drive, Suite H
Carson City, NV 89701
[Regular US Mail]


(Name)


(Signature)

1 CASE NO. DC-CV-21-68

2 DEPT. NO. 2

3 This document does not contain personal information of any person.

FILED
2023 NOV -7 PM 3:39
4TH JUDICIAL DISTRICT COURT
CLERK _____ DEPUTY JB

5 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
6 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
7

8 KEVIN JOHN MENTABERRY,
9 Petitioner,

10 vs.

ORDER re:
CONTINUANCE OF
HEARING ON PETITION FOR WRIT
OF HABEAS CORPUS
(POST-CONVICTION)

11 CHARLES DANIELS,
12 Director, Nevada Department of Corrections,
13 Respondent.
14 _____/

15 Having considered the stipulation of the parties regarding the need to continue the hearing
16 currently set for November 9, 2023, the request is granted. The evidentiary hearing on Mr.
17 Mentaberry's postconviction petition for a writ of habeas corpus is reset to the following date:

18 To Be Determined
19

20 IT IS SO ORDERED

21 Dated Nov 7, 2023

22 District Judge
23 _____
24 _____
25 _____
26 _____
27 _____
28 _____

[Signature]
C.D.J.

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CERTIFICATE OF SERVICE

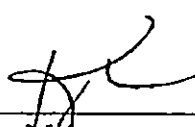
I hereby certify, pursuant to N.R.C.P. 5(b), that on this 3 day of the month of
November, 2023, I mailed a true and correct copy of the foregoing Stipulation to
Continue Hearing on Petition for Writ of Habeas Corpus addressed to:

Elko County District Attorney
540 Court St.
2nd floor
Elko, NV 89801

Charles Daniels
Director
Nevada Department of Corrections
P.O. Box 7011
Carson City, Nevada 89702

Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, NV 89701

Dated this 3 day of November, 2023.



Kerry Malone

1 Case No. DC-CV-21-68

2 Dept. No. 2

FILED

2023 DEC 13 PM 3:40

4TH JUDICIAL DISTRICT COURT

CLERK DEPUTY AS

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

8
9 KEVIN MENTABERRY,

10 Petitioner,

ORDER RESETTING EVIDENTIARY
HEARING

11 vs.

12 TIM GARRETT,
Warden, Lovelock Correctional Center

13 Respondent.
14 _____/

15 On July 7, 2021, Petitioner Kevin Mentaberry filed an amended petition for a writ of habeas
16 corpus. Petitioner is challenging a judgment of conviction entered in Case No. CR-FP-18-5030. In that
17 case, the court entered a judgment of conviction on June 19, 2020, finding Petitioner guilty of one count
18 lewdness with a 14 or 15 year old child, a category B felony. The court ordered Respondent to respond
19 to the petition on July 20, 2021.

20 Because the judgment of conviction set forth an illegal sentence, the court held a resentencing
21 hearing in that case. At the hearing, the parties stipulated in open court to dismiss this action. The court
22 entered an order dismissing the action on November 3, 2021.

23 The court entered a second corrected judgment of conviction on January 4, 2022 and ordered
24 Petitioner to serve a maximum term of 72 months and a minimum term of 28 months in the Nevada
25 Department of Corrections. The Court of Appeals affirmed the conviction on September 22, 2022.
26 Petitioner then petitioned the Supreme Court of Nevada for review.
27
28

1 On March 22, 2023, the Supreme Court entered an "Order Denying Petition for Review and
2 Remanding." In that order, the Supreme Court instructed the court to address the post-conviction petition
3 for a writ of habeas corpus that was dismissed.

4 On May 2, 2023, the court held a hearing to determine how the parties wished to proceed. At the
5 conclusion of the hearing, the court stated it would vacate its July 20, 2021 order and give Respondent
6 45 days to respond to the amended petition. Respondent filed an "Answer to Petition for Writ of Habeas
7 Corpus" on May 19, 2023.

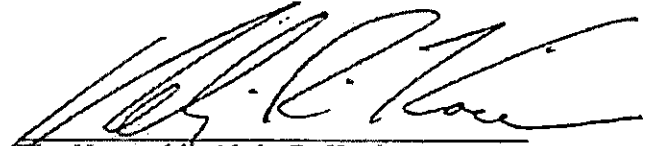
8 The court set an evidentiary hearing for August 30, 2023. However, the parties stipulated to
9 continue the hearing. On September 12, 2023, the court reset the evidentiary hearing to November 9,
10 2023.

11 On November 7, 2023, the court entered a stipulated order to continue the evidentiary hearing.
12 Accordingly, the court is again resetting the evidentiary hearing.

13 **Therefore, the court enters the following order:**

- 14 1. An evidentiary hearing is set for March 6, 2024, from 1:00 p.m. PST to 5:00 p.m. PST in the
15 courtroom of Department 2, Fourth Judicial District Court.

16
17 DATED this 13 day of December, 2023.

