

<input type="checkbox"/> FILED	<input checked="" type="checkbox"/> RECEIVED
<input type="checkbox"/> ENTERED	<input type="checkbox"/> SERVED ON
COUNSEL/PARTIES OF RECORD	
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> <p style="text-align: center; font-weight: bold;">AUG 08 2016</p> <p style="text-align: center;">No copy</p> </div>	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	KMR DEPUTY

Robert Logan Berry Jr.
 Name
#1105137
 Prison Number
Northern Nevada Correctional Center
 Place of Confinement

**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

3:16-cv-00470

Robert Logan Berry Jr., Petitioner,)
 (Full Name))
 vs.)
Isidro Baca, Respondent,)
 (Name of Warden, Superintendent, jailor or)
 authorized person having custody of petitioner))
 and)
The Attorney General of the State of Nevada)

CASE NO. 38910
 (To be supplied by the Clerk)

**PETITION FOR A
 WRIT OF HABEAS CORPUS
 PURSUANT TO 28 U.S.C. § 2254
 BY A PERSON IN STATE CUSTODY
 (NOT SENTENCED TO DEATH)**

1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: Tenth Judicial District, Thomas Stockard, Dept I Churchill Co Fallon, NV
2. Full date judgment of conviction was entered: 9/17/2013. (month/day/year)
3. Did you appeal the conviction? Yes ___ No. Date appeal decided: 10/19/2015.
4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court? Yes ___ No. If yes, name the court and date the petition was filed: Tenth Judicial District Court Fallon NV 2/17/2014. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? Yes ___ No. Date the appeal was decided: / / . Have all of the grounds stated in this petition been presented to the state supreme court? ___ Yes ___ No. If no, which grounds have not?
5. Date you are mailing (or handing to correctional officer) this petition to this court: 8/4/2016.
 Attach to this petition a copy of all state court written decisions regarding this conviction.

<input type="checkbox"/> FILED	<input checked="" type="checkbox"/> RECEIVED
<input type="checkbox"/> ENTERED	<input type="checkbox"/> SERVED ON
COUNSEL/PARTIES OF RECORD	
<div style="border: 1px solid black; padding: 5px; margin: 5px auto; width: 80%;"> <p style="text-align: center; font-weight: bold;">AUG 08 2016</p> <p style="text-align: center;">No copy</p> </div>	
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BY: _____	KMR DEPUTY

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5. Date you are mailing (or handing to correctional officer) this petition to this court: 8/4/2016.
 Attach to this petition a copy of all state court written decisions regarding this conviction.

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? Yes
 No. If no, what was the prior case number? N/A. And in what court was
the prior action filed? N/A
Was the prior action denied on the merits or dismissed for procedural reasons (check
one). Date of decision: N/A. Are any of the issues in this petition raised in the
prior petition? Yes No. If the prior case was denied on the merits, has the Ninth
Circuit Court of Appeals given you permission to file this successive petition? Yes No.
7. Do you have any petition, application, motion or appeal (or by any other means) now pending in
any court regarding the conviction that you are challenging in this action? Yes No.
If yes, state the name of the court and the nature of the proceedings: _____

8. Case number of the judgment of conviction being challenged: 38910
9. Length and terms of sentence(s): 10 to Life
10. Start date and projected release date: 6-24-2013 - 6-23-2023
11. What was (were) the offense(s) for which you were convicted: Attempt Robbery
Habitual Criminal
12. What was your plea? Guilty Not Guilty Nolo Contendere. If you pleaded guilty
or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement:
Agreed to a 10 to 25 year sentence
13. Who was the attorney that represented you in the proceedings in state court? Identify whether
the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed	Retained	<i>Pro se</i>
arraignment and plea	<u>Paul Drakulich</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
trial/guilty plea	<u>Paul Drakulich</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
sentencing	<u>Paul Drakulich</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
direct appeal	<u>Wayne Pederson</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1st post-conviction petition	<u>Profia Person</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
appeal from post conviction	<u>Wayne Pederson</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2nd post-conviction petition	<u>Profia Person</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
appeal from 2nd post-conviction	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

• **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes ___ No. If no, explain why not: _____

• **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes ___ No. If no, explain why not: _____

If yes, name of court: Tenth Judicial District Court Fallon NV date petition filed 2 / 12 / 2014

Did you receive an evidentiary hearing? Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? Yes ___ No. If no, explain why not: _____

• **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed ___ / ___ / ___

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: N/A

• **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes No. If yes, explain: _____

State concisely every ground for which you claim that the state court conviction and/or sentence is

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes ___ No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes ___ No. If no, explain why not: _____

If yes, name of court: 10th Judicial Court Churchill Co. Fallon date petition filed 2/12/2014

Did you receive an evidentiary hearing? Yes ___ No. Did you appeal to the Nevada Supreme Court? Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? Yes ___ No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ___/___/___

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

N/A

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes No. If yes, explain: _____

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two

Yes ___ No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes ___ No. If no, explain why not: _____

If yes, name of court: 10th Judicial District, Fallon NV date petition filed 2/12/2014.

