

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARY JERARD PICKETT A/K/A GARY
PICKETT,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, THE HONORABLE MICHAEL
CHERRY, DISTRICT JUDGE, THE
HONORABLE SHIRLEY B.
PARRAGUIRRE, CLARK COUNTY
CLERK,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

No. 42934

FILED

MAY 20 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION

This is a proper person petition for a writ of mandamus seeking an order from this court directing the clerk of the district court to file petitioner's motion for rehearing from an order denying a motion to correct an illegal sentence.

Petitioner claims that he submitted a motion for rehearing on January 5, 2004. The clerk of the district court did not file the motion for rehearing; instead the clerk forwarded the motion for rehearing to Judge Michael Cherry, who caused the motion for rehearing to be forwarded to petitioner's former trial counsel, the public defender's office. Petitioner claims that he is no longer represented by the public defender's office and that the district court had an obligation to file his motion for rehearing and not send it to his former counsel. The documents before this court indicate that on December 30, 2003, the district court granted petitioner's

application to proceed in forma pauperis and that the underlying motion to correct an illegal sentence was filed in proper person. Petitioner seeks a writ of mandamus directing the district court clerk to file the motion for rehearing so that the court may proceed to resolve the issues raised in the motion for rehearing.

We have consistently held that the district court clerk has a ministerial duty to accept and file documents presented for filing if those documents are in proper form.¹ Although the district court rules do not appear to contemplate a motion for rehearing, these rules do not appear to alter the district court clerk's ministerial duty to accept and file documents.²

It is unclear from the documents before this court if petitioner's motion for rehearing was in the proper form. It is unclear if the clerk of the district court stamped the motion for rehearing "received" and maintained a copy of the motion for rehearing for the record. It is also unclear what authority would permit the motion for rehearing to be sent

¹See, e.g., Sullivan v. District Court, 111 Nev. 1367, 904 P.2d 1039 (1995) (holding that the district court had a duty to file an application to proceed in forma pauperis and "receive" a civil complaint); Whitman v. Whitman, 108 Nev. 949, 840 P.2d 1232 (1992) (holding that the clerk has no authority to return documents submitted for filing; instead, clerk must stamp documents that cannot be immediately filed "received," and must maintain such documents in the record of the case); Bowman v. District Court, 102 Nev. 474, 728 P.2d 433 (1986) (holding that the clerk has a ministerial duty to accept and file documents unless given specific directions from the district court to the contrary).

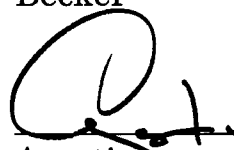
²See District Court Rule 13(7) (providing that "[n]o motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion thereof, after notice of such motion to the adverse parties"); EDCR 7.12 (prohibiting multiple applications).

to the public defender's officer when it appears that the public defender's office was no longer representing petitioner. Thus, it appears that petitioner may have set forth an issue of arguable merit and that he may not have an adequate remedy at law.³

On April 9, 2004, this court directed the State to show cause why a writ should not issue directing the district court clerk to file petitioner's motion for rehearing. The State has responded to this court's order and indicates that it does not oppose granting the petition. Therefore, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the clerk of the district court to file petitioner's motion for rehearing.⁴


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

³See NRS 34.160; NRS 34.170.

⁴We have attached a copy of the motion for rehearing that petitioner submitted as an exhibit to his mandamus petition. We have received petitioner's proper person documents submitted in this court, and we conclude that petitioner is entitled only to the relief described herein.

cc: Hon. Michael A. Cherry, District Judge
Cary Jerard Pickett
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

EX 75

1 Cary Pickett- 57591#
2 P.O. Box 208
3 Indian Springs, Nevada - 89070
4 Defendant, In Pro-Se

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7 District Court
8 County Of Clark, Nevada

9
10 Cary Pickett, Case No: 145127
11 Defendant Dept No: XVII
12 v.
13 The State Of Nevada
14 Plaintiff

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17 Motion For Rehearing

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20 Comes Now, Cary Pickett(hereafter- Defendant) in pro-se
21 hereby moves this honorable court for rehearing of his motion to
22 correct his illegal sentence, in which this court denied on
23 December 30, 2003. This motion for rehearing is pursuant to
24 N.R.A.P..40;

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This honorable court based it's denial on false, inaccurate, and misleading information by the plaintiff in this instant case, thus causing the court to inadvertently overlook and misinterpret viable material facts in granting the relief sought by the defendant in this instant case.

1
2 **Statement Of The Case**
3

4 On August 28, 1997, Defendant Pickett pled guilty to the crime
5 of grand larceny pursuant to NRS 205.220, in district court, case
6 number c143146.