18
19
20 
21 The Honorable Alvin R. Kacin
22 District Judge/Department 2
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 13 day of December, 2023, served by the following method of service:

<input checked="" type="checkbox"/> Regular US Mail	<input type="checkbox"/> Overnight UPS
<input type="checkbox"/> Certified US Mail	<input type="checkbox"/> Overnight Federal Express
<input type="checkbox"/> Registered US Mail	<input type="checkbox"/> Fax to # _____
<input type="checkbox"/> Overnight US Mail	<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Personal Service	<input checked="" type="checkbox"/> Box in Clerk's Office

a true copy of the foregoing document addressed to:

Elko County District Attorney's Office
[Box in Clerk's Office]

John Malone, Esq.
209 N. Pratt Avenue
Carson City, NV 89701
[Regular US Mail]

Liz Carlos Mores
(Name)

[Signature]
(Signature)

Case No. DC-CV-21-68

Dept. No. 2

FILED

2024 MAR 28 PM 3:35

4TH JUDICIAL DISTRICT COURT

CLERK DEPUTY



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

KEVIN MENTABERRY,

Petitioner,

ORDER GRANTING HABEAS RELIEF

vs.

TIM GARRETT,
Warden, Lovelock Correctional Center

Respondent.

On July 7, 2021, Petitioner Kevin Mentaberry filed an amended petition for a writ of habeas corpus. Petitioner is challenging a judgment of conviction entered in Case No. CR-FP-18-5030 on June 19, 2020. In that case, a jury found Petitioner guilty of one count of lewdness with a 14 or 15 year old child, a category B felony. The court ordered Respondent to respond to the petition on July 20, 2021.

Because the judgment of conviction set forth an illegal sentence, the court held a resentencing hearing in the criminal case. At the hearing, the parties stipulated in open court to dismiss this action. The court entered an order dismissing the action on November 3, 2021.

The court entered a corrected judgment of conviction on November 2, 2021, and ordered Petitioner to serve a maximum term of 72 months and a minimum term of 28 months in prison. The Nevada Court of Appeals affirmed Petitioner's appeal from the corrected judgment of conviction on September 22, 2022. Petitioner then petitioned the Supreme Court of Nevada for review.

On March 22, 2023, the supreme court entered an "Order Denying Petition for Review and Remanding." In that order, the supreme court instructed this court to address the dismissed amended petition. On March 28, 2023, the court entered an order vacating the order entered November 3, 2021.

1 The court held an evidentiary hearing on the amended petition on March 6, 2024. In the amended
2 petition, Petitioner claims his trial counsel ineffectively failed to: (1) advise him of his right to a direct
3 appeal from the original judgment of conviction and (2) perfect the appeal. Petitioner and his trial
4 counsel, Gary Woodbury, testified at the hearing. Petitioner's testimony about the claim was not credible
5 and the court doubts the testimony. Nevertheless, having now carefully considered Mr. Woodbury's
6 testimony, the court is granting habeas relief.

7 **1. The Record**

8 On July 26, 2018, the State of Nevada filed a criminal information charging Petitioner with
9 alternative counts of sexual assault on a child under the age of 16 years, statutory sexual seduction, and
10 lewdness with a 14 or 15 year old child. On January 27, 2020, a jury found Petitioner guilty of lewdness
11 with a 14 or 15 year old child. After receiving the jury's verdict, the court essentially invoked NRS
12 176A.110(1)(a) and ordered Petitioner to undergo a psychosexual evaluation to determine whether he
13 represented a high risk to reoffend.

14 Before sentencing Petitioner, the court reviewed a report of the psychosexual evaluation. The
15 report revealed Petitioner was certified as not representing a high risk to reoffend based upon a currently
16 accepted standard of assessment. The court held a sentencing hearing and entered a judgment of
17 conviction against Petitioner on June 19, 2020. *See Exhibit 1*, Copy of Judgment of Conviction (entered
18 June 19, 2020). The court sentenced Petitioner to serve a maximum term of 72 months and a minimum
19 term of 28 months in prison. *Id.* However, the court suspended the execution of the sentence as
20 recommended by the Division of Parole and Probation and placed Petitioner on probation for a period of
21 60 months on standard and special conditions. *Id.* One of those conditions was that Petitioner serve 180
22 days in jail starting June 19, 2020. *Id.* During the sentencing hearing, the parties argued as if Petitioner
23 was indeed eligible for probation.

24 In connection with a separate matter, the court reviewed NRS 176A.100(1)(a) and NRS
25 176A.110 and determined that the suspension of the execution of Petitioner's sentence was likely illegal
26 under Nevada law. *See Exhibit 2*, Copy of Order to Show Cause (entered August 23, 2021). Thus, the
27 court entered an order to show cause why it should not resentence Petitioner and pronounce a legal
28 sentence upon which an amended judgment of conviction could be entered. *Id.* As neither the State nor

1 Petitioner could show cause why a resentencing hearing should not be set to correct the illegal sentence,
2 NRS 176.555, the court resentenced Petitioner on November 2, 2021. *See Exhibit 3*, Copy of Corrected
3 Judgment of Conviction (entered November 2, 2021). Under the corrected judgment of conviction,
4 Petitioner was again sentenced to serve to serve a maximum term or 72 months and a minimum term of
5 28 months in prison; however, the execution of the sentence was not suspended and he was not placed
6 on probation.¹

7 Between the entry of the original judgment of conviction and the order to show cause, Petitioner
8 filed a postconviction petition for a writ of habeas corpus in this case. Petitioner filed the petition on
9 June 11, 2021. The petition was supported by the declarations of Petitioner and his father, John
10 Mentaberry. In his declaration, Petitioner declared under penalty of perjury that: (1) after the sentencing
11 hearing on June 19, 2020, he discussed appealing his conviction with Mr. Woodbury (2) he asked if Mr.
12 Woodbury if the “judgment and/or sentence” could be appealed (3) Mr. Woodbury informed him that the
13 jury’s verdict could not be appealed and (4) he “always wanted to appeal this conviction and would have
14 done so if Mr. Woodbury had informed [him] that [he] had a right to appeal.” In his declaration,
15 Petitioner’s father declared under penalty of perjury that: (1) after the sentencing hearing on June 19,
16 2020, he told Mr. Woodbury that Petitioner and he wanted to appeal the conviction and sentence and (2)
17 Mr. Woodbury informed him “there was no issue [Petitioner] could appeal” and that Petitioner “could
18 not appeal.”

