Application Appendix

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER EWING, AKA
ALEX CHRISTOPHER EWING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

Case No. 77670, 77671

Appeal from the First Judicial District Court

APPELLANT'S AMENDED OPENING BRIEF

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JURISDICTIONAL STATEMENT

The final orders appealed from were filed below on December 4 and December 6, 2018. The December 6 Orders denied Appellant's Petitions For Writs Of Habeas Corpus. The Notice Of Appeal was timely filed on December 10, 2018, within 30 days of the Orders appealed from, in accordance with NRAP 4(b)(1)(A), and this Court has jurisdiction under NRS 177.015(3) – if this appeal is considered to be from a criminal case. If this appeal is considered to be from a non-criminal case, then its timeliness and this Court's jurisdiction is established by NRAP 4(a)(1) and NRAP 4(b)(1)(A), and by provisions governing denials of writs of habeas corpus in NRS 34.560(2)-(3) and NRS 34.575(1).

ROUTING STATEMENT

This is neither a criminal nor post-conviction proceeding, so this is not a fast track appeal under NRAP 3C(a)(1). This appeal is not subject to presumptive assignment to the Court of Appeal under NRAP 17(b).

The Supreme Court should retain this appeal under NRAP 17(a)(10) and (11) because this appeal raises **two** principle issues that are questions of first impression, that involve the United States and Nevada Constitutions, and that raise questions of statewide public importance.

The first principle issue is the Appellant's right to appointed counsel in an

extradition proceeding. This appeal is the first in 50 years to directly challenge and seek to overrule *Roberts v. Hocker*, 85 Nev. 390, 456 P.2d 425 (1969). For 50 years – since 1969 – *Roberts* has wrongfully denied appointed counsel to persons challenging their extradition. *Roberts* was poorly reasoned and wrongly decided. It is clearly out of step with a vast number of decisions of other courts that interpret provisions of the Uniform Criminal Extradition Act that are identical to Nevada's, and with decisions which also determine that there is a constitutional right to appointed counsel in an extradition proceeding.

The second principle issue is a matter of first impression in Nevada: whether an extradition petition should be denied or dismissed which contains illegal provisions in a governor's agreement that is required for extraditing a Nevada prisoner to another state.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Can a person whose extradition from Nevada is being sought by another state, and who demands the appointment of counsel, be denied that right when NRS 179.197(1) guarantees him the right to "demand" counsel?

2. Shall this Court overrule the holding of *Roberts v. Hocker*, 85 Nev. 390, 394, 456 P.2d 425 (1969): that an extradition subject's right under NRS 179.197(1) to "demand" counsel, "merely affords a defendant the privilege to have counsel

present," and does not "afford appointed counsel to indigents during an extradition proceeding."?

3. Shall this Court overrule another holding of *Roberts v. Hocker,* that an extradition subject has no constitutional right to appointed counsel during an extradition proceeding?

4. Does the extreme likelihood that Mr. Ewing will be sentenced to death if extradited and convicted in Colorado further support the granting of his demand for appointed counsel because it is both statutorily and constitutionally required?

5. Should Mr. Ewing's present unappointed, unretained and unpaid appeal counsel be formally appointed as his counsel for this appeal, *nunc pro tunc*?

6. Should Mr. Ewing's unappointed, unretained and unpaid volunteer counsel be formally appointed as his counsel *nunc pro tunc*, for his pre-appeal work done?

7. Does a petition for extradition satisfy the requirements for its granting if the agreement between the two states' governors clearly and directly violates a prohibition in both states' extradition statutes?

8. Should extradition of a Nevada prisoner to Colorado be denied if the required governors' agreement provides that, if the prisoner is convicted of a crime there, he will not be returned to Nevada until all sentences are completed – a direct violation of both states' statutes, and of *Kroc v. Sheriff*, 85 Nev. 91, 450 P.2d 788

(1969), requiring that the prisoner be returned to Nevada "as soon as the prosecution . . . is terminated", NRS 179.187(1) (Nevada) and C.R.S. 16-19-106(1) (Colorado)?

STATEMENT OF THE CASE

The Nevada government filed petitions requesting that Appellant Christopher Ewing, presently serving a Nevada prison sentence, be extradited to two Colorado counties to face murder charges there. One 70-page petition concerned charges pending in Jefferson County, Colorado, and a second 150-page petition concerned charges pending in Arapahoe County, Colorado.

The lower court assigned separate case numbers to the two petitions. The factual claims in the two petitions were different, but the issues in the litigation below and in this appeal concern only the parts of the two petitions which were identical, except for the names of the Colorado counties. As a result, the subsequent pleadings filed below in each of the two cases were identical, except for the case numbers and the names of the counties.

At his first court appearance, the district court refused to appoint counsel to represent Mr. Ewing in the extradition proceeding. An unretained, unpaid, and unappointed "volunteer" counsel later appeared on his behalf, notified the lower court in several motions that Mr. Ewing was indigent and unable to afford counsel, and moved the lower court to appoint counsel for him. The motions alleged that Mr. Ewing had the statutory right to "demand" counsel, under NRS 179.197(1), which clearly and unambiguously meant that he had the right to appointed counsel. The

motions argued that the brief, unexplained, and poorly-reasoned holding of *Roberts v. Hocker*, 85 Nev. 390, 394, 456 P.2d 425 (1969) should be overruled: it held that an extradition subject's right to "demand" counsel under NRS 179.197(1), "merely affords a defendant the privilege to have counsel present," and does not "afford appointed counsel to indigents during an extradition proceeding."

The litigation below primarily focused on Mr. Ewing's **statutory** right to demand and be granted appointed counsel, but it also raised a second challenge to the holding in *Roberts*: that he has a **constitutional** right to appointed counsel both under constitutional provisions not addressed in *Roberts* and under constitutional provisions that were wrongly decided in that decision.

The statute-based motions argued that the right to "demand" counsel cannot possibly mean that an indigent defendant has the right to have counsel present whom he cannot pay, and whom the court will not pay. The motions also alleged that the extradition petitions should be denied or dismissed if Mr. Ewing was forced to defend himself without appointed counsel.

The extradition petitions make it clear that Colorado will seek the death penalty for Mr. Ewing if he is convicted there. Colorado's intention and belief that he will be sentenced to death are additional grounds under Nevada law for his right to appointed counsel. The lower court denied his renewed motions for counsel, repeated its

decision that no counsel would be appointed to represent him, and refused to dismiss or deny extradition because of the refusal to appoint counsel.

Mr. Ewing submits that this Court's decision on the right-to-counsel issue, should: (1) formally appoint his present appellate counsel as appointed appellate counsel for him *nunc pro tunc*; (2) order the district court to appoint his volunteer counsel as appointed counsel *nunc pro tunc* for pre-appeal work already done; and (3) order the district court to appoint counsel for him at his request in any future extradition proceedings.

> **NOTE**: The two states in an extradition are referred to as the "sending state" (Nevada in Mr. Ewing's case, NRS 197.225(1)(c)), and as the "demanding state" (Colorado in this case, NRS 197.201(1)).

A second challenge to the extradition petitions alleged that the governors' agreement required by both states' statutes clearly and directly violated a prohibition in those statutes. The agreement of the governors (neither of whom are still in office) to extradite Mr. Ewing to Colorado illegally provides that if he is convicted of a crime there, he will not be returned to Nevada until all Colorado sentences are completed, including returning him **after a likely death sentence results in his execution -- presumably as a corpse**. This is a direct violation of both states' statutes requiring that the sending state's prisoner be returned to the sending state "as soon as the [demanding state's] prosecution . . . is terminated", NRS 179.187(1) (Nevada) and

C.R.S. 16-19-106(1) (Colorado).

Mr. Ewing's volunteer counsel filed motions to dismiss and deny the extradition petitions because the agreement clearly violated both states' statutes. The illegal governors' agreement fails one of the four essential requirements for a valid extradition proceeding: that all of the essential extradition documents must "be in order", which certainly does not contemplate approving a required governor's agreement that contains illegal provisions. The lower court denied these motions.