7 On September 18, 1997, Defendant pled guilty to Burglary,
8 pursuant to NRS 205.060, in district court, case number C145127.

9 On September 25, 1997, Defendant was sentenced to a minimum of
10 thirty-six (36) months and a maximum of one hundred and twenty
11 (120) months in both cases. The sentence in c145127 was ordered
12 to be served consecutively to the sentence of C143146. Defendant
13 sentences in both cases were suspended and defendant was placed on
14 probation for an indeterminate period, not to exceed 5 years.
15 Defendant received thirty-five (35) days credit for time served.

16 The Judgment Of Conviction was filed on October 17, 1997.
17 On November 3, 1997, a bench warrant was issued for defendant
18 because he violated a condition of parole. On March 23, 1998, an
19 the state filed a motion to revoke the defendant's probation.
20 On May 1, 1998, an order was filed which revoked defendant's
21 probation and imposed his suspended sentence. Defendant received
22 sixty-four(64) days for time served.

23 On February 24, 1999, defendant filed a Petition for Writ of
24 Habeas Corpus. On March 15, 1999, the state filed it's opposition
25 and on April 28, 1999, a finding of fact, Conclusion of Law and
26 Order was filed which denied Defendant's petition.

27 Defendant appealed , and on June 18, 2001, the Nevada Supreme
28 Court affirmed the district court's decision. The Nevada Supreme

1 court consolidated this appeal with the defendant's appeal in
2 C143146. A remitter was issued on July 16, 2001.

3 On July 11, 2001, Defendant filed a Motion for Modification of
4 Sentence. On August 13, 2001, an order denying motion was filed.

5 On December 18, 2003, Defendant filed the instant Motion to
6 Correct an Illegal Sentence. This court denied said motion on
7 December 30, 2003. This motion follows.

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11 **Statement Of The Facts**

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13 In bringing this Motion For Rehearing, upon the "denial" of
14 defendant's Motion to Correct his Illegal Sentence on December 30,
15 2003. Defendant contends that the state in it's pleading did
16 so mislead this court, by the misleading tactics of misdirect -
17 ing the court from the issue of defendant's motion to correct
18 his illegal sentence.

19 In doing so this court overlooked material facts that would
20 have given this court a deeper clarity when faced with such
21 a task; as had been put forth by the state.

22 Defendant prays to this court that his motion for rehearing
23 is granted.

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25
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27 **LEGAL ARGUMENTS**

28 In this instant motion for rehearing, the defendant

1 respectfully contends that this court was deceptively misled
2 by the opposing party, whereas this court inadvertently overlo-
3 oked misapprehensive of the material facts that would have
4 led to the granting the relief sought by the defendant in
5 his motion to correct his illegal sentence in case no:145127.

6 As such, defendant presents this court with viable exhibits
7 showing the district court judge exceeded it's jurisdiction
8 in case no:145127, when the court ordered probation and grant-
9 ed a suspended sentence in case no:145127. Thus, by the state
10 of Nevada's laws, and NRS. STATUES, the proceduer used during
11 defendant's sentencing on September 25,1997, an illegal
12 sentence, giving this court jurisdiction in granting defendant
13 MOTION TO CORRECT AN ILLEGAL SENTENCE; the proper judicial
14 vehicle for reveiw.

15
16 POINTS AND AUTHORITIES

17
18 Defendant was convicted in the Eighth Judicial District
19 Court on, or about the 10th of December 1992 of the offense
20 of burglary.

21 Defendant's motion to correct his illegal sentence in case no:
22 145127 specifically alledged the district court exceeded it's
23 juridisdiction in imposing probation in case no:145127, and
24 exceeded it's jurisdiction revoking said probation:

25 N.R.S. 205.060 states in pertinent part:

26 2. " A PERSON WHO HAS BEEN CONVICTED OF BURGLARY
27 AND, WHO HAS PREVIOUSLY BEEN CONVICTED OF BURGLARY
28 OR ANOTHER CRIME INVOLVING FORCIBLE ENTRY,OR,

1 invasion of a dwelling 'must not' be released on probation or
2 granted a suspension of his sentence....

3 Therefore, the conviction obtained in case no: 145127,
4 and the subsequent sentence of probation imposed an illegal
5 suspended 36 months to 120 months.

6 ' An ILLEGAL SENTENCE IS AT VARIANCE WITH THE CONTROLLIN-
7 G SENTENCING STATUTE, OR ILLEGAL, IN A SENSE THAT THE COURTGOE-
8 S BEYOND IT"S AUTHORITY BY ACTING *without Jurisdiction* , OR
9 IMPOSING A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM
10 PROVIDED".... Edwards v. State, 112 Nev. at 708. 918 P2d.
11 at 324 - 1996.