Did you receive an evidentiary hearing? Yes ___ No. Did you appeal to the Nevada Supreme Court? Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? Yes ___ No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ___/___/___

Did you receive an evidentiary hearing? ___ Yes ___ No. Did you appeal to the Nevada Supreme Court? ___ Yes ___ No. If no, explain why not: _____

N/A

If yes, did you raise this issue? ___ Yes ___ No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ___ Yes No. If yes, explain: _____

WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

NONE

(Name of person who wrote this complaint if not Plaintiff)

Robert Berry
(Signature of Plaintiff)

8-2-2016

(Date)

IN PROPRIA PERSON

(Signature of attorney, if any)

NONE

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at Norther Nevada Correction Facility Carson on 8-2-2016.
(Location) city (Date)

Robert Berry
(Signature)

#1105137
(Inmate prison number)

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th + 14th Amendment right to Due process and equal protection, based on these facts:

1 Petitioners counsel was constitutionally ineffective for
2 failure to make any reasonable investigations before any hearings or
3 meetings, proceedings...

4 Claims of ineffective assistance of counsel are reviewed
5 under the two part Strickland standard enunciated in Strickland v. Washington,
6 466 U.S. 668, 687, 90 L. Ed 674, 104 S. Ct. 2052 (1984) and adapted in this state in
7 Wardon v. Lyons, 100 Nev. 430, 683 P. 2d 504 (1984). For a defendant to prevail on a
8 claim of ineffective assistance of counsel he/she must demonstrate: (1) that his/her
9 attorney performed deficiently and (2) that counsels deficient performance
10 was prejudicial to the Defendant. 466 U.S. at 687. A court does not have to
11 consider both prongs of the Strickland test "if a defendant makes an
12 insufficient showing on either prong" 466 U.S. at 697. Claims of
13 ineffective assistance of counsel are "a mixed question of fact and law and
14 are subject to independent review. Evans v. State, 117 Nev. 609, 622, 28 P.
15 3d 498, 508 (2001).

16 (A) Paul Drakulich, ESQ. Paul Drakulich, ESQ. was
17 the only attorney this petitioner had during his criminal matter.

18
19 Please see Attached Points and Authorities
20 Thank-You

21 (Pg 1)

Exhaustion of state court remedies regarding Ground 1:

22 Ground 1 " Points and Authorities "

23 During this Petitioners sentencing, Mr. Drakulich presented a compelling
 24 argument that the Tenth Judicial District Court did not have jurisdiction
 25 to hear the petitioners case (Sentencing transcript, pp. 4, line 1-23). Nevada
 26 Revised Statute (NRS.) 41.430 (1) states that "the state of Nevada does hereby
 27 assume jurisdiction over Public offenses committed by or against Indians in the
 28 areas of Indian Country in Nevada." However, NRS. 41.430 (1) does not apply
 29 "to any area of Indian Country within this State wherein the Indian tribe
 30 occupying any such area has failed or refused to consent to the continuation
 31 of State jurisdiction over such area" NRS. 41.430(4). It has not been determined
 32 whether an inter-agency agreement was not or was agreed upon between the
 33 Fallon Paiute-Shoshone Tribe and Churchill Co. to retain jurisdiction of
 34 criminal acts committed at the Fox Peak Station. However, if an inter-agency
 35 agreement was not executed between the Fallon Paiute-Shoshone Tribe and
 36 Churchill County, then arguably, Churchill County would not
 37 retain jurisdiction over criminal acts committed at The Fox Peak Station.
 38 Subsequently, Federal Law may apply and govern the alleged criminal
 39 offense which took place in this case.

40 Federal law establishes that the United States may
 41 retain jurisdiction of this Petitioners Case. 18 United States Code (U.S.C.)
 42 Section 1152 states that the laws of the United States governing punishment
 43 for criminal offenses committed with United States exclusive and sole jurisdiction
 44 extends to Indian Country.

45 The United States Supreme Court clarified in Williams v. U.S.
 46 (Williams) that United States courts and/or laws, not State courts and/or laws,
 47 retain jurisdiction over offenses committed in Indian Country. 327 US 711,
 48 at 714 (1946). All three of these United States jurisdictional requirements
 49 have been satisfied by Facts of the Petitioners Case.