A petition for writ of habeas corpus was filed on behalf of Mr. Ewing, reasserting his right to appointed counsel, and asserting that the extradition petitions should be dismissed and denied because of the refusal to appoint counsel and because of the illegal governors' agreement. The appointment of counsel was again denied, the habeas corpus petition was denied, and this appeal followed.

STATEMENT OF THE FACTS

The Nevada government filed petitions below requesting that Appellant Christopher Ewing, presently serving a Nevada prison sentence, be extradited to two Colorado counties to face murder charges there. One petition concerned charges pending in Jefferson County, Colorado (Appellant's Appendix, page P1, hereafter cited, for example, as "P1"). A second petition concerned charges pending in Arapahoe County, Colorado (P12).

The lower court assigned separate case numbers to the two petitions: #18 OC 227 to the Jefferson County case, and #18 OC 228 to the Arapahoe County case; any references below to the two case numbers will identify them simply as #227 or #228.

The Appendix contains those pages of the petitions that are relevant to the issues on appeal. The final pages of both petitions are also included (P11-2, -3, 19-2), so that this Court can see the size of the extradition petitions (please note the "AG" numbering, plus the three introductory pages of each petition). The Jefferson County petition was 70 pages (P1). The Arapahoe County petition was 150 pages (P12).

The factual claims in the two petitions were different, but the issues in the litigation below and in this appeal only concern those parts of the two petitions which were identical, except for the names of the Colorado counties. As a result, the subsequent pleadings filed below in each of the two cases were identical except for the case numbers and the names of the counties. To avoid duplication, the Appendix usually contains only one of the two identical pleadings filed below.

Right To Appointed Counsel

At his first court appearance on the extradition petitions, on October 2, 2018, Mr. Ewing was without counsel (P20). He said he could not afford an attorney, wanted to fight extradition, and requested the assistance of an attorney. The district court refused to appoint counsel to represent Mr. Ewing in the extradition proceeding,

based on the prosecutor's reliance on *Roberts v. Hocker*, *supra* (P24-26). The prosecutor then stated that one of the four issues to be determined was "whether the papers are in order" (P26).

An unretained, unpaid, and unappointed "volunteer" counsel later appeared on Mr. Ewing's behalf, notifying the lower court in several pleadings that Mr. Ewing was indigent and unable to afford counsel, and moving the lower court to appoint counsel to represent him (P34, 45, 53). Mr. Ewing's written statement of indigency and requesting appointed counsel was submitted to the lower court (P38). The motions alleged that Mr. Ewing had the statutory right to "demand" counsel under NRS 179.197(1), which clearly and unambiguously meant that he had the right to appointed counsel. The motions argued that the extremely brief, unexplained, and poorly-reasoned holding of *Roberts v. Hocker*, at 394 should be overruled: that an extradition subject's right to "demand" counsel under NRS 179.197(1) "merely affords a defendant the privilege to have counsel present," and does not "afford appointed counsel to indigents during an extradition proceeding."

The prosecutor opposed Mr. Ewing's pleadings (P40, 49).

The litigation below primarily focused on Mr. Ewing's statutory right to demand and be granted appointed counsel. It also raised a second challenge to the holding in *Roberts*: that he has a **constitutional** right to appointed counsel under

constitutional provisions not addressed in *Roberts*, and under constitutional provisions that were wrongly decided in *Roberts* (P35, 46).

The statute-based motions argued that the right to "demand" counsel cannot possibly mean that an indigent defendant has the right to have counsel present whom he cannot pay, and whom the court will not pay. The motions also alleged that the extradition petitions should be denied or dismissed if Mr. Ewing was forced to defend himself without appointed counsel.

The extradition petitions make it clearly apparent that Colorado wants and intends to have Mr. Ewing sentenced to death if he is convicted in Colorado. The paragraphs beginning "IT IS FURTHER HEREBY AGREED" clearly intend and believe that Mr. Ewing will be sentenced to death (P6 and 17):

> "*IT IS FURTHER HEREBY AGREED* by the undersigned, Governor of the State of Colorado . . . that in the event Christopher Ewing . . . is convicted and **sentenced to either death** or life imprisonment in the State of Colorado, Christopher Ewing . . . will remain in the State of Colorado to serve the entire sentence of imprisonment or **until the sentence of death is executed**. In the alternative, in the event [he] . . . is sentenced to . . . other than **the death penalty** . . . "

(P17) (emphasis added). Colorado's intention and belief that he will be sentenced to death are additional grounds under Nevada law for his right to appointed counsel.

The lower court denied his renewed motions for counsel, repeated its decision that no counsel would be appointed to represent him, and refused to dismiss or deny extradition because of the lack of appointed counsel (P109, 111).

Illegal Governors' Agreement

> **NOTE**: The two states in an extradition are referred to as the "sending state" (Nevada in Mr. Ewing's case, NRS 197.225(1)(c)), and as the "demanding state" (Colorado in this case, NRS 197.201(1)).

A second challenge to the extradition petitions was that the required governors' agreements (P5 and 16), clearly and directly violated a requirement in both states' statutes. The agreement of the governors (neither of whom are still in office) to extradite Mr. Ewing to Colorado provides in the paragraphs beginning "IT IS FURTHER HEREBY AGREED" that, if he is convicted of a crime there, he will not be returned to Nevada until all sentences are completed, including **after a likely death sentence results in his execution** (P6 and 17)):

> "***IT IS FURTHER HEREBY AGREED*** by the undersigned, . . . that in the event Christopher Ewing . . . is convicted and sentenced to either death or life imprisonment in the State of Colorado, Christopher Ewing . . . will remain in the State of Colorado to serve the entire sentence of imprisonment or until the sentence of death is executed. In the alternative, in the event Christopher Ewing . . . is sentenced to a term of imprisonment other than the death penalty or life imprisonment, [he] . . . shall be returned to the State of Nevada upon the **completion** of his term of imprisonment and eligibility for parole in Colorado

. . . to serve any remaining term of imprisonment in the State of Nevada." (P6, 17) (emphasis in original).

This was in direct violation of Colorado law, C.R.S. 16-19-106(1), which was fully quoted – and ignored by the signatories – in the paragraphs beginning "*WHEREAS*, the People of the State of Colorado" (P5, 16). That statute, which is substantially identical to Nevada's NRS 179.187(1), requires that Mr. Ewing be returned to the sending state of Nevada "as soon as the prosecution [in Colorado] is terminated" – not after he completes his sentence.

Mr. Ewing's volunteer counsel filed pleadings to dismiss and deny the extradition petitions because the agreement clearly violated both states' statutes (P31, 45). The illegal governors' agreement fails one of the four essential requirements for a valid extradition proceeding: the requirement that all of the essential extradition documents must "be in order" (asserted by the prosecutor at the October 2 hearing (P26), and in her pleadings (P63, lines 14-15)), which certainly excludes a required governors' agreement containing illegal provisions from being adjudged as "in order".

The prosecutor filed oppositions (P45, 62). The lower court denied these motions (P109, 113).

Writ Of Habeas Corpus

A petition for writ of habeas corpus was filed on behalf of Mr. Ewing, reasserting his right to appointed counsel, and asserting that the extradition petitions should be dismissed and denied because of the refusal to appoint counsel and because of the illegal governors' agreement (P74).

At a December 4, 2018 hearing (P78), the court had already prepared orders denying all of Mr. Ewing's pleadings; they were on counsel's table when the hearing began (P80). Mr. Ewing argued against the orders, but it did not alter the judge's pre-hearing decisions. The orders were later filed, denying the motions (P109, 111, 113) and denying the habeas corpus petitions (P117-2, 118).

Also, the appointment of counsel was summarily denied. This was a reversible abuse of discretion for the court's failure to consider the factors required for appointment of counsel under NRS 34.750.

This appeal followed (P118-2, 119).