19 On June 18, 2021, the court entered an order denying habeas relief and granting leave to file an
20 amended post-conviction petition for a writ of habeas corpus. *See Exhibit 4*, Copy of Order Denying
21 Habeas Relief and Order Granting Leave to File Amended Post-Conviction Petition for Writ of Habeas
22 Corpus (entered on June 18, 2021). On July 7, 2021, Petitioner filed his amended petition for a writ of
23 habeas corpus. Believing Petitioner had a right to appeal any issues arising from the record in the
24 criminal case, the parties stipulated to dismiss this action at the resentencing hearing.

25 As noted above, the court entered an order dismissing this action on November 3, 2021. As also
26 noted above, the Nevada Court of Appeals affirmed Petitioner’s appeal from the corrected judgment of

27 ¹ The court found it necessary to invoke NRS 176.565 and enter a second corrected judgment of conviction due to a clerical
28 mistake in the corrected judgment of conviction. The clerical mistake appeared on the second page of the corrected judgment of conviction,
which reflected that the court sentenced Petitioner on the information’s first count (sexual assault on a child under the age of 16 years)
rather than the information’s third count (lewdness with a 14 or 15 year old child).

conviction on September 22, 2022. *See Exhibit 5*, Order of Affirmance – Case No. 83878-COA (entered September 22, 2022). On appeal, Petitioner argued that: (1) this court committed plain error by failing to strike two jurors and admitting hearsay and (2) the jury’s guilty verdict was not supported by substantial evidence. *Id.* Quoting *Jackson v. State*, 133 Nev. 880, 882 (Ct. App. 2017), the court of appeals noted that for appeals “taken from an amended judgment of conviction, the appellant may only raise challenges that arise from the amendments made to the original judgment of conviction.” *Id.*

After the Nevada Supreme Court entered an “Order Denying Petition for Review and Remanding,” this court entered its order vacating the order entered November 3, 2021, and held an evidentiary hearing on the amended petition. Only Petitioner and Mr. Woodbury testified at the hearing.

Petitioner’s Testimony

Petitioner testified that he was “not happy” with the verdict because the jury convicted him of lewdness with a 14 or 15 year old child. Petitioner maintained he was unhappy because the verdict tarnished his family’s name and would result in his having to “register[] as a sex offender for life.” Petitioner also maintained that he was shaken up and cried “right after the verdict was handed down,” but followed Mr. Woodbury to the attorney’s office as requested. Petitioner testified that it was *then* he asked Mr. Woodbury “what [Petitioner] needed to do on [his] end to get an appeal going.” According to Petitioner, Mr. Woodbury did not answer the question and instead “deliberately changed the subject” and discussed the need for Petitioner to undergo an evaluation as a prerequisite to arguing for probation.

On cross-examination, Petitioner acknowledged that he went to jail immediately after the sentencing hearing on June 19, 2020. Petitioner reiterated that he asked Mr. Woodbury *on the day of the verdict* “what [Petitioner] needed to do on [his] end to get an appeal going.” Petitioner volunteered that he could not have made his dissatisfaction with the verdict more obvious during this ten-minute, post-verdict meeting. Petitioner maintained that the subject of an appeal was never brought up between Mr. Woodbury and him at any other point during the representation.² Petitioner explained that he saw Mr. Woodbury only one more time between the date he was convicted of and initially sentenced for lewdness with a 14 or 15 year old child. Petitioner maintained he did not discuss an appeal with Mr. Woodbury on

² Petitioner testified that he knew a direct appeal was available to him only because his sister and father discussed the matter with him after the verdict. On recross-examination Petitioner changed his testimony and testified that he learned about the right to a direct appeal only after he was released from jail.

1 either that occasion or on the date he was initially sentenced. In essence, Petitioner testified that the only
2 other times he spoke with Mr. Woodbury after he was initially sentenced were: (1) during a chance
3 meeting at the jail in late July 2020 after the 30-day window to file an appeal had lapsed and (2) in
4 November 2020 when Petitioner retrieved his case file from the attorney's office.