50

Ground 1 "Points and Authorities" cont.

A. Indian Territory

It was conceded by both the state and Mr Drakulich that Count 1 Attempt to commit Robbery, occurred at the Fox Peak Station which is owned and operated by Fallon Tribal Development Corporation. The Fallon Tribal Development Corporation was established and is operated by the Fallon Paiute-Shoshone Tribe. Therefore, it is undisputed that the crime alleged occurred on property owned and operated by the Fallon Paiute-Shoshone Tribe and is therefore considered "Indian territory" as set forth in the Williams case 327 U.S. 711.

B. Offense committed against an Indian

The real issue in this case, for jurisdictional purposes, is who is the alleged victim here: The Fallon Paiute-Shoshone Tribe AND/OR the cashier who happened to be working when the alleged robbery occurred. Arguably, the Cashier, mainly Danny Luft Jr. Suffered the greatest amount of mental anguish and distress due to the incident in question. However, given the fact that Mr Luft was an employee of the Fallon Paiute-Shoshone Tribe who was working for them the day the incident occurred, and that the money attempted to be taken was money from the cash register of the Fox Peak Station, the Fallon Paiute-Shoshone Tribe was also a victim in this case.

Even the information filed in this case against this Petitioner implies that the Fox Peak Station is the victim of the offense by stating that this Petitioner "attempted to Rob Fox Peak by telling the clerk to give him the money or "I will kill you" (Information, page 2 line 1-2) Given these facts, the Fallon Paiute-Shoshone Tribe was a victim in this case. As all three requirements for Federal jurisdiction have been met in this case and as it is unclear whether the State of Nevada has jurisdiction of this case pursuant to NRS 41.430

" Points and authorities " cont.

Ground 1

1 An adequate legal argument could be made that the Tenth judicial
 2 District court was not the proper jurisdiction to hear This Petitioner's
 3 Case. Based on the Facts and Laws included herein, there is more
 4 than adequate basis for an appeal on the jurisdictional issues
 5 presented in this case. As Counsel for this Petitioner, Mr Drakulich
 6 should have addressed these jurisdictional issues Prior to This
 7 Petitioner's Sentencing hearing. Mr Drakulich stated that during
 8 the petitioner's sentencing that "I did want to address something
 9 related to the jurisdiction of the court, It came to me this morning"
 10 (Sentencing transcript, pp. 3, lines 7-9).

11 Additionally, Petitioner alleges that Mr. Drakulich never advised
 12 nor suggested to this Petitioner that he should appeal the jurisdictional
 13 issues presented during sentencing. It appears from the facts of this
 14 Petitioner's case that he had an adequate legal argument which supports
 15 Petitioner's assertion that the Tenth Judicial District Court did not
 16 have jurisdiction of his case. Due to Mr Drakulich's failure to
 17 advise his client to appeal and/or advise the Court prior to sentencing
 18 of the jurisdictional issues in this case, Mr. Drakulich performed
 19 deficiently under the "Strickland" Standards set forth above.
 20 This Petitioner's counsel failed to investigate critical aspects of his entire
 21 case, Counsel failed to investigate this Petitioner's Mental Stability
 22 concerning numerous medications this petitioner was taking at the
 23 time of the alleged crime Mr. Berry Also Alleges that he was
 24 never informed that he would not be eligible for probation, that
 25 the Courts canvass contained conflicting information as to how
 26 much time Mr Berry would spend in prison, and his attorney
 27 Paul Drakulich, did not object when he was sentenced to Life
 28 with the possibility of parole after 10 years.

" Points and Authorities" cont

Ground 1

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This Petitioner further Alleges that his counsel Paul Drakulich did not file a discovery motion seeking Brady Information, and that such a motion would have produced a well-spring of potentially exculpatory evidence and his counsel conducted no investigation for potential witnesses even when this Petitioner told his counsel that he had no weapon and did not attempt to rob anyone. Finally, this Petitioner asserts that his counsel coerced him to plead guilty by telling him that if he did not so plead, he would spend the rest of his life in prison. After signing a plea agreement, this Petitioner was given a life sentence, this cannot go unresolved. Missouri v. FRYE 132 S. Ct 1399, 182 Led 2d 379 (2012) and Laffer v. Cooper 132 S. Ct 1376, 182 Led 2d 398 (2012).