SUMMARY OF THE ARGUMENT

Mr. Ewing has both a statutory and constitutional right to appointed counsel in the extradition proceedings. The impending death penalty, if he is extradited to and convicted in Colorado, is additional support for his demand for appointed counsel. The proceedings below, in which he was represented by an unretained, unpaid and

unappointed volunteer counsel, was so tainted by the denial of appointed counsel that the extradition requests should have been denied or dismissed.

Further, his present appellate counsel should be formally appointed, *nunc pro tunc*, to represent him in this appeal **as this Court did for the appellant** in *Roberts*, at 391: "Finally, upon application to this court for habeas corpus, **counsel was appointed**". The only difference is that Mr. Ewing applied for habeas corpus below, and Mr. Roberts applied in this Court.

Mr. Ewing also submits that this Court should order the district court to: (1) appoint his volunteer counsel as appointed counsel *nunc pro tunc* for pre-appeal work already done; and (2) appoint counsel for Mr. Ewing at his request in any future extradition proceedings.

Another separate ground for denying and dismissing the extraditions is the illegal governors' agreement. It clearly and directly violated both states' statutes that require the exact opposite of the agreement's provision allowing Colorado to execute Mr. Ewing's sentence – **including killing him pursuant to the death penalty** – before returning him to Nevada to complete his Nevada prison sentence (presumably as a corpse). Instead, both states' statutes require that the agreement explicitly declare that the demanding state must return him to the sending state when the demanding state prosecution is terminated.

ARGUMENT

1. VIOLATION OF APPELLANT'S RIGHT TO APPOINTED COUNSEL.

A. Statutory Requirement For Appointed Counsel.

The first hearing below, where Mr. Ewing appeared without counsel on October 2, 2018, had several noteworthy events (P20).

First, the lower court believed – and told Mr. Ewing – that an attorney could be appointed for him if he was indigent (P23). The court's belief was based on its reading of the "right to demand and procure legal counsel" plain language in NRS 179.197 (P24). Despite Mr. Ewing's request, the prosecutor then convinced the court to reverse itself and deny appointed counsel, based on *Roberts v. Hocker, supra* (P23-26). Here are some conclusions this Court should draw from that exchange: (1) The judge did not know Nevada extradition law. (2) Mr. Ewing also certainly did not know, either, yet he was expected by *Roberts* to be able to adequately represent himself. (3) The plain meaning of NRS 179.197 to the lower court judge was that it guaranteed the right to "demand" appointed counsel, further undermining any logic or rationale for the unreasoned conclusion in *Roberts*, at 394, that the statute does not mean what it clearly says.

Second, a demonstration of the lower court's incompetence at that October 2

hearing is that the court's minutes nowhere mention the appointed counsel request, decision, discussion, or reversal of that decision (P30).

Third, the lower court asked Mr. Ewing if he had received "that paperwork" about Colorado's demands, to which he answered "yes" (P22). But the lower court never determined or explained what "that paperwork" was. Was it anything more than the simple summary of the Colorado accusations that the judge recited (P22-23)? His answer – and the truth -- was unknown.

Fourth, the lower court asked Mr. Ewing if he understood the Jefferson County charges, but received an answer only from the prosecutor, not from Mr. Ewing (P22-23).

Fifth, the lower court never determined whether Mr. Ewing had received, read or understood the 70 pages of the Jefferson County extradition petition (P1) or the 150 pages of the Arapahoe County extradition petition (P12). It also never determined whether he could read and understand them – if he had ever received or would receive them.

Sixth, the lower court asked Mr. Ewing, "Do you want to file a state habeas petition?" (P25). Mr. Ewing answered: "Can I get an attorney to help me with it?" There is no record that Mr. Ewing was ever told what the purpose would be for a "habeas" petition, what "habeas" or "petition" meant, what "file" meant, how to "file"

it, what was the law on extraditions and on "habeas petitions", or how a "habeas petition" would affect the extradition. Nor is there any record that Mr. Ewing understood what is a "**state** habeas petition", in contrast to some other kind of "habeas petition". Without counsel, it is impossible that Mr. Ewing could fully understand these words and legal principles; it is also impossible that he could understand that the Nevada government could "file" "petitions" to extradite him, with him being the "Respondent", and that he could then "file" "petitions" to fight against the extradition, with the government being the "Respondent". Nor could he understand that he would have to "file habeas petitions" challenging both extradition petitions.

Seventh, the lower court gave him 30 days to "file a state habeas petition" challenging "each of these cases filed" (P26). How could he challenge the 220 pages of the government's extradition petitions, without appointed counsel, in two "habeas petitions", required to be "filed" within 30 days, all while incarcerated in prison, with little or no access to law books, typing devices and materials, and with no certainty that he had received some or all of those 220 pages, and that he could read and understand them if he had received them?

Eighth, the prosecutor then recited what she claimed to be the four issues that are to be decided in an extradition (P26-27). Did the lower court ask Mr. Ewing if he

understood? No. Did he understand what she said or what it meant, or could he remember it in the next 30 days he had in which to "file a state habeas petition" in each of the two cases? Without counsel, absolutely not. Was the prosecutor correct? Mr. Ewing certainly had no way to know that without appointed counsel.

Mr. Ewing has not been represented by retained or paid counsel, despite his "demand" for appointed counsel. A 50 year-old decision, which has never been reviewed or examined by this Court, is the ancient authority relied on by the prosecution to deny him counsel: *Roberts v. Hocker*, *supra*. But that decision – besides its archaic antiquity and lack of any confirming authority – is contrary to both Nevada and Colorado statutes.

Nevada and Colorado have both adopted the Uniform Criminal Extradition Act (UCEA), NRS 179.177, C.R.S. 16-19-101. Among the rights provided to a person whose extradition is sought is NRS 179.197(1), which guarantees Mr. Ewing the right to "**demand** and procure counsel" (emphasis added).

"Statutory interpretation is a question of law subject to de novo review," *State v. Catanio,* 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

The plain meaning of "demand" is that Mr. Ewing has a right to obtain counsel from the court. From whom or what else can he **demand** counsel except from the court? That is the plain meaning of the statute, and it must be obeyed by the courts,

Barrios-Lomeli v. State, 114 Nev. 779, 780 (1998): "[R]igid adherence to [a statute] was the clear intent of the legislature."

The definition of "demand" as a verb is: "to claim as one's due; to require; to ask relief. To summon; to call in court". As a noun, it means, "A peremptory claim to a thing of right, differing from a claim, in that it presupposes that there is no defense or doubt upon question of right." *Black's Law Dictionary* 516 (4th ed. 1951). That is the plain and unambiguous meaning of "demand" that *Roberts* unexplainedly failed to recognize.

Also, that **exact** statutory language was determined by the highest court of the demanding state (Colorado) to require appointment of counsel for an indigent extradition subject: *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972). It is certainly Colorado, the demanding state in this case, that has the vested interest in having the extradition accomplished, yet **its law** has no objection to counsel being appointed for someone like Mr. Ewing.

NRS 179.235 supports and requires this reciprocity and symmetry of holdings between states. It requires that the UCEA "be so interpreted and construed as to effectuate their general purposes to **make uniform** the laws of those states that enact them." This strongly argues in favor of *Roberts* being overruled to conform to Colorado's *Mora* decision.

This Court should note that *Mora*, at 385, described *Roberts* as the only one of four other decisions nationally that denied appointed counsel for someone like Mr. Ewing; it was an outlier in opposition to Illinois, Texas and Michigan. Also, *Bentzel v. Florida*, 585 So.2d 1118 (1991) later held that someone like Mr. Ewing is entitled to appointed counsel, based on the identical statutory language as Nevada's. Thus, with *Mora* and *Bentzel* added to the other three states, *Roberts* was the only outlier among these six states' decisions recognizing the right to appointed counsel.