5 Eventually, Petitioner was cross-examined about his declaration in support of the initial petition.
6 Petitioner agreed he signed the declaration under penalty of perjury. Implicitly acknowledging that his
7 declaration was inconsistent with his testimony about the timing of his request for an appeal, Petitioner
8 chalked up the inconsistency to "a misprint." When confronted with the assertion in his declaration that
9 Mr. Woodbury informed him the jury's verdict could not be appealed, Petitioner simply testified, "I
10 don't believe he said that. He never said that I couldn't appeal." In the end, Petitioner clung to his
11 testimony that Mr. Woodbury never informed him of his right to appeal and that he only learned of the
12 right by speaking with his sister and father about it. Petitioner stood on this testimony even though he
13 acknowledged that he "had a chance to review [the declaration] for errors" before signing and filing it.³

14 *Mr. Woodbury's Testimony*

15 Mr. Woodbury acknowledged Petitioner "was not happy" with the verdict, but that he did not file
16 a notice of appeal for his client. Mr. Woodbury explained the reasons for this circumstance. Mr.
17 Woodbury testified that Petitioner and he "discussed the right to appeal on at least four occasions." Mr.
18 Woodbury maintained that the first discussion took place shortly after Petitioner's father retained him to
19 represent Petitioner.⁴ Mr. Woodbury also recalled that he told Petitioner he could appeal the court's
20 pretrial decision to block access to the alleged victim's mental health records if Petitioner suffered a
21 conviction. Mr. Woodbury then explained that after the verdict he briefly advised Petitioner he could
22 appeal the court's decision to reject jury instructions proposed by the defense. Mr. Woodbury testified
23 that the final discussion regarding an appeal occurred before the initial sentencing hearing. Mr.
24 Woodbury recalled that Petitioner maintained "he would be okay with the jury verdict if he was placed
25 on probation" and "wouldn't appeal." Mr. Woodbury specifically recounted that: (1) "by the time he had
26 completed the forms for the presentence report, [Petitioner had] taken the position that he was not going

27 ³ Petitioner testified that he believed he filed the declaration himself.

28 ⁴ Mr. Woodbury concurred that it is his "custom, habit, or practice" to go over the right to appeal when he first talks to a criminal defendant for whom he is providing representation.

1 to appeal if he got probation" and (2) Petitioner "probably wanted to appeal if he didn't get probation."
2 Mr. Woodbury maintained that Petitioner took this stance because "he had a whole bunch of things to
3 get done, and he . . . didn't want to deal with the prosecution anymore" and wanted "things to get solved
4 so all he had to do was the various things that he had to do to comply with his probation." Mr.
5 Woodbury confirmed that he never informed Petitioner he could not appeal the jury's verdict.

6 In so many words, Mr. Woodbury testified that he: (1) questioned and researched whether the
7 court had the authority to place Petitioner on probation even if he was certified as not representing a high
8 risk to reoffend and (2) explained the issue to Petitioner. Mr. Woodbury maintained he did not bring the
9 issue to the court's attention at the initial sentencing hearing because he began to doubt his concern that
10 Petitioner was not probation eligible after the court, the State, and the Division of Parole and Probation
11 all proceeded as if Petitioner could be placed on probation.

12 **2. Brief Analysis**

13 "To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's
14 performance was deficient in that it fell below an objective standard of reasonableness and resulting
15 prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the
16 proceedings would have been different." Toston v. State, 127 Nev. 971, 976 (2011) (citing Strickland v.
17 Washington, 466 U.S. 668, 687 (1984), and Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505
18 (1984) (adopting the test in Strickland)). Typically, a petitioner must satisfy both the deficient
19 performance and prejudice prongs of this inquiry in order to prevail. Id. (citing Strickland, 466 U.S. at
20 697). However, "prejudice may be presumed for purposes of establishing the ineffective assistance of
21 counsel when counsel's conduct completely denies a convicted defendant an appeal." Lozada v. State,
22 110 Nev. 349, 357 (1994).

23 In this case, Petitioner effectively claims that his right to directly appeal issues arising before the
24 entry of the original judgment of conviction was completely denied by Mr. Woodbury's objectively
25 unreasonable conduct. The court agrees, but not for the reasons argued by Petitioner. Rule 3.3(a)(2) of
26 the Nevada Rules of Professional Conduct provides that "[a] lawyer shall not knowingly . . . [f]ail to
27 disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly
28 adverse to the position of the client and not disclosed by opposing counsel." As used in those rules,

1 “[k]nowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question.” NRPC 1.0(f). “A
2 person’s knowledge may be inferred from circumstances.” Id. Mr. Woodbury all but admitted that he
3 failed to disclose to the court his actual knowledge that NRS 176A.100 prohibited the suspension of the
4 execution Petitioner’s sentence and the placement of Petitioner on probation. See Transcript of
5 Evidentiary Hearing, 70: 23-25; 71: 1-7. In the short term, this failure benefitted Petitioner. For a time
6 after the initial sentencing hearing, Petitioner realized his goal of avoiding the execution of a prison
7 sentence and moving on with his life. However, the failure was objectively unreasonable and detrimental
8 to Petitioner in the long run. Among other things, the failure resulted in the loss of Petitioner’s right to
9 timely bring a direct appeal concerning issues that arose before the original judgment of conviction was
10 entered. As Mr. Woodbury acknowledged in his testimony, this is the precise outcome Petitioner sought
11 to avoid if the court decided not to place Petitioner on probation.

12 As noted above, the court doubts Petitioner’s testimony at the post-conviction hearing. The court
13 also doubts the declaration supporting his initial petition. There is clear and convincing evidence that
14 Petitioner accepted his original sentence and decided against a direct appeal despite Mr. Woodbury’s
15 advice that the sentence’s legality was questionable. Petitioner took a chance that the court would never
16 revisit the egregious error it made by initially placing him on probation. Petitioner rolled the dice and
17 lost. Nevertheless, the court is constrained to grant habeas relief. In the court’s opinion, there is
18 preponderating evidence that Petitioner has established a valid appeal-deprivation claim. NRAP
19 4(c)(1)(B)(i). Under these unique circumstances, Petitioner is entitled to directly appeal issues arising
20 before the entry of the original judgment of conviction with the assistance of his retained appellate
21 counsel, John Malone. Id.