Respectfully Submitted,

Robert Logan Berry Jr
#1105137
DATE 8-4-16

unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th + 14th Amendment right to Due Process and effective assistance of counsel based on these facts:

Attorney failed to object to Anything during this Petitioners Proceedings

Failure to object to anything, Evidence, Sentence structure, testimonies or anything else during any proceedings or trial is a violation of this petitioners or Any Defendants Due Process Amendment. Failure to make any objections against the state during the proceedings is a violation of his due process. And a complete failure to develop or present any defense at all. The Cumulative objection errors of this Petitioners counsel demand a hearing or a trial which gaurantee defendants 6th and 14th amendments rights. Cumulative Error is recognized by the Nevada Supreme Court as reversible Error when they noted in Earl V. State 11 NEV. 1304 P 2d 1029 (1995) Thus a court has a grave duty imposed to strike a balance. (Brown V. State, 81 NEV 397, 400, 404, P 2d 428 (1965)) and should allow the evidence with caution, (McMichael V. State. 94 NEV 184, 190, 577 P 2d 398 (1978)) that required caution was Absent in Petitioners Entire Proceedings. This and a failure to object to anything is a manifest Error. This cannot go unresolved by Any means. This is a violation of this Petitioners due process rights, And this Petitioners 6th Amendment right to effective counsel.

Please SEE Attached Points and authorities

Exhaustion of state court remedies regarding Ground 2:

- Direct Appeal:

Ground Two Points and Authorities

This Petitioners Counsel was deficient in so much as not to inform him of the sentence structure or object to the sentence that this Petitioner received. Lockett v. Ohio 98 S.Ct 2954; Says that Petitioner should be defended at Sentencing Hill v. Lockhart 106 S.Ct. 366 states that Petitioners Counsel should be effective in all areas of the Petitioners Proceedings. Jackson v. Warden Nevada State Prison, 91 NEV. 430, 432, 537 P2d 473, 474 (1975) ("Effective counsel does not mean errorless counsel, but rather Counsel whose assistance is (w) within the range of Competence demanded of attorneys in criminal cases." Quoting McMann v. Richardson, 397 US 759, 771, 90 S.Ct 1441, 1449 (1970).

Counsel's performance fell below an objective standard of reasonableness, In all areas pertaining to This Petitioners case. An Attorney has an obligation and duty to defend thier client in all areas, this is a standard of law and a 6th and 14th Amendment right in the United States. that is gauranteed and demanded in all criminal prosecutions pertaining to the Law.,

FILED

1 Case No.: 13-CR-00319A

2 2013 JUN 25 PM 1:37

3 JUSTICE COURT
4 FALLON, NEVADA

5
6 IN THE JUSTICE'S COURT OF NEW RIVER TOWNSHIP
7 COUNTY OF CHURCHILL, STATE OF NEVADA

8
9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

CRIMINAL COMPLAINT

12 ROBERT LOGAN BERRY,

13 Defendant.

14 I, OFFICER RICHARD BABCOCK, with the Fallon Paiute Shoshone Tribal Police,
15 declaring under penalty of perjury under the laws of the State of Nevada, complains and
16 charges **ROBERT LOGAN BERRY** with having committed the following:

17 **COUNT 1**

18 **ASSAULT (SIMPLE), a Misdemeanor, in violation of NRS 200.471(2)(A)**

19 That within declarant's information and belief, **ROBERT LOGAN BERRY**, on or
20 about the 24th day of June, 2013, and prior to the filing of this criminal complaint, at or near
21 615 East Williams Avenue, Fallon, Churchill County, Nevada, did willfully and intentionally
22 place another person in reasonable apprehension of immediate bodily harm, to-wit: said
23 Defendant did threaten to kill Danny Luft, leaving him is reasonable apprehension of
24 immediate bodily harm.

25 ///

26 ///

27 ///

28 ///

TRIBE / 20131298
DA #13-965/LRM/ERH

Churchill County District Attorney
165 North Ada Street
Fallon Nevada 89406
(775) 423-6561 Fax (775) 423-6528

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COUNT 2
FAILURE TO REGISTER AS AN EX-FELON WITH LOCAL LAW ENFORCEMENT
OFFICER WITHIN 48 HOURS, a Misdemeanor, in violation of NRS 179C.100 and
179C.220

That within declarant's information and belief, **ROBERT LOGAN BERRY**, on or about the 24th day of June, 2013, and prior to the filing of this criminal complaint, at or near 615 East Williams Avenue, Fallon, Churchill County, Nevada, did willfully and unlawfully fail to notify law enforcement of his changed address, within 48 hours, having been previously convicted of a Felony in the State of Nevada requiring him to register as a an ex-felon.

All of which is contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the State of Nevada.