The aberrance of *Roberts* is reinforced by the United States Supreme Court's decision in *Cuyler v. Adams*, 101 S. Ct. 703 (1981), which held that adopters of the uniform extradition act require that a prisoner is entitled to the procedural protections of the Act.

Mr. Ewing presented a **statutory** basis for appointing counsel for him – that NRS 179.197(1) guarantees him "the right to demand and procure counsel". *Roberts*, at 392, quotes that entire statute, and emphasizes the "demand and procure" phrase with italics. But it never discusses that statutory right except to summarily claim that **it does not mean what it clearly says**.

"Procure" means "to cause a thing to be done; . . . to contrive, bring about, effect, or cause . . . To obtain . . .", *Black's Law Dictionary* 1373 (4th ed. 1951). This is the exact opposite of the definition of "to demand": "to claim as one's due; **to**

require; to ask relief. To summon; **to call in court**.", *Id* at 561 (emphasis added). There is no reason why the Legislature would guarantee the right "to require" or "to call in court" if it meant the same as "to cause" or "to obtain". Yet, that is what *Roberts's* wrongheaded conclusion believes – that "demand" means the same as "procure".

Roberts was a case in which Washington state petitioned to extradite Roberts, a Nevada prisoner, to face felony charges. The district court denied Mr. Roberts appointed counsel. The Court held, at 393, that habeas corpus was the proper vehicle to challenge the refusal to appoint counsel, hence Mr. Ewing's claims are properly before this Court.

It then recited the entire text of NRS 179.197, with the key "right to demand" phrase from its subsection (1) emphasized in italics: "and that he has the *right to demand and procure legal counsel*." *Ibid*, (emphasis in original). The opinion then stated, "In the absence of a statute allowing a defendant the right to demand and procure legal counsel at an extradition proceeding, no such right exists." This is especially noteworthy because it clearly implies that such a right **does** exist in Nevada because **there is** a statute providing that right. That sentence in *Roberts* confirmed the right to counsel in an extradition from Nevada.

But the *Roberts* court then did something unexplainable, unjustifiable, and

dead wrong. The court completely reverses itself. With no explanation, no description, no analysis, and no discussion, at 394 it summarily claims that,

> "The meaning of NRS 179.197 is unambiguous and needs no construction; it merely affords a defendant the privilege to have counsel present. If the legislature deems it desirable to afford appointed counsel to indigents during an extradition proceeding, it is their prerogative, not ours."

Such a conclusion is contrary to the plain and unambiguous meaning of the statute. And it is remarkably absurd, because the right to "demand" counsel **is the legislature's statement** – that an indigent extradition target, with no ability or resources to "procure" his own counsel, has the right to "demand" a free, appointed counsel.

"Statutory interpretation is a question of law subject to de novo review," *State v. Catanio,* 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004), and it begins with the plain language of the statute in question, *McKay v. Bd. of Supervisors of Carson City,* 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Thus, a clear and unambiguous statute like NRS 179.197(1) must be given its plain meaning, regardless of the result. The right to "demand" counsel can mean only one thing, and it is totally clear and unambiguous -- the right to "demand" that a court appoint counsel for an indigent.

"Under long established principles of statutory construction, when a

> statute is susceptible to but one natural or honest construction, that alone is the construction that can be given. State v. Cal. M. Co., 13 Nev. 203, 217 (1878). We have also consistently held that **where there is no ambiguity in a statute**, **there is no opportunity for judicial construction and the law must be followed regardless of result**. McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986); State v. Woodbury, 17 Nev. 337, 343, 30 P. 1006, 1008 (1883). This means that if a statute clearly and unambiguously specifies the legislature's intended result, such result will prevail even if the statute is impractical or inequitable. State v. Commissioners Washoe Co., 22 Nev. 203, 212, 37 P. 486, 488 (1894); In Re Walters' Estate, 60 Nev. 172, 186, 104 P.2d 968, 974 (1940).
>
> We are constrained by the above rules of statutory interpretation. The view with the most interpretational integrity and which takes the statutory language at face value is the view that concludes **the statute means what it says** despite its potential for incommensurate hardship."

Randono v. CUNA Mutual Insurance Group, 106 Nev. 371, 374, 793 P.2d 1324 (1990) (emphasis added).

When Mr. Ewing titled his motion as a "request" for appointed counsel (P34), he was being unnecessarily polite. The statute cited in that motion gives him the right to "demand" counsel. Thus, he actually was **demanding** that his right to counsel be complied with by the lower court, not merely requesting it. The clear meaning of NRS 179.197(1) is that he can hire (procure) his own counsel, if he is able to; if he is unable to, then he has a right to demand that he have counsel – and that demand can

be addressed to, and granted by only one authority: the court.

Overruling *Roberts v. Hocker* is appropriate both in its illogical statutory conclusion and its indefensible constitutional conclusion:

> "Although the doctrine of stare decisis militates against overruling precedent, *Armenta-Carpio v. State,* 129 Nev. 531, 535, 306 P.3d 395, 398 (2013), 'when governing decisions prove to be "unworkable or are badly reasoned," they should be overruled,' *State v. Lloyd,* 129 Nev. 739, 312 P.3d 467, 474 (2013) (quoting *Egan v. Chambers,* 129 Nev. 239, 243, 299 P.3d 364, 367 (2013) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827 (1991))).",

Harris v. State, 130 Nev. 435, 441, 329 P. 3d 619 (2014).

B. <u>Constitutional Requirements For Appointed Counsel</u>.

Mr. Ewing has constitutional rights to due process of law under the United States Constitution, 5th and 14th Amendments, and under Nevada's Constitution, Article 1, section 8(1) (right to counsel) and 8(5) (due process).

The Washington Court of Appeals rejected the government's position that extradition is a technical civil matter: "Surely it is elementary that **constitutional due process** prohibits the bundling up and shipment of a human being from one state to another without an opportunity to be heard, no matter how limited in scope the available defenses against it may be.", *In re Personal Restraint of Jian Liu*, 208 P.3d 1207, 1209-10 (Wash. App. 2009) (emphasis added).

The Massachusetts Supreme Court stated: "Since the [extradition] procedure has a **potential deprivation of liberty**, the proceedings should be deemed criminal with attending **due process rights**.", *In re Hinnant*, 678 N.E. 2d 1314, 1318 (Mass. 1997) (emphasis added).

Other cases confirmed the constitutional due process requirement for appointed counsel in extraditions: *Kostic v. Smedley*, 522 P.2d 535, 537 (Alaska 1974) (in contrast with *Roberts*, "We shall not apply the law in such a manner that an express and unambiguous statutory right has no meaning. Nor shall we apply the law in such a manner as to possibly deprive [the extradition's target] of his right to due process of law."); *Pruett v. Barry*, 696 P.2d 789, 791 (Colo. 1985); *State ex rel Jones v. Warmuth*, 272 S.E. 2d 446, 451 (W. Va. 1980); and *State v. Robbins*, 590 A. 2d 1133, 1136-37 (N.J. 1991).

These cases establish the 5th Amendment and Nevada Constitution's due process rights as clearly providing Mr. Ewing's constitutional right to appointed counsel. *Roberts* confined itself to discussing the 6th Amendment right to counsel, but summarily concluded, at 393, that due process was inapplicable. These cases also establish that *Roberts*, *supra*, is out of the mainstream in concluding that extradition is "certainly not a critical stage of the criminal proceeding." Finally, *Roberts* is incorrect in concluding, at 394, that there is no equal protection issue in allowing one

to retain counsel, but denying counsel to the indigent, in holding that there is no 6th Amendment right to appointed counsel in extradition proceedings.

The motions below reflected that Colorado's *Mora* decision, *supra*, found only four decisions involving the right to appointed counsel on an extradition case. Only one of the four, *Roberts*, denied the right to appointed counsel. But it is clear that, with *Mora* recognizing the right to appointed counsel, Nevada was then the only one of five states that denied appointed counsel. Then came *Bentzel*, *supra*, in which Florida granted the right to appointed counsel in 1991, making Nevada the only one of **six** states to deny the right to appointed counsel.