12 The state cannot put forth a claim that the defendant
13 claim of being sentence illegally is an empty assersation or
14 that it only amounts to a harmless error. An illegal sentence
15 should not stand against the controlling state law, and for
16 this court to permit further manipulation tactics from the
17 state would undo the state constitution and the united states
18 constitution as well. The distict attorney in this case was
19 well aware that before the defendant *Accepted the plea agreement in*
20 the above matter, that the defendant had previously been
21 convicted for the criminal offense of burglary. And, *with disregards*
22 to that the statutory limits prohibiting the sentencing judge
23 from imposing probation, but the prosecuting attorney purposely
24 chose not to disclose this fact to the sentecing court in it's
25 overzealous effort to gain a conviction.

26 Based upon the due process that derive from equal protec-
27 tion, and the due process clause of the 14th amendment of
28 u.s. constitution, the defendant respectfully request this

1 court's order demanding the state to respond to the specifics
2 of the above motion to correct an illegal sentence and all
3 pleadings associated with this action. Whether the issue asser-
4 ted by the defendant that the district court lacked jurisdic-
5 tion to imposed probation, or, revoked an otherwise illegally
6 ordered probation.

7 This court's order should not be used as a vehicle for the
8 state to confuse, mislead, or turn the court's attention toward
9 unrelated assertions, such as laches in an attempt to take the
10 focus away from what is crucial. The crucial matter remains
11 that the district attorney was well aware of the unconstitution-
12 al procedure implemented, *As habitual treatment was sought showing District*
13 attorney was aware of defendant's prior conviction of burglary
14 in case no: 107733, *prior to requesting probation in Case No 145127*

15 It is when the state presented the court it's motion to
16 amend complaint to seek habitual treatment of defendant
17 (see exhibit- A, STATE'S AMENDED INFORMATION); which clearly
18 shows the use of aforementioned conviction as part of the basis
19 to have the defendant prosecuted as a habitual criminal. And it
20 was 14 days later on august 28, 1997, stated to the sentencing
21 court to do what 'it might not be inclined to do' (SEE EXHIBIT B
22 TRANSCRIPTS_- calender call) 'accept a plea memo that urged
23 the court to impose a 'state created illegal sentence'.

24 Further, the defendant moves his request for this court's
25 issuance of an order to transport and produce defendant for
26 a hearing in the above matter, and if oral arguments is
27 warranted it would assure defendant's fairness in representation.

28 The Nevada Supreme Court state's in; GEBERS V. STATE, 118 Nev-

1 ADV. OP. NO:53 (august 2, 2002).

2
3 CONCLUSION
4

5 Based upon all facts put forth, supported by the points and
6 authorities, and supplemented by exhibits. Defendant respectfu-
7 lly contends this court inadvertently overlooked crucial
8 facts due to the states intentional misdirecting the court
9 away from those facts. Defendant hereby prays to this honorabl-
10 e court grants his motion for rehearing of his 'MOTION TO
11 CORRECT AN ILLEGAL SENTENCE: AND,AN AMENDED JUDGEMENT OF
12 CONVICTION"; reflecting the releif sought in "MOTION TO CORRECT
13 HIS IILEGAL SENTENCE.
14

15 DATED this 5th day of January 2004.
16

17 Respectfully Submitted,
18 
19 _____

20 Cary Pickett-Defendant
21 P.O. Box 208
22 Indian Springs, Nevada
23 89070

24 VERIFICATION

25
26 EXECUTED this day of January 2004, at the Southern
27 Desert Correctional Center, Indian Springs, Nevada- 89070- under
28 penlty of perjury that the foregoing instrument is true and

1 correct, pursuant to the provision of N.R.S. 208.16 .

2
3 Respectfully Submitted,

4
5 Cary Rickett-Defendant

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8 PROOF OF SERVICE

9
10 I, Cary Pickett, (DEFENDANT) IN THE ABOVE ENTILED ACTION
11 FOR "MOTION FOR REHEARING" DID DULY SERVE A TRUE AND CORRECT
12 COPY OF THE SAME UPON:

13 David Rogers District Attorney
14 200 South Third Street
15 Las Vegas NV 89155
16

17
18 BY PLACING IN A SEALED ENVELOPE WITH THE NECESSARY FIRST
19 CLASS POSTAGE AFFIXED THEREON, AND DELIVERING THE SAME TO AN
20 AUTHORIZED AGENT OF THE NEVADA DEPARTMENT OF CORRECTIONS AT
21 SOUTHERN DESERT CORRECTIONAL CENTER: INDIAN SPRINGS, NEVADA,
22 FOR DEPOSIT IN THE U.S. POSTAGE SERVISSES.