I declare under pains and penalties of perjury under the laws of the State of Nevada, that the foregoing is true and correct.

DATED: this 25 day of June, 2013.



Officer Richard Babcock
Fallon Paiute Shoshone Tribal Police

Churchill County District Attorney
165 North Ada Street
Fallon Nevada 89406
(775) 423-6561 Fax (775) 423-6528

extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th and 14th Amendment right to Due process and effective assistance of counsel based on these facts:

Failure to have any defense at all.

This case is fraught with substantive errors. Counsel's negligence and ineffective actions for failing to prepare a defense set the entire groundwork for this Petitioner's failure during his proceedings. The Plurality opinion in Ewitts and Douglas, Infra makes it clear that: there is lacking the equality demanded by the 14th amendment where the rich man enjoys the benefit of counsel's examination into the record research of law and arguments on his behalf while the indigent burdened by the preliminary determination that this case is without merit and forced to shift for himself.

This Petitioner's counsel fell below an objective standard of reasonableness which violated his due process Amendment right. This cannot go unresolved by any means. This Petitioner's counsel did nothing to defend him. Counsel's decision not to investigate or object to anything, cannot be termed a tactical decision. Only on day of sentencing did counsel for the petitioner bring up an argument on a crucial jurisdictional issue which the district court denied. A Party whose counsel is unable to provide effective assistance is no better than one who has no counsel at all.

Cumulative Errors of Counsel demands a new hearing or Trial.

McNilton V State, 115 Nev 990 P2d (1999) States (Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different).

Exhaustion of state court remedies regarding Ground 3:

Direct Appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Memorandum of Points And Authorities.

GROUND 3,

Page 1

1 This Petitioners counsel failed to investigate critical aspects of his entire case,
 2 Counsel failed to investigate this Petitioners mental stability concerning numerous
 3 medications this petitioner was taking at the time of the alleged crime. Absolutely
 4 no investigations pertaining to this critical and important issues and matters.
 5 Petitioner can further establish prejudice as a result of counsels failure to
 6 investigate all of this because such evidence could have established reasonable
 7 doubt with the minds of the court. This rebuttal evidence was denied to this Petitioner.
 8 In Jackson V. Warden 537 P2d 437 (Nev. 1970) The Nevada Supreme Courts view
 9 on failure to investigate is summed up and refers to the American Bar Association
 10 Standards for Criminal Justice, which is relevant in this case.. It is the duty of
 11 the lawyer to conduct a prompt and full investigation of the circumstances of the
 12 case and to explore all avenues leading to facts relevant to the merits of the case
 13 and the penalty in the event of a conviction. This Petitioner Alleges that he was
 14 never informed that he would not be eligible for probation, that the Courts
 15 canvass contained conflicting information as to how much time he would
 16 spend in prison, and that his Attorney did not object when he was sentenced
 17 to life with the possibility of parole after 10 yrs. In the case at hand, The
 18 appropriate process for this Petitioner is to raise the claim of ineffective
 19 assistance of counsel at the district court level in a Petition for Post-Conviction
 20 relief. The 6th Amendment guarantees the effective assistance of counsel in
 21 criminal prosecutions: McMANN V. Richardson 397 U.S. 759 N. 14 (1970) and Missouri
 22 V. Frye (2012, 2013), Lafler V. Cooper (2012). The Court in Strickland Stated
 23 that the purpose of the 6th and 14th Amendment is to ensure that criminal
 24 defendants receive a fair proceedings and trial. Strickland States that
 25 a reviewing Court must judge the reasonableness of counsels challenged
 26 conduct on the facts of the particular case viewed at the time of counsels
 27 conduct. Evitts V. Lucy 105 S.ct. 830 (1985) And Douglas V. California 483 S.ct 814
 28 (1963).

GROUND 3.

Points and Authorities Cont.

1 The Tenth Judicial Court determined an evidentiary hearing was in
2 order for the limited purpose of determining whether Mr. Berry received
3 ineffective assistance of counsel regarding his right to appeal after
4 entering a no contest plea, which substantively is treated the same as
5 a guilty plea.