Finally, the lower court's refusal to grant Mr. Ewing's demand for appointed counsel left it only one alternative: to dismiss or deny the pending extradition petition.

C. Death Penalty Threat Compels Appointment Of Counsel.

Roberts v. Hocker is especially an "outlier" in light of Colorado's intention to extradite Mr. Ewing (now serving time in Nevada for non-capital offenses) to face charges of capital murder:

> "*IT IS FURTHER HEREBY AGREED* by the undersigned . . . that in the event Christopher Ewing . . . is convicted and **sentenced to either death** or life imprisonment in the State of Colorado, Christopher Ewing . . . will remain in

the State of Colorado to serve the entire sentence of imprisonment or **until the sentence of death is executed**. In the alternative, in the event [he] . . . is sentenced to a term of imprisonment other than **the death penalty** . . ."

(P6, P17) (emphasis added).

In a non-capital habeas proceeding, appointment of counsel is discretionary, although certain factors must be considered by the court, per NRS 34.750(1). But in a capital murder case, appointment of counsel is mandatory, NRS 34.820(1)(a). Moreover, counsel appointed pursuant to NRS 34.820(1) must be effective, meaning that ineffective assistance of capital counsel can establish cause for the failure to raise certain issues in earlier proceedings, *Crump v. Warden*, 113 Nev. 293, 303, 304-05, 934 P.2d 247 (1997). *Roberts* is inconsistent with the spirit, if not the letter, of *Crump,* which requires constitutionally-effective counsel if counsel is appointed by statutory mandate. The lower court's refusal to appoint counsel for Mr. Ewing, as required by NRS 179.197(1), denies him the right to constitutionally-effective counsel in this pending capital case.

Also, Supreme Court Rules 250(5) (and 250(32)) have rigid and extensive rules for counsel in capital cases: "Right to counsel: U.S. Const. amend. VI; Nev. Const. art. 1, § 8, cl. 1; NRS 34.820(1)(a), 171,188, 175.151, 178.397; SCR 250(2), (3), (4)(a)-(b)."

D. <u>This Court Should Appoint Counsel For Mr. Ewing</u>.

There can be no doubt that Mr. Ewing is indigent. His counsel in this appeal have neither been appointed, retained, nor paid for their work. They request and submit that they should be appointed counsel for Mr. Ewing for all appeal-related proceedings, *nunc pro tunc*. This should be done regardless of this Court's decision on whether he should have had, and will have appointed counsel for the district court proceedings. It is ironic that *Roberts*, the central and only Nevada opinion denying the right to appointed counsel in an extradition, **is authority for the appointment of appellate counsel**: it recited at 85 Nev. 390, 391 that, "upon application to this court for habeas corpus, counsel was appointed." The only difference in Mr. Ewing's case was that he applied for habeas corpus below in the district court, not in this Court. The only enduring validity in any of *Roberts'* holdings is that Mr. Ewing should have appointed counsel in this appeal.

Blandino v. State, 112 Nev. 352, 914 P.2d 624 (1996), compelled representation by counsel in all Nevada appeals that affect the Appellant's liberty interests. This was based on Amendments 5, 6 and 14 of the United States Constitution ("[T]he due process right to a fair appeal would be hindered by establishing a right to self-representation on appeal.", *id.* at 355). The numerous

decisions cited above establish that there is a liberty interest at stake in an extradition and thus establish the necessity for Mr. Ewing to have counsel on his appeal.

Crump v. Warden, at 297 n.2, discussed the statutory grounds for requiring appointment of counsel for an indigent post-conviction relief petitioner. The appointment was under since-repealed NRS 177.345(1), "However, NRS 34.750, which allows discretionary appointment of counsel to indigent petitioners is still in effect." That statute governs petitions for writs of habeas corpus, so it applies to this case. Despite the requirements of NRS 34.750(1) and (2), the lower court summarily denied appointment of counsel, without considering the factors required by that statute to be considered, a reversible abuse of discretion.

2. THE EXTRADITION PAPERS ARE NOT "IN ORDER", REQUIRING DENIAL OR DISMISSAL OF THE EXTRADITION PETITIONS

The Executive Agreements in this case state, in their paragraphs beginning "It is hereby further agreed", that if Mr. Ewing is not acquitted after extradition to Colorado, then he must serve his Colorado sentence before he can be returned to Nevada to complete his Nevada imprisonment (P6, 17). This violates the terms required in such an agreement.

First, the very title of the prosecution's petitions are for "Temporary" transfer to Colorado (P1, 12). What could be less temporary and more permanent than

Colorado returning Mr. Ewing's deceased corpse to Nevada to complete his sentence here – or waiting until he is released from imprisonment?

Second, the fifth "Whereas" paragraph of the Agreement itself is a recitation of Colorado law – the Uniform Criminal Extradition Act, C.R.S. 16-19-101, and a quotation of the complete C.R.S. 16-19-106(1): that such an extradition agreement must be "conditioned" on the prisoner being returned to the "other state [the sending state of Nevada] as soon as the prosecution in this State [Colorado] is terminated." (P5, 16-17). This statute clearly means that Nevada's relinquishment of custody is only temporary. See NRS 179.225(1)(c), which establishes that the demanding state receives only **temporary** custody.

Third, C.R.S. 16-19-106(1) is identical to NRS 179.187(1), except for Nevada having some pronoun changes that make its version gender-neutral, and Nevada substituting "such other state" for "the other state" and substituting "such person" for "that person".

Thus, the Executive Agreement is in violation of both state's statutes, and it is illegal, void and unenforceable because it does not guarantee Mr. Ewing's return to Nevada "as soon as" his trial and sentencing (if he is found guilty) is terminated. Instead, it agrees that the exact opposite be done if he is found guilty and sentenced – he must serve all Colorado sentences before being returned to Nevada.

NRS 179.187(1) and C.R.S. 16-19-106(1) cover a particular factual circumstance: where extradition is sought for someone who is either a sending state prisoner or the subject of a pending criminal proceeding in the sending state. The demanding state can simply wait until the prisoner is released or the criminal proceedings terminated before seeking extradition. But if the demanding state wants extradition to proceed before the prisoner's release or the termination of prosecution, then it must follow the statute's requirements: that there be an executive agreement "conditioned" on Mr. Ewing being returned to Nevada, "as soon as the prosecution in [Colorado] is terminated." Instead, the agreement in this case provides **exactly the opposite of what the statute requires**. The agreement is that Mr. Ewing will not be returned to Nevada until after he completes any sentence imposed on him in Colorado – including the execution of the death sentence. This will occur long after "the prosecution is terminated" by a judgement of acquittal or by a judgement of conviction and sentencing order.

The prisoner's serving of his sentence is not part of "the prosecution". The prosecution proceeds in court, the judicial branch. Execution of a sentence of prison or death is a function of the executive branch of government, the department of prisons. This is the plain and unambiguous meaning of "as soon as the prosecution [in Colorado] is terminated", C.R.S. 16-19-106(1):

> **"PROSECUTION**. In criminal law. A criminal action; a proceeding instituted and carried on . . . before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime . . . with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused."

Black's Law Dictionary 1385 (4th ed. 1951).

"**TERMINATE**. To put an end to; to make to cease; to end." *Black's, supra* at 1641. This makes it clear: execution of a sentence by death or imprisonment occurs **after "the prosecution is terminated"**. The relevant statutes in both states clearly prohibit an agreement which provides that Mr. Ewing will **not be returned** to Nevada after the Colorado prosecution is completed. This is directly in violation of the laws of both states.

This Court cannot simply rewrite that agreement in an attempt to make it conform to the law in both states. An agreement is a meeting of the minds of those signing the agreement, and only those parties – the governors and the secretaries of state of those two states – have the power to memorialize their agreement in writing.

This Court is also prohibited by Nevada's constitutional separation of powers between the judiciary and the executive branch of government from altering an

agreement signed by Nevada's governor and secretary of state, Nevada Const. Art. 3(1)(1).