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1 **3. Orders**

2 **Accordingly,**

3 Habeas relief is GRANTED.

4 Within 7 days of the entry of this order, the Elko County Clerk shall prepare and file on
5 Petitioner's behalf a notice of appeal from the judgment of conviction entered June 19, 2020.

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7 DATED this 28 day of March, 2024.

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10 The Honorable Alvin R. Kacin
11 District Judge/Department 2
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CERTIFICATE OF SERVICE


Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 28 day of March, 2024, served by the following method of service:

<input checked="" type="checkbox"/> Regular US Mail	<input type="checkbox"/> Overnight UPS
<input type="checkbox"/> Certified US Mail	<input type="checkbox"/> Overnight Federal Express
<input type="checkbox"/> Registered US Mail	<input checked="" type="checkbox"/> Email
<input type="checkbox"/> Overnight US Mail	<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Personal Service	<input checked="" type="checkbox"/> Box in Clerk's Office

a true copy of the foregoing document addressed to:

Elko County District Attorney's Office
[Box in Clerk's Office]

John Malone, Esq.
1865 Monte Vista Drive
Reno, NV 89511
[Regular US Mail]
[Email to jmalonclaw@gmail.com]


(Name)

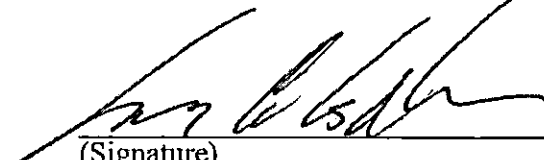

(Signature)

EXHIBIT 1

EXHIBIT 1

1 CASE NO. CR-FP-18-5030

2 DEPT. NO. 2

FILED JUN 19 PM 3:51
2020 JUN 19
ELKO CO DISTRICT COURT

CLERK _____ DEPUTY *LP* @

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5 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
6 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
7

8 * * * * *

9
10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

JUDGMENT OF CONVICTION

13 KEVIN JOHN MENTABERRY,

14 Defendant.
15 _____ /

16 On January 27, 2020, a jury found Defendant KEVIN JOHN MENTABERRY (date of
17 birth: December 22, 1977; place of birth: Boise, ID) guilty of **COUNT 3: LEWDNESS WITH A**
18 **14 OR 15 YEAR OLD CHILD A CATEGORY B FELONY AS DEFINED BY NRS 201.230**
19 **(NOC 60336)**, which crime occurred on or about December 31, 2017. The court held a
20 sentencing hearing on June 19, 2020, and sentenced Defendant as follows:

21
22 IT IS ORDERED that Defendant shall submit to a test to determine his
23 genetic markers, and shall pay the genetic testing fee of \$150.00. In
24 addition, Defendant shall pay a genetic administrative assessment of
\$3.00.

25 IT IS FURTHER ORDERED Defendant shall pay an administrative
26 assessment of \$25.00.

27 For Count 1, Defendant shall serve a maximum term of 72 months and
28 a minimum term of 28 months in prison.

1 IT IS FURTHER ORDERED that Defendant shall pay restitution in the
2 amount of \$1,470.00.

3 IT IS FURTHER ORDERED that the sentence for Count 3 is suspended
4 and Defendant is placed on a term of probation of 60 months.
5 Defendant shall comply with the standard rules of probation.

6 Defendant is required to follow the following special conditions:

- 7 1. That Defendant shall not consume any alcoholic beverages.
8 Further Defendant shall not possess alcoholic beverages or be
9 present in any cocktail lounge, bar or similar establishment for
10 which the primary purpose is serving alcoholic beverages;
- 11 2. That Defendant shall obtain a substance abuse evaluation from an
12 LADC within 30 days of release from custody, and shall enter and
13 complete a treatment program as deemed necessary and approved
14 by the Division of Parole and Probation;
- 15 3. That Defendant shall neither possess nor use marijuana and
16 marijuana products. Further Defendant shall not be present in any
17 dispensary or similar establishment for which the primary purpose
18 is selling marijuana and/or marijuana products;
- 19 4. That Defendant shall not gamble and shall not be present in a
20 gambling establishment;
- 21 5. That Defendant shall submit his digital storage media and any
22 media to which he has access or uses, including computers,
23 handheld devices and any network applications associated with
24 those devices, including social media and remote storage services,
25 to a search, and shall provide all passwords, unlock codes and
26 account information associated with those items, with or without a
27 search warrant, to the Division of Parole and Probation or its agent;
- 28 6. That Defendant shall serve 180 days in the Elko County Jail (with
credit for 23 days served) starting June 19, 2020;
7. That Defendant shall pay the restitution at a rate determined by the
Division of Parole and Probation;
8. That Defendant shall have no contact with his victim, AP;
9. That Defendant shall have no contact with Chad and Shawna
Eklund;

1
2 In addition to the conditions set forth above, Defendant shall abide by
3 the following conditions as required by NRS 176A.410:

4 1. Defendant shall submit to a search and seizure of his person,
5 residence or vehicle or any property under his control, at any time of
6 the day or night, without a warrant, by any parole and probation officer
7 or any peace officer, for the purpose of determining whether he has
8 violated any condition of probation or suspension of sentence or
9 committed any crime.