6 At the hearing, Mr. Berry testified that on the morning of his
7 sentencing his Counsel, Paul Drakulich, raised for the first time the
8 issue of subject matter jurisdiction. Specifically he testified that
9 Mr. Drakulich raised the concern that because the crime was
10 committed in Indian Country, that the Court may not have jurisdiction
11 over the crime Mr. Berry was accused of and to which he pleaded no
12 contest. Mr. Berry asserted that had that issue been raised earlier
13 he likely would have defended his case differently. Mr. Berry also
14 testified that he was assured that the most likely outcome would
15 be that he would receive ten (10) to twenty-five (25) years under the
16 habitual criminal statute, the lightest possible penalty. Mr. Berry
17 testified that when he was in fact sentenced to life with the
18 possibility of parole after ten (10) years, that he asked Mr.
19 Drakulich whether he could appeal and was told yes. He further
20 testified that he called Mr. Drakulich some weeks later to inquire
21 into an appeal again, and was told by Mr. Drakulich the only way he
22 could win on appeal was if counsel was found ineffective, and that
23 this was unlikely to happen.

24 Mr. Drakulich also testified mostly regarding his routine practices and
25 procedures as to how he advises his clients as the public defender. In
26 relevant part, Mr. Drakulich testified that he did not recall whether
27 Mr. Berry inquired into the possibility of appeal, but that he did not
28 believe so.

Ground 3 Points and Authorities Cont.

1 A successful petition for writ of habeas corpus will state
 2 specific facts that demonstrate good cause for the petitioners
 3 failure to present the claims earlier and actual prejudice to the
 4 petitioner NRS 34.810(3). A plea of guilty is presumed valid
 5 and the petitioner must show the plea was not knowingly
 6 and intelligently entered. McConnell v. State, 125 Nev. 243 (2009). A
 7 district court will not invalidate a plea where the totality of the
 8 circumstances shows that the plea was made freely, knowingly,
 9 and voluntarily, and that the petitioner understood the nature
 10 of the offense, and the ramifications of the plea. Id.
 11 (citing) State v. Freese, 116 Nev. 1097, 1104 (2000)

12 A district court must review a claim of ineffective assistance of
 13 counsel under a two-part test, which requires the
 14 petitioner to show that 1) counsel's performance was
 15 deficient, and 2) counsel's deficient performance
 16 prejudiced the defense. Strickland v. Washington, 466
 17 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Warden v. Lyons, 100
 18 Nev. 430, 432 (1984). The district court is not required to address
 19 both prongs if the petitioner makes an insufficient showing on either
 20 prong. Strickland, 466 U.S. at 697. The court is not obligated to
 21 analyze the Strickland prongs in a particular order. Id. (I) If it
 22 is easier to dispose of an ineffectiveness claim on the ground of
 23 lack of sufficient prejudice, which... will often be so, that course
 24 should be followed. Id. If the court finds that either prong
 25 has not been established, the ineffective-assistance claim fails. Id.
 26 To meet the deficiency prong of the Strickland test, a petitioner
 27 must demonstrate that counsel's representation fell below an objective
 28 standard of reasonableness.

GROUND 3,

Points and Authorities cont.

1 reasonableness. 466 U.S. at 687-88; Means v. State, 120 Nev. 1001, 1011 (2004)

2 When a conviction is the result of a guilty plea, there is no constitutional

3 requirement that counsel inform a defendant of the right to appeal

4 unless the defendant inquires about an appeal or if the defendant

5 may benefit from the advice because of the existence of a direct-

6 appeal claim that has a reasonable likelihood of success. Thomas

7 v. State, 115 Nev. 148, 150 (1999); see also Rice v. Flores-Ortega, 528

8 U.S. 470, 1029 S.Ct. 2000 (2000). Affirmatively misadvising a client about

9 the availability of an appeal is deficient performance. Toston v.

10 State, 267 P. 3d 795, 800 (2011).

11 Trial counsel has a constitutional duty to file a direct appeal

12 when requested to do so or when a defendant expresses dissatisfaction

13 with the conviction. *Id.* If trial counsel fails to do so, his or her

14 performance is deficient for purposes of the Strickland test.

15 Davis v. State, 115 Nev. 17, 20 (1999) In determining whether counsel

16 has a duty where the defendant has expressed dissatisfaction with

17 the conviction, the court must consider whether counsel knew or

18 should have known that the defendant wanted to appeal the

19 conviction based upon the totality of the circumstances.

20 Toston, 267 P. 3d at 801. When the conviction is based upon a guilty

21 plea, the court may consider whether: the defendant received

22 the bargained-for sentence; any issues were reserved for

23 appeal, the defendant indicated a desire to appeal within the time

24 period; and whether the defendant sought relief from the plea

25 before sentencing. *Id.*

26 The Tenth Judicial Court's view that the State of the law

27 regarding crimes committed by non-Indians in Indian Country such

28 as attempted burglary, vests this Court with subject matter ~~and~~

GROUND 3. Points and Authorities cont.