Also, any attempt by this Court to rewrite the executive agreement will be imposing its will upon an authority over which it has no jurisdiction – Colorado's governor, secretary of state and executive branch.

The illegal provision is a fatal defect in the executive agreement and should not be approved by granting extradition – this extradition must be denied or dismissed.

Kroc v. Sheriff, 85 Nev. 91, 450 P.2d 788 (1969) is a pivotal Nevada extradition decision on this issue. This was a case in which Nevada was the **demanding** state, and the decision explains the real-world intentions and consequences of the rules in NRS 179.187(1) and C.R.S. 16-19-106(1). Mr. Kroc was serving a California prison sentence when Nevada requested his extradition for crimes allegedly committed here. He moved for release on bail upon his appearance in a Nevada court. The Nevada Supreme Court held as follows, explaining that jurisdiction over the prisoner remains in the sending state (California in *Kroc*, Nevada in this appeal) under the executive agreement required by NRS 179.187(1):

> "The appellant is present in this state by virtue of an agreement entered into between the Governor of the State of Nevada and the Governor of the State of California. That agreement was executed pursuant to the provisions of the Uniform Criminal Extradition Act, which act has been adopted by both

states. **Kroc is still a constructive prisoner of the State of California on "loan" to the State of Nevada, for the sole purpose of affording him a speedy trial.**

By agreement, the State of **California has retained its jurisdiction over the appellant for the purpose of returning him to that state to serve the remainder of his prison term**. . . .

At all times while the appellant is physically present in Nevada this state is under a compulsion by virtue of the conditions of the executive agreement and the provisions of the Uniform Criminal Extradition Act **to return the appellant to California**, NRS 179.187(1). The appellant's return can not be guaranteed if he is free on bail. **The rules of comity between the states require fulfillment of this obligation.**

. . . He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to **conviction** of crime against it [i.e., but not for execution of sentence].

In the case of Lunsford v. Hudspeth, 126 F.2d 653 (10th Cir. 1942), the court said: "As an easy and flexible means of administering justice and of affording each sovereignty the right and opportunity to exhaust its remedy for wrongs committed against it, there has evolved the now well established rule of comity which is reciprocal, whereby one sovereignty having **exclusive jurisdiction** of a person may **temporarily** waive its right to the exclusive jurisdiction of such person **for purposes of trial** in the courts of another sovereignty. . . . The privileges granted by this flexible rule of comity **should and must be respected by the sovereignty [i.e., the demanding state] to**

> **which it is made available, and this respectful duty is reciprocal**, whether federal or state, because **neither sovereignty has the power to override it.** . . . **There was no voluntary relinquishment of jurisdiction over the appellant by [the sending state of] California**.
>
> Adoption of the Uniform Criminal Extradition Act by both Nevada and California **is a barrier against** the rule espoused by Kroc **that the State of California has waived jurisdiction over him through its voluntary release**."

Kroc, at 92-94 (emphasis added).

It is noteworthy that *Kroc* is Nevada's statement of the limited rights of a demanding state -- which happened to be Nevada in that case. There is no rational justification for Nevada's government to attempt to avoid the holding in *Kroc:* to argue that the demanding state of Colorado has more rights to Mr. Ewing than the demanding state of Nevada had to Mr. Kroc in *Kroc*, a Nevada Supreme Court decision. *Kroc* controls on this issue. The required executive agreement in this case **is void** because it violates both *Kroc* and Colorado's statute in agreeing to a prohibited disposition of Mr. Ewing's custody if he is extradited and convicted.

The government may try to argue that the sending state can waive its clearly superior rights to the prisoner's custody. But NRS 179.187(1) and C.R.S. 16-19-06(1) are intended to clarify, notify the states of, and memorialize in a written document the supremacy of the sending state's clearly superior rights to the prisoner's custody, as

thoroughly described in *Kroc*. That is a prerequisite of the UCEA for a valid extradition of a sending state's prisoner. It is irrelevant to this appeal, and is pure speculation, whether Nevada can or will later waive its superior rights to custody of Mr. Ewing. There can be no valid extradition of a sending state's prisoner without the executive agreement's contents that are required by both Nevada law and Colorado law. The extradition statutes require both states to acknowledge and agree to follow the *Kroc* rule of the sending state's **temporary** surrender of its superior right to jurisdiction over the prisoner.

The relevant test for a valid extradition in this appeal – as conceded by the prosecutor in court and in pleadings – is whether all of the extradition documents are "in order", *Castriotta v. State,* 111 Nev. 67, 68-69, 888 P.2d 927 (1995) (a court considering an extradition challenge must, "decide . . . **whether the extradition documents on their face are in order**.") *Michigan v. Doran*, 439 U.S. 282, 289 (1978) is the United States Supreme Court's seminal decision that is the source of the above quotation in *Castriotta,* requiring that the extradition documents be "in order" before an extradition can proceed. *Pacileo v. Walker* 449 U.S. 86 (1980) repeated the *Michigan v. Doran* test.

It is clear that the papers being "in order" does not mean that page 4 follows page 3 instead of preceding it. Nor does it mean that the pages are in chronological

order and are all facing in the same direction. What it clearly means is that the extradition documents must comply with all the rules and requirements for extradition proceedings. The executive agreement in this case does not meet those requirements and are not "in order" because they contain language expressly prohibited by Colorado's (and Nevada's) extradition rules and requirements, requiring denial or dismissal of the extradition petitions.

CONCLUSION

The foregoing facts and law clearly compel appointment of counsel for Mr. Ewing, for proceedings both in the lower court and in this Court. His counsel in this appeal should be appointed as appellate counsel *nunc pro tunc* so that counsel can properly process a voucher for payment at the rate for counsel appointed for capital defendants.

This Court should also order the district court to appoint his volunteer counsel as counsel *nunc pro tunc* for pre-appeal work already done during district court proceedings. And it should order the district court to appoint counsel for Mr. Ewing at his request in any future extradition proceedings.

The improper refusal to appoint counsel below is grounds to deny or dismiss the extradition petitions.

Finally, the illegal provisions of the executive agreements that violate Colorado law and Nevada's parallel law render the extradition petitions as void because the extradition documents are legally and completely "out of order", and are additional grounds to deny or dismiss the extradition petitions.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using WordPerfect X8 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7,847 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 3, 2019.

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Law Office of Martin H. Wiener, and that on June 3, 2019, I electronically filed with the Nevada Supreme Court the foregoing document. Electronic Service of the foregoing document was made by email on:

Heather Procter, for State of Nevada

Richard F. Cornell, for Appellant

/s/ Martin H. Wiener

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,

Petitioner,

vs.

CHRISTOPHER EWING aka ALEX CHRISTOPHER EWING,

Respondent.
_____/

Case No. 18 OC 00227 1B

Dept. No. II

NOTICE OF APPEAL

Respondent Mr. Ewing appeals to the Supreme Court of Nevada from the December 6, 2018 (*nunc pro tunc* to December 4, 2018) Order denying his Petition For Writ Of Habeas Corpus, and from the December 4, 2018 denial of the following pleadings on which his Petition was grounded: Renewed Motion For Appointed Counsel; Petition In Opposition To Extradition; and, Motion To Dismiss. The result was that he was denied appointed counsel, and his objection to the State's request to extradite him to Colorado was denied.

Timeliness/Stay. Because this appeal is being filed within five judicial days of the above Orders (under NRAP 26(a)), there is an automatic stay of the extradition proceedings during the pendency of the appeal, under NRS 34.560(2-3).

This is not a Fast Track Appeal because it is not an appeal from a judgment entered in a criminal or post-conviction proceeding, NRAP 3C(a)(1), and NRAP 1(e)(8).

///

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned affirms that this document does not contain the "personal information" of any person, as defined in NRS 603A.040.

DATED this 10 day of December, 2018.