10 2. Defendant shall reside at a location only if:

11 a. The residence has been approved by the parole and probation
12 officer assigned to him.

13 b. If the residence is a facility that houses more than three persons
14 who have been released from prison, the facility is a facility for
15 transitional living for released offenders that is licensed pursuant to
16 chapter 449 of NRS.

17 c. Defendant keeps the parole and probation officer assigned to
18 him informed of Defendant's current address.

19 3. Defendant shall accept a position of employment or a position
20 as a volunteer only if it has been approved by the parole and probation
21 officer assigned to him and keep the parole and probation officer
22 informed of the location of Defendant's position of employment or
23 position as a volunteer.

24 4. Defendant shall abide by any curfew imposed by the parole and
25 probation officer assigned to him.

26 5. Defendant shall participate in and complete a program of
27 professional counseling approved by the Division.

28 6. Defendant shall submit to periodic tests, as requested by the
parole and probation officer assigned to him, to determine whether
Defendant is using a controlled substance.

7. Defendant shall submit to periodic polygraph examinations, as
requested by the parole and probation officer assigned to him.

1 8. Defendant shall not have contact or communicate with a victim
2 of his sexual offense or a witness who testified against Defendant or
3 solicit another person to engage in such contact or communication on
4 behalf of Defendant, unless approved by the Chief Parole and
5 Probation Officer or the Chief Parole and Probation Officer's designee
6 and a written agreement is entered into and signed in the manner set
7 forth in subsection 5 of NRS 176A.410.

8 9. Defendant shall not use aliases or fictitious names.

9 10. Defendant shall not obtain a post office box unless he receives
10 permission from the parole and probation officer assigned to him.

11 11. Defendant shall not have contact with a person less than 18
12 years of age in a secluded environment unless another adult who has
13 never been convicted of a sexual offense is present and permission
14 has been obtained from the parole and probation officer assigned to
15 Defendant in advance of each such contact.

16 12. Unless approved by the parole and probation officer assigned
17 to him and by a psychiatrist, psychologist or counselor treating him,
18 if any, Defendant shall not knowingly be within 500 feet of any place,
19 or if the place is a structure, within 500 feet of the actual structure, that
20 is designed primarily for use by or for children, including, without
21 limitation, a public or private school, a school bus stop, a center or
22 facility that provides day care services, a video arcade, an amusement
23 park, a playground, a park, an athletic field or a facility for youth
24 sports, or a motion picture theater. The provisions of this paragraph
25 apply only to a Defendant who is a Tier III offender.

26 13. Defendant shall comply with any protocol concerning the use
27 of prescription medication prescribed by a treating physician,
28 including, without limitation, any protocol concerning the use of
psychotropic medication.

 14. Defendant shall not possess any sexually explicit material that
is deemed inappropriate by the parole and probation officer assigned
to him.

 15. Defendant shall not give patronage to a business that offers a
sexually related form of entertainment and which is deemed
inappropriate by the parole and probation officer assigned to him.

1 16. Defendant shall not possess any electronic device capable of
2 accessing the Internet and not access the Internet through any such
3 device or any other means, unless possession of such a device or
4 such access is approved by the parole and probation officer assigned
5 to him.

6 17. Defendant shall inform the parole and probation officer
7 assigned to him if Defendant expects to be or becomes enrolled as a
8 student at an institution of higher education or changes the date of
9 commencement or termination of Defendant's enrollment at an
10 institution of higher education. As used in this paragraph, "institution
11 of higher education" has the meaning ascribed to it in NRS 179D.045.

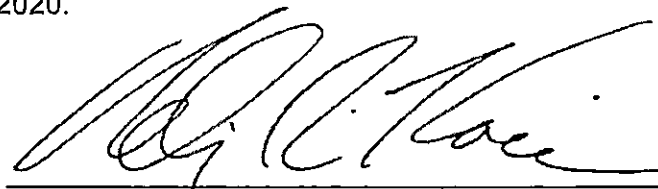
12 IT IS FURTHER ORDERED that defendant is sentenced to lifetime supervision after
13 any period of probation or any term of imprisonment and any period of release on parole.

14 Throughout these proceedings, Defendant was represented by Gary D. Woodbury,
15 Esq.

16 THEREFORE, the Clerk of the Court is directed to enter this Judgment of Conviction
17 as part of the record in this matter.