1 jurisdiction over this case. However, under the circumstances
 2 where the issue of jurisdiction was never mentioned until sentencing,
 3 and therefore never brought and disposed of, it may raise a question
 4 as to whether Mr. Berry's plea of no contest was in fact intelligently
 5 entered as there was a potential issue he was unaware of until
 6 after he pleaded guilty and was about to be sentenced. Given
 7 the foregoing, Defense Counsel ought to have been correspondingly
 8 sensitive with regard to a potential appeal for Mr. Berry. Mr.
 9 Berry asserted that he inquired into the possibility of an appeal,
 10 and Mr. Drakulich asserts that he does not believe this occurred,
 11 and that he did not believe that Mr. Berry had a likelihood of
 12 success on any potential appeal. Under the particularly unique
 13 circumstances presented by this case where the jurisdictional issue
 14 was raised for the first time at sentencing Mr. Berry's dissatisfaction
 15 with his sentence was likely more than that of the average
 16 defendant who has just been sent to prison. Mr. Berry also
 17 received a sentence that exceeded the definite term of
 18 twenty-five (25) with possibility of parole after ten (10) years
 19 that the State agreed to and did recommend.

20 Under the unique circumstances of this case, Mr. Berry was
 21 sentenced only moments after a jurisdictional issue was raised
 22 for the first time and that may or may not have affected the
 23 trajectory of this case. Moments later Mr. Berry received a
 24 life sentence, which exceeds the ten (10) to twenty-five (25) years
 25 the State agreed to, and did argue for. Defense Counsel had a
 26 Constitutional duty to advise Mr. Berry of his right to appeal,
 27 and failure to do so falls below an objectively reasonable standard,
 28 and Mr. Berry established a valid appeal-deprivation claim.

Ground 3 Points and Authorities cont.

1 Any single error may not have been prejudiced. However
 2 together they reflect the Cumulative Nature of Errors that
 3 occurred during this Petitioner's Entire Proceedings. Cumulative
 4 Error is plain Error and is a reversible Error.

5 Short v. United States, 471 F.3d 686, 692 (6th Cir. 2006). ("A defendant
 6 challenging his attorney's conduct during plea bargaining must
 7 show that counsel did not attempt to learn the facts
 8 of the case and failed to make a good-faith-estimate
 9 of a likely sentence. He must also show that his lawyer's deficiency
 10 was a decisive factor in his decision to plead guilty.

11 Woodard v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990).

12 "when a lawyer advises his client to plea bargain to an
 13 offense which the attorney has not investigated, such conduct
 14 is always unreasonable.

15 Hammond v. United States, 528 F.2d 15, 18-19 (4th Cir. 1975)

16 Erroneous advice that if defendant did not plead
 17 guilty, this petitioner would receive life without the
 18 possibility of parole.

19 Jackson v. Warden Nevada State Prison, 91 Nev. 430, 432, 537 P2d
 20 473, 474 (1975) ("Effective counsel does not mean errorless counsel,
 21 but rather counsel whose assistance is (w) within the range of competence
 22 demanded of attorneys in criminal cases" Quoting McMann v.
 23 Richardson, 397 US 759, 771, 90 S.Ct 1441, 1449 (1970).

24 Homick v. State, 112 Nev. 304, 310, 913 P2d 1280, 1285 (1996) (The court
 25 begins with a presumption of ineffectiveness and then must
 26 determine whether or not that defendant has demonstrated by
 27 "strong and convincing proof that counsel was ineffective. (Citing Lenz
 28 State 97 Nev. 65, 66, 624 P2d 15, 16 (1981); Davis v. State 107 Nev. 600, 602, 817 P2d 1169 (1991))

Ground 3 Points and Authorities cont.