MARTIN H. WIENER
Attorney for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICES of MARTIN H. WIENER, and that on this date I caused to be served a true and correct copy of the attached document, addressed to the following, by the method indicated below:

Via Email:

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Via U.S. Mail:

Christopher Ewing #20866
c/o NNCC
PO Box 7000
Carson City, NV 89702

__X__	U.S. Mail
_____	Overnight Mail
_____	Hand Delivery
_____	Reno Carson Messenger Service Delivery
_____	Facsimile
__X__	E-mail

DATED this 10 day of December, 2018.

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IN AND FOR THE CARSON CITY

THE STATE OF NEVADA,

Petitioner,

vs.

CHRISTOPHER EWING aka ALEX CHRISTOPHER EWING,

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_____/

Case No. 18 OC 00227 1B

Dept. No. II

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CASE APPEAL STATEMENT

Pursuant to NRAP 3(f) and Form 2, the above Respondent, Mr. Ewing, files the required Case Appeal Statement.

1. Appellant: Christopher Ewing aka Alex Christopher Ewing

2. Carson City District Judge whose decisions are appealed from: Hon. James E. Wilson, Jr.

3. Counsel for Appellant: Martin H. Wiener, 316 South Arlington Avenue, Reno, Nevada 89501

4. Counsel for Respondent State of Nevada: Nevada Attorney General, 100 North Carson Street, Carson City, Nevada 89701-4717

5. No non-Nevada counsel.

6. District court representation of Appellant was by non-appointed counsel.

7. Appellate representation of Appellant is by non-appointed counsel.

8. This is not an in forma pauperis appeal.

9. District court proceedings commenced by extradition petition filed on September 12, 2018.

10. This appeal is from an order denying Mr. Ewing's Petition For Writ Of Habeas Corpus, and from the denial of supporting pleadings on which his Petition was grounded, which moved for appointment of counsel, and opposed the extradition petition.

11. No prior Supreme Court proceedings in this case.

12. No child custody or visitation involvement.

13. This is an appeal from the denial of a habeas corpus petition filed during an extradition proceeding, so it is partly a civil and partly a non-civil case, *Hill v. Warden*, 96 Nev. 38, 39-40, 604 P.2d 807 (1980). There does not appear to be a possibility of settlement.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the "personal information" of any person, as defined in NRS 603A.040.

DATED this 10 day of December, 2018.

MARTIN H. WIENER
Attorney for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICES of MARTIN H. WIENER, and that on this date I caused to be served a true and correct copy of the attached document, addressed to the following, by the method indicated below:

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Via U.S. Mail:

Christopher Ewing #20866
c/o NNCC
PO Box 7000
Carson City, NV 89702

DATED this 10 day of December, 2018.

Barbara Oltman

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER EWING, AKA
ALEX CHRISTOPHER EWING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

Case No. 77670, 77671

EMERGENCY MOTION, UNDER NRAP 27(e):
TO STAY REMITTITUR, UNDER NRAP 41(b)(3), PENDING APPLICATION FOR U.S. SUPREME COURT WRIT OF CERTIORARI

A decision on this Motion is requested immediately, or no later than February 18, 2020.

The order denying rehearing was issued January 24, 2020. Under NRAP 41(b)(1), remittitur issues 25 days after denial of that petition for rehearing, on February 18, 2020. Granting of the this Rule 41(b)(3) Motion for Stay of Remittitur – "pending application to the Supreme Court of the United States for a writ of certiorari" – is essential before February 18, the date that remittitur will issue. A further explanation of the need for urgency is set forth in the "NRAP 27(e) Certificate" at the end of this Motion.

STAY OF REMITTITUR UNDER RULE 41(b)(3)

Appellant, through undersigned counsel, moves for an order staying the issuance of remittitur under NRAP 41(b)(3). Rule 41(b)(3)(A) provides for such a stay, "pending application to the Supreme Court of the United States for a writ of certiorari". Rule 41(b)(3)(B) provides that such a stay shall not exceed 120 days; the period of the stay can be extended for cause shown; it does not specifically provide for a shorter stay, but a full 120-day stay is requested so that Appellant can have sufficient time to prepare and file the petition for a writ of certiorari and to notify this Court that such a writ petition has been filed.

The stay is automatically extended if this Court receives notice that a writ of certiorari has been filed in the United States Supreme Court, and the stay continues until final disposition of the writ, NRAP 41(b)(3)(B).

There is no financial consequence to the appeal in this case. So this Court should not require a bond or other security as a condition to granting the requested stay of remittitur, Rule 41(b)(3)(C).

Finally, Rule 41(b)(3) does not have any requirement that there must be good cause shown for granting the stay of remittitur to pursue United States Supreme Court relief. Nonetheless, the following facts clearly establish both good cause, and the certainty of Mr. Ewing seeking United States Supreme Court relief if this Court

imposes such a good cause requirement on him. Thus, there should be no suspicion that delay alone is any part of Mr. Ewing's motivation, intention or justification in filing this motion. The following facts clearly establish: that there are multiple meritorious and unique grounds to seek certiorari; that there are life-threatening consequences to Mr. Ewing; and that he has retained a 2,000-lawyer law firm that is prepared and committed to litigate his claims before the United States Supreme Court.

FACTS

Death Penalty Likelihood

Mr. Ewing is charged in two separate Colorado counties with multiple charges, including three counts of murder in one county, and one count of murder in another county. He is presently imprisoned in Nevada, and Colorado has sought to extradite him to face those charges. Nevada's Attorney General is, in effect, representing Colorado's interests in this litigation. Colorado has the death penalty for Appellant's alleged crimes, and if he is tried in Colorado, there is a great likelihood that he will be sentenced to death. Thus, the consequences to Appellant in this case are life-threatening.

Meritorious, Unique Legal Issues

The appeal in this case raised two issues of unique national importance. First, the agreement between the two states' governors directly violates both states'

statutes: the agreement provides, contrary to the express language in NRS 179.187(1) (Nevada) and C.R.S. 16-19-06 (Colorado), that if extradited, Appellant must serve his Colorado sentence before being returned to Nevada to complete his Nevada sentence. This is agreement is not only prohibited, but it is absurd if he is sentenced to death there and the sentence is executed. Instead, those statutes require that such an agreement between governors **must** provide that Mr. Ewing be returned to Nevada "as soon as [Colorado's] prosecution . . . is terminated". This illegal agreement clearly appears to be a matter of first impression both in Nevada and in the United States.

Second, the other issue in this appeal is whether Nevada's statutory scheme, and Appellant's resultant 5th Amendment constitutional rights, guarantee him the right to appointed counsel to challenge the extradition. There appears to be uniform national support everywhere but Nevada for his statutory right to appointed counsel. Nevada's 51-year old contrary decision in *Roberts v. Hocker,* 85 Nev. 390, 456 P.2d 425 (1969) appears to be the only outlier in this uniform national support for his statutory right to appointed counsel. A denial of his statutory right implicates his constitutional right to due process of law under the Fifth Amendment, which issue also appears to be a matter of first impression nationally.

Roberts v. Hocker is inadequately reasoned and incorrect, and is unsupported by any judicial decision cited by Respondent either in this appeal or in the district

court: Respondent's Answering Brief in this appeal cited authorities purporting to support its claim that *Roberts v. Hocker* is correct, but none of those citations were relevant to, nor supportive of that claim (see Appellant's Amended Reply Brief, p. 16-23).

This lack of support from multiple mis-cited purported authorities was a repeat of Respondent's inability in the district court to find or cite to any support for the holding in *Roberts v. Hocker*: Mr. Ewing's lower court Reply to the government's pleading described the multiple authorities falsely relied on by the government, all ten of which were irrelevant, inapposite, or distinguishable from the issues before the lower court (Appellant's Appendix, p. P68-71, Volume 1).