18 DATED this 19 day of June 2020.

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ALVIN R. (AL) KACIN
District Court Judge

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District
3 Court, Department 2, and that on this 19 day of June 2020, I served by hand delivery by
4 placing a copy of said document in the agency box located in the Elko County Clerk's Office,
5 a true copy of the foregoing document to:

6
7 Elko County District Attorney

8 Gary D. Woodbury, Esq.

9 State of Nevada, Division of Parole & Probation

10 Elko County Sheriff

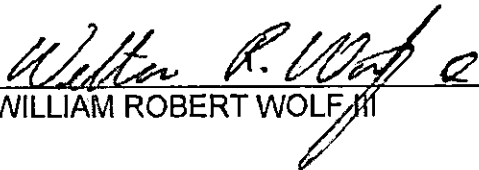
11 
12 WILLIAM ROBERT WOLF III
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EXHIBIT 2

EXHIBIT 2

1 Case No. CR-FP-18-5030

2 Dept. No. 2

FILED

2321 AUG 23 PM 2:34

ELKO DISTRICT COURT

CLERK _____ DEPUTY 

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

9 STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 KEVIN JOHN MENTABERRY,

13 Defendant.
14 _____/

ORDER TO SHOW CAUSE

15 On January 27, 2020, a jury found Defendant Kevin John Mentaberry guilty of one count
16 Lewdness with a 14 or 15 Year Old Child, a category B felony. On June 19, 2020, the court entered a
17 judgment of conviction finding Defendant guilty of the charge. The court ordered Defendant serve a
18 minimum term of 28 months in prison and a maximum term of 72 months. On the recommendation of
19 the Division of Parole and Probation, the court suspended the execution of sentence and placed
20 Defendant on probation for a period of 60 months. Neither the Elko County District Attorney nor
21 Defendant's lawyer questioned the legality of the suspension of the execution of sentence.

22 Except as otherwise provided in this section and NRS 176A.110 and 176A.120, if a person is
23 found guilty in a district court upon verdict or plea of . . . lewdness with a child pursuant to NRS
24 201.230. . . the court shall not suspend execution of the sentence imposed or grant probation to
the person.

25 NRS 176A.100(1)(a).

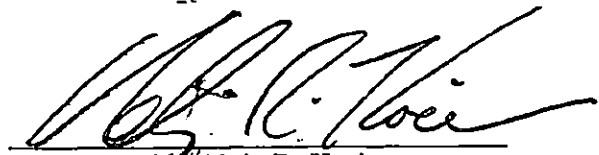
26 In connection with a separate matter, the court has reviewed NRS 176A.100(1)(a) and NRS
27 176A.110 and determined that its suspension of the execution of sentence in this case was likely illegal
28 under Nevada law.

1 The court may correct an illegal sentence at any time. NRS 176.555. Accordingly, the court
2 finds it necessary to order the parties to show cause, if any, why the court should not reset the sentencing
3 hearing and pronounce a legal sentence upon which an amended judgment of conviction may be entered.

4 **Therefore, the court enters the following orders:**

- 5 1. A hearing to show cause is set for September 10, 2021, at 2:00 p.m. in the
6 courtroom of Department 2, Fourth Judicial District Court. 30 minutes shall be set aside for the
7 hearing.
- 8 2. At the hearing, the parties shall be prepared to show cause, if any, why the court should not reset
9 the sentencing hearing and pronounce a legal sentence upon which judgment may be entered.

11 DATED this 19 day of August, 2021.

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14 The Honorable Alvin R. Kacin
15 District Judge/Department 2
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 23rd day of August, 2021, served by the following method of service:

- | | |
|---|---|
| <input type="checkbox"/> Regular US Mail | <input type="checkbox"/> Overnight UPS |
| <input type="checkbox"/> Certified US Mail | <input type="checkbox"/> Email |
| <input type="checkbox"/> Registered US Mail | <input type="checkbox"/> Fax to # _____ |
| <input type="checkbox"/> Overnight US Mail | <input type="checkbox"/> Hand Delivery |
| <input type="checkbox"/> Personal Service | <input checked="" type="checkbox"/> Box in Clerk's Office |

a true copy of the foregoing document addressed to:

John Malone, Esq.
1662 US Highway 395, Suite 202
Minden, Nevada 89423
[Regular US Mail]

Elko County District Attorney's Office
[Box in Clerk's Office]

Philip J. Tacaon
(Name)

Philip J. Tacaon
(Signature)

EXHIBIT 3

EXHIBIT 3

FILED

1 CASE NO. CR-FP-18-5030

2 DEPT. NO. 2

2021 NOV -2 PM 4:19

4th JUDICIAL DISTRICT COURT

CLERK _____ DEPUTY HL

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5 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
6 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
7

8 * * * * *

9
10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

CORRECTED
JUDGMENT OF CONVICTION

13 KEVIN JOHN MENTABERRY,

14 Defendant.
15
16

17 On January 27, 2020, a jury found Defendant KEVIN JOHN MENTABERRY (date of
18 birth: December 22, 1977; place of birth: Boise, ID) guilty of **COUNT 3: LEWDNESS WITH A**
19 **14 OR 15 YEAR OLD CHILD A CATEGORY B FELONY AS DEFINED BY NRS 201.230**
20 **(NOC 60336)**, which crime occurred on or about December 31, 2017. The court held a
21 sentencing hearing on June 19, 2020, and subsequently entered a judgement of conviction
22 setting forth an illegal sentence.

23 On November 2, 2021, the Court held a resentencing hearing and sentenced the
24 Defendant as follows.

25 **IT IS ORDERED** that Defendant shall submit to a test to determine his
26 genetic markers, and shall pay the genetic testing fee of \$150.00. In
27 addition, Defendant shall pay a genetic administrative assessment of
28 \$3.00.

1 IT IS FURTHER ORDERED Defendant shall pay an administrative
2 assessment of \$25.00.

3 For Count 1, Defendant shall serve a maximum term of 72 months and
4 a minimum term of 28 months in prison. Defendant shall have credit
5 for 116 days served as of November 2, 2021.