1 Donovan v State, 94 Nev. 671, 675, 584 P2d 708, 711 (1978)
 2 (The role of a court considering an allegation of ineffective
 3 assistance of counsel is, "not to pass upon the merits of the action
 4 not taken but to determine whether, under the particular facts
 5 and circumstances of the case, Counsel failed to render
 6 reasonably effective assistance). Citing Cooper v Fitzharris,
 7 551 F2d 1162, 1166 (9th Cir. 1977) McNilton v State 115 Nev 396,
 8 403, 990 P2d 1263, 1268 (1999) (Even if a defendant can demonstrate
 9 prejudice and show a reasonable probability that, but for counsel's
 10 errors the result of the proceedings would have been different.)
 11 Citing Strickland Id 466 US at 687. "A reasonable probability
 12 is a probability sufficient to undermine confidence in the outcome."
 13 Strickland Id. 466 US at 687-89, 694
 14 Donovan Id. 94 Nev. at 675, 584 P2d at 711 (This analysis
 15 does not mean that the court "should second guess reasoned
 16 choices between (defense) tactics nor does it mean that
 17 defense counsel, to protect himself against allegations of
 18 inadequacy, must make every conceivable motion no matter
 19 how remote the possibilities are of success).
 20 Molina v State 120 Nev. 185, 87 P3d 533 (2004) (A defendant making
 21 an allegation that defense counsel was ineffective in failing to
 22 conduct an adequate investigation must establish that a better
 23 investigation would have benefited the case.)
 24 Marshall v State, 100 Nev. 1328, 1331, 885 P2d 603, 605 (1994) A defendant is entitled to an
 25 evidentiary hearing if his petition is supported by specific factual allegations, which
 26 if true, would entitle him to relief, unless the factual allegations are repelled by the
 27 record.) Hargrave v State, 100 Nev 498, 503, 686 P2d 222, 225 (1984) The judge or justice, upon review
 28 of the return, and all supporting documents which are filed, shall determine whether

Ground 3 Points and Authorities cont.

1 an evidentiary hearing is required." NRS 34.770(1).

2 Cumulative Errors of counsel demands a new hearing in this case.

3 Petitioner Submits that defense Counsel made absolutely no attempt
4 to put forth the effort guaranteed by the Sixth Amendment and
5 demanded by the Fourteenth Amendment. Specific instances are
6 well documented in hearing transcripts. yet this Petitioner was
7 denied transcripts that were ignored by This Petitioner's Counsel.
8 An evidentiary hearing would put forth for the record the
9 wholly and incontrovertible lack of representation.

10 This Case is fraught with Substantive Errors, Counsels
11 negligence and ineffective actions for failing to prepare a
12 defense set the groundwork for this Petitioner's failure during
13 all proceedings. The Plurality opinion in *Evitts and Douglas*, *infra*,
14 make it clear that:

15 "There is lacking the equality demanded by the Fourteenth
16 Amendment where the rich man enjoys the benefit of Counsels
17 examination into the record, research of law and marshalling of
18 arguments on his behalf, while the indigent burdened by the
19 preliminary determination that this case is without merit is
20 forced to Shift for himself."

21 See: Tactical decision, *Strickland* 104 S.Ct at 2066

22 Petitioner would note to this reviewing Court that Such was
23 the case here: an indigent defendant assigned to an attorney by
24 the court, promised by the Constitution an effective representation and
25 provided with failure to perform any pretrial hearings, investigations
26 and no suppression motions.

27 Failure to provide any testimony to the Court that was
28 critical to the defense

Ground 3 Points and Authorities cont.

1 Failure to make even one objection against the state at
 2 this Petitioner's proceedings and a complete failure
 3 to develop or present any defense at all. The Cumulative
 4 Errors of this Petitioner's counsel demand that this Court
 5 grant this Petitioner a new hearing or trial. Honick v.
 6 State 112 Nev. 304, 93 P2d 1280 (1996) Cumulative Error is recognized
 7 by the Nevada Supreme Court as reversible error when they
 8 noted in Earl v. State, 111 Nev. 1304, 904 P2d 1029 (1995) that:

9 Any single Error may not have been prejudiced, however
 10 together they reflect the Cumulative nature of Error
 11 that occurred during this Petitioner's proceedings".

12 Cumulative error is Plain Error and is reversible error.

13 This Petitioner's Counsel was deficient in so much as not to
 14 inform him of the sentence structure or object to the sentence
 15 that this Petitioner received. Lockett v. Ohio 98 S. Ct. 2954;
 16 Says that Petitioner shall be defended at sentencing Hill v. Lockhart

17 106 Sct. 366 states that Petitioner's counsel should be effective
 18 in all areas of this Petitioner's proceedings. These issues and
 19 errors from Petitioner's counsel cannot go unresolved.

20 This is a violation of this Petitioner's 6th + 14th Amendment
 21 Rights. Petitioner Prays that this Court reviews this petition
 22 accordingly and grants relief.
 23
 24
 25
 26
 27
 28

Conclusion

Wherefore this Petitioner Prays that this reviewing U.S. District Court issue and grant this Petition for writ of Habeas Corpus and relief on the following grounds to wit.

(1) Ineffective assistance of counsel
For counsels,

1. Failure to investigate
2. Failure to object
3. Failure to have any defense at all.

Petitioner seeks relief to which he is entitled
Thank-you for your time and Consideration.

Respectfully Submitted,

Robert Logan Berry Jr.
Robert Logan Berry Jr.
#1105137

In Proper Person

DATE - 8-4-16