Appellant's Supreme Court Counsel Is
Identified, Retained and Prepared To Seek Certiorari

Mr. Ewing has signed a retainer agreement to be represented *pro bono* before the United States Supreme Court by multiple attorneys at the Washington D.C. office of Sidley Austin LLP, a 2,000-attorney law firm with 20 offices worldwide. The Sidley Austin attorneys will be working on Mr. Ewing's application for writ of certiorari together with professors and students at the Northwestern University Law School Supreme Court Practicum. The undersigned counsel has already had several conversations and communications with the Sidley attorneys and with members of the

Northwestern Law School program about pursuing a writ of certiorari from the United States Supreme Court.

Wherefor, the Rule 41(b)(3) stay of remittitur should be granted for 120 days.

NRAP 27(e) CERTIFICATE

As required by NRAP 27(e)(3), Appellant's counsel provides the following information:

(A) The telephone number and office address of Appellant's attorney is:

Martin H. Wiener
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008

That information for Respondent's counsel is:

Heather Procter
Senior Deputy Attorney General, Post-Conviction Unit
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1271
(775) 684-1102 (fax)

(B) The existence and nature of the claimed emergency is that the issues in this appeal will be mooted if Mr. Ewing is extradited to Colorado before the writ of

certiorari can be addressed by the United States Supreme Court. Jurisdiction will be returned to the district court if and when remittitur is issued by this Court, thereby allowing Mr. Ewing to be extradited. So a stay of remittitur is necessary to avoid mooting his petition for writ of certiorari that he intends to file in the United States Supreme Court.

The emergency is that the stay must be issued **before February 18, 2019**, because on that date, remittitur will issue under NRAP 41(b)(1) -- 25 days after the January 24, 2020 denial of Mr. Ewing's petition for rehearing. If Respondent opposes this Motion, litigation over its granting may not be completed and decided prior to February 18. And even if it is unopposed, there is no certainty that the Court will decide this Motion prior to February 18 unless the Motion is considered on an emergency basis.

So this Motion should be considered and granted on an emergency basis in order for this Court to effectuate the intent of Rule 41(b)(3). The intent of that rule is that remittitur should be stayed prior to February 18 to permit the United States Supreme Court to address the merits of the petition for writ of certiorari and its several national issues of first impression -- and to do so without those issues being mooted by prior issuance of remittitur, which will allow Mr. Ewing to be extradited.

(C) On January 30, 2019, Appellant's counsel electronically notified

Respondent's counsel and the Clerk of the Court of his intention to file this emergency motion. A copy of this emergency motion will be served electronically on Respondent's counsel simultaneously with the filing of this Motion, NRAP 27(e)(1). Neither the notice nor the filing of this motion could be accomplished earlier: Appellant's counsel did not become aware of the denial of rehearing until Monday, January 27, 2019, and it took four days until today, January 30, to coordinate and consult with Mr. Ewing's United States Supreme Court counsel to prepare and file this Motion.

DATED: January 30, 2020.

/s/ Martin H. Wiener, Esq.
MARTIN H. WIENER
NBN 2115
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008
mw@martinwienerlaw.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Law Office of Martin H. Wiener, and that on January30, 2020, I electronically filed with the Nevada Supreme Court the foregoing document. Electronic Service of the foregoing document was made by email on:

Heather Procter, for State of Nevada

/s/ Martin Wiener

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EXECUTIVE AGREEMENT

TO THE EXECUTIVE AUTHORITY OF THE STATE OF NEVADA

WHEREAS, John Hickenlooper, Governor of the State of Colorado and Brian Sandoval, Governor of the State of Nevada, do hereby enter into the following agreement.

WHEREAS, Christopher Ewing AKA Alex Christopher Ewing NDOC #20866, is presently incarcerated in the Nevada Department of Corrections serving a sentence imposed upon him as a result of a state conviction in Nevada. Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 stands charged in Arapahoe County, Colorado with the crimes of First Degree Murder-After Deliberation (3 counts); First Degree Murder – Felony Murder (3 counts); Criminal Attempt To Commit First Degree Murder; First Degree Sexual Assault (2 counts); First Degree Assault; Sexual Assault on a Child (2 counts); First Degree Burglary; Violent Crime-Death; Violent Crime – Serious Bodily Injury; and Violent Crime-Deadly Weapon.

WHEREAS, the possibility exists that Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 could have a lengthy term of imprisonment remaining on his sentence and the prosecuting authorities of Arapahoe County, Colorado are desirous that Christopher Ewing be brought to trial at the earliest possible date and

WHEREAS, the powers and duties of the several states, including the State of Colorado, in matters relating to interstate extradition are contained and prescribed in Article IV, section 2, of the Constitution of the Unites States, and are implemented by Congress in title 18 U.S.C. § 3182; and;

WHEREAS, the People of the State of Colorado have enacted the Uniform Criminal Extradition Act, C.R.S. 16-19-101, whereby in section 16-19-106, it provides as follows:

> (1) When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of the other state for the extradition of that person before the conclusion of such proceedings or his term of sentence in the other state, upon

condition that such person be returned to the other state at the expense of this state as soon as the prosecution in this state is terminated.

(2) The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section 16-19-124 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

WHEREAS, the laws of the State of Nevada similarly provide the Uniform Criminal Extradition Act in NRS 179.177 TO 179.235, that in appropriate cases, the Governor of the State of Nevada may, by agreement with the executive authority of another state, authorize the extradition from Nevada of a person imprisoned in Nevada to such other state in order to render such person amenable to the jurisdiction of such other state;

IT IS HEREBY AGREED that said Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 shall be held in custody at all times while within the State of Colorado for the aforementioned purpose by law enforcement in the County of Arapahoe, as agreed upon by Arapahoe and Jefferson Counties.

IT IS HEREBY AGREED by the undersigned, Governor of the State of Colorado, that in the event Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 is acquitted following all trials or all prosecutions in the State of Colorado are terminated in any manner, Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 shall be returned to the State of Nevada at the expense of the State of Colorado, and that the executive authority of the State of Colorado shall upon demand of the executive authority of the State of Nevada surrender Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 to the duly authorized agents of the State of Nevada.

IT IS FURTHER HEREBY AGREED by the undersigned, Governor of the State of Colorado and the Governor of the State of Nevada, that in the event Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 is convicted and sentenced to either death or life imprisonment in the State of Colorado, Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866, will remain in the State of Colorado to serve the entire sentence of imprisonment or until the sentence of death is executed. In the alternative, in the event Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866, is sentenced to a term of imprisonment other than the death penalty or life imprisonment, Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866 shall be returned to the State of Nevada upon the completion of his term of imprisonment and eligibility for parole in Colorado, at the expense of the State of Colorado without formalities, to serve any remaining term of imprisonment in the State of Nevada.

NOW, THEREFORE, pursuant to the authority hereinabove set forth and in consideration of the granting of said demand for the rendition of Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866, and the issuance of a warrant of arrest and delivering up of Christopher Ewing to the duly authorized agents of the State of Colorado by the executive authority of the State of

Nevada, which said acts by the executive authority of the State of Nevada shall constitute an acceptance of this agreement.

IN WITNESS WHEREOF, the undersigned Governor of the State of Colorado and the Governor of the State of Nevada, do hereby covenant and agree that the above express conditions upon which the custody of Christopher Ewing AKA Alex Christopher Ewing, NDOC #20866, is granted, shall be in all respects fulfilled and complied with and are expressly accepted as the terms and conditions of Christopher Ewing's AKA Alex Christopher Ewing's, NDOC #20866, custody.

IN WITNESS WHEREOF, I have here unto set my hand in Denver, State of Colorado, and cause to be affixed the Seal of the State of Colorado this 10th day of August, 2018

JOHN HICKENLOOPER
GOVERNOR OF THE STATE OF COLORADO

By the Governor:

Wayne W. Williams
Secretary of the State of Colorado

BRIAN SANDOVAL
GOVERNOR OF THE STATE OF NEVADA

By the Governor:

Barbara K. Cegavske
Barbara K. Cegavske
Secretary of the State of Nevada

By: Scott W. Anderson
Deputy