23
24 DATED THIS 5th, DAY OF JANUARY 2004.

25
26 RESPECTFULL SUBMITTED,

27
28 Cary Pickett_ DEFENDANT

1 IN PERTINENT PART: "A PERSON WHO IS CONVICTED OF BURGLARY, AND
2 WHO HAS PREVIOUSLY CONVICTED OF BURGLARY ,OR, ANOTHER CRIME
3 INVOLVING FOCLEBLE ENTRY,OR, INVASION OF A DWELLING MUST NOT BE
4 RELEASED ON PROBATION,OR, GRANTED A SUSPENSION OF HIS SENTENCE.

5 6.) THAT DUE TO A PRIOR BURGLARY CONVICTION IN 1992,CASE NO:
6 C107733; SENTENCING TO PROBATION AND SUSPENSION OF 36 months
7 to 120 months. in case no; 145127;was, and is, illegal
8 ACCORDING TO THE LAWS OF THE STATE OF NEVADA, AS CITED ABOVE
9 IN N.R.S.205.060.(SUB. SEC.)(2.)

10 7.) THAT TO SUPPORT THIS CAUSE, ATTACHED THIS AFFIDAVIT AND
11 MOTION TO REHEAR MOTION TO CORRECT ILLEGAL SENTENCE, I HAVE
12 INCLUDED: (A.) A COPY OF STATE"S MOTION TO AMEND INFORMATION
13 TO SEEK HABITUAL TREATMENT OF WHICH CONTAINS STATE"S ENTRY OF
14 KNOWLEDGE OF CASE NO: c107733, prior burglary conviction ON
15 AUGUST 14,1997. (B.) COPY OF STATE"S ARGUMENT ON AUGUST 28,
16 1997, IN WHICH STATE URGED THE COURT TO ACCEPT *An illegal plea*
17 (C.) JUDGEMENT OF CONVICTION THAT VIOLAED N.R.S.205.060(2.)
18 IN THAT PROBATION IS IMPOSED AND SENTENCE SUSPENDED.

19 8.) THAT I HEREBY APPLY FOR AND, ASK THAT THE COURT ISSUE AN
20 ORDER TO THE DISTRICT ATTORNEY TO SPECIFICALLY RESPOND TO
21 ISSUES ADDRESSED IN THE MOTION TO REHEAR AND MOTION TO CORREC-
22 T ILLEGAL SENTENCE IN REGARDS TO PROBATION ATTACHED TO CASE
23 NO: 145127.

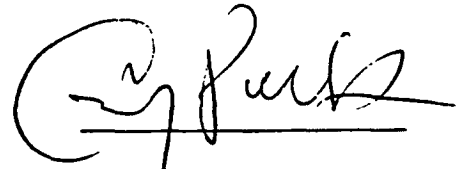
24 9.) THAT I HEREBY APPLY FOR, AND ASK THAT THE COURT ORDER THE
25 TRANSPORTATION AND PRODUCTION OF THE DEFENDANT AT ANY EVIDENT-
26 UARY OR HEARING CONCERNING THIS INSTANT MATTER BEFORE THE
27 COURT.
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10.) THAT I AM EMANCIPATED ADULT AND NOT UNDER DURESS, OR
UNDER INFLUNCE IN THESE PROCEEDINGS.

FURTHER YOUR AFFIANT SAYETH NOT.

DATED THIS 4 DAY OF JANUARY 2004.

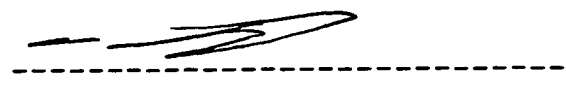


GARY PICKETT DEFENDANT

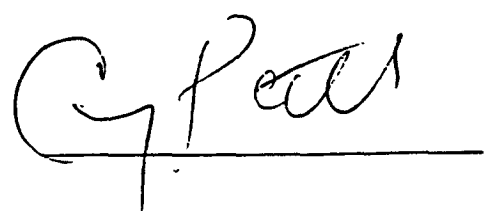
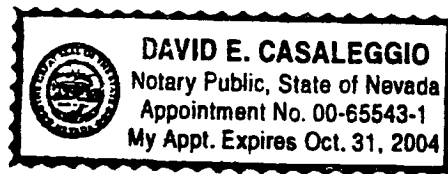
P.O. BOX 208

INDIAN SPRINGS, NEVADA

SUBSCIBED AND SWORN BEFORE ME
THIS DAY 4 OF JANUARY 2004.



notary public; in and for the
STATE OF NEVADA
COUNTY OF CLARK



GARY PICKETT--DEFENDANT