6 IT IS FURTHER ORDERED that Defendant shall pay restitution in the
7 amount of \$1,470.00. Defendant shall have credit for payment of
8 restitution in the amount of \$1,470.00.

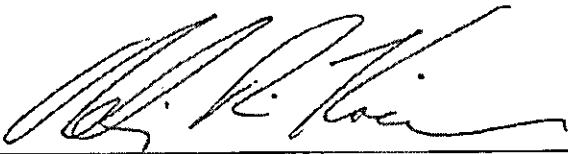
9 IT IS FURTHER ORDERED that defendant is sentenced to lifetime supervision after
10 any period of probation or any term of imprisonment and any period of release on parole.

11 IT IS FURTHER ORDERED that the AAwesome Bail Bond No. SS10003470 posted in
12 the amount of \$100,000.00, is exonerated.

13
14 Throughout these proceedings, Defendant was represented by Gary D. Woodbury,
15 Esq.

16 THEREFORE, the Clerk of the Court is directed to enter this Judgment of Conviction
17 as part of the record in this matter.

18
19 DATED this 2 day of November 2021.

20
21 
22 ALVIN R. (AL) KACIN
23 District Court Judge
24
25
26
27
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District
3 Court, Department 2, and that on this 2 day of November 2021, I served by hand delivery
4 by placing a copy of said document in the agency box located in the Elko County Clerk's Office,
5 a true copy of the foregoing document to:

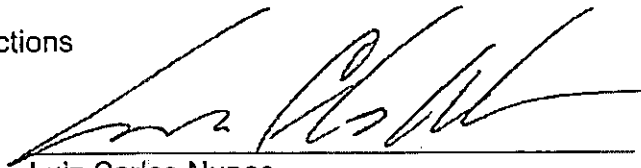
6
7 Elko County District Attorney

8 Gary D. Woodbury Esq.

9 State of Nevada, Division of Parole & Probation

10 Elko County Sheriff

11 Director, Nevada Department of Corrections

12
13 
14 Luiz Carlos Nunes

15 CERTIFICATE OF SERVICE

16 Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District
17 Court, Department 2, and that on this 2 day of November 2021, I served by regular
18 U.S. Mail, a true copy of the foregoing document to:

19 Nevada Department of Corrections
20 Offender Management Division,
21 Sentence Management
22 PO Box 7011
23 Carson City, NV 89702

24 John E. Malone, Esq.
25 1662 US Highway 395, Suite 202
26 Minden, Nevada 89423

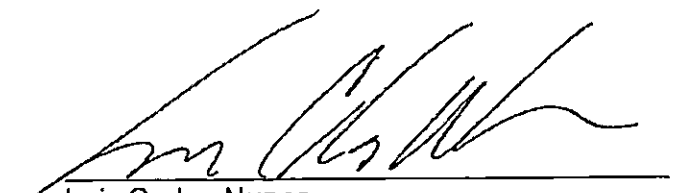
27 
28 Luiz Carlos Nunes

EXHIBIT 4

EXHIBIT 4


FILED

1 Case No. DC-CV-21-68

2 Dept. No. 2

2021 JUN 18 AM 11:16

ELKO CO DISTRICT COURT

CLERK _____ DEPUTY 

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6 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
8

9 KEVIN MENTABERRY,

10 Petitioner,

ORDER DENYING HABEAS RELIEF

11 vs.

**ORDER GRANTING LEAVE TO FILE
AMENDED POST-CONVICTION
PETITION FOR WRIT OF HABEAS
CORPUS**

12 CHARLES DANIELS,
Director, Nevada Department of Corrections,

13 Respondent.
14 _____

15 On June 11, 2021, Petitioner Kevin Mentaberry filed a petition for writ of habeas corpus.
16 Petitioner is challenging a judgment of conviction entered in Case No. CR-FP-18-5030. For the
17 following reasons, the court is denying habeas relief.

18 First, a review of the petition reveals it is unverified and otherwise fails to comply NRS 34.370
19 and NRS 34.730.

20 Second, the petition is not in the form prescribed by law. NRS 34.730; NRS 34.735.

21 Accordingly, the court is denying habeas relief. However, the court is granting Petitioner leave
22 to file an amended petition that addresses the deficiencies noted above. *See Miles v. State*, 120 Nev. 383,
23 387 (2004) (under Nevada's post-conviction statutes, an inadequate verification is an amendable, not a
24 jurisdictional, defect).

1 CERTIFICATE OF SERVICE

2 Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District
3 Judge, Fourth Judicial District Court, Department 2, and that on this 18 day of June, 2021, served by
4 the following method of service:

4 (X) Regular US Mail () Overnight UPS
5 () Certified US Mail () Overnight Federal Express
6 () Registered US Mail () Fax to # _____
7 () Overnight US Mail () Hand Delivery
8 () Personal Service (X) Box in Clerk's Office

7 a true copy of the foregoing document addressed to:

8 Elko County District Attorney's Office
9 [Box in Clerk's Office]

10 John Malone, Esq.
11 1662 US Highway 395, Suite 202
12 Minden, Nevada 89423
13 [Regular US Mail]

13 Office of Nevada Attorney General
14 100 North Carson Street
15 Carson City, Nevada 89701
16 [Regular US Mail]

17 Liz Carlos Kacin
18 (Name)

19 [Signature]
20 (Signature)
21
22
23
24
25
26
